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Legal Aspects of Protecting the State Border of the Republic of Poland during Pandemics

Abstract

The problems raised in this article focus on the issues related to the solutions adopted by the Polish legislator as to the protection of the state border in the context of an international threat. The author presents the legal conditions related to the probability of temporary re-introduction of border control for persons crossing the state border regarded as an internal border of the European Union in the event of a threat to public health. The background for these considerations are legal regulations concerning the change in the organization of the protection of the state border of the Republic of Poland, as introduced due to the World Health Organization's announcement of the pandemic caused by the SARS-CoV-2 coronavirus leading to the COVID-19 disease.

Keywords: law, protection, state border, pandemic, border control, COVID-19

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Prawne aspekty ochrony granicy państwowej Rzeczypospolitej Polskiej w warunkach pandemii

Abstrakt

Przedstawiona w niniejszym artykule problematyka skupia się wokół zagadnień związanych z rozwiązaniami przyjętymi przez polskiego prawodawcę w zakresie ochrony granicy państwowej w kontekście wystąpienia zagrożenia o charakterze międzynarodowym. Autor przedstawił uwarunkowania prawne związane z możliwością *tymczasowego przywrócenia kontroli granicznej osób przekraczających granicę państwową stanowiącą granicę wewnętrzną Unii Europejskiej* w przypadku zagrożenia zdrowia publicznego. W tle tych rozważań zostały przedstawione

regulacje prawne dotyczące zmiany organizacji ochrony granicy państwowej Rzeczypospolitej Polskiej wprowadzone w związku z ogłoszeniem przez Światową Organizację Zdrowia pandemii spowodowanej koronawirusem SARS-CoV-2 wywołującym chorobę COVID-19.

Słowa kluczowe: prawo, ochrona, granica państwowa, pandemia, kontrola graniczna, COVID-19

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Правові аспекти охорони державного кордону Республіки Польща на випадок пандемії

Анотація

Проблеми, представлені в цій статті, зосереджуються на питаннях, пов'язаних із рішеннями, прийнятими польським законодавцем щодо охорони державного кордону в контексті міжнародної загрози. Автор представив правові умови, пов'язані з можливістю тимчасового відновлення прикордонного контролю осіб, які перетинають державний кордон, що становить внутрішній кордон Європейського Союзу, у разі загрози здоров'ю населення. У зв'язку з цими міркуваннями були представлені правові норми, що стосуються змін в організації охорони державного кордону Республіки Польща, введені у зв'язку з оголошенням Всесвітньою організацією охорони здоров'я про пандемію, спричинену коронавірусом SARS-CoV-2, що спричинює хворобу COVID-19.

Ключові слова: право, охорона, державний кордон, пандемія, прикордонний контроль, COVID-19

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Introduction

Protection of the state border is one of the basic tasks of each country [1, p. 7]. Hence an appropriately guarded border “is perceived by the society as evidence of the strength and effectiveness of the state, an expression of the security of its citizens” [2, p. 6]. The policy adopted by the Polish state is oriented concurrently at adopting the biggest

possible facilitations with respect to free movement and trade exchange [3, p. 23]. We are striving at assuring the maximum possible securing of borders, both from criminality and – as has been shown by recent events connected with the prevalence of the SARS-CoV-2 coronavirus, which causes the COVID-19 disease – from the spreading of human infectious diseases [4]. Given the above it has been assumed that the objective of this paper will be to present solutions adopted by the Polish legislator with respect to protection of the state border in the context of hazard of an international nature.

Issues related with the protection of the state border are being regulated in the first place by sources of universally binding law, international agreements, including in the first place with neighbouring countries, and agreements concluded between the Minister of the Interior and the Minister of National Defence, Border Guards and commanders of diverse types of armed forces, the Police [5] and the Internal Security Agency [6]. The basic legal act that regulates the issues of protection of the state border is the Act of 12 October 1990 on protection of the state border [7]. Furthermore, legal acts that regulate this area of national security [8] also include the following:

- Regulation of the Minister of the Interior and Administration of 13 August 2008 *on methods of setting out the territorial range of border crossings* [9],
- Regulation of the Minister of the Interior and Administration of 29 August 2005 *on the listing of municipalities and other units of basic territorial division of the state situated in the border zone and a table that defines the range of that zone* [10],
- Regulation of the Council of Ministers of 18 June 2001 *on setting up maritime and fixed border crossing points and on the type of traffic admitted through those crossing points* [11],
- Regulation of the Council of Ministers of 13 December 2005 *on obligations of the province governor with respect to financing and maintenance of border crossing points, tourist border crossings, border crossing places on tourist routes and points of overnight parking on border rivers, their equipping, as well as authorities relevant for setting up and maintaining border signs on internal sea waters* [12],
- Regulation of the Minister of the Interior and Administration of 21 April 2008 *on conditions for tourism, sport, hunting and fishing in the border zone* [13],
- Regulation of the Council of Ministers of 2 November 2011 *on appointment of a body for command of the air defence and code of conduct for application of air defence in relation to foreign aircraft that fail to abide by summons of a state authority assigned with management of air traffic* [14],

- Regulation of the Minister of National Defence of 5 January 2005 *on crossing the state border and flights of foreign military aircraft in the air space of the Republic of Poland* [15],
- Announcement of the Minister of the Interior of 3 July 2015 *on specification of border crossing points, type of traffic admissible through those border crossings and the time of their opening* [16].

The border of the Republic of Poland is a vertical surface that crosses the border line, which separates the territory of Poland from territories of other states and from the open sea. The state border also separates the air space, waters and interior of the ground. The course of a state border on land and the distinguishing of maritime internal waters and the territorial sea with neighbouring countries have been specified in international agreements concluded by the Republic of Poland. The state border on the sea lies at a distance of 12 sea miles from the basic line or over the external borders of the roadstead comprised by territorial sea.

To protect the state border a border land strip and the frontier zone have been distinguished. The border land strip comprises an area 15 m wide, starting towards land interior from the state border or from the bank of border waters or sea coast. From the viewpoint of the subject of this research, of particular importance is the authorisation of the province governor to declare prohibition of stay on certain sections of the border land strip on the border crossing constituting an internal border in the event of temporary reintroduction or extension of border checks of persons that cross that border, in the period for which the checks have been reintroduced or extended. The prohibition of staying may also be introduced on the state border that constitutes the external border.

On the other hand, the frontier zone comprises the entire area of communes adjacent to the state border, and on the sea section – to the sea coast. If the width of the frontier zone defined in such a way is found to be smaller than 15 km, the frontier zone is also extended by the area of communes directly neighbouring with communes adjacent to the state border [17, pp. 52–56].

As of Poland's accession to the European Union [18], which took place on 1 May 2004, the Polish state borders have changed their nature. State borders with Czech Republic, the Slovak Republic, the Republic of Lithuania and the Federal Republic of Germany have become internal borders of the European Union, while state borders with the Russian Federation, the Republic of Belarus, Ukraine and the belt of territorial waters and international airports have become external borders of the European Union. Internal borders are joint borders of member states, i.e. land borders, including on

rivers and lakes, airports designated for domestic flights and sea and river harbours, ports on lakes used for regular ferry connections. External borders consequently apply to land borders, sea borders of member states, as well as their airports, river ports, sea ports and ports on lakes, provided that they do not constitute internal borders. On the other hand, Poland's accession to the European Union led as a consequence to entering the Schengen zone as of 21 December 2007.

The concept and essence of protecting the state border

Pursuant to the border code of Schengen [19], protection of the border comprises protecting the border between border crossing points and protection of border crossings beyond the fixed opening hours to render impossible avoidance of border control by any person and discouraging others from doing so. Hence, to be able to comprehend the essence of protection of the state border, it is necessary to explain first the importance of such terms, as: border checkpoint and border checks. A border crossing should be understood as each border crossing designated by relevant bodies for the crossing of external borders. Furthermore, border checks should be comprehended as inspection activities conducted on border crossings to assure the possibility of permitting the entry of persons, including their transport means and items at their possession, to the territory of member states or permitting their exit from that territory.

Taking the above into consideration, protection of the state border of the Republic of Poland comprises protecting the border between places set out by the minister of the interior for needs of crossing external borders, i.e. state borders with the Russian Federation, the Republic of Belarus and Ukraine, and protection of places assigned for crossing external borders beyond the fixed opening times to hinder the possibility of avoiding inspection activities by anyone, which are conducted in places assigned for needs of crossing of external borders in order to guarantee the entry of people, including their transport means and items being in their possession to the territory of the Republic of Poland, or allow leaving by them of this territory or discourage such a person from doing so.

At this point attention should be drawn to one more term, which is of considerable importance from the viewpoint of undertaken issues, i.e. border control, which comprises border checks and protection of the border. Border control comprises all activities undertaken at the border, only in response to the intention of crossing that border or to the fact of its crossing, regardless of all other circumstances.

Consequently the basic objective of border protection is preventing unauthorised crossing of the border and taking up appropriate measures in relation to persons who have crossed the border in an illegal way. Protection of the state border in the air space of the Republic of Poland is the responsibility of the Minister of National Defence. On his behalf tasks are implemented by the Operational Commander of Branches of Armed Forces with the use of a command body by air defence. On the other hand, protection of the state border on land and sea and control of border traffic is the responsibility of the minister of the interior, on whose behalf tasks are executed by the Chief Commandant of the Border Guards. Hence tasks related to protection of the state border of the Republic of Poland on land and on sea, as well as in the scope of control of border traffic and combatting illegal migration [20, pp. 29–30] have been entrusted to permanent uniformed and armed formation, i.e. the Border Guards [21]. To assure protection of the border, the Border Guards use stationary and mobile inspection points, executing their tasks by patrolling or stationing in places that are known or perceived as being endangered, and the objective of such protection is detaining persons crossing the border in an illegal way. Protection may also be implemented with the use of technical means, including electronic ones. Protection is aimed at preventing the avoidance of border checks by persons on border crossing and their discouraging from avoidance of such checks in the future [22, art. 12].

The division of borders into external borders and internal ones entails certain rules connected with their crossing. Internal borders may be crossed by people at any point without the necessity of border checks regardless of their nationality. Basically the abolition of border checks on internal borders does not affect the exercising of police rights by relevant bodies of member states pursuant to domestic legislations, control of the security of persons carried out in sea ports and airports, and the possibility of laying down regulations concerning the obligation of possessing certain documents. On the other hand, crossing of external borders is only permissible through border checkpoints during fixed hours of their operation, on which border traffic is subject to border checks executed by border guards. All persons are subject to minimum border checks aimed at the determination of their identity based on the presented travel documents. Third-country residents, i.e. in a considerable simplification – persons who are not citizens of the European Union – are subject to detailed border checks at entry and at exit.

It should be borne in mind that the border check is not only in the interest of the member state, on the external border of which it is made, but also in the interest of all

member states which have abolished border checks on their internal borders. Border checks should help in combatting illegal immigration and human trafficking as well as preventing all hazards to internal security [23, p. 32], public order [24, p. 11], public health and international relations [25, pp. 95–99].

Given the subject of studies, of key importance are solutions adopted in case of temporary reintroduction of border checks on internal borders. A member state may exceptionally restore border checks on its internal borders in the event of occurrence of a grave hazard to public order or internal security. Restoration of the border checks may take place for a limited period no longer than 30 days or for an anticipated period of duration of such grave hazard, if it is longer than 30 days. If reasons of public order or internal security require undertaking immediate measures, the given country may exceptionally immediately reintroduce border checks on internal borders. There is also a possibility of extending border control for renewable 30-day periods. In the event of temporary reintroduction or extension of the border check of persons on the state border considered an internal border, particular significance is gained by the obligation imposed on persons crossing the state border to undergo border inspection.

Temporary reintroduction, extension or abolition of border checks of persons who cross the state border considered an internal border takes place by virtue of a regulation issued by the minister of interior [26, art. 17a]. The regulation specifies the period and sections of the state border on which the border checks of persons are temporarily restored, extended or abolished, as well as border checkpoints, type of traffic permitted through those checkpoints and time of their operation, as well as the territorial range of border crossings. The regulation should allow for adaptation of the scope of inspection to causes that justify its introduction and the possibility of making checks on some sections of roads or railroads that cross the state border, as well as in some ports and harbours and in airports [27, pp. 45–46].

Temporary reintroduction of border checks owing to spreading of the SARS-CoV-2 coronavirus

The objective of border control is among others to prevent all kinds of hazards to public health, which should be understood pursuant with the Schengen borders code as “each disease that could potentially turn into epidemic according to definitions of international health regulations issued by the World Health Organisation or another infection disease or a contagious parasitic disease, if they are comprised by regulations concerning

protection, which are applicable to citizens of member states” [28, art. 2 item 11]. A lot of diseases, which have contributed to the epidemics, have already been identified and named in ancient times [29]. The first decades of the 21st century is a time of occurrence of epidemics. In the period from November 2002–July 2003 the SARS virus originating from southern China infected ca. 8 000 persons in 29 countries, killing 774 of them. In 2009 an epidemic broke out of what is colloquially called the swine flu, which is a type of the same virus that had caused the Spanish flu. On 11 June 2009 for the first time in 41 years WHO declared a state of pandemics. In the period from December 2013–January 2016 there was an attack of the Ebola virus, which was contracted by 28 646 people, and 11 323 of them died as a result. As emphasised by the World Health Organisation (WHO), subsequent attacks of new viruses is only a matter of time. In December 2019 for the first time in Wuhan in China the SARS-CoV-2 coronavirus was identified, which is responsible for epidemics affecting infections of the respiratory tract and causes the COVID-19 disease [30, pp. 20–21].

In an attempt at presenting the essence of state border protection in the context of pandemics, further deliberations should be commenced with providing an explanation of the notion of “epidemic”. The word “epidemic” originates from the Greek *epi-demos*, i.e. “among people”, and most likely has been started by Hippocrates. In its general meaning epidemic means the occurrence of a disease in a given community or region at a frequency that clearly exceeds the incidence expected at this time and place [31]. A similar approach, albeit one a little broader, is presented by the legal definition contained in the Act of 5 December 2008 *on preventing and control of infections and infectious diseases in people* [32], pursuant to which epidemic implies the occurrence on a given area of infection or contacting an infection disease, the prevalence of which is much bigger than in an earlier period, or the occurrence of infections or infectious diseases hitherto unheard of [33, art. 2 item 9]. The act also adopts the concept of epidemic hazard, which should be understood as the prevalence on a given area of conditions or premises pointing to a risk of prevalence of an epidemic.

Pandemic is a word that originates on the other hand from the word *pan-demos*, which means “all people”. Hence in a general meaning pandemics should be understood as the occurrence of cases of a disease at a frequency that clearly exceeds the one expected at this place and at this time on a significantly large area (a few countries or continents). As an effect the announcement of a pandemic entails among others the introduction of numerous limitations related among others to the freedom of movement to limit the spreading of the virus that causes the given disease. The introduction

of tightening as regards the freedom of movement leads among others to change of the hitherto binding rules applicable for state border protection, as has been proven by the pandemic declared on 11 March 2020 by the World Health Organisation (WHO). As a consequence of the declared pandemic, on 13 March 2020 the health minister issued regulation [34] *on declaration on the territory of the Republic of Poland of a state of epidemiological hazard as of 14 March 2020 until further notice due to spreading of the SARS-CoV-2 coronavirus and the increase in incidence of the COVID-19 disease caused by it*. The objective of declaring the state of epidemiological hazard was to limit the range of coronavirus spreading and to keep down the prevalence increase. The decision also meant adopting numerous limitations concerning both the freedom of movement, and the freedom of assemblies and trade.

By Regulation of the Minister of the Interior and Administration of 13 March 2020 [35] temporarily border checks were reintroduced for persons crossing the state border considered an internal border in the period from 15 March 2020 until 24 March 2020. It was assumed that the scope of control would be appropriately adapted to the level of hazard to public order or state security in connection with the occurrence of a serious hazard for public health caused by the SARS-CoV-2 coronavirus that causes the COVID-19 disease. Temporary border control has been restored for persons crossing the state border considered an internal border on the state border with the Czech Republic, the Federal Republic of Germany, the Republic of Lithuania, the Slovak Republic and in sea and air ports constituting such an internal border. The Regulation of the Minister of the Interior and Administration of 13 March 2020 *on temporary restoration of border control for persons crossing the state border considered an internal border* due to escalation of the threat caused by the SARS-CoV-2 coronavirus has been amended several times (e.g.: “Border checks of persons, restored temporarily for the period of (...) are extended for a period from 4 May 2020 until 13 May 2020” [36], “Border checks of persons, restored temporarily for the period of (...), are hereby extended for a period from 14 May 2020 until 12 June 2020” [37].

Furthermore, by Regulation of 13 March 2020 the Minister of Interior and Administration [38] has either suspended or limited from 15 March 2020 until further notice all border traffic on the border crossings with the Russian Federation, the Republic of Belarus and Ukraine. In addition, limited border crossing traffic was introduced on border crossings with the Federal Republic of Germany, the Czech Republic, Republic of Lithuania, the Slovak Republic, as well as in air and sea ports serving as border crossings. The adopted tightening consisted in limiting passenger traffic on border crossings on

the entry direction into the Republic of Poland to the following categories of persons who cross the state border through air and sea border crossings and who cross the border by passenger cars in road border crossing points: citizens of the Republic of Poland, foreigners (spouses, children of Polish citizens or those remaining under permanent custody of Polish citizens, holders of the Card of the Pole or holder of permanent or temporary stay or right to work on the territory of the Republic of Poland) and heads of diplomatic missions as well as members of the members of the diplomatic and consular staff of the mission. The above mentioned regulation, similarly as the regulation on temporary restoration of border check of persons crossing the state border that constitutes an internal border, has also undergone several amendments (e.g. regulations of the Minister of the Interior and Administration *amending the regulation on temporary suspension or limiting of border traffic on certain border crossing points* of 11 June 2020 – Polish Journal of Laws/Dz.U. item 1030 [39], of 15 June 2020 – Polish Journal of Laws/Dz.U. item 1045 [40], of 2 July 2020 – Polish Journal of Laws/Dz.U. item 1183 [41]).

Pursuant to the regulation of the Council of Ministers of 13 March 2020 [42], an additional prohibition has been introduced applicable for the landing in Polish airports of international flights that carry passengers, with the exception of flights that carry Polish residents returning to the territory of the Republic of Poland by chartered aircraft at the order of the Prime Minister, and also flights:

- necessary to prevent consequences of natural calamities or their elimination and rescue of human life or health;
- necessary to protect borders, assure state security or public order;
- necessary only for carrying on an official mission of a reigning monarch and his closest relatives, heads of states, head of a parliament or its chamber, head of a government or another person occupying an equivalent post [43, art. 76 par. 1].

Pursuant to the Regulation of the Minister of the Interior and Administration of 11 June 2020 *amending the regulation on temporary restoration of border control of persons crossing the internal state border* [44], inspections on the frontier section with Lithuania were ceased at 9:00 hrs. on Friday, 12 June 2020. On the remaining sections of the internal border inspections were ceased at midnight on the turn of 12 to 13 June 2020. This also meant abolition of sanitary control and lack of obligatory quarantine. Restrictions, including limitations pertaining to the entry of foreigners to Poland and quarantine, were still kept up on the Polish border which concurrently serves as the external border [45].

Summary

In connection with the hazard posed by the SARS-CoV-2 coronavirus that causes the COVID-19 disease, in the period from 15 March 2020 until 13 June 2020 border control on Polish internal borders were reintroduced temporarily, i.e. at the border with the Czech Republic, the Slovak Republic, Republic of Lithuania and the Federal Republic of Germany. Despite the fact that temporary checks have been restored by Poland five times, this time it had a different dimension. During the Finals of the UEFA EURO 2012 European Football Championships or during the World Youth Days the inspections were carried out randomly. In the period of the pandemic border checks accompanied by sanitary control were conducted 24/7. Additionally the internal border could be crossed only through selected check points, and the remaining routes that beforehand allowed crossing of the border have been closed.

On average every day ca. 670 officers of the Border Guards were involved in activities, supported by the army, the Police and the State Fire Service [46]. Under the temporarily reinstated border checks on the internal border [47, pp. 204–205] on the entry route to Poland, inspections were performed of a total of 2 481 848 persons, including on the border section with the Federal Republic of Germany – 1 969 845 persons, the Czech Republic – 385 415 persons, the Slovak Republic – 14 217 persons, Republic of Lithuania – 34 623 persons and in sea ports – 55 026 persons and airports – 22 722 persons. During border checks executed on the internal borders 270 persons were found to try entering Poland in an illegal way. On the border with the Federal Republic of Germany 105 persons were detained, including 51 Polish citizens and 24 Ukrainian citizens, on the border with the Czech Republic – 107 persons, including 49 Czech citizens and 29 of Ukrainian citizens, on the border with Slovakia – 40 persons, including 15 Polish citizens and 10 Slovak citizens and on the border with Lithuania – 15 persons [48].

To recapitulate, in a situation of a hazard, including one arising from pandemics, solutions adopted in Poland with respect to protecting the state border enable taking up relevant measures aimed at limiting the spreading of an infectious disease, as has been confirmed by the pandemic caused by the SARS-CoV-2 coronavirus that causes the COVID-19 disease. A solution of key importance, the legal basis of which is the act of 12 October 1990 *on protection of the state border*, is the institution of temporary restoration of the border checks of persons crossing the state border constituting an internal border [49].

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