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INSTITUTIONAL RISK IN AGRICULTURAL PRODUCTION IN THE FACE OF NEGOTIATING THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP)

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Abstract. The article discusses the issues connected with the EU entering and conducting negotiations with the US on the Transatlantic Trade and Investment Partnership. These issues relate to institutional risk due to the necessity to change the agricultural policy statement of the parties and to implement new legal instruments or amend those that already exist. The article aims at analysing the proposed organisational and legal solutions relating to agriculture in the face of negotiations of the contents of the partnership. It also intends to indicate essential differences between the parties relating to agriculture and food production, to determine the direction of amendments in the event of joining the partnership, and to assess its potential consequences from the perspective of EU agricultural producers and food consumers.

Key words: production risk, food security, Common Agricultural Policy, phytosanitary standards, Geographical Indications, sanitary standards

INTRODUCTION

An agricultural activity is believed to be particularly at risk of occurrence of events the consequences of which may have a negative influence on its effectiveness,

profitability and stability. Although risk is intrinsically connected with all human activities, its scale, however, is significantly different in the case of agricultural production. Risk may come from various sources. It may result, in particular, from decisions made by farmers in respect of production, from changing natural and climatic conditions or the market situation, etc. A crucial role here is played by institutional transformations which are connected with the change in the state policy and, thus, in legal and organisational conditions¹. It results mainly from the obligations accepted while joining international organizations, which may be exemplified by the European Union. As for its international relations, the EU puts a lot of emphasis on the liberalization of trade, which has had a great impact on the solutions relating to supporting agricultural producers in terms of the market situation and their income in the course of reforming the Common Agricultural Policy (Sulewski and Czekaj, 2015). It should be mentioned here that every change to a policy, as well as the implementation of its mechanisms causes uncertainty as

¹ Institutional risk also relates to e.g. changes in the amount of fiscal charges, interest rates, state intervention, etc.

* The article is financed by the National Science Centre with the resources for research within research project – OPUS No. 2013/09/B/HS5/00683, called “Legal instruments of risk management in agricultural production”.

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to meeting the set financial goals. It is, therefore, vital to prepare the farmers, to some extent, for a new situation, as well as to provide them with suitable risk management methods.

In respect of risk management, *acquis communautaire*, which is being implemented by Poland, sets out certain legal instruments which may be applied by the Member States (Article 36 of the Regulation No. 1305/2013)². Their subject, however, refers mainly to the production risk, the occurrence of which directly leads to a decrease in an agricultural producer's income. It is worth stressing that the solutions adopted at the EU level may cause risk themselves.

Currently, the reform of the Common Agricultural Policy is being accompanied by negotiations relating to the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States. The main objective of the Partnership is the liberalization of the trade exchange and investments among partners by eliminating customs duties and other restrictions in the trade of goods³. It relates to numerous branches of economy, including agriculture, which is treated as one of the most important and, simultaneously, the most difficult negotiation areas. It results from the fact that agriculture is the sector where state intervention is used by both negotiating partners, namely by the US and the EU. As Grzegorz Szychalski points out, interventionism means that the "state" takes deliberate actions to mitigate the drawbacks of the market mechanism (Szychalski, 2008). As a rule, its main priority is to keep being competitive on international markets. Interventionism is reflected in various forms of support and currently its main purpose is to ensure the food safety (Krasiuk and Piekutowska, 2014; Wróbel, 2015). It is worth indicating here that, according to statistics, both parties to the Partnership constitute a significant mutual market for agricultural raw materials and

food. The current trade level between them, however, is low (Rowiński, 2013)⁴.

AIM AND METHODS

The purpose of this paper is to present the issues relating to institutional risk which may potentially arise upon the EU's accession to the Transatlantic Trade and Investment Partnership. The paper aims at showing significant organizational and legal differences between the parties in respect of agriculture and food production. It intends mainly to determine the direction of changes in regulations in the event of joining the Partnership and to assess its potential consequences from the perspective of the EU agricultural producers.

The author applies a dogmatic and descriptive method of legal acts analysis and uses Polish and foreign reference books. Due to limited access to a source material in the form of contents of the Partnership itself, the paper refers to secondary sources.

RESULTS AND DISCUSSION

As it has already been mentioned, agriculture is one of the economy branches which is subject to the TTIP negotiations. It needs to be emphasized that both parties to the Partnership significantly differ on its role, place and laws regulating it (Marciniuk, 2013). The US concentrate mainly on strictly economic issues, which contributes to the fact that American agriculture has been shaped by the market principles to a much higher extent than the European one. The EU agriculture, however, focuses on its own multifunctional character, which is reflected in the approach assuming that not only the production of food but also applying other values is of importance (e.g. the protection of rural way of life, wellbeing of animals, preventing climate changes etc.). There is also a crucial difference regarding the instruments used for interventionism purposes. The American approach differs from the EU one, which is reflected both in the amount of budget support and the definition of the end beneficiary of that support (USA FARM BILL (2014-2023)⁵; Sobiecki, 2015).

² Regulation (EU) no 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005, OJ L 3 47 from 20.12.2013, p. 487–548.

³ Member states support negotiations in the scope of investments and trade between EU and the US, European Commission – Note, Brussels 2013; http://europa.eu/rapid/press-release_MEMO-13-564_pl.htm.

⁴ International Trade Statistics 2014; World Trade Organization, Geneva, p. 66.

⁵ USA FARM BILL (2014–2023); <http://www.usda.gov/wps/portal/usda/usdahome?navid=farmbill>.

The work on the contents of the Partnership is spread into 24 working groups and two of them concentrate on the issues concerning trade of agri-food products. Having analysed the available source materials it should be stated that the subject of negotiations into agriculture includes production and non-production aspects. The former relate to the issues of the functioning of the agricultural market, as well as sanitary and phytosanitary standards. The talks take place at two levels. The first refers to the reduction of tariff barriers which limit access to the EU market (Puccio, 2015). Although the protection level depends on how sensitive the market is to external competition, the EU tariffs are higher than the US ones (Hajdukiewicz, 2014; Czermińska, 2012). It may be exemplified by the milk market, which is subject to protection both in the EU and the US (Wróbel, 2014). The discussed issue of limiting the tariff barriers refers mainly to abolishing some customs duties on agri-food products, as well as to creating both the system of duty-free quotas and reduced-duty quotas. In consequence, the agricultural markets will open to a significant extent. From the EU perspective, such a situation will not be beneficial since the American agriculture has a competitive advantage over the EU agriculture due to lower production costs. The reduction of tariff limitations, thus, will provide easy access to the EU market, which will weaken the position of agricultural producers and, in an extreme case, may be a factor making the producers cease to run their agricultural activity. Furthermore, as Agnieszka Hajdukiewicz notices, the American party does not honour the EU certificates of origin of goods since in their trade relations they do business with each individual Member State as a business partner and not with the European Union as a whole (Hajdukiewicz, 2014). It refers to certificates within the EU quality policy, namely the Protected Designation of Origin (PDO) and Protected Geographical Indication (PGI) for the products which originated in the EU. A number of immigrants have indeed started to produce in the US the products which are protected in Europe. The American party, therefore, is not willing to protect them in any special way since it would forbid American producers from freely marketing these products.

The second negotiation aspect refers to non-tariff issues, in particular, different legal regulations. They concern mainly the application by the EU high, from the American perspective, sanitary and phytosanitary standards (SPS), as well as numerous technical barriers

(Rowiński and Bułkowska, 2013)⁶. It is connected, among other things, with placing on the EU market of meat containing hormones and antibiotics, using poultry disinfectants, allowing GMO⁷, feeding animals with animal waste, permissible levels of pesticides in agri-food products, as well as with softening the EU rules on the wellbeing of animals (Sharma, 2014; Hajdukiewicz, 2014; Kobza, 2013). The divergence results, in particular, from the protective approach to the assessment of threats to human and animal life and health, as well as from different institutional and procedural solutions (Mudgal et al., 2014). The EU and the US have worked out totally different safety net systems. The EU applies, pursuant to Article 191 of the Treaty on the Functioning of the European Union, the so-called precautionary principle, which says that before marketing a product, a producer or an importer is obliged to prove that the product is not detrimental to health. The US, in turn, promotes the science-based approach, which says that before a product which already exists on the market is withdrawn, it must be proved to a producer that it is harmful to health (Rostowska, 2013). Particular regulations in that respect are mutually exclusive and they effectively limit or even prevent trade.

Making the agreement would, therefore, require harmonising the approach to regulatory processes, creating norms and ensuring their bigger transparency. It should lead to limiting some certification procedures and working out a relatively harmonised standardization system since the agriculture agreement is not aimed at creating the common market.

Another divergent negotiation issue of a non-production character is the protection of geographical indications (GI) of food products. As the European legislator points out in the preamble to Rozporządzenie 1151/2012⁸, their exceptional quality and diversity give

⁶ Risk and opportunities for the EU agri-food sector in a possible EU-US trade agreement, Study, Brussel, 2014; [www.europarl.europa.eu/.../AGRI_IPOL_STU\(2014\)514007_EN.pdf](http://www.europarl.europa.eu/.../AGRI_IPOL_STU(2014)514007_EN.pdf).

⁷ As J. Rowiński (2013) points out, the GMO issues are one of the most significant problems under negotiations. They include both introducing new varieties and diversifying procedures for approving genetically modified raw materials and agri-food products including GM raw materials as fit for consumption and feed.

⁸ Rozporządzenie Parlamentu Europejskiego i Rady nr 1151/2012 z 21 listopada 2012 r. w sprawie systemów jakości produktów rolnych i środków spożywczych. Dz. U. L 343 from 14.12.2012, p. 1–29.

the producers a competitive advantage on the market. Simultaneously, it helps to retain cultural and culinary heritage of the EU. Their special added value comes both from sticking, in the production process, to traditional manufacturing methods and from incorporating the latest changes in the production methods and raw materials. Pursuant to Article 5 point 2 of Rozporządzenie 1151/2012, the geographical indication means a name which defines a product: a) originating in a specific place, region or a country; b) whose given quality, reputation or other characteristic is, to a large extent, attributed to its geographical origin; and c) whose at least one production stage takes place in that specific geographical area. A proper geographical indication is the subject of intellectual property rights and constitutes a good of a specific economic value. Therefore, it is subject to specific legal protection provided for by the regulation in question. The legislator claims that the geographical indication system is designed to support the producers of goods connected with a given geographical area. It takes place in the following way: firstly, by ensuring decent income owing to the qualities of the products they produce; secondly, by ensuring harmonised protection of indications as one of intellectual property rights in the EU territory; and, thirdly, by providing consumers with clear information about the qualities constituting an added value of the products.

Comparative analyses of the EU and American solutions show that that area is approached differently as well. The EU protection involves the necessity to use specific legal instruments provided for in the secondary law⁹. Pursuant to Article 13(1) letter a of Rozporządzenie 1151/2012, the geographical indication is protected from any direct or indirect use for commercial purposes of a registered name for the products not covered by the registration provided these products are similar to the products registered under that name or if using the name makes it possible to benefit from the reputation of the PGI. The American system, on the other hand, pursuant to Article 15 U.S.C. §1051 U.S. Trademark Act, perceives indications as trademarks, at the same time allowing the protection of collective nature of geographical indications based on collective mark or certification mark. At the same time, the United States Patent and Trademark Office (USPTO)¹⁰ does not keep

any specific record of indications. Accordingly, each interested entity applies for protection to the Trademark Electronic Search System (TESS) (Johnson, 2014). Such a solution is justified by the economic approach to intellectual property rights, which assumes that the creator gets adequate remuneration for their work. As it has been pointed out by Agata Wróbel, a highly poor, in that respect, protection system of geographical indication results, to a high extent, from historical and doctrinal factors (Wróbel, 2014)¹¹. The United States, referring to the Agreement on Trade Related Aspects of Intellectual Property Rights¹², perceive the EU protection as strictly monopolistic measure limiting American producers' access to the market. The European approach, in turn, explains its protection of intellectual property rights by the protection of natural rights where non-economic importance of intellectual property and the necessity to protect the reputation are emphasized (Doster, 2006; Wróbel, 2014). The EU emphasizes the necessity to work out a harmonised certification system which is supposed to properly inform consumers about the origin of agri-food products and to secure the interests of the EU producers (Trachtenberg, 2012). Therefore, the consumers may be at risk of being misinformed about the origin of a product, in particular there may be a concern that the goods may lose its character of cultural culinary heritage, their special nature and reputation.

Finally, it is worth adding that American agricultural producers, in respect of risk management within agricultural farms or agricultural enterprises, have a much wider range of instruments, including those concerning the price risk. This refers, in particular, to derivative instruments used in the derivatives market, including forward and future transactions, as well as commodity options. These instruments are rarely used in the EU agri-business (Stępień and Śmigła, 2012). Therefore, as for the risk limiting instruments and the preventive measures, the parties to the agreement have different approaches as well. The issue which raises some doubts is whether American farmers are protected in a better or different way. Whether or not particular risk management instruments are going to be used will be impacted

⁹ Ibidem.

¹⁰ United States Patent and Trademark Office.

¹¹ More: Wróbel (2014). Modele ochrony oznaczeń geograficznych w Unii Europejskiej i Stanach Zjednoczonych – problematyka prawna. PhD dissertation not published. Uniwersytet Łódzki.

¹² Dz.U. 1996, nr 32, poz. 143.

by the awareness of agricultural producers, as well as access to organised derivatives market.

From the legislative perspective, the provisions of the TTIP will entail changes to legal systems of both parties. It raises a question about the shape of future Common Agricultural Policy and whether it will have the EU character. At the moment, the result of negotiations is difficult to be assessed but the agricultural policy may, undoubtedly, be subject to many changes not necessarily beneficial to the EU agriculture and its participants.

CONCLUSION

The final outcome of negotiations will have a great impact on the EU agriculture and the future of the CAP. Some symptoms of changes, including some protection of the industry, are visible in the works of the European Commission, e.g. in respect of allowing GMO food and feed, ban on cloning animals and introducing clones meat to the market (Leśkiewicz and Lipińska, 2014). As far as agricultural production is concerned, the least invasive would be to scrap or significantly reduce customs tariffs and exclude the most contentious sanitary and phytosanitary issues from the negotiation scope.

As Karen Hansen-Kuhn and Steve Suppan from the US Institute for Agriculture and Trade Policy indicate, it is difficult at this stage of negotiations to explicitly state whether proposed solutions will contribute more to the “high standards” agreements or whether they will help to harmonise legal regulations (Adamowicz, 2015; Hansen-Kuhn and Suppan, 2013). Undoubtedly, it is of utmost importance to adopt some regulatory coherence. It seems more beneficial for the EU to keep the current situation than to create a much wider area of free trade of agri-food products since the abolition of customs on most goods may bring more benefits to the American agriculture, which contradicts general EU principles relating to supporting the external market. The TTIP seems to become a new quality agreement by taking a common stance on abolishing or reducing trade barriers. It is also of high importance, however, to assess how it influences a standard protection of a consumer as a free-trade participant. What is more, the issue which needs to be addressed is the extent to which the proposed solutions are simply a manifestation of the policy which supports concerns. That policy aims at strengthening their position on the international market since it concerns which may benefit from the trade with the US as they have the

capacity to meet requirements under negotiations. The position of an agricultural producer, undoubtedly, is going to weaken and a consumer may experience difficulty in identifying a product.

In conclusion it may be stated that negotiations in agriculture are of political character. Making the Partnership will influence mutual economic relations, as well as the functioning of world economy as a whole, in particular it will cause certain isolation of China and Russia. Since the trade of agricultural products accounts only for 1% of mutual turnover of the EU, in the course of negotiations, agriculture may become the industry of a relatively small importance in the context of other sectors (Wróbel, 2015). It refers mainly to the energy sector and access to American energy resources. The Agreement, provided it is made, needs to be perceived as the first “live organism”, and the parties to it should strongly cooperate in the future, bearing in mind that the United States of America is highly pragmatic. Additionally, its proposed solutions should be assessed in the context of trade agreement and not in respect to “free” trade from the economic and legal perspective.

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RYZIKO INSTYTUCJONALNE W PRODUKCJI ROLNEJ W ASPEKCIE NEGOCJACJI TRANSATLANTYCKIEGO PARTNERSTWA W DZIEDZINIE HANDLU I INWESTYCJI (TTIP)

Streszczenie. Przedmiotem artykułu jest problematyka związana z podjęciem i prowadzeniem przez UE negocjacji z USA w zakresie Transatlantyckiego Partnerstwa w dziedzinie Handlu i Inwestycji. Łączy się ona z ryzykiem instytucjonalnym, wynikającym z konieczności zmiany założeń polityki rolnej stron oraz wdrożenia nowych lub zmiany istniejących instrumentów prawnych. Celem artykułu jest analiza zaproponowanych rozwiązań organizacyjno-prawnych w dziedzinie rolnictwa w odniesieniu do negocjacji postanowień Partnerstwa. Opracowanie zmierza do wskazania istotnych różnic w zakresie rolnictwa i produkcji żywności między stronami. Chodzi tu w szczególności o określenie kierunku zmian regulacji w sytuacji związania się Partnerstwem oraz o ocenę jego ewentualnych skutków z punktu widzenia unijnych producentów rolnych i konsumentów żywności.

Słowa kluczowe: ryzyko produkcyjne, bezpieczeństwo żywności, Wspólna Polityka Rolna, normy fitosanitarne, oznaczenia geograficzne, normy sanitarne

Accepted for print – Zaakceptowano do druku: 17.10.2016