

Tomasz Nieborak

# CREATION AND ENFORCEMENT OF FINANCIAL MARKET LAW IN THE LIGHT OF THE ECONOMISATION OF LAW



CREATION AND ENFORCEMENT  
OF FINANCIAL MARKET LAW  
IN THE LIGHT  
OF THE ECONOMISATION OF LAW



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Tomasz Nieborak

**CREATION AND ENFORCEMENT  
OF FINANCIAL MARKET LAW  
IN THE LIGHT  
OF THE ECONOMISATION OF LAW**



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This book raises some topical issues around the creation and enforcement of financial market law through the prism of the economisation of law. Its topicality arises from the fact that today when everyday life is becoming financialized, or in other words, when the financial sphere is gradually taking it over, the role of the legislator in shaping market relationships must be redefined. This means that the specificity of the matter regulated (i.e. the financial market) must be taken into consideration in the law-making process because this market constitutes an element of a greater whole which, apart from the financial and the economic system, consists of the social system as well. This thesis has been confirmed in recent years when the crises in financial markets have shaken the foundations of global society. Thus the legislator as an architect of the surrounding reality must take into account other factors as well, such as economic or psychological, and not just legal ones. This thesis can be found in earlier publications as well, for example in the work of Leon Petrażycki, but there has been no attempt as yet to transfer it to laws regulating the functioning of the financial market and which the behavioral concept of law would help us to understand. This concept may in the near future be regarded as a new paradigm of financial market law.

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*To Ania, Tosia and Franek,  
thanking you for the joys of life  
which you help me discover every day*



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## Introduction

When analysed from a closer perspective, the reality around us looks quite diverse and complex. The world today differs greatly from what it was decades ago. Globalisation, development and innovations – all these bring about substantial changes to our lives. And although these changes are generally positive, at times they pose certain risks and threats. A commonly noticed tendency is the growing significance of economic factors present in the real sphere, i.e. in human everyday activity.

Because economic phenomena are objective, measurable and logical, they may appear to have a right to determine trends in everyday life. Life becomes economized, as does the sphere of legal regulations. Hence the idea of researching the interdependencies between the world of the law and the world of the economy in the context of today's financial markets. This book, entitled "Creation and enforcement of financial market law in the light of the economisation of law" is the result of research undertaken. Its title, though it may seem rather theoretical, is not accidental and refers to many issues which in the author's opinion are major determinants of the financial market and its functioning today. The reference to a market rather than markets has been made deliberately. In the deliberations presented in this book, the financial market symbolizes the world as it is today: highly economized and profit focused, where the gains are meant, at least theoretically, to increase the well-being and welfare of the global community.

This permeation of the real sphere by the economic sphere is defined as the „financialization” of life and results in changes in many aspects of everyday life to an extent never before encountered.<sup>1</sup> Changes occur in human relationships, business relations, education, or ways of spending free time, all becoming determined

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<sup>1</sup> See P.H. Dembinski, *Finanse po zawale. Od euforii finansowej do gospodarczego ładu*, Warszawa 2011; M. Wrzesiński, *Finansjalizacja gospodarki – fakty czy mity?*, in: K. Ostaszewski, E. Kosycarz [eds], *Rozwój nauk o finansach. Stan obecny i pożądane kierunki jego ewolucji*, Warszawa 2011, pp. 293-305; G. Ritzer, „Hyperconsumption” and „Hyperdebt”: A „Hypercritical” Analysis, in: R. Brubaker, R.M. Lawless, Ch. J. Tabb [eds], *A Debtor World. Interdisciplinary Perspective on Debt*, Oxford 2012, pp. 60-86.

by a new fetish – money.<sup>2</sup> Since the time it was created, money has always been an important element in human life, but it was only through financialization that it seems to have become the number one good, enforcing a new way of thinking about the architecture of the world around us, and in which law plays a substantial role. Law treated instrumentally is considered as a complex social process as one of the major elements necessary to maintain social homeostasis, or, to take an example from biology, to maintain an equilibrium between different elements of a given social system. In the case of the financial market and the law regulating its functioning, there is a certain dependence, which frequently passes unnoticed, arising from the relationship between the financial market and the social system, the former being a part of a greater whole – the financial system participating in the creation of the economic system, the latter being in turn a part of the social system. This means that any disturbance in the financial market will sooner or later have consequences in the social system. We do not need to go far to confirm this thesis which will anyway be discussed in detail in this book. The recent financial crisis began with the spectacular fall of the icons of American banking, until then treated as too big to fail. The reality, however, proved different. It was originally claimed that the first and foremost reason for the fall was a failure to enforce certain regulations by bodies specifically appointed to do so, combined with some defective legal solutions governing certain aspects of the functioning of the financial market. There was another factor to it as well. It was **the decline of values and the crisis of humanism which led to a situation in which greed defeated common sense, and was an insult to the authority of law**. It was also forgotten that the economic sphere is not only determined by objective laws but also depends on the level of awareness among those who influence certain legal decisions made as well as those to whom these decisions are addressed. Thus one should agree with the thesis proposed by Maria Szyszkowska that “today’s processes of economic globalisation occurred ahead of the changes in the awareness of individuals. They happened before transformations took place in the hierarchy of values (...). Currently, of higher priority is to establish the hierarchy of values and the relevant creation of legal regulations. It is obvious that what should lie at the foundations of positive law are those values which a state wishes to enforce at a given time”.<sup>3</sup>

Therefore, when developing the concept of this book, the author decided to analyse the process of creating and enforcing the laws governing the financial

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<sup>2</sup> C. Nagel, *Money as a fetish. The financial market crisis from a psychodynamic perspective*, in: S. Long, B. Sievers [eds], *Towards a Socioanalysis of Money, Finance and Capitalism. Beneath the surface of the financial industry*, London 2012, pp. 43-57.

<sup>3</sup> M. Szyszkowska, *Zależność zjawisk ekonomicznych od świadomości jednostek i kształtującej ją edukacji*, in: J. Oniszczyk [ed.], *Normalność i kryzys. Jedność czy różnorodność*, Warszawa 2010, pp. 454-455.

market differently from how it has been done so far. In this approach, he will not only base his analysis on a mechanical exegesis of legal regulations, but first and foremost on a wider humanistic and axiological perspective. Having said that it must also be said that there have been many publications in which tendencies characteristic of the new trend emerging in financial market law<sup>4</sup> have been described and which, combined, were meant to identify regulations of financial markets. However, many tended to focus on individual solutions adopted, explain them in detail and discuss them in-depth, and were seldom accompanied by a deeper reflexion on the purpose of their adoption.

Hence the concept of a book whose focus will be on the examination of how law is created and applied, or made and enforced, in a highly economized financial market. One of the characteristics of such a market are financial instruments developed as a result of innovative solutions, and which, due to their strategic character, should fall under certain legal norms. Another characteristic of an economized market are the regulatory dialectics in it – a continuous competition between a legislator and a market in which new forms of investments enforce the adoption of new legal solutions the market then attempts to avoid, leading in consequence to more innovations. Hence the never-ending test of strength between the two even becoming global when supranational financial markets are involved. The European Union financial market is global too as it is subject to an

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<sup>4</sup> See for example E. Fojcik-Mastalska, *Ocena stanu prawa bankowego*, in: A. Kostecki [ed.], *Prawo finansowe i nauki prawa finansowego na przełomie wieków*, Kraków 2000, pp. 281-282; E. Fojcik-Mastalska, *Prawo rynku finansowego w systemie prawa*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, Warszawa 2016, pp. 19-26; C. Kosikowski, *Nowe prawo rynku finansowego Unii Europejskiej*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego*, op. cit., pp. 27-38; C. Kosikowski, M. Olszak, *Od prawa bankowego do prawa rynku finansowego*, in: J. Głuchowski [ed.], *System prawa finansowego*, Vol. IV, Warszawa 2010, pp. 224-250; Z. Ofiarski, *Rola soft law w regulacji rynku finansowego na przykładzie rekomendacji i wytycznych Komisji Nadzoru Finansowego*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego*, op. cit., Warszawa 2016, pp. 137-160; M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, Warszawa 2013; A. Jurkowska-Zeidler, *Bezpieczeństwo rynku finansowego w świetle prawa Unii Europejskiej*, Warszawa 2008; R. Mroczkowski, *Nadzór nad funduszami inwestycyjnymi*, Warszawa 2011; M. Olszak, *Bankowe normy ostrożnościowe*, Białystok 2011; W. Srokosz, *Instytucje parabankowe w Polsce*, Warszawa 2011; D. Wojtczak, *Usługi bankowe w regulacjach Unii Europejskiej*, Warszawa 2012; A. Zalcewicz, *Bank lokalny. Studium prawne*, Warszawa 2013; M. Lemonnier, *Europejskie modele instrumentów finansowych. Wybrane zagadnienia*, Warszawa 2011; D. Cyman, *Elektroniczne instrumenty płatnicze a bezpieczeństwo uczestników rynku finansowego*, Warszawa 2013; E. Rutkowska-Tomaszewska, *Ochrona prawna klienta na rynku usług bankowych*, Warszawa 2013; A. Nadolska, *Komisja Nadzoru Finansowego w nowej instytucjonalnej architekturze europejskiego nadzoru finansowego*, Warszawa 2014; P. Zawadzka, *Instrumenty finansowe w gospodarce gminy*, Warszawa 2015; A. Michór, *Odpowiedzialność administracyjna w obrocie instrumentami finansowymi*, Warszawa 2009; P. Wajda, *Efektywność informacyjna rynku giełdowego*, Warszawa 2011; L. Góral, *Zintegrowany model publiczno-prawnych instytucji ochrony rynku bankowego we Francji i Polsce*, Warszawa 2011; P. Stanisławiszyn, *Status Komisji Nadzoru Finansowego w polskim systemie bankowym*, in: W. Góralczyk [ed.], *Problemy współczesnej bankowości. Zagadnienia prawne*, Warszawa 2014, p. 296 et seq.

array of legal regulations adopted by the EU's legislator, recently rather hyperactive (read: over-productive).

The effects of EU legislation will be referred to later in the book and be used to illustrate certain assumptions. The provisions and nuances regulating the financial market in the EU are so detailed and numerous that it would be pointless to try to describe them all in detail in this book. The dilemmas accompanying their application are also due to the fact that sometimes we have to deal with two sources of law: one, consisting of laws that will soon stop being applicable and binding and one made of laws just made and published, and which will gradually be replacing, or have already replaced, the former. For the purpose of the research and deliberations presented in this book, it was decided to review the latter.

The social and axiological aspect of legal regulations has been taken into account in order to arrive at the following thesis: **A thorough and detailed analysis of the nature of a financial market (its functions and importance), complemented with the legislator's activities undertaken in this market (mainly the EU market) so far, allows us to state that the supreme value upon which the functioning of a financial market should be based is trust.** The word "trust" has recently been abused in discussions about law and in the law itself to the extent that we might even get the impression that soon the world will transform itself into a wonderful place founded on nothing but "trust". And yet, those who use the word "trust" rarely give it more profound thought or reflect on the nature of trust. Of course notable exceptions to the rule do exist, as for example the deliberations of Tomasz Stawecki on the law-trust relationship. Stawecki identified four extremely important types of relations between trust and legal order (understood in the traditional positivist way) and distinguished between:<sup>5</sup>

1. A situation in which trust is a *sine qua non* condition for the functioning of a given legal institution;
2. **A situation where trust is perceived as a subject to protection, a recognised value whose absence, although living without it is still possible, will sooner or later result in the delegitimation of certain legal institutions, or even the rejection of the whole legal order;**
3. A situation in which, in a certain social relationship, law is a substitute of trust;
4. A situation where law is treated as an alternative to trust.

The bold type above indicates the relationship which is the closest to the deliberations presented in the book. In the author's opinion in order **to secure trust as described above, the protection of certain goods such as stability and security of the market is indispensable and these goods are sometimes characterized as global.** The activity of today's legislator seems to have been submitted to achieving this goal as well. Current legislators tend to reach out for legal

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<sup>5</sup> T. Stawecki, *Prawo i zaufanie. Refleksja czasu kryzysu*, in: J. Oniszczyk [ed.], *Normalność i kryzys*, op. cit., p. 122 and 125.

regulations available in public law even more often, despite the fact that by doing this they may interfere in the private sphere as well. Thus their activity is vertical as well as horizontal, and still much influenced by the process of the economisation and financialization of law. Hence real challenges and **the need for a fresh look at the process of the creation and enforcement of financial market law, which in the author's opinion should take the human factor into account. After all, it is man who is the source of the fundamental main market values, of which trust has been considered the most important one.** We must agree with the statement that "law as it is today, made up of extensively elaborated sets of rules and principles of behaviour, rules of granting competences to act, or determining the consequences of certain behaviours, is very strongly tied to the relationship between people and this relationship is called trust. It seems to me that this aspect of law passed largely unnoticed by lawyers who analyzed and shaped the practice of the creation and enforcement of law as well as those who have attempted to describe, explain, understand or design such practice."<sup>6</sup> This becomes even more topical today, as Anthony Giddens writes, in times when rapid changes are eroding traditional forms of trust. In the past trust was founded upon a local community. Today, in the globalized world, we depend more and more often on others who frequently operate from a completely different part of the world, and whose global decisions have local repercussions.<sup>7</sup>

The changing character of contemporary financial markets, which are complex, dynamic and abstract, requires new forms of regulation, such as, for example, soft law or general clauses. These ought to account for the specificity of the issues regulated, whose functioning is contingent upon elements that are hard to define such as risk, trust, temptation to abuse, efficiency and the like.

In creating and enforcing law, the specificity of the matter to be regulated (here, the financial market) must be taken into account. Determining the optimal scope of regulation so that it would fit within an area marked by under-regulation on the one hand and over-regulation on the other may also pose a problem. An example may for instance be a potential ban on certain forms of investment (or financial instruments).

With the above in mind, a legislator cannot act lightly, but must refer to the sources. These are embedded in different concepts of law which provide answers to many questions that emerge in the process of law making and its later application. Leon Petrażycki's concepts of law, or legal realism are worthy of note here, and so are behavioural concepts that have recently gained in popularity (originating, partly, from the economic analysis of trends in the law, also termed Law&Economics). It is important to ensure that when doing so, a legislator will not idealise the addressee of a norm (a human being with all his virtues but vices

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<sup>6</sup> *Ibidem*, p. 117.

<sup>7</sup> A. Giddens, *Socjologia*, Warszawa 2008, p. 698.



as well), and all these determine his reaction to market laws in times when the role and importance of financial markets is beginning to play an important role in his life. The behavioural aspect is of capital importance. "Human consciousness is responsible for the content and direction of man's actions. It is not that a change of external conditions automatically results in a change of consciousness. On the contrary. The reasons why reality is undergoing transformations must be looked for in human consciousness."<sup>8</sup>

Market mechanisms (financial) are beginning to have an increasing influence on the everyday lives of recipients of financial services. Among the latter the following two groups may be distinguished: professional and non-professional recipients, more commonly referred to as consumers of financial services. Professional recipients possess knowledge and financial resources and are therefore better safeguarded against the negative impact of market mechanisms, such as for example taking advantage of the weaker side of the other party, enforcing unfavourable terms and conditions of contracts, misleading or misrepresentation, playing on emotions, and the like. And yet, in the operations of both, professional and non-professional entities alike, there is a human element present. After all, at the end of the day it is always a man who makes the final investment decision the effects of which do not only affect his everyday life but also the lives of other people in a given social community.

In the reality as described above, many of the recent regulations have been drafted in such a way as to cover many aspects and account for many possibilities; they are also elaborate, extensive and complex, too detailed and thus (frequently) incomprehensible. An analysis of the main regulations of the European financial market shows the real determination and consistency of the EU's legislator to regulate all the elements present in this market. The purpose of the legal provision expressed in these regulations is usually stated in the preamble to individual legislative acts. The rationale for such an intervention in the financial market stated in the preamble includes, among other things, the necessity to ensure the safety and security, stability and transparency of the functioning of a financial market, and the protection of consumers of financial services. Both traditional and new techniques of financial market regulation are being used to achieve this goal, among the latter are soft law regulations. The author of this book is of the opinion that general clauses used in combination with new regulatory instruments are the core of the contemporary process of creating and enforcing financial market law. This law must be recognized as a new area of financial law, or perhaps even a separate branch of law that covers, apart from the traditional financial elements, also the administrative, civil and penal law issues, alongside matters traditionally in the domain of other sciences, i.e. economics, psychology and sociology. Only such an

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<sup>8</sup> M. Szyszkowska, *Zależność zjawisk ekonomicznych od świadomości jednostek i kształtującej ją edukacji*, op. cit., p. 458.

interdisciplinary approach to financial markets will allow an understanding of the mechanisms of its functioning and constitute the basis of a rational law-making process and subsequent enforcement of the laws in the financial market.

One of the central entities deciding about the essence of a financial market and its regulations is the human being. This fact must be emphasized here again. It is a man who undertakes investment decisions. It is a man who is a potential recipient of various, sometimes quite complex or complicated (or incomprehensible) financial products. This is why – and this is one of the theses of this book – **the process of creating and enforcing financial market law must be examined with behavioural aspects in mind** as by and large it is the behaviour of market participants which influences this process. What must be remembered though is that the behaviour of market participants is determined, or directed so to say, by the legal regulations governing that market. This dependency is laid on law which seeks to safeguard certain values, of which the above mentioned security and stability of the financial market are but a few.

The choice of an “optimal” way of creating and enforcing financial market law is a difficult one because it requires choosing between the interest of the state (its stability and security) and the society on the one hand, and the interest of financial institutions on the other hand. Financial institutions operate on the basis of economic freedom which plays an important role in a country’s sustainable economic development. And yet, these institutions ought not to oversee the human factor in their operations but draw from the heritage of business and human rights. After all, in both cases it is the society which is the ultimate recipient of the resulting advantages. Therefore, as the author sees it, **efforts should be made to create a system that would ensure the rights of the recipients (buyers) of financial services** (including supporting their financial education and consciousness) **while securing at the same time the untrammelled** (although still supervised) **functioning of a financial market in which the human factor and trust will be accounted for.** “Lawyers should abandon the agreeable state of self-satisfaction and belief that their products and instruments will automatically serve to enhance social confidence. They should ask themselves whether it is really the case that the regulations, institutions, sanctions or similar solutions strengthen relations between people. We may well have to alter our thinking about law so that it does not injure trust which is the foundation of society, and so that we do not need to limit ourselves to hopes that major social disorders can be avoided”.<sup>9</sup> Law as an instrument of politics must strive to prexeologically direct the relationship between a regulation and the real state of affairs to which this regulation is to apply.<sup>10</sup> Thus the importance of a proper recognition by the ‘architect of choices’ –

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<sup>9</sup> T. Stawecki, *Prawo i zaufanie. Refleksja czasu kryzysu*, op. cit., p. 131.

<sup>10</sup> A. Nowak-Far, *Wątroba Prometeusza. Kryzys jako czynnik wyzwalający prometeizm prawa*, in: J. Oniszczyk [ed.], *Normalność i kryzys. Jedność czy różnorodność*, op. cit., p. 242.

a name given in this book to a legislator – of the matter regulated. The awareness of the specificity of the matter, the nuances, and, which must be stressed once again, the determination of the values that are to be protected are therefore of the utmost importance. “Entities which make law [and also apply it – T.N.] act rationally when their decisions are made on the basis of the best knowledge of the circumstances of operations and in a manner complying with the adopted preferences and tactics of decision-making. In other words, law is created rationally if the making of a norm, based on the best knowledge available under the given circumstances, is a means to achieve pre-determined and acceptable goals.”<sup>11</sup> The author’s task here is to take part in the process by way of examining a selected area or research related to the nature and essence of the process of creating and enforcing financial market law.

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<sup>11</sup> A. Michalska, S. Wronkowska, *Zasady tworzenia prawa*, Poznań 1980, p. 27.

# **FINANCIAL MARKET LAW AS AN EXAMPLE OF A COMPLEX SOCIAL PHENOMENON – ON THE NEED FOR AN INSTRUMENTALIST APPROACH TO LAW**

*The more we try to understand the social world, the more complicated the structure of our analyses becomes, the less are we able to formulate simple dependencies which tell us how law shapes the social world that surrounds us.<sup>1</sup>*

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## **1. Introduction**

In order to analyse the process of the creation and enforcement of financial market law, some assumptions must first be made upon which this analysis will be carried out. The essence and scope of such an analysis lie in the matter being analysed, i.e. financial market law which, owing to the role that financial markets play in everyday life today, is currently considered to be one of the major branches of financial law. It is, after all, financial markets which generate the “life-giving” capital for the economy, ensuring its continuous growth contributes to greater social wealth. As a result, we get richer and can afford more. In other words, at least theoretically, we should therefore be happier and more content. But are we really? Is it not the case that wealth is only illusory or applies only to some ‘chosen’ communities living on this Globe? And what price must be paid to achieve it? Answers to these questions are being sought by sociologists, psychologists, philosophers, as well as economists and lawyers. Such a joint interdisciplinary effort in finding the answer is certainly necessary for objective assessments which will then constitute grounds for implementing changes intended to ensure that the financial market, the most important element of the economy, will not be interested only in the economic calculation. This book by no means aspires to be called philosophical, but since its author has a long fascination with financial markets,

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<sup>1</sup> K. Frieske, *Socjologia prawa*, Warszawa-Poznań 2001, pp. 110-111.

he felt somewhat obliged to reach out to the “sources” i.e. axiological elements, or (in other words) values which a legislator must take into account when making laws to govern financial markets. This legislative process must include all actions based on a rational model of law making which involves creating legal regulations that are indispensable for proper functioning of a financial market, or removing those that are obsolete or defective. It will run undisturbed when the legal regulations governing “understand” the matter being regulated. This ‘condition’ is even more important today after the events of 2008 (and subsequent ones) when, as we could observe, numerous legal regulations of financial markets failed to prevent a global crisis. Interestingly, the sources of the crisis were simple, or financial instruments of straightforward construction such as e.g. derivatives, securitisation instruments etc. Some of them functioned outside any legal framework while those under legal supervision turned out to be structured so, that although seemingly in line with the intentions underlying their adoption, they could be used to achieve other purposes. This, in turn, led to a situation where these instruments were used to earn substantial extra gains but at the cost of creating extra high risk, of a magnitude never seen before. The financial crisis which followed became a real challenge for governments, supervisory authorities, courts and other entities responsible for enforcing the law.

The experience of recent years shows that the nature of the law-making process and enforcement of financial market law ought to be looked at and analysed from a wider legal perspective and that the essence of the law, its purpose and the values which the law is to serve require deeper study.<sup>2</sup> The law that governs financial markets is obviously related to economics and therefore the inclusion of elements of economic analysis should be considered as well. The economic analysis of law has not as yet been adapted to the needs of financial law within whose framework a so-called behavioural conception of law has developed. In the author’s opinion this conception provides arguments supporting a statement that **in the process of making and enforcing financial market law, besides the existing laws of economic regularities other values and principles must also be respected** since they serve to protect those who make use of the benefits flowing from financial markets. These values, as it turns out, have long been present in the legal discourse on the essence and role of law. However, it must be remembered that when studies on law are conducted on many levels, and law is seen as a certain normative expression, a social phenomenon, or a mental experience that includes axiological elements, then constant supervision and regard for the difference and exceptionality of legal sciences is absolutely necessary.<sup>3</sup>

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<sup>2</sup> J. Wróblewski, *Teoria racjonalnego tworzenia prawa*, Wrocław 1985, pp. 243-247.

<sup>3</sup> K. Opalek, *Swoistość prawoznawstwa a problem integracji*, in: *Państwo i Prawo*, No 4-5 1966, p. 628 et seq.

## 2. Law as an instrument regulating social relationships – on the need to reach to the sources

An important element accompanying the process of globalisation is law which evolves all the time, adapting to the changing reality.<sup>4</sup> Law accompanies us at each stage of our lives and regulates different social relationships. However, even if we intuitively feel its presence, we do not think too often of its essence. It may of course be claimed that more important than thinking about law is adjusting one's conduct so that it complies with legal norms applicable in a given community. However, when the nature of certain regulations (and those of the financial market in particular) is being sought and the process of their making and enforcing is to be included in their analysis, it becomes necessary to reach to the core of the problem. This is especially so because this "puzzle of normativity" as Bartosz Brożek calls it, has accompanied the science of law since the very beginning.<sup>5</sup> When we analyse individual theories of law (supported by the philosophy of law), no matter whether positivist or naturalist, what can be noted is a desire to explain the nature, or essence of law. For example, let us look at quotations drawn from works by two authors of rather differing approaches to the issue in question: Leon Petrażycki and Richard A. Posner. Both had an enormous influence on the science of law and their thoughts are a never-ending inspiration to many contemporary researchers.

As will be shown later in this book, some of the theorems of the above authors may be used with success in an analysis of the process of financial market law making and enforcing, with a financial market being an element of a legal system.<sup>6</sup> Talking about the essence of law, Leon Petrażycki, creator of the psychological theory of law, said:

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<sup>4</sup> Globalisation is not indifferent to law. It constitutes inspiration to develop new concepts, including one of "the New Global Law" which in the opinions of M. Dybowski and M. Romanowski, as group of regulations (currently rather only as its seedlings) forms itself as an effect of transformations in the social reality. See M. Dybowski, M. Romanowski, *Próba interpretacji koncepcji prawa globalnego*, in: *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No 4 2014, p. 51; A. Bator, *Globalizacja jako perspektywa postrzegania prawa*, in: J. Helios [ed.], *Autonomia prawa ze stanowiska teorii i filozofii prawa*, Wrocław 2003, pp. 19-40; R. Domingo, *The New Global Law*, Cambridge 2011.

<sup>5</sup> B. Brożek, *Normatywność prawa*, Warszawa 2012, p. 11. The author seeks the meaning of the term "normativity of law" by answering four key questions formulated in the introduction to his book. These questions are described as ontological, epistemological, about the normativity *sensu stricto* and psychological. They are asked in two variants: one regarding the legal norms and one regarding all rules. Examples of questions from the former group are: What are norms? (an ontological question); How do we recognise them? (epistemological), What does it mean that legal norms are reasons for acting? (normativity) and How do legal norms become motives for acting? (psychological question).

<sup>6</sup> The notion "system of law" should be understood as a "certain relatively well-ordered set of legal norms" See R. Sarkowicz, J. Stelmach, *Teoria prawa*, Kraków 1998, p. 109.

“The fact that till today it has not been possible to resolve (...) the task of defining law despite multiple efforts and countless more or less inventive attempts to define the essence of law, has led to a situation that in more recent times there emerged doubts whether the essence of law will ever be resolved, and the wish to achieve a piece of mind caused that insufficient definitions have become satisfying and the issue of the essence of law evaded.”<sup>7</sup>

Richard A. Posner, one of the most distinguished representatives of the economic analysis of law, took a quite different stance, claiming that what is of more importance in deliberations on law is not so much its nature but its “environment”, by which he meant the effects of the application of law. This view is in line with his other views on law and interpretation of legal norm in the spirit of a positive and normative assessment. Posner wrote:

“We tend to think of law as though it preceded the solution of a legal problem, however doing so we are making a mistake perceiving law as a concept not activity. We think that law exists regardless of the processes of imposing legal obligations and sanctions. While more interesting is the reverse sequence”<sup>8</sup>

Is it really so that law is seen only as a concept, not an activity? Do lawyers, as Petrażycki claimed, avoid finding out what the essence of law is? Even a preliminary answer to this question made in reference to financial market regulation will point to the fact that indeed this process does not always include a deeper thought about (at least) the values that underlie it. As will be shown later in this book, although the stability and security of the market is ensured among other things by consumer protection, and references are made to these values in the respective legislation, in practice they are taken as obvious and existent anyway. This kind of widespread thinking confirms the thesis of law as a concept, not an activity, a phenomenon which implies the need to ask questions about its essence and tasks. In the case of a financial market, this is of particular importance because the matter regulated has a considerable impact on the everyday lives of individuals. Law is first and foremost a tool for shaping people’s behaviours, and the process of its making and enforcing must take into account and examine observable human behaviours which law influences.<sup>9</sup> Only this kind of legal dialectics<sup>10</sup> i.e. one that includes philosophical reflections on law, will bring us closer to law that is effective, efficient and fair. More questions may be immediately asked

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<sup>7</sup> L. Petrażycki, *Wstęp do nauki o prawie i moralności. Podstawy psychologii emocjonalnej*, Warszawa 1959, p. 25.

<sup>8</sup> R.A. Posner, *The Problems of Jurisprudence*, Cambridge 1990, p. 232. Quoted after B. Brożek, *Normatywność prawa, op cit.*, p. 12.

<sup>9</sup> This has been elaborated on in an article by T. Nieborak, *Behawioralna koncepcja prawa jako element Law&Economics*, in: *Ekonomia i Prawo*, Vol. VIII, No 1 2012, pp. 27-36.

<sup>10</sup> On the “dialectic interaction of norm and behaviour” according to H.T. Klami, see J. Wróblewski, *Problem ontologicznej złożoności prawa*, in: K. Opałek, J. Wróblewski [eds], *Prawo. Metodologia. Filozofia. Teoria prawa*, Warszawa 1991, pp. 87 et seq.

though. Can this kind of law exist at all? What do concepts as “effectiveness”, “efficacy” or “fairness” mean, how should they be understood?”. Before these, as well as many other much more detailed questions are answered, a few general statements must be made.

First of all, it must be stressed that law develops as an extremely complex social process, in the course of which legal norms take form or are being shaped. These norms are binding upon certain (defined) social groups, e.g. entities operating on the financial market.<sup>11</sup> The very concept of “law” is not uniform, and its definition depends among other things upon whether it is approached subjectively or objectively, or whether it is defined based on the concepts of the law of nature or the positivist law. However, the dynamic approach to law (brought in by Posner) which treats it as a social process, means that it may be considered as a set of general norms and abstract norms duly adopted or recognised by competent state bodies, and to be followed and enforced by virtue of State coercion (objective approach).<sup>12</sup> This process is either analysed by scientists as a process of law shaping<sup>13</sup>, or as a process of law making.<sup>14</sup> The former occurs when legal norms are being shaped in the course of collaboration (negotiation) between certain social groups which in this way include in law certain social or economic mechanisms, while the latter is a process which is properly organised and conducted in certain institutionalised forms.<sup>15</sup>

Law making (as well as law enforcement) is a very complex and varied process which is influenced by different factors of an economic, social and psychological

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<sup>11</sup> S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2005, p. 21.

<sup>12</sup> A. Redelbach, *Wstęp do prawoznawstwa*, Poznań 1995, p. 59.

<sup>13</sup> See also A. Michalska, S. Wronkowska, *Zasady tworzenia prawa*, Poznań 1980, pp. 16-17.

<sup>14</sup> S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, Poznań 1997, p. 128.

<sup>15</sup> *Ibidem*; When writing of law making, J. Wróblewski drew attention to the fact that this term may be understood in three different ways. Firstly, as the creation of a legal system, secondly as a system of law creation and thirdly as law creation analysed in the context of systemic factors that condition law creation, and consequent actions performed. This last is included in the theory of law making *sensu largo*, and focuses on a systemic context of factors which condition the law making process and are its consequence. This type of law making constitutes an element of the functioning of a society organised in a state. Factors influencing the process include nature (a factor which objectively determines human existence). The formally binding law is a product of law making and influences the behaviours of its addressees or, indirectly, the behaviours of other subjects. The consequences of these behaviours may be: intentional – i.e. the goal of the legislative activity, unintentional, and unknown. The third ones are a law making risk. The above consequences are coupled with law making which means that a rational legislator takes into account the consequences of the law already applicable and binding as well as of the laws being created. This conception confirms the thesis about the dynamic nature of law as a social phenomenon, and fits in perfectly in the regulation of a financial market which must take into account the elements of the matter regulated as well as the consequences of the intervention in the matter, including those hard to foresee, and which may be identified with the financial risk discussed in the next Chapter below. The approach to “law making” analysed here has been based on the model presented in an article by J. Wróblewski, *Tworzenie prawa w ujęciu systemowym*, published in: *Państwo i Prawo*, No 5 1980, p. 48 et seq.



nature.<sup>16</sup> A certain feedback is also observed in it as well, as the legislator attempts to shape or create certain relations and behaviours in advance. Recent years, however, have also seen the reverse situation, where legislative activity comes second, enforced as a consequence of certain events that create certain situations which, in order to ensure stability, must be put in a certain legal framework.

A perfect example of the above is a financial market, one of the principal elements of contemporary economy of which law is an institutional element.<sup>17</sup> The tendency observed in the financial market in the last dozen or so years is development of numerous financial innovations.<sup>18</sup> The underlying reason for them is a desire to generate new profit centres, but also to identify new and more refined forms of financial insurance. These financial instruments, very sophisticated in form and structure, are a real challenge for the legislator. They are at the same time an excellent example of dependencies that exist between law and economics, and which in simple terms come down to the need to normalise economic constructions, which will be discussed later in this book.

First, however, it is necessary to explain (at least briefly) the essence of law, which will then serve as a basis as well as a source of inspiration when final conclusions and proposals are to be formulated. Accepting the assumption that law must be analysed with the anthropological aspect in mind, and therefore in a context where the human factor is strongly exposed, further analysis must be based on a model proposed by Wojciech Załuski who postulated basing it on four questions which enable a multi-level analysis and a reference to defined scopes of phenomena (see Table 1):<sup>19</sup>

1. An ontological question: What is law, i.e. what is the nature of law?
2. A theological-axiological question: What are the main objectives of law and how can they be achieved?
3. A question about normativity, (constructed) based on two aspects:
  - a. a normative aspect: what are the sources of a normative aspect of law, i.e. the fact that legal norms constitute rationale?
  - b. a motivational aspect: how can the fact that legal norms are motives of human actions be explained. i.e. how can it be explained that people act according to legal norms?

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<sup>16</sup> An interesting concept is the one which sees law as engineering made by its creators who are engineers, and based on principles that guarantee its success. Important elements are also "humans in engineering system", without whom the system could not exist. More in: D. Howarth, *Law as Engineering*, Cheltenham 2013, pp. 51-96.

<sup>17</sup> P. Kłosiewicz, W. Kozłowski, J. Paczocha, W. Rogowski, *Papierologia czy bezpieczeństwo depozytów? Koszty administracyjne w sektorze bankowym w Polsce na przykładzie przestrzegania wybranych regulacji bankowych*, in: *Materiały i Studia*, No 153, NBP, Warszawa 2009, p. 8.

<sup>18</sup> As for instance an algorithmic trade. See A. Chłopecki, Ł. Malanowski, *Handel algorytmiczny*, in: *Monitor Prawa Bankowego*, No 7-8 2014, pp. 65-71.

<sup>19</sup> W. Załuski, *Ewolucyjna filozofia prawa*, Warszawa 2009, p. 12; See also W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, Warszawa 1986, p. 22.

4. A methodological-epistemological question: What methods are particularly effective in the analysis of law?

Table 1. Systematic analysis of individual reflexions on law

PLANE	WHAT IS LAW? (ONTOLOGY)	HOW IS LAW COGNISED?	HOW IS LAW RESEARCHED? (METHODOLOGY)
LOGICAL-LINGUISTIC	NORM (SYSTEM OF NORMS)	UNDERSTANDING	METHODS OF LOGIC, METHODS OF LINGUISTICS
SOCIOLOGICAL	SOCIAL FACT	PERCEPTION	METHODS AND TECHNIQUES OF SOCIAL STUDIES
PSYCHOLOGICAL	MENTAL FACT	PERCEPTION	METHODS AND TECHNIQUES OF PSYCHOLOGICAL STUDIES
AXIOLOGICAL	VALUE (DUTY)	COGNITION OF THE VALUE (DUTY)	DIVERSE
MULTI-LEVEL ASPECT	COMPLEX PHENOMENON	COMPLEX	DIVERSE

Source: W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, Warszawa 1986, p. 38.

All these questions apply to the analysis of financial market law as well. As has already been said above, financial market law must be treated as part of the legal system of a given state or a public-law entity such as the European Union. Its regulations contain the very essence of law, concentrating ontological, normative and, what is particularly important, axiological elements. These, however, cannot be analysed if first the main thoughts of the discussion on the essence of law are not presented.

We can follow Jerzy Stelmach in the view that although there exist many methods of interpreting law, their choice should be decided upon by the nature of the case interpreted, as well as the philosophy of the law previously adopted, which is largely responsible for our understanding of law and, in consequence, for its cognition (interpretation).<sup>20</sup> Thus, with the above in mind, it may be stated that the purpose of our considerations of what law is and what its essence is, is the possibility of making reference to the analysis of financial market law, including in the process of its creation and enforcement also the behavioural (psychological)

<sup>20</sup> Compare J. Stelmach, B. Brożek, W. Załuski [eds], *Dziesięć wykładów o ekonomii prawa*, Warszawa 2007, p. 182.

aspect. This aspect can be found in the conceptions of legal functionalism<sup>21</sup>, but first and foremost in works by Petrażycki and other representatives of the behavioural conception of law. Behaviours of market participants influence this process but the existing legal solutions streamline these behaviours as well.

## 2.1. On the instrumentalist approach to the understanding of law

Law has been a subject of interest to researchers for hundreds if not thousands of years but the discussion on what law actually is has not as yet been concluded. Some see law as a set of norms which determine human conduct. These norms are formulated and endorsed by social authorities. Others emphasise the fact that although law is a set of norms of conduct, the wording of these norms does not depend on a man who does not make them but is obliged to respect them.<sup>22</sup>

Following Sławomira Wronkowska's **understanding of law** as a set of norms of conduct created or recognised by authorised, competent state bodies, the most important elements which such a definition implies may be identified<sup>23</sup>. Their source is **a norm of conduct** placed in a wider category – a directive utterance belonging to the group of extra-descriptive expressions. A norm of conduct imposes a certain conduct or behaviour on its addressees, ordering them a certain conduct or prohibiting another. Such a norm is binding either because of its tetic rationale (the will of its creator will be obeyed) or axiological values, i.e. values that allow a given subject (addressee) who adheres to the norm to determine whether certain acts are good or bad.

A norm may also be binding in a behavioural sense, as it manifests itself as a situation in which the addressees of a norm adhere to it because there exists a potential inconvenience or unpleasant consequence should it not be obeyed. Three of the justifications of a norm presented above are also valid when it comes to norms binding on a financial market. This is the case because the behaviour of the players in this market, even if it does not extend beyond the limits determined by a legislator (tetic norms) will also be dependent on certain axiological and behavioural reasons. The former may be shaped by the objectives articulated in legislative acts (e.g. in preambles of directives or EU regulations). They may be an expression of beliefs, convictions or morality<sup>24</sup>, but they also may be the effect of certain

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<sup>21</sup> See J. Kowalski, *Funkcjonalizm w prawie amerykańskim*, Warszawa 1960.

<sup>22</sup> S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, op. cit., p. 11.

<sup>23</sup> *Ibidem*, p. 11. A further analysis aimed at reconstructing the main elements constituting the definitions of law was based on deliberations presented in the publication cited. See also J. Mikołajewicz, *Pojmowanie prawa*, in: J. Mikołajewicz [ed.], *Problematyka intertemporalna w prawie. Zagadnienia podstawowe. Rozstrzygnięcia intertemporalne. Geneza, funkcje, aksjologia*, Warszawa 2015, pp. 79-110.

<sup>24</sup> On morality as a factor shaping the content of law, in: Z. Ziemiński, *Etyczne problemy prawoznawstwa*, Wrocław 1972, pp. 117-139.

educational activities. Financial education constitutes an important element in shaping behavioural attitudes in the market, while behavioural rationale may in fact be related to behaviours whose objective is the protection of the addressee of a norm against negative sanctions if the norm has not been obeyed. What needs to be emphasised though here is that the conduct of each subject is influenced by non-legal elements (psychological, sociological<sup>25</sup> and economic) as well.

The norms of conduct discussed here "increase in importance" once they are established or recognised by a competent state body. Then they become **legal norms**, formed in the course of a complex social process of law-making<sup>26</sup> and the law so made should be seen as an effect of a social process as a result of which norms of conduct are established to subsequently influence human behaviour. Human behaviour, in turn, is influenced by numerous non-legal factors (let us call them behavioural). In light of the above definition, the essence of law, as this author sees it, is an effect of behaviours of entities that belong to a given community, and whose existence is based on certain specified values<sup>27</sup> that are important

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<sup>25</sup> A special role is played by sociology of law which although primarily seen as a division of sociology, has also developed into a certain division of legal science, a certain version of the sociology of law. Compare Z. Ziemiński, *Socjologia prawa jako nauka prawna*, Warszawa-Poznań 1975, p. 7. See also M. Borucka-Arctowa, *Socjologia prawa w Polsce powojennej. Ocena syntetyczna dorobku naukowego*, in: *Studia Socjologiczne*, No 4 1973, p. 141; J. Wróblewski, *Socjologia prawa a prawoznawstwo*, in: *Państwo i Prawo*, No 12 1967, pp. 910-921.

<sup>26</sup> Writing on norms, one should remember that "principles of law" are classified as norms formulating an order to realise a certain value. See M. Kordela, *Zasady prawa. Studium teoretyczno-prawne*, Poznań 2012, p. 276; In order for a system to effectively influence social life, it must constitute a coherent whole, i.e. such a system of norms for which, on the basis of an appropriately coherent authority, it will be possible to find a proper axiological justification in the ordered system of values. The "principles of law" serve such ordering. See more in: S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, op. cit., pp. 186-187.

<sup>27</sup> It must be noted that the term "value" is linked to a whole family of other concepts, sometimes similar or related to one another, and sometimes relating to completely different ones. Therefore a discourse carried out to, among other things, assess the legal solutions through the prism of realisation by these solutions of certain values, requires information on how the term is understood. Following Ziemiński, "value" should be understood as specification of a feature of a thing by assessing it positively or negatively. Thus in such a meaning value is a relative feature, informing about the attitude to a given thing by certain subject(s). The use of the term "value" is then limited to cases when assessments of a given thing (object) are already well established or of great importance from the point of view of a given subject. Now, applying such an understanding of "value" on a financial market, it will be possible to take it that they will materialise in a situation in which identification of features established in a given society and connected with the functioning of a financial market will be possible. The legislator's task is thus to identify objectively those values that are material from the point of view of the functioning of a given community. Objectivisation of values is another challenge because a question arises about which values are to be regarded as objectively fair as a risk may arise that they are relativised and imposed on a society in the name of certain ideas, such as e.g. more welfare, happiness etc. Financial markets are an excellent background upon which such activities may take place because their understanding requires experience and knowledge which usually subjects in these markets (consumers of financial services) do not have and without which the functioning of these markets would not be possible. And it is these subjects who buy products offered by

when it comes to the shaping of attitudes towards law which is then followed or not. These norms result from facts that constitute law, i.e. law making, agreement, customary law and precedent. All four, as will be shown later, are present in the EU financial market. In order to function well, the EU financial market needs not only certain sources of law set in directives or regulations, but it also requires agreements concluded by parties, such as consents to create certain off-market financial instruments (OTC derivatives), good practices, or the law-making role of the European Union Court of Justice.

The first of the law constituting facts – creating law is the basic form of **law-making**. A complementary element will be **enforcement**, identified with a conventional act performed by a state body, through which act a given, concrete case is decided based on a binding legal norm. Thus it seems reasonable to use the formula "enforcement of a legal norm" rather than "enforcing the law".<sup>28</sup> Enforcement of law (likewise law-making) is a complex and dynamic process which in a model form consists of the establishment of: the legal ground, factual state, its 'sub-summation' under a certain defined legal norm and issuance of a final decision.<sup>29</sup>

The process of **law enforcement** requires interpretation of law and therefore the opportunity to choose a proper method for the task. From the point of view of the law regulating the functioning of a financial market, it is also necessary to use methods related to the economic function of law. The possibility and scope of their enforcement must, however, arise from the nature of the case interpreter, and the interpretative context. The latter is a constituent element of many smaller albeit equally important elements defined by detailed contexts which in the opinion of Jerzy Stelmach, Bartosz Brożek and Wojciech Załuski are: the legal-dogmatic, the economic, social, political, historical and psychological contexts.<sup>30</sup>

It is believed that "from the very ontological essence of law it derives that at least four **economic goals** should be realised, namely: the basic economic needs of legal subjects must be safeguarded; an economically effective system of goods allocation must be defined; solution of economic conflicts that may arise among subjects must be ensured; and it must lead to increased individual and social welfare (financial as well as non-financial) which means that for it to »work« a re-

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financial markets and who constitute an important 'supply base' for its liquidity. Thus, most probably financial markets are such focus of attention of a legislator. For more on the concept of "value" see in: Z. Ziemiński, *Wstęp do aksjologii dla prawników*, Warszawa 1990, pp. 58-67.

<sup>28</sup> S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, op. cit., p. 140.

<sup>29</sup> It should be remembered that the very understanding of the process of law enforcement depends on a few factors, including: the philosophy adopted in a given analysis, ontological understanding of law, and the scientific approach to jurisprudence. In the literature, at least several models of law enforcement are differentiated (judicial, administrative, managerial, functional, informational, decisional). See also in: R. Sarkowicz, J. Stelmach, *Teoria prawa*, op. cit., pp. 93-96. See also K. Opałek, J. Wróblewski [eds], *Zagadnienia teorii prawa*, Warszawa 1969, pp. 284-285; A. Redelbach, S. Wronkowska, Z. Ziemiński, *Zarys teorii państwa i prawa*, Warszawa 1992, p. 250.

<sup>30</sup> J. Stelmach, B. Brożek, W. Załuski [eds], *Dziesięć wykładów o ekonomii prawa*, op. cit., p. 11.

quirement of at least »minimal economic efficiency« must be satisfied”.<sup>31</sup> These standards are counted among the primary functions of law.

In **interpreting law** other, non-positivist conceptions (so called realistic conceptions) should be referred to. Such realistic conceptions see law as a ”thing that is ontologically complex”<sup>32</sup>, consisting of a formal element and a substantive (usually empirical) element.<sup>33</sup> This is because an approach to law reduced to formal deliberations only, with no reference made to economic, social and even psychological facts, makes it but an abstract system of binding norms.<sup>34</sup> While it is important that a ‘golden mean’ is found, which in other words means that an analysis of certain legal solutions is made with the use of empirical elements alongside those which are qualified in law as a formal system of norms.<sup>35</sup>

When analysing the process of making and enforcing law it must also be taken that law is a wholly ordered structure that realises three basis postulates addressed to it. They are: fairness of the rights and obligations imposed, linguistic clarity and internal order; the last allowing us to determine the consequences of a binding norm and the effectiveness of the law.<sup>36</sup>

This complex approach to law has become the basis for formulating a thesis that law may be analysed in the context of **the policy of law** that assumes that law is used to achieve intended goals. The conception of the ”policy of law” in jurisprudence extends to law making as well as law enforcing.<sup>37</sup> Thus law is not only seen as a set of general and abstract legal norms but also as decisions which in actual situations perform the function of ”law” *vis a vis* certain entities.<sup>38</sup> Now, if law is seen as a policy, within this policy certain detailed parts must be distinguished:<sup>39</sup>

1. Policy of law making – focused on the making of legal norms the task of which is the realisation of specified goals.
2. Policy of law enforcement – which involves issuing legislative acts enforcing law in order to realise specified (predefined) goals. This policy is of the essence because the legal norms applied provide that the decisive body appointed to enforce the law will be given a certain discretion.<sup>40</sup>
3. Policy of exercising the rights and competences granted.

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<sup>31</sup> Ibidem, p. 12.

<sup>32</sup> More on the ontological complexity of law in: R. Sarkowicz, J. Stelmach, *Teoria prawa*, op. cit., pp. 23-28.

<sup>33</sup> J. Stelmach, B. Brożek, W. Załuski [eds], *Dziesięć wykładów o ekonomii prawa*, op. cit., p. 23.

<sup>34</sup> Ibidem, p. 23.

<sup>35</sup> Ibidem.

<sup>36</sup> A. Bator, *Instrumentalizacja jako założenie ekonomicznej analizy prawa*, in: J. Stelmach, M. Soniewicka [eds], *Analiza ekonomiczna w zastosowaniach prawniczych*, Warszawa 2007, p. 26.

<sup>37</sup> S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, op. cit., p. 125.

<sup>38</sup> J. Wróblewski, *Zasady tworzenia prawa*, Warszawa 1989, p. 39.

<sup>39</sup> Ibidem.

<sup>40</sup> W. Gromski, *Law and Economics jako teoria polityki prawa*, in: J. Stelmach, M. Soniewicka [eds], *Analiza ekonomiczna w zastosowaniach prawniczych*, Warszawa 2007, p. 46.

The predominant thread in the analysis of the policy of law discussed here concerns its **tasks**, or rather a question whether it should also indicate the goals of jurisprudence and means of achieving these goals (being a maximalist and axiologically engaged version of the policy of law), or whether it should only be restricted to indicating the means (thus being a minimalist, neutrally engaged policy of law).<sup>41</sup> The apparent problem here is the possibility of realising goals and more importantly a (scientific) justification of their choice. It is extremely difficult to give rational reasons for making one or another choice. What really happens is that a legislator vested with the task of realising the policy of law identifies **values** that are important from the point of view of a given society. Choosing these values, it is optimal to adopt an attitude of a moderate acognitivism and a stance that values and norms cannot be cognised in the same manner as an empirical reality. They may, however, be scientifically analysed and approached from the historical and cultural perspective, for example.<sup>42</sup> In such a case the subject of the analysis will be certain systems of values and their structure, and an assessment of norms with regard to their effectiveness in the realisation of the specified goals.<sup>43</sup> Thus law made and enforced in this way may invoke "traditional values built on a hierarchical order, that are proper for a legal discourse (justice, fairness, legal safety etc.)."<sup>44</sup>

Law as a cultural phenomenon is built upon certain **values**, and these values are to be realised and protected. Values are an inseparable element of each culture, be it moral, academic, political or other.<sup>45</sup> The nature of values has been disputed for centuries, usually centred on the axiological absolutism approach (they are unchangeable and constitute a durable and reliable point of reference), a cognitivist approach (they may be the subject of human cognition) and acognitivist (values may not be a subject of cognition but may be subject to human creation).<sup>46</sup> A convincing view is a middle of the road approach according to which "certain values are of durable or almost unchangeable nature and are a heritage of the whole of humanity accomplished over its history, while others are relativised to the time,

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<sup>41</sup> S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, op. cit., p. 125.

<sup>42</sup> *Ibidem*, p. 126.

<sup>43</sup> The notion of the "goal" includes a certain postulated state of affairs that must be achieved through undertaking certain actions such as, e.g. the adoption of certain norms. The goal of the law should, however, be identified with its functions. See T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 2003, pp. 12-13.

<sup>44</sup> A. Bator, *Instrumentalizacja jako założenie ekonomicznej analizy prawa*, op. cit, p. 33; In order to maintain the protection of certain values, the legislator sometimes uses certain rather blurred terms such as "general interest" or "public interest". According to L. Góral their common denominator is the conviction of the values and the need to preserve them at all costs as they are necessary to ensure the development of a society. See also Góral, *Zintegrowany model publicznoprawnych instytucji ochrony rynku bankowego we Francji i Polsce*, Warszawa 2011, p. 66.

<sup>45</sup> For more on moral norms and legal norms and their relationship in the society see Z. Ziemiński, *Normy moralne a normy prawne*, Poznań 1963.

<sup>46</sup> T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, op. cit., p. 26.

place and social group (or even an individual) which identifies with them”<sup>47</sup> What is more, each society is permeated by certain common values which must constitute the axiological foundation of law which is also part of the same culture. These values extend to individuals who are elements of the community of common values, and influence individual axiological choices marking assessments of certain acts as being incompatible with universally accepted values<sup>48</sup> while the choices are the effect of a number of different factors influencing a human being, such as education, upbringing or wealth, of which all may have an impact on a person’s attitude to values. A sensitive person aware of these values should, at least theoretically, take them into consideration when undertaking a certain action. Such a person may be a judge enforcing the law, but also a client of a financial institution or its employee managing financial resources entrusted to him. A reference to these three is not accidental since all three share a certain **financial literacy**, or financial capability<sup>49</sup>, which influences the decisions they make. Their financial capability results from the knowledge of the principles according to which the financial market operates and which is indispensable in making relevant decisions. Because clients are usually entities whose financial literacy is the lowest, much effort is made by legislators to protect them, irrespective of the assumption made that as a *homo oeconomicus*, a client is also capable of making rational decisions grounded in the information and knowledge he possesses. And yet, this **rationality** must be challenged when creating a legal policy, which should also take into account other, not strictly legal elements.

The approach proposed here must find application with regard to the goals and values of the financial market regulations. Their analysis allows us to distinguish goals that the legislator deemed achievable, as well as the values that underlay their choice. The basis goals of financial regulations today are most certainly the stability and the security of the financial market, through which harmonious economic as well as social development can be ensured, the latter being possible when proper protection of its representatives has been adequately secured. Activities undertaken in the financial sector derive from certain values of which the most important is in the author’s view **the trust in the market**, which is the greatest asset which current financial institutions can boast.<sup>50</sup> It is trust which gathers all other social values that in a given community are related to certain

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<sup>47</sup> Ibidem.

<sup>48</sup> Ibidem, p. 27.

<sup>49</sup> Financial literacy is the effect of financial education seen as one of the elements of economic education. Financial literacy allows people to assess the opportunities and threats arising from traditional as well as modern financial products, the latter characterized by a high degree of complexity. See M. Iwanicz-Drozdowska, *Edukacja i świadomość finansowa. Doświadczenia i perspektywy*, Warszawa 2011, pp. 14-15.

<sup>50</sup> Compare K. Żądło, *O wartości zaufania. Komunikacja i budowa zaufania a rynkowa wartość przedsiębiorstwa*, Warszawa 2014.



norms of conduct. They also accompany the process of law making which, being a social process, ought to account for the social and political mechanisms operating in a community and which are not indifferent to the creation of law in an organised manner. These mechanisms also belong to the element of law enforcement.

An analysis of the contemporary role of financial market law requires it to be set in a wider context. It will be thus helpful to employ an instrumentalist approach to this context and approach law as a complex phenomenon.<sup>51</sup> Włodzimierz Gromski shows that **the instrumentalist approach to law** allows it to be treated as a means to accomplish intended goals.<sup>52</sup> In Zygmunt Ziemiński's thinking, a formal (linguistic) aspect and well as a realistic (non-linguistic) aspect of legal phenomena must be noted. The former refers to the development in certain organisational forms of norms recognised as legal norms. The other aspect described as real and non-linguistic, sociological, or psychological, is nothing more than the operation of norms recognised as legal (and their continuous shaping) in social life.<sup>53</sup> At the same time, as Wróblewski points out, these norms ought to be seen as a social fact intertwined "by way of various dependencies in the context of other social facts".<sup>54</sup> In a situation in which the focus is put on only the formal aspects of law, having no regard to its non-linguistic (sociological and psychological) aspects, we cannot speak of the implementation of the "instrumentalist values of law".<sup>55</sup>

One should agree here with the thesis put forward by Gromski that law seen as a system of normative utterances may, from the instrumentalist point of view, be of use when it comes to the management of social life, provided however, among other things, that the communicative aspect, the unambiguity as well as the coherence of utterance formulated is ensured.<sup>56</sup> Bearing in mind contemporary social circumstances, though, i.e. advancing technological development, globalisation of markets, including financial markets and their increasing importance in everyday life, it becomes necessary to look at law realistically and see it as a fac-

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<sup>51</sup> W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, op. cit., pp. 32-35.

<sup>52</sup> Here the author draws readers' attention to the duality of the expression "instrumentalist approach to law". In one case, the one adopted for the purpose of this work, law should be associated to the concept of law through which an attempt is made to identify its features of an instrument serving to achieve certain goals. In the other case, focus is put on the specific attitudes to law (and specific attitudes to it). See also W. Gromski, *Autonomia i instrumentalny charakter prawa*, Wrocław 2000, pp. 85-86.

<sup>53</sup> Z. Ziemiński, *Problemy podstawowe prawoznawstwa*, Warszawa 1980, pp. 85-86; See also W. Gromski, *Law and Economics jako teoria polityki prawa*, op. cit., p. 51.

<sup>54</sup> J. Wróblewski, *Zmiany społeczne a prawo*, in: *Państwo i Prawo*, No 11 1984, p. 4.

<sup>55</sup> „Talking about »instrumental value of law« one usually has its usefulness if realising states of affairs in mind, that have been globally recognised”. – Z. Ziemiński, *Wstęp do aksjologii dla prawników*, op. cit., p. 73, footnote 3.

<sup>56</sup> W. Gromski, *Law and Economics*, op. cit., p. 51. Instrumentalist approach to law means that law as well as its consequences (the functions of law) are the consequence of the actions undertaken by entities which make, enforce or implement law.

tor determining the attitudes and opinions of members of society, shaping them in line with the models that have been either created or approved by the state.<sup>57</sup> This approach allows us to take a wider look at law as **an instrument creating a legal order**, which at the same time exercises some influence on interpersonal relationships.<sup>58</sup> This way of perceiving law as a social phenomenon<sup>59</sup>, i.e. combining the real and formal aspect, is desirable as it allows us to take a holistic look at law, taking into account its role in the functioning of a society as well as **the functions** which it ought to perform.<sup>60</sup> The instrumentalist treatment of law may not, however, extend beyond certain limits beyond which law will become an instrument in a metaphorical way only. It is essential that entities have the chance to decide upon its use.<sup>61</sup>

The instrumentalist approach to law is connected with distinguishing in it a metafunction<sup>62</sup>, also seen as a basic function<sup>63</sup> consisting of a stabilising (homeostatic) function that ensures the maintenance of certain social relationships<sup>64</sup> and a dynamising (instrumentalist) function the task of which is to initiate changes in the already existing social relationships as well as to shape new ones. Following Wróblewski, we may say that law may be seen as an instrument that maintains **social homeostasis**.<sup>65</sup> The concept of “homeostasis” derives from biology and generally refers to the maintenance of a balance (or stability) between individual

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<sup>57</sup> Ibidem, p. 51.

<sup>58</sup> Z. Ziembinski, *Wstęp do aksjologii dla prawników*, op. cit., pp. 72-73.

<sup>59</sup> M. Borucka-Arctowa, *O społecznym działaniu prawa*, Warszawa 1967, p. 251. See also W. Lang, *Obowiązki prawa*, Warszawa 1960, p. 26 et seq.; S. Zawadzki, *Z problematyki badań empirycznych w naukach prawnych*, in: *Państwo i Prawo*, No 3 1966, p. 564.

<sup>60</sup> It is pointed out in literature that there are realistic concepts of law which approach it in a comprehensive way. See Z. Pulka, *Instrumentalizacja prawoznawstwa*, in: A. Kozak [ed.], *Z zagadnień teorii i filozofii prawa. Instrumentalizacja prawa*, Wrocław 2000, p. 41.

<sup>61</sup> F. Studnicki, *Działanie przepisu prawa – model teoretyczny*, in: *Studia Socjologiczne*, No 2 1962, p. 103.

<sup>62</sup> M. Borucka-Arctowa, *Společne funkce prawa formułowane w doktrynie, ustawodawstwie i orzecznictwie*, in: M. Borucka-Arctowa [ed.], *Společne poglądy na funkcje prawa*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1982, p. 7.

<sup>63</sup> W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, op. cit., pp. 271-275; Z. Ziemiński, *Problemy podstawowe prawoznawstwa*, op. cit., pp. 482-484.

<sup>64</sup> On social functions see Z. Ziemiński, *O pojmowaniu celu, zadania, roli i funkcji prawa*, in: *Państwo i Prawo*, No 12 1987, pp. 15-28; I. Bogucka, *O pojęciu „funkcja prawa”*, in: *Państwo i Prawo*, No 9 1990, p. 50; M. Borucka-Arctowa, *Společne funkce prawa formułowane w doktrynie, ustawodawstwie i orzecznictwie*, in: M. Borucka-Arctowa [ed.], *Společne poglądy na funkcje prawa*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1982, p. 7; M. Borucka-Arctowa, *Poglądy na społeczne funkcje prawa w świetle badań empirycznych*, in: *Państwo i Prawo*, No 5 1981, pp. 5-17; W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, op. cit., p. 81 and pp. 271-275; S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, op. cit., p. 232.

<sup>65</sup> J. Wróblewski, *Prawo i homeostaza społeczna*, in: *Państwo i Prawo*, No 2 1982, pp. 33-36; See also A. Kozak, *Homeostaza prawa*, in: J. Helios [ed.], *Autonomia prawa ze stanowiska teorii i filozofii prawa*, Wrocław 2003, pp. 145-162.

elements of a given system. While in psychology it is used to describe adaptive mechanisms and references made to law serve to describe it as an instrument with which the balance among the three types of system can be maintained:<sup>66</sup>

1. Humanity understood as a biologically existing species *homo sapiens*;
2. A global society as a form of humanity's social coexistence;
3. A certain socio-political type of a global society.

This theory is especially important for the analysis of the regulation of a financial market. This regulation is created and enforced under the conditions of a global economy and ought to aim to make sure that homeostasis is maintained. In other words, when a market develops in harmony, the interests of all participants should be catered for, with particular attention extended to the consumers of financial services who – as the weaker party – are owed particular protection. Thus the actions undertaken must aim at ensuring the stability and security of transactions, without which protection of the supreme value, which is trust, will not be possible. Trust is an emotion and an intangible element of a social dimension; thus, when creating favourable market conditions for trust, the legislator must take into consideration other, non-legal elements as well. The goals of law<sup>67</sup> should therefore be linked to the solving by means of law of certain social problems. Załuski is right in stating that when we define new goals, human nature should be taken into account because social policy is not indifferent to the visions that human nature has. The law maker, likewise everybody enforcing the law must possess knowledge of human nature, and in particular must be aware of the potential reactions that human beings may have to the law. A skilful use of the model of human nature will allow the law-maker to create effective laws.<sup>68</sup>

**Effectiveness of law** is one of the central concepts on which the concepts of theory and law policy are focused. The assumption that law is effective derives from the instrumentalist approach to law. Legal effectiveness, or efficacy belongs

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<sup>66</sup> J. Wróblewski, *Prawo i homeostaza społeczna*, op. cit., pp. 33-36.

<sup>67</sup> Two types of goals have been distinguished in literature in relation to law-making: 1) instrumental – aimed at inducing a social change, and 2) homeostatic – aimed at preventing change. When the legislator determines these goals, he aims either at preserving the *status quo* or at a change. Relating to instrumental goals, the intention to induce certain lawful behaviours of the addressees, their attitudes and motivations of their actions are shown. These goals are determined by the axiology adopted by the legislator who does not, in any case, have a completely free choice and takes into account cultural, moral, social and political factors. Whether these instrumental goals are realised depends on the effectiveness of the law. However, the realisation of these instrumental goals is not possible without homeostatic goals because although social changes are a consequence of the implementation of instrumental goals, they are conditioned by a *status quo* – that must be maintained. i.e. they depend on the existence (homeostasis) of a system that is being changed by the law. This system consists of three elements: humanity, global society organised in a state and a socio-political system of a given global society, and corresponding to them homeostasis of biological existence, homeostasis of social co-existence and socio-political homeostasis. More in: J. Wróblewski, *Zmiany społeczne a prawo*, op. cit., pp. 10-13.

<sup>68</sup> W. Załuski, *Ewolucyjna filozofia prawa*, op. cit., pp. 11-19.

to the sphere of law policy, a concept developed by Leon Petrażycki<sup>69</sup> who was of the opinion that law policy should "envisage the effects of certain legal reforms".<sup>70</sup>

Literature contains many different definitions and divisions of the effectiveness of law. According to Maria Borucka-Arctowa, the effectiveness of law may be considered in both a broad and narrow sense. The former denotes the compatibility of the social results of the consequences of a given legal norm with the expectations of the norm maker. The latter, narrow meaning, denotes the compatibility of the behaviour of the addressee of a legal norm with the model of behaviour contained in the norm.<sup>71</sup> The concept of "law effectiveness" ought to be distinguished from its action understood as the "impact of the legal norm or its elements on the attitudes or behaviour of individuals and on the shaping of social and economic relations".<sup>72</sup> In a situation where the impact of law affects an individual or results in some (other) social effects, we may talk about the consequences of a legal regulation<sup>73</sup>. Talking about the effectiveness of law is talking of a qualified type of action, i.e. an impact that is assessed as compatible with the content of a legal norm or the purpose underlying the legislator's norm (purpose of a legal regulation)<sup>74</sup>. The effectiveness of law as a qualified type of action is qualified as actual effectiveness, different from legal effectiveness. Legal effectiveness relates to a situation in which a certain defined state of affairs is ascribed a normative legal consequence (such as e.g. legal effectiveness of a legal event).<sup>75</sup> The actual effectiveness may happen either in the conventional as well as non-conventional sphere of human behaviour, in which several types of legal effectiveness may be distinguished:<sup>76</sup>

1. Behavioural effectiveness of law – being the satisfaction of a legal norm in a given situation;
2. Psychological effectiveness – consisting in generating a certain mental state in the addressees of the norm;

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<sup>69</sup> A. Kojder, *Ograniczenia skuteczności prawa*, in: T. Giaro, *Skuteczność prawa*, Warszawa 2010, pp. 34-35.

<sup>70</sup> L. Petrażycki, *O ideale społecznym i odrodzeniu prawa naturalnego*, Warszawa 1925, p. 13.

<sup>71</sup> M. Borucka-Arctowa, *O społecznym działaniu prawa*, op. cit., p. 11. See also J. Wróblewski, *Skuteczność prawa i problemy jej badania*, in: *Studia Prawnicze*, No 1-2 1990, pp. 7-8.

<sup>72</sup> W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, op. cit., p. 490.

<sup>73</sup> Analysing the impact of law on social life, A. Podgórecki came to the conclusion that law operates in stages. His opinion was based on the fact that "an abstract legal regulation passed by a legislator has an impact on social behaviour through three principle variables. These variables are (i) the content and significance of a given legal regulation, (ii) the kind and type of popular culture acting as a link between the orders formulated by the legislator and social behaviours of the recipients of legal norms, and the third independent variable that may modify in different ways the functioning of an abstract legal provision, is (iii) a (...) personality of the ultimate performer of the recommendation of a given norm or provision..." A. Podgórecki, *Prestiż prawa*, Warszawa 1966, pp. 175-176; See also A. Podgórecki, *Socjologiczna teoria prawa*, Warszawa 1998, pp. 24-36.

<sup>74</sup> W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, op. cit., p. 493.

<sup>75</sup> *Ibidem*, p. 494.

<sup>76</sup> *Ibidem*, pp. 494-495.

3. Finistic (purposeful) effectiveness with which we are dealing with a situation where intended goals have been achieved by the legislator who considered them as the intended goal of a given norm;
4. Social and educational effectiveness – referring to a longer period, in which permanent stereotypes of behaviour are being shaped almost automatically, and they then influence the addressees of the norm; as a result this should lead to a situation in which a regulation of a given type becomes redundant;
5. Axiological effectiveness – when values that are to be safeguarded (or promoted) by legal norms become approved and adopted by a significant majority of the society.<sup>77</sup>

In pursuit of the creation of effective law, one should not forget the limits of law which not only depend on the objectively natural properties of the world, but are also delineated by social systems. Although crossing these limits or boundaries will not result in behavioural ineffectiveness, neither the finistic, nor the axiological effectiveness will be achieved.<sup>78</sup> As Niclas Luhmann said, law that is abused so as to realise a function not ascribed to it, may lead to its deformation.<sup>79</sup>

Writing about the effectiveness of law, one should not forget about its **efficacy**, especially since this feature of law is frequently referred to in financial market regulations<sup>80</sup>, and even more so since it constitutes an important element of considerations when it comes to the economic analysis of law. It is proposed in literature to use these two terms (effectiveness of law and efficacy) interchangeably when looking at them from a broad perspective.<sup>81</sup> According to Paweł Chmielnicki, one may talk about the efficacy of law “in the context of the impact of legal norms on the condition of the schematic operations commonly conducted and protected in a community, and in particular on the performance (realisation) of the underlying goal, which is to be achieved in the course of these schematic operations undertaken”.<sup>82</sup> In the theory of law the understanding of efficacy (or efficiency) differs from its common understanding in economy. It is perceived as the realisation of a goal intended by the legislator.<sup>83</sup> This type of understanding is referred to as formal (as different from substantive – identified with an economic meaning) because it “does not determine which concrete goal law ought to realise but

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<sup>77</sup> J. Jabłońska-Bonca, *Prawo w kręgu mitów*, Gdańsk 1995, p. 104.

<sup>78</sup> *Ibidem*, p. 105.

<sup>79</sup> N. Luhmann, *Teoria polityczna państwa bezpieczeństwa socjalnego*, Warszawa 1994, p. 153.

<sup>80</sup> For more on that, see R. Mroczkowski, *Efektywność nadzoru nad rynkiem kapitałowym w ujęciu prawnym i ekonomicznym – przyczynek do dyskusji*, in: H. Mamczarz [ed.], *Rynki finansowe*, Lublin 2006, pp. 27-33.

<sup>81</sup> P. Chmielnicki, *Efektywność prawa*, in: P. Chmielnicki [ed.], *Pochodzenie, tworzenie i efektywność prawa*, Warszawa 2014, p. 363.

<sup>82</sup> *Ibidem*, p. 364.

<sup>83</sup> H. Izdebski, *Refleksje o skuteczności prawa*, in: T. Giaro, *Skuteczność prawa*, op. cit., p. 258.

it simply expects that the goal is actually achieved by certain legal solutions”<sup>84</sup> and economic efficiency determines this goal.<sup>85</sup>

As said above, the criterion of the efficacy of law is critically important in the assessment of financial market regulations, and these are closely related to economy.<sup>86</sup> This criterion is an important tool for assessing the regulations that are being created as well as those already in force. In the former case, the legislator, when making a new law, must assess the effect of the legal solution adopted. In such a situation, the emphasis is usually put on the cost of the implementation of a legal regulation, and such cost should be looked at as having at least two meanings: financial and social. The financial cost includes the cost of the implementation of a new law (connected with, e.g. the appointment of a new institution or office and employment of suitable personnel) as well as the cost of the process of enforcement of this law (or its illegal non-enforcement), the consequence of which may be the liability of certain persons and damages arising from this liability.<sup>87</sup> When speaking of efficacious law, its social aspect must also be emphasised as it includes a cost element as well. When new legal solutions are being considered, the effects of such solutions must be assessed when a certain category of clients of a financial institution applies. A full assessment of all these aspects is of course not possible because we are dealing here with different groups of clients (consumers)<sup>88</sup>, with varying levels of financial literacy and unequal abilities in analysing information that financial institutions provide. This information, although largely sufficient, is not always comprehensible for the average consumer of financial services.<sup>89</sup> Consequently, investments may be made in high-risk projects which instead of yielding profit may generate losses and when they grow to a mass scale, this may lead to social dissatisfaction and create risk for market stability. In consequence, a financial crisis that may eventually occur will be costly not only for those engaged in given transactions, but the whole society when insti-

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<sup>84</sup> J. Stelmach, B. Brożek, W. Załuski [eds], *Dziesięć wykładów o ekonomii prawa*, op. cit., p. 26.

<sup>85</sup> More on that in: J. Wilkin, *Efektywność a sprawiedliwość jako problem ekonomiczny*, in: J. Wilkin [ed.], *Efektywność a sprawiedliwość*, Warszawa 1997, pp. 23-47.

<sup>86</sup> On the assessment of law and the forms it takes see W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, op. cit., p. 490; J. Wróblewski, *Oceny w prawie i oceny prawa*, in: *Studia Prawnicze*, No 24 1970, p. 4-25; J. Wróblewski, *Analityczne podejście do aksjologii prawa*, in: *Studia Filozoficzne*, No 2-3 1985, pp. 49-65; Z. Ziemiński, *Wstęp do aksjologii dla prawników*, op. cit., pp. 7-11.

<sup>87</sup> On the liability for damages see A. Michór, *Odpowiedzialność administracyjna w obrocie instrumentami finansowymi*, Warszawa 2009, p. 22.

<sup>88</sup> There is more on the difference between a "client" and "consumer" in subsequent parts of this book.

<sup>89</sup> An example of such a situation may be life insurance with a life insurance fund recently offered in the financial sector market. These instruments, although their very name suggests certainty and surety by repeating the words insurance twice, have in practice turned out to be hybrid-type instruments which exposed holders to great risk and frequently major financial losses, leading in consequence to a handful of legal disputes. More in: A. Michór, *Ubezpieczenia na życie z ubezpieczeniowym funduszem kapitałowym a ochrona konsumenta*, in: *Bezpieczny Bank*, No 1 2015, pp. 156-182.

tutions at risk will be helped from insolvency with the use of public money.<sup>90</sup> The question arises here of how such situations could be minimised. The answer that comes immediately is: through efficacious legal solutions. Efficacious meaning what? First of all, such that will effectively fulfil their function and secondly such that will take into account the specificity of the matter being regulated<sup>91</sup>. Effective in the meaning presented above, i.e. ensuring the achievement of legislator's objectives (goals) which from the theoretical point of view will consist in verifying the behaviour of the addressee of the norm, to check whether he complies with it (formal effectiveness), which norm – at least theoretically – has been properly set (realistic effectiveness) leading at the same time to the achievement of a certain *status quo* intended by those who make the law. Otherwise, the legislator's effort may be wasted. This approach, although correct, must however account for a situation when the objectives have not been set properly and negative consequences of a norm occur. Therefore, when the legislator sets objectives, it is important to position them in the values that are of essential importance for the matter they are to regulate. Taking as an example a financial market, it must be pointed out that trust is the key value and as such must be maintained and the norms created must be such as to adequately safeguard that value, or in other words, to ensure the safety, security and stability of the market. This, however, will not be possible to achieve without thorough understanding of the nature of the regulated matter, the specificity of the addressees of the norms created (both the managers of financial institutions as well as clients of those institutions) whose actions are influenced by certain behavioural factors. As Chmielnicki put it, they may be related to the schematic behaviour common and protected in a given community.<sup>92</sup>

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<sup>90</sup> A. Hryckiewicz-Gontarczyk, *What do we know about the impact of government interventions in the banking sector? An assessment of various bailout programs on bank behavior*, in: *Journal of Banking&Finance*, No 46 2014, pp. 246-265; A. Hryckiewicz-Gontarczyk, *Interwencje rządowe w sektorze bankowym a stabilność systemu finansowego*, in: *Ekonomista*, No 1 2014, pp. 31-70.

<sup>91</sup> **Knowledge** of the regulated matter constitutes a necessary condition for rational law making. Two types of knowledge are necessary; firstly, it must be knowledge of the causative dependencies occurring between the realisation of behaviours identified in the legal norms being adopted and the consequences of those behaviours. Secondly, it must be knowledge whether the fact that certain norms have been created will influence behaviours of the addressees of these norms as well as other entities who will undertake activities regulated by the norms in question. As A. Michalska and S. Wronkowska show, knowledge regarding the above may be obtained by the legislator from other sciences, e.g. sociology, economics, social psychology. For example, knowing the social and economic consequences of the adoption of a certain norm, or legal solution, a certain knowledge must be had on the formal and informal structures of a given society, attitudes of its representatives to law, or which non-legal norms will influence the behaviours of members of that society. An essential issue connected with the above is the ability of the law-maker to draw on the expertise already gained or to plan research studies aimed at gaining such knowledge necessary in law making. These postulates are of universal applicability and value and may also be applied to financial market law-making. For more see A. Michalska, S. Wronkowska, *Zasady tworzenia prawa*, op. cit., pp. 31-32.

<sup>92</sup> More on that in: P. Chmielnicki, *Społeczne i gospodarcze determinanty norm prawnych*, in: P. Chmielnicki [ed.], *Pochodzenie, tworzenie i efektywność prawa*, Warszawa 2014, pp. 68-112.

To summarise, the considerations so far, regarding the essence of law analysed employing the instrumentalist approach<sup>93</sup>, are of a varied nature. The process of making and enforcing law must be carried out according to certain pre-determined objectives which in order to be achieved must be set in a system of values that are of essential importance for the community which is to function according to a certain legal norms implemented to protect these values. In this way it will be possible to satisfy the functions that law is to fulfil, and particularly the function ensuring stability. It will also be possible to create certain other efficacious regulations to ensure maintenance of certain schematic behaviours, so important for a given society, as well as to provide it with an economic basis on which to function.

## 2.2. Thinking of law as a psychological phenomenon

The instrumentalist approach to law is based on the conviction that law is a complex phenomenon whose operation is contingent upon many factors. Ages of thinking about the essence of law have resulted in the development of many different concepts of how law should be defined. The differences among them boil down to several factors that are indispensable and must occur when law is to be analysed. Thus law will be perceived differently when discussed by the representatives of legal positivism, or pure theory of law, or by those advocating concepts that law is a social or psychological phenomenon. In the latter case law will be related to certain behaviours of humans and their communities, with the reservation however, that not all types of human behaviour derive from law.<sup>94</sup> A question then may be asked about the sources and methods of research. It will be necessary to employ empirical methods as well, based on the experience and results of other social sciences, and psychology and sociology in particular. Such an interdisciplinary approach is intended to assess the behaviour people show in different situations as well as the rules and principles they obey or reject, and based on that the essence of law so perceived may be determined in a way that will allow it to create legal principles that will be socially acceptable. Such a broad approach to law is close to the realistic trends which, according to Kazimierz Opałek are by their nature of an integrative character. Elaborating on his idea we may also agree

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<sup>93</sup> Writing on the instrumentalist approach to law M. Borucka-Arctowa stated that the "contemporary creator of norms, when making norms, is guided in doing this by goals determined by a certain social policy and therefore applies an instrumentalist approach to these norms treated as a tool of social influence, or as a means on the path to the achievement of the intended goals. The legislator's activity is thus directed at a conscious and planned influence on social relationships and creating such norms of behaviours that will not only reflect the existing relationships and views, but will also initiate new models to follow, thus becoming factors in social transformations". In M. Borucka-Arctowa, *O właściwy zakres regulacji prawnej*, in: *Państwo i Prawo*, No 2 1975, pp. 3-17.

<sup>94</sup> W. Góralczyk, *Podstawy prawa*, Warszawa 2008, p. 14.



with his thesis that when considerations on law are moved to other areas, such as psychological or sociological phenomena, other humanities or social sciences become involved as well. Thus a realistic approach leads inevitably to a wider context encompassing other phenomena to which law is related.<sup>95</sup>

This thinking of **law as a psychological phenomenon**<sup>96</sup>, created and developing in the human mind, is attributed to Petrażycki and his disciples (Jerzy Lande and Henryk Piętka)<sup>97</sup> who continued the concepts initiated by their master, searching first and foremost the answer to the question “What is law?” Establishing a scientific conception of law is a necessary condition for the subsequent development, scientifically, of all other conceptions of jurisprudence.<sup>98</sup> “Likewise, all judgments regarding law, unless they lack an established conception of law, constitute a statement regarding a subject unknown”.<sup>99</sup> Law is not regarded by me as a matter for the individual because all humans in their mass are inclined to behave almost identically, and tend to perceive their obligations in almost the same way, which proves that they constantly interact with one another.<sup>100</sup> Law as a mental factor of social life either strengthens or weakens certain inclinations humans have.<sup>101</sup> This interaction leads to the creation of what are termed **ethical emotions** the effect of which are rules. Some of these rules transform into legal norms, while other behaviours retain the character of moral, aesthetic or social norms. Emotions described here are another type of mental experiences, alongside cognition, feeling and will, and are felt by humans as an imposing feeling of a necessity to behave in a particular manner. Thus they may be of a univocally imperative character, an obligation to behave towards another subject in a particular way, in the absence of a conviction that such behaviour on our part was due to that subject (moral emotions). However, emotions may also be of an imperative-attributive character when accompanied by a feeling that a given subject might expect a certain behav-

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<sup>95</sup> K. Opałek, *Teoria Petrażyckiego a współczesna teoria prawa*, in: K. Opałek [ed.], *Z zagadnień teorii prawa i teorii nauki Leona Petrażyckiego*, Warszawa 1969, p. 122.

<sup>96</sup> It must be noted that experts on Petrażycki's theory suggest a possibility of distinguishing based on his concept of three basic aspects relating to the concept of "law": psychologism, antirelativism and correlativism. More in: K. Motyka, *Wpływ Leona Petrażyckiego na polską teorię i socjologię prawa*, Lublin 1993, pp. 95-161.

<sup>97</sup> It is believed that Petrażycki's conception served later as a basis for theories developed in the spirit of psychologism, which, although sourced in primary theses, underwent certain modifications too, the examples being: 1) change in the perception of law as a phenomenon of the individual psyche, towards seeing law as a phenomenon of mass psyche; 2) change from the conception of law as a psychic phenomenon to its conception as a complex phenomenon. See K. Motyka, *Wpływ Leona Petrażyckiego na polską teorię i socjologię prawa*, op. cit., pp. 100-123.

<sup>98</sup> L. Petrażycki, *Wstęp do nauki prawa i moralności. Podstawy psychologii emocjonalnej*, op. cit., p. 24.

<sup>99</sup> *Ibidem*, p. 40.

<sup>100</sup> W. Góralczyk, *Podstawy prawa*, op. cit., p. 15.

<sup>101</sup> L. Petrażycki, *Wstęp do nauki prawa i moralności*, op. cit., p. 14.

our as due to him (legal emotions).<sup>102</sup> Thus law is reduced to emotions of an imperative-attributive character (also referred to as bilateral emotions).<sup>103</sup> Contrary to morality, the essence of law consists in the fact that morality is related to the sphere of obligation whereas the law is the sphere of obligation and right related to a claim. Legal emotions seem to be stronger than moral ones.<sup>104</sup>

An important role in the process described here is played by **the state** which, in the opinion of the creator of the psychological conception of law, should not be treated as the only law-maker. This is because law consists also of what functions as law in the universal conscience, while the role of the state is merely reduced to:<sup>105</sup>

- discovering the norms that are being created spontaneously within a society;
- supporting certain selected norms;
- shaping new norms, not only through a system of orders, but also in such a way that these norms become accepted by a given community, and subsequently form an element of the universal emotions present in the minds of a significant majority of the addressees of the norm.

The above is also an element of postulates formulated by Petrażycki with regard to the creation of the policy of law whose role as a science would also indicate to the legislator the manner in which law should be made in order to achieve the intended goals since the objective of this policy should also be such "projection of the character, shape and norms of law and the legal system that it is efficacious and properly enforced".<sup>106</sup>

This concept is considered to be a realistic one. Its characteristic feature is not so much searching for an answer regarding the essence of law, but rather **how law exists in a given community** and how it transpires in the lives of an individual and a society. This is because law exists as certain human behaviours and attitudes related in one way or another to legal norms and to the functioning of different institutions.<sup>107</sup> It is looked at as a fact, a real phenomenon. According to Petrażycki "the phenomena of law remain in a mutual causative relationship with other processes of social and mental life. On the one hand, law is a factor in social and mental life and its development, triggering off further processes in the sphere of the human psyche and an individual's or society's conduct as well as the development of an individual and the mass. On the other hand, the very law

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<sup>102</sup> L. Petrażycki, *Teoria prawa i państwa w związku z teorią moralności*, Vol. I, Warszawa 1959, § 3, 4, 5.

<sup>103</sup> S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, op. cit., p. 68.

<sup>104</sup> J. Zajadło [ed.], *Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć*, Warszawa 2010, pp. 294-295.

<sup>105</sup> W. Góralczyk, *Podstawy prawa*, op. cit., pp. 15-16.

<sup>106</sup> K. Woźniak, *Wpływ koncepcji prof. Leona Petrażyckiego na organizację państwa i postrzeganie prawa*, in: D. Gil, Ł. Pikuła [eds], *Prawo i nauka w poglądach Leona Petrażyckiego*, Lublin 2013, p. 42.

<sup>107</sup> S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, op. cit., p. 68.

is a product of the operation of certain social and mental processes law is made and changed contingent upon a causative chain of relations.”<sup>108</sup>

Under Petrażycki’s concept of law regarded as a mental phenomenon, the accepted view is the pluralism of legal systems, based on which three types of law may be distinguished: the official law (originating in the state), the positive law (mental experiences connected with the imagination of normative facts, e.g. a statute); and the intuitive law (mental experiences created for no reason, as a consequence of many different factors but with the exclusion of external authorities, e.g. legislation).<sup>109</sup>

As rightly noted by Krzysztof Motyka “in its very broadly psychological aspect, the influence of Petrażycki’s concept was reflected in the interest on the part of theoreticians in the empirical law, and in the psychological issues of jurisprudence in particular.”<sup>110</sup> These concepts may in turn be of substantial help in the analysis of the functioning of financial markets as well as the provisions regulating these markets.<sup>111</sup> Assuming that a financial market belongs to the most important elements of the economy, we may also say that changes in the mentality (psyche) of the mechanisms responsible for the actions and activities undertaken by human beings will in consequence result in changes in business conducts.<sup>112</sup> Quoting Petrażycki again we may say that observing changes in the human psyche, one may foresee the direction of changes in the market (including the financial market). What is important though is to recognise the reason for these changes in the psyche.

Petrażycki noted that changes are the fastest in production, and therefore in the technical customs which are not, however, correlated with changes or amendments to the existing laws.<sup>113</sup> And yet, law as a mental factor responsible for emotions that induce certain types of behaviour, plays an important role, be it positive or negative in economic life. In other words it may be either sand or oil in the cogwheels of the economic machine<sup>114</sup>.

Petrażycki also dealt with the problem of **crisis** and social bonds, especially **mental bonds**. He pointed to the possibility of emotion spreading like a contagious infection among people. Apart from the mental bond, there is also a tangible bond in the form of the production and exchange of activities. Two of the bonds mentioned above constitute a unity which takes the form of an economic

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<sup>108</sup> L. Petrażycki, *Teoria prawa i państwa, w związku z teorią moralności*. Vol. II, by W. Leśniewski, Warszawa 1960, p. 664.

<sup>109</sup> J. Zajadło [ed.], *Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć*, op. cit., p. 295.

<sup>110</sup> K. Motyka, *Wpływ Leona Petrażyckiego na polską teorię i socjologię prawa*, op. cit., p. 96.

<sup>111</sup> J. Kowalski, *Psychologiczna teoria prawa i państwa Leona Petrażyckiego*, Warszawa 1963, p. 60.

<sup>112</sup> *Ibidem*, p. 61.

<sup>113</sup> L. Petrażycki, *Zagadnienia prawa zwyczajowego*, Warszawa 1938, pp. 47-48.

<sup>114</sup> J. Kowalski, *Psychologiczna teoria prawa i państwa Leona Petrażyckiego*, op. cit., p. 62.

bond. As Petrażycki said, it is the ability to find social regularities by detecting certain mental tendencies that should constitute the basis upon which reasons for or causes of economic crisis should be determined.<sup>115</sup> However, as Jerzy Kowalski notices, law ought to be researched as a psychological and social, but also as a linguistic fact. It cannot be denied that legal norms influence human behaviour through the psyche and in the longer term create certain mental facts which take the form of certain attitudes, inclinations, tendencies or dispositions which significantly influence human behaviour.<sup>116</sup> Understanding this process requires a comprehensive approach based on the integration of the humanities (psychology, law, morality, economy or sociology) for which emotional theory as well as interest in human behaviour would constitute the basis for future research. Human behaviour would need to be researched very broadly and include the study of human reasoning. Petrażycki emphasised the relationship of law and economy.<sup>117</sup> While he did not see law as a form of economic life, he claimed that it influenced people's behaviours in the economic sphere too, being an element of mental life. These behaviours, according to Petrażycki, ought to be dealt with by economy, which should analyse the regularities of these behaviours, induced by a variety of factors, including legal emotion. Law as a legal emotion occurs as an effect and its cause. It is a product and a producer of social reality.<sup>118</sup>

Petrażycki developed his concepts several dozen years ago but they have not lost relevance today. In this work, reference to several is made, to those that in the author's view correspond to contemporary times characterised by globalisation, financialization of life and the growing importance of financial markets and their regulation. Financial market regulation may, in turn, be seen as a producer, or creator of social reality because it is indeed the legislator who by conducting a certain policy of law creates a certain reality. It is up to the legislator what the structure and importance of financial markets will be, how they will develop, which financial instruments they will offer etc. And yet, this "full" discretion will not make him immune to the changes happening in the market itself and enforcing new legal instruments. This means that a legislator must discover norms being created within or by the society which, to quote Petrażycki, are the effect of certain emotions sourcing legal norms.<sup>119</sup>

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<sup>115</sup> Ibidem, p. 63.

<sup>116</sup> Ibidem, p. 64.

<sup>117</sup> A critical analysis of his views can be found in: H. Kaczmarczyk's work *Prawo i gospodarka w poglądach Leona Petrażyckiego*, in: D. Gil, Ł. Pikuła [eds], *Prawo i nauka w poglądach Leona Petrażyckiego*, Lublin 2013, pp. 33-39; See also P. Chmielnicki, *Ekonomia – teorią działania prawa cywilnego? Poglądy Leona Petrażyckiego na relacje między prawem a ekonomią – w ujęciu krytycznym*, in: D. Gil, Ł. Pikuła [eds], *Prawo i nauka w poglądach Leona Petrażyckiego*, Lublin 2013, pp. 121-139.

<sup>118</sup> J. Kowalski, *Psychologiczna teoria prawa i państwa Leona Petrażyckiego*, op. cit., pp. 105-106.

<sup>119</sup> The impression may sometimes be created that although creating the financial reality a legislator, despite his willingness to create a society friendly market, fails to take into account individual

Creating effective law, i.e. law which realises its own goals but is also accepted by a given society requires that norms be made taking into account the emotions that are present in the society to which they are addressed. A question here may arise: must the legislator be a psychologist as well, to analyse the emotions of the members of a given society? Does making financial market law require prior market research in this respect? Although it all seems unfeasible in practice, it is nevertheless essential, at least when it comes to financial markets, to take into account the psychological (behavioural) factor and the experience (as Petrażycki required) of other sciences. This is best proved by certain regularities, commonly referred to as effects, which we observe in financial markets, such as e.g. aversion to risk, the knock-on effect, the contagion effect, or the temptation to engage in moral hazards. As will be seen later in this book, an element that always in some way accompanies the above is law (emotions) or in other words, legal norms which influence human behaviour through the psyche. The way humans behave influences many other aspects of life, including the economic, which constitutes one of the fundamental elements of the economic consideration of the law.

### 2.3. Economy and law – symbiosis or competition?

One of the earlier sub-chapters was devoted to the analysis of law seen as an instrument of the regulation of social relationships. An instrumentalist approach to law regards law as a complex being that serves to realise certain goals, including economic ones. Their achievement will not be possible, however, if the legislator has failed to account for certain standards. These standards belong to the primary functions of law and originate in the economy. One of those is most certainly economic effectiveness which, when related to law, means that law should be economically effective, or that it should ensure the economically effective allocation of goods.<sup>120</sup> In the literature, this postulate is identified with the necessity to include in the decision-making process the consideration of the economic calculation or cost-efficiency, needed to be done by those who make laws as well as those who enforce them.<sup>121</sup> In order to realise this postulate, a number of as-

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consumers' interests. For example: Does the information requirement intended to enable making rational investment decisions really account for the emotions of the decision makers? Is an average consumer capable of understanding the lengthy rules drafted by financial professionals? Do the drafters of these rules take into account the emotional aspect and the ability of the addressees of the rules to respond to them properly? Are they able to receive and process the masses of information so characteristic of today's world?

<sup>120</sup> On the principle of wealth maximisation read in: R.A. Posner, *Problems of Jurisprudence*, Cambridge-London 1990, p. 360 et seq.

<sup>121</sup> D. Maśniak, *Transgraniczny system ochrony ofiar wypadków drogowych, Studium prawnofinansowe*, Warszawa 2010, pp. 150-154.

assumptions must first be made, and the question of the feasibility of the postulate must be raised. Regarding the assumptions, it should be taken as understood that the economics provides instruments with which a legislator may later assess the cost of legal initiatives undertaken. Their application should, first and foremost be at every level of the “life of the law”, i.e. at the moment it is being made and enforced. The creation of the instruments mentioned above requires assessment of the economic effectiveness of law and account taken of the specificity of its branches. Last but not least there must exist a mechanism which, based on the assessment made, will allow the necessary amendments to the existing law to be made, bringing it to its ideal form. These assumptions imply numerous questions, of which of main importance is the one about the possibility of enclosing the essence of law in economic formula. Is economic effectiveness the same as legal effectiveness? How should “cost” be understood? Is that cost only the cost expressed in money, may it be understood more widely as social cost, for example? The answer to these and many other questions regarding the relationship of law and economy has for long been the subject of heated debate and the various opinions formulated have been of great importance for matters discussed in this book whose main themes derive from and focus on financial market regulations. This is directly connected to the importance of the financial market for the functioning of the state, the consequence of which is among other things increased activity on the part of the legislator who in his actions should take into consideration the specific features of the law – economy relationships or the legal-economic relationships arising from the economisation of the law that will be discussed in more detail further in this Chapter. In order to understand it though, the main points of the debate between Law and Economy must first be explained. This debate has always been present when the conception of the economic analysis of law was being developed, and will in subsequent Chapters of this book be referred to as Law&Economics (L&E).

### **2.3.1. The economic analysis of law – a concept**

The characteristics of the economic analysis of law should commence with its definition. As it turns out, this is not an easy task because of the number of methods in which the analysis of law is described. Following the research method applied by Katarzyna Metelska-Szaniawska and Jarosław Bełdowski we find that these L&E researchers study law using economic tools.<sup>122</sup> These authors see the analysis of law as a scientific movement which derived from the interest which economists took in law, and, from the expansion of this interest in the second half

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<sup>122</sup> K. Metelska-Szaniawska, *Ekonomiczna analiza prawa (Law&Economics) – wprowadzenie*, in: R. Cooter, T. Ulen, *Ekonomiczna analiza prawa*, Warszawa 2011, p. XVI.

of the 20<sup>th</sup> century to other social sciences.<sup>123</sup> What should be emphasised here is the obvious fact that there exists a common denominator for law and economics – they both belong to the social sciences. Consequently studies focus on society, its structure, history, culture as well as regularities observed in law and economy and their development. Representatives of this research use inductive reasoning based on moving “from the detailed to the general” to discover the regularities that govern the mechanisms according to which a society functions. In this method where a human is seen as the nucleus, the majority of economic scientists call him a rational economic being – *homo oeconomicus*. The paradigm of the existence of this type of subject was created by John Stuart Mill on the assumption that an economic human acts rationally and strives to achieve maximum profits.<sup>124</sup> His real nature that transpires in the background is, according to Adam Smith, free and egoistic but owing to that, while pursuing his own interests *homo oeconomicus* serves the general interest as well.<sup>125</sup> This concept of the rationality of *homo oeconomicus* will be criticised later in this book as being too idealistic. A similar view has also been voiced by economists themselves who quite frequently refer to the rational economic man as a hypothetical imaginary figure only and state that certain “concrete human behaviours undertaken in the economic sphere may be explained in idealistic categories of strictly rational choices (the economic human is perceived to be a rational human)”.<sup>126</sup> Hence the recent trends proposing to replace the paradigm of a rational man with a **paradigm of an emotional man (*homo sapiens oeconomicus*)**, who, when making decisions, does not always base them on reason, but his decisions are subject to numerous non-economic factors, as well, frequently of psychological or social character.<sup>127</sup> This is particularly evident today, in a world full of crises, frequently started on financial markets burdened as it may seem with risk and uncertainty. Thus we may fully share the opinion expressed by Beata Woźniak-Jęchorek that “created by John S. Mill, the universal, rational and culturally bias-free, as well as suitable for each type of society *homo oeconomicus*, focused on maximising utility and allowing the use of mathematical formalism, does not work in a world of uncertainty and risk”.<sup>128</sup>

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<sup>123</sup> J. Bełdowski, K. Metelska-Szaniawska, *Law&Economics – geneza i charakterystyka ekonomicznej analizy prawa*, in: *Bank i Kredyt*, No 10 2007, p. 52.

<sup>124</sup> J. Szacki, *Historia myśli socjologicznej*, Warszawa 2002, p. 263.

<sup>125</sup> A. Smith wrote about this phenomenon: “The fact that we will be able to put meat, bread and bear on the table in the evening does not depend on the good will of the butcher, baker or brewer, but on that that in the production of the goods which others consume they see their own interest”. A. Smith, *Badania nad naturą i przyczynami bogactwa narodów*, Vol. I, Warszawa 2007, p. 20.

<sup>126</sup> K. Wach, *Od człowieka racjonalnego do emocjonalnego. Zmiana paradygmatu nauk ekonomicznych*, in: *Horyzonty Wychowania*, No 9 2010, p. 96.

<sup>127</sup> K. Dopfer, *The Economic Agent as Rule Maker and Rule User: Homo Sapiens Oeconomicus*, in: *Journal of Evolutionary Economics*, Vol. 14 2004, p. 179.

<sup>128</sup> B. Woźniak-Jęchorek, *Gospodarcza niepewność według Johna R. Commons’a*, in: *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No 3 2014, p. 175.

These two values: uncertainty and risk are the focus of interest of both law and economy. While the economists are striving to establish ways of defining, measuring and quantifying risk, lawyers aim at putting risk in a certain legal framework allowing the exercise of some kind of control over it. These pursuits are compatible since risk cannot be regulated if first its nature has not been understood, and here methods developed by economists may come of use. Hence an area of potential collaboration of economists and lawyers and using the achievements of the economic analysis of law, the success of which is sometimes explained teasingly as possible since economy was lucky to find and quickly fill in an unexplored niche that existed in the “intellectual space” of law. Explaining this phenomenon, Robert Cooter and Thomas Ulen used a definition of law which saw it as an obligation supported by a state sanction. In law-making, a legislator must take into account the potential reactions to the law made by its addressees. In other words, he must consider whether the provision for sanctions in the event of the law not being observed will have any influence on the behaviour of those obliged to follow that law. As can be seen from the above, economy provides a way as well, and allows us to compare human behaviour in this respect with, for example, prices whose increase diminishes consumption, while when they go down, consumption increases. Analysing the relationship between price and human behaviour, an economist will use precise mathematical theories (the theory of the price or game theory) as well as certain other empirical methods (statistical, econometric).<sup>129</sup> Their proper receipt and implementation in law may, in the opinion of L&E scholars, influence positively the making and enforcement of law because it will, among other things, provide a behavioural theory which will serve to predict human reactions to laws.

One of the fundamental articles which influenced the development of economic analysis entitled: *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*<sup>130</sup>, by Guido Calabresi and A. Douglas Melamed, contains a metaphor of the L&E trend which sees law as a huge, historic and sacred object – a cathedral. This metaphor was further worked on by Cooter and Ulen who in their behavioural definition of this trend, compared it to the cement bonding of the walls of the cathedral, pointing to economy as the behavioural science that is most useful for law and which, apart from methods and theories, provides normative models for assessing law and law policy. These authors saw law as a tool for achieving important social goals. Thus, in order to assess the action of law on society and its effectiveness in ensuring the intended goals, it is necessary that these methods be used by those who make and enforce law. These methods should be provided by economy and when properly used, they should assess the effectiveness level

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<sup>129</sup> R. Cooter, T. Ulen, *Ekonomiczna analiza prawa*, Warszawa 2011, p. 4.

<sup>130</sup> G. Calabresi, A.D. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, in: *Harvard Law Review*, (85) 1972, p. 1089 et seq.



of law.<sup>131</sup> A question may be asked here, how should this effectiveness be understood? Should its economic or legal aspect be assessed? Does the fact that it may be assigned two meanings: economic and legal, mean that there are two types of effectiveness? An answer to these questions is of essential importance and necessary, in particular for delineating the limits of the intervention of the economic analysis of law in the essence of law and formulation of the policy of law making and enforcement.

As already said above, the concept of “effectiveness” is not the same in the legal and economic meanings. In the legal meaning effectiveness, sometimes understood as efficacy is analysed in “the context of the influence of legal norms on the state of schematic behaviours commonly spread and protected in a given community, in particular on the realisation of the purpose of a certain activity which is to ensure accomplishment of the goal”.<sup>132</sup> Effectiveness in law is seen as a formal purpose determined by the legislator who decided in favour of such and not another solution. Economy, on the other hand, usually accepts the financial aspect of effectiveness, referring it to the way in which goods are allocated. Based on the solutions developed in L&E, when writing on law that is economically effective, its representatives attribute at least several meanings to it, and the differences among them arise from the fact that each is based on a different idea. What should be mentioned here are the ideas of maximising social welfare, effectivity as seen by Pareto, effectivity as understood by Kaldor-Hicks and effectivity in the marginal analysis.<sup>133</sup>

Not all the achievements of economic scholars involved in research into effectivity can be presented here. Effectivity is a conception of a number of meanings and aspects, and can be looked at from multiple angles. It is a product of a complex evolutionary process of different economic systems and economic thought.<sup>134</sup>

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<sup>131</sup> R. Cooter, T. Ulen, *Ekonomiczna analiza prawa*, op. cit., pp. 4-5.

<sup>132</sup> P. Chmielnicki, *Efektywność prawa*, op. cit., p. 364.

<sup>133</sup> All of these have been thoroughly analysed in a work by J. Stelmach, B. Brożek and W. Załuski, *Dziesięć wykładów o ekonomii prawa*, op. cit., pp. 25-50. See also J. Stelmach, B. Brożek, *Metody prawnicze*, Kraków 2004, pp. 136-137 and J. Bełdowski, K. Metelska-Szaniawska, *Law&Economics – geneza i charakterystyka ekonomicznej analizy prawa*, op. cit., pp. 56-58. Based on the publications cited, it may be said that an effective allocation of goods as proposed by Pareto will occur in a group where the situation of none of its members can be improved without the worsening of the situation of any of the others. With respect to the law, a legal solution will have to be found that will allow the improvement of the condition of at least one member of the group without worsening that of the others. While an effective allocation of goods according to Kaldor-Hicks will occur when the common and shared welfare of the group cannot be bettered even if the conditions of some of the other members were to deteriorate. In this approach, a more effective solution might result in the worsening of the situation of some of the individuals. Theoretically, however, individuals whose condition has improved may compensate the ‘injured’ ones affected by the change. See also A.M. Nolan, *Unijne prawo konkurencji: efektywność systemu odwołań spraw dotyczących koncentracji przedsiębiorstw*, Warszawa 2015, pp. 133-157.

<sup>134</sup> M. Szudy, *Efektywność ekonomiczna w ujęciu dynamicznym a sprawność systemu gospodarczego*, in: U. Zagóra-Jonszta [ed.], *Studia Ekonomiczne*, Uniwersytet Ekonomiczny w Katowicach, Katowice, No 176 2013, p. 22.

One of the characteristic elements of the approach which in the case of L&E refers to the effective allocation of goods is the financial aspect mentioned above. We will have to deal with it in a group in which improvement of the condition of any of its members will not be possible without the worsening of the condition of the remaining members. In such an understanding, law will be economically effective when a proper allocation of goods has been ensured. i.e. both the law maker as well as the body enforcing law base their decisions on an economic calculation which also includes the costs of the decision taken. An optimal decision will of course be an economically justified one.<sup>135</sup> And it is the economic analysis of law which is to provide methods and instruments for such an assessment, and this analysis has been widely discussed in literature.

However, since the economisation of the law discussed here includes the focus of interest of L&E, the main assumptions of this trend will also be discussed here as they may turn out to be useful in the process of making and enforcing financial market law.

### 2.3.2. Economic analysis of law and an instrumentalist approach to law

Although the beginnings of the economic analysis of law date back to the 1960s<sup>136</sup>, the relationship between law and economy was already noted and studied several centuries ago. An example is Ancient Rome where, according to Stelmach, the development of economic institutions contributed to the development of individual branches of law (and private law in particular) and jurisprudence. Economic thinking influenced the institutions of property law, the law of obligations, as well as financial law, which in those times influenced such categories as: taxation, fiscal duties and the state treasury.<sup>137</sup> As contemporary studies show, financial instruments were also known and used in antiquity, and they have nowadays been re-discovered and taken the form of broadly understood derivative financial instruments.<sup>138</sup> The development of humanity and the thinking of law have been over the centuries constantly accompanied by an academic discourse. Among the great thinkers involved in it was Niccolo Machiavelli who saw human behav-

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<sup>135</sup> D. Maśniak, *Transgraniczny system ochrony ofiar wypadków drogowych. Studium prawnofinansowe*, op. cit., p. 150.

<sup>136</sup> Three articles were then published, which till date have been recognised as the foundations of *Law&Economics*. They were: R.H. Coase, *The Problem of Social Cost*, in: *Journal of Law and Economics*, Vol. 3 1960, pp. 1-44; G. Calabresi, *Some Thoughts on Risk-Distribution and the Law of Torts*, in: *Yale Law Journal*, Vol. 70 1961, pp. 499-553; A.A. Alchian, *Some Economics of Property Rights*, in: *Il Politico*, Vol. 30 1965, pp. 816-829.

<sup>137</sup> J. Stelmach, *Spór o ekonomiczną analizę prawa*, in: J. Stelmach, M. Soniewicka [eds], *Analiza ekonomiczna w zastosowaniach prawnych*, Warszawa 2007, p. 9.

<sup>138</sup> More on that in: T. Nieborak, *Pochodne instrumenty finansowe: aspekty prawno-odatkowe*, Warszawa 2004.

our as a result of rational choice. David Hume, on the other hand, approached law as a set of conventions regarded as indispensable for cooperation in the world of scarce goods. This can be seen today as well and human interactions have become the focal point of researches using the game theory. Jean Jacques Rousseau noted the dilemma of trust and coordination and illustrated it using the example of a stag hunt<sup>139</sup> in the *Discours sur Les Sciences et Les Arts – Discours sur l'Origine des Inégalités* in the following way: "the hunters are fully aware that in order to shoot the stag they must be loyal to one another and keep to their posts. However, if a rabbit comes to the scene and runs close to one of the hunters, he will run after the certain prey, and the stag hunt will be ruined".<sup>140</sup> A few hundred years ago this description was translated into the language of mathematics (see the Nash equilibrium) and has not lost any of its topicality. It may well serve to describe the market behaviours of the consumers at the stock exchange which are not for no reason referred to as herd behaviour. Other recognised precursors of economic analysis of law include Cesare Beccaria who, among others, saw penalties acting as deterrents of a crime and John Bentham who is regarded as one of the creators of utilitarianism and the concept of the happiness calculus (Latin: *felicific calculus*) being responsible for human behaviour.<sup>141</sup>

Although the thoughts and theories of the above are not counted as part of the economic analysis of law, they have certainly contributed to the development of the economic thinking of law that was growing dynamically in the 20<sup>th</sup> century. It was then that, first in Europe and then in the USA, economists turned to law and initiated two waves of Law&Economics. The former, situated in the thirties of the

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<sup>139</sup> These examples have been taken from the work by E. Mackaay, *History of law and economics*, in: B. Bouckaert, G. De Geest [eds], *Encyclopedia of Law and Economics*, Cheltenham 2000, available on [encyclo.findlaw.com/0200book.pdf](http://encyclo.findlaw.com/0200book.pdf) [accessed on 4 January 2016] *Encyclopedia of Law and Economics*, Cheltenham 2000, on: [encyclo.findlaw.com/0200book.pdf](http://encyclo.findlaw.com/0200book.pdf) [accessed on 4 January 2016] and J. Kabzy, *Koncesje i zezwolenia. Analiza ekonomiczna*, Warszawa 2014, pp. 41-42; See also E. Mackaay, *Law and Economics for Civil Law Systems*, Cheltenham 2013, pp. 17-26.

<sup>140</sup> To quote: A. Kalinowska, A. Stański, *Po co matematykom Jan Jakub Rousseau?*, in: *Problemy wczesnej edukacji*, No 3 2015, p. 122.

<sup>141</sup> Jeremy Bentham sees a human as a being whose activity is determined by two biological instincts: to achieve pleasure and avoid unpleasantness. The feeling of pleasure will be then perceived as a proof that the activity undertaken has been useful. This assessment can be aided by using the happiness calculus resulting from the pleasure and displeasure relationship. A similar view was expressed by the creators of the economic analysis of law for whom one of the primary assumptions was the fact that a human being pursues in a rational way, the multiplication of pleasure. Thus, being a – *homo oeconomicus* as well and having at his disposal pleasure and distress, he will undertake such actions which will help him to achieve the former. More in: J. Stelmach, R. Sarkowicz, *Filozofia prawa XIX i XX wieku*, Kraków 1998, pp. 186-187; E. Mackaay, *Encyclopedia of Law and Economics*, Cheltenham 2000, on: [encyclo.findlaw.com/0200book.pdf](http://encyclo.findlaw.com/0200book.pdf) [accessed on 4 January 2016] *Encyclopedia of Law and Economics*, Cheltenham 2000, on: [encyclo.findlaw.com/0200book.pdf](http://encyclo.findlaw.com/0200book.pdf) [accessed on 4 January 2016]; J. Kabza, *Koncesje i zezwolenia. Analiza ekonomiczna*, Warszawa 2014, p. 42.

20<sup>th</sup> century developed mainly in Europe by, *inter alia*, Carl Menger, Werner Sombrat and Adolf Wagner. The other wave of Law&Economics had a typical American character and was rooted in the second half of the 20<sup>th</sup> century. The works published then continue to remain the key positions on the economic analysis of law today and include works by Ronald H. Coase<sup>142</sup>, Guido Calabresi<sup>143</sup>, Armen Alchian<sup>144</sup>, or Richard A. Posner<sup>145</sup>, who are sometimes referred to as founders of L&E. It should nevertheless be emphasised that although these authors are among the most frequently quoted, their works might not have been written if it were not for the efforts of another representative of the Chicago Law School – Aaron Director who managed to persuade economic scholars to give economic research a fresh look. Among his colleagues was Gary Becker, creator of the economic theory of crime and researcher of human behaviour who received a Nobel Prize in 1992. Some of the researchers whose names have already been referred to above (Richard A. Posner, George A. Akerlof) have been awarded a Nobel prize as well, as was Daniel Kahneman for the integration of the results of psychological studies into the study of economy and in the assessment of human behaviour and decision-making under the conditions of uncertainty.<sup>146</sup> The latter is of particular relevance from the point of view of the behavioural analysis of law which also belongs to L&E, and which will be further discussed in the last (third) Chapter of this book. This trend was started a dozen or so years ago with works by Christine Jolls, Cass R. Sunstein, Richard H. Thaler<sup>147</sup>, and has been considered an alternative to the traditional schools of L&E which underwent heavy criticism. One of the objections was that the methods L&E developed were impossible to apply in studies of the nature of law. Another was the limited scope of the application of empirical methods arising from the limited “availability of empirical data necessary for the formulation of testable hypotheses in order to verify theoretical theses under the

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<sup>142</sup> R.H. Coase, *The Nature of the Firm*, in: *Economica*, Vol. 4 1937, pp. 386-405; R.H. Coase, *The Problem of Social Cost*, in: *Journal of Law and Economics*, Vol. 3 1960, pp. 1-44.

<sup>143</sup> G. Calabresi, *Some Thoughts on Risk-Distribution and the Law of Torts*, in: *Yale Law Journal*, Vol. 70 1961, pp. 499-553; G. Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, in: *Harvard Law Review* Vol. 78 1965, pp. 713-774.

<sup>144</sup> A.A. Alchian, *Some Economics of Property Rights*, op. cit., pp. 816-829.

<sup>145</sup> R.A. Posner, *Economic Analysis of Law*, Boston 1972; R.A. Posner, *Theories of Economic Regulation*, in: *Bell Journal Economics and Management Science*, Vol. 5 1974, pp. 335-358; R.A. Posner, *The Economic Approach to Law*, in: *Texas Law Review*, Vol. 53 1975, pp. 757-782.

<sup>146</sup> See [www.nobelprize.org/nobel\\_prizes/economic-sciences/laureates/2002/index.html](http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2002/index.html) [accessed on 3 November 2015].

<sup>147</sup> See, for example C. Jolls, C.R. Sunstein, R.H. Thaler, *A Behavioral Approach to Law and Economics*, in: *Stanford Law Review*, Vol. 50 1997-1998, p. 1471 et seq.; C. Jolls, *Behavioral Economics Analysis of Retributive Legal Rules*, in: *Vanderbilt Law Review*, Vol. 51 1998, p. 1631 et seq.; C. Jolls, C. R. Sunstein, *Debiasing through law*, in: NBER Working Paper Series, Working Paper 11 738, 2005; C. Jolls, *Behavioral Law and Economics*, in: John M. Olin Center for Studies in Law, Economics, and Public Policy, Yale Law School, Research Paper, No 342 2006, p. 3 et seq.

concrete socio-economic reality”.<sup>148</sup> A solution may be to combine a theory with empirical studies.<sup>149</sup> It is also necessary to limit the impact of the assumption that may influence the studies of the rationality of individuals, that seems to be of fundamental importance for some researchers involved in L&E. As behaviourists rightly note, an individual’s choices may be rational, but individuals are also altruists, excessive optimists with limited strength of willpower and self-control and therefore their choices are based on short-cut decisions and accepted practices.<sup>150</sup> In consequence, it is necessary to include in the study of law not only the “pure” economy but cognitive psychology, behavioural economy and sociology as well. Only such an approach (already present in the conceptions developed by Petrażycki and other representatives of the Polish theory and sociology of law) will make it possible, as is rightly believed, to predict better the effects of the law being made and enforced.<sup>151</sup> Helpful may also turn out the results of other studies conducted by followers of schools of the economic analysis of law, which employed different methods or chose different issues as objects of their analysis. The ones most frequently referred to include:<sup>152</sup>

1. The Chicago school already mentioned, considered to be in the mainstream, a representative of the positivist approach. The first branch journal “The Journal of Law and Economics” came into being in 1958 on its initiative and published works by Coase, Becker, Posner and others. The main tool used by researchers following the Chicago school was the theory of price which allows us to describe the reaction of addressees of legal norms to their adoption. As said before, it is assumed that the addressees of norms act rationally and strive to make the maximum profit of the legal norm available. In a similar way in which prices influence the behaviour of consumers of marketed goods, law may also be used to create desired attitudes and useful behaviours which, from society’s perspective, will be economi-

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<sup>148</sup> K. Metelska-Szaniawska, *Ekonomiczna analiza prawa (Law&Economics) – wprowadzenie*, in: R. Cooter, T. Ulen, *Ekonomiczna analiza prawa*, op. cit., p. XXVIII.

<sup>149</sup> The proof that this is possible has been provided by studies conducted among others under the guidance of Paweł Chmielnicki which supported the theses made by data arising from analyses based on methodological foundations. See P. Chmielnicki, A. Dybała, M. Stachura, *Activity rules of economic man in society as the source of legal norms*, Warszawa 2010, passim.

<sup>150</sup> There are references in the literature to examples that undermine the assumption of a rational *homo oeconomicus* who wants to maximise his useful actions. There are two types of these: 1. Instances in which this assumption is distorted and leads to a wealth effect, the manner of framing problems and the choice – false consciousness, and 2. The externalities, also observed in the market, including negative ones, and such as the tragedy of the commons or the prisoner’s dilemma as well as the positively assessed free riding problem. More on that in: R.T. Stroiński, *Ekonomiczna analiza prawa czyli w poszukiwaniu efektywności*, in: *Kwartalnik Prawa Prywatnego*, issue 3 2002, pp. 553-557.

<sup>151</sup> K. Metelska-Szaniawska, *Ekonomiczna analiza prawa (Law&Economics) – wprowadzenie*, in: R. Cooter, T. Ulen, *Ekonomiczna analiza prawa*, op. cit., p. XXVIII.

<sup>152</sup> Based on J. Kabza, *Koncesje i zezwolenia. Analiza ekonomiczna*, op. cit., pp. 40-61.

- cally effective for it. If this happens, law made and enforced in this way will be considered economically effective as well, also in the social dimension.
2. The New Haven School is identified with the University of Yale and also regarded as one of the main streams representing a normative approach, initiated by Calabresi<sup>153</sup> who analysed the possibility of using concepts developed in L&E for the purposes of delict law (law of tort). The achievements of the New Haven School include an analysis of the role of the state in correcting market mechanisms and the focus on norms.
  3. The Virginia School also referred to as the school of public choice represented a functional approach developed by James M. Buchanan and Gordon Tullock.<sup>154</sup> Contrary to the two other schools which assumed the existence of a legislator as a neutral subject pursuing the maximisation of social utility, representatives of the Virginia School focused their considerations on a legislator in a very broad meaning of the word. A comprehensive analysis of law, they claim, requires the inclusion of the process of law making as well as the process of law enforcement, but from the perspective of the subjects who participate in these processes, i.e. politicians and other officials performing these functions in consequence of a choice made by those (members of the society) who voted for them or elected them (as their representatives). In particular the former (politicians) are subject to laws similar to market laws, these laws influencing their actions and emerging as interest groups or other activities of the political authorities. Thus the Virginia school is sometimes referred to as the economic analysis of politics.

The above schools are commonly regarded as those that make up Law&Economics. Certain doubts, however, appear as other schools are analysed more closely, which is especially true with regard to the institutional economic analysis of law and the new institutional economy. Simplifying, it may be said that the main concerns raised are whether these schools should be analysed as part of the economic analysis of law, or whether it is the economic analysis of law that constitutes one of its elements.<sup>155</sup> Since this dispute is not of particular relevance or value to this book, it should suffice to say that its source institutional economy which takes into account the relationship between law and economy and the concept of 'institution'<sup>156</sup>, understood as a certain way of thinking of standards or a certain activity, or a constantly agreed upon consensus of human thoughts and their habits which "materialise", or take the form of taxation or a credit, which

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<sup>153</sup> See G. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, op. cit., pp. 499-553; G. Calabresi, *The Cost of Accidents: A legal and Economic Analysis*, New Haven 1970.

<sup>154</sup> J.M. Buchanan, G. Tullock, *The Calculus of Consent. Logical Foundation of Constitutional Democracy*, Ann Arbor 1962.

<sup>155</sup> J. Kabza, *Koncesje i zezwolenia. Analiza ekonomiczna*, op. cit., p. 52.

<sup>156</sup> T. Gawęł, M. Klimczak, *Pojęcie instytucji w prawie i ekonomii*, in: B. Polaszkiwicz, J. Boehlke [eds], *Ład instytucjonalny w gospodarce*, Vol. I, Toruń 2005, pp. 73-86.

can then become subject to a continuous revolution and on-going influences.<sup>157</sup> The economic system influences the legal system but by using law it is possible to shape and influence certain business activities. These considerations were also enriched by contributions from the new institutional economy, among other things, by including them in the deliberations going beyond the discussion of the elements of law and economy, but including the issues of the theory of organisation, political sciences, sociology or anthropology as well.<sup>158</sup>

As can be seen from the above, the concepts that have developed under L&E are numerous and varied. In the literature they are presented either descriptively or based on their normative character. Descriptiveness is also associated with the role which L&E has in the explanation of the functioning of law using economic cost analysis to calculate the costs that ought to be taken into account in the process of the creation and enforcement of law. This will then allow the achievement of the intended goal i.e. law which is economically effective, and which contributes to the accumulation of maximal social wealth. This idea should also accompany the activity of other bodies making and enforcing law and should thus realise the assumptions of the normative character of L&E.<sup>159</sup>

Summing up, it can be said that the added value of the economic analysis of law is that it systemises the relationships between law and economy creating at the same time methodological foundations for relevant research. The variety of concepts and opinions in L&E prevents the formulation of one coherent conception of L&E which could then be used for research in law. As the author sees it, what is most feasible is the use of L&E for predicting the effects of law made and enforced on human behaviours. The human factor is strongly present in law as well as the economy. Law is an instrument that serves to achieve goals which are socially important, while economy traditionally focuses on cognition and the explanation of market behaviours of the social life actors.<sup>160</sup> Researching the relationship between the two sciences using the economic analysis of law but having in mind the variety of the analysis, forces a lawyer to make certain assumptions and fundamental theses, such as:<sup>161</sup>

1. The basic determinant in assessing law is its effectiveness; this however immediately stirs up controversy whether the function of law should be effectiveness or fairness (justice), especially since the latter is counted among equity, or legal security, to the traditional values laid on a hierarchi-

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<sup>157</sup> Also see B. Hsiung, *The Commonality Between Economics and Law*, in: *European Journal of Law and Economics*, Vol. 18 2004, pp. 33-53.

<sup>158</sup> J. Kabza, *Koncesje i zezwolenia. Analiza ekonomiczna*, op. cit., pp. 57-59.

<sup>159</sup> J. Stelmach, R. Sarkowicz, *Filozofia prawa XIX i XX wieku*, op. cit., pp. 189-190.

<sup>160</sup> J. Boehlke, *Charakterystyka nurtu prawo i ekonomia we współczesnej myśli ekonomicznej*, in: B. Polaszkiwicz, J. Boehlke [eds], *Ład instytucjonalny w gospodarce*, Vol. I, Toruń 2005, pp. 44-45.

<sup>161</sup> J. Stelmach, B. Brożek, *Metody prawnicze*, op. cit., pp. 136-138.

cal order which characterise a legal discourse.<sup>162</sup> It is worthy of note that in practice it is not easy to define 'justice' either, even though its definition is of fundamental importance for law making and its enforcement. Justice is treated as a value and constitutes an axiological basis of legal norms and law enforcement.<sup>163</sup> Aligning justice understood in the "simplest" Aristotelian form as proper and equal treatment in the same situations with economic effectiveness of law, which focuses among other things on maximising utility will in practice constitute a challenge for the legislator as well as the entity enforcing this law.<sup>164</sup> Critics of the economic analysis of law underline that law cannot be assessed on the basis of its economic effectiveness because law is to seek to achieve higher goals, a supreme value, which is justice.<sup>165</sup> One should not equal effective law with just law. It would even be allowable to lose on effectiveness for the sake of the achievement of other normative goals. And although economy serves to find a solution through which it will be possible to ensure a just division with the least possible loss of resources, there will be no answer to what is just.<sup>166</sup>

These dilemmas are also seen in the regulation of the financial market, where on the one hand the consumer's interest as the weaker actor's is taken care of, but on the other hand, the foundation upon which his relationship with a financial institution is grounded should be based on freedom of contract. It can of course be argued that it is the specificity of the matter regulated which enforces this kind of attitude. But is it just? Are all subjects treated equally? Will some "assistance" provided by the legislator increase the wealth of all players in the market? Or should, at times of e.g. crises, to maintain proper balance, the interest of financial institutions prevail? These and similar questions might easily fill several pages of this book. They show as well, how complicated the nature of financial market regulations is and how important the role of L&E may be in shaping these regulations. And yet it would not be right if only one value were to be taken into account and become dominant in the process of shaping legal solutions, even it is a very important value, because this sometimes overesti-

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<sup>162</sup> A. Bator, *Instrumentalizacja jako założenie ekonomicznej analizy prawa*, op. cit., p. 33.

<sup>163</sup> T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, op. cit., p. 224. For more, see A. Gomułowicz, *Zasada sprawiedliwości podatkowej*, Warszawa 2001; Ch. Perelman, *O sprawiedliwości*, Warszawa 1977; J. Rawls, *Teoria sprawiedliwości*, Warszawa 1994; Z. Ziemiński, *O pojmowaniu sprawiedliwości*, Lublin 1992.

<sup>164</sup> It is pointed out in the literature that "in the mainstream of the economy, the category of effective economic value is the basic standard of the assessment and valuing, not the standard of justice or equality" See also J. Wilkin, *Efektywność a sprawiedliwość jako problem ekonomiczny*, op. cit., p. 25.

<sup>165</sup> J. Bełdowski, K. Metelska-Szaniawska, *Law&Economics – geneza i charakterystyka ekonomicznej analizy prawa*, op. cit., p. 58.

<sup>166</sup> *Ibidem*.



mated economic effectiveness “may lead to the infringement of the principles that constitute the core of ethical and legal thinking: the principle of freedom of contract, the *pacta sunt servanda* principle and the principle of the protection of acquired rights”<sup>167</sup>

It would also be difficult to agree with another concept of effectiveness sometimes proposed by followers of the economic analysis of law, according to whom it is nothing but an economic explication of justice.<sup>168</sup> The discrepancies which arise in this kind of thinking arise from different goals which guide economic analysis of law and pure law itself. In the first case a focus will be put on the effective allocation of goods, which as a rule leads to an unjust division of the goods among individuals. This is of course one of many different ways of looking at effectiveness from the economic perspective. And yet, a legislator who is creating effective and just law, despite having to take into account economic elements, will nevertheless be guided by his own perception of those concepts. This means that when creating effective laws properly he will do it in such a way as to ensure that once used and enforced, they will serve to achieve the goal which they are to serve within the framework of certain defined values. Another optimal solution should be law that will be just law and, as stated above, law that under the same circumstances will treat all subjects equally. The reality, however, may prove that it will not be possible to reconcile all these elements, and, what is more, they will have to be considered individually, depending on a given case. A good example of a situation of this type is a conception recommended by law-makers, and analysed in detail by Paweł Wajda, which is based on the belief in the economic effectiveness of a stock exchange market.<sup>169</sup> Wajda pointed out first to the “effectiveness of a stock market” which is a “situation in which the market valuation of financial in-

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<sup>167</sup> J. Stelmach, B. Brożek, W. Załuski, *Dziesięć wykładów o ekonomii prawa*, op. cit., pp. 39-40; These authors, of yet another publication that characterises the economic stream in the analysis of law, point out to six theses that underline the stream or the theory about it: they are 1. That what decides about the essence of law cannot be reduced to mere facts of an economic character; 2. The only goal of law should be economic effectiveness; 3. The creator and the subject of the laws enforced is a legal subject *homo oeconomicus*; 4. The existing (binding) may be justified using tools (theory) used in economic analyses; 5. Using economic tools, it is possible to build a coherent theory of justice; 6. An economic analysis is a privileged type of legal method (a stronger version) or an economic analysis is an authorised type of a legal method (weaker version). J. Stelmach, B. Brożek, W. Załuski, *Dziesięć wykładów o ekonomii prawa*, op. cit., pp. 17-20.

<sup>168</sup> More in: D. Maśniak, *Transgraniczny system ochrony ofiar wypadków drogowych. Studium prawnofinansowe*, op. cit., pp. 155-159; See also L. Kaplow, S. Shavell, *Fairness versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, in: *The Journal of Legal Studies*, Vol. 32 No 1 2003, pp. 331-362.

<sup>169</sup> The analysis below has been inspired by the conception presented in a monograph by P. Wajda, *Efektywność informacyjna rynku giełdowego*, Warszawa 2011, passim; See also A. Waszkowski, *Efektywność informacyjna rynku finansowego w Polsce*, in: M. Kalinowski [ed.], *System finansowy –*

struments ensures proper allocation of resources". This type of effectiveness is not a monolithic creation. It is composed of: allocation effectiveness, transaction effectiveness and information effectiveness, showing in legal regulations, in particular. The last one will be guaranteed, in the economic sphere, if investors have at their disposal, in identical circumstances, equal access to certain defined information which, if taken into account by them when assessing their intended purchases will, as may be assumed, lead to the best possible allocation of goods. Translating this assumption into the language of law we might say that the legislator's task should be to create regulations that will ensure the accomplishment of the purpose of effectiveness, which is one of the three elements determining the economic effectiveness of the stock exchange market focusing on: the allocation of goods, low transaction costs and equal access to information allowing the achievement of the best possible economic result. Even if in the latter case we note elements of justice, the supreme goal remains economic, not axiological that is so close to law. Despite the fact that, as stated earlier, the legislator must, when aiming at effectiveness, take into account economic purposes, he must still in all his actions create law that accounts for the wider context in which a society functions, and ensure for that society the stability and security of the financial market, trust in that market, and the protection of its weaker participants. As shown in this example, it is very difficult for the law to guarantee that interests of different parties will be ensured and that those interests should be altogether uncontroversial. It is obvious that the best possible allocation of goods should be pursued, as well as the assurance of the welfare of all. This, however, should not be done at all costs or be a purpose in itself. What must be taken into account when making (as well as enforcing) laws is the economic element. Taking as an example the information effectiveness of the stock exchange (market) analysed by Wajda, in order to ensure effectiveness by legal norms certain schematic behaviours of the market participants who create the demand and the supply group must be taken into account. This however may influence human behaviour or attitudes, albeit only in a limited scope.<sup>170</sup> And yet, their better understanding or cognition may help to create a more effective law, either in the economic or legal understanding, which should

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*aktualne wyzwania i perspektywy rozwoju*, Prace naukowe WSB w Gdańsku, Vol. XXVII, Warszawa 2013, pp. 59-67.

<sup>170</sup> P. Wajda, *Efektywność informacyjna rynku giełdowego*, op. cit., p. 344; In the instrumentalist approach to law its formal (linguistic) aspect is stressed as referring to the process of making norms that are regarded as legal norms. Another element that is stressed is the real aspect (non-linguistic, sociological and psychological) connected with its influence on human behaviours and attitudes. See also A.M. Nolan, *Unijne prawo konkurencji: efektywność systemu odwołań spraw dotyczących koncentracji przedsiębiorstw*, op. cit., pp. 118-119.

also be treated as confirmation of the thesis of a symbiotic existence of law and economy, in particular in the sphere of a broadly understood financial law. In this case the necessity to respect by the legislator the objective economic law and arising from them limits of intervention in the market mechanism must be emphasised. Legal regulations may, however, strengthen the impact of these laws, modify them or even exclude them.<sup>171</sup> The legislator must take these regularities into account as well as predict the changes which will be going on in the social and economic reality. The economic consequence of the changes should be, following Aleksandra Nadolska, treated as an external value to the law. If they cannot be measured, they should only be valued by their quality looking at the intrinsic values of law such as its effectiveness.<sup>172</sup> It is the nature of law that it manifests itself as generally binding norms that are based on a certain system of values which economy should take into account and realise. Therefore, we must fully agree with the thesis that law approached in this way cannot be reduced to law performing a passive function only, or serving existing economic relationships. Its active function is equally important, as it manifests itself in shaping and changing these relationships in a manner allowing the realisation of new goals that are preferred in a given reality as serving social purposes, and based on certain values.<sup>173</sup> However, some of them, which could be considered as goods from the economic point of view, are extremely difficult (and sometimes impossible) to assess. They are, for example, life, health or trust<sup>174</sup> so frequently mentioned earlier in this book.

2. This is the assumption that a man acts in a rational way, and as *homo oeconomicus*, on the basis of information (data) obtained is capable of making rational decisions. It is one of the fundamental ones grounded in neoclassical economy which studies and verifies the implication of a statement that a man is a rational maximiser of his self-interest<sup>175</sup> and his efforts to satisfy his needs must take into account the changes going on in his environment and react to the stimuli flowing from it, and which are sourced in, among other things, law.<sup>176</sup>

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<sup>171</sup> P. Wajda, *Efektywność informacyjna rynku giełdowego*, op. cit., pp. 92-93.

<sup>172</sup> A. Nadolska, *Komisja Nadzoru Finansowego w nowej instytucjonalnej architekturze europejskiego nadzoru finansowego*, Warszawa 2014, pp. 301-302.

<sup>173</sup> J. Grabowski, *Rola i funkcje prawa w kształtowaniu stosunków gospodarczych*, in: J. Grabowski, L. Kieres, A. Walaszek-Pyziół [eds], *Publiczne prawo gospodarcze*, Tom 8A, *Systemu Prawa Administracyjnego*, Warszawa 2013, pp. 4-12.

<sup>174</sup> J. Kabza, *Koncesje i zezwolenia. Analiza ekonomiczna*, op. cit., p. 32.

<sup>175</sup> An opinion may be heard that this conception "is the narrowest conception of a human that may be imagined". Quotation from M. Niedużak, *Postępowanie grupowe. Prawo i ekonomia*, Warszawa 2014, p. 12.

<sup>176</sup> W. Karsz, *Ekonomiczna analiza prawa w prawoznawstwie amerykańskim*, in: *Studia Prawno-Ekonomiczne*, Vol. XXVIII, 1982, p. 77.

3. Taking into account the descriptive and normative character of L&E, in which an assumption is made that law is economically effective, or at least should be economically effective, the choice between one of the two options presented should already be made at the preliminary stage of an analysis because this choice will subsequently influence further stages of an analysis grounded in the economic analysis of law.

These assumptions, combined with views held by representatives of different schools of economic analysis of law must be taken into account when legal regulations are analysed. In practice this may be a very difficult task like for instance an analysis of regulations governing financial markets, so far not a focal point of interest of L&E, hence a lack of research methods already developed which would account for the specificity of these markets. There has been made some analysis with regard to the insurance market or the capital market, but none which would also consider issues of particular significance today, looking at: 1) the mixed character of financial market regulation which combines public issues with issues characteristic of private law; 2) the use of soft law; and 3) the irrationality of subjects functioning in the market, both when it comes to financial institutions and their clients. Therefore L&E studies should be recommended and conducted so that financial market law is studied from a different, economic angle. Thus an instrumentalist approach to law is needed so that law can be analysed as a complex phenomenon. Whether however a complex analysis to study law as recommended here is at all possible is another matter. In practice it would mean that an analysis would have to extend to all segments of the market and include its public and private law character, as well as account for the territorial aspect (global, European, domestic regulations) which does not seem at all feasible.

Therefore, in a similar way as happens when a method of legal interpretation is selected, which is usually dependent on the nature of an individual case that is to be constructed or interpreted and the philosophy of law adopted earlier, when a concept of an economic analysis of financial markets law is developed, it will be necessary to narrow it down to a selected problem only even though this problem may nevertheless be shared by several segments of the financial market (i.e. the protection of values in the form of trust). In this author's opinion, owing to the specific character of the matter regulated on the financial market, efforts of not only legal and economic scholars, but representatives of sociology and psychology as well should be joined, which will then make it possible to develop a concept allowing them to approach the problem from the point of view of L&E in a complex. This may turn out to be of great value for the process of making and enforcing financial market law.

There is another option though and this one has been used in this book. It is based on the assumption that the achievements of L&E may be used to support the justification of certain theses which will predominantly be based on the exegesis of selected legal texts, relevant judicial decisions and the doctrine. What has been

found of value from L&E is, for instance, a proposal that law is tied to mental behaviour (experiences) of law-makers or those who subsequently enforce it (this has also been signalled by Petrażycki as well). It has also been accepted that the element of effectiveness must also be included in the process (which in practice means that it is used in developing a methodology for assessing the effects of regulation).

However, it should be remembered that in discussions on the economic analysis of law (and this fact passes frequently unnoticed) law itself and a reflection on it are but one of many facts that are described and assessed in order to establish the regularities governing the process of making economic decisions. Andrzej Bator emphasised that in such studies, their object or goal is not law itself, but the economic consequences arising as a result of the enforcement of such law.<sup>177</sup> Such an approach allows us to break with the distinction into different branches of law and, in consequence, the conceptual barriers that we observe and which result in the expansion the language of economy to the science of law.<sup>178</sup> Reference to economic achievement is of course desirable, and it has already helped to eliminate many barriers that restricted the way of thinking of law which used to be rather hermetic. This revolution, in particular in respect of the regulations of the financial market is indispensable in the opinion of the author of this book, in a situation when today new forms of financial activity are being developed in a dynamically growing market offering completely new or novel investing instruments. The economic analysis of law, maybe not perfect, still in the same way as “each other theory has a characteristic for itself explanatory power and cannot be blamed for not being capable of explaining all interesting phenomena in its field. It is an obvious fact that the explanatory scope of a given theory is determined by the assumptions upon which it is grounded. Hence, the economic theory of law must out of necessity share the fate of all other interdisciplinary scientific research that set aside many important issues – often because these are problems which cannot be formulated in a certain defined integrating discipline”.<sup>179</sup>

### **3. Financial market law as an answer to the process of the economisation of law**

#### **3.1. Financial market law – concept**

The considerations on the financial market, its regulation and the essence of law, or law seen as a social phenomenon made so far have not been accidental. Their aim was to define the main elements which make up the concepts of “finan-

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<sup>177</sup> A. Bator, *Instrumentalizacja jako założenie ekonomicznej analizy prawa*, op. cit., pp. 25-26.

<sup>178</sup> Ibidem, p. 30.

<sup>179</sup> W. Karsz, *Ekonomiczna analiza prawa w prawoznawstwie amerykańskim*, op. cit., pp. 79-80.

cial market law” and “the economisation of the law” and which are of fundamental importance for this book. Although these concepts have been used for some time already, it seems that frequently they have not been given due thought. Deeper thought is however necessary in order to understand the two phenomena properly, and without that understanding it will be difficult for a legislator to outline the regulatory framework on the one hand, and on the other hand, to include the human (behavioural) factor in the process of the creation and enforcement of law. Regarding the former, the regulatory framework is being extended both horizontally as well as vertically.<sup>180</sup> This means that the law created and enforced which regulates the functioning of financial market law starts to extend to and include subsequent segments of the financial market in all EU Member States (the horizontal dimension). What is more, its application (binding) goes deeper, which means that regulations of public law that have traditionally regulated the state-individual relationship increasingly frequently start to intervene in relationships of a typically private character. Even if their action is not direct, they nevertheless have an impact on the relationships between parties. An example here are prudential norms meant to simplify the control of allowable risk undertaken by financial institutions (banks in particular).<sup>181</sup> To fulfil their requirements, apart from the necessity to implement certain technical solutions which generate extra costs (paid by the clients) there is also an indirect requirement to inform clients and in some situations even to assess clients’ awareness or knowledge of risk. A consequence of such procedures may be a refusal to sign an agreement or even a prohibition to offer certain financial solutions (new derivative instruments in particular). This issue will be discussed later in this book, here it is only mentioned to support the statement that contemporary regulations of financial markets are very complex, being the effect of a greater activity of the legislator (especially the European Union)<sup>182</sup> who being aware of the threats arising from the financialization of life undertakes steps aimed at encompassing the main aspects of the functioning of financial markets in a certain legal framework. In consequence, new regulations are created and their characteristic features are complexity, their multi-aspect nature, extensivity, high level of detail and at times difficulty in their understand-

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<sup>180</sup> This remark concerns the EU financial market as the regulation of this market will be taken into account in this book. These regulations must be analysed as a multicentre study, with a focus on its EU as well as domestic dimension. As will be shown later in this book, the EU dimension, thanks to the conception of maximum harmonisation, is becoming of dominant position in the EU.

<sup>181</sup> For more on prudential norms see Z. Ofiarski, *Istota, zakres i przeznaczenie opłaty ostrożnościowej*, in: *Monitor Prawa Bankowego* 2015, No 6, pp. 63-75; M. Olszak, *Bankowe normy ostrożnościowe*, Białystok 2011; C. Kosikowski, M. Olszak, *Od prawa bankowego do prawa rynku finansowego*, in: J. Głuchowski [ed.], *System prawa finansowego*, Vol. IV, Warszawa 2010, pp. 224-250.

<sup>182</sup> M. Fedorowicz is right to identify this phenomenon with a legislative ‘vitality’ or even ‘hyperactivity’ when it comes to EU financial market regulations. More in: M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, Warszawa 2013, p. 19 et seq.

ing. An analysis of the main solutions present in the EU financial market shows an attempt made to regulate all the elements of this market, and this as can be seen is being done with overt determination and consistency. The objectives of the regulations are usually expressed in preambles to legal acts enforced, and the rationale behind these regulations that usually accompanies them and includes the need of stability and security of the market, the transparency of its functioning as well as protection of the clients of financial services. All this is to be achieved using traditional techniques as well as new ones, which include e.g. soft law which frequently cannot be included in the catalogue of traditional sources of law. In the opinion of this author the use of numerous underspecified, or blurred concepts (general clauses)<sup>183</sup> together with new instruments of financial market regulation is key to the essence of the contemporary process of creating and enforcing financial market law, a law that most certainly ought to be regarded as a separate field of financial law or maybe even a separate branch of law covering, apart from the traditional financial elements of a study also administrative, civil and criminal law issues as well as those that are the domain of other sciences i.e. economy, psychology and sociology. In the opinion of the author only an interdisciplinary approach to financial markets enables an understanding of the mechanisms of their functioning and constitutes grounds for a rational process of creating and enforcing financial market law. Such an approach, however, must refer to the tradition or in

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<sup>183</sup> As L. Leszczyński pointed out, the term "general clause" was coined for the purpose of the language of the theory of law but it also functions in the practice of law. Its definition suggests that it must fulfil three conditions: 1) its meaning must be underspecified, blurred and it must constitute a part of a legal provision; 2) it must make a reference to general criteria allowing non-legal assessment, 3) its concrete content must be determined in the process of law enforcement. More in: L. Leszczyński, *Klauzule generalne w stosowaniu prawa*, Lublin 1986, p. 14 et seq.; General clauses ought to be considered as an important element of the enforcement of law, leaving the decisive bodies with some freedom of decision, in which they may be guided by opinions in individual cases (type I general clauses) as well as by non-legal principles of procedure that will have their axiological justification in general assessments (type II general clauses). The application of clauses takes place in the case of financial market law as well. For instance, among the goals of supervisory bodies are: "protection of market security and stability", "protection of the proper functioning of the financial market", or "ensuring safety of monetary funds". These functional phrases are carriers of general clauses that "open" statutory law on other normative systems. See A. Kunkiel-Kryńska, *Metody harmonizacji prawa konsumenckiego w Unii Europejskiej i ich wpływ na procesy implementacyjne w państwach członkowskich*, Warszawa 2013, p. 327 et seq. In the doctrine of financial market law, clauses of that type constitute legal norms that refer to non-legal values such as moral, social, cultural or economic norms. Their presence results in the implementation of assessing, or evaluating elements to legal norms which do not, however, mean that there is complete freedom in the construction of legal norms which must be interpreted in accordance with the guidelines obtained from knowledge and experience as well as the judicial decisions and the doctrine. In adopting yet another clause, the legislator left its fulfilment with a proper content to the sciences of law and economy. According to Rafał Mroczkowski this formulation is to be considered as a state in which the market will fulfil its functions properly R. Mroczkowski, *Nadzór nad funduszami inwestycyjnymi*, Warszawa 2011, p. 96.

other words to the foundations that are responsible for the fact that financial law is a separate branch of law<sup>184</sup> from which financial market law emerges.

Financial market law is one of the fastest growing specialties of financial law. That it should be a separate area of study has been postulated for long. An example to be followed was banking law which has largely evolved as a separate branch in the course of systemic transformations. Banking law is of a mixed character showing strong ties between public and private law matters, and indeed any attempt to separate the two would be artificial and in vain.<sup>185</sup> What is more, banking law today is undergoing Europeisation or even globalisation, which means that national laws must implement novel solutions, breaking up the traditional division between the two. Creating new instruments, the market enforces the implementation of complex legal solutions that will ensure the regulation of legal relations horizontally (between two equal parties) as well as vertically (between the State and, for instance a financial institution). At the same time, and this needs emphasising, the tendency to develop new legal solutions is accompanied by the reduction of differences between the traditional market segments of the financial market. Banks no longer focus on credit or deposit activity only but are currently present in the insurance and capital markets as well, while other (e.g. paying) institutions emerge as completely new and offer services that have been till now associated with banks only. Hence the need to look at law anew and see it as having a function to regulate a financial market, and therefore developing a specialist area under the name of financial market law. As Eugenia Fojcik-Mastalska noted, it will then enable the crossing of the boundaries of the traditionally narrow understanding of law and will provide “more uniform and comparable conceptions and terminology adequate to market needs, and more daring systematisation of the market in the legislative sense, with a significantly greater support of the scientific community”.<sup>186</sup> The latter is indispensable and requires scientific specialist research into frequently complicated problems emerging as a result of introducing into the market new solutions that must then be regulated by law.<sup>187</sup> A tendency in the discussion on the essence of financial

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<sup>184</sup> See W. Nykiel, *Normy prawa finansowego – wybrane zagadnienia*, Acta Universitatis Lodzensis, in: ZNUŁ, Nauki Humanistyczno-Społeczne, Series I, issue 65 1979, p. 5; See also M. Zdebel, *Prawo finansowe jako dział prawa*, in: J. Głuchowski, C. Kosikowski, J. Szołno-Koguc [eds], *Nauka finansów publicznych i prawa finansowego w Polsce – dorobek i kierunki rozwoju. Księga jubileuszowa Profesor Alicji Pomorskiej*, Lublin 2008, p. 58; B. Brzeziński, *Prawo finansowe jako gałąź prawa – wątpliwości i nowe tendencje*, in: A. Kostecki [ed.], *Prawo finansowe i nauka prawa finansowego na przelomie wieków*, Kraków 2000, p. 357.

<sup>185</sup> E. Fojcik-Mastalska, *Ocena stanu prawa bankowego*, in: A. Kostecki [ed.], *Prawo finansowe i nauki prawa finansowego na przelomie wieków*, Kraków 2000, pp. 281-282.

<sup>186</sup> Ibidem, p. 294. See also C. Kosikowski, M. Olszak, *Od prawa bankowego do prawa rynku finansowego*, op. cit., pp. 195-250.

<sup>187</sup> The result of the research undertaken is numerous works published, which clearly shows that the doctrine of financial market law has continually supported development of a new spe-



market law is to place it (financial market law) within the framework of public and private law issues.<sup>188</sup> These legal aspects of the financial market are usually referred to as “financial services law”. As a result there are two different notions being used: “financial market law” and “financial services law”.<sup>189</sup> Where such a distinction exists, the understanding of “financial market law” should be made more precise, and be divided into “financial market law *sensu largo*” and “financial market law *sensu stricto*”. The definition of the former would cover public law as well as private law issues while the latter would refer public law issues only and as such be associated with traditionally understood financial law.<sup>190</sup> This is

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cialised area of law. Some of the works worth mentioning here include: E. Fojcik-Mastalska, *Oce-  
na stanu prawa bankowego*, in: A. Kostecki [ed.], *Prawo finansowe i nauki prawa finansowego na  
przełomie wieków*, Kraków 2000, pp. 281-282; E. Fojcik-Mastalska, *Prawo rynku finansowego w sys-  
temie prawa*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego. Doktryna, instytucje,  
praktyka*, Warszawa 2016, pp. 19-26; C. Kosikowski, *Nowe prawo rynku finansowego Unii Europejskiej*,  
op. cit., pp. 27-38; C. Kosikowski, M. Olszak, *Od prawa bankowego do prawa rynku finansowego*,  
in: J. Głuchowski [ed.], *System prawa finansowego*, Vol. IV, Warszawa 2010, pp. 224-250; Z. Ofiarski,  
*Rola soft law w regulacji rynku finansowego na przykładzie rekomendacji i wytycznych Komisji Nad-  
zoru Finansowego*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego*, op. cit., War-  
szawa 2016; M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, Warszawa 2013;  
A. Jurkowska-Zeidler, *Bezpieczeństwo rynku finansowego w świetle prawa Unii Europejskiej*, War-  
szawa 2008; R. Mroczkowski, *Nadzór nad funduszami inwestycyjnymi*, Warszawa 2011; M. Olszak,  
*Bankowe normy ostrożnościowe*, Białystok 2011; W. Srokosz, *Instytucje parabankowe w Polsce*, War-  
szawa 2011; D. Wojtczak, *Usługi bankowe w regulacjach Unii Europejskiej*, Warszawa 2012; A. Zalce-  
wicz, *Bank lokalny. Studium prawne*, Warszawa 2013; M. Lemonnier, *Europejskie modele instrumentów  
finansowych. Wybrane zagadnienia*, Warszawa 2011; D. Cyman, *Elektroniczne instrumenty płatnicze  
a bezpieczeństwo uczestników rynku finansowego*, Warszawa 2013; P. Tereszkiwicz, *Obowiązki in-  
formacyjne w umowach o usługi finansowe. Studium instrumentów ochronnych w prawie prywatnym  
i prawie unijnym*, Warszawa 2014; C.B. Martysz, *Manipulacje instrumentami finansowymi i insider  
trading*, Warszawa 2015; E. Rutkowska-Tomaszewska, *Ochrona prawna klienta na rynku usług  
bankowych*, Warszawa 2013; A. Nadolska, *Komisja Nadzoru Finansowego w nowej instytucjonalnej  
architekturze europejskiego nadzoru finansowego*, Warszawa 2014; P. Zawadzka, *Instrumenty finan-  
sowe w gospodarce gminy*, Warszawa 2015; A. Michór, *Odpowiedzialność administracyjna w obrocie  
instrumentami finansowymi*, Warszawa 2009; P. Wajda, *Efektywność informacyjna rynku giełdowego*,  
Warszawa 2011; L. Góral, *Zintegrowany model publicznoprawnych instytucji ochrony rynku bankowego  
we Francji i Polsce*, Warszawa 2011; P. Stanisławiszyn, *Status Komisji Nadzoru Finansowego w polskim  
systemie bankowym*, in: W. Góralczyk [ed.], *Problemy współczesnej bankowości. Zagadnienia prawne*,  
Warszawa 2014, p. 296 et seq.,

<sup>188</sup> A. Jurkowska-Zeidler, *Bezpieczeństwo rynku finansowego w świetle prawa Unii Europejskiej*,  
op. cit., p. 57.

<sup>189</sup> D. Wojtczak, *Usługi bankowe w regulacjach Unii Europejskiej*, Warszawa 2012, p. 15 et seq.  
See also W. Srokosz, *Pojęcie usług finansowych w regulacjach prawnych Unii Europejskiej*, in: *Prawo  
Bankowe*, No 9 2000, pp. 79-81.

<sup>190</sup> A. Jurkowska-Zeidler understands it in the same way and defines financial market law by legal  
regulations adopted by the State and their impact on the organisation and functioning of financial  
institutions, with the aim of ensuring the proper functioning and security of a financial market whose  
law is made up of legal norms regulating among other things the identification of subjects authorised  
to perform financial services in a financial market, the conditions of undertaking business activity

also the approach to it in this work. And yet, what must be remembered is that the distinction presented here is predominantly of methodological and ordering significance. In reality both scopes complement each other mutually and what can be observed today is the financial market is being publicised and Europeanised *sensu largo*, the extent or scope of which is beginning to extend to newer market segments. Regulating the financial market, the (EU) legislator focuses on the public law aspect first, for which the common denominator is the financial supervision of this market. In reality, however, it turns out that this common denominator is a part of a more complicated fraction whose numerator is created by many regulations that also have private law characteristics and the enforcement of which has a growing impact on public law regulations. An example here may be provisions regulating the functioning of the payment services market that will be discussed in detail later in this book. The nature of each payment service (bank transfer, cash transfer, issuance of a debit card) is that it is based on the relationship between the service provider and service recipient. This relationship, however, is being intervened in by a legislator who, for the sake of law and its objectives, will seek to protect certain values. He intends to achieve them by certain provisions (norms) which enforce certain behaviours on the subjects to a legal relationship, as for example: the necessity to provide certain information in a certain time and form to (usually) a consumer i.e. a service recipient, the scope of liability for failure by a supervisory authority to provide or to detail the universally binding provisions that are universally binding by virtue of legally prescribed instruments (e.g. executive guidelines). Several dozen years ago such a situation would have been regarded as a “heresy” and infringement of the existing customs or tradition upon which the continental (Roman law based) in particular, system of law had been built. The contemporary period has confirmed the reality though. New beings created by the financial market enforced a change in the philosophy underlying legislative work and prompted a quest for new solutions in the name and for the sake of the security and stability of the financial market, and therefore the State itself. The effect of these changes, not always clearly noticeable, is the emergence of a new specialty of law i.e. financial market law *sensu largo*.

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by financial institutions, market supervision as well as principles of doing business of the financial market. See A. Jurkowska-Zeidler, *Prawo rynku finansowego*, in: A. Drwiłło [ed.], *Podstawy finansów i prawa finansowego*, Warszawa 2011, p. 91; See also A. Jurkowska-Zeidler, *Prawo rynku finansowego jako nowy dział prawa finansowego*, in: J. Głuchowski, A. Pomorska, J. Szolno-Koguc [ed.], *Główne wyzwania i problemy systemu finansów publicznych*, Lublin 2009, p. 121 et seq.; E. Fojcik-Mastalska, *Prawo rynku finansowego w systemie prawa*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, op. cit., pp. 19-26; C. Kosikowski, *Nowe prawo rynku finansowego Unii Europejskiej*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, op. cit., pp. 27-38.

### 3.2. Financial market law (*sensu stricto*) as part of financial law

Accepting that there exists a strong connection between a financial market law *sensu stricto* and financial law, it is worthwhile stopping here to characterise briefly the latter. Knowledge of the rules governing this branch of law will most certainly prove useful in the project aimed at the creation and enforcement of a new branch under the name of financial market law. Already the very term financial law does not always enjoy the same understanding (and sometimes it is even associated with issues related to public finances); it is not infrequent either that from time to time its existence as a separate branch of law is questioned. However, the importance of its existence as a separate branch of law arises from the origin and evolution which are closely related to the isolation of such financial institutions as: money, tax or state budget.<sup>191</sup> Agreeing with Cezary Kosikowski, we may say that these institutions are not the effect of law because they had existed earlier, before the adoption of norms to regulate them.<sup>192</sup> Their legal character, however, but also, first and foremost, the social interest present in the above examples, has created the need for regulation. Money as well as taxes are dynamic institutions that evolve over years and adjust to changing circumstances and although some of the elements (and functions) constituting these institutions remain intact, changing circumstances enforce new interpretations of the same elements. This, in turn, influences law which, as repeated many times above, must have regard for the reality it regulates. And so, a legislator today must face challenges resulting from the introduction of electronic money or the desire to impose a financial transaction tax. The significance of these institutions for the functioning of the State makes them public institutions that require public regulation, i.e. regulations that will guarantee certain specific roles and tasks performed by the State specificity of the matter regulated and have enforced development of a separate branch of law – financial law – generally considered as a part of public law.<sup>193</sup>

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<sup>191</sup> The opinion that despite the rich academic achievements of financial law there have been only few works devoted to the fundamental issues ordering the terminology and understanding of financial institutions and the legal ground for their functioning is right. See A. Gomułowicz, J. Małecki, *Formy prawne stosowania prawa finansowego*, in: C. Kosikowski [ed.], *System prawa finansowego, Teoria i nauka prawa finansowego*, Vol. I, Warszawa 2010, p. 329.

<sup>192</sup> C. Kosikowski, *Geneza i ewolucja oraz stan obecny i przewidywania na przyszłość prawa finansowego*, in: C. Kosikowski [ed.], *System prawa finansowego, Teoria i nauka prawa finansowego*, Vol. I, Warszawa 2010, pp. 15-16.

<sup>193</sup> It is worth here pointing to a discussion that has been going on for many years regarding the division of legal norms into those binding in private law and those in public law. Different opinions on this division are sometimes voiced. For example Natalia Gajl believes that due to the extensive scope of the application of public law norms, it is difficult to predict the line of demarcation between the norms of public and private law. Both are entangled in each other in a very complicated way the effect of which is the emergence of new constructions in which the "publicisation" of law is tied to the application of many civil law constructions which had earlier only and entirely a private law character. Although this view was expressed already several dozen years ago, it is still valid with one reservation

Financial law covers many aspects of the functioning of a contemporary state, of which all are to some extent connected with economy and constitute its very extensive and complicated being. One of its elements is the financial market which is currently the focus of special attention of the legislator. It must be remembered that thanks to the financial market which plays the role of an intermediary between entities who have this capital and those who need it, the economy can procure capital and develop. Last but not least, the financial market determines the functioning of individual states which seek funds necessary for maintaining their budget balance.

These dependences are only some of the examples of the need to accept the thesis that global evolutionary development has resulted in the development of a new specialty, financial market law, which derived from the already existing financial law.<sup>194</sup> This new law constitutes a "completely new complex of legal regulations, manifesting the principles of the organisation and functioning of a financial market, including its control and supervision by the State, and connections with public financial services (e.g. taking out a public loan on a financial market). These regulations are not autonomous. They cannot be counted as private law or be attributed to any other area of public law, than financial law".<sup>195</sup> Financial market law, similarly to financial law, may be referred to as "borderland law" since it shows connections with other areas of law (EU law, constitutional law, administrative law, civil etc.).<sup>196</sup> Currently it has its own concepts, terminology and institutions, and is supported by constructions of universal character with their sources in civil law, criminal law or financial law. It also includes the influence of the State on the organisation and functioning of financial market institutions and may be

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though: although the political and economic circumstances have changed, the tendency to publicise law (and financial market law in particular) has been continuing owing to the legislative activity of the European Union. The view expressed in Rafał Szczepaniak's work has been also present in other works and the claim is that "on the other hand there has been frequent mention in academic circles that private law is more mature and better shaped thus being a universal, or common law, and in consequence the principles developed based on private law permeate, in some way, the whole legal system". For more on that compare N. Gajl, *Instrumenty finansowe w zarządzaniu gospodarką narodową*, Warszawa 1988, pp. 22-24 and R. Szczepaniak, *Zagadnienie praw podmiotowych na styku prawa prywatnego i publicznego. Rozważania de lege ferenda na przykładzie opłat należnych komornikowi*, in: *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No 3 2014, p. 68.

<sup>194</sup> According to Cezary Kosikowski, whether financial law can be qualified as an autonomous branch of law depends on whether it is possible to base it on its own institutions from the scope of the subject and object of legal regulation, taking account of the procedure of their application or enforcement. And what is more, also legal and financial regulations, according to the same author, reveal certain differences in comparison with those that govern other areas of social, economic and political life. See C. Kosikowski, *Prawo finansowe. Część ogólna*, Warszawa 2003, pp. 33-36.

<sup>195</sup> C. Kosikowski, *Geneza i ewolucja oraz stan obecny i przewidywania na przyszłość prawa finansowego*, op. cit., pp. 31-32.

<sup>196</sup> W. Nykiel, *Normy prawa finansowego*, in: C. Kosikowski [ed.], *System prawa finansowego, Teoria i nauka prawa finansowego*, Vol. I, Warszawa 2010, p. 38.

described according to the following criteria that (normally) serve to distinguish between different areas of law. They are:<sup>197</sup>

1. The subject of regulation, i.e. the scope of the social relationships regulated;
2. The method of regulation;
3. The subjects (entities) to whom the legal norms are addressed;
4. The principles of law that are relevant for a given area of law;
5. The scope of applicability;
6. All complemented by the criteria of interest, purpose of a legal norm, or historical tradition.<sup>198</sup>

Enforcement of financial market law ought to be looked at as, predominantly, actions taken by public authority bodies which have certain defined competences and powers as well as instruments for law enforcement, granted to them by the legislator with regard to the matter regulated, and used by these bodies in performing conventional acts of heavy legal weight, such as those creating certain special norms<sup>199</sup> or amending financial market regulations in a manner provided by law, based on established factual states and leading to certain legal effects.<sup>200</sup>

Writing about the norms and their significance one ought to refer to the manner in which they are approached in the doctrine of financial law. The concept that is particularly important from the point of view of i.e. the economisation of the law discussed in this book as well, is **the creation of legal norms**. Certain economic phenomena referred to in this concept may also be successfully referred to the financial law regulations. Following their division proposed by Gajl four main groups may be distinguished (as composed of):<sup>201</sup>:

1. Norms which create new organisational structures of an economic character, such as financial institutions (approached subjectively) e.g. banks, credit institutions, paying institutions etc.<sup>202</sup> The procedures according to which they

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<sup>197</sup> W. Gromski, *Gałąż prawa*, in: U. Kalina-Prasznic [ed.], *Encyklopedia prawa*, Warszawa 2007, p. 204.

<sup>198</sup> C. Kosikowski, *Samodzielny byt prawa finansowego jako działu prawa i problem jego autonomiczności*, in: C. Kosikowski [ed.], *System prawa finansowego, Teoria i nauka prawa finansowego*, Vol. I, Warszawa 2010, p. 428.

<sup>199</sup> The analysis of literature, especially that on the theory of law, leads to a reflection expressed by Gajl already in 1980s that due to the wide extent of the impact exercised by financial instruments, an analysis of financial legal norms may constitute a proper research field for theoretical legal science, especially since, as it is today believed, interest in this extremely important issue seems to be negligible. More on the characteristics of legal norms regulating financial matters in: N. Gajl, *Instrumenty finansowe w zarządzaniu gospodarką narodową*, op. cit., pp. 22-41.

<sup>200</sup> Compare A. Gomułowicz, J. Małecki, *Formy prawne stosowania prawa finansowego*, in: C. Kosikowski [ed.], *System prawa finansowego, Teoria i nauka prawa finansowego*, Vol. I, Warszawa 2010, p. 332.

<sup>201</sup> N. Gajl, *Instrumenty finansowe w zarządzaniu gospodarką narodową*, op. cit., p. 32.

<sup>202</sup> For more on the regulation of payment services, see D. Cyman, *Elektroniczne instrumenty płatnicze a bezpieczeństwo uczestników rynku finansowego*, op. cit.; Z. Ofiarski, *Zapłata podatków lokalnym instrumentem płatniczym – uwagi na tle redakcji art. 61a Ordynacji podatkowej*, in: R. Dowgier

are created are strictly defined by law and are also subject to the provisions of the EU's financial market law as well as the principles developed in the course of its enforcement (mutual recognition, maximum harmonisation etc.).

2. General (programme and delegated) norms regarding economic phenomena that serve to realise general projects with no time limit, as well as suprastate projects such as e.g. creation of a new financial architecture within the EU<sup>203</sup>, of which one part is the European System of Financial Supervision<sup>204</sup> or the Banking Union.<sup>205</sup> What is worth noting is that many of these norms may be decoded using for their interpretation the preambles of EU legislative acts which, even if lacking the status of a legal provision, are extremely useful in the exegesis of the regulations contained in regulations or directives.
3. Explanatory (complementary) and qualifying norms which can be found in provisions containing glossaries as well as in legislative acts which, even if not always commonly binding, serve to complement the primary acts. They include recommendations<sup>206</sup>, opinions, recommendations (sometimes classified as soft law)<sup>207</sup>, as well as the novel in EU financial market law binding technical standards (BTSS).<sup>208</sup>

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[ed.], *Ordynacja podatkowa. Stan obecny i kierunki zmian*, Białystok 2015, pp. 251-267; W. Srokosz, *Instytucje parabankowe w Polsce*, Warszawa 2011; A. Zalcewicz, *Nadzór Komisji Nadzoru Finansowego nad rynkiem usług płatniczych – nowe uregulowania prawne w zakresie kompetencji i zadań nadzorczych*, in: E. Fojcik-Mastalska, E. Rutkowska-Tomaszewska [eds], *Nadzór nad rynkiem finansowym. Aktualne tendencje i problemy dyskusyjne*, Wrocław 2011; pp. 137-147; T. Nieborak, *Rynek usług płatniczych jako element rozwoju przedsiębiorczości – aspekty prawno-finansowe*, in: A. Pomorska [ed.], *Krytyka prawa. Niezależne studia nad prawem, Vol. V, Przedsiębiorczość. Aspekty prawne*, Warszawa 2013, pp. 67-88.

<sup>203</sup> A. Jurkowska-Zeidler, *Nowa globalna architektura finansowa*, in: Gdańskie Studia Prawnicze, Vol. XXV: W. Adamczak [ed.], *Księga Jubileuszowa Profesora Zdzisława Brodeckiego*, Gdańsk 2011, p. 535 et seq.; T. Moskal, *Sieć bezpieczeństwa bankowego. Aspekty prawne*, Wałbrzych 2015, pp. 13-98.

<sup>204</sup> M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, op. cit., pp. 130-149; P. Stanisławiszyn, *Nadzór makroostrożnościowy w Unii Europejskiej. Jak bardzo potrzebny? Jak bardzo skuteczny?*, in: W. Rogowski [ed.], *Nowe koncepcje nadzoru i regulacji rynku finansowego. Nadzór makroostabilnościowy. Nadzór bankowy SKOK. Instrumenty finansowe*, Warszawa-Kraków 2014, pp. 11-27.

<sup>205</sup> See J. Monkiewicz, *Unia bankowa jako zmiana architektury regulacyjnej i nadzorczej rynku finansowego z perspektywy ekonomicznej*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, op. cit., pp. 59-73; A. Jurkowska-Zeidler, *Prawo unii bankowej*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, op. cit., pp. 74-93; T. Nieborak, *Unia bankowa – w stronę bezpieczeństwa i stabilności rynku finansowego Unii Europejskiej?*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, op. cit., pp. 94-112.

<sup>206</sup> More on that in: T. Nieborak, *Rekomendacja Komisji Nadzoru Finansowego jako element nadzoru ostrożnościowego – synteza dyskusji*, in: I. Czaja-Hliniak [ed.], *Nauka prawa finansowego po I dekadzie XXI wieku, Księga pamiątkowa dedykowana Profesorowi Apoloniuszowi Kosteckiemu*, Kraków 2012, pp. 301-312.

<sup>207</sup> M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, op. cit., pp. 150-168.

<sup>208</sup> *Ibidem*, pp. 169-176.

4. Special (detailed) norms defining economic phenomena into which parametric norms may be included. They are defined as "legal norms the subject of which, i.e. the behaviour of their addressee presumed under predicted circumstances, is determined by numerical values (parameters)".<sup>209</sup> When these norms refer to the value that is the subject of a financial regulation, we may speak of parametrical financial norms. Their encoding in a given legal provision may serve the purpose of either achieving a certain desired state (e.g. stability and security of the financial market) or stimulating certain specifically defined behaviours. The analysis of financial market law justifies considering these norms as norms that are commonly called prudential. Generally speaking they serve the process of internal management of a financial institution through supervision and control exercised over the risk undertaken, which in consequence leads to increased security of the actions undertaken by a given entity, and indirectly, increased security of the funds vested in the institution by its clients. The most common prudential norms used include: solvency rate, capital engagement rate and capital requirements.<sup>210</sup>

Law as a set of norms ought to be understood as a category of universal axiological values that have developed in a given legal culture.<sup>211</sup> What is important is that when (financial market) law is being made or enforced, ethical standard and axiological values are left aside. If this happened, the essence of law as an instrument serving harmonious and just<sup>212</sup> development would be lost. And yet, this development is to take into account to the maximal extent the (financial, intellectual and behavioural) interests of individuals rather than only focus on profit and

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<sup>209</sup> W. Nykiel, *Normy prawa finansowego*, op. cit., p. 47; See also W. Nykiel, *Norma parametryczna*, in: ZNUŁ, series I, issue 19 1977, pp. 135-145.

<sup>210</sup> Also see M. Żurek, *Kapitał regulacyjny w Dyrektywie CRDIV oraz Rozporządzeniu CRR – odpowiedź normatywna na kryzys finansowy w UE*, in: *Monitor Prawa Bankowego*, No 6 2014, pp. 32-51.

<sup>211</sup> Z. Ziemiński, *O stanowieniu i obowiązywaniu prawa. Zagadnienia podstawowe*, Warszawa 1995, p. 116 et seq.

<sup>212</sup> Writing about justice Andrzej Gomułowicz referred to the thesis formulated by Wojciech Łączkowski that "justice constitutes a value of good law which by virtue of its very essence should be just". See A. Gomułowicz, *Zasada sprawiedliwości podatkowej w orzecznictwie Trybunału Konstytucyjnego. Aspekt materialny*, Warszawa 2003, p. 11 and the literature quoted there, including W. Łączkowski, *Aksjologiczne problemy stosowania prawa*, in: *Roczniki Nauk Prawnych KUL*, Vol. III 1993, p. 61 et seq.; This type of law, also referred to as fair law, ought to be founded on an axiological system containing objective truth about a humankind. Contemporarily, at the time of progressing financialization and economisation as well as consumption, this view may be regarded as revolutionary, but this would be a big mistake. It should be remembered that the essence of law ought to be manifested in values which this law is to protect and serve humankind. The economic (financial) sphere is of course important as it provides capital that is indispensable for, say, new medical or technical solutions. This capital is sourced in the financial market whose operations in the area of, for instance, money creation, would not be possible without funds originating from individual members of societies, and who are in practice, the lower players in the market described.

money.<sup>213</sup> Although in practice such a postulate may turn out difficult to realise, it is not totally impossible either. Its materialisation at the stage of law creation will have occurred already at the time when they are referred to the system of values mentioned above, for the realisation of which the stage at which law is enforced will be of crucial importance. Law cannot be enforced thoughtlessly or mechanically.<sup>214</sup>

Therefore of essential importance for the functioning of law is its **interpretation**. This is because the final shape of legal norms is the shape given to them by bodies of public authorities competent to constitute, or interpret the law. This usually happens at the stage of law enforcement (operational interpretation) although the growing role of the *in abstracto* interpretation is also emphasised. It is connected, among other things, with the need to ensure citizens legal security. Thus the scope of freedom that is left to a body who interprets law is important. It is usually subject to the influence of numerous formal factors as well as informal rules that arise, for instance, from the culture of a given society. Apart from these, Bogumił Brzeziński emphasises external, non-legal factors, such as views on the essence of law, the hierarchy of the values respected in a given place at a given time that influence the body interpreting law, as well as certain preconceptions, prejudices, lack of knowledge or ignorance. Law seen as a set of legal norms is always a result of interpretation and hence it does not exist without interpretation. Legal norms are encoded in the content of normative acts.<sup>215</sup> Interpretation (construction) serves to decode these norms.

The interpretation of the provisions of financial law (and therefore of financial market law too) has not as yet been analysed in any detail, save for one of its main areas which is tax law. It can nevertheless be assumed that all constructions of interpretations that are known in legal studies (methods, directives, interpretative presumptions, or strategies) may also be applied in financial law. This will also be true of financial market law which is exceptional owing to its specific legal terminology used to describe an extremely complicated matter, the impact of international treaties on it, new forms of market regulations (soft law in particular), the defining of the goals of law when general clauses are used, and its interdisciplinary character. This last characteristic is the result of the strong connections of financial market law with civil and private law on the one hand but on the other hand the still much stronger, and not encountered in other areas of financial law, influence of other sciences: economics, psychology or sociology. All these should

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<sup>213</sup> See J. Crotty, *If Financial Market Competition is Intense, Why are Financial Firm Profits so High? Reflection on the Current 'Golden Age' of Finance*, in: *Competition&Change*, Vol. 12 No 2 2008, pp. 167-183.

<sup>214</sup> A. Gomułowicz, J. Małecki, *Formy prawne stosowania prawa finansowego*, op. cit., pp. 333-334.

<sup>215</sup> B. Brzeziński, *Wykładnia przepisów prawa finansowego*, in: C. Kosikowski [ed.], *System prawa finansowego, Teoria i nauka prawa finansowego*, Vol. I, Warszawa 2010, pp. 284-285.



be taken into account in the process of decoding legal norms from the provisions of financial market law using **linguistic, systemic as well as purposeful** interpretation. Each will be in this case equally important.

First of all it will be necessary to make use of a thinking process i.e. interpretation of the language used (**linguistic interpretation**) in order to decode the language, words, syntax and grammar as carriers of information intended by the legislator. Of great help at this stage will be concepts that have been defined in the legislative act, although they may cause identity problems due to being identical to those encountered in other branches of law<sup>216</sup> (e.g. an investment firm whose definition is fully understood by those operating within financial market law but generates controversy when analysed by a civil lawyer).

Despite the fact that language is the medium through which we learn about law, law is also based on specific values and this has been repeated many times in this work. In order to find these values we use **a systemic interpretation** which, using proper argumentation, will be capable of identifying rules that govern a given system of law as well as the values upon which it is created. Without going into a detailed analysis, it should suffice to say that this kind of interpretation is of great importance for the process of the enforcement of financial market law. The interpreter of the provisions of this law will, of course, first try to understand the language used to formulate the provision. However, when doing so he will have to reflect on the meaning (impact) of his understanding of law adopted for the understanding of the whole system of law which (apart from the economic system) is one of the foundations upon which the social system functions. It may thus be claimed that owing to the specific nature of the regulated matter and the difficulty of embracing all its elements, a systemic interpretation will be of frequent use. Those who enforce financial market law need to demonstrate knowledge, sensitivity and maybe an intuitive understanding of the nature of the financial market and be capable of identifying the values that underlie financial market law and the possible consequences of the decisions made. In this last case it may be of help to look at the market participants from the behavioural perspective and to seek to understand the emotions mentioned by Petrażycki which govern those who enforce law (but also those who make it) and which arise from the law being in force. The law, the existence of which is justified by the objectives the legislator had in mind and which can be read with the use of **a purposeful interpretation**. The purpose in this case is a reference point and may be clearly stated in the wording of a given provision and it may also be ascribed to a given legislative act by the interpreter of the law. "Familiarity with the social and economic relationships existing at the time when a legislative act was adopted together combined with the content of the act may,

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<sup>216</sup> Ibidem, pp. 295-297.

up to a certain extent, identify and assign certain goals (purposes) which the legislative act is to serve.”<sup>217</sup>

Referring the above to financial market law it may be said that interpretation is very important in law enforcement and it is also present at the stage of its creation. When law is being made, this process is accompanied by certain intentions to achieve certain goals which in turn serve to realise certain values. Assuming that an axiological element constitutes the foundation of the functioning of law, its essence and the purposes it is to serve, decoding of the values underlying law will be of primary importance. Even if it may seem that the relationship described here is obvious, in practice it may occur that decoding the values may already be a difficult task. Taking as an example financial market law, several types of values which this law is to protect may be distinguished. The fundamental one is trust in the market. Although it has already been stated a number of times, trust is the value upon which other values such as stability, market security, customer protection, risk management or limitation etc. are based. Interpretation of legal provisions in the spirit of these values turns out difficult in practice because, apart from knowledge, it requires that the interpreter of a provision uses his intuition as well, and in the case of the law of the EU Member States, takes into account the specificity of EU law and its interpretation. Intuition is, in many ways, responsible for the proper (or improper) interpretation and, consequently, enforcement of financial market regulations. For instance, when interpreted based on the stability and security of the market (the latter being the source from which trust in the market is derived), the consequences of the interpretation of regulations must be first defined and the subjects “involved” must be specified. It will then turn out that the stability and security of the financial market depend on subjects defined as financial institutions as well as professional and non-professional clients of the former. Hence a dilemma about which party is more important for maintaining market security and stability, those who manage financial institutions, or those who make use of the services provided by financial institutions, or maybe both, equally. Promoting the former at the expense of the latter may result in the weakening of trust in the market and undermine its stability and security. But diminishing the role of the clients of financial institutions will bring about a similar result. This confirms the thesis about the specificity of financial market law as a new branch that has developed within financial law.<sup>218</sup> At the same time it justifies the thesis that the process of creating and enforcing financial market law requires that an instrumentalist approach to it (as presented) is undertaken. It also requires us to see it as a complex social phenomenon which in order to be described and understood must be approached in an interdisciplinary way at both stages, when law is be-

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<sup>217</sup> Ibidem, p. 306.

<sup>218</sup> E. Fojcik-Mastalska, *Prawo rynku finansowego w systemie prawa*, op. cit., pp. 19-26; C. Kosikowski, *Nowe prawo rynku finansowego Unii Europejskiej*, op. cit., pp. 27-38.

ing created and then enforced. This approach means that behavioural elements (which will be analysed later in this work) as well as economic elements (discussed in the above section on the economic analysis of law) must be considered. If this happens, the analysis undertaken must be founded on the achievements of the doctrine developed to date, in which several major principles have been identified. They are presented below, based on the work by Brzeziński *Zasady tworzenia prawa finansowego (Próba sformułowania) (Principles of financial law making)*.<sup>219</sup>

The first principle concerns respecting economic laws and regularities as boundaries of financial law regulations which in fact are related to economic relationships which, in turn, take the form of different dependencies and relationships referred to as economic laws. These laws are characterised by a certain objectivism which means that they are binding regardless of being noticed by subjects of economic relationships. This regulation exercises a strong impact on these relationships and may either modify or exclude them. Therefore it is important to define a certain regulatory optimum which will then manifest itself in optimal relationships between the desired and the negative effects of financial law regulations.

The next principle concerns the short- and long-term effects of a regulation that influences the consequences of law implemented, depending on the length of time that has elapsed since it was adopted.

Another extremely important principle concerns the effects which both indirect and direct regulations have in the individual links of the financial system. They may take different forms, ranging from what they currently are in a given individual link, to those which may apply to the whole financial system. Moreover, these effects may be under certain circumstances predictable, and in some others they will not; they may also be assessed as positive or negative. Last but not least, sometimes they are the result of an intentional action on the part of the regulator, although it frequently happens that their consequences had not been taken into account in the first place, when the regulation was being worked on.

The fourth principle concerns the fluctuation of the changes in the level of charges and financial obligations. Its definition says that a change in the factor causing the fluctuations ought not to be by leaps and bounds in order to avoid excessive cost.

When regulations are being worked on, the principle of the financial interest of the State is frequently also taken into account. The concept of the State's financial interest is related to the understanding of the State as an organisational form of a society and the premises of a widely understood regulation. The latter was discussed at the beginning of this Chapter.

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<sup>219</sup> B. Brzeziński, *Zasady tworzenia prawa finansowego (Próba sformułowania)*, in: Państwo i Prawo, No 5 1986, pp. 68-76.

The fifth principle concerns the adequacy of the degree of detail, or the “depth” of the matter to which a legal regulation pertains, and ought to be tied to the scale of complexity of the phenomenon being regulated, as well as depend on the understanding or knowledge of its structure, qualitative characteristics and possibility of its quantification. It happens too often that existing regulations do not meet the demands of reality because of the lack of familiarity with the matter being regulated. This can best be seen when we look at Polish doctrine of financial law and the concept of **the economisation of the law** discussed in this book. As Marian Weralski has noted, “a considerable influence on the shaping of financial institutions is also exercised by economic sciences. This, however, is a very complex combination of issues connected with the economisation of financial law”.<sup>220</sup> This process consists in embracing certain economic categories within legal norms”.<sup>221</sup> It is identified as a process of the expansion of the economic premises that lie at the foundation of financial law regulations.<sup>222</sup> In this case, the norms of financial law, while shaping economic relationships, make use of objective economic forces (economic laws and regulations). This happens because of the working of a number of factors that are mutually interrelated, and of which the key ones are: the expansion of the economic premises underlying financial law regulations, the interference of these regulations in the sphere of economic activity<sup>223</sup>, and in consequence the necessity of finding new economic solutions within the scope of legal norms, which will, to a great extent, be norms of financial law.<sup>224</sup> What follows is that at times the instruments which the financial market creates are encompassed in a legal framework. This process, extremely important since it shapes economic relationships in the market, ought to be conducted according to the principle discussed here, while the regulator of the financial market should put the utmost care into making sure that he is well familiarised with the matter he is regulating but at the same time he should be capable of maintaining his regulatory philosophy arising from certain premises.

An equally important aspect of the regulator’s activity is his knowledge of the relationships occurring between legal institutions (understood here as abstract concepts reconstructed on the basis of certain specified legal norms) and categories serving to generalise the realistic and objective economic phenomena, which is possible as a result of learning their essential properties.<sup>225</sup> Analysing the concept of an “economic category”, Weralski draws attention to three regularities

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<sup>220</sup> M. Weralski, *Pojęcie instytucji prawnofinansowych i ich systematyka*, in: M. Weralski [ed.], *System instytucji prawnofinansowych PRL*, Vol. I, Wrocław 1982, p. 40.

<sup>221</sup> N. Gajl, *Instrumenty finansowe w zarządzaniu gospodarką narodową*, op. cit., p. 27.

<sup>222</sup> M. Weralski, *Instytucje prawno-finansowe a kategorie ekonomiczne*, in: M. Weralski [ed.], *System instytucji prawnofinansowych PRL*, Vol. I, Wrocław 1982, p. 43.

<sup>223</sup> M. Weralski, *Pojęcie instytucji prawnofinansowych i ich systematyka*, op. cit., p. 43.

<sup>224</sup> N. Gajl, *Instrumenty finansowe w zarządzaniu gospodarką narodową*, op. cit., p. 27.

<sup>225</sup> M. Weralski, *Instytucje prawno-finansowe a kategorie ekonomiczne*, op. cit., p. 55.

connected with it. Firstly, to the fact that they arise as a realistic reflection of the existing economic relationships, and are not just an effect of speculative reasoning detached from reality. Hence the need to see them in a broader, also social, dimension. Secondly, these categories should also be considered from a historical point of view, drawing from past experience. Thirdly, and most importantly, the categories described here are generalisations of objective economic phenomena which are the outcome of human social practice.<sup>226</sup> Despite the objective existence of economic phenomena, as well as the objectively existing (inter)dependencies among them, the objective regularities which govern them do not deprive man of the possibility of consciously shaping economic reality. This is because while learning about these phenomena and the interdependencies among them as well as economic regularities, humankind is able to use them for the purposes of achieving the goals it set for itself, using for that purpose, among other things, law.

In consequence we are dealing with different economic categories, coexisting and frequently sounding identical, existing alongside legal institutions (money, budget, financial instruments, securities, options etc.). Both are most certainly abstract concepts, creations of the human mind, of a man who when learning about the surrounding reality and its rules is trying, to quote Weralski, to generalise them by making and enforcing legal regulations he himself has created.<sup>227</sup> Financial law as a separate branch of law is one that is most certainly the most closely related to economics.<sup>228</sup> Scholars representing this branch even usually claim that without economics, financial law is like a ladder without rungs. This saying illustrates very adequately the relationships between financial institutions and economic categories. When we analyse the way of thinking of a lawyer specialising in financial law in particular, and that of an economist, we can easily conclude that both, each formulating concepts based on his or her own area of scholarly interest see the same phenomenon differently because each focuses on and takes into account selected features that are interesting or essential from the point of view of the science they represent.<sup>229</sup> This “different view” may also be the source of discrepancies between law and economics (lawyers and economists) that arise from, as we may say, (their) different philosophies. For instance the regulations adopted to protect the interest of market participants and especially, the values specified in them, interfere in the economic forces of the financial market they aim to protect. Thus the conflict of interest between law and economics becomes a natural consequence and an issue if the limits of the interference of law in the

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<sup>226</sup> Ibidem.

<sup>227</sup> Ibidem, p. 56.

<sup>228</sup> It is believed that it belongs to those branches of law in which the social (public) interest occupies the primary position, while by always participating in the relationships that are created on the basis of norms, the State interferes indirectly in social life. See C. Kosikowski, *Legislacja finansowa*, Warszawa 1998, p. 14.

<sup>229</sup> M. Weralski, *Instytucje prawno-finansowe a kategorie ekonomiczne*, op. cit., p. 56.

economic sphere returns. Defining these limits is obviously not easy and requires a more thorough analysis of the reality being regulated with legal norms, and the consequences of such regulation in particular. Especially, since the legislator's object of interest is a financial market which, and this is worth recalling, must always be seen as an element of an economic system which in turn, is part of the social system.

The analysis of the law making and law enforcement process in the context of the economisation of the law leads us to formulate the thesis that this process is an excellent example of **regulatory dialectics** taking place between the subject regulating and the one being regulated. This means also that new solutions (instruments) that appear in the financial market and are created by participants in this market entail an initiative on the part of the legislator to encapsulate these solutions in a certain legal framework. As will be shown later in this book, this is not a simple process because what needs to be regulated are frequently very complicated economic constructions. Although relatively easy to describe or explain using the language of economics, the task is no longer so easy when needed to be defined in the language of law. In the latter case the problem is that law making assumes the creation of universal constructions, by which we understand solutions that may be applied to more than one case. In practice, achieving this universality turns out to be extremely difficult. Taking as an example derivative financial instruments which are commonly used in the financial market, they may have a standardised form, such as those functioning in the market. They may also, however, be tailor-made by a financial institution, to match the needs of its clients, say to protect them against adverse weather conditions (weather derivatives). A person not actively familiar with financial markets may feel that this kind of protection is closer to science fiction than real life. But far from that! The example given here has been taken from a real situation and what is more, such instruments are playing an increasingly important role. These instruments are commonly referred to as off-market instruments, also called over-the-counter derivatives (OTC derivatives). According to the Bank for International Settlements the global market of OTC derivatives at the end of 2014 was about 630 billion USD<sup>230</sup>, a sum several times greater than the GDP of the whole globe!<sup>231</sup> The difficulty with this kind of instrument usually lies in their flexibility, or in other words, the possibility of shaping their constructions freely, depending on the needs of a client. This shows at the same time the complexity of the problem i.e. the public – private law relationships that are based on tradition, philosophy, the (researcher's) workshop and the like. However, because of the strategic importance of the financial market for the today's economy, the legislator (and the EU legislator in particular) de-

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<sup>230</sup> 630 000 000 000 000 USD!

<sup>231</sup> OTC derivatives statistics at the end-December 2014, available on [http://www.bis.org/publ/otc\\_hy1504.htm](http://www.bis.org/publ/otc_hy1504.htm) [accessed on 26 September 2015].

cides to cross these barriers by not only expanding the scope of intervention, but by deepening it as well. This is because the public-private law regulations of the financial market contain in their structures elements which will directly or indirectly interfere in the relationship of the parties to a civil law agreement. What is more, the legislator reserves to himself a further initiative based on the use of the “new” forms of making and enforcing law, including soft law. All this of course is being done within the competences granted.

The aim of the description of the whole process is the protection of the values (so many times mentioned in this book) which are important from the point of view of the society and the state, as well as trust in the market and the protection of its participants. This protective process, albeit important, may bring about certain consequences. Firstly, remembering the regulatory dialectics referred to above, it may be the reaction of the subjects being regulated to new legal solutions the effect of which may be a desire to change the construction of the financial instruments used in a way that enables their exclusion from regulation. Secondly, it may be impossible to extend it to all the solutions functioning in the financial market, there may be the problem of their territorial scope (extraterritorial aspect of financial markets), their subjectivity, or a situation in which application of the existing legal solutions would turn out indispensable. In this latter case it would be a situation where despite the existence of legal norms that could be used in particular case, they were not used at all or were used improperly by the authorised body (e.g. a supervisory authority). The effects of such a state of affairs may be divided into apparent or hidden effects. The former include, for instance, claims for damages paid by the State to injured parties suffering as a result of negligence or failure to act by relevant bodies. The latter, although invisible, may be of an economic dimension and entail various social or systemic consequences. These consequences, in fact, simply arise from the behavioural nature of the market and its regulation, and a good example of this is a loss of trust in the market.

The lack of these regulations as well as their improper enforcement (or failure to enforce) can be seen in many examples from the past, which always led to the weakening of trust in the market, arousal of anxiety, concerns and even panic. Therefore it is so important to consider all these regularities in the process of making financial market law and in its enforcement, which then has a chance to become efficacious law<sup>232</sup>, as well as effective, thus ensuring the harmony of the

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<sup>232</sup> Writing about the effectiveness of the financial system as a set of norms regulating the functioning of financial institutions, the main objective of which is to link the supply and demand for capital, attention is drawn to the fact that the basic criterion for assessing these norms as well as their structure forming a financial system, is the effectiveness of their impact on the processes that are realistic from the point of view of the optimal satisfaction of an individual and a group, and the current and future needs of the society. Although in the opinion cited the realistic sphere is emphasised, the abstract sphere that refers to behaviours (emotions) of market participants is also of im-

social results of the action of certain legal norms and their compliance with the legislator's intentions.

**The effectiveness of law** analysed from the point of view of legal financial regulations must be analysed with the prior assumption that there exist strict dependencies (as has been shown earlier in this work) between financial law and economics. We must agree with the thesis that "effectiveness of a legal regulation of financial phenomena ought to be considered not only in the light of the evaluation of intended assumptions but also taking account of their different, frequently unintended side effects. The effectiveness of a legal regulation is limited by economic as well as legal factors. Therefore what needs to be considered is the extent to which financial phenomena as economic phenomena may be the subject of legal regulation. Another issue is the extent to which law, owing to its nature may be useful for the realisation the goals of the financial policy adopted."<sup>233</sup> What is also important from the point of view of the effectiveness of law is the scope of regulation because there exists a certain 'detail threshold' which when crossed will result in unfavourable and unpredictable consequences.<sup>234</sup> This is the reason why the detail and depth of financial law regulations should be contingent upon the optimal social effects of the regulation in question.<sup>235</sup>

#### 4. Summary

Summing up it must be stated that financial market law is certainly a challenge for a legislator from whom extremely specialist knowledge on the matter regulated is required, and who also must ensure that the regulations are enforced consistently, especially when it comes to the social sphere. The social sphere is always focused on a human being who is either a manager of a financial institution or a recipient of the services it provides. A human being, whose behaviours

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portance. Compare Z. Fedorowicz, *Racjonalny system finansowy. Główne kierunki reformy*, Warszawa 1984, pp. 5-9.

<sup>233</sup> M. Weralski, *Instytucje prawno-finansowe a kategorie ekonomiczne*, op. cit., p. 64.

<sup>234</sup> The mechanism has so far been developed in financial law which would research the efficacy of its norms. Kosikowski proposes for that purpose a model adopted for the theory of law and complemented with achievements of administrative law in that regard. Consequently, when studying the effectiveness of financial law norms, the efficacy of the realisation of its goals with the help of binding laws as well as the efficacy of sanctions are studied. When the effectiveness of law is studied based on administrative law regulations, the following are taken into consideration: 1) the object and objectives of the regulation; 2) measures available to legal intervention; 3) legislative competences; 4) manner of law-making; 5) information flow regarding legal norms; 6) making decisions about law enforcement, and 7) ensuring legal dispositions. After C. Kosikowski, *Legislacja finansowa*, op. cit., p. 30; See also Z. Ziemiński, *O stanowieniu i obowiązywaniu prawa*, op. cit., pp. 101-110; Z. Kmiecik, *Skuteczność regulacji administracyjnoprawnej*, Łódź 1994, p. 48 et seq.

<sup>235</sup> M. Weralski, *Instytucje prawno-finansowe a kategorie ekonomiczne*, op. cit., p. 64.



change depending on his feelings, emotions or well-being as well as on the law which in the form of a social institution determines the essence of a given social group and attitudes of its members. Here the educational role of law can also be seen since law as a dynamic (complex) being in its instrumental function ought to react to the changes that emerge.

The financial sphere is the best example of what has been said above. It is a sphere in which social, psychological, historical, economic and legal issues come together and interact.<sup>236</sup> Therefore it is so important to remember concepts such as the economic analysis of law or Petrażycki's psychologism and draw on these in the process of the creation and enforcement of financial market law which constitutes the foundations of the functioning of the financial market as an element of the financial system. A rational construction of this system ought to be based on certain specified criteria such as its efficacy, compliance of the systemic regulations with the nature of the regulated phenomena and economic laws, internal compliance of the financial system norms, simplicity of the construction of the regulatory norms and their system, and the ability of the financial system to self-regulate (understood as the possibility of implementing amendments to the internal regulations of individual norms with their construction and the whole system left intact).<sup>237</sup> These criteria may be defined as universal and capable of self-regulation. This means that they must be read with reference to the features characterising the whole system, as for example the level of its complexity, territorial extent, or the specificity of the matter regulated. All these may be related to contemporary financial markets which despite being global, are partially regional as well, and use similar types of financial instruments. The configuration of power among the main actors in the financial market remains intact as well. These actors include regulatory bodies, financial institutions and clients of these institutions. There has always also been and will continue to exist one constant element, *homo oeconomicus*, who, at least theoretically, which is the commonly held belief makes decisions rationally and who will be the subject of the next Chapter of his book.

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<sup>236</sup> Also see M. Borucka, *Inżynieria społeczna przez prawo*, in: *Życie Nauki*, Vol. V No 27/28 1946, p. 181 et seq., and J. Szczepański, *Socjologia-socjotechnika-prawo-administracja*, in: *Państwo i Prawo*, No 3-4 1971, p. 433 et seq.

<sup>237</sup> Z. Fedorowicz, *Racjonalny system finansowy. Główne kierunki reformy*, op. cit., pp. 5-19.

# REGULATION OF THE FINANCIAL MARKET AT A TIME OF GLOBALISATION

*There are things which money cannot buy although there not many of them these days. Today almost everything is for sale.<sup>1</sup>*

Michael J. Sandel

## 1. Introduction

Although financial markets have a history of several hundred years and have been frequently researched in many studies, it was only in the last century that they underwent their most dynamic development, mainly as a result of the emergence of many novel forms of investing that are currently available in the new segments of the financial market traditionally associated with banking, capital and insurance. These three segments used to have clear-cut boundaries, and the law had a certain role in maintaining their division. With the increasing role of financial activities in the economies of individual states and their societies, it became apparent that a legal framework was necessary to ensure the proper functioning of the market. It must be remembered that for several dozen years financial markets were predominantly domestic markets. Numerous restrictions on the free movement of capital had successfully limited the free cross-border flow of capital for years. The first attempts to change the existing world economic order date back to the 1940s and resulted in the emergence of supranational institutions such as the International Monetary Fund and the International Bank for Reconstruction and Development. They were both part of the Bretton Woods system, a system which only survived till the middle of the 1970s, but its shortcomings prompted changes in the market and contributed greatly to the development of a new quality known as the system of the floating exchange rate. Although this system constitutes only part of the financial market, or more precisely, the currency market, a thorough analysis of the growing role of different currencies in the financial market in recent decades leads to the conclusion that it is currencies that are among the main foundations of the financial market. What is more, many examples of states whose economies have been seriously hit by currency

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<sup>1</sup> M. Sandel, *Czego nie można kupić za pieniądze?*, Warszawa 2013, p. 15.

crises seem to support this thesis. Many financial instruments developed to open up new ways of increasing the existing capital are based in their construction on currencies.<sup>2</sup> Last but not least, commercial exchange would not be possible were it not for the existence of currencies, the principles which determine their value or the establishment of exchange rates.

How important the commercial exchange is for the economy is well illustrated by the European Union's efforts to save the Euro zone. Without going into a discussion about the Euro zone crisis or the weakness of the Economic and Monetary Union it shall suffice to say that the idea of a united Europe dates back to the 1940s and European integration certainly counts among the most important projects in human history. It has led to the creation of the European internal market where, in the absence of internal borders, its functioning is based on the free transfer of capital, goods, persons and payments. One part of this internal market is the financial market which has undergone substantial transformation since the 1970s when the integration process started, and which seems to have achieved its peak today.

The main elements of this integration process include the ongoing harmonisation of EU legislation relating to the financial sector, the appointment of supra-national monitoring or supervisory authorities, the creation of the banking and capital unions as well as the participation of the European Union in global financial market initiatives.<sup>3</sup> The global character of economic activity crosses state boundaries and the above measures were necessary to ensure unrestricted trade within the internal market, despite the national approach still prevailing in many EU Member states which continue to be separated from one another by political borders. Financial markets today, taken globally, are compared to the British Empire "over which the sun never set". Hundreds of milliards of dollars change hands every day while the production of goods or the provision of services frequently requires the collaboration of entities dispersed all over the world.<sup>4</sup> The effect is the biggest tectonic movement of contemporary times, sometimes termed **globalisation**, while financial markets whose existence is based on money act as catalysts of the process. As rightly noted by Barbara A. Good, money is a particular

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<sup>2</sup> It should be noted here that it is estimated that the use of currencies for the purposes of the global exchange of goods accounts for only 5% of the global exchange of currencies. The remaining 95% constitutes the basis of a currency exchange not related to actual trade, but to an abstract currency market which enables investors to earn profits using currency arbitrage for example. This of course is not without an impact on the functioning of the real economy that is dependent on the exchange rates of individual currencies.

<sup>3</sup> See K. Mitręga-Niestrój, *Stabilność światowego systemu finansowego jako cel nowej międzynarodowej architektury finansowej*, in: J. Żabińska [ed.], *Rola międzynarodowych organizacji finansowych w stabilizowaniu światowego systemu finansowego*. Part II, Katowice 2007, pp. 69-102.

<sup>4</sup> L. Read, *Ja, ołówek*, Warszawa 2009; It is generally agreed that this book excellently illustrates the nature of globalisation and processes related to it.

way of thinking, a way in which human behaviour is arranged, but first and foremost it is an integral part of modern culture, although it does not need to be its object.<sup>5</sup> It seems though that money is its object too, and it would also seem that money is identified with financial markets which influence the economy and are now beginning to influence and manage the lives of contemporary societies, too. This process, sometimes referred to as **financialization**,<sup>6</sup> is **hardly noticed** by the average person without specific legal or economic knowledge, while financial markets use the latest advances in financial engineering and develop sophisticated financial instruments.<sup>7</sup> Consequently, if uncontrolled, these markets may become the source of economic crises like the recent ones. According to Paul H. Dembinski they originated in **the crisis of values**, and the selfish maximisation of profits.<sup>8</sup> The result was a dramatic **crisis of trust** which always weakens creative thinking and prompts anxiety about the future, and in the long run impairs human dignity when jobs or life savings are lost.<sup>9</sup> Perversely, the added value prompted by these events was a discussion on the need for new solutions, in recognition of the need to strike a balance between the financial market and its customers, especially individual ones. The relationship between the two must be seen from the perspective of **the common good** where wealth is understood as the sum of an individual's wealth and the artificial perspective of *homo oeconomicus* must be replaced with **a realistic anthropological human perspective**. The human being is then placed in an egocentric as well as relative dimension and is not focused only on himself but on others (a group or a community) as well.<sup>10</sup> An important element of this reform will certainly be law that creates relationships grounded in axiology.<sup>11</sup> As has been shown in Chapter I, law is an effect of a social process which shapes specified norms of conduct and must take into account the values that are the fundamental values of a given community.

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<sup>5</sup> B.A. Good, *Will Electronic Money Be Adopted In the United States?*, in: Working Paper No 9820, Federal Reserve Bank of Cleveland 1998, pp. 6-7.

<sup>6</sup> See also A. Janc, M. Jurek, P. Marszałek, *Polish Financial System in the Age of Financialization*, Warszawa 2015, pp. 11-36; P. Langley, *Financialization and the Consumer Credit Boom*, in *Competition&Change*, Vol. 12 No 2 2008, pp. 133-147; M.B. Aalbers, *The Financialization of Home and the Mortgage Market Crisis*, in: *Competition&Change*, Vol. 12 No 2 2008, pp. 148-166.

<sup>7</sup> S. Çankaya, *Pros and Cons of Financial Innovation*, in: H. Dincer, Ü. Hacıoğlu [eds], *Globalization of Financial Institutions. A Competitive Approach to Finance and Banking*, Heidelberg 2014, pp. 166-174.

<sup>8</sup> P.H. Dembinski, S. Beretta, *Kryzys ekonomiczny i kryzys wartości*, Kraków 2014, pp. 107-113.

<sup>9</sup> See W. Polak, Słowo wstępne, in: P.H. Dembinski, S. Beretta, *Kryzys ekonomiczny i kryzys wartości*, op. cit., p. 7; See also P. Rotenburger, *Nauka wobec kryzysu gospodarczego, naukowa wobec kryzysu zaufania*, in: R. Kamiński, J. Sójka [eds], *Ekonomiczne i etyczne aspekty kryzysu gospodarczego*, Poznań 2013, pp. 161-188.

<sup>10</sup> A. Glapiński, *Przedmowa*, in: P.H. Dembinski, S. Beretta, *Kryzys ekonomiczny i kryzys wartości*, op. cit., pp. 9-10.

<sup>11</sup> H. James, *The Financial Crisis and the Disciplinary Challenge of Natural Law*, in: *Journal for Comparative government and European Policy*, Vol. 7 No 3-4 2009, pp. 436-449.

In the case of a financial market, **trust** is a value of supreme importance. It is upon trust that the entire structure of the market, a part of a bigger whole made up of the financial, economic and social system, is built. The legislator seeks to achieve the stability and security of the financial market by establishing norms that will protect trust in the market. Security and stability are sometimes termed **global public goods**, and their protection is ensured among other things by risk management, proper market architecture, or the moderation of the behaviour of market participants (by e.g. orders, prohibitions or education).<sup>12</sup> This process involves solving many dilemmas concerning, among other things, the limits of intervention in the market, the methods of such intervention, and last but not least, taking into account the behavioural elements connected with the addressees of the norms adopted, their intellectual capabilities and potential choices. Hence the importance of a proper understanding of the matter regulated (i.e. the financial market), its specificity, structure and the principles governing its functioning.

## 2. Financial market – concept and importance

An analysis of financial market regulation must be preceded by a few words of explanation of why it is so important and what its essence really is. It is also important to place the object of our study in a wider economic and social context. In the literature, there are numerous positive as well as negative definitions of the financial market and its subdivisions: the banking market, the capital market, and the insurance market are regarded as the main ones. EU legislation does not define the financial market univocally but describes its activity through the activities undertaken in it by financial institutions. It is believed that the technique of defining the legal status of a financial institution by ascribing it to the relevant catalogue of financial services which it has the right to provide permits the reconstruction of the structure of the financial market seen through the prism of the financial services this institution provides.<sup>13</sup> Thus, once we know the type of a given activity we can align, or match it with an appropriate subject and when still newer types emerge and are put in a legal framework, the whole legal structure is filled in and the final product may then be defined as a financial market.

Apart from the three traditional segments mentioned above, the financial market in the European Union extends to payment services, investment funds, and rating agencies and is soon to include shadow banking as well. This regulatory

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<sup>12</sup> See also R. Sura, *Zaufanie do podmiotów administracji finansowej w dobie kryzysu*, in: M. Stahl, M. Kasiński, K. Właźlak [eds], *Sprawiedliwość i zaufanie do władz publicznych w prawie administracyjnym*, Warszawa 2015, pp. 609-621.

<sup>13</sup> D. Wojtczak, *Usługi bankowe w regulacjach Unii Europejskiej*, Warszawa 2012, pp. 15-54.

philosophy seen in the EU market is reflected in respective EU legislative acts of which two require special attention.

One is Regulation No 575/2013 on prudential requirements.<sup>14</sup> Its Article 4(1) point 27 introduces the category of “**financial sector entity**” defining it by listing twelve subjects whose detailed characteristics are provided elsewhere in the same Regulation and in other legislative acts regulating the activity of these subjects. Two subjects included in the list are: (i) an institution and (ii) a financial institution.<sup>15</sup> Although it might seem that both denote the same entity, the term “institution” denotes a credit institution<sup>16</sup> and an investment firm<sup>17</sup> while a “financial institution” is to be understood as an enterprise rather than an institution, whose main activity is either the acquisition of share packages or the pursuit of at least one activity referred to in points 2–12 and point 15 of Appendix I to EU Directive No 2013/36.<sup>18</sup> This concept includes financial holding companies, mixed activity financial holding companies and payment institutions in the meaning of Directive (EC) 2007/64 of the European Parliament and of the Council on payment services within the market and the asset management companies, with the exclusion, however, of insurance holding companies and mixed activity insurance holding companies.<sup>19</sup>

Another piece of EU legislation containing an indirect definition of a financial market is the provision of Article 2 point (b) of Directive (EC) 2002/65 of the European Parliament and of the Council concerning the distance marketing of consumer financial services<sup>20</sup> in which the European legislator decided that **financial services** include all services of a banking, insurance, pension(s), investment(s) or payment(s) nature.

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<sup>14</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176/1 as later amended, hereinafter referred to as the CRR Regulation.

<sup>15</sup> M. Fedorowicz, A. Zalcewicz, *Pojęcie „instytucji finansowej” na gruncie europejskiego i polskiego prawa bankowego*, in: *Przegląd Ustawodawstwa Gospodarczego*, No 8 2010, pp. 18-22.

<sup>16</sup> A “credit institution” means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits on its own account (Article 4 (1) point 1 of the CRR Regulation).

<sup>17</sup> An “investment firm” means a person as defined in point (1) of Article 4(1) of Directive 2004/39/EC, which is subject to the requirements imposed by that Directive, excluding three exceptions (Article 4 (1) point 2 of the CRR Regulation).

<sup>18</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176/338, hereinafter referred to as the CRD IV Directive.

<sup>19</sup> Article 4 clause 1 point 26 of CRR Regulation.

<sup>20</sup> Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271/16.

The above two contrasting definitions, both aimed at describing the essence of the (European) financial market, may be regarded as a confirmation of the thesis about the difficulty to formulate an adequate legal definition of a financial market. In consequence, each time the need arises to define the financial market, its definition ought to be broad enough to accommodate its subjectivity (the financial market seen through the prism of the financial institutions operating in it) as well as the objectivity approach i.e. (by the financial services which determine the legal status of a financial institution operating in this market).<sup>21</sup>

The similarities and differences in definitions formulated in law and economics ought to be noted as well. In both cases the financial market is set in the wider context of a **financial system**. The concept of a "system" indicates a complex structure made up of individual elements interacting with one another. If they function properly, the synergy effect, when achieved, contributes to the generation of an added value for the participants who function in this system and use it for their own purposes.<sup>22</sup> In the case of a financial system, the value added can be considered as **the functions** for the realisation of which this system has been developed. It must be first said, though, that the financial system one of whose elements is the financial market with its individual segments, is itself a part of a bigger whole i.e. the economic system which is, in turn, a part of the social system (See Fig.1).<sup>23</sup> This remark, even if seemingly obvious, is of capital importance and should serve as a guideline for legislators and those who enforce the laws made. Any distortion in the financial market (or in the financial system) will produce undesired effects in the economic sphere, and indirectly, in the social sphere as well.

The financial crises (e.g. the American subprime crisis of 2008 or the Euro zone crisis) are model examples of the relationships described above. Even if the latter originated in a lack of discipline in the public finances sector in Greece, as is believed, it would not have happened had it not been for the too liberal approach of the creditors financing the Greek debt. These creditors, as it turned out, were financial institutions.<sup>24</sup> In the case of the American crisis, apart from macroeconomic and institutional factors, there were also psychological (behavioural) aspects which had an impact on the behaviour of the market participants.<sup>25</sup> All these taken together had their role and led to a situation in which the problems which had first occurred in the financial market started to affect the functioning of the

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<sup>21</sup> D. Wojtczak, *Usługi bankowe w regulacjach Unii Europejskiej*, op. cit., pp. 15-23.

<sup>22</sup> For more on the system see S.J. Rittel, *Podręcznik obywatela Unii Europejskiej. Demokracja, rynek, giełda papierów wartościowych*, Wrocław 1998, p. 169.

<sup>23</sup> Z. Polański, *Wprowadzenie. System finansowy we współczesnej gospodarce rynkowej*, in: B. Pietrzak, Z. Polański, B. Woźniak [eds], *System finansowy w Polsce*, Warszawa 2006, p. 17.

<sup>24</sup> A. Sławiński, *Przyczyny globalnego kryzysu finansowego*, in: J. Osiński, S. Sztaba [eds], *Nauki społeczne wobec kryzysu na rynkach finansowych*, Warszawa 2009, pp. 44-59.

<sup>25</sup> A. Szyszka, *Behawioralne aspekty kryzysu finansowego*, in: *Bank i Kredyt*, No 40 (4) 2009, p. 14.

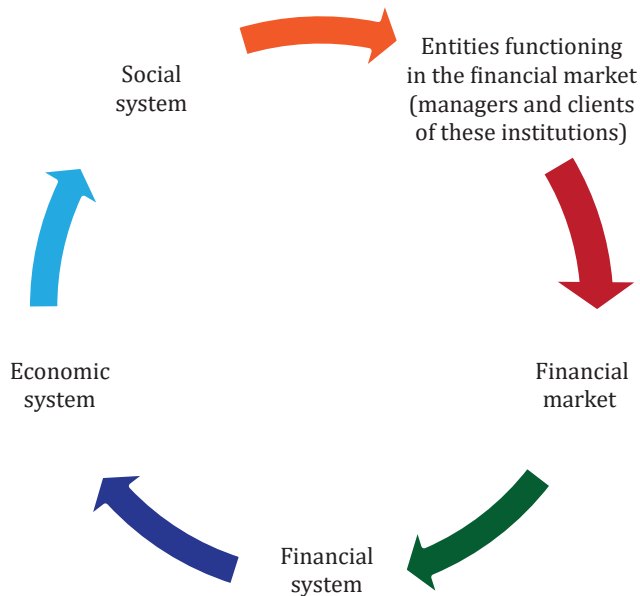


Figure 1. The financial market as a part of the social system

Source: the author's own study

economy, and in the long run, had a negative influence on the condition of societies and their individual members. What is noteworthy here is that among these individuals were decision-makers in the financial institutions that were blamed for causing the crisis. This issue will be analysed in more detail later in this book, but the complexity of the problem is worth noting at this point. There is always a human being standing at one end or the other of the crisis chain in the role of either manager of a financial institution or client of this institution who entrusts his savings to it. Both may be driven by emotions which may influence their behaviour and decisions. Therefore it is of such importance to take this specificity into account in the process of making or enforcing laws intended to regulate the functioning of the financial system. This system is considered to be a “mechanism which enables the provision of services which make it possible for purchasing power to circulate in the economy”.<sup>26</sup> It follows from the above that the basic role of financial markets is to facilitate the transfer of savings from households to businesses (or to follow the EU terminology, to undertakings). This **intermediary function** is one of the fundamental ones as well as one of the oldest.<sup>27</sup> It is commonly associated with the role of banks in the economy, which acting as interme-

<sup>26</sup> Ibidem.

<sup>27</sup> J. Szyrocki, *Finanse w gospodarce społeczno-rynkowej*, in *Instrumenty finansowe w gospodarce rynkowej*, in: Zeszyt naukowy No 129/93, Akademia Ekonomiczna im. Karola Adameckiego, Katowice 1993, pp. 15-16.



diaries or brokers, match those who have surplus capital with those who are in need of capital, and in this way help to maintain the flow of capital. This function is actually apparent in other segments of the market as well, such as capital and insurance, although in the case of the latter, a transfer of risk may also occur. This risk, however, is compensated for in the form of payments (premiums) made to insurance companies for the taking of risk that as a rule accompanies cash flows.<sup>28</sup>

Another function of the financial market and the banking sector in particular is **the function of capital concentration**. Owing to this function even the very modest savings of small individual subjects may be aggregated in capital of significant value. These high value capital sums realise **the allocation function** and are used to finance projects of substantial importance for the economy. Its stable development would not be possible without an undistorted flow of capital supported by the clearing and settlement systems operating in the capital and banking markets. These markets, too are subject to legislation.<sup>29</sup> Because of them another function known as **the clearing function** can be realised. As has been shown above, capital is the central constituent of the market in which it is generated, aggregated, loaned, cleared and settled. It should not be forgotten though that capital undergoes various transformations regarding its amounts and terms (**the market function of asset and liabilities management**). Thanks to the financial market understood in a broad sense, short-term liabilities can be matched with long-term assets, or put simply, short-term deposits are matched with long-term credits. It is also possible for investors (corporate or individuals) to “lend” funds for a long-term to share issuers, or create insurance funds using for this purpose insurance premiums. There are many more examples that could be given and in each of them two elements characteristic of the financial market, **money and risk** will always be present. They will be discussed later in this Chapter.

Before this, however, based on what has been said so far, an attempt will be made to define the notions of the “financial system” and the “financial market”. Despite their economic nature, they are set in a certain legal framework which de-

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<sup>28</sup> Although, it must be stressed, insurance companies have recently been active in other segments of the financial market, seeking to collaborate with other subjects, e.g. banks in order to grow their capital. An example of such collaboration is i.a. *bancassurance*, a real challenge for the legislator. More in: B. Mrozowska, *Bancassurance – regulacje prawne i samoregulacja rynku*, in: *Prawo Asekuracyjne*, No 3 2012, pp. 30–47; E. Rutkowska-Tomaszewska, *Nieuczciwe praktyki na rynku bankowych usług konsumenckich*, Warszawa 2011, pp. 166-169.

<sup>29</sup> See The Second Report on EU Clearing and Settlement Arrangements, The Giovannini Group, Brussels, April 2003; Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012, OJ L 257/1; Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012, OJ L 337/1.

depends on the legal culture of a given state.<sup>30</sup> The legal culture in conjunction with the financial system regulations is of fundamental importance for the stimulation of competition in the financial sector, ensuring its stability as well as its transparency.<sup>31</sup> It must also be stressed that legal science has developed a definition of **the financial system** which it uses for its own needs. According to this definition, a financial system is the entirety of all legal norms which specify the principles of aggregating and dividing monetary funds and govern the organisation of institutions and the organs of the state whose task is to accumulate monetary resources.<sup>32</sup> It is recommended that such a system should always be analysed with reference to a given state and the given period in which it exists. Understood in this way, the financial system has the task of creating principles upon which the state's economy is to be based.<sup>33</sup> Such a system extends to many entities and therefore varies in terms of its functions and organisation. The elements that constitute the financial market, termed the links of the financial system, are undertakings commonly referred to as financial institutions.<sup>34</sup>

Thus it may be stated that the financial system is a meeting place for institutions and markets. Markets are places where assets are transferred between investors and subjects wishing to multiply their savings".<sup>35</sup> It is in the market that deposited cash savings are transformed into long-term funds, and are subsequently used by undertakings for necessary investments. The whole financial system, together with its participants, function according to certain principles which are termed legal provisions and which apply to domestic and international investments. These provisions, in turn, constitute a regulatory system of the financial market whose functioning and impact stem from assumptions that have been well elaborated both in theory and in practice.

**The financial market** may be defined in many ways, of which one is that it is a place for clearing and settling transactions, or a source of funding for economic activity. It is not a monolithic structure and usually consists of money markets, capital markets and currency markets (sometimes defined as a specific form of

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<sup>30</sup> These issues as described here were based on deliberations presented in detail in: T. Nieborak, *Aspekty prawne funkcjonowania rynku finansowego Unii Europejskiej*, Warszawa 2008, pp. 41-50.

<sup>31</sup> T. Kozłowski, *Ochrona inwestorów a struktura systemu finansowego*, in: B. Polaszkiewicz, J. Boehlke [eds], *Ład instytucjonalny w gospodarce*, Vol. II, Toruń 2006, p. 50.

<sup>32</sup> A. Majchrzycka-Guzowska, *Finanse*, Warszawa 1991, p. 220; See also N. Gajl, *Finanse i prawo finansowe*, Warszawa 1992, p. 28; T. Dębowska-Romanowska, *Pojęcie systemu finansowego państwa oraz jego części składowe*, in: W. Wójtowicz [ed.], *Prawo finansowe*, Warszawa 1996, pp. 25-27.

<sup>33</sup> L. Kurowski, *System finansowy*, in: *Leksykon finansowo-bankowy*, Warszawa 1991, p. 438.

<sup>34</sup> J. Harasimowicz, *Ogniwa finansów*, in: *Leksykon finansowo-bankowy*, Warszawa 1991, p. 269; Also see A. Majchrzycka-Guzowska, *Finanse*, op. cit., pp. 221-222.

<sup>35</sup> P. Coggan, *Money, money, money.. czyli jak działa londyńskie City*, Londyn 1991, p. 12. See also R. Henderson, *European finance*, London 1993, p. 168.

money market).<sup>36</sup> There is also a thesis that these elements are referred to as “types of financial markets.” As can be seen from the above, the concept of a “financial market” is somewhat arbitrary.<sup>37</sup> The reason for this is the specificity of the assets (e.g. currencies, shares) traded in these markets, and the subjects operating in them.<sup>38</sup> Therefore when we talk about financial markets, both **the subjectivity aspect** (e.g. financial institutions) as well as **the objectivity aspect** (e.g. financial services) ought to be kept in mind. The distinction between the two can be found in definitions proposed by Piotr Zapadka and Lesław Góral. The former defines the financial market as “the whole of the activities of an economic nature and related legal events performed by undertakings with the use of financial instruments through specialised financial market institutions, the object of which is the transfer and allocation of funds”.<sup>39</sup> Góral, on the other hand, understands the financial market as “a piece of equipment (legal institutions) connected with one another in a manner which ascribes to each a certain structure based on the function it has in the economy. It is not only a place for entering into contracts whose subject is financial capital in broad terms, or transactions in securities as instruments for granting credits. Such a definition would be apt solely for the financial services market. The financial market becomes a legal institution only when the organisation and public-private tasks of the institution appointed to protect it as well as the categories of subjects operating in this market and the principles of its functioning are taken into account, which means that only then do we deal a mental reflection and adopt a holistic approach to the essential the phenomena that the law regulates. However, the latter is frequently ignored when a simplified method is used in which only the subjectivity aspect of the market is taken into account and the objectivity aspect is left aside. The financial market may be defined, as has been shown, based on the subjectivity aspect, as a place where money is transferred from those with a surplus of it to those who wish to invest it or transform it into real assets. It may also be defined with the objectivity aspect in mind, i.e. as a certain financial obligation or a claim by the capital provider against the capital-receiver.”<sup>40</sup>

Based on the definitions presented above, it must be stated that in this work the financial market is understood broadly, covering the subjectivity as well as the

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<sup>36</sup> See Reuters, *Rynek walutowy i pieniężny. Wprowadzenie*, Kraków 2001, pp. 9-11; Compare W. Tarczyński, *Rynki kapitałowe. Metody ilościowe*, Vol. I, Warszawa 2001, p. 12.

<sup>37</sup> M. Górski, *Rynkowy system finansowy*, Warszawa 2007, pp. 255-258; Also see M. Markiewicz, *System finansowy i walutowy*, in: E. Pietrzak, M. Markiewicz [eds], *Finanse, bankowość i rynki finansowe*, Gdańsk 2006, pp. 22-26.

<sup>38</sup> A. Sławiński, *Rynki finansowe*, Warszawa 2006, pp. 11-15.

<sup>39</sup> P. Zapadka, *Aspekty prawne funkcjonowania rynku finansowego w Polsce*, in: *Bank i Kredyt*, No 1 2002, p. 28.

<sup>40</sup> L. Góral, *Opinia do projektu ustawy o nadzorze nad rynkiem finansowym* (printout No 654), Biuro Analiz Sejmowych, Warszawa 2006, p. 2.

objectivity aspect. In other words, it is a place where **the supply and demand for money (capital) meet** and where certain types of undertakings carry out economic activity and acts-in-law related to it, making use of a certain **infrastructure**. These acts-in-law, or legal events, take the form of **financial instruments** and are used in the interests of financial institutions as well as their customers whose ultimate goal should be to earn a profit on capital invested. In this definition of the financial market, the focus has been put, firstly, on the relationship between the supply and demand of money, and secondly, on the goal of undertakings which is to increase the value of funds raised. The importance of looking at the financial market with its subjectivity and objectivity in mind is also emphasised. In the case of the financial market's subjectivity, the definition focuses on the participants present in the market, i.e. the financial institutions and their customers as well as the infrastructure (clearing and settling of transactions). Without these, the subjectivity related part of the market, i.e. its financial instruments, could not be used. However, although the main focus is put on institutions indirectly engaged in the realisation of the functions ascribed to the financial market, the role of the financial supervisory authorities, the deposit guarantee schemes, as well as that of the central bank, cannot be overlooked.<sup>41</sup>

The definition proposed here and the placement of the financial market in a wider context requires one more aspect to be taken into account. It is the identification of those elements which are usually given little attention in discussions about the essence of the financial market. However, owing to the concept adopted for the purposes of this book, they ought to be characterised here. These elements are **the values** which underlie the premise about the legislator's activity in the financial market. They will obviously change depending on place and time. And yet, an attempt must be made to identify at least those which are timeless, universal and "understand" so to speak the matter which is regulated. In the opinion of this author, one such value is **trust** in the financial market as it constitutes the essence of all other values. However, what will first be presented, is a concept based on the assumption that the **financial market is always an element of a social system** and must be considered from this perspective in the process of law making and enforcement. This concept will then be a leading motif of our future deliberations.

### 3. The financial market as an element of the social system

The financial market must always be analysed in a wider perspective to account for its connection with the social system of a given state (or with a legal person such as e.g. the European Union). The reason for this is not only the chain

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<sup>41</sup> In the literature they are referred to as "guardians of finance". See J.R. Barth, G. Capiro Jr, R. Levine, *Guardians of Finance. Making Regulators Work for Us*, Cambridge 2012.

of dependencies illustrated above as the relationships existing between the financial market, the economic market and the social system) but also the fact that the financial market as a specific form of commodity market<sup>42</sup> is based on **money**, the purest social phenomenon<sup>43</sup> which, on the one hand influences human behaviour (attitudes) but, on the other hand, also depends on it. "Money, and likewise law exists only because people live in groups, not in isolation".<sup>44</sup> Since it is very closely related to social behaviour, its legal analysis must be complemented with economic and sociological analyses, and the findings of the last show that the concept of money is predominantly based on **social trust**.<sup>45</sup> Without social trust money could not realise its economic functions i.e. it could not serve to finalise transactions, be used for valuations or for the accumulation of the value made up of the savings of individuals, which underlie the further creation of money in the form of loans and credits. In some way, money exists in the human mind which 'decides' at some times of history that certain goods have a monetary value money but others do not.<sup>46</sup> Besides, law as well, both statutory and common, regulates what, at a certain time, shall be money within the society it governs. This can be seen in the example of new forms of money (electronic money in particular) which become embraced in a legal framework.<sup>47</sup>

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<sup>42</sup> C. Kosikowski, *Rynek finansowy*, in: B. Hołyst, E. Smoktunowicz [eds], *Wielka encyklopedia prawa*, 2nd ed. Warszawa 2005, p. 891.

<sup>43</sup> G. Simmel, *Filozofia pieniądza*, Poznań 1997, p. 141 et seq.

<sup>44</sup> L. Balcerowicz, *Jakość pieniądza*, in: *Wprost*, No 1143 2004, p. 58.

<sup>45</sup> D. Cyman, *Elektroniczne instrumenty płatnicze a bezpieczeństwo uczestników rynku finansowego*, Warszawa 2013, pp. 39-40.

<sup>46</sup> It may be worth here referring to A. Gąsiorowska, *Psychologiczne znaczenie pieniędzy. Dlaczego pieniądze wywołują koncentrację na sobie?*, Warszawa 2014 and A. Borcuch, *Pieniądz w ekonomii i socjologii*, Warszawa 2010.

<sup>47</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337/35 (this Directive, commonly referred to as PSD2 will fully come in force as of 13 January 2018); Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, OJ L 267/7; Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001, OJ L 226/11; Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009, OJ L 94/22; See also R. Janowicz, R. Klepacz, *Pieniądz elektroniczny na świecie*, Warszawa 2002, p. 11 et seq.; A. Maśląg, *Pieniądz elektroniczny*, in: *Materiały i Studia*, No 127, NBP, Warszawa 2001, p. 3 et seq.; R. Kaszubski, P. Widawski, *Pieniądz elektroniczny – znaczenie pojęcia*, in: *Glosa*, No 3 2004, p. 10; S.K. Misra, R.G. Javalgi, R.F. Scherer, *Global electronic Money and related issues*, in: *Review of Business*, Vol. 25 2004, p. 15; B.J. Cohen, *Electronic Money: New day or false dawn?*, in: *Review of International Political Economy*, Summer 2001, p. 202 et seq.; C. Goldfinger, *Intangible Economy and Electronic Money*, in: *The Future of Money*, OECD, Paris 2002, p. 87 et seq.; See also J. Grodzicki, *Karty płatnicze i pieniądz elektroniczny a pieniądz gotówkowy*, in: *Glosa*, No 1 2002;

It has been rightly stated that “the discovery of money likewise the subsequent evolution of its forms is the result of human development on the economic and social plane”.<sup>48</sup> The idea of money was conceived to facilitate relationships among people.<sup>49</sup> It is the product of individual and mass emotions.<sup>50</sup> Consequently, money is frequently defined as any good that people are willing to accept in exchange for goods and services.<sup>51</sup>

When writing about money, Aristotle stressed the social dimension of its value. Money – Aristotle wrote – does not have any usable value in itself, or only to a very limited extent. It acquires value only in the course of an exchange. In his work *Politics* Aristotle said that “money is an idle word, its value based merely on a legal provision but none by nature because if those who use money change the provision, its value will be lost altogether and then it cannot be used any longer to satisfy any need”.<sup>52</sup> What can be drawn from this is that whether a given good (or asset) is regarded as money, depends mainly on – contemporarily – a legal provision adopted by a legislator, and historically – on what was established in customary law. As Feliks Młynarski noted, money becomes money only when one of the goods performing the function of a means of exchange not only replaces others, but its function solidifies, thus making it within a certain group of people a commonly used tool whose function is justified by custom. This process is connected to an important psychological change.<sup>53</sup> It regards the way money is perceived by the social group which uses it. It is the trust of this group that influences the value of money, the purchasing power confined within it owing to its relationship to other goods. Thus it is not so much its form but its substance which counts (*pecunia vis est non est materia*).<sup>54</sup> As Milton Friedman noted, money owes its social acceptance to a certain illusion which is not an unstable ephemeral creation, but its power stems from the universal human need for common money.<sup>55</sup> This acceptance results from the purchasing power it represents and which is used in the buying

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A. Stosio, *Pieniądz elektroniczny – cywilnoprawna analiza pojęcia* (I), in: *Przegląd Prawa Handlowego*, No 6 2002; W. Srokosz, *Istota prawna pieniądza elektronicznego*, in: *Prawo Bankowe*, No 12 2002; J. Masiota, *Elektroniczne instrumenty płatnicze. Komentarz*, Warszawa 2004.

<sup>48</sup> S. Patrycki, *Zarys teorii socjologii gospodarki*, Lublin 2004, p. 93.

<sup>49</sup> W. Bloom, *Pieniądze, serce i umysł*, Warszawa 1995, p. 26.

<sup>50</sup> D. Korenik, S. Korenik, *Podstawy finansów*, Warszawa 2004, pp. 35-42.

<sup>51</sup> R. LeRoy Miller, D.D. Van Hoose, *Essentials of Money, Banking, and Financial Markets*, New York 1997, p. 4.

<sup>52</sup> Arystoteles, *Polityka*, Ks. I 3, 14-18, Warszawa 2002, p. 34.

<sup>53</sup> F. Młynarski, *Pieniądz i gospodarstwo pieniężne*, Kraków 1947, p. 18. See also A. Furnham, M. Argyle, *The Psychology of Money*, London 1998; C. Lapavitsas, *Social Foundation of Markets, Money and Credit*, London 2003.

<sup>54</sup> The nature of money has been discussed in more detail in an article by T. Nieborak, *Pecunia vis est non est materia – rozważania nad prawną naturą pieniądza*, in: P. Wiliński, O. Krajniak, B. Guzik [eds], *Prawo wobec wyzwań współczesności*, Prace Naukowe WPIA UAM, Vol. IV, Poznań 2007, pp. 223-232. Some of the theses presented there have also been referred to in this book.

<sup>55</sup> M. Friedman, *Money Mischief*, New York 1992, p. 10.

(or exchange) of goods and services.<sup>56</sup> From the sociological point of view, what is crucial for the functioning of money is the role of the illusion defined as the faith citizens have in their money.<sup>57</sup> Günter Schmoelders believes that faith in money “is nothing but the faith in the value of money understood a general, non-individual estimation of a monetary unit within a given community; its value is the awareness that there exists a value that is promised and that it is embodied in the form of money”.<sup>58</sup> This element of faith is contained, for example, in the name “fiduciary money” (Latin: *fides* – faith), one of the types of contemporary monies based on trust. Discussing money in its psychological and social aspect, we usually refer to the categories of **trust and value**. Most certainly it is the value of a given good which decides about its use as money. Economists will add that other features that money must also have include: durability, divisibility, scarcity and variety. It is, however, value or, basically faith in this value, that is the decisive factor when it comes to the classification of a specific good as money. The value of money was also discussed in works by Adam Smith who claimed that the principles which are behind people’s decisions when money is exchanged for other goods determine what is referred to as the relative, or variable value of goods.<sup>59</sup> According to Georg Simmel, “money is the embodiment of a certain economic value abstracted from valuable goods, in the same way as is the sound of words which, despite being an acoustic and physiological phenomenon, expose their full meaning to us only in the internal performance which they carry and symbolise”.<sup>60</sup> The essence of money is contained in our feelings and thoughts. We believe that we create some fiction (illusion) that a certain good is money to us because it has a value to us. This value manifests itself in the possibility of purchasing other goods (services) that we need to survive. This kind of interdependence must, however, extend to a wider social group for whom a given good will also represent a value and will therefore also be used as money. Hence the importance of thoughts and feelings about money”.<sup>61</sup>

Summing up the deliberations so far, we may say that money must be regarded as a power that shapes human relationships and is also a carrier of these interrelations<sup>62</sup>, used as an abstract measure of value. Like any other measure of value (metre, pound) it is an abstract being materialised in the form of a certain good.<sup>63</sup>

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<sup>56</sup> Ibidem, p. 16.

<sup>57</sup> J. Górniak, *Pieniądz*, in : *Encyklopedia Socjologii*, Vol. III, Warszawa 2000, p. 108.

<sup>58</sup> Quoted ibidem, p. 108.

<sup>59</sup> A. Smith, *Badania nad naturą i przyczynami bogactwa narodów*, Vol. I, Warszawa 1938, p. 37.

<sup>60</sup> G. Simmel, *Filozofia pieniądza*, op. cit., p. 82.

<sup>61</sup> H. Ganssmann, *Doing Money. Elementary monetary theory from a sociological standpoint*, London 2012, pp. 23-61.

<sup>62</sup> D. Korenik, S. Korenik, *Podstawy finansów*, op. cit., p. 42 et seq.

<sup>63</sup> See F. Zweig, *Rola teorii wartości w systemie ekonomji*, in: *Czasopismo Prawnicze i Ekonomiczne*, No 1-4 1920, pp. 44-67.

This good is, owing to a certain kind of a social contract, used and accepted within the society of those who “accept this contract”, and who function within ethnic groups, nations or states. It is also heard that “money is an agreement – a contract – the most free and fundamental of all possible contracts”.<sup>64</sup> The functioning of communities is regulated by law which is not indifferent to money either because the issue of money is fundamental to the functioning of these societies. The (customary) law that exists within a given group will then consider a given good to be money. As Jean Jacques Rousseau wrote, law is based on contracts.<sup>65</sup> What is important, however, is that the universal acceptance of money is created, and this acceptance must be based on the faith of a given society in the value of money.

### 3.1. Trust as the fundamental value of the financial market

In the analysis of the institution of the financial market and its regulation one cannot overlook the fact that the word most often used in this context is “trust”. We read about “the loss of trust in the market”, “the institution of public trust”, or “trust as an element of maintaining stability”. The word is used in different situations, perhaps even mechanically at times, or for no reason at all, without any deeper reflexion. This may be because each of us, by nature, feels intuitively what the essence of trust is and is able to identify the conditions in which trust will have to be present and prevailing. And yet, the same human nature which seeks trust can also be a source of situations capable of undermining it, examples of which can sometimes be seen in the financial market. Despite the legislator’s efforts to protect the fundamental value of the market, which as we have agreed earlier is trust in the market, its full protection is impossible to achieve. Full protection is never possible due to the dynamics of the market and, even more so, the unpredictability and impossibility of fully controlling or regulating human behaviour. Having said this, it is nevertheless absolutely necessary to build trust in the market even if this task is arduous and time-consuming. At the same time it must be remembered that the effect of this lengthy and burdensome process may easily be frustrated. This regularity seems to be universally understood, but, strangely, those who are directly or indirectly engaged in the process of law making and law enforcement frequently tend to overlook it.

Deliberations over trust – this word has so many times been repeated in this book – should not lack a reflexion about its nature. What is more, the wider cultural and social aspect of trust should be analysed in reference to the results of studies conducted in other sciences, of which sociology is of special relevance.

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<sup>64</sup> D.R. Kamerschen, R.B. McKenzie, C. Nardinelli, *Ekonomia*, Gdańsk 1992, p. 173.

<sup>65</sup> J.J. Rousseau, *O umowie społecznej*, Warszawa 2002, p. 6.



Sociologists study the manner in which societies function, and they also analyse human reactions to legal regulations and how these regulations influence individuals. Regulations created "in a proper manner" influence the behaviours and attitudes of the members of society, and have an impact on their trust in the state, its institutions as well as in the financial market which, frankly, could not really function in the absence of trust. Trust is regarded as an integral element of social capital. Some (Niclas Luhmann) refer to it directly as capital.<sup>66</sup> Trust is also seen as an intentional act consisting in the emotional treatment of another person shaped by knowledge about the person.<sup>67</sup> To quote Katarzyna Żądło, another definition proposed by Rotter may be offered here. He defined trust as faith, hope or a feeling, rooted deeply in the personality, stemming from the early psycho-social development of an individual.<sup>68</sup>

Most definitions of trust confirm that scholars have been fascinated by the idea of trust for centuries. To mention a few: Thomas Hobbes, John Lock, Adam Smith, Adam Ferguson, or Georg Simmel were all precursors of the debate on trust. The last two decades have also been a time of discourse centred on trust. It has become a focus of interest for a number of sociologists including Niclas Luhmann, Bernard Barber, Francis Fukuyama, Bronisław Misztal or Piotr Sztompka. In the opinion of the latter, sociological studies of trust founded on empirical studies as well, have achieved a noticeable autonomy in comparison to those conducted in social psychology, economics or political science.<sup>69</sup> In this book, the essence of trust will be presented, based on the work by Sztompka entitled *Zaufanie. Fundament społeczeństwa (Trust. The Foundation of Society)*.<sup>70</sup> Because of the extent of this multifaceted work, only two main elements of trust will be discussed here, which in the view of this author ought to be taken into account by a legislator as important in the process of the creation and enforcement of financial market law. This process, like trust, is indispensable for economic development.<sup>71</sup>

**Trust** is perceived as a specific type of moral bond between people and belongs to a category termed **the social bond**. This bond, since it exists between a concrete person who trusts and one who is (or is not) trustworthy, this bond either fulfils or fails to fulfil the expectations formulated with regard to the latter by the former (the trusting one).<sup>72</sup> This relationship as well as other relations constitutes the elementary material of which human existence is built. Its char-

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<sup>66</sup> N. Luhmann, *Trust and Power*, New York 1980, p. 64.

<sup>67</sup> J. Filipek, *O zaufaniu i pseudozaufaniu w przestrzeni gospodarczej*, in: *Prakseologia* No 143 2003, p. 59.

<sup>68</sup> K. Żądło, *O wartości zaufania. Komunikacja i budowa zaufania a rynkowa wartość przedsiębiorstwa*, Warszawa 2014, p. 84.

<sup>69</sup> P. Sztompka, *Zaufanie. Fundament społeczeństwa*, Kraków 2007, p. 11.

<sup>70</sup> *Ibidem*.

<sup>71</sup> T. Zaleśkiewicz, *Psychologia ekonomiczna*, Warszawa 2012, p. 394.

<sup>72</sup> P. Sztompka, *Socjologia. Analiza społeczeństwa*, Kraków 2012, p. 346.

acteristic features are its social character and its active attitude with respect to the future. Therefore if one wishes to understand the essence of social existence, it is necessary to familiarise oneself with the key category which is trust.<sup>73</sup> Today trust is increasingly more frequently related not only to the attitudes presented by an individual, but also to interpersonal relationships. Its significance is connected, among other things, with features characteristic of our reality: complexity, uncertainty and risk. All three are the fruits of progressing globalisation and even if they are associated with some danger, they are also an impulse to action or a challenge to take up in the expectation of the results it brings in the future. As can be seen from the above, there are two important elements that come to the fore in a discussion about trust: the activity undertaken towards the other subject and the orientation to the future. Thus trust is a remedy for fear that may originate in risk and uncertainty. It is more like a third orientation, “a basic strategy of coping with uncertainty and the impossibility of controlling the future”.<sup>74</sup> Following Sztompka’s views, we may define it as “a bet made on the future and uncertain actions of others.”<sup>75</sup> Sztompka sees this bet as the materialisation of convictions in an action, active coping with the future by undertaking actions resulting in consequences only partly uncertain and impossible to control. Therefore trust means more than mere conviction; it is a conviction in combination with an action based on this conviction. “Trust is a special, human bridge to the uncertain world of the future in which the central role is played by other people. I cannot fail to step on this bridge because others, even if uncertain in their intentions or reactions, are those I need”.<sup>76</sup> This is why we decide “to bet” (or take a chance), entering in relationships with others, counting on a positive result. The existence of this condition of trust is like a spark which triggers off the entire chain of interpersonal reactions, initiating an action to build the future. Without taking this challenge, or, shall we say, without giving others the credit of trust, humankind would not advance or develop. As Toshio Yamagishi proposed, trust is none other than an evolutionary game of mind and society.<sup>77</sup> It enables our orientation towards the future despite the fact that human activity is largely contingent upon future circumstances that are beyond its control. What is more, the effect of the activity undertaken may be harmful for the person who has undertaken it and yet, notwithstanding this **risk**, we take up the game or make bets hoping for such or other behaviour of our partners, bestowing trust on them or choosing not to trust them. This risk is intensified with the increasing number of our potential partners or their diversification, when the social environment in which we are functioning expands and becomes

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<sup>73</sup> P. Sztompka, *Zaufanie. Fundament społeczeństwa*, op. cit., pp. 11-12.

<sup>74</sup> *Ibidem*, p. 69.

<sup>75</sup> *Ibidem*, pp. 69-70.

<sup>76</sup> *Ibidem*, p. 72.

<sup>77</sup> T. Yamagishi, *Trust. The Evolutionary Game of Mind and Society*, Tokyo 2011.

more complicated.<sup>78</sup> But this is the world we must live in today. There are opinions heard sometimes that globalisation damages trust since it undermines or weakens all the factors which are conducive to the creation of strong and universal social trust, or that globalisation hinders calculation, the assessment of people's credibility, social roles, organisations and institutions, and that by doing so it frustrates the building up of the proper climate and culture of trust.<sup>79</sup>

In the building up of the culture of trust an important role is that of the legislator whose task it is to make sure that liabilities are satisfied and credibility is verified and ensured. When creating trust-based laws to govern financial market operations, the legislator must reduce the elements which may undermine trust. One such element is excessive risk. This has been aptly illustrated by Luhmann according to whom "trust is a solution to a particular type of risk-related problem".<sup>80</sup> In its essence risk is similar to trust. Sztompka states that trust is also future-oriented and has its source in the natural sciences (created by *homo sapiens*), assumes uncertainty arising from a possibility that in the future the world will be in an undesired state and that the development of events is not fully controllable, and the fact that all this results from the engagement of the individual.<sup>81</sup> Thus "situations that are related to trust are a sub-class of risk-related situations. They are situations in which the risk undertaken depends on the actions undertaken by others".<sup>82</sup> For Sztompka, bestowing trust upon someone equals a kind of suspension, taking risk "in brackets", acting as though risk did not exist.<sup>83</sup> This process ought to be considered as an element in the creation of a culture of trust, a real challenge in the age of the universalisation, spread of globalisation, institutionalisation and reflexivity".<sup>84</sup>

Therefore when the phenomenon of trust is discussed, it is necessary to refer to **the culture of trust**. This notion usually refers to the culture-sanctioned generalised "climate" of trust<sup>85</sup> necessary for the functioning of society. Two groups

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<sup>78</sup> P. Sztompka, *Socjologia. Analiza społeczeństwa*, op. cit., p. 129.

<sup>79</sup> P. Sztompka, *Zaufanie. Fundament społeczeństwa*, op. cit., p. 382. However, it should be pointed out that the author notes positive sides of the phenomenon he describes as well. They include: the re-organisation of a trust-based attitude, "taming the unfamiliar" or strengthening local communities (ethnic, regional and religious).

<sup>80</sup> N. Luhmann, *Familiarity, confidence, trust: problems and alternatives*, in: D. Gambetta [ed.], *Trust: Making and Breaking Cooperative Relations*, Oxford 1988, p. 95. Quoted after P. Sztompka, *Zaufanie. Fundament społeczeństwa*, op. cit.

<sup>81</sup> P. Sztompka, *Zaufanie. Fundament społeczeństwa*, op. cit., p. 81.

<sup>82</sup> J. Coleman, *Foundations of Social Theory*, Cambridge, 1990, p. 91. Quoted after P. Sztompka, *Zaufanie. Fundament społeczeństwa*, op. cit., p. 83.

<sup>83</sup> P. Sztompka, *Zaufanie. Fundament społeczeństwa*, op. cit., p. 83.

<sup>84</sup> For example: the universality of financial crises extending on entire segments of the economy (or the financial market) as well as the side effects of other human activity, so called boomerang effect (increasing poverty as a result of insolvency arising from unpaid debts). For more see in: P. Sztompka, *Zaufanie. Fundament społeczeństwa*, op. cit., p. 97.

<sup>85</sup> P. Sztompka, *Socjologia. Analiza społeczeństwa*, op. cit., p. 348.

of factors influencing the culture of trust are particularly important. One is contained in the tradition and the historic heritage and the other is the structural context made up by:<sup>86</sup>

1. Normative stability directly influencing existential security through which the generalised axiological or guardian type trust is created;
2. Transparency of social organisation;
3. Durability of the social order;
4. Subordination of the authority to the rule of law;
5. Consistency in the realisation of rights and obligations by independent institutions (e.g. courts) appointed to protect endangered rights, or enforcing the realisation of certain obligations (e.g. financial market supervisory authorities).

All these elements contribute to an increased feeling of trust in a given social group. Their analysis leads to the conclusion that in most cases they are referred to the law. Thus it may be said that law is an instrument that shapes social life. Of course it may also be that bad law leads to undesired effects such as instability, social chaos, lawlessness or an abuse of power. These, in turn, may bring about a loss of trust by individuals in a given social group. Trust, it needs to be emphasised here, is built on a mutual relationship supported by external conditions. It is through trust that certain attitudes may be shaped and formed, human behaviours influenced, and “betting” prompted. All this is possible thanks to trust. Building this “trust impulse” requires ground work though, by which one understands the strengthening of capital resources of individuals through education, community bonds, a rich spirit as well as optimism and pro-social activity.<sup>87</sup>

The sociological approach to trust presented here corresponds fully with the one present in legal regulations, particularly these concerning the financial market. The financial market is a part of a financial system, and at the same time, of the social system. The consequence of this dependence is that problems encountered in the financial market sooner or later will also be felt and suffered by society. Trust is present at each stage of this chain.

It would be difficult to build interpersonal relations if they were to be poisoned right from the start by mistrust or uncertainty as to the future or the intentions of the other person. Obviously there are many other factors that influence interpersonal relations depending to varying degrees on the person and his life experience. They include education, moral values, or the environment in which a person was brought up. One of the elements of this last is the law: law created by a legislator and enforced by people and bodies of which people are a part. One of the functions of the law is to prompt betting or interpersonal initiatives with the aim of building mutual trust. In the case of the financial market and its regulation,

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<sup>86</sup> *Ibidem*, pp. 348-350.

<sup>87</sup> *Ibidem*, p. 354.

there are a few elements that may be considered as key in this process. They are contained in the structural context presented above but must be complemented by: the promotion of financial education<sup>88</sup>, the creation of conditions facilitating free access to information, as well as the stable and safe development of the financial market. All these relate to interpersonal relations, encourage trust and ultimately ensure stability and safety. Therefore it is of vital importance that the legislator be aware of and understands the principles that govern the functioning of a society which also belongs to the financial market. He must also take into account the potential reactions of the addressees of the norms to the law created. In other words, he must be aware of the behavioural aspects of the enforcement of the law. Law that is detached from the real world becomes a façade which, instead of promoting trust by facilitating its building, will destroy it, causing damage to the stability and security of the financial market, which is one of the major common goods of today's world.

### 3.2. The stability and security of the financial market as protected goods

Once we have decided that **trust is a fundamental value** of the financial market and as such should be protected by the law, the question ought to be asked of how this protection can be ensured. Experience so far shows that the provisions of financial market regulation must guarantee the protection of **the common values** of which the stability and security of the market are the main ones.<sup>89</sup> There is sometimes voiced the complaint that these two are of a too general character.

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<sup>88</sup> See M. Iwanicz-Drozdowska, *Edukacja i świadomość finansowa. Doświadczenia i perspektywy*, Warszawa 2011.

<sup>89</sup> When the essence of **good** is analysed, there is a division in the literature into search goods, experience goods, and credence, or post- experience goods. They are defined by examples of concrete products or services and the value added is the possibility of applying them in the discourse on the goods present in the financial market. Particular attention should be placed on the latter two i.e. experience and post-experience goods which are translated as "difficult to verify before consumption" and "those whose quality is hard to assess even after consumption" (J. Kabza, *Koncesje i zezwolenia. Analiza ekonomiczna*, Warszawa 2014, pp. 193-195; See also P. Nelson, *Information and consumer behavior*, in: *Journal of Political Economy*, Vol. 78 Issue 2 1970, pp. 311-329). As a matter of fact contracts whose subject is a concrete financial instrument (**financial services contracts**) are very difficult to define. See P. Tereszkiwicz, *Obowiązki informacyjne w umowach o usługi finansowe*, Warszawa 2014, pp. 45-48). On the one hand they concern "something" which is difficult for the buyer to identify before its purchase, and sometimes afterwards too. This "something" is a financial instrument which ought to be treated as an economic concept dressed in a legal framework. This constitutes the basis justifying the concern of law makers and those who enforce law regarding information obligations. It is important that financial services providers provide also fair, clear and complete information to customers of services, who on the basis of this information will be capable of assessing (as the optimist version assumes) the quality of the service before they buy it as well as after.

Their detailed analysis, however, allows us to identify their constituent elements which are: risk and information. If these two can be adequately “controlled” by the law, it will be possible to create optimal conditions for financial institutions to carry on their business to the benefit of the whole financial system, which includes the social system as well. This somewhat idealistic thesis may of course be criticised for lacking a pro-consumer character or more detailed legal solutions for example. This is of course constructive criticism and in order to defend the above thesis **axiological optics** must be adopted.

These optics assume that in order to maintain trust, measures must be taken to protect economic security whose constituent element is stability. This is why the legislator’s activity in the area of public law is focused on developing solutions that serve the stability of the market which include, *inter alia*: (i) determination of the risk level (including methods of its quantification and tools with which it can be controlled; (ii) formulation of requirements to be satisfied by subjects carrying out financial activity in the market and (iii) determination of the principles governing the availability and ways of providing information (to investors, bank clients, customers etc.).<sup>90</sup> Through such activities, the legislator intervenes in private law relationships between a financial institution and its customer as well. These relationships are either of a micro or macro-type. The former will control the risk connected with the activity of a financial institution. Thus, prudential requirements as already mentioned above, may be reflected in the provisions of a contract between such an institution and its client. It may also be that risk will be controlled by its assessment beforehand or by the introduction of specific reporting requirements. The latter, macro-type of relationships will be closely connected to the maintenance of the stability of the whole financial system which is directly dependent on trust in it.

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<sup>90</sup> See, for example, Articles 8-14 of the Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176/338 hereinafter referred to as the CRDIV Directive; also Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176/1 hereinafter referred to as the CRR Regulation; Articles 45-49 of the Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337/35 (this Directive, commonly referred to as PSD2 will fully come in force as of 13 January 2018); Article 25 of the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173/349 hereinafter referred to as the MiFID2 Directive; Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173/84 hereinafter referred to as the MiFID2 Regulation.

These micro- and macro-type relationships are mutually inter-dependent because in order to maintain trust in the system, the foundations of this system must be taken care of in the first place. These foundations consist of the subjects who create them, i.e. financial institutions and the customers buying financial services. If the legislator's approach is too liberal and only minimalistic requirements are adopted to control the lender's risk, or if too risky financial instruments are allowed, the stability of the system may be shaken owing to the potential losses that may be incurred by a financial institution selling risky services. This, in turn, may undermine the trust of subjects in the system and potentially initiate the contagion effect<sup>91</sup> where a crisis spreads to other subjects, frequently completely accidentally, causing their fall. The costs of this knock-on effect will be paid by society. Therefore the process of the creation and enforcement of financial market law aimed at protecting its fundamental value which is trust, requires a comprehensive approach and the legislator's making sure that the specificity of the matter regulated has been taken into account. Failure to do that may result in increased **risk** and a loss of **stability**.

### 3.2.1. Risk

Risk is one of the main factors that influence the functioning of the financial market. The quantification of risk factors serves to manage risk and is a subject of interest to those who make financial market regulations, as well as those who enforce them. The ability to estimate risk is necessary in order to protect stability, one of the goods without which the supreme value – trust – could not be protected. It must be noted that risk is more than a practical concept and has many practical implications as well. Therefore it is so important to define it and identify its sources, and then finally implement risk management processes.<sup>92</sup> A dictionary definition of "risk" reads that "it is a possibility of loss or injury, a dangerous element or factor; the chance of loss".<sup>93</sup> Another important concept close to risk is "uncertainty" understood as a "lack of sureness about someone or something, lack of definite knowledge esp. about an outcome or a result, lack of faith in someone or

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<sup>91</sup> R.W. Kolb, *What Is Financial Contagion?*, in: R.W. Kolb [ed.], *Financial Contagion. The Viral Threat to the Wealth of Nations*, New Jersey 2011, pp. 3-9.

<sup>92</sup> For example, see the wording of Article 97(3) of CRDIV Directive reading that: "on the basis of the review and evaluation referred to in paragraph 1, the competent authorities shall determine whether the arrangements, strategies, processes and mechanisms implemented by institutions and the own funds and liquidity held by them ensure a sound management and coverage of their risks" and Article 3(1) point 11 of CRDIV Directive defining 'model risk' as "the potential loss an institution may incur, as a consequence of decisions that could be principally based on the output of internal models, due to errors in the development, implementation or use of such models".

<sup>93</sup> Webster's Ninth New Collegiate Dictionary, Merriam-Webster Inc. Publishers, Springfield, Mass. 1987, p. 1018.

something”.<sup>94</sup> The two definitions prove that both concepts are similar and these words used in everyday speech allow people to express their feelings, anxieties or concerns. Transferred to the specific language of academic study though (e.g. the language of economy or law) they change in some way their meaning.<sup>95</sup> It is essential to distinguish skilfully between the ways in which they are understood because their meanings are not only symbolic but they influence the decision-making processes as well as the decisions made on the basis of the pre-recognised and quantified risk and sometimes uncertainty as well. The terms “risk” and “uncertainty” have been abundantly researched in a number of different sciences, of which economics has achieved the best results, having very distinctly differentiated between these two categories, possibly because, as has been suggested earlier, risk is an element of financial activity. Its basic elements are believed to be: uncertainty arising from the impossibility of telling at a given moment what the future development of events will be, and the level of risk to which we expose ourselves when making certain decisions. But is this really so? Is there any material difference between these two concepts which are frequently used interchangeably?

Defining the concept of “risk” is not easy. Risk is an amalgam of continually changing factors.<sup>96</sup> It is believed that issues related to risk are determined by the boundaries between what is certain and what is uncertain.<sup>97</sup> However, to define risk adequately, the term “uncertainty” must first be discussed. Uncertainty is defined as inaccuracy or the impossibility of foreseeing the effects of certain future events. This condition has a characteristic feature in that the result of the activities undertaken may not be known in advance, and also that what will actually happen will differ from what was expected.<sup>98</sup> “Risk” on the other hand is the possibility of a certain event happening in the future whose final result is influenced by many factors of which at least one is unknown but the probability of its occurrence is known.<sup>99</sup>

Factors which have an impact on human decisions are usually independent of the will of the person who makes them. They include all types of natural disasters, wars, armed conflicts, social unrest and the like, commonly referred to as force majeure. On the other hand, the consequences of often depend on this person and may prompt research in new fields of study in search of substitutes for scarce materials or new legal or technological solutions. All phenomena that are independent of human will but exercise a direct influence on a person’s life are

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<sup>94</sup> Ibidem, p. 1284.

<sup>95</sup> An example here may be the CRR Regulation.

<sup>96</sup> S. Soroczyński, J. Stachowicz, *Zabezpieczenie ryzyka stopy procentowej i ryzyka walutowego za pomocą transakcji nierezeczywistych futures i options wraz z aktami prawnymi*, Kraków 1994, p. 11.

<sup>97</sup> T.T. Kaczmarek, *Zarządzanie ryzykiem w przedsiębiorstwie eksportującym*, Gdańsk 2001, p. 18.

<sup>98</sup> A. Seldon, F.G. Pennance, *Everyman’s dictionary of economics*, London 1969, p. 428.

<sup>99</sup> Ibidem p. 371; Compare E. Cyrson [ed.] *Kompedium wiedzy o gospodarce*, Warszawa-Poznań 1997, p. 283.



uncertainty. Risk is thus a specific type of uncertainty which can be measured or expressed numerically.<sup>100</sup> Taking up the risk, one must be ready to accept the possibility that the effects achieved will differ from the expected results. These distortions are subject to the law of large numbers and may be used in a probability calculus<sup>101</sup> which is none other than the quantification of risk.

Risk has its positive sides as well. It may mean, or become, success and prosperity as is sometimes proposed in the literature.<sup>102</sup> This approach seems to be the right way of thinking. People create situations which entail risk but by undertaking certain measures or precautions they aim to reach the predetermined goal expecting a profit. At the same time they are aware of the dangers that may destroy the plan, but they continue, in the hope of lucky developments leading to the risk of success.<sup>103</sup>

To sum up, it may be stated that risk ought to be analysed as a phenomenon whose characteristic (feature) is the possibility of the occurrence of a result different from the one planned and expected. This result may, using proper mathematical methods, be approximately specified.<sup>104</sup> As a matter of fact, every type of human activity is burdened with risk, but it is financial risk that ought to be given special attention, hence such emphasis on the ability to manage risk, understood as both, its creation, and, more importantly, its limitation. A human being is capable of differentiating between different types of risk based on the information collected beforehand (it is important to note that not only its amount but also its quality)<sup>105</sup> and realise the predetermined goal, i.e. to ensure the economic security achieved thanks to a stable financial system.<sup>106</sup>

### 3.2.2. Stability

The question of the essence of **the stability of the financial system** (and financial market stability) has attracted considerable interest among both theoreticians and practitioners in the last dozen years or so.<sup>107</sup> This interest originated in the

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<sup>100</sup> L. Osiatyński, *Ryzyko w transakcjach handlu zagranicznego*, Warszawa 1973, p. 8.

<sup>101</sup> B. Minc, *O ryzyku i niepewności*, in: *Ekonomista*, No 2 1969, pp. 480-481.

<sup>102</sup> After T.T. Kaczmarek, *Zarządzanie ryzykiem w przedsiębiorstwie eksportującym*, op. cit., p. 24, who gave as an example the views expressed by M.J. Ahn, W.D. Fallon, *Strategic risk management: how global corporations manage financial risk for competitive advantage*, London 1991, p. 117 et seq.

<sup>103</sup> This has been described interestingly by A. Sopoćko in an article *Ryzyko – problem nie całkiem obiektywny*, in: *Rynek Terminowy*, No 1/01 2001, pp. 71-75.

<sup>104</sup> E.J. Vaughan, *Risk Management*, New York 1996, p. 8.

<sup>105</sup> E. Cyrson [ed.], *Kompendium wiedzy o gospodarce*, op. cit., p. 283.

<sup>106</sup> This issue has been thoroughly analysed by T. Nieborak in *Aspekty ryzyka na tle działalności finansowej*, in: *Aktualności Rachunkowo-Podatkowe*, No 2 2002, pp. 26-31.

<sup>107</sup> When a "system" is analysed, attention is drawn to its two principal functions: stability (protecting the system against breaking) and development (a driving force of the system). See A. Borcuch, *Pieniądz w ekonomii i socjologii*, op. cit., p. 111.

crises that hit the financial sector and which became an impulse for change in the regulatory philosophy prevailing in this sector.<sup>108</sup> The globalisation of financial markets, their technological development facilitating the development of new forms of investment and financial disintermediation<sup>109</sup> have created a growing financial risk problem which started to threaten the stability of the whole system. Although the concept seems to be universally understood, once embraced in legal provisions it stops being a mere phrase used in everyday life or seen in newspaper headlines, and must be treated as an element of the language of law with all the consequences of this inclusion, especially when it comes to the process of the enforcement of the law.

Looking for a definition of financial stability we come to the conclusion that there is not one, commonly agreed upon and accepted way of understanding it. Definitions proposed in the literature describe it as a situation in which the financial system performs its functions well, i.e. when it ensures a proper flow of capital between the participants of the market. Sometimes financial stability is identified with the absence of a crisis.<sup>110</sup> Regardless of which of the two definitions we decide to choose, financial stability ought to be considered as **a public good, or a common good**<sup>111</sup> acceptable and controllable in the interest of society and regarded as a resultant of individual interests.<sup>112</sup> Its protection requires that certain necessary and extraordinary measures be sometimes undertaken by entities duly appointed to intervene whenever necessary (e.g. supervisory authorities) whose aim is to ensure **economic security** defined as a the capability of an economic system of sustained development in the absence of external and internal economic threats.<sup>113</sup> Regarding the security of the financial market, economic security means its stability, and this stability is subject to special protection. Threats to stability have their source in all kinds of financial crises as well as do their causes or results which, in other words, constitute risk.<sup>114</sup> It is interesting that apart from the “traditional” sources of risk, striving for **the efficacy of the financial system** commonly ob-

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<sup>108</sup> K.R. Ilmonen, *Transatlantic convergence of financial regulation: a European perspective*, in: K. Alexander, R. Dhumale [eds], *Research Handbook on International Financial Regulation*, Cheltenham 2012, pp. 148-170.

<sup>109</sup> The phenomenon of financial disintermediation consists in taking over the existing segments of the financial market by non-financial institutions. In its final form it is simply a savings battle which may in consequence lead to an increased risk. More in: A. Jurkowska-Zeidler, *Bezpieczeństwo rynku finansowego w świetle prawa Unii Europejskiej*, Warszawa 2008, p. 72.

<sup>110</sup> O. Szczepańska, P. Sotomska-Krzysztofik, M. Pawliszyn, A. Pawlikowski, *Instytucjonalne uwarunkowania stabilności finansowej na przykładzie wybranych krajów*, in: *Materiały i Studia*, No 173, NBP, Warszawa 2004, pp. 6-9.

<sup>111</sup> “Common good” is sometimes called “social interest”, “public interest” or “general interest”.

<sup>112</sup> D. Maśniak, *Transgraniczny system ochrony ofiar wypadków drogowych*, *Studium prawno-finansowe*, Warszawa 2010, pp. 35-53.

<sup>113</sup> A. Jurkowska-Zeidler, *Bezpieczeństwo rynku finansowego w świetle prawa Unii Europejskiej*, op. cit., pp. 166-167.

<sup>114</sup> *Ibidem*, pp. 171-182.

served today, may be added to the list of financial risk creating factors. As rightly noted by Anna Jurkowska-Zeidler, the efficacy of the financial system and its stability are interchangeable“. What this means is that striving for maximal efficacy may result in the distortion of the stability and cause a crisis. On the other hand, though, excessive concern with the stability (or security) of the financial system may jeopardise its efficacy.<sup>115</sup> This example is a real eye-opener to the problem the legislator must cope with when seeking to ensure the best possible compromise between the not so infrequent conflicting interests encountered in the financial market. Thus, if protection of trust in the market is to be maintained as the fundamental goal (achieved by ensuring market stability and security) special focus ought to be put on finding a proper definition of the concept of “efficacy”. This task may prove extremely difficult and must take into account among other things the assumptions adopted at the first stage of creating financial market regulations. It may turn out, again, that an economically efficacious law may not be efficacious in the legal sense which is the sense, or goals sought by the legislator. In the first case the main focus should be on the maximisation of the utilities already possessed, i.e. a broad range of goods (information, innovation, capital) which will facilitate the generation of profit. Efficacy in the legal sense will focus on the goal of the regulation, leaving in the shadow the efforts to protect certain values. If trust in the market is the fundamental value and is secured by, among other things, the protection of the stability of the market, it becomes obvious that in certain situations trust will harm efficacy in the economic sense. Fostering stability forces the implementation of certain limitations, even a possible intervention. Limitations are ‘harmful’ to the economic potential of the market and hamper the possibility of growing capital which would otherwise be beneficial to society. Examples of the crises of the past are nevertheless the best proof that sometimes benefits are illusory because at the end of the day it is society that will pay the costs.<sup>116</sup> Hence we see the unrewarding task before the legislator of determining the limits of the freedom within which the financial market is to function. This statement may, by some, be regarded as acting against the freedom of the financial market. It should be remembered though that a market is not a mere mechanism but a social institution that must function on the basis of specified values. The legislator is obliged to foster the interests of all market participants, both the stronger ones and the weaker, bearing in mind the specificity (morphology)<sup>117</sup> of individual segments of

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<sup>115</sup> Effectiveness and efficacy have been analysed in Chapter I.

<sup>116</sup> The main crises of the recent years have been presented in: P. Masiukiewicz [ed.], *Międzynarodowe bankructwa i afery bankowe*, Warszawa 2010; F. Capie, G. Wood, *Financial crises from 1803 to 2009 the crescendo of moral hazard*, in: C.J. Green, E.J. Pentecost, T. Weyman-Jones [eds], *The Financial Crisis and the Regulation of Finance*, Cheltenham 2011, pp. 134-151.

<sup>117</sup> Made up of suppliers, buyers, the object traded, the price and bodies organising the market. See L. Góral, *Zintegrowany model publicznoprawnych instytucji ochrony rynku bankowego we Francji i Polsce*, Warszawa 2011, p. 13.

the financial market.<sup>118</sup> It is required from him to be well familiar with the matter he regulates and in his activity he should take into consideration the non-legal factors: economic, sociological and psychological as well. He must be aware of the fact that the regulations intended to ensure security may reduce risk but may also create it. What is more, according to Lesław Góral, the legislator seeking to protect the common good by protecting the stability of the financial system (which is a somewhat blurred concept) must, apart from the non-legal factors identified above, take into account the normative context and the overall goal of the legal regulation.<sup>119</sup>

A doubt may arise though, whether in such an important matter as the process of creating legal norms intended to regulate the functioning of the financial market, it will be justified to use such blurred concepts (general clauses). Addressing this doubt, it may be worth pointing to one of the features of a “blurred concept” which is the “obtainment of meaningful outcomes only as a result of the application of this concept to a concrete case whose textual content may seldom be defined, and usually may only be subject to the description of its fundamental features”.<sup>120</sup> The financial market confirms this remark because through its simultaneous dynamism and abstraction, as well as its size, this market is a being that is extremely difficult to embrace in a legal framework.<sup>121</sup> Therefore in regulating this market, the legislator resorts to these blurred, or unclear concepts (stability, trust, security, transparency, public order, ensuring market participants’ protection, proper functioning of the financial market and the like). The aim of all this is to create such legal provisions (regulations) which will serve to protect the common goods that are hidden under the above terms. Regarding stability, it is believed that this goal may be achieved through credit prevention, or crisis management in a situation where the crisis has already occurred.<sup>122</sup> Financial market regulations ought to contain solutions applicable in both cases. The process of their creation requires that adequate regulatory tools be used, such as for example soft law. The rights and obligations of market participants must also be specified and the principles upon which they should act and the procedures ensuring desired behaviours determined. They will be discussed further in this book. What is important though is that the concept of the “common good” is a relative and dynamic concept that must be looked at from the perspective of the reality

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<sup>118</sup> P. Wajda, *Efektywność informacyjna rynku giełdowego*, Warszawa 2011, p. 18 et seq.

<sup>119</sup> L. Góral, *Zintegrowany model publicznoprawnych instytucji ochrony rynku bankowego we Francji i Polsce*, op. cit., pp. 62-63.

<sup>120</sup> M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Warszawa 1986, p. 50.

<sup>121</sup> L. Góral, *Zintegrowany model publicznoprawnych instytucji ochrony rynku bankowego we Francji i Polsce*, op. cit., p. 63.

<sup>122</sup> D. Cyman, *Elektroniczne instrumenty płatnicze a bezpieczeństwo uczestników rynku finansowego*, op. cit., p. 119.

in which it functions. Thus identifying the common good in the financial market with public interest<sup>123</sup>, it must be emphasised that although in the discourse on this good attention is drawn to the legislator's efforts to protect market mechanisms and prevent crises, the main premise of these activities is **the protection of the values that constitute the public interest**. This fundamental thesis was formulated by Góral.<sup>124</sup> Since there is no objective criterion according to which public interest could be defined, the only justified criterion in this situation will be the subjective approach of the legislator, his willingness to believe, when making reference to blurred concepts, that there exist values which constitute their common denominator and which must be kept and maintained at all costs in order to ensure social development.<sup>125</sup> "These values, referred to as minimal, should not only be understood as necessary and indispensable, but should also be considered as a challenge prompting the pursuit of a state of affairs which may only be achieved in the presence of conducive circumstances. The adoption of such an assumption may cast some light on the understanding of the concept of 'general public interest' in the financial market space".<sup>126</sup> It also justifies the regulatory activity such as shaping the architecture of the financial market made up by the subjects and instruments that exist in it.<sup>127</sup> The values that constitute the public interest determine the goals formulated by the legislator. When realised they will constitute the proof that the law created is efficacious,<sup>128</sup> hence the importance of determining them early in the process of law making. To sum up, at the core of financial law making must be an assumption that the legislator acts in the public interest and that this value consists predominantly of trust which will be achieved when some other good such as economic security has been achieved. Economic security is contingent upon stability which can be ascertained by embracing its constituent elements (risk and information in particular) in some legal norms.<sup>129</sup> In this way the legislator influences the behaviour of market participants by shaping their behaviour. He must be aware though that the law he creates is a social

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<sup>123</sup> Being, in reality, an instrument for shaping the situation of an individual, facilitating the realisation of this individual's interests by providing the protection of values that are important for the community in which the individual functions and which he creates.

<sup>124</sup> L. Góral, *Zintegrowany model publicznoprawnych instytucji ochrony rynku bankowego we Francji i Polsce*, op. cit., p. 65.

<sup>125</sup> Ibidem, p. 66.

<sup>126</sup> Ibidem.

<sup>127</sup> S. Voight, *Do we need a new international financial architecture? Many questions and some preliminary advice*, in: R. Grote, T. Marauhn [eds], *The regulation of international financial markets. Perspective for reform*, Cambridge 2008, pp. 277-294.

<sup>128</sup> See also A.T. Szablewski, *Zarys teorii i praktyki reform regulacyjnych na przykładzie energetyki*, Warszawa 2003, pp. 29-31.

<sup>129</sup> See M. Fedorowicz, *Implementacja regulacji MiFID do polskiego prawa rynku finansowego – wybrane zagadnienia teoretyczne i praktyczne*, in: E. Rutkowska-Tomaszewska [ed.], *Regulacja MiFID – skutki prawne dla funkcjonowania rynku finansowego*, Wrocław 2014, pp. 11-27.

and dynamic being, and therefore changes in the behaviour of market participants must be taken into account. Some of the changes will be prompted by the legal solutions adopted. If this is the case, we shall deal with **regulatory dialectics** whose essence is contained in the action – reaction relationship.<sup>130</sup> This means that the changes in the law may compel the addressees of legal norms to either duly modify their behaviours according to the legislator’s will, or to adapt them but in a manner which will not bring about the actual realisation of the goal determined by the legislator, indicating at the same time that the law made is not efficacious.

### 3.3. Information as a guarantee of the values and goods of the financial market

As has been shown above, the financial market and its regulation belong to the fundamental elements of the contemporary social system. Its functioning must be based on certain values which fulfil the concept of public interest perceived universally as a common good. Without these values, or goods, the stability and security of the market would be difficult to protect. As a result, such importance is ascribed first, to the specification of these values in legal provisions and then, the creation of a situation enabling their promotion and protection. An optimal situation would be a financial market based on trust. The underlying nature of trust allows the assumption that the future-oriented relationships and interactions among individuals may be conducive to the development of the stable and secure foundations of the financial market. Building such relationships requires one more element, though, which is present in the financial market regulation.<sup>131</sup> It is **information**, or rather access to it. Likewise in the case of concepts such as “trust”, “security”, “stability” or “risk”, the term “information” requires a few words of explanation even if it appears to be generally understood.

The general understanding of the term allows for certain differences in its definition depending on the segment of the financial market in the legislator’s

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<sup>130</sup> I. Walter, *Financial architecture, prudential regulation and organizational structure*, in: J.R. Barth, Ch. Lin, C. Wihlborg [eds], *Research Handbook on International Banking and Governance*, Cheltenham 2012, pp. 333-334.

<sup>131</sup> See for example Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337/35 (this Directive, commonly referred to as PSD2 will fully come in force as of 13 January 2018), TITLE III Transparency of conditions and information requirements for payment services, and within its framework, Article 41 regarding the burden of proof in respect of information requirement providing that “Member States shall stipulate that the burden of proof lies with the payment service provider to prove that it has complied with the information requirements set out in this Title.”

focus of attention. This is the right attitude, given the specificity of the individual parts of the financial sector. The scope of information and the degree of its detail, and even more so, its content will differ depending on whether it concerns for example the capital or the payment market. What is also important is the subject who is to receive the information, and the resulting question of who is to provide the information and how it should be done to ensure that it has been effective. Information may entail two contradictions: there may be too little or too much of it. Both situations are undesirable. Excessive information may make it impossible to analyse, while insufficient information induces the risk that wrong decisions will be made based on incomplete data. In both cases yet another feature of information becomes clear, namely the level of its detail. As will be shown later in this book, in order to ensure the protection of market stability and security as well as trust in the market, the legislator seeks to ensure that more and more specific information is provided in increasingly narrow detail, which then results in higher costs of conducting financial activity. Such an attitude arises from the conviction that the transparency of the financial market is the supreme goal and that reasonable subjects operating in the market must have access to such information in order to make rational, information-based decisions. However, it is also believed that the abundance and omnipresence of information in our modern life requires that it also be controlled in some way to ensure the transparency of the financial market.

**Transparency** is, alongside stability and security, one of the main elements needed for the proper functioning of the financial market. It is pointed out that it must be approached from the formal as well as the subjectivity point of view.<sup>132</sup> The former refers to the requirements formulated by the legislator in respect of the scope of information disclosed, and which must be relevant to the type of (business) activity performed. This information, or its content, constitutes the other (subjectivity) form of transparency. Aleksandra Nadolska distinguished three types of transparency for the purpose of her analysis of the activity of supervisory authorities in the financial market. Her distinction may, however, be used in a wider context that also covers the functioning of the financial market. She distinguished: **transparency of the goal**, **transparency of knowledge** and **operational transparency**. These types must also be regarded as being mutually compatible and when referred to a broader market context they ought to be identified with what the legislator refers to as the goal of the regulation (**transparency of the goal**) which should be clear to all market participants. Striving to achieve this goal ought to be the road leading to the protection of the supreme market value, which is trust in this market. This, however, will not be achieved without **trans-**

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<sup>132</sup> A. Nadolska, *Komisja Nadzoru Finansowego w nowej instytucjonalnej architekturze europejskiego nadzoru finansowego*, Warszawa 2014, pp. 311-312.

**parency of knowledge**, i.e. the availability of or access to information<sup>133</sup> based on which its recipients will be able (at least this is assumed) to make rational (investment) decisions. In such a case, apart from the information received, they will have a chance to understand it and make an informed decision. The manner in which information is to be provided and what it should contain will be discussed later in the next Chapter and it will be shown that these two elements constitute the biggest challenge in the contemporary process of the creation and enforcement of financial market law. The doubts that arise concern the extent and type of detail of the information obligation which the legislator may impose on subjects in the financial market. It is most certain that too detailed and specific information will not be understood, while too general and unspecific information will not serve the purpose for which it was intended. In both cases the intellectual capabilities of the addressee of the information and his financial education will play a key role. Regardless of our wishful thinking that each player in the market is a model reasonable *homo oeconomicus*, the reality is quite different at times, the main cause being the mass character and general availability of financial services in the modern world, which means that they are offered to most members of the wider public, and also those with almost no financial knowledge. Apart from this, there are emotions which also govern the market. Some of the emotions are created by e.g. mass media, and some stem from human nature. The latter, called behavioural elements must be taken into account by a rational legislator wishing to ensure the transparency of the market to protect its weaker participants.

Another important element of the law making process will be reference to the third type of transparency termed **operational transparency meaning that** the concern about the transparency of information must be present in the *ex ante*, as well as *ex post* decision-making processes. The financial market offers many examples of this. The creation of *ex ante* transparency is most certainly an example of the prudential requirements which banks are obliged to satisfy e.g. maintenance of specified solvency ratios or the level of equity or information disclosure.<sup>134</sup>

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<sup>133</sup> As it turns out, distinguishing between supplying and making information accessible has a practical application and the legislator uses this distinction in regulations which, among other things, concern payment services. The difference between these concepts although it may seem subtle, can be seen when it come to the requirements arising from it. For example the provision of information in the form of an electronic carrier or in writing on paper differs from making the same information available at the bank's premises, or on a notice board. The essence of the difference boils down to the possibility of the actual familiarisation of the addressee with the information in question.

<sup>134</sup> See for example Article 92 (4) of CRR Regulation, providing i.a. that "EBA in consultation with ESMA shall develop draft regulatory technical standards to specify in greater detail the following: (a) the calculation of the requirement to hold eligible capital of at least one quarter of the fixed overheads of the previous year; (b) the conditions for the adjustment by the competent authority of the requirement to hold eligible capital of at least one quarter of the fixed overheads of the previous year; (c) the calculation of projected fixed overheads in the case of an investment firm that has not completed business for one year."



Knowledge of these ratios allows us to assess in a relatively short space of time the condition and financial situation of a given entity. This knowledge, however, is available to a narrow spectrum of recipients, reserved to those who are capable of making use of it because they are familiar with the accounting methodology and who, first of all, understand the significance of the information obtained. Because some recipients of information are less educated in financial matters, it is essential that these at least are informed that there have been appointed institutions (supervisory financial market authorities, the central bank, the deposit guarantee scheme authorities) whose task is the protection of the market and the building of trust in it. These institutions may have a key role in building *ex post* transparency in, for instance, a crisis situation. Simple and transparent messages are then valuable for the maintenance of trust and the prevention of financial market destabilisation.<sup>135</sup> What can be read from this is that information is a way of limiting risk.<sup>136</sup> The financial market is a place where such information is exchanged.

“Information” is a term with many meanings which has been for long a subject of interest to many sciences. It derives from the Latin word *information*, defined as an explanation, or comprehension. As shown by Beata Bińkowska-Artowicz, the way it is understood depends on the research perspective adopted in the study and expressed in relevant information theories, of which the major ones are: mathematical (quantitative), semantic (qualitative) and pragmatic (evaluative).<sup>137</sup> The second of the three is the closest to legal science. In the language of law it appears either as a part of the statutory term denoting the type of information (e.g. economic) or it is used for specifying a concrete set of data. What is also worthy of note is the fact that there exists a certain dependence between the term “data” and “information”. The “data create a set of symbols from a specified group which have been assigned some agreed meaning, but only a proper set of data (assuming that these symbols have a meaning and there are principles governing how they match) constitutes information which is a description of a certain fragment of reality”.<sup>138</sup> What follows from this is that the term “information” is superior to the term “data.”

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<sup>135</sup> The stabilisation of financial markets is sometimes defined as the fifth threat, after, nuclear war, armed conflict, ethnic conflict and terrorism, in terms of the extent of damage. At the same time the probability that it will occur is higher than for the other four. See J. Czaputowicz, *Bezpieczeństwo w teoriach stosunków międzynarodowych*, in: K. Żukrowska [ed.], *Bezpieczeństwo międzynarodowe. Przegląd aktualnego stanu*, Warszawa 2011, p. 97, quoted after A. Nadolska, *Komisja Nadzoru Finansowego w nowej instytucjonalnej architekturze europejskiego nadzoru finansowego*, op. cit., pp. 316-317.

<sup>136</sup> M. Lemonnier, *Europejskie modele instrumentów finansowych. Wybrane zagadnienia*, Warszawa 2011, p. 280.

<sup>137</sup> B. Bińkowska-Artowicz, *Informacja gospodarcza. Informacja kredytowa. System wymiany informacji o zobowiązaniach pieniężnych*, Warszawa 2014, p. 19.

<sup>138</sup> *Ibidem*, p. 23.

Therefore, the meaning of information must be sought in the functions it plays, which include supervising, stimulating, educating and opinion-making.<sup>139</sup> When referred to the socio-economic system, it is determined by the level of complexity and variety of the systems, reflects reality and influences the resources of social and individual knowledge gathered, acting at the same time as the steering factor and the basis for decision making and the common good as well.<sup>140</sup>

The fact that information may be perceived in many different ways or approached from different angles is responsible for the fact that it is difficult to create one, general definition of it. In spite of this numerous efforts have been made to do so, by scholars in legal doctrine.<sup>141</sup> The outcome of their studies is a definition of information as an intangible transferrable good asset that reduces uncertainty.<sup>142</sup> This definition, simple in its form, is nevertheless rich in content and corresponds excellently with the information present in the financial market. This, builds, besides stability and security, also trust in the market, and consequently constitutes one of the market's three basic foundations, its common goods. Seeing this dependence, the contemporary legislator gives it much attention. After all it may be claimed that next to energy and matter, information is the third main element present in the description of our contemporary universe.<sup>143</sup>

Legal scholars who approach information from a semantic (qualitative) perspective will focus in their analyses on the meaning of the terms or expressions used, decoding from them legal norms hidden there by the legislator.<sup>144</sup> It thus seems that in analysing this issue a lawyer will have to go beyond the mere meaning of words or their interpretation. He will also have to reproduce the broader context in which a given piece of information is used by subjects in the financial market, hence the need to look at information from a pragmatic, evaluative perspective, since it is capable of influencing the financial market directly or indirectly. In order to understand this phenomenon, it must once again be emphasised strongly that information is a financial market good vulnerable to the asymmetry of information

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<sup>139</sup> W. Lis, *Rola i znaczenie informacji*, in: *Jurysta*, No 4 2007, pp. 3-6. Quoted after B. Bińkowska-Artowicz, *Informacja gospodarcza. Informacja kredytowa. System wymiany informacji o zobowiązaniach pieniężnych*, op. cit., p. 24.

<sup>140</sup> J. Olesiński, *Teoria informacji*, in: J. Zawila-Niedźwiecki, K. Rostek, A. Gąsioriewicz [eds], *Informatyka gospodarcza*, part 1, Warszawa 2007, p. 244. Quoted after B. Bińkowska-Artowicz, *Informacja gospodarcza. Informacja kredytowa. System wymiany informacji o zobowiązaniach pieniężnych*, op. cit., p. 24.

<sup>141</sup> For more on that, in: B. Bińkowska-Artowicz, *Informacja gospodarcza. Informacja kredytowa. System wymiany informacji o zobowiązaniach pieniężnych*, op. cit., pp. 19-42.

<sup>142</sup> G. Szpor, *Prawa człowieka, prawa i wolności obywatelskie*, in: Z. Niewiadomski [ed.], *Prawo administracyjne, część materialna*, Warszawa 2004, pp. 97-98.

<sup>143</sup> B. Bińkowska-Artowicz, *Informacja gospodarcza. Informacja kredytowa. System wymiany informacji o zobowiązaniach pieniężnych*, op. cit., p. 31.

<sup>144</sup> For more on that see M. Marczak, *Interpretacja prawnicza w świetle semantyki Kripkego-Putnama*, in: *Państwo i Prawo*, No 6 2008, p. 65.

which may lead to **adverse selection** and a **moral hazard**. All these are considered to be three key elements that make up the traditional model of a financial crisis.<sup>145</sup>

**Asymmetry of information** is regarded as one of the features characteristic of the financial market: a situation in which one party to a financial transaction is deprived of information which is the privilege of the other party. Such a situation impairs the relationship between the parties and undermines the trust between them.<sup>146</sup> There are two causes (objective and subjective) of the appearance of the asymmetry of information. One is the high cost of the transfer of information by the informed party to the less informed. The other is a subjective cause related directly to one party to the transaction who encounters difficulties in finding the information needed, and even if it is obtained it is impossible to decode. It may also be that one party transfers information fraudulently, with the aim of gaining a (subjective) advantage over the potential business partner.<sup>147</sup> This kind of behaviour is of course blameworthy but cannot be completely eradicated. This would have been theoretically possible in the case of a perfectly transparent market in which all subjects had free and equal access to information. This is, however, not the case. And yet, apprehending the potential problem, the legislator tries to minimise the possibility that such an adverse phenomenon will occur in the financial market as well. His activity is particularly evident in the capital market where the objects of trading are different types of financial instruments (securities, derivatives, bonds) and investment decisions are made based on stakeholder information.<sup>148</sup> Thus, in order to maintain the balance between the parties to a financial transaction, efforts are made to provide both parties with the same information at the same time. This information, accessible, transparent, comprehensible and clear to all, ensures competition in the market and secures equal chances for all participants. If this state is achieved it will be manifested in e.g. the price of market values (assets) which, are not distorted when market mechanisms are not manipulated express their true value.<sup>149</sup> This, in turn, generates a feeling of secu-

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<sup>145</sup> When a financial crisis originating in systemic risk is discussed in the literature, four channels of contagion, or transmission mechanisms are identified. They are: the Interbank market, the payment system, information flow and psychological influence. The last usually influences the market through the information channel and asymmetry of information analysed above. For more on that see A. Jurkowska-Zeidler, *Bezpieczeństwo rynku finansowego w świetle prawa Unii Europejskiej*, op. cit., p. 171 et. seq.

<sup>146</sup> A. Jurkowska-Zeidler, *Bezpieczeństwo rynku finansowego w świetle prawa Unii Europejskiej*, op. cit., p. 178.

<sup>147</sup> J. Kabza, *Koncesje i zezwolenia. Analiza ekonomiczna*, op. cit., p. 159.

<sup>148</sup> For more on that see A. Chłopecki, M. Dyl, *Prawo rynku kapitałowego*, Warszawa 2002, p. 1; M. Levine, *Providing the Regulatory Framework for Fair, Efficient and Dynamic European Securities Markets*, CEPS Task Force Report No 46, April 2003, p. 38.

<sup>149</sup> T. Jedwabny, *Ochrona prawna inwestora na rynkach kapitałowych Unii Europejskiej – stan obecny i projekty przyszłych regulacji*, in: M. Królikowska-Olczak [ed.], *Studia z gospodarczego prawa Unii Europejskiej*, Kraków 2004, p. 35.

rity among market participants, consequently increasing trust in the market and, in the long term, better market efficacy. The efficacious functioning of the capital market requires transparency, fairness, breadth and depth. The first two elements refer to information directly and should be understood as equal access to the same information guaranteed to all investors at the same time, on condition that the information disclosed is genuine and of quality. The postulate of transparency and fairness of the capital market will then reduce the negative influence of the asymmetry of information on the functioning of the market<sup>150</sup> which takes the form of adverse selection and moral hazards mentioned above.

**Adverse selection** is defined as a situation in which asymmetry of information leads to the unreliability of the market.<sup>151</sup> This happens when the party better informed (usually referred to as an agent) has knowledge about a given product (service) which the other party (a principal) has not, and therefore has an advantage over the less informed party. As a result, products of lesser quality will start to supplant those of better quality, which will be adverse to the essence of the market, resulting in a declining number of transactions concluded. This is possible because taking advantage of the fact that not all potential customers have adequate information, the market will offer products (services) of high as well as of poor quality and the agents who are better informed, using their information advantage, will be able to offer lower quality goods. By doing this they will eliminate the better quality products, and this will additionally undermine the reliability of the market. A classic example of such a situation was presented in 1970 by Nobel laureate George A. Akerlof in an article entitled *The Market for »Lemons«: Quality Uncertainty and the Market Mechanism*<sup>152</sup> in which he described the market in second-hand cars (usually with hidden defects).<sup>153</sup> The first owner of a car usually has better knowledge of the car and therefore has an information advantage over potential buyers. A buyer, being under-informed, usually fears that he may overpay and in order to minimise this risk negotiates a lower price in the hope that he can use the 'saved' sum for potential future repairs if any. The truth is that not all second-hand cars are proverbial "lemons". And yet, there is a prevailing belief among potential buyers that the product they want to purchase is potentially defective, which makes them try to enforce a reduction in the selling price. Sellers on the other hand, disagreeing with this, get discouraged and withdraw from selling altogether, thus worsening liquidity in the market. What is more, the market then becomes flooded with products of lesser quality and these are even

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<sup>150</sup> P. Wajda, *Efektywność informacyjna rynku giełdowego*, op. cit., pp. 45-46.

<sup>151</sup> W. Szpringer, *Spoleczna odpowiedzialność banków. Między ochroną konsumenta a osłoną socjalną*, Warszawa 2009, p. 48.

<sup>152</sup> G.A. Akerlof, *The Market for »Lemons«: Quality Uncertainty and the Market Mechanism*, in: *The Quarterly Journal of Economics*, Vol. 84 No 3 1970, pp. 488-500.

<sup>153</sup> Colloquially referred to as lemons in the USA. Akerlof called these cars if they were in good technical condition "cherries".

more easily sold by their first owners.<sup>154</sup> This example is universal and applies to other markets as well, including the financial market (of course having regard for the specificity of each of its segments) in which, as it is believed, it causes an increased cost of capital and reduced liquidity.<sup>155</sup> Under market conditions banks are not really in a position to determine univocally and with certainty the risk related to bad debts and insurance companies cannot be sure of the probability of the occurrence of events in consequence of which they will have to pay compensation to their clients. In a situation of such an asymmetry of information, both banks and insurers will have to treat all consumers and products in the same way, and this will result in adverse selection. This also means that the interest or premium amounts will have to be identical for all their clients, regardless of the potential risk they will carry. In consequence, good quality products will be driven out of the market.<sup>156</sup> The question arises then of how the problem of adverse selection could be addressed, or more broadly speaking, how the asymmetry of information which is the source on adverse selection could be solved. A legislator responsible for the regulations can be of use here too, because it is his task to minimise the differences regarding access to information, or deny this privilege if it is only enjoyed by a narrow group of recipients. An example here would be the regulations of the capital market that provide for the disclosure and publication of specified information and prohibit the use of insider information.<sup>157</sup> In the banking market, adverse selection will most certainly be prevented by requirements that give financial institutions the opportunity to obtain information on their clients, which, in turn, constitutes the basis for estimating the risk level and creating adequate

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<sup>154</sup> Sometimes this phenomenon is referred to as a mechanism of "exchanging the better for the worse" per analogiam to Copernicus's law that "bad money supplants good money" described in his work *Sposób urzędzenia monety*, in: M. Kopernik, *O obrotach ciał niebieskich i inne pisma*, Warszawa 2001, p. 124 et. seq. For more on that see I. Bludnik, *Negatywna selekcja na polskim rynku kredytów hipotecznych w latach 2007-2009*, in: *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No 3 2010, p. 65 et seq.

<sup>155</sup> For more see C.B. Martysz, *Manipulacje instrumentami finansowymi i insider trading*, Warszawa 2015, p. 133 et. seq.; See also J.J. Hansen, *The Trinity of market regulation: Disclosure, insider trading and market manipulation*, in: *International Journal Disclosure and Governance*, Vol. 1 2003, p. 83.

<sup>156</sup> I. Bludnik, *Negatywna selekcja na polskim rynku kredytów hipotecznych w latach 2007-2009*, op. cit., pp. 66-67.

<sup>157</sup> A thorough analysis of this and other problems connected with the capital market is presented in the following works: J. Kołacz, *Prawo inwestora do informacji na rynku kapitałowym*, Warszawa 2012 and Cz. B. Martysz, *Manipulacje instrumentami finansowymi i insider trading*, op. cit.; P. Teresz-kiewicz, *Obowiązki informacyjne w umowach o usługi finansowe. Studium instrumentów ochronnych w prawie prywatnym i prawie unijnym*, op. cit., pp. 130-250. Also see Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), OJ L 173/179; Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173/1.

provisions for such a risk. As Frederic S. Mishkin emphasised, adverse selection is related to the asymmetry of information which appears *ex ante*, i.e. before a transaction is concluded. Contrary to this, the other phenomenon, mentioned above, the moral hazard, appears *ex post*, i.e. after the transaction has been concluded.<sup>158</sup> Moral hazards concern more risky behaviours but these are only attempted by those who are aware of a greater level of protection (which, in fact, gives rise to moral hazards).

In order to explain the above example, the term **moral hazard** must be defined. It is a situation in which the existence of an indemnity against the effects of the occurrence of a certain event causes the probability that this event will occur to be much higher than it would normally be if there were no indemnity at all.<sup>159</sup> The sources of moral hazards lie in the financial market regulation which influences the behaviours of its addressees. As Rasiah Gengatharen noted rightly, a regulation is a “free good” and there should not be too many free of charge goods because this has a negative impact on the motivation of “consumers” who stop focusing on the “quality”<sup>160</sup> of goods and rely on the bank deposit guarantee scheme instead.<sup>161</sup> For example, because there exists a state bank deposit guarantee scheme, bank clients may be more interested in potential profits earned on funds deposited in banks whose financial condition is dubious, but which offer a higher interest, and be less concerned about the security of their savings. Their reckless behaviours will stem from the fact that the state guarantees 100% security of their money. In the same way, bank managers will be tempted to take “risky decisions” concerning management issues, knowing that in the event of a problem, it will be the state which will eventually take on the burden. What is therefore necessary is the adoption of a new regulatory philosophy which will enable the negative consequences of the phenomenon indicated above to be minimised. A possible solution could be the diversification of liability by distributing it between the state, banks and their clients whose savings would not be 100% covered. While the latter will influence individual clients’ decisions of where to deposit their funds, their savings will still be protected only up to a certain specified sum.<sup>162</sup> Banks on the other hand may be obligated to join the deposit guarantee scheme and make ob-

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<sup>158</sup> F.S. Mishkin, *Ekonomika pieniądza, bankowości i rynków finansowych*, Warszawa 2002, p. 258 et seq.

<sup>159</sup> L. Oręziak, *Rynek finansowy Unii Europejskiej*, Warszawa 1999, p. 19.

<sup>160</sup> R. Gengatharen, *Derivatives Law and Regulation*, the Hague 2001, p. 130.

<sup>161</sup> See N. Kleftouri, *Deposit protection and bank resolution*, Oxford 2015, pp. 28-54; See also D.G. Mayes, *Moral hazard, bank resolution and the protection of depositors*, in: J.R. Barth, Ch. Lin, C. Wihlborg [eds], *Research Handbook on International Banking and Governance*, op. cit., pp. 270-284.

<sup>162</sup> See Article 6(1) of Directive of the European Parliament and of Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173/149, providing that “Member States shall ensure that the coverage level for the aggregate deposits of each depositor is EUR 100 000 in the event of deposits being unavailable”.

ligatory contributions, which will then allow, in the event of a crisis and based on the joint and several liability principle, them to cover the losses incurred by any of them. In this way the principle of Three Musketeers developed by D'Artagnan that "one for all and all for one" will be realised. Although banks compete among themselves, it is in the interest of none that any of them falls because they each will have to bear the costs of such a fall, anyway. One should not forget other negative consequences potentially caused to the financial (and social) system, manifesting themselves as a panic in the market, the contagion effect, the knock-on effect and the like. The subjects responsible for the protection of market stability (such as the central bank, the government, the financial supervisory authority, or the subject responsible for deposit protection – all identified these days with the Financial Safety Net),<sup>163</sup> must have a ready-made scenario in the event of a crisis. But even in such a case, owing to potential temptations to abuse the system, market participants should be kept in constructive uncertainty,<sup>164</sup> perversely, in a way, because insufficient knowledge (information) that keeps them in uncertainty is intended to serve as an instrument guaranteeing the greater stability which can be achieved when financial institutions engage in less risky activities.<sup>165</sup>

To sum up it must be said that the temptation to abuse which is nowadays commonly referred to as a moral hazard<sup>166</sup> contains an emotional element already in its name, in which reference is made to the psyche of the person experiencing a temptation and the moral concern connected with it.<sup>167</sup> This state is a behavioural condition with its source in information (knowledge) or the lack

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<sup>163</sup> H.M. Schooner, M.W. Taylor, *Global Bank Regulation Principles and Policies*, Amsterdam 2010, pp. 51-72; A.M. Jurkowska, *Nowa architektura sieci bezpieczeństwa jednolitego rynku finansowego Unii Europejskiej*, in: J. Węclawski [ed.], *Bankowość. Zjazd Katedr Finansowych: instytucje, instrumenty i strategie finansowe w dobie integracji gospodarczej*, Lublin 2006, p. 121 et seq.; A. Jurkowska-Zeidler, *Instytucjonalne zmiany w strukturze nadzoru nad rynkiem finansowym a stabilność i bezpieczeństwo systemu bankowego*, in: P. Karpuś, J. Węclawski [eds], *Problemy rozwoju rynku finansowego w aspekcie wzrostu gospodarczego*, Lublin 2007, pp. 99-100.

<sup>164</sup> For more see D.W. Johnson, *Constructive Controversy: Theory, Research, Practice*, Cambridge 2015, pp. 1-41.

<sup>165</sup> See also P. Niedziółka, *Pokusa nadużycia w działalności kredytowej banków a stabilność finansową*, in: *Bank i Kredyt*, No 11 2008, pp. 18-29.

<sup>166</sup> The differences between "morale hazard" and "moral hazard" is sometimes discussed in the literature on moral hazards. The former is referred to the attitude of a person which contributes to the probability of a loss resulting from the emergence of a risky situation. An example of this may be the behaviour of an insured person who, once he has taken out the insurance, will pay less attention to the potential risk e.g. "the house has been insured so I don't have to lock the door." Such attitudes may be "verified" by contractual clauses that will limit the liability of the insurer in the case of a theft from a house if the door has not been locked. The characteristic feature of the latter (moral hazard) is the behavioural factor whose source is in the habits, customs or morality present in each of us, and which increase the risk of unconscious risky behaviours that switch off rational thinking. An example here is the effect of the bank deposits guarantee system.

<sup>167</sup> See T. Baker, *On the Genealogy of Moral Hazard*, in: *Texas Law Review*, Vol. 75 No 2 1996, pp. 237-292.

of it, either of which is a contributory factor to the phenomena described above which sometimes depend on each other. It is usually the case that in situations burdened with a moral hazard, adverse selection occurs as well, but never *vice versa*. An example is given by Jakub Kabza who describes a person interested in taking out an insurance policy but who conceals his liking for risk from the insurer, and then indulges in extreme sports or other activities even more often than before purchasing the policy.<sup>168</sup>

This analysis of the essence of information and phenomena related to it prove the thesis of its increasing role in the process of building the values and goods of the financial market. Although concepts like information, values or goods might seem abstract and detached from reality, they do function in the real world, likewise trust, stability, security or risk, and provide the foundations of the nature of the financial market. They are also the determinants of the functioning of the contemporary state and social systems. Last but not least, this is why so frequently in the process of the creation of financial market law, reference is made to these key concepts upon which the regulatory philosophy of the legislator is based, and which stem from the premises of the financial market regulation.

#### 4. On the need of financial market regulation

The recent crisis that hit financial markets has revealed the shortcomings of the belief that the invisible hand working in a free market will guarantee market efficacy and the rational behaviour of market participants.<sup>169</sup> As Paweł Wajda has noted, the fact that the crisis was caused by market failures and other risks shows that in order for the financial market to function properly, it ought to be built on legal foundations commonly referred to as “financial market regulations”.<sup>170</sup> These regulations must be there to eliminate market failures<sup>171</sup> and create a supervision system to control risk. Their overriding goal however is the protection of certain goods and values threatened by overt or covert irrational market behaviour both on the part of the financial institutions and their managers, as well as on the part of clients of these institutions. Irrational behaviours may take the form of a single activity or decision,

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<sup>168</sup> J. Kabza, *Koncesje i zezwolenia. Analiza ekonomiczna*, op. cit., p. 131.

<sup>169</sup> The history of financial markets proves that crises similar to that of 2008 occurred in the past as well. They have been frequently analysed and described in the literature. The most spectacular crises include the one of 1929 and the South Sea Bubble scandal, or Tulipmania. More in: T. Nieborak, *Historyczne aspekty wykorzystywania instrumentów pochodnych na przykładzie Tulipanomanii*, in: Rynek Terminowy, No 2 2004, pp. 100-110; P.M. Garber, *Tulipmania*, in: Journal of Political Economy, Vol. 97 No 3 1989, p. 543 et seq. R.P. Flood, P.M. Garber, *Speculative Bubbles, Speculative Attacks, and Policy Switching*, Cambridge 1994, p. 59 et seq.; C. Mackay, *Extraordinary Popular Delusions and the Madness of Crowds* & J. de la Vega, *Confusión de Confusiones*, New York 1996, passim.

<sup>170</sup> P. Wajda, *Efektywność informacyjna rynku giełdowego*, op. cit., p. 96 et seq.

<sup>171</sup> For example: inefficiency of the competition, externalities or information deficit.



or a state of group irrationality which prompts herd behaviour, so difficult to control especially in an age of global financial markets.<sup>172</sup> As a result we see increasing legislative efforts taken on many levels. It must be remembered though that these markets are of a multi-level and multicentric character. This means that there are several centres creating and enforcing applicable law at the same time, for example the European Union and the financial market it has been building. This market includes the markets of EU Member States which together create one internal market subject to EU law. This law must take into account the specificity of these domestic financial markets but also have regard to global trends, such as for example the proposals of the Basel Committee on Banking Supervision. Due to their size and complexity they will be presented in synthetic form only. Despite their diversity and numerous differences existing among individual segments (banking, capital, insurance) an attempt will be made to identify the features they share.<sup>173</sup> The analysis will start with an opinion expressed in 1788 by Alexander Hamilton, James Madison and John Jay on the need for state regulation, who claimed that “If men were angels, no government [regulation – T.N. ] would be necessary”.<sup>174</sup> Despite the lapse of time, this remark continues to be valid. It is especially apt in a situation where the regulation (which is a direct form of State intervention in the economic activities of undertakings) applies directly to one of the pivotal elements of the economy – the financial market – whose functioning is based on the clients’ trust in the market well as the trust that financial institutions have in one another.<sup>175</sup>

#### 4.1. Regulation – its essence

The essence of the financial market will now be analysed from a wider social perspective, taking into account the process of the creation and enforcement of legal norms governing this market. These norms are its constituent elements and it must be once again stressed here that in discussions on financial market law the concept of “financial market regulation” is frequently used. Thus a question may be asked about the relationship between “financial market regulation” and

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<sup>172</sup> F. Galimberti, *When Man is a Bubble*, in: *etruria oggi*, No 59, pp. 62-63.

<sup>173</sup> In the analysis above, the results of a study presented in a monograph by this author have been used. See *Aspekty prawne funkcjonowania rynku finansowego Unii Europejskiej*, op. cit., pp. 17-56.

<sup>174</sup> A. Hamilton, J. Madison, J. Jay, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, in: *The Federalist Papers*, No 51 1788, published on: [www.infoplease.com/t/hist/federalist-papers/no51.html](http://www.infoplease.com/t/hist/federalist-papers/no51.html) [accessed on 20 February 2016]; See also: W. Talbot, *Which Rights Should Be Universal?*, Oxford 2005, p. 139.

<sup>175</sup> T. Gruszecki, *Teoria pieniądza i polityka pieniężna*, Kraków 2004, pp. 52-53; See also T. Dębowska-Romanowska, *Tendencje tworzenia regulacji prawnofinansowych i ich wpływ na rozumienie prawa organicznego (ustrojowego) w Polsce*, in: H. Dzwonkowski, J. Głuchowski, A. Pomorska, J. Szołno-Koguc [eds], *W kręgu prawa podatkowego i finansów publicznych. Księga dedykowana Profesorowi Cezaremu Kosikowskiemu w 40-lecie pracy naukowej*, Lublin 2005, p. 77.

“financial market law” or an even broader term “the process of the creation and enforcement of financial market law”. This is why regulation and its characteristics must be included in deliberations on the essence of the making and enforcement of financial market law. The reason behind this is that the idea of **regulation must be approached from a broader perspective, extending to the creation and enforcement of the law on the one hand, and to the values, premises and goals of the law on the other**. Law-making (as well as law enforcement) is an extraordinarily complicated process in which many different factors must be taken into account, including economic, social and psychological ones to name three. The same applies to the financial market whose proper functioning is contingent upon actions that are taken on the basis of a proper understanding its nature. They must also be based on a recognition of certain values and carried out by subjects (such as e.g. the State, an organ of public administration, a specialised agency) whose task is to supervise and intervene when necessary in certain activities that are important from the point of view of the financial market and a given social group (or society as a whole). The effects of these activities and norms of conduct are then reflected in the form of legal norms (sometimes called rules or principles) adopted in order to ensure the achievement of certain predetermined goals. These goals, in turn, may be contained in legal provisions constituting a regulatory tool serving to realise a wider program of change (reform) which (in its assumption) should be based on values previously defined and adopted.<sup>176</sup> Taking as an example the financial market, **the process of the making and enforcement of the law governing this market ought to be written in the broader context of the regulation** of this market. This regulation, in order to fulfil its task, should be founded on a coherent theoretical concept of the creation and enforcement of law. What is important to note though is that not all aspects of economic (or other) activity must be regulated. The idea is that the regulatory body makes conscious choices about what needs to be regulated.<sup>177</sup>

What is more, a rational decision to regulate (or abstain from regulating) a given aspect of economic relationships should be preceded by a thorough analysis and description of the fragment of reality that will be subject to regulation.<sup>178</sup> Regulation must be regarded as the art of recognising important problems on the basis of knowledge of the functioning of the matter regulated.<sup>179</sup> As rightly

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<sup>176</sup> K.K. Mwenda, *Legal Aspects of Financial Services Regulation and Concept of a Unified Regulator*, The World Bank, Washington D.C., 2006, p. 5; See also L.M. Friedman, *On Regulation and Legal Process*, in: R.G. Noll [ed.], *Regulatory Policy and the Social Sciences*, Berkeley 1985, p. 111 et seq.; B. Fiedor, *Regulacja państwowa a monopole naturalne*, in: *Rynek-Państwo-Regulacja w świetle współczesnej teorii ekonomii i doświadczeń krajów wysoko rozwiniętych*, No 598, Wrocław 1991, p. 35.

<sup>177</sup> S. Wronkowska, *Zagadnienia racjonalnego tworzenia prawa*, in: *Studia Prawnicze*, Issue 2, 1979, p. 14.

<sup>178</sup> *Ibidem*, p. 20.

<sup>179</sup> G. Majone, *Regulation and its modes*, in: G. Majone [ed.], *Regulating Europe*, London 1996, p. 9.

noted by Łukasz Boberek, "it is not sufficient in today's world to limit ourselves to the analysis of the world of legal norms without referring to the factual reality".<sup>180</sup> Regulations which are created without this "reference" fail to perform and will in a short time be probably pushed out by competing solutions.<sup>181</sup> What is really essential is not so much the structure of legal regulations but their efficacy. Efficacious regulation should address the different goals of the subjects regulated. It should apply to the substance of the matter it regulates but also aim to influence the motivations of the regulated subjects.<sup>182</sup>

There are many ways in which the term "regulation" can be understood. Some also depend on the specificity of the language or the legal culture. There are very broad definitions of the word, but there are also much narrower ones, focusing on its role. In the literature, the regulatory process acquires a different meaning. This was also noticed by Aleksander Gut who stated that the concept of "regulation" is very often used in a sense that considerably differs from its meaning in the legal sense.<sup>183</sup> As can be seen from the example of Anglo-Saxon literature, alongside "regulation" there are terms like "legislation" or "supervision". All three (legislation, regulation, or supervision, surveillance) are understood differently in the legal doctrine of some countries with a Roman-law tradition (especially Poland and Germany). For the purposes of this book, we shall therefore keep to the term "regulation" with its two ranges of meaning: the narrow one and the broad one.

#### 4.1.1. A broad approach to regulation

An example of a broad approach to regulation may be that proposed by Anthony Ogus who sees it as any form of **behaviour control** regardless of its source.<sup>184</sup> Although this definition is extremely broad, it nevertheless illustrates very well the nature of the concept it defines, and which contains three elements identified by Richard Baldwin and Martin Cave. They are:<sup>185</sup>

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<sup>180</sup> Ł. Boberek, *Problem niedoskonałości regulacji państwowych, jego związek z oceną skutków regulacji*, in: Przegląd Ustawodawstwa Gospodarczego, No 2 2006, p. 15.

<sup>181</sup> Ibidem.

<sup>182</sup> A. Shleifer, *Efficient Regulation*, in: D.P. Kessler [ed.], *Regulation versus Litigation. Perspective from Economics and Law*, Chicago 2011, pp. 27-45; I. Ayres, J. Braithwaite, *Responsive regulation*, Oxford 1992, p. 4; See also R. Mroczkowski, *Efektywność nadzoru nad rynkiem kapitałowym w ujęciu prawnym i ekonomicznym – przyczynek do dyskusji*, in: H. Mamcarz [ed.], *Rynki finansowe*, Lublin 2006, pp. 27-33.

<sup>183</sup> A. Gut, *Auditing OTC Derivatives for Banks*, Bern 1995 p. 103; See also A. Surdej, *Determinanty regulacji administracyjnoprawnych w oddziaływaniu państwa na gospodarke*, Kraków 2006, pp. 9-14.

<sup>184</sup> A. Ogus, *Regulation; Legal Form and Economic Theory*, Oxford 1994, p. 1.

<sup>185</sup> R. Baldwin, M. Cave, *Understanding Regulation. Theory, Strategy, and Practice*, Oxford 1999, p. 2.

- a) Regulation – understood as a specific set of commands used by a given regulatory subject;
- b) Regulation perceived as deliberate state influence which in a broader sense applies to this subject's initiatives influencing directly or indirectly the behaviour of specific social groups and individual market segments;
- c) Regulation which takes all forms and manifestations of social and economic control where all the mechanisms of activities regulated by the State or by the market are recognised as a regulation. A characteristic feature of such regulation is that it is not a strictly purposeful intervention and its effects are rather incidental.

In all the above concepts, the social issue is present in the form of either behavior control or a form of social control. Both are realised – as a rule – by the use of legal norms through which the legislator points to specific models of behaviour. These models are built on the basis of predetermined goals whose aim is to contribute to the promotion and in particular the protection of the values adopted. The analysis of the essence of the financial market, its nature, and first and foremost its functions which have been discussed above, allows us to point to stability and security as goals the attainment of which is a prerequisite to protect the basic value of the contemporary market, which is trust in it. The path to market stability and security leads through the control of risk and information.

Sociology may be of some help in explaining the phenomenon of regulation, and the functioning of social rules which determine the activities and behaviours of individual members of society, in particular. These rules are a constituent element of social regulation.<sup>186</sup> Frequently they are very numerous and concern the determination of relationships between individual subjects, or ways in which collective decisions that subsequently influence other individuals (subjects) are made.<sup>187</sup> In the case of social regulation, the important elements are: firstly, coordination of individual rules within the same social group; and secondly, the processes owing to which these rules are created and later used.<sup>188</sup> Both the coordination of the making of rules and the processes accompanying the making of rules require the existence of an institution (a subject) with the task of controlling and supervising of the whole process discussed here.

It is usually the State<sup>189</sup> which by way of intervention may influence the ultimate shape of the relationships between entities constituting a given social group. What needs emphasising here is that the State is not the only source of regulation

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<sup>186</sup> L. Nader, C. Nader, *A Wide Angle On Regulation. An Anthropological Perspective*, in: R.G. Noll [ed.], *Regulatory Policy and the Social Sciences*, op. cit., p. 142.

<sup>187</sup> A. Brémond, J.F. Couet, A. Davie, *Kompendium wiedzy o socjologii*, Warszawa 2006, p. 58.

<sup>188</sup> *Ibidem*, p. 60.

<sup>189</sup> A state may be perceived as an „element of self-organisation of a modern industrial society” see W. Kahl, *Gwarantowanie wykonywania zadań przez podmioty publiczne i prywatne poprzez „nadzór państwa”*, in: Z. Niewiadomski [ed.], *Ius Publicum Europeum*, Warszawa 2003, p. 195.

because social regulation may frequently be decentralised by the participation in its making of individual members of society in its making.<sup>190</sup>

Thus regulation ought to be recognised as one of the methods by means of which relationships among individuals are modified in a democratic system without weakening the foundations of the system.<sup>191</sup> Such “modifying” activity is justified by the desire to achieve a certain objective, or a goal as referred to in the earlier part of this Chapter, specified as the protection of goods and values.<sup>192</sup> And such measures will most certainly be “justified” by the regulatory subjects who will refer to them as normative models of behaviour. What is more, if need be, they will also become more concrete and spelt out in a very authoritarian way.<sup>193</sup> Regulation as described above may practically extend to all spheres of life and to the whole the legal system.<sup>194</sup>

The main debate on regulation nowadays, however, concerns the manner in which economic activity is to be conducted. It is usually identified with administrative regulations. And yet, as noted by Lawrence M. Friedman, the ultimate shape of the regulation depends on many other factors as well, such as court decisions, decisions of local authorities, or the market seen as an economic institution in itself.<sup>195</sup> The market, alongside various forms of possession, money and society, is the most important institution in contemporary economies, and, seen from the sociological perspective, it is not only an economic, but a social institution as well.<sup>196</sup> Quoting Max Weber it may be described as a condition in which the freedom of the market is substantively limited by the efficient performance of rules which bring order to it.<sup>197</sup>

What is also worth noting is that regardless of the place or time, **the regulatory process** remains under the influence of a legal system and the legal culture related to it, which obviously determines **the regulatory culture**.<sup>198</sup> These two types of

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<sup>190</sup> M. Ricketts, *Foreword*, in: J. Blundell, C. Robinson [eds], *Regulation Without the State*, Institute of Economic Affairs, London 1999, p. 13.

<sup>191</sup> T. Woś, *Niezależne organy regulacyjne w Stanach Zjednoczonych Ameryki. Zagadnienia prawne*, Kraków 1980, p. 10.

<sup>192</sup> K. Shaw, M. Ricketts, *The Theory of Regulation*, in: A. Peacock [ed.], *The Regulation Game*, Oxford 1984, p. 7.

<sup>193</sup> M. Szydło, *Regulacja sektorów infrastrukturalnych, jako rodzaj funkcji państwa wobec gospodarki*, Warszawa 2005, pp. 31-35: See also R. Stasikowski, *Regulacyjne układy sterowania w administracji publicznej*, in: *Przegląd Prawa Publicznego*, No 1-2 2007, pp. 16-39; H. Izdebski, M. Kulesza, *Administracja publiczna. Zagadnienia ogólne*, Warszawa 2004, pp. 106-107.

<sup>194</sup> L. Hancher, M. Moran, *Organizing Regulatory Space*, in: L. Hancher, M. Moran [eds], *Capitalism, culture and economic regulation*, Oxford 1989, p. 271.

<sup>195</sup> L.M. Friedman, *On Regulation and Legal Process*, in: R.G. Noll [ed.], *Regulatory Policy and the Social Sciences*, op. cit., p. 111.

<sup>196</sup> L. Gilejko, *Rynek jako regulator procesów gospodarczych i instytucja społeczna*, in: J. Gardawski, L. Gilejko, J. Siewierski, R. Towalski [eds], *Socjologia gospodarki*, Warszawa 2006, p. 83.

<sup>197</sup> M. Weber, *Gospodarka i społeczeństwo. Zarys socjologii rozumiejącej*, Warszawa 2002, p. 59.

<sup>198</sup> D.A. Westbrook, *The Culture of Financial Institutions: The Institution of Political Economy*, in: J. O'Brien, G. Gilligan [eds], *Integrity, Risk and Accountability in Capital Markets*, Oxford 2013, pp. 3-20.

culture have a common denominator as both may be regarded as a product of social powers. Quoting Friedman again, it may be stated that neither the legal system nor the regulatory system is a one-way street. Their form and substance depend on a variety of factors such as pressure groups, economic activity or political activity. These two systems also serve to ensure the proper allocation of goods and services, thus creating the principles underlying the functioning of a free market.<sup>199</sup>

#### 4.1.2. A narrow approach to regulation

Unlike the broad approach to regulation, its narrow definition emphasises supervision exercised by a body specifically appointed for that purpose. Regulation understood in this way often focuses on individual sectors of the economy, such as, for example the financial market.<sup>200</sup> A definition which is worthy of note here was formulated by Jan Walulik who identified **regulation** with **a function of the State**. This function requires "a continuous intervention-type influence exercised on the economy in response to selected economic phenomena which are **regarded as imperfect**"<sup>201</sup> from the point of view of the adopted **axiological assumptions** realised within individual sectors of the economy through the authoritarian and restrictive **influence on the market structure and the behaviours of its participants** with the use of modifying and prescriptive instruments implemented in legislative acts of an abstract-general and individual-concrete nature [the bold type – T.N.].<sup>202</sup> The extensiveness and breadth of this definition shows how difficult it is to formulate a universal definition of "regulation". At the same time this definition illustrates well its essence, pointing to its restrictive character as well as its axiological foundations and the nature of intervention, particularly in relation to the behaviours of selected groups of subjects.

It must be added here that although the behaviour of market participants is usually shaped by legal regulations adopted by a legislator, the same legislator resorts, from time to time, to **soft law or soft forms of market influence**.<sup>203</sup> The

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<sup>199</sup> L.M. Friedman, *On Regulation and Legal Process*, op. cit., pp. 114-115; See also M. Lederder, *Exchange and Regulation in European Capital Markets*, Münster 2003, p. 45.

<sup>200</sup> J. Walulik, *Reforma regulacyjna. Przykład transport lotniczego*, Warszawa 2013, p. 34.

<sup>201</sup> It ought to be taken that regulatory activities do not always arise from the fact of the existence of imperfections, and that their correction is the only task before the legislator. It is very important to emphasise the active and dynamic role of the legislator, who should also be the one who initiates certain processes undertaken based on relevant judgements as well as having taken into account the changing reality. The financial market with its dynamic nature is the best example here. Its development and innovatory character are a challenge for the legislator who establishes a legal framework for this market to function in, and who must take into account its axiological, social or psychological elements. By doing so the legislator contributes to the creation of the regulation in question.

<sup>202</sup> J. Walulik, *Reforma regulacyjna. Przykład transport lotniczego*, op. cit., p. 34.

<sup>203</sup> Soft forms of influence must be distinguished from soft law discussed later in this Chapter.

latter include financial education, the use of self-regulation elements as well as the promotion among financial institutions of the idea of socially-responsible activity.<sup>204</sup> After all the shaping of market behaviours must be grounded in axiological foundations.

Hence such importance is attached to the determination of the axiological premises underlying the regulation, which must be based on the “right” values. These values are described in the literature as a legislator’s time-specific assessment made with regard to a given condition, thing, fact or event referred to a system of relatively fixed assessments.<sup>205</sup> The specification of these values is a premise for intervening in the behaviour of the subjects to the regulation, which carries an emotional factor. Therefore, the relevant legislator’s activities must, firstly, be based on certain legal grounds and secondly, undertaken within certain limits. In the case of the financial market, the determination of the limits is not an easy task, especially in a situation where the objective of the regulation is the protection of trust. The regulatory process pertaining to the financial market has always been accompanied by the dilemma of whether there is any need for financial market regulation at all.<sup>206</sup> The potential regulator<sup>207</sup> aiming to protect trust may find himself between the proverbial Scylla and Charibdis where the former means

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<sup>204</sup> More in: A. Voiculescu, H. Yanacopoulos [eds], *The Business of Human Rights an evolving agenda for corporate responsibility*, London 2011; W. Cragg [ed.], *Business and Human Rights*, Cheltenham 2012; R. Sullivan [ed.], *Business and Human Rights. Dilemmas and Solutions*, Sheffield 2003.

<sup>205</sup> Z. Cieślak, *Zbiory zachowań w administracji państwowej: zagadnienia podstawowe*, Warszawa 1992 p. 40. See Z. Cieślak, *Aksjologiczne podstawy jawności. Perspektywa nauk o administracji*, in: Z. Cieślak [ed.], *Podstawy aksjologiczne*, Vol. II, in: G. Szpor [ed.], *Jawność i jej ograniczenia*, Warszawa 2013, pp. 1-11.

<sup>206</sup> A.P. Morriss, B. Yandle, A. Dorchak, *Regulation by Litigation*, Yale 2009, pp. 16-35.

<sup>207</sup> Bearing in mind the broad understanding approach to regulation presented in this book, the term “regulator” must be defined in the same way. This term is usually, rightly, used interchangeably with “legislator”. However, if we assume that apart from values, premises and goals, regulation covers the whole process of the creation and enforcement of the law as well, we find that the function of a regulator may also be played by other entities engaged in the legislative process and authorised to issue legislative acts shaping the behaviours of market participants. Such a function is most certainly played by central banks as well as authorities responsible for financial market supervision. It is also worth having a look at the debate on the recommendation of supervisory bodies conducted by legal scholars. See T. Czech, *Charakter prawny rekomendacji Komisji Nadzoru Finansowego*, in: *Przegląd Prawa Publicznego*, No 11 2009, p. 63 et seq., C. Kosikowski, *Akty wykonawcze w sprawie bankowym jako problem konstytucyjny*, in: T. Dębowska-Romanowska, A. Jankiewicz [eds], *Konstytucja – ustroj – system finansowy państwa. Księga pamiątkowa ku czci prof. Natalii Gajl*, in: *Studia i Materiały Trybunału Konstytucyjnego*, No 10 1999, p. 384; E. Fojcik-Mastalska, *Podstawowe źródła prawa bankowego po nowelizacji*, in: *Prawo Bankowe*, No 4 2002, pp. 51-52; A. Skoczylas, *Środki ochrony banku w postępowaniu przed Komisją Nadzoru Bankowego (wybrane zagadnienia)*, in: *Prawo Bankowe*, No 2 2002, pp. 53-61; T. Nieborak, *Rekomendacja Komisji Nadzoru Finansowego jako element nadzoru ostrożnościowego – synteza dyskusji*, in: I. Czaja-Hliniak [ed.], *Nauka prawa finansowego po I dekadzie XXI wieku, Księga pamiątkowa dedykowana Profesorowi Apoloniuszowi Kosteckiemu*, Kraków 2012, pp. 301-312.

overregulation and the latter symbolises under-regulation.<sup>208</sup> This, in turn, will influence the development of the financial system as a whole and depends not only on general economic conditions but also on the legal regulations constituting this market.<sup>209</sup> Besides, an over-regulated as well as under-regulated financial system may become a source of different types of risk which when uncontrolled may lead to a crisis. A similar effect will follow in the case of **dysfunctional (apparent) regulation** which may in turn cause market instability, hamper innovations) and restrict competition.<sup>210</sup> It must also be remembered that the undisturbed functioning of financial structures is one of the essential elements of the economic system of each State since in the age of globalisation it is the mobility of capital that has the greatest impact on these structures. In consequence such emphasis in the policy of the European Union is put on the free movement of capital and its protection.

Similar emphasis is also put on **the proportionality principle**, another important element from the point of view of financial market regulation. This principle is also referred to as the principle of adequacy whose origins can be found in the rule of law. It was developed in the 19<sup>th</sup> century judicial practice of the Prussian Administrative Court. This German model was later borrowed by other legal systems, including European Union law<sup>211</sup> and the international human rights system.<sup>212</sup> The essence of this principle stems from the thesis that there must be a proper balance maintained between the purpose of the State's intervention and the freedom of establishment and the measures implemented.<sup>213</sup> This principle draws a line determining the limits of the State's intervention, and also with regard to the financial market whose functioning should be based on the principle of the free market economy.<sup>214</sup> However, if there are reasons of material importance, such as e.g. an important public interest, the rights of different subjects existing in the market may be limited. Addressees of the principle of proportionality may include the legislator, or organs of public administrations (both being law-making

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<sup>208</sup> S. Flejterski, B. Świecka [eds], *Elementy finansów i bankowości*, Warszawa 2006 p. 128; See also I. Ayres, J. Braithwaite, *Responsive regulation*, op. cit., pp. 3-18.

<sup>209</sup> J. Osiński, D. Tymoczko, *Rozwój systemu finansowego w Polsce w 2005 roku*, Warszawa 2006, p. 25.

<sup>210</sup> M. Lederder, *Exchange and Regulation in European Capital Markets*, op. cit. p. 1; T. Dębowska-Romanowska, *Tendencje tworzenia regulacji prawnofinansowych i ich wpływ na rozumienie prawa organicznego (ustrojowego) w Polsce*, op. cit., p. 78.

<sup>211</sup> A primary EU definition of this principle can be found in Article 5(4) of the Treaty on the European Union, which provides that the content and form of the Union action shall not exceed what is necessary to achieve the objectives of the Treaties. EU institutions use the principle of proportionality in compliance with the Protocol on the application of the principles of subsidiarity and proportionality. See The Treaty on European Union – consolidated version, 7 June 2016, OJ C 202/13.

<sup>212</sup> J. Walulik, *Reforma regulacyjna. Przykład transportu lotniczego*, op. cit., p. 64.

<sup>213</sup> More in: K. Strzyczkowski, *Prawo gospodarcze publiczne*, Warszawa 2005, p. 64 et seq.

<sup>214</sup> A. Stępkowski, *Zasada proporcjonalności w europejskiej kulturze prawnej*, Warszawa 2010, pp. 39-47.



and law enforcement bodies) charged with the task of weighing the interests of the subjects being regulated and the public interest.<sup>215</sup> An analysis of this principle shows its **formal and substantive aspect**. The first concerns the requirements that must be satisfied if a given regulation is to be considered compatible with the proportionality principle. These requirements include: the requirement of adequacy, indispensability and proportionality in the strict meaning of the word.<sup>216</sup> Thus, when a legal solution intended to limit the freedom of establishment is to be implemented, the following questions must be considered: 1. Is this solution necessary? 2. Will it result in the achievement of the intended goal? and 3. Will the effects of this solution be proportional to the burdens or limitations imposed? The realisation of the last premise requires a comparison of the values that are protected with those which are to be curtailed as well as the assessment of the method used to implement the limitation.<sup>217</sup> These values are also present in the second aspect of the principle of proportionality i.e. the substantive aspect based on the thesis that the legal order must respect a certain system of values.<sup>218</sup> The above remarks concerning the principle of proportionality (which as a general principle of European Union law is, next to the primary and secondary law, the third category of sources of law<sup>219</sup>) may be used in the analysis of the financial market regulation.<sup>220</sup> When such an analysis is conducted though, firstly, the

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<sup>215</sup> K. Strzyczkowski, *Prawo gospodarcze publiczne*, op. cit., p., 64 et seq.

<sup>216</sup> A. Walaszek-Pyziół, *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego*, in: *Przegląd Ustawodawstwa Gospodarczego*, No 1 1995, p. 14 et seq.

<sup>217</sup> More in: J. Kabza, *Koncesje i zezwolenia. Analiza ekonomiczna*, op. cit., p. 251 et seq.

<sup>218</sup> A. Walaszek-Pyziół, *Swoboda działalności prawnej. Studium prawne*, Kraków 1994, p. 58.

<sup>219</sup> See J. Sozański, *Prawo Unii Europejskiej, Analiza krytyczna system i doktryny*, Toruń 2014, p. 111 et seq.; J. Sozański, *Ogólne zasady prawa a wartości Unii Europejskiej*, Toruń 2012, p. 94 et seq.

<sup>220</sup> See M. Fedorowicz, *Ocena projektu ustawy o nadzorze makroostrożnościowym nad systemem finansowym w świetle zasady proporcjonalności ze szczególnym uwzględnieniem charakteru prawnego Rady ds. Ryzyka Systemowego oraz instrumentów nadzoru makroostrożnościowego*, Warszawa 2014, pp. 8-9. The view on the relationship between the principle of proportionality and the scope of the supervisory authority intervention expressed in this publication must be shared without any reservation. It states that: "The principle of proportionality applies to the process of the creation as well as the enforcement of the law. A special case is the making and enforcing of law related to the supervision of the financial market because the essence of the regulation is that it is intended to limit a subject's actions resulting from a failure to observe the supervisory regulations or to enforce a change in behaviour of market participants in order to achieve a behaviour model resulting from the adopted law or from the models of desired behaviour. The extent of this limitation ought to be as minimal as possible to ensure respect for market freedoms, but it should be adequate to satisfy the assumptions underlying the supervisory regulation. It seems that the specificity of the regulation of these matters arises from the contradiction between the regulatory assumptions (the principle of proportionality) and the building of an efficacious supervisory regulation. Thus a special focus must be put on the proper balance of the regulatory interests. Analyses of the principle of proportionality (as well as the principle of subsidiarity) in the financial market are becoming increasingly important in today's post-crisis days." See also S. Kasiewicz, L. Kurkliński, W. Szpringer, *Zasada proporcjonalności. Przełom w ocenie regulacji*, Warszawa 2014, pp. 39-76.

questions posed above must be asked in order to, generally speaking, justify the planned regulation, and secondly, the values which the regulation is to serve must be specified.<sup>221</sup>

#### 4.2. Regulation of the financial market – rationale

When analysing regulation understood in a broader sense i.e. a regulation extending to the process of its creation and enforcement and the premises and goals that underlie it, it is necessary to identify those premises that are responsible for the legislator's regulatory activity. The most important ones have already been discussed earlier in this book when the financial market treated as a part of the social system of which a man is the most important element was analysed. Such a perception of the financial market implies the necessity of determining (and this has already been done) the fundamental goods and values which must be protected in order to serve its development and the realisation of its function for the benefit of the society. The analysis ought to include a discussion of the premises that constitute the basis of actions intended to ensure the well-being of the subjects fulfilling the imposed obligations. A doubt may arise though regarding the question of how intensive should be the efforts undertaken to provide the well-being of the citizens, if their freedoms are to be limited at the same time.<sup>222</sup> The answer to this will depend among other things on the regulatory philosophy which will in turn influence the elements of the regulation adopted. Following Marcin Orlicki, three essential types of this philosophy may be distinguished: liberal, paternalistic and communitarian. Orlicki related them to obligatory insurances, i.e. the insurance segment which is one of the main segments of the financial market.<sup>223</sup> Without going into their detailed description here, let it suffice to note two trends associated with the intervention-type nature of a regulation. They are: communitarianism (collectivism) and paternalism.

From the perspective of the financial market, the important trend in the communitarian (collective) philosophy concerns value and memory acting as connectors that bind individual members of society with one another. The conse-

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<sup>221</sup> It is suggested in the literature that the principle of proportionality may also be analysed from the point of view of its regulatory innovation, taking the form of tools for the interim assessment of the level and justification of an intervention. According to Szpringer, they include: (i) the sunset clause which enforces a review of the regulation after a certain time; (ii) regulatory holidays which basically means that certain categories of subjects may be released from some regulatory burdens but the behaviours of these subjects will be monitored; and (iii) a ladder of investment used to couple the regulation with investment incentives See W. Szpringer, *Instytucje nadzoru w sektorze finansowym. Kierunki rozwoju*, Warszawa 2014, p. 58.

<sup>222</sup> M. Orlicki, *Ubezpieczenia obowiazkowe*, Warszawa 2011, p. 194.

<sup>223</sup> *Ibidem*, p. 195-196.

quence of membership of society ought to be a feeling of responsibility for its fate and the individual fates of its members. Regarding the other trend, the idea of paternalism can be explained, following Gerald Dworkin, as an intervention in the freedom of activity of a person, justified as being done exclusively in the name of the well-being, good, needs, interests or values of this person who is (at the same time) the object of coercion.<sup>224</sup> The argument usually offered to justify paternalistic activity is the “limited rationality” of actions undertaken by individuals owing to the fact that “in many spheres, people lack clear, fixed and ordered preferences. Their choices depend, among other things, on the manner in which a given matter is presented to them and how they might perceive it in the course of generating information.”<sup>225</sup> The above views are close to the financial market regulation in which a desire not to limit freedom is sometimes pursued at the cost of security, or security seems more important than freedom. It is also interesting that in such cases the State (the regulator) takes the initiative in managing risk and does so in a manner characteristic of it, which is often simply by making it impossible for subjects to make free decisions. To achieve this the State may also resort to coercive measures.<sup>226</sup> The State, like a good and wise father, cares for the good of its citizens, doing so when, as the State justifies it, the citizens, being unaware and short-sighted, do not feel such a need or are even against being taken care of.<sup>227</sup>

The premises of regulation perceived in this way are not stable but change with time. This can be seen in the case of two sets of relationships in the financial market in particular. These are (i) the mutual competences and obligations of subjects to market relationships which are regulated by the use of private law provisions, referred to as horizontal relationships and (ii) the legal competences and obligations of the market participants towards the State, governed by the provisions of public law and termed vertical relationships.<sup>228</sup> Intervention in these relationships, undertaken apparently on the basis of a certain “regulatory philosophy”<sup>229</sup>,

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<sup>224</sup> G. Dworkin, *Paternalism. Some Second Thoughts*, in: R. Sartorius [ed.], *Paternalism*, Minneapolis 1983, pp. 105-112.

<sup>225</sup> A. van Aaken, *Begrenzte Rationalität und Paternalismusgefahr*, in: M. Anderheiden, P. Bürkli, H.M. Heining, P. Kirste, K. Seelmann [eds], *Paternalismus und Recht. In memoriam Angela Augustin (1968-2004)*, Tübingen 2006, p. 110, quoted after M. Orlicki, *Ubezpieczenia obowiązkowe*, op. cit., p. 201.

<sup>226</sup> M. Orlicki, *Ubezpieczenia obowiązkowe*, op. cit., p. 203.

<sup>227</sup> *Ibidem*, p. 202.

<sup>228</sup> C. Kosikowski, *Polskie publiczne prawo gospodarcze*, Warszawa 2003, p. 83.

<sup>229</sup> It is taken that regulatory philosophy depends on the customs and habits characteristic of a given financial system and deliberations on this philosophy may be conducted on two planes, of which one refers to the general ideology (views) on the perception of the role of the financial market, while the other is already connected with the role played by specific regulations. More in: D.T. Llewellyn, *Filozofia, cele i zasady stosowania regulacji finansowych*, in: *Bank i Kredyt*, No 9 1995, pp. 4-10.

will, depending on the economic ideology adopted, justify a greater or lesser degree of intervention in free market relationships, using for this purpose a broad spectrum of premises. These premises have been comprehensively analysed by scholars representing different economic doctrines and determine the direction of the search for the answer to the question: Why to regulate?<sup>230</sup>

One of the essential premises of economic market regulation is believed to be the existence in it of numerous “imperfections” or market failures that exercise a materially negative impact on the market and threaten it with the emergence of **a systemic risk**. This risk is defined as a possibility of the occurrence of a situation the consequence of which is a loss of trust in a given (e.g. financial) system. This is accompanied by uncertainty about the future of such a system and leads to certain negative implications for the economy as a whole (e.g. insolvency of companies).<sup>231</sup> Such risk is at times compared to a plague during which a disease that is spreading has a considerable impact on the whole population, but is also doing it good.<sup>232</sup> The possibility that such a situation may potentially occur is an argument supporting the regulation of markets and their supervision in order to ensure the stability of the system as well.<sup>233</sup> This stability is of particular interest to the State which regards it as a public good. Hence the State’s support of institutions specifically appointed to protect this good as well as the creation of regulations aimed at reducing market failures. This activity is motivated by:<sup>234</sup>

1. Demand for regulation among the clients of financial institutions who, when buying financial services, ought to be offered some kind of reassurance;

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<sup>230</sup> C. Kosikowski, *Publiczne prawo gospodarcze Polski i Unii Europejskiej*, Warszawa 2005, p. 226.

<sup>231</sup> G. De Nicoló, M.L. Kwast, *Systematic risk and financial consolidation: Are they related?*, in: IMF Working Paper, No WP/02/55, Washington 2002, p. 4.

<sup>232</sup> O. De Brandt, P. Hartmann, *Systematic risk: a survey*, in: European Central Bank Working Paper Series, No 35, Frankfurt am Main 2000, p. 10.

<sup>233</sup> A. Matysek-Jędrych, *Wpływ współczesnych przeobrażeń system finansowego na stabilność finansową*, in: H. Mamcarz [ed.], *Rynki finansowe*, op. cit., pp. 13-20; See also M. Fedorowicz, *Wzmocniona integracja nadzorcza jako cecha współczesnego rynku bankowego UE*, in: K. Opolski, J. Górski [eds], *Strategie gospodarcze i społeczne Unii Europejskiej „Mechanizmy funkcjonowania strefy euro”*, Warszawa 2015, pp. 35-42; M. Fedorowicz, *Rola bankowego nadzoru stabilnościowego w architekturze finansowej Unii Europejskiej*, in: K. Opolski, J. Górski [eds], *Perspektywy integracji gospodarczej i walutowej w Unii Europejskiej w czasach kryzysu*, Warszawa 2013, pp. 263-274.

<sup>234</sup> D.T. Llewellyn, *The Economic Rationale for Financial Regulation*, *Financial Services Authority*, Occasional Paper Series 1, April 1999, pp. 9-10; See also G. Borys, *Dyskusja wokół regulacji i nadzoru nad sektorem finansowym*, in: P. Karpuś, J. Węclawski [eds], *Rynek finansowy. Szanse i zagrożenia rozwoju*, Vol. I, Lublin 2005, pp. 9-10; Ch.A.E. Goodhart, *Some regulatory concerns*, in: Ch.A.E. Goodhart [ed.], *The emerging framework of financial regulation*, Central Banking Publications, London 1998, pp. 218-223; Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, in: A.I. Ogus, C.G. Veljanowski [ed.], *Readings in the Economics of Law and Regulation*, Oxford 1994, pp. 234-240; J. de Haan, P. Oosterloo, D. Schoenmaker, *Financial Markets and Institutions. A European Perspective*, Cambridge 2012, pp. 362-365; G.J. Benston, *Regulating Financial Markets. A Critique and some Proposals*, London 1998, pp. 27-29.

2. The need to build clients' trust in financial institutions;
3. Potential systemic problems which are subject to the influence of external factors such as for example a loss of liquidity by a financial institution which may entail negative consequences for the whole sector;
4. The need to minimise or reduce market failures and their consequences in a situation where there is a lack of ideal competition in the market and the position of e.g. bank clients is weaker;
5. The imperfection of information resulting from the asymmetry of information discussed above and its consequences;
6. Advantages enjoyed by financial institutions manifested as their greater efficacy and subsequent clients' trust in them;
7. The need for the constant monitoring of the financial institutions.

The above premises are these that are most frequently referred to in the debate on financial market regulation. It seems that any is present to a greater or lesser degree in the market which balances between crisis and stability. The latter is obviously the desired premise but as experience shows, the history of the financial market is like a sinusoid in which periods of stability are intertwined with times of upheaval. This is also reflected in the process of making financial market regulations and in **the effect of the cycle spiral** (also termed a 3×R phenomenon standing for regulation – reaction and re-regulation). What it means is that when a regulation is implemented, the subjects regulated “adapt” to it (reaction) in a way which forces the legislator to create new provisions (re-regulation).<sup>235</sup> This effect is an excellent confirmation of the thesis that the regulation of the financial market which deals with a very vast and complicated matter requires the legislator to take a universal approach, albeit based on certain axiological premises. These are necessary because of the dilemma arising from the need to find a balance between the efficacy of the regulation (which is expected to contribute to the development of the market) and market stability as a guarantor of the fundamental value of the market – trust. In order to achieve trust in the market it is in turn necessary to employ specific instruments and to answer the question of what market efficacy means and how it can be achieved without exceeding certain lines drawn to ensure the freedom of the market.

Efficacious regulation ought to address different goals and apart from regulating subjects in the market it should also influence their attitudes and the motivations of their actions. The concept of **responsive regulation** developed by Ian Ayres and John Braithwaite<sup>236</sup> is a good example here. In the view of these authors this regulation should not be perceived as a clearly specified programme

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<sup>235</sup> K. Jackowicz, *Dyscyplina rynkowa na integrujących się rynkach finansowych UE*, in: *Integracja rynków finansowych w Unii Europejskiej od A do Z*, in: *Bank i Kredyt*, No 10 2007, p. 12.

<sup>236</sup> I. Ayres, J. Braithwaite, *Responsive regulation*, op. cit. p. 101 et seq.

or a set of principles according to which regulation should be made. Instead, the regulatory strategy should first of all depend on the context in which the regulated matter is set, as well as on the regulatory culture and the tradition. In such a case efficacy is an attitude according to which varied and innovatory regulatory concepts are developed.<sup>237</sup> The above postulates are particularly topical with regard to the regulatory environment of the European Union where the transparency and clarity of regulation has been particularly promoted for the last decade or so. Attention is drawn at the same time to the fact that excessive, overdetailed provisions as well as frequent instances of ambiguous regulations may result in the distortion of competition and fragmentation of the market. It is vital to update the existing legal provisions, especially those governing economic activity, as well as to bring them up to the requirements and expectations of changing circumstances, so that the proportion between the expenditure of legislative activity and the goals is maintained.<sup>238</sup> However, the hyperactivity of the European legislator, as aptly formulated by Magdalena Fedorowicz<sup>239</sup> seems to contradict the postulate proposed above. The EU's legislator's activity reflects the goal of EU legislation which has been clearly defined as achieving the full integration of the financial market. It must be admitted that this is not an easy task, bearing in mind the multitude of the regulatory cultures, the non-uniformity of the development of individual Member States and the habits (attitudes) of these diversified markets' participants.

## **5. The financial market of the European Union as an example of contemporary trends in financial market regulation – a synthesis**

The EU's financial market is currently one of the main elements of global financial structures. It underlies the functioning of the united European structures and the process of its development is directly involved in subsequent stages of economic integration within the EU.<sup>240</sup> The question which still remains unsolved is how this market should be understood. Can we talk of a single financial market of the European Union? Or is it rather a structure based on the individual financial markets of EU Member States, for which the unifying factor is the European Union law? Answering these questions is not easy and depends on the assump-

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<sup>237</sup> Ibidem, pp. 4-5.

<sup>238</sup> M. Wiktorowicz, *Uproszczenie otoczenia regulacyjnego w Unii Europejskiej*, in: *Prawo i Podatki Unii Europejskiej*, No 11 2006, pp. 42-43.

<sup>239</sup> M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, Warszawa 2013, p. 19.

<sup>240</sup> M.N. Jovanović, *The Economics of European Integration*, Second Edition, Cheltenham 2013, pp. 1-144.

tions adopted for identifying a market as a single market. Methods that are usually used for determining the level of financial market integration may be of help here. They involve:<sup>241</sup>

1. Existence of the one-price rule – which recognises markets as integrated when prices of the same products traded in the integrating market are identical;
2. Determination of the rate of market integration through the lens of market participants – or more precisely, determination of the benefits possible to be achieved as a result of market unification.

Neither of the two above could be applied to confirm a satisfactory level of EU market integration or refer to it as a single market. An example here may be different bank charges in Member States or lack of unified fees for payment transaction.<sup>242</sup> What is more, market participants, both the professional ones (financial institutions) and the non-professionals (consumers) are not always profit-driven in making their investment choices. The decisions of the latter, also termed clients of the retail sector, are frequently influenced by other factors, such as: (i) the proximity of the subject rendering a service; (ii) cultural conditioning; (iii) the linguistic aspect; and (iv) the level of financial education.<sup>243</sup> In practice this means that when making a choice, an individual client will not necessarily have the “European idea” in mind, and will rather be inclined to go for a “more local” choice and decide on a service offered by an institution operating in the financial market in his own country, even if this choice guarantees less profit. And yet, such a service will nevertheless be of a European character because its structure, the manner in which it will be delivered, the supervision of the subject providing the service, will all be influenced by the regulation of the European Union’s financial market.

It is no accident that the term “regulation” has been used here in a broad sense, covering the process of its creation and enforcement as well the philosophy of regulation with its focus on the protection of the goods and values which the regulation applies to. Before these are identified and characterised, first the nature of the financial market of the European Union must be determined and secondly, a concise synthesis of the historical development and trends in the financial market reforms must be made.

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<sup>241</sup> J. Żabińska, *Procesy integracyjne na europejskim rynku bankowym*, in: J. Węclawski [ed.], *Bankowość*, op. cit., p. 55; See also M. Iwanicz-Drozdowska, *Integracja rynków finansowych – jej rodzaje i znaczenie*, in: *Integracja rynków finansowych w Unii Europejskiej od A do Z*, in Bank i Kredyt, No 1 2007, Narodowy Bank Polski, Warszawa 2007, pp. 8-9.

<sup>242</sup> See Commission Staff Working Document National measures and practices as regards access to basic payment accounts Follow-up to the Recommendation of 18 July 2011 on access to a basic payment account, Brussels, 22.8.2012 SWD (2012) 249 final.

<sup>243</sup> Special Eurobarometer 373 Retail Financial Services Report, March 2012, published on: [http://ec.europa.eu/internal\\_market/finservices-retail/docs/policy/eb\\_special\\_373-report\\_en.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/policy/eb_special_373-report_en.pdf) [accessed on 25 January 2016].

## 5.1. The Basel consensus on as an element of the new regulatory and supervisory paradigm of the European Union

With regard to the nature of the EU financial market and bearing in mind that the integration of the market is continuing all the time through the regulation of individual financial markets of the Member States which must incorporate EU law into their domestic systems it may be claimed that these markets do constitute a functioning financial market of the European Union, of which European Union law is the binding element. The creation and enforcement of this law is based on **a new paradigm** aptly termed **a regulatory-supervisory paradigm**.<sup>244</sup> This paradigm departs significantly from the Washington consensus that used to be treated as a guideline for determining global financial standards and which was based on the absolute belief in the rationality of the financial market, which assumed that the predetermined efficiency or effectivity of markets will be achieved through rational market participants, provided that they have guaranteed access to market information and the support, even if only limited, of relevant regulation. This approach focused mainly on domestic market regulation, while the global dimension of the regulatory activity and the (predominantly systemic) risk related to it and other threats to the stability of the economic (and thus the social) system were practically unnoticed.<sup>245</sup> As a result, the adoption of the “regulatory trinity”<sup>246</sup> i.e. greater transparency, clarity and better risk management turned out to be incompatible, especially under the circumstances of a dynamically changing situation in financial markets which, although regarded as domestic markets, nevertheless became a part of the global structures which eventually contributed to the global financial crisis and enforced the adoption of a new regulatory philosophy (see the Table below) based on new paradigm.

This new paradigm is considered to be **the Basel consensus** whose name derives from the head office of the Bank for International Settlements sometimes referred to the Basel Committee of Banking Supervision<sup>247</sup> functioning within the

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<sup>244</sup> J. Monkiewicz, M. Monkiewicz, *Ochrona konsumentów w nowym paradygmacie regulacyjno-nadzorczym rynków finansowych*, in: J. Monkiewicz, M. Orlicki [eds], *Ochrona konsumentów na rynku ubezpieczeniowym w Polsce. Współczesne wyzwania*, Warszawa 2015, pp. 13-14.

<sup>245</sup> Ibidem, pp. 14-15.

<sup>246</sup> Ibidem.

<sup>247</sup> P. Stanisławiszyn, *Zasady Bazylejskie – międzynarodowe standardy bezpieczeństwa i stabilności sektora bankowego*, in: M. Duczmał, T. Pokusa [eds], *Przejawy i instrumenty nowoczesnego zarządzania*, Opole 2004, pp.137-168; M. Iwanicz-Drozdowska, *Zmiany w regulacjach ostrożnościowych a harmonizacja nadzoru bankowego w Unii Europejskiej*, in: R. Wierzba, M. Iwanicz-Drozdowska, B. Lepczyński [eds], *Nowa Umowa Kapitałowa Bazylejskiego Komitetu Nadzoru Bankowego – konsekwencje dla gospodarki i sektora bankowego w Polsce*, Gdańsk 2004, pp. 145-146; T. Nieborak, *Realizacja zaleceń Komitetu Bazylejskiego ds. Nadzoru Bankowego dotyczących procesu powstawania i funkcjonowania banku w polskim prawie bankowym*, in: *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No 1-2 2001, pp. 51-66.



Table 1. The old and new regulatory and supervisory consensus on financial markets

Areas	Perception of financial markets	Intervention instruments	Character of the supervision
<b>Old Washington consensus</b>	<ul style="list-style-type: none"> <li>• rational, wise, self-recovering</li> <li>• financial innovations as an important element of the financial stability and security</li> <li>• corporate governance and business models as elements of free choice</li> </ul>	<ul style="list-style-type: none"> <li>• market discipline supported by regulations,</li> <li>• enhanced transparency</li> <li>• private financial risk management</li> </ul>	<ul style="list-style-type: none"> <li>• formal and superfluous</li> <li>• micro-prudential perspective</li> <li>• security as a private domain</li> <li>• supervision isolated from politics</li> </ul>
<b>New Basel consensus</b>	<ul style="list-style-type: none"> <li>• pro-cyclic, frequently unreliable, without the guarantee of being self-recovering</li> <li>• financial innovations as a potential market destabilisation factor</li> <li>*corporate governance and business models as a subject to public control</li> </ul>	<ul style="list-style-type: none"> <li>• regulatory discipline supported by market discipline</li> <li>• greater competences of the supervisory bodies</li> <li>• financial risk management regulated by public law</li> </ul>	<ul style="list-style-type: none"> <li>• substantial, thorough and multi-focal</li> <li>• macro-prudential perspective taking into account mutual relationships</li> <li>• security as a public domain</li> <li>• consumer protection as a constituting element of the supervisory</li> <li>• supervision tied to politics</li> </ul>

Source: J. Monkiewicz, M. Monkiewicz, *Ochrona konsumentów w nowym paradygmacie regulacyjno-nadzorczym rynków finansowych*, in: J. Monkiewicz, M. Orlicki [eds], *Ochrona konsumentów na rynku ubezpieczeniowym w Polsce. Współczesne wyzwania*, Warszawa 2015, p. 16.

Bank's structure. Both these subjects, despite the lack of legislative competences do, through their prestige and experience, have a considerable influence on the contemporary architecture of financial markets.<sup>248</sup> Among other things they develop regulatory standards (functional sources of law<sup>249</sup>) which subsequently serve as an inspiration for local legislators, including the European Union one.

These standards are founded on a new regulatory philosophy which takes note of: the instability of the market, its pro-cyclic character and herd behaviours accompanying it. What is more, financial systems are becoming increasingly complicated, offering highly innovative financial tools (of which some say that only their

<sup>248</sup> More in: A.M. Jurkowska, *Nowa architektura sieci bezpieczeństwa jednolitego rynku finansowego Unii Europejskiej*, in: J. Węclawski [ed.], *Bankowość*, op. cit. p. 121 et seq. See also M. Gałaj, *Nowa międzynarodowa architektura finansowa jako element długofalowego, strategicznego procesu zmian w światowym systemie finansowym*, in: Studia i Prace Kolegium Zarządzania i Finansów Szkoły Głównej Handlowej w Warszawie, Vol. 51 2004, p. 17 et seq.

<sup>249</sup> See R. Kaszubski, *Funkcjonalne źródła prawa bankowego publicznego*, Warszawa 2006.

inventors understand them) and carry a risk which is an intrinsic element of them.<sup>250</sup> As a result the mechanism of regulatory dialectics, that has been discussed earlier, is initiated in such a way that an action (change in the market) forces a reaction which in this case is the activity of the legislator who endows subjects in the market (central banks, supervisory bodies) with relevant legal instruments. Thus an attempt may be made here to formulate the thesis that the financial market as a kind of living organism has itself contributed to the changes currently happening, and to the adoption of a new regulatory-supervisory paradigm based on the Basel consensus, strongly emphasising the macro-prudential perspective<sup>251</sup> focused on the public management of systemic risk. Jan Monkiewicz and Marek Monkiewicz distinguished several features characteristic of this new paradigm. They are:<sup>252</sup>

- A strong emphasis on the role of regulatory discipline permitting intervention in market mechanisms;<sup>253</sup>
- Development of multilevel and complex regulatory systems;<sup>254</sup>
- Application of "soft" regulatory instruments such as recommendations, opinions, guidelines, or binding technical standards;<sup>255</sup>
- Resorting to out-of-court systems of compulsory restructuring and development of standards of financial institutions insolvency procedure (resolution systems);<sup>256</sup>

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<sup>250</sup> J. Monkiewicz, M. Monkiewicz, *Ochrona konsumentów w nowym paradygmacie regulacyjno-nadzorczym rynków finansowych*, in: J. Monkiewicz, M. Orlicki [eds], *Ochrona konsumentów na rynku ubezpieczeniowym w Polsce. Współczesne wyzwania*, op. cit., p. 15.

<sup>251</sup> M. Fedorowicz, *Nowy europejski nadzór finansowy ze szczególnym uwzględnieniem nadzoru bankowego- pojęcie, istota prawna i funkcje*, in: Zeszyty Naukowe Uniwersytetu Szczecińskiego No 630 2010, Roczniki Prawnicze No 22, pp. 59-75; M. Fedorowicz, *Normatywne aspekty regulacji europejskiego nadzoru finansowego ze szczególnym uwzględnieniem europejskiego nadzoru w prawie bankowym*, in: A. Dobaczewska, E. Juchniewicz, T. Sowiński [eds], *System finansów publicznych. Prawo finansowe wobec wyzwań XXI wieku*, wyd. I, Warszawa 2010, pp. 299-307; M. Fedorowicz, *Główne zasady organizacyjne nowego europejskiego nadzoru finansowego, na przykładzie Europejskiej Rady Ryzyka Systemowego oraz Europejskiego Organu Nadzoru Bankowego*, in: Przegląd Ustawodawstwa Gospodarczego, No 7 2011, pp. 2-9; M. Fedorowicz, *Kompetencje regulacyjne Europejskiego Urzędu Nadzoru Bankowego w zakresie przeciwdziałania kryzysowi finansowemu*, in: J. Szambelańczyk [ed.], *Wyzwania regulacyjne wobec doświadczeń globalnego kryzysu finansowego*, Warszawa 2011, pp. 109-127; M. Fedorowicz, *Prawne ujęcie nadzoru makroostrożnościowego w świetle krajowych projektów ustaw o nadzorze makroostrożnościowym nad systemem finansowym w ramach przedsejmowego etapu legislacyjnego*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, Warszawa 2016, pp. 113-136.

<sup>252</sup> Ibidem, pp. 16-25.

<sup>253</sup> See also M. Dyl, *Środki nadzoru na rynku kapitałowym*, Warszawa 2012, pp. 35-71.

<sup>254</sup> The most ambitious project of this kinds currently is the European System of Financial Supervision

<sup>255</sup> Soft law will be discussed further in this Chapter. See also *Soft law i mechanizmy nielegislacyjne jako instrumenty integracji rynku usług bankowych Unii Europejskiej*, in: Monitor Prawa Bankowego, No 1 2012, pp. 58-71.

<sup>256</sup> An example of this is the currently being built but already partly functional the Banking Union operating within the EU.

- Development and implementation of new concepts of financial supervision systems based on several pillars, of which the most frequently used are the micro- and macroprudential ones.<sup>257</sup>
- A tendency to even stronger articulation of the need for consumer rights protection since these rights, as has been shown by the developments of recent years, do not always work rationally and decisions about these rights are frequently influenced by behavioural aspects. The markets and their stability are not indifferent to these effects, hence the need to combine consumer protection policy with the financial stability model of consumer protection.

## 5.2. The financial market of the European Union – a historical and structural perspective

The analysis of the financial market from the historical perspective ought to start with the statement that its current transformation is based on the new regulatory-supervisory paradigm presented above. It has taken several dozen years to develop this paradigm which has at the same time underlined the building of the internal market as defined under Article 26 (2) of the Treaty on the Functioning of the European Union [TFEU]<sup>258</sup> as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.<sup>259</sup>

The concept of an internal market as a space without internal borders is one of the pillars upon which the European Union is founded.<sup>260</sup> It is commonly agreed that this market should include, as an integral part of it, the financial market of the European Union as well.<sup>261</sup> This approach can also be seen in the process of the creation and enforcement of new regulations pertaining to the EU's financial market, where the rationale for adopting these regulations refers to relevant provisions of the EU's primary law. An example of this methodology is the appointment of

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<sup>257</sup> An example here is the building up of new European structures of financial supervision based on micro- and macro-prudential pillars. More in: D. Green, *The Relationship between Micro-Macro-Prudential Supervision and Central Banking*, in E. Wymeersch, K.J. Hopt, G. Ferrarini [eds], *Financial Regulation and Supervision*, Oxford 2012, pp. 57-71.

<sup>258</sup> The Treaty on the Functioning of the European Union – consolidated version, 7 June 2016, OJ C 202/1.

<sup>259</sup> N. Moloney, *EU Securities and Financial Markets Regulation*, Oxford 2014, pp. 1-42; P. Zawadzka, *Instrumenty finansowe w gospodarce gminy*, Warszawa 2015, pp. 42-63.

<sup>260</sup> B. Bacia, A. Zawadzka, *Swoboda przepływu kapitału i usługi finansowego w Unii Europejskiej*, Warszawa 2011, p. 48.

<sup>261</sup> C. Kosikowski, *Finanse i prawo finansowe Unii Europejskiej*, Warszawa 2014, pp. 270-272; J. de Haan p. Oosterloo, D. Schoenmaker, *Financial Markets and Institutions. A European Perspective*, op. cit., pp. 178-184; T. Nieborak, *Aspekty prawne funkcjonowania rynku finansowego Unii Europejskiej*, op. cit., pp. 62-123.

the European System of Financial Supervision. Fedorowicz has conducted a thorough analysis of this System<sup>262</sup> starting with the exegesis of the treaty provisions lying at its foundation. The European System of Financial Supervision is regarded as one of the main concepts of the EU's financial market supervision. Fedorowicz indicated Article 114 TFEU as fundamental, constituting the competences of the European Parliament and the Council to adopt, in the ordinary legislative procedure and in consultation with the Economic-Social Committee, measures aimed at approximating the statutory, executive and administrative laws of individual Member States in order to achieve and provide for the proper functioning of the internal market. The exercise of these competences is however restricted to merely legislative initiatives that may be proposed if this is not prohibited under EU primary law and if such initiatives are to serve and actually safeguard the free movement of goods, persons, services and capital within the EU's internal market.<sup>263</sup> This provision of Article 114 TFEU as well as its Article 26 constitute the springboard for the changes currently going on in the regulatory process of creating the EU financial market regulation.<sup>264</sup> Considering this market as a part of the EU's internal market, the legislator has authorised relevant bodies operating in it to put forward initiatives that will allow the implementation in the future of the idea of a fully integrated, uniform financial market which will also, it can be assumed, constitute a supranational economic structure.<sup>265</sup>

One of the manifestations of such a supranational structure is among other things the European financial supervision initiated in 2011 and, pursuant to the Treaty provisions referred to above, equipped with completely new instruments for ensuring the efficacy of this market. Fedorowicz distinguished between two types of such instruments and called them: (i) the non-binding legal instruments available to the bodies of the European System of Financial Supervision and the (ii) the legally-binding instruments used by these bodies.<sup>266</sup> Their specificity confirms the thesis that the regulatory philosophy underlying the making of financial regulation has changed. The new instruments have indeed never been used in practice before.

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<sup>262</sup> M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, passim.

<sup>263</sup> M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, op. cit., p. 113.

<sup>264</sup> See also D. Wojtczak-Samoraj, *Cele unijnego prawa rynku finansowego*, in: W. Miemiec, K. Sawicka [eds], *Instytucje prawnofinansowe w warunkach kryzysu gospodarczego*, Warszawa 2014, p. 579.

<sup>265</sup> This concept, owing to the diversity of the factors occurring in domestic financial markets seems difficult (if not impossible) to realise. More real seems the attempt to build the European Union financial market of a federal structure based on shared supervisory structures (the organisation of which will account for the domestic factor) and legal grounds. In this last case it will not be easy to create a uniform legal framework which would, for example, account for the differences in the development of the financial market in Germany and Poland.

<sup>266</sup> See also M. Fedorowicz, *Funkcje nowego europejskiego nadzoru finansowego ze szczególnym uwzględnieniem funkcji nadzorczych w sektorze bankowym*, in: *Kwartalnik Prawa Publicznego*, No 4 2010, pp. 59-79.

Regarding the change of the regulatory philosophy, it may be worth remembering that until the global crisis of 2008 the prevailing belief had been that the regulatory processes in the EU financial market could have continued on the basis of the existing and then considered “sacred” **principle of minimum harmonisation** which recognised the role of the autonomy of Member States in the legislative process. In other words, States could at their discretion decide how the goals specified for them in legislative acts (directives) were to be achieved. However, spreading globalisation combined with the financial crisis and the temptation to goldplate the EU legislation<sup>267</sup> brought about a change in direction towards **the maximum harmonisation** of EU financial market regulation, an example of which can be seen in the trend to create supranational, pan-European supervisory and control structures composed of bodies equipped with legal instruments that allow them to, where permissible, intervene in matters that had earlier been within the unrestricted competence of the relevant organs of individual Member States.<sup>268</sup> What is more, changes also concern legislative acts governing the functioning of the individual segments of the financial market.<sup>269</sup> For the main segments (bank-

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<sup>267</sup> The idea of goldplating EU regulations may be defined as a process of accepting such regulations by the EU Member States’ legislators to function in the internal legal systems in such a way that although the spirit of the regulation has been preserved, the attempted goal of the regulation has been not. This is realised through specially edited for this purpose legal texts. Such an activity is prompted by the desire to maintain the competitiveness of the domestic market against other markets of the EU Member States, which in consequence leads to unequal competition resulting in, for example, regulatory arbitrage. This happens because financial institutions choose for the place of their activity a more convenient regulatory environment which is not always the most secure one. Apart from the competitiveness element, another negative aspect of this phenomenon is the threat to the stability of the system.

<sup>268</sup> For example the decisions of the EU’s supervisory bodies regulated, among others, under Article 19(4) of the Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331/2, OJ L 331/2 – hereinafter referred to as the EBA Regulation providing that: “without prejudice to the powers of the Commission pursuant to Article 258 TFEU, where a competent authority does not comply with the decision of the Authority, and thereby fails to ensure that a financial institution complies with requirements directly applicable to it by virtue of the acts referred to in Article 1(2), the Authority may adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law, including the cessation of any practice.”; More in: M. Fedorowicz, A. Michór, *O charakterze prawnym decyzji nowych europejskich organów nadzoru nad rynkiem finansowym UE*, in: Europejski Przegląd Sądowy, No 11 2011, pp. 24- 35; M. Fedorowicz, *Reforma nadzoru nad rynkiem finansowym w Unii Europejskiej a samodzielność krajowego nadzorca*, in: W. Rogowski [ed.], *Nowe koncepcje i regulacje nadzoru finansowego. Nadzór makrostabilnościowy. Nadzór bankowy SKOK. Instrumenty finansowe*, Kraków-Warszawa 2014, pp. 33-49; T. Nieborak, *Decyzja jako szczególna forma działań podejmowanych przez Europejski Organ Nadzoru Bankowego*, in: A. Pomorska, P. Smoleń, J. Stelmasiak, A. Gorgol [eds], *Prawo finansowe w warunkach członkostwa Polski w Unii Europejskiej. Księga Jubileuszowa dedykowana Profesor Wandzie Wójtowicz*, Lublin 2011, pp. 321-332.

<sup>269</sup> Including among other things the following: financial supervision, shadow banking, short sale, investment funds, derivative investment funds, alternative investment funds, the Capital Un-

ing, capital), special legal grounds are created, usually based on legislative acts, which constitute the driving force (of the legislative process) as they are basically the EU directives and regulations. A directive may have the role of a maximum harmonisation directive obligating all Member States to incorporate in their domestic legal systems the provisions identified in it, with no derogations allowed. Member States may, however, rely on what are called national options agreed during the process of the adoption of directives, under which individual States may choose from the solutions identified in directives as allowable. A regulation on the other hand is a EU legislative act which is directly applicable and (likewise a directive) sometimes offers completely new solutions, never known in the financial market earlier. They need to be more specifically determined, which can be achieved through the use of new, original instruments (soft law instruments) such as binding technical standards (BTS)<sup>270</sup> which can be developed and approved in a procedure rooted in the provisions of the TFEU, and which apply to delegated (Article 290 TFEU) and executive (Article 291 TFEU)<sup>271</sup> acts of a non-legislative character and which must, in the hierarchy of EU legislative acts, comply with the legislative acts.<sup>272</sup>

Without going into a detailed analysis of this matter (soft law instruments), (it ought to be taken that) the role of these acts can best be understood when it comes to the creation of stability and balanced competition in the market, achieved through precisely formulated and meticulously explained requirements to be satisfied by financial institutions. Their role in the building of uniform models of behaviour (i.e. the cohesion-convergence aspect) is worth noting here. They materialise as regulations or decisions, but at the cost of the national organs of Member States responsible for the functioning of domestic markets.<sup>273</sup> Here we must

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ion, crowdfunding, the Single European Payment Area (SEPA), the deposit guarantee system, social and contractual insurance, the system of deposit guarantees, the bank restructuring and insolvency resolution, financial conglomerates, rating agency supervision, money laundering and many others.

<sup>270</sup> See for example Article 97(4) of the CRR Regulation providing that: "EBA in consultation with ESMA shall develop draft regulatory technical standards to specify in greater detail the following: (a) the calculation of the requirement to hold eligible capital of at least one quarter of the fixed overheads of the previous year; (b) the conditions for the adjustment by the competent authority of the requirement to hold eligible capital of at least one quarter of the fixed overheads of the previous year; (c) the calculation of projected fixed overheads in the case of an investment firm that has not completed business for one year.

<sup>271</sup> J. Barcz, *Akty delegowane i akty wykonawcze – pojęcie i kryteria rozróżnienia*, in: Europejski Przegląd Sądowy, No 3 2012, pp. 6-16; A. Piesiak, *Główne problemy w negocjacjach i we wprowadzaniu w życie nowego systemu aktów delegowanych i wykonawczych zgodnie z art. 290 i art. 291 TFEU* in: Europejski Przegląd Sądowy, No 3 2012, pp. 17-22; J. Bast, *New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law*, in: Common Market Law Review, No 3 2012, pp. 885-927; M. Chamon, *EU agencies between Meroni and Romano or the devil and the deep blue sea*, in: Common Market Law Review, No 4 2011, pp. 1055-1075.

<sup>272</sup> M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, op. cit. p. 169 et seq.

<sup>273</sup> *Ibidem*, pp. 175-175.

agree with Fedorowicz's opinion that the accuracy and detailed character of the regulations may turn out to be a blessing to the European Union financial market, although it may also cause disorientation and an impression of overregulation.<sup>274</sup>

This thesis can be fully justified after selected examples of EU legislation created in the spirit of the new maximum harmonisation philosophy have been analysed. This philosophy frequently leads to a situation where a directive is more often reminiscent of a regulation and a regulation, precisely specified with the BTSs, becomes more of a directive. It is no accident that BTSs have been referred to above as only an example of a form in which legislative acts may be specified. They have also been referred to earlier as legally binding instruments of the European supervisory authorities. The non-binding forms of law enforcement are: guidelines, recommendations, opinions (counted as an interesting category known as soft law), warnings are a different category altogether.

Soft law and the ways in which it can be used in the financial market is a very interesting subject which has not, however received much attention in the literature, or the European literature in particular.<sup>275</sup> The idea of soft law is believed to originate in international law where the name was coined. It is sometimes referred to as flexible law. What is worth mentioning here is that scholars do not agree upon the definition of the term "soft law" or its scope, or the possibility of referring to soft law instruments (which are, in fact, non-legal instruments) as laws.<sup>276</sup> The most important problem appearing in the debate on soft law is the character (legal and non-legal) of the instruments counted as soft law. Are they capable of

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<sup>274</sup> Ibidem, p. 176.

<sup>275</sup> There is an interesting monograph by C. Brummer, *Soft Law and the Global Financial System. Rule making in the 21st Century*, Cambridge 2012 (passim) in which a concept of International Financial Law is presented – see notes on the definition of financial market law in comparison with financial law. The conception provides for a financial market created by international subjects which from the legal point of view do not have legislative power. The latter are examples of soft law defined by Brummer, which is to be the answer to the challenge present in contemporary markets. Therefore collaboration between e.g. G-20, *Financial Stability Board*, *Basel Committee on Banking Supervision*, *International Organization for Securities Commissions (IOSCO)*, *International Association of Insurance Supervisors (IAIS)*, *International Accounting Standards Board (IASB)*, *Committee on Payment and Settlement Systems (CPSS)*, *Financial Action Task Force (FATF)*, *Organisation for Economic Co-operation and Development (OECD)*, *International Association of Deposit Insurers (IADI)*, as well as the *International Swaps and Derivatives Association (ISDA)* is necessary since all these include in their activities issues related to the financial market.

<sup>276</sup> These issues have been extensively discussed in an article by A. Wyrozumska, *Instrumenty międzynarodowe niewiążące prawnie (soft law lub flexible law)*, in: A. Łazanowsky, R. Ostrihansky [eds], *Współczesne wyzwania europejskiej przestrzeni prawnej. Księga pamiątkowa dla uczczenia 70. urodzin Profesora Eugeniusza Piontka*, Kraków 2005, pp. 607-644. See also R. Bierzanek, „Miękkie” prawo międzynarodowe, in: *Sprawy Międzynarodowe*, No 1 1987, pp. 91-106; H. Hilgenberg, *A Fresh Look at Soft Law*, in: *European Journal of International Law*, Vol. 10 No 3 1999, pp. 499-515; I. Seidl-Hohenveldern, *International Economic „Soft Law”*, in: *Recueil des Cours de l'Academie de Droit International*, 1979 – II, p. 169 et seq.; A.J.P. Tammes, *Soft Law*, in *Essays on International and Comparative Law in Honour of Judge Erades*, den Haag 1983, p. 187 et seq.

causing legal effects despite their legally non-binding character? Should they only be perceived as acts whose basic virtue is their flexibility and lesser formality of application as well as the ease with which they may be repealed? Sometimes, because of the prestige of the subject adopting soft law, its provisions are frequently implemented.<sup>277</sup> The result, or goal obtained by way of such an application of soft law is similar to that which characterises “hard law” whose binding character is manifested in the sanctions that may be imposed for non-compliance with the law. This is possible owing to the prestige mentioned above, but also because of the philosophy underlying the manner in which sanctions are used: their moral and persuasive values. Therefore we must agree with the view that even if all these types of “resolutions, guidelines, memoranda, covenants, declarations reports and programmes, are not granted legal force, the premises of their adoption shared by Member States as well as the lack of unambiguous and clear objections regarding their adoption, and the far advanced convergence of the accepted standards, made them an essential point of reference with regard to the enforcement of the law.”<sup>278</sup> It is no different when it comes to the financial market of the European Union which is showing a tendency to “soften” the law. This trend most probably arises from the specificity of the matter regulated and in particular from its extensiveness, and even more importantly, its dynamics. New forms of investment that have been developed as a result of market needs, demand a reaction from the legislator. It is not possible though to adopt one provision which could universally regulate the functioning of a given investment for a longer time without requiring at the same time the legislator’s intervention based on predetermined procedures of law making. Thus it may be stated that the flexibility of the market enforced the flexibility of the legislator who resorted to the opportunities offered by soft law, which take the form of guidelines, opinions, recommendations, warnings etc. and which, are issued for example, by bodies constituting the European financial supervision structure. In this case soft law must be analysed in two dimensions: the internal one (*pro foro interno*), that is to the extent to which soft law applies to the supervisory authorities of Member States, and external (*pro foro externo*), directed at financial institutions that are subject to supervision.<sup>279</sup> Without going into too much detail in analysing soft law and its forms present in the financial market of the European Union (and largely governing the supervisory structures intended to control this law) we may quote Fedorowicz who rightly states that soft law:<sup>280</sup>

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<sup>277</sup> A. Wyrozumska, *Pojęcie prawa Unii Europejskiej i zasady jego działania*, in: J. Barcz, M. Górka, A. Wyrozumska, *Instytucje i prawo Unii Europejskiej*, Warszawa 2015, pp. 291-292. See also P. Pęczak, „Miękkie” prawo międzynarodowe w procesie stosowania prawa krajowego, in: L. Leszczyński [ed.], *Wykładnia prawa. Odrębności w wybranych gałęziach prawa*, Lublin 2006, pp. 129-137.

<sup>278</sup> M. Menkes, *Soft law i jego tworzenie w relacjach międzynarodowych*, in: P. Chmielnicki [ed.], *Pochodzenie, tworzenie i efektywność prawa*, Warszawa 2014, p. 312.

<sup>279</sup> M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, op. cit., p. 153.

<sup>280</sup> Ibidem, pp. 162-163.



1. Serves to understand in a coherent and uniform manner, and subsequently to observe European Union financial market law;
2. Its regulation differs greatly from the regulation of traditionally understood soft law as it is much closer to its addressees now than before;
3. Its efficacy is ensured largely by normative instruments used to enforce it and sanction the failure to realise what has been intended by the creator of soft law instruments;
4. Acts constituting soft law belong to the new generation of soft law which plays a special role in the EU financial market arising from the fact that the EU's legislator who cannot ascribe to soft law a directly binding force nevertheless attempts to "make it work" by enforcing upon its addressees certain legal consequences which are essential from the point of view of the regulation made (in this case concerning the supervision of the EU financial market).

A short description of the specificity of this new regulatory philosophy in the financial market leads to the conclusion that its effect includes among other things new legal solutions which at first glance seem to serve the realisation of the idea of the unification of the market. There is a risk of overregulation though. Or at least such an impression may be created having analysed the basic legislative acts (directives and regulations) adopted with a view to embracing the functioning of the EU financial market in a set of legal norms. There are about seventy such legislative acts and work on other forty is currently in progress. What is more, taking as an example the banking sector, for which the main pieces of legislation that are its driving force are the CRDIV Directive and the CRR Regulation (consisting of 436 pages for just the two of them not to mention the other instruments issued on their basis), the reason or justification of such hyperactivity of the European legislator may be questioned. This is even more so since the example above is but one of many and the regulation constitutes only a part of the vast number all legislative initiatives, which in the case of the whole European capital market amount to about 1000 pages, and there are proposals to create as well the Banking Union project<sup>281</sup>

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<sup>281</sup> See T.H. Tröger, *Regulatory Influence on Market Conditions in the Banking Union*, in House of Finance Working Papers, SAFE Working Paper No 109 2015.; J. Monkiewicz, *Unia bankowa jako zmiana architektury regulacyjnej i nadzorczej rynku finansowego z perspektywy ekonomicznej*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, op. cit., pp. 59-73; A. Jurkowska-Zeidler, *Prawo unii bankowej*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, op. cit., pp. 74-93; T. Nieborak, *Unia bankowa – w stronę bezpieczeństwa i stabilności rynku finansowego Unii Europejskiej?*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, op. cit., pp. 94-112; P. Stanisławiszyn, *Unia Bankowa – blaski i cienie nowego mechanizmu rynku finansowego*, in: Z. Ofiarski [ed.], *XXV lat przeobrażeń w prawie finansowym i prawie podatkowym – ocena dokonań i wnioski na przyszłość*, Szczecin 2014, pp. 851-860.

of which part is now the European Central Bank<sup>282</sup>, and the Capital Union project<sup>283</sup>, which will most probably include in future the Insurance Union project too.

Most certainly the objective behind each of these projects is the creation of a European Union financial market capable of competing with similar markets in other parts of the world. The determination of the EU's authorities to achieve this goal is obvious and apparent. However, bearing in mind the diversity, complexity and the number of sources of the laws applicable to this market that are not always uniform in their form and level of detail, the question arises whether the actual control of the functioning of this market is really possible. It seems a valid question especially since the new regulatory tendency is the result of the desire to exercise control over the financial market, a desire which became particularly strong after 2008. And yet, it is understandable that the multiplication of the regulation is also a simple consequence of market activity, such as for example **the 3xR effect (the effect of the cycle spiral)** mentioned above) where a new regulation is enforced by the market reaction to the previous one. The creativity of the market and the financial innovations resulting from it observed today suggest that this process will continue.<sup>284</sup> But will this facilitate the realisation of the goals and protection of the goods and values specified in the legislative acts underlying the European Union financial market? Or is it that the average customer, instead of due protection, receives from a bank, or another financial institution only thousands of regulations which he (and frequently the institutions likewise) finds totally incomprehensible? Do they really provide adequate protection of market stability or serve to protect the supreme value of the market which is trust? This and many other questions emerge when the achievements of the EU's legislator in the scope of the financial market are analysed. It is not the intention to answer them in this book, nevertheless they may be asked to raise interest, or even doubts and, possibly, concerns among the readers who, having arrived at this point of reading of this book, have become well familiar with the essence of financial market regulation which governs the building of a secure and stable financial market based on trust in the age of globalisation.

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<sup>282</sup> Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63.

<sup>283</sup> See also M. Fedorowicz, *Stabilnościowe elementy Europejskiej Unii Bankowej jako podstawa reformy zadań i funkcji Europejskiego Banku Centralnego oraz Europejskiego Organu Nadzoru Bankowego*, in: Z. Ofiarski [ed.], *XXV lat przeobrażeń w prawie finansowym i prawie podatkowym – ocena dokonań i wnioski na przyszłość*, Szczecin 2014, pp. 691-700.

<sup>284</sup> More in: Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union, Brussels, 30.9.2015 COM(2015) 468 final.

<sup>285</sup> See also A. Samborski, *Globalizacja rynków finansowych*, in: *Przegląd Ustawodawstwa Gospodarczego*, No 3 2004, p. 16 et seq.

It is no different in the case of the European Union and its law. In the regulation of the functioning of individual segments of the EU's financial market, the legislator formulates the goals of the regulation by making references to, among others, preambles of relevant legislative acts.<sup>285</sup> Referring to these frequently extensive forms of existing legislation arises from the role ascribed to the functional interpretation of law, including the analysis of the goals which it is to serve, and the recognition of the essence of the European Union's goods and values.<sup>286</sup> In the opinion of Dorota Wojtczak-Samoraj, despite the fact that the functional interpretation used to be of subsidiary character in individual Member States, the multi-centric character of the legal system<sup>287</sup> based on the co-existence of the domestic

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<sup>285</sup> See for example point 9 of the Preamble to the CRR regulation providing that: "for reasons of legal certainty and because of the need for a level playing field within the Union, a single set of regulations for all market participants is a key element for the functioning of the internal market. In order to avoid market distortions and regulatory arbitrage, prudential minimum requirements should therefore ensure maximum harmonisation. As a consequence, the transitional periods provided for in this Regulation are essential for the smooth implementation of this Regulation and to avoid uncertainty for the markets." And point 6 PSD2 In which the legislator provides that "new rules should be established to close the regulatory gaps while at the same time providing more legal clarity and ensuring consistent application of the legislative framework across the Union. Equivalent operating conditions should be guaranteed, to existing and new players on the market, enabling new means of payment to reach a broader market, and ensuring a high level of consumer protection in the use of those payment services across the Union as a whole. This should generate efficiencies in the payment system as a whole and lead to more choice and more transparency of payment services while strengthening the trust of consumers in a harmonised payments market."

<sup>286</sup> M.E. Stefaniuk, *Preambuła aktu normatywnego w doktrynie oraz w procesie tworzenia i stosowania prawa w latach 1989-2007*, Lublin 2009, p. 143 et seq.

<sup>287</sup> The multi-centricity of the legal system has been the subject of a lively debate for many years now. The impulse which initiated the debate was the transformation of the global reality of which one of the elements is emergence of supranational decision-making centers which create norms of behaviour which directly or indirectly influence different forms of human activity. They are either international organisations or subjects of public-law character such as the European Union. The legislative acts created by such organisations must be taken into account by bodies enforcing the law, e.g. tax law regulations which today have an international dimension (more on this in: D. Mączyński, *Międzynarodowe prawo podatkowe*, Warszawa 2015, pp. 36-39). The laws of financial markets are also increasingly often become international financial laws using novel legal instruments, earlier unknown to this market, as for instance soft law (C. Brummer, *Soft Law and the Global Financial System. Rule making in the 21st Century*, op. cit., pp. 60-114). The need to distinguish the multi-centric system (also termed policentric, or pluralistic) is explained by the fact that "contemporary legal systems are less and less a mono-centric system (described by Hans Kelsen and illustrated as a pyramid with the State as a main decision-centre at the top) but are more often a conglomerate composed of many autonomous and independent although interrelating with one another decision centres." (A. Kalisz, *Multicentryczność systemu prawa polskiego a działalność orzecznicza Europejskiego Trybunału Sprawiedliwości i Europejskiego Trybunału Praw Człowieka*, in: *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No 4 2007, p. 35). Despite the differences in the perception of this trend, including its criticism, this issue needs further debate in the light of the on-going changes of the environment in which law must function. More in: A. Kustra, *Polemika. Wokół multicentryczności systemu prawa*, in: *Państwo i Prawo*, No 6 2006, p. 85 et seq.; E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, in: *Państwo i Prawo*, No 4 2005, p. 3 et seq.; E. Łętowska, *Multicentryczność*

and the European Union's legal systems applicable at the same time, has enforced the need to include it in the process of the enforcement of European Union financial law.<sup>288</sup> As rightly pointed out by the above writer, when the goals of the European Union financial market are to be identified, first the goals specified in the primary law as essential for the internal market as a part of the legal system of the European Union must be referred to, and only later detailed goals pertaining to the financial market ought to be analysed. These are "hiding" in legislative acts which occupy lower positions in the hierarchy of the sources of European Union law.<sup>289</sup>

The common goals that can be found in different pieces of legislation in the financial market regulation are subsequently concretised in individual legislative acts. As can be seen, the supreme goals shared by all are **the security of the financial market** and the **protection of the interests of its participants**.<sup>290</sup> On the basis of them, a whole spectrum of other goals has been built and subsequently categorised in the literature. The following types of such goals may be distinguished:<sup>291</sup>

1. External and internal goals of the financial market regulation, where the former arise from and ought to be referred to the general goals of the legal system of the European Union, while the latter are framed in the detailed regulations of the financial market;<sup>292</sup>

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*współczesnego systemu prawa i wykładnia jej przyjazna*, in: L. Ogiegło, W. Popiołek, M. Szpunar [eds], *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, Kraków 2002, p. 1127 et seq.

<sup>288</sup> D. Wojtczak-Samoraj, *Cele unijnego prawa rynku finansowego*, op. cit., p. 578.

<sup>289</sup> Ibidem, p. 580.

<sup>290</sup> See Article 1(5) of the EBA Regulation stating that: "the objective of the Authority shall be to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses. The Authority shall contribute to: (a) improving the functioning of the internal market, including, in particular, a sound, effective and consistent level of regulation and supervision; (b) ensuring the integrity, transparency, efficiency and orderly functioning of financial markets; (c) strengthening international supervisory coordination; (d) preventing regulatory arbitrage and promoting equal conditions of competition; (e) ensuring the taking of credit and other risks are appropriately regulated and supervised; and (f) enhancing customer protection."

<sup>291</sup> D. Wojtczak-Samoraj, *Cele unijnego prawa rynku finansowego*, op. cit., pp. 579-585.

<sup>292</sup> See point 7 of the Preamble to the Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, OJ L 123/1, stating that: "some Member States have issued or are preparing legislation to regulate directly or indirectly interchange fees and covering a number of issues, including caps on interchange fees at various levels, merchant fees, the 'Honour All Cards' rule and steering measures. The existing administrative decisions in some Member States vary significantly. To make the levels of interchange fees more consistent, a further introduction of regulatory measures at national level aimed at addressing the levels of, or discrepancies between, these fees is anticipated. Such national measures would be likely to lead to significant barriers to the completion of the internal market in the area of card-based payments and internet and mobile payments based on cards and would therefore hinder the freedom to provide services."

2. The general goals mentioned referred to above and their derivatives;<sup>293</sup>
3. Vertical goals of a public law character (applicable to the market structure) and vertical goals (which are partially of a private law character) influencing the relationships between financial institutions and their clients). The two kinds are sometimes complementary;<sup>294</sup>
4. Positive and negative goals which express the legislator's intentions with regard to the desired actual condition to be achieved;<sup>295</sup>
5. Basic goals related directly to the matter regulated, as well as ancillary goals identified among other things as the process of the creation and enforcement of the law (its quality, transparency and cohesion).<sup>296</sup>

All these goals are important but in this book we have assumed the fundamental role of trust for the proper functioning of the market for which stability, security (achieved among other things by risk control) and transparency are indispensable. It may be worthwhile to focus for a while on two of the goals distinguished above, namely the security of the financial market and the protection of the interests of its participants, as both serve to promote trust as the fundamental value of the market.

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<sup>293</sup> For example Article 2(1) of the EBA Regulation providing that: "the Authority shall form part of a European System of Financial Supervision (ESFS). The main objective of the ESFS shall be to ensure that the rules applicable to the financial sector are adequately implemented to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services."

<sup>294</sup> See point 33 of the Preamble to CRDIV directive which provides that "for the purposes of strengthening the prudential supervision of institutions and the protection of clients of institutions, auditors should have a duty to report promptly to the competent authorities, wherever, during the performance of their tasks, they become aware of certain facts which are liable to have a serious effect on the financial situation or the administrative and accounting organisation of an institution."

<sup>295</sup> See point 4 of the Preamble to the Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173/1, which provides that: "there is a need to establish a more uniform and stronger framework in order to preserve market integrity, to avoid potential regulatory arbitrage, to ensure accountability in the event of attempted manipulation, and to provide more legal certainty and less regulatory complexity for market participants. This Regulation aims at contributing in a determining manner to the proper functioning of the internal market and should therefore be based on Article 114 of the Treaty on the Functioning of the European Union (TFEU), as interpreted consistently in the case-law of the Court of Justice of the European Union."

<sup>296</sup> See point 93 of the Preamble to the Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 12/1, which provides that "good governance is the basis for effective and sound management of insurance and reinsurance undertakings as well as a key element of the regulatory framework. The system of governance of an insurance and reinsurance undertaking should be based on an appropriate and transparent allocation of oversight and management responsibilities to provide for an effective decision making, to prevent conflicts of interest and to ensure effective management of the undertaking."

The choice of these goals is completely right. The European legislator has paid much attention to the security and dependent on its stability of the market in recent years. This **stability narrative** as it is called, has become the determinant of the legislator's activity founded on the recognition of stability as a public good.<sup>297</sup> It is possible to achieve it if the legislator employs a **risk-approach to the regulation** being created and enforced. What also helps in this process is the use of methods allowing the quantification of risk and based on this quantification certain necessary actions. However, such quantification of risk would not be possible without the data that are needed to describe a given fragment of the reality which belongs to a wider category – information. Information perceived in this way constitutes but one of the elements of the European legislator's policy on the European Union financial market.

The other of the goals distinguished above is market participants' protection, considered to be one of the main objectives of the EU regulation. There are two ways in which protection can be achieved. One is through an institutional system of risk supervision and control whose organs equipped with competences to procure very detailed and specific information<sup>298</sup> gather such information on the basis of which decisions or activities are made or undertaken with a view to ensuring stability. Part of this system is the European System of Financial Supervision, already in place, and the Banking Union still in the course of development, both intended to function in a regulatory environment based on the philosophy of maximum harmonisation. This philosophy provides norms for the functioning of the financial market that covers up new and even newer segments. The other way in which market participants may be protected is by ensuring them access to information. This will allow them to make rational decisions, or at least this is expected. The term or concept of a "participant" is extremely broad and may apply to professional subjects (financial institutions) as well as non-professional ones (consumers). The same division is also characteristic of a part of the regulation of the EU's financial market. These differences should be taken into account in the financial market as well, to follow the example of the regulation and the existence of such norms in the capital market or the market of payment services.

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<sup>297</sup> M. Andenas, I. H-Y Chiu, *The Foundation and the Future of Financial Regulation*, London 2013, pp. 18-38; See also J.P. Trachtman, *The International Law of Financial Crisis: Spillovers, Subsidiarity, Fragmentation and Cooperation*, in: *Journal of International Economic Law*, No 13 2010, p. 719.

<sup>298</sup> See Article 11 (1) of MiFID2 Directive providing that: "Member States shall require any natural or legal person or such persons acting in concert (the 'proposed acquirer'), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an investment firm or to further increase, directly or indirectly, such a qualifying holding in an investment firm as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the investment firm would become its subsidiary (the 'proposed acquisition'), first to notify in writing the competent authorities of the investment firm in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in Article 13(4)."

As can be supposed, and also bearing in mind the analysis of the wording of the provisions of individual legislative acts (set in the stability philosophy and intended to protect market participants) the idea underlying the EU's legislator's activity is the protection of a value in the form of trust in the market. To achieve trust in the market though, the stability and transparency of the functioning of this value (trust) is absolutely necessary. (see Fig. 2)<sup>299</sup>

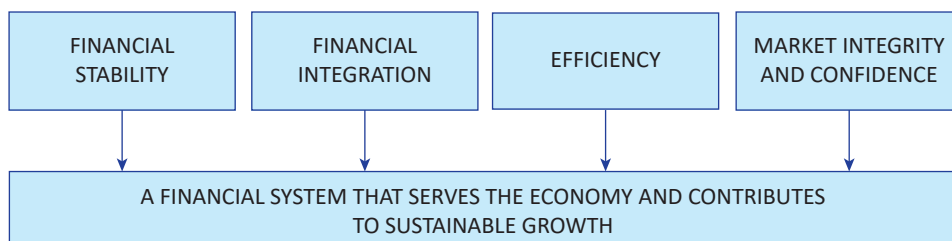


Figure 2. Objectives of the European Union financial market regulation

Source: Commission staff working document Economic Review of the Financial Regulation Agenda Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A reformed financial sector for Europe COM(2014) 279 final, p. 8.

This approach reflects the concept of the perception of the financial market as an element of the social system (with all the consequences of such an approach) which was discussed at the beginning of this Chapter. This structure of European Union financial market regulation despite its extensiveness makes up a logical whole which, like the universe, continues to grow, extending to subsequent kinds of financial activity, and is a proof of the existence of regulatory dialectics. The use of the term “regulation” as defined earlier is well justified here because the process analysed is not merely the making and enforcement of law but also contains axiological and sociological elements related to it. These elements can be found in legislative acts or draft documents such as the White Paper<sup>300</sup> or Impact Assessment Documents<sup>301</sup> which frequently precede the adoption of concrete legal solutions.

<sup>299</sup> The concept of the building up of the European Union financial market in the coming years was presented extensively in a document entitled Commission staff working document Economic Review of the Financial Regulation Agenda Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A reformed financial sector for Europe COM (2014) 279 final.

<sup>300</sup> See e.g. the Commission White Paper of 1 December 2005 on Financial Services Policy 2005-2010 COM(2005) 629 final.

<sup>301</sup> More on the impact assessment of the regulation in: W. Szpringer, W. Rogowski [eds], *Oce- na skutków regulacji – poradnik OSR, doświadczenia, perspektywy*, Warszawa 2007; C. Kirkpatrick, D. Parker [eds], *Regulatory Impact Assessment. Towards Better Regulation?*, Cheltenham 2007. See e.g. Impact Assessment Report Accompanying the proposal for Commission delegated Regulation (EU), Supplementing directive 2009/138/EU of the European Parliament and of the Council on the tak-

However, in a situation of such extensive organisational structures, the multitude of provisions and amount of information which are to serve the making of rational investment decisions, questions about the efficacy of such activities arise. Is it not the case that for fear of the growing dominance of the financial market the European legislator decided to regulate all of its existing and future segments notwithstanding the rationality of such a decision? And did he, in his actions, take into account the non-legal (axiological, economic or behavioural) elements as well? The synthesis of the regulation of the European Union financial market presented here shows that the philosophy behind it was a regulatory philosophy adopted as a consequence of the emergence of the financial empire headed by the Systematically Important Financial Institutions (SIFIs) which are institutions of material significance to the entire (including global) financial system.

The fruits of the materialisation of this philosophy include: replacement of the concept of minimum harmonisation with the concept of maximum harmonisation; the creation of supranational supervisory-control structures capable of using new instruments of law enforcement (e.g. a possibility of a ban put on certain forms of investment<sup>302</sup>); increased international and global collaboration, ; implementation of the Basel consensus; inflation of provisions to a degree as never before; yet more emphasis on the need to increase the rights of the consumer who as a reasonable market participant is capable of making rational decisions based on the information provided.

The last of these elements is controversial because the paradigm of a *homo oeconomicus* has recently been frequently challenged. It seems however that it guided the European legislator in the process of creating the norms for the financial market. Thus the need of a redefinition of this paradigm as well as of the concept of the rational customer who is aware of the phenomena going on internally (his emotions and the thinking process) as well as externally (e.g. under financial market circumstances).<sup>303</sup> With this knowledge, supported by educational activity, the consumer ought to be capable of reacting adequately to the above phenomena and bear part of the risk associated with the investment decisions he is making. This type of change must of course be a gradual process and take into account, apart from the structural conditions also the behavioural conditions which – as

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ing-up and pursuit of the business of Insurance and Reinsurance (Solvency II), Brussels, 10.10.2014, SWD(2014) 308 final.

<sup>302</sup> See e.g. Article 40 (1) of the MiFID2 Regulation providing that "in accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may, where the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union: (a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain specified features; or (b) a type of financial activity or practice. A prohibition or restriction may apply in circumstances, or be subject to exceptions, specified by ESMA."

<sup>303</sup> D. Cyman, *Elektroniczne instrumenty płatnicze a bezpieczeństwo rynku finansowego*, op. cit., pp. 208-209.



has been shown in the analysis of the essence of this phenomenon – are and have always been present in the market. The recognition and understanding of these conditions as well as their implementation in the process of the creation and enforcement of law may be achieved with the help of behavioural studies which have been developing so successfully in recent years and which have already started to permeate through economic studies to legal science.

## 6. Summary

When summing up the deliberations on financial market regulation at a time of globalisation, it must once again be emphasised that a wider perspective is required<sup>304</sup> since it includes the process of the creation and enforcement of (financial market) law that has been analysed in the previous Chapter, and the premises, goals and values which accompany the process. It would seem important to articulate the latter i.e. the axiological factor as it is very important in the light of the crisis of values seen in recent years in global financial markets. This crisis and the financialization of our everyday lives have together created a new reality, never encountered before in human history, where on the one hand owing to easy access to certain goods and numerous innovations everyday life has become easier but on the other hand interpersonal relationships, so important for the building up of social structures based, inter alia, on trust, have eroded.

Trust, as this book has attempted to explain is one of the determinants responsible for the existence of the financial market, an important element of the social system.<sup>305</sup> This assumption would appear to be present in the process of the creation and enforcement of financial market law in which the human factor must be taken into account. This in turn arises from the essence of law as an instrument with the use of which social relationships are shaped. There therefore arises the need to emphasise the humanisation of the market, in which the legislator as well as the subjects enforcing the law play important roles. They must understand the nature of the matter regulated but first of all they need to determine the goals before them. The latter are connected with certain goods which must be protected in order to promote values that are important for a given society. In the case of the financial market, regardless of the time or territorial dimension, trust is the fundamental value necessary to ensure the proper functioning of a stable and secure market. Ensuring stability and security requires a certain regulatory activity, though.

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<sup>304</sup> See also P. Wajda, *Wpływ globalizacji na publicznoprawne regulacje rynku finansowego*, in: T. Giaro [ed.], *Prawo w dobie globalizacji*, Warszawa 2011, pp. 181-203.

<sup>305</sup> See also W. Szpringer, *Regulacja konkurencji a konkurencja regulacyjna. Ujęcie instytucjonalne*, Warszawa 2010, pp. 225-232.

The specificity of the financial market and the matter regulated is reflected in its innovatory character, its extensiveness as well as its dynamics. They all mean that squeezing them into a legal framework is not an easy task. Just how difficult such a task may be can be shown by the example of the European Union financial market where the ardent legislator is striving to regulate all the aspects of the functioning of this market. To achieve this goal he uses novel solutions, develops new organisational structures and adopts dozens of legislative acts which all manifest his desire to build up a single market based on security, stability and trust. Will this, however, be achieved through total regulation? Will it really serve a market and its humanistic character which cares for the needs of its participants and, more importantly, which provides for their security? Does the contemporary (EU) legislator foresee the consequences of his activity such as the behaviour of the addressees of the norms he creates? Or perhaps, do such behaviours constitute an inspiration for the legislator's actions, which must also take into account the non-legal elements (economic, social and psychological)?

An analysis of the documents accompanying the process of the creation and enforcement of financial market law and European Union financial market law in particular shows that the answer to the last of the above questions is not positive.

Thus there arises the need to start a discussion, especially since, as was shown in the previous Chapter, the achievements of other sciences in this field call for an interdisciplinary approach to law. Therefore, remaining faithful to the values considered indispensable in the creation of a legal system, the legislator must nevertheless account for the dynamics of a changing world. The financial market is not an easy object to embrace in a framework of legal norms.<sup>306</sup> The main reasons for this are: its multi-dimensional character (public and private law elements permeating each other)<sup>307</sup>, multi-centricity resulting from its global nature, numerous conflicts of interests as well as sensitivity, which is not often present in

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<sup>306</sup> The difficulty of the financial market regulation was aptly illustrated by James R. Barth, Gerard Caprio Jr. and Ross Levine in a book entitled *Guardians of Finance. Making Regulators Work for US*, op. cit., pp. 26-27. These authors compared financial market regulation to cooking hot and sour soup in which there is needed a combination and a balance of different flavours: spicy, sweet and sour. It cannot be reduced to simple measuring off the same amount of each. An addition of a spoonful of chilli will damage the soup and a failure to add chilli at all will ruin the delicate balance of flavours of the sweet and sour soup. A similar situation is encountered with orange juice which although delicious, will not be "itself" is added to the soup. This is why, the choice of ingredients based on their particular features is not the best strategy for the making of the soup. The key is the proper balance. Likewise in the case of the soup, also the process of creation stable financial markets regulations requires in the opinion of these authors first an assessment of how individual legal solutions will influence a market when combined to create a whole. Therefore it is a mistake to assess the impact of a regulation without taking into account a wider horizon of mutual interactions, or the influence of non-legal factors for example.

<sup>307</sup> See also Włodyka, *Problem prawa gospodarczego w świetle aktualnej nauki o systematyce prawa*, in: Państwo i Prawo, No 12 1972, p. 41.

other segments of the economy. The latter is connected with the behavioural elements characteristic of the financial market and which can be found both, on the part of the financial institutions (or more precisely their managers) and, indeed especially their customers. Both may be placed in one category which is that of market participants.

The above behavioural factors have become in the last years the subject of a heated debate between economic and legal scholars. The phenomena discussed in this Chapter (asymmetry of information, negative selection, moral hazard, contagion effect, herd behaviour) which are connected with the functioning of the financial market are an argument in favour for the continuation of such a debate, or even its further development. It is to be hoped that this behavioural factor will permeate into practice whilst also, in the case of financial market law, relating to the process of its making and enforcement. When behavioural elements are included, this will become a “new beginning” which will in fact be a return to the roots described in the previous Chapter. These are the theories which accounted for the human factor in the definition of the essence of law and the emotions related to it which are often the source of irrational behaviour. It would seem that the financial market and its regulations have so far been outside the discussion of the behavioural approach to law. This was probably due to the complicated nature and extensive structure of this vast subject. Owing to this multiplicity of aspects, the collaboration of scholars from different disciplines (sociology, psychology, economics and law) is required for its thorough analysis. The results of such collaboration may turn out invaluable on condition though, that they are taken into consideration by the legislator in the process of creating law, bearing in mind the reality of the world around him. Before this happens, it may be worthwhile analysing this concept of a behavioural perception of or approach to law and then asking a question: is acceptance of this approach really feasible in the process of the creation and enforcement of financial market law?

## THE BEHAVIOURAL CONCEPT OF LAW AS A NEW PARADIGM OF FINANCIAL MARKET LAW?

*I wish my life and my decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's act of will. I wish to be a subject, not an object.<sup>1</sup>*

Isaiah Berlin

*Law is a "mechanism", not a text. A legal text creates an ideal world of illusion, which the realities of later practice hollow out.<sup>2</sup>*

Ewa Łętowska

### 1. Introduction

The above deliberations on the process of creating and enforcing financial market law in the light of the concept of its economisation have focused on two interdependent elements. The first concerned the essence of law, how it is defined, the tasks attributed to it, as well as its relationship with other sciences, in particular economics. Its analysis was based on the assumption of the necessity for an instrumentalist approach to law, treating it as a complex phenomenon whose existence is dependent upon many factors. Law recognised in such a way, as a dynamic being, should respond to changes. The process of globalisation makes these changes happen exceptionally quickly, and one of their effects is the growing knowledge of modern man who using this knowledge contributes to the creation of innovations, for example in the form of new financial solutions.

Knowledge also means pieces of information, thousands of which reach us every day, influencing our decisions. Their inflation is a real challenge of modern times, because – it would appear – our evolutionary development (especially our brain) does not keep up with it. Of course it is not necessary to process all the

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<sup>1</sup> Quoted after E.S. Fruehwald, *Law and Human Behavior: A Study in Behavioral Biology, Neuroscience, and the Law*, Lake Mary 2011, p. 121.

<sup>2</sup> Quoted after K. Pałeczki, *Neutralization of Values in Law – Main Concepts*, in: K. Pałeczki [ed.], *Neutralization of Values in Law*, Warszawa 2013, p. 22.

pieces of information that reach us. Yet, among them there are those which have a significant impact upon our daily lives. These should certainly include information related to the functioning of modern financial markets. The financial sphere is the one in which the most crucial problems of the modern world are concentrated: social, psychological, historical, economic and legal, all of them mutually interacting. Financial markets, through financialization that has already been discussed in the previous Chapters, affect us both directly and indirectly. In the first case the results of this interaction can be seen in our everyday lives, for example when a loan instalment is paid off and the amount of the instalment depends on the fluctuations in the currency market whose rules are hardly familiar to the average person. An indirect interaction can be related first of all to the sphere of financial market regulations, and secondly to the important behavioural sphere concerning the making and enforcing of these regulations. They were the subject of an analysis in the previous Chapter and – which is worth underlining – are understood in this publication widely as a process containing both the creation and enforcement of the law as well as its values, premises and goals. The principal value of a financial market is trust in it, which should be seen by the reader as some sort of key word. Aiming at this state of trust, people lay bets, or enter into interactions which trigger off the whole chain of personal relationships essential for the development of humanity. An important element of this development is the financial market discussed earlier, which fulfils certain defined functions, among them that related to the delivery of a life-giving capital to the economy, so essential to its development, enabling the development of innovations, but above all increasing the prosperity of societies.

One of the central subjects which accounts for the essence of the financial market (as an element of the social system), but also for its regulations – is a person, a human being. Because it is the human being who, as was mentioned earlier, makes certain investment decisions, it is he or she who is the potential receiver of individual, sometimes extremely sophisticated (and incomprehensible) financial products. This is the reason why, in the author's view, the analysis of the process of the creation and enforcement of financial market law which is established in the axiological sphere must also take into consideration behavioural aspects<sup>3</sup> related to the participants in the market<sup>4</sup> whose behaviours influence this process.

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<sup>3</sup> It is essential to point out the difference between the behavioural approach and behaviourism, understood as a psychological trend, which "adopts as the subject of psychology the observed directly or indirectly (with the help of instruments) behaviour of man, without reference to the content of consciousness. Behaviourism restricts itself to detecting descriptions of relationships between a stimulus and a reaction, whereas in the behavioural approach explanations are formulated with reference, among other things, to the subject's preferences, perceptions, emotions." Quoted after M. Małecka, *O behawioralnym podejściu do badania prawa, paradoksie, do którego prowadzi i sposobie jego przewycięzenia*, in *Nauka i Szkolnictwo Wyższe*, No 1 2013, p. 31.

<sup>4</sup> Used on purpose here, the concept "market participant", which should be understood widely and includes both the supply and the demand parties of the financial market. The first in this case

Simultaneously, these behaviours, in some way, are directed by the existing legal regulations. Subsequently, the foundation on which these regulations are based is law whose essence is the protection of certain goods, among them the security and stability of the financial market.

Finding the “optimal” way of making and enforcing financial market law is difficult, as it forces the choice between, on the one hand, the State interest (its stability and security) and the society, and on the other hand, the interest of financial institutions whose functioning is based on the idea of economic freedom, so very important for the sustained economic development of the State. Yet, both the State (the legislator) as well as financial institutions must in their activities pay attention to the human element and make use of the achievements of other sciences. That is why, in the author’s opinion, there should be some determination to create a system based on securing the rights of the consumers of financial services (embracing reinforcement of their education and their financial awareness), while at the same time ensuring the unhindered functioning of the financial market (yet, under supervision), embracing in its activities the sociological element. This task is certainly not easy, having in mind, among other things, the complexity of the problems. However, it is essential to make the legislators (and entities enforcing the law) see the non-legal aspects of their activities.

The sources of knowledge on this topic can be found in the achievements of behavioural sciences which have been developing very dynamically in recent years. Although, which is worth highlighting, they had been pointed out and analysed much earlier as could be seen on the example of the psychological concept of law of Leon Petrażycki discussed earlier in this book. The multi-layered structure of the discussion on the behavioural aspects of law is responsible for the subjective selection of the most important topics discussed in this book. It assumes perceiving the law (of the financial market) as a complex social phenomenon, based on defined values, whose protection and realisation requires in the process of making and enforcing law also the consideration of the non-legal aspects, among them the behavioural ones. The latter, as will be shown, are present in the financial market and in its regulations and are significant in shaping the attitudes (behaviours) of the addressees of the law made. A thesis may be drawn that through law the legislator has the opportunity to create appropriate, from his point of view, attitudes, helpful for instance in building a feeling of trust. In doing that, he must be aware of the dialecticity of his actions, that is, the

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can be identified as financial institutions (sometimes called professional market participants), and specifically as managers. The supply party, in the author’s view, means the subjects who make use of financial services, thus consumers of financial services, a category which is included in the group of “clients of financial institutions” (encompassing, beside consumers also entrepreneurs). Although in the following part of the research the analysis undertaken and the thesis formulated on the basis of it will primarily concern consumers, some of them concerning behavioural issues can also be applied to the professional participants in the market.

emergence, under the influence of his activity (but also external conditions), of the changes in the behaviour of the addressees of the norms. No less important is consideration of the attitudes of these addressees towards the law, but also the effectiveness of specific initiatives, which will be influenced by other factors, such as: the legal instruments used, the level of education of the addressees of norms, the speed of the response towards changes, the willingness to introduce these changes, or even the multicentricity of legal systems. The multi-layered structure of the problem requires narrowing the perspective of the discussion to its most important elements, while at the same time referring to the results of the research of other scholars and illustrating these deliberations with examples of regulations in a specific market segment, in particular the capital market and the payment services market.

## **2. Behavioural finance – the beginning of the road towards a behavioural concept of law**

Deliberations on the possibility of the reception of behavioural concepts through financial market law regulations should start with a short introduction to the characteristics of this trend. A trend that should be recognised as multidisciplinary and – as its name shows – concentrating on issues connected with the evaluation of specific human behaviours, their causes and effects. The need for an interdisciplinary viewpoint on these behaviours results from the specificity of the object of the research – a human being who through his development has brought about the rise of diverse branches of science, thanks to which, in turn, it has become possible to find answers to some of the questions it posed. Hence, behavioural issues bring together biology<sup>5</sup>, sociology, psychology, medicine, economics, and more recently law.

In the last case the behavioural approach will certainly be recognised by representatives of the science of law as a specific *novum*, and what is certain, will be severely criticised by some of them. So how can you imagine interpretation of law through the lens of behavioural aspects? Does it not stand in opposition to the essence of the law, whose existence we owe, one way or another, to a rational legislator, who possesses thorough knowledge on the subject of the regulated matter? Is this the case in real life? Does the made and enforced law also account for the non-legal elements which may affect its effectiveness? If so, then why despite the existence of numerous regulations and supervising authorities enforcing them, has the unprecedented global financial market crisis, unprecedented in all human history, taken place at all?

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<sup>5</sup> See E.S. Fruehwald, *Law and Human Behavior: A Study in Behavioral Biology, Neuroscience, and the Law*, op. cit., pp. 121-154.

The crisis was caused by excessive greed and distorted financial risk assessment, but also by a lack of basic knowledge on the consequences of particular investments and institutional solutions. Whereas the real hero of this collapse became the average American who having no adequate income, often no job and no assets, had the opportunity to take a loan for his dream house. That American – popularly described by the term “NINJA” (no income, no job, no assets) – was not aware of the mechanism of the whole operation, which was behind granting him a loan, on the basis of which institutions had created other extremely sophisticated and unrealistic financial instruments, such as CDO (collateralised debt obligations), synthetic CDO, ABS (asset-backed securities) or CDS (credit default swaps), subsequently sold all over the world. Based on the analysis of the publications concerning the recent financial crisis a thesis can be put forward that one of its causes was **the withdrawal of the state from its presence in the financial system and the permission to use instruments whose rules of operation were known only to a narrow group of people and certainly not those who, as it was soon to turn out, suffered most from the crisis.** The events that took place then can constitute the background of the research conducted in the two previous Chapters whose aim was to present the specificity of the financial market, but above all to underlie the necessity of reaching to the roots and follow Petrażycki’s understanding of law as a psychological phenomenon, hence the inclusion of the behavioural element. In the case of making and enforcing financial market law it is also necessary to use the achievements of economics, and in particular the economic analysis of the law.

Since the financial market is characterised by behavioural elements, such as the ones discussed in detail in the previous Chapter: risk, information, stability, security or above all, trust. All these, to a greater or lesser extent, refer to man’s psycho-sociological sphere. The science which has for a long time been placing this sphere as its subject of research is, among other things, economic psychology which uses the knowledge of man’s mind and psyche to describe economic behaviour.<sup>6</sup> Importantly, it is not the only science of this kind able to create autonomous ways of formulating the theory or the methods of research.<sup>7</sup>

Next to it, there has been in recent years, a dynamic development of the science of economy, described in an overall concept as **behavioural economy**, which evokes numerous questions, sometimes even emotions, among (some) economists. These emotions result from the fact that representatives of the new viewpoint on economy rejected its fundamental paradigm that is the concept of a perfectly rea-

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<sup>6</sup> It has been accepted that the beginning of its development is the two volume work published in 1902 by Gabriel Tarde, entitled *La psychologie économique*. Recognising it as a separate field of science is in fact connected with the works of George Kanton and the representatives of the Austrian school. More in: S. Flejterski, *Neurobankowość. Nauki o finansach w poszukiwaniu nowych paradygmatów*, in: *Finanse 2009 – Teoria i praktyka*. Bankowość, Zeszyty Naukowe, Uniwersytet Szczeciński, No 548 2009, p. 529 et.seq.

<sup>7</sup> T. Zaleśkiewicz, *Psychologia ekonomiczna*, Warszawa 2011, p. 33.



sonable, economic man (*homo oeconomicus*) who has already been mentioned several times in this book.<sup>8</sup> This change is defined as **Paretian turn** and as its name suggests it relates to the negation of the theory of Pareto, according to whom “economic theories should be proved on the basis of well-established empirical facts regarding observed human choices, without the use of psychological concepts like utility, impression and happiness.”<sup>9</sup> And even more, despite the fact that economics as a science places a man and his behaviour as the central subject of its research, which, among other things, results from the definition proposed by Lionel C. Robbins who stated that “economics is a science which studies human behaviour as a relationship between the objectives and the limited means which may have alternative usages”.<sup>10</sup>

While searching for the precursors of behavioural economy one should begin with the father of economy Adam Smith, the author of the widely known work written in 1776 entitled *An Inquiry into the Nature and Causes of the Wealth of Nations* which, as many people do not realise, was preceded by the equally important, although less often quoted publication in 1759 of *Theory of Moral Sentiments*<sup>11</sup>, in which he undertook to describe human nature and the principles of importance for the proper shaping of relationships among people.<sup>12</sup> It was not until 200 years later that works were being created that now are considered to be the foundations of behavioural economics. Among the authors we should mention Herbert A. Simon who created the concept of bounded rationality; George Kantona<sup>13</sup>, Harvey Leibenstein – supporters of using psychology in economy; János Kornai – the author of the concept of anti-equilibrium as well as Daniel Kahneman and Amos Tverski, who thanks to their works *On the Psychology of Prediction*<sup>14</sup>, *Prospect Theory: An Analysis of Decision under Risk*<sup>15</sup>, and *Judgment under Uncertainty: Heuristics and Biases*<sup>16</sup>, created the foundations for a further dynamic development of behavioural economics.<sup>17</sup>

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<sup>8</sup> The word “rational” from Latin “*rationalis*”, meaning “rational” comes in turn from “*ratio*”, that is “judgment, reason, calculation”. See also R. Zeckhauser, *Comments: Behavioral versus Rational Economics: What You See Is What You Conquer*, in: *Journal of Business*, Vol. 59 No 4 1986, pp. 435-449.

<sup>9</sup> J. Polowczyk, *Podstawy ekonomii behawioralnej*, in: *Przegląd Organizacji*, No 12 2009, p. 3.

<sup>10</sup> L.C. Robbins, *An Essay on the Nature and Significance of Economic Science*, London 1935, p. 16. Quoted after J. Polowczyk, *Podstawy ekonomii behawioralnej*, op. cit., p. 3.

<sup>11</sup> A. Smith, *Teoria uczuć moralnych*, Warszawa 1989, passim.

<sup>12</sup> See J. Polowczyk, *Elementy ekonomii behawioralnej w dziełach Adama Smitha*, in: *Ekonomista*, No 4 2010, pp. 493-522.

<sup>13</sup> G. Kantona, J.N. Morgan, *Essays on Behavioral Economics*, Ann Arbor 1980.

<sup>14</sup> D. Kahneman, A. Tversky, *On the Psychology of Prediction*, in: *Psychological Review*, Vol. 80 No 4 1973, pp. 237-251.

<sup>15</sup> D. Kahneman, A. Tversky, *Prospect Theory: An Analysis of Decision under Risk*, in *Econometrica*, Vol. 47 No 2 1979, pp. 263-292.

<sup>16</sup> D. Kahneman, A. Tversky, *Judgment under Uncertainty: Heuristics and Biases*, in: *Science. New Series*, Vol. 185 No 4157 1974, pp. 1124-1131.

<sup>17</sup> J. Polowczyk, *Podstawy ekonomii behawioralnej*, op. cit., p. 4.

The last of these researchers created **the theory of perspective** which explains the choices in the context of an unpredictable future. At the same time it changes the image of the rational man, designating new norms of rationality.<sup>18</sup> The experiments carried out by these authors proved that investors, when taking their decisions, are guided to a great extent by their emotions and are not consistent in their decisions which often depend on coincidence, or the way the problem is presented in a situation of uncertainty.<sup>19</sup> Their decisions, taken in risk situations, should be explained in the light of possible options of choice within the category of profits and losses. Researchers have proved that a man choosing from among the options seen as a profit shows an aversion to risk. Whereas when choosing from among the options already put in the category of loss, he is willing to make risky decisions.<sup>20</sup>

Another important work, worth paying attention to, whose authors analyse further the processes researched using the theory of perspective, is the publication of Richard H. Thaler and Cass R. Sunstein entitled *Nudge: Improving decisions about health, wealth and happiness*<sup>21</sup>, in which they discuss the phenomenon of **nudging**.<sup>22</sup> The theory presented is extremely interesting also from the point of view of the regulations of the financial market. The essence of nudging is very well presented on the original cover of the book, on which there is an illustration of a cow elephant “encouraging” her little ones by delicate nudging to move on (see Illustration 1). It symbolises the object called by the authors the architect of choice whose duty is to organise the context in which people make decisions. Every day our decisions, to a greater or lesser extent, depend on such real or fictional architects. The real architect is certainly the legislator, who through created (and subsequently enforced) law influences our behaviour. Each of us can in fact be a fictional architect. For example the choice of the proposed solution depends on the attractiveness of its presentation. In order to create a relaxed atmosphere at a meeting it may be enough to place a bouquet of beautiful flowers. Such examples can be multiplied.

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<sup>18</sup> B. Dzik, T. Tyszka, *Problem racjonalności podmiotów ekonomicznych*, in: T. Tyszka [ed.], *Psychologia ekonomiczna*, Sopot 2004, pp. 53-55; See also P. Zielonka, *Giełda i psychologia. Behawioralne aspekty inwestowania na rynku papierów wartościowych*, Warszawa 2011, pp. 9-15.

<sup>19</sup> M. Czerwona, B. Gorlewski, *Finanse behawioralne. Zachowania inwestorów i rynku*, Warszawa 2012, p. 13.

<sup>20</sup> M. Małecka, *Prawo, ekonomia, ludzkie działanie. Dyskusja nad zastosowaniem ekonomii behawioralnej do analizy prawa*, in: *Archiwum filozofii prawa i filozofii społecznej*, No 1 2011, pp. 18-19. See also C. Guthrie, *Prospect Theory, Risk Preference & the Law*, in: *Vanderbilt University Law School Law&Economics, Working Paper*, No 02-12.

<sup>21</sup> R.H. Thaler, C.R. Sunstein, *Nudge: Improving decisions about health, wealth and happiness*, London 2009.

<sup>22</sup> See Polish language edition of this book R.H. Thaler, C.R. Sunstein, *Impuls. Jak podejmować właściwe decyzje dotyczące zdrowia, dobrobytu i szczęścia*, Poznań 2012.

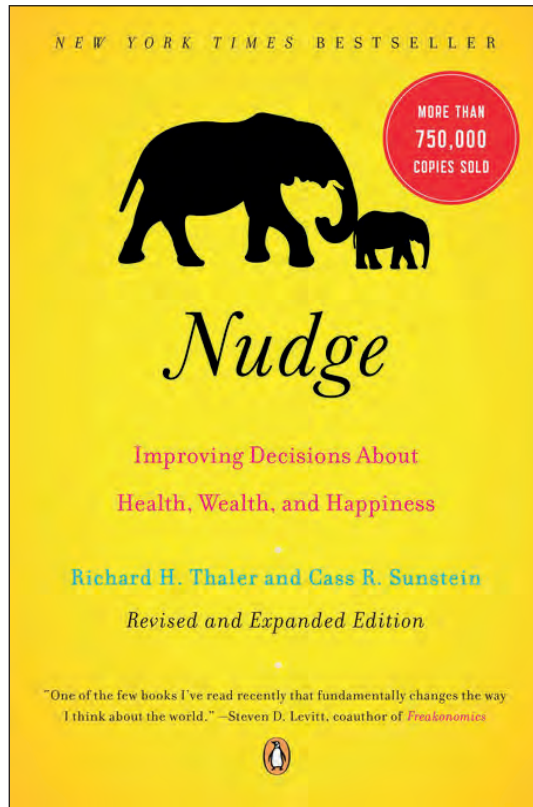


Illustration 1. Original cover of the book by R.H. Thaler and C.R. Sunstein

Source: Penguin Random House Website

According to Thaler and Sunstein “small and insignificant details may have significant influence on people’s behaviour. It is good practice to assume that »everything counts«. In many cases the power of detail stems from the idea of drawing the user’s attention in a specific direction.”<sup>23</sup>

Explaining their theory, the authors relate it to the idea of **libertarian paternalism**.<sup>24</sup> They assume that in general people should be free and do what they want. The word “libertarian” should be understood as “retaining freedom”, first of all of thought. Whereas paternalism (which is usually associated with opposition to libertarianism), is to have an ancillary function to the choices made, that

<sup>23</sup> R.H. Thaler, C.R. Sunstein, *Impuls. Jak podejmować właściwe decyzje dotyczące zdrowia, dobrobytu i szczęścia*, op. cit., p. 14.

<sup>24</sup> R.H. Thaler, C. Sunstein, *Libertarian Paternalism Is Not an Oxymoron*, in: University of Chicago Law Review, Vol. 70 No 4 2003, pp. 1154-1202.

is to direct a man towards a behaviour that will ensure he lives a longer, healthier and better life.<sup>25</sup> The proposed theory became the subject of discussion and many critical opinions.<sup>26</sup>

While joining this trend, it is worth considering the possibility of the application of the concept under consideration to the process of creating and enforcing financial market law, which, as was presented in the previous Chapter, is no stranger to the influence of paternalism. It results, among others, from the significance of financial markets. Accepting in general the transfer of the idea of libertarian paternalism to (the basis of) financial market regulations, it must be assumed that the role of the legislator is to establish goals and indicate values, based on which, by means of legal instruments, he will try to exercise these goals in practice, while leaving a certain amount of freedom to market participants, in particular to the consumers, especially with regard to the choices made by them. That freedom may also apply to the second group included in the category of market participants, that is financial institutions (more precisely, the people managing them), which will be entitled to take advantage of the benefits of the until recently fashionable financial market self-regulation. The two examples presented here are related respectively to participants and financial institutions and from the perspective of the concept of Thaler and Sunstein may lead to quite diverse conclusions, depending, however, on the initial assumption constituting a specific regulatory philosophy.<sup>27</sup>

In the first case, in the author's view, it is possible to reconcile the theory presented with the "freedom" of the financial market consumers, assuming at the same time that the changes of the paradigm of their perception (especially visible in the European Union, which will be discussed in the following parts of

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<sup>25</sup> R.H. Thaler, C.R. Sunstein, *Impuls. Jak podejmować właściwe decyzje dotyczące zdrowia, dobrobytu i szczęścia*, op. cit., p. 16. In the discussion on this concept, which allows the choices of the legal norms addressees to be "steered", without depriving them of the freedom of choice, points to the possibility of applying two types of instruments, that is opt-out and opt-in. For example, when increasing the participation of employees in a saving programme offered by the employer, using the opt-out option they can include all of them in the programme, leaving them the option of resignation from participation in it. This participation may also depend on the obligation of the employees to consent (option opt-out). In both cases presented there is the possibility of choice, although the first option in practice will result in a greater number of people included in the saving programme. Example from M. Małecka, *Prawo, ekonomia, ludzkie działanie. Dyskusja nad zastosowaniem ekonomii behawioralnej do analizy prawa*, op. cit., p. 19.

<sup>26</sup> See for example G.S. Becker, R.A. Posner, *Nieoczywistości. Ekonomiczna teoria wszystkiego*, Warszawa 2013, pp. 161- 166; D. Klein, *Statist Quo Bias*, in: *Econ Journal Watch*, Vol. 1 No 2 2004, pp. 260-271.

<sup>27</sup> We can agree here with the conclusions of R. Lepenies and M. Małecka, that using the concept of *nudging* requires some caution, in particular, handing the instruments for its realisation over to politicians who wish to change democratic societies into a nudge world. More on this topic in: R. Lepenies, M. Małecka, *The Institutional Consequences of Nudging – Nudges, Politics, and the Law*, in: *Review of Philosophy and Psychology*, No 6 2015, pp. 427-437.

this Chapter) as reasonable subjects, who on the basis of the information given to them (mandatorily because of the legal regulations) take rational, decisions which are the best for them (which often in practice proves to be illusory). Information overload may prove just as harmful as its shortage. That is why it is reasonable to accept the thesis of Damian Cyman that “the process of informing the consumer should take into consideration the lack of his professionalism (which is supported by the findings of behavioural sciences) to the degree necessary for taking a proper decision and choosing the offer which is most appropriate for his objectives and possibilities. It cannot however, be overwhelmed by an excess of detail. There should also be a change in the model of the consumer, from reasonable to conscious (prudent). In the era of universal access to technology and of the more and more complex mechanisms of bank operations, the consumer, still in his non-professionalism, is aware however, of the principles upon which various financial instruments function. The model of an imprudent customer that is sometimes accepted and realised through replacing the rule that the consumer must be informed, by a ban on using certain practices or contractual provisions under a clause of nullity does not seem proper. It is contrary to the very idea of consumer protection, which should neither restrict nor eliminate his activity but rather enable him to make the optimal decision.”<sup>28</sup> Yet another issue is the possibility of creating, through the market, some specific types of instruments, subsequently offered to non-professional subjects. In such a situation one should apply paternalist ideas, which in the name of the common good (security and stability) will give the state, in exceptional circumstances, the right to evaluate a specific financial instrument and not to accept it for trade. The notion of an informed customer, freely making decisions with a guarantee of security and stability by the state, should be considered as the implementation of the idea of libertarian paternalism.

The other situation is connected with the self-regulation of the market by financial institutions. Allowing for this type of possibility certainly constitutes an element which proves the existence of a wide range of economic freedom in the market. The legislator, allowing the possibility, however, must be aware of the consequences of his actions and take into account the advantages and disadvantages. The advantage is certainly the indicated range of freedom of action. While its negative consequences may be associated with the lack of acceptance of self-regulation by the public, *inter alia* due to the danger of self-serving, and thus creating the regulations in the interest of the regulators and maintaining the independence of their own interests. This issue was perfectly presented in the description of self-regulation seen as a situation where the fox (the state-regulator) remains under the rule of hens (as the subjects regulated), whose representatives can present

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<sup>28</sup> D. Cyman, *Elektroniczne instrumenty płatnicze a bezpieczeństwo uczestników rynku finansowego*, Warszawa 2013, p. 208.

a tendency towards a disproportionate distribution of the relationship between their interests and the interests of their clients.<sup>29</sup> Accordingly, in order to connect libertarian ideas with paternalistic ones, in selected situational contexts, the use of co-regulation may be allowed rather than self-regulation. Co-regulation in its essence is similar to self-regulation, but its concept is supplemented by government supervision of the adopted regulations, as well as of their observance. It manifests itself, among others things, in the sanctioning by the public authority of the regulations created by the subjects operating in the market, only to become at this moment the legally binding norms.<sup>30</sup>

Regardless of the acceptance of the above mentioned concept of libertarian paternalism, or the lack of it, it may be considered innovative. Consideration of its use should be taken into account when designing future solutions in the field of financial market activities. Their regulation requires from the legislator a thorough analysis of all the “pros and cons” associated with its interference in the functioning of that market. As Peter L. Bernstein wrote: “the ability to formulate precise predictions regarding the likely course of future events, and making choices from among various alternatives is the most important aspect of the life of modern societies. Controlling risk determines the direction of our activities in such diverse areas associated with decision-making, as the allocation of cash resources, creating a system of universal health care, warfare, family planning.”<sup>31</sup>

The achievements of behavioural economics can certainly be helpful here, and as Jan Polowczyk rightly observes, it is not a coherent theory, but a “rather large heterodox research project consisting of different hypotheses, tools and techniques. It is created by a number of different trends (schools, cognitive trends) associated with one another in a more or less strict manner. These directions are connected, above all, by opposition to the paradigm of traditional economics, based on the assumption of strict rationality”.<sup>32</sup> What is worth underlying here is the fact that questioning the paradigm of rationalism should not be, as it is often the case, perceived as an equation with a complete lack of this rationality, the definition of which also poses many problems.<sup>33</sup> Making such an assumption

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<sup>29</sup> M. Pagano, A. Röell, *Self-regulation of financial markets*, in: P. Newman, M. Milgate, J. Eatwell [eds], *The New Palgrave Dictionary of Money and Finance*, Vol. III, London 1992, p. 440; M.C. Malaguti, *Private-Law Instruments for Reduction of Risks on International Financial Markets: Results and Limits of Self-Regulation*, in: *Open Economies Review* 11:S1 2000, pp. 254-256.

<sup>30</sup> K. Kowalik-Bańczyk, *Sposoby regulacji handlu elektronicznego w prawie wspólnotowym międzynarodowym*, Kraków 2006, p. 67.

<sup>31</sup> P.L. Bernstein, *Przeciw bogom. Niezwykłe dzieje ryzyka*, Warszawa 1997, p. XIV.

<sup>32</sup> J. Polowczyk, *Podstawy ekonomii behawioralnej*, op. cit., p. 4. The author recognises the most important trends: psychological economy, evolutionary economy, experimental economy, behavioural macro-economy, economy of complexity as well as behavioural finance.

<sup>33</sup> The question about rationality is connected to the problem of the search for an answer to the question: What is rationality? Its solution is the subject of an extremely interesting debate among scholars. Its multi-layered and wide scope does not allow us to discuss it closer in this place. The

would mean here the division into rational and irrational subjects whereas the research shows that man is a rational and logical being, although susceptible to unconscious, but regular **emotions**<sup>34</sup> [the bold type – T.N.]. Behavioural economics proves individual decision makers not to be as rational as traditional economics tells us. It does not mean however, that they are totally irrational.”<sup>35</sup> The question about rationality is included in one of the trends of behavioural economics, that is behavioural finances, whose representatives (among others Richard H. Thaler, Robert J. Shiller, Andrei Shleifer, Hersh Shefrin) show that financial markets are not always as effective as is assumed by the standard theory of economics. They search for justifications of their thesis by studying the behaviour of market participants.

The above mentioned, extremely valuable and accurate quotation from Polowczyk on the need for a cautious approach to the issue of man’s irrationality, is presented here not without a reason. First of all, it is supposed to give a direction in further deliberations on behavioural issues and their acceptance by the law. Secondly, its value results from pointing to emotions which were already described by Petrażycki in his analysis of the essence of law. Emotions bring to life rules, some of which change subsequently into legal norms.<sup>36</sup> They are psychological experiences, next to cognition, feeling and will. Man perceives them as the experience of acting in a particular way.

It is, among others, reflected in the financial market of interest, in particular, to one of the trends of behavioural economics, i.e. **behavioural finance**, concentrating its attention on the behaviour of investors in the market. Studies on these issues are based on two fundamental assumptions, which are: 1) thesis of market efficiency and 2) thesis of the rationality of decisions taken by investors. The rational activity of investors in the field, for example of the assessment of the market and the choices made, should result in market efficiency, understood as a situation in which prices of assets will result only from rational factors, and not

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recommended publications on this subject are the following: H. Simon, *Models of bounded rationality*, Vols. 1 and 2, Cambridge 1982; V.L. Smith, *Racjonalność w ekonomii*, Warszawa 2013; G.S. Becker, *Ekonomiczna teoria zachowań ludzkich*, Warszawa 1990; J. Elster, *Alchemies of the mind. Rationality and the emotions*, Cambridge 1999; B. Dzik, T. Tyszka, *Problem racjonalności podmiotów ekonomicznych*, op. cit., pp. 39-76; M. Małecka, *Prawo, ekonomia, ludzkie działanie. Dyskusja nad zastosowaniem ekonomii behawioralnej do analizy prawa*, op. cit., p. 19 et seq. et seq.

<sup>34</sup> See also O.D. Jones, *Law, Emotions, and Behavioral Biology*, in: L.A. Frolik [ed.], *Law & Evolutionary Biology. Selected essays in Honor of Margaret Gruter*, Portola Valley 1999, pp. 269-279.

<sup>35</sup> J. Polowczyk, *Podstawy ekonomii behawioralnej*, op. cit., p. 7.

<sup>36</sup> In psychology the positive and negative influence of emotions is of importance. The first of these aspects is especially interesting. Positive emotions, as it turns out, may help an individual to reach certain goals. Through emotions and application of specific heuristics (discussed below), thus through “mental shortcuts” one is protected from situations in which considering the choices would take a very long time. Thanks to emotions the time of consideration is optimised. More on this topic in: B. Dzik, T. Tyszka, *Problem racjonalności podmiotów ekonomicznych*, op. cit., pp. 72-73.

emotions which might influence the investors.<sup>37</sup> Placing the theory of rational investment beside reality has proved that its assumptions are illusory, because investment behaviour is also influenced by other factors, including psychological ones. What is also important, based on numerous studies, is that it was demonstrated that in their “rational” thinking, investors in capital markets in particular, make many mistakes which to a large extent arise from the ineffective processing of information or result from their yielding to emotions.<sup>38</sup> This observation should not remain indifferent to the legislator who creates norms regulating the market<sup>39</sup> and above all to those whose ideas are based on the existence of the rational consumer.<sup>40</sup> This consumer, sometimes referred to as an investor, wanders around logically while processing information, which stems from its excess or misinterpretation. A manifestation of this is, for example, recurrent stock exchange crashes or excessive optimism.

Reading publications which deal with the psychological side of the financial market leads to the conclusion that these errors arise from a comparison between two elements, namely our mind and its cognitive abilities, and contemporary reality, characterised by a huge amount of data (information). We are forced to process the latter in specific situational contexts, including, time pressure.<sup>41</sup> The result is a formulation of human judgments on the basis of random data, thinking somehow in shortcuts (processing only certain information), which is what the process psychologists refer to as **a heuristic way of thinking** (see Illustration 2).<sup>42</sup> Heuristic processing allows us to operate in a complex environment, and its scheme is attributed to the aforementioned Kahneman and Tverski who pointed to, among other things, anchoring heuristics, representation and availability.<sup>43</sup>

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<sup>37</sup> T. Zaleśkiewicz, *Psychologia ekonomiczna*, op. cit., p. 34.

<sup>38</sup> Ibidem, p. 35.

<sup>39</sup> In particular, having in mind the significance of financial market in functioning of economy. More on this topic in: K. Opolski, T. Potocki, *Znaczenie dokonai ekonomii behawioralnej w kształtowaniu polityki gospodarczej*, in: A. Alińska, B. Pietrzak [eds], *Stabilność systemu finansowego – instytucje, instrumenty, uwarunkowania*, Warszawa 2012, pp. 255-272.

<sup>40</sup> More on the topic of inter-dependence between information and taking decision in the light of behavioural economics in: A. Biela, *Informacja i decyzja w ekonomii behawioralnej*, Lublin 2011, pp. 33-37.

<sup>41</sup> Herbert Simon criticising the unlimited ability of man to process data, which is an element of classical theories of economy, pointed to its “limited rationality”. See H. Simon, *A behavioral model of rational choice*, in: *Quarterly Journal of Economics*, No 69 1955, p. 99.

<sup>42</sup> Optical illusion is a frequently given example of “thinking in shortcuts”.

<sup>43</sup> T. Zaleśkiewicz, *Psychologia ekonomiczna*, op. cit., p. 57. See also D. Kahneman, A. Tversky, *Judgment under Uncertainty: Heuristics and Biases*, op. cit., p. 1124 et seq.; D. Kahneman, A. Tversky, *Choice, Values and Frames*, in: *American Psychologist*, Vol. 34 No 4 1984, p. 341 et seq. et seq.; D. Kahneman, A. Tversky, *Availability: A Heuristic for Judging Frequency and Probability*, in: D. Kahneman, P. Slovic, A. Tversky [eds], *Judgment Under Uncertainty: Heuristics and Biases*, Cambridge 1982, p. 166 et seq. et seq.



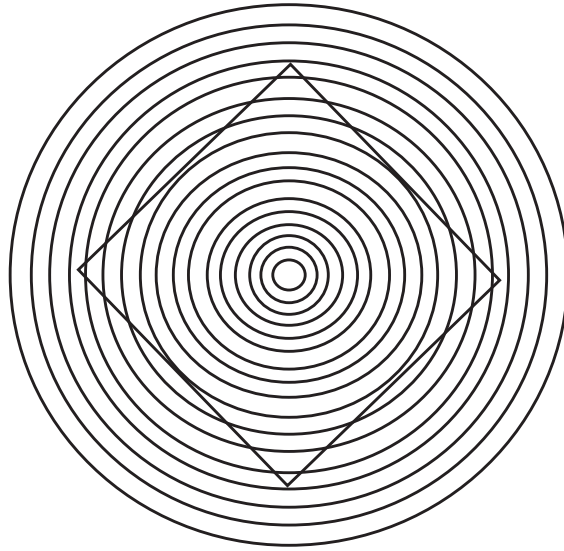


Illustration 2. Optical illusion as an example of the heuristic distortion<sup>44</sup>

Source: the author's own study

Discussing behavioural economics synthetically it would be necessary, apart from the above mentioned phenomenon of heuristics, to pay attention to the concept of **cognitive bias**, a phenomenon which is the result of research on the process of human thinking, in particular from the perspective of rationality.<sup>45</sup> Its essence is based on the assumption of systematic distortions of the established standards in the processes of thinking, evaluation and other cognitive processes, following which man creates his own subjective social reality which, in turn, affects his behaviour. That impact may cause misinterpretation or wrong judgments which in the opinion of others will be perceived as irrational. The distortions fall into several categories (types of errors) which are important for the understanding of the functioning of the elements of the financial market, among others:<sup>46</sup>

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<sup>44</sup> The above illustration is an example of “short-cut thinking” which must be quite frequently going on in our minds. Despite the fact that there is a full-size square entered into the circles, after staring at it for a longer time we get an impression that its sides are curved.

<sup>45</sup> Both heuristics as well as cognitive thinking were discussed in the work of D. Kahneman, *Pułapki myślenia. O myśleniu szybkim i wolnym*, Warszawa 2012, p. 147 et seq.

<sup>46</sup> The following examples are just a few of many examined in detail and described in the literature of the psychological determinants of the perception of reality and decision making in the financial market (primarily capital). Their extensive analysis was presented in the monograph by A. Szyszka, *Finanse behawioralne. Nowe podejście do inwestowania na rynku kapitałowym*, Poznań 2009, pp. 44-97.

- An effect of narrow framing<sup>47</sup> – based on the analysis of specific problems detached from a wider context, in an isolated way<sup>48</sup>;
- Anchoring bias – seen, among others, in the capital market where investors create their own prognosis under the influence of earlier evaluations, expectations, decisions, and often so in a situation when they do not have reliable data. In spite of incomplete data, the human mind does not tolerate an information vacuum and in a situation of ambiguity, the evaluations made stem from anchoring onto any data whatever.<sup>49</sup> Moreover, these data sometimes do not have to be directly related to the situation analysed; although conclusions drawn in this way do influence it, significantly!
- Herd instinct – the characteristics of this error must be preceded by a remark about the phenomenon often-cited in discussions of representatives of behavioural sciences of animal spirits whose name comes from the Latin term *spiritus animalis*, in which the second word (*animalis*) means “mental” or “animated” and refers to the primeval energy of the mental power of life.<sup>50</sup> It means that the contemporary use of this term is quite different from its original meaning. Speaking of animal instincts, we think rather in negative terms, uncertain, associating them with irrational behaviour, collective and sometimes difficult to predict. An example of such behaviour may be the panic in the banking market, defined as a run on the bank, which occurs in a situation where a large number of clients want to withdraw their savings from a given bank at the same time, for fear of its insolvency and sometimes guided by false information. The latter can act as a catalyst when it spreads within a larger group of people, contributing to a self-fulfilling prophecy and the actual fall of the bank, which at the ini-

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<sup>47</sup> The effect discussed is described as “framing”, which is one of the cognitive syndromes, known as the effect of interpretative framework, consisting in brief, on the assumption that the perception of available options by the chooser depends largely on the way of their presentation. It depends, above all, on whether particular results will be illustrated as profits or losses, and as a consequence, whether the client registers them in the same way. Thaler and Sunstein cite the example of the information communicated by the doctor to the patient with heart disease, who should undergo a major surgery. Pointing to the chances of its success, the doctor may formulate his statement in two different ways: 1. “In a hundred patients who had this operation, there are ninety alive after five years” or 2. “In a hundred patients who had this operation, ten died after five years”. Of course in spite of the fact that the information both in the first and second case is the same, placing it in a different context (frames) brings about a completely different interpretation. More on that topic in: R.H. Thaler, C.R. Sunstein, *Impuls. Jak podejmować właściwe decyzje dotyczące zdrowia, dobrobytu i szczęścia*, op. cit., pp. 53-54; P. Tereszkiwicz, *Obowiązki informacyjne w umowach o usługi finansowe. Studium instrumentów ochronnych w prawie prywatnym i prawie unijnym*, Warszawa 2014, pp. 616-617.

<sup>48</sup> A. Szyszka, *Behawioralne aspekty kryzysu finansowego*, in: *Bank i Kredyt*, No 40 (4) 2009, p. 14.

<sup>49</sup> T. Zaleśkiwicz, *Psychologia ekonomiczna*, op. cit., p. 313.

<sup>50</sup> G.A. Akerlof, R.J. Shiller, *Zwierzęce instynkty*, Warszawa 2010, p. 21.

tial stage of the whole process had no solvency problems.<sup>51</sup> In such a situation the behaviour of “rational” customers of the bank results from **the herd instinct phenomenon** described by Leibenstein when one person acts as another one who in turn wishes to imitate other people and, who, as we would say, is sometimes following an instinct that is incomprehensible from a rational point of view and which is especially visible in sheep which move in a compact herd, following their guide. The herd instinct also defines a trend seen in the capital market, manifested by a sudden and unjustified purchase or sale of shares;<sup>52</sup>

- Rationalisation of unethical actions;
- Excessive confidence – expressed in overrating one’s knowledge and skills in a particular area and the belief is greater when the person is an expert in a particular field;<sup>53</sup>
- The result of the information overload, or an excessive amount of information received at the same time, which increases the likelihood of taking an incorrect decision by the person who uses it;<sup>54</sup>
- a tendency to cheat.

The distortions presented above prove that *homo sapiens* is a conservative creature who prefers what there is and is attached to what he has. Yet, often he succumbs to illusions and is susceptible to external influences. As it correctly noted, it results from the heritage of the history of our evolution, in which most of the time people lived as hunters-gatherers. That environment has equipped us with a psyche that is not quite adjusted to life in the modern world, which is full of stimuli, impulses and information.<sup>55</sup> This is confirmed by studies developed in recent years within one of the trends of behavioural economics, that is neuroeconomics (and its part neurobanking).<sup>56</sup> When characterising it, attention is drawn to the subject of its research, focused on finding the answer to the question about the sources of market participants’ behaviour in their decision-

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<sup>51</sup> A textbook example of this kind of situation is the collapse of the Northern Rock Bank. See P. Masiukiewicz, *Klasyczny run na kasy w banku hipotecznym Northern Rock*, in: P. Masiukiewicz [ed.], *Międzynarodowe bankructwa i afery bankowe*, Warszawa 2010, pp. 143-160.

<sup>52</sup> See also C.B. Martysz, *Manipulacje instrumentami finansowymi i insider trading*, Warszawa 2015, pp. 125-128.

<sup>53</sup> T. Zaleśkiewicz, *Psychologia ekonomiczna*, op. cit., p. 303.

<sup>54</sup> P. Tereszkiwicz, *Obowiązki informacyjne w umowach o usługi finansowe. Studium instrumentów ochronnych w prawie prywatnym i prawie unijnym*, op. cit., p. 618; See also T. Parades, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, in: *Washington University Law Quarterly*, Vol. 81 2003, p. 417 et seq.

<sup>55</sup> J. Polowczyk, *Podstawy ekonomii behawioralnej*, op. cit., p. 6.

<sup>56</sup> T. Lohrenz, P.R. Montague, *Neuroeconomics: what neuroscience can learn from economics*, in: A Lewis [ed.], *The Cambridge Handbook of Psychology and Economic Behaviour*, Cambridge 2008, pp. 457-459.

making processes, in order to classify the risks and benefits of the transactions. In the field of interest there are also motives and principles of human behaviour in the conditions of the modern financial market. This effect manifests itself in taking decisions whose source is the human brain with its complex neural architecture.<sup>57</sup> This brain, and more precisely, the changes taking place in it, are the object of neuroeconomics.

The latest achievements of medicine are used for this purpose, among others: functional magnetic resonance imaging, positron emission computed tomography, and also single photon emission tomography, whereby scientists penetrate the functioning of the limbic system of the brain, considered to be the anatomical substrate responsible for patterns of behaviour and the emotional condition of man. The system formed by, among others, hippocampus, corpus amygdaloideum or part of the ventral globus pallidus, participates in the formation of feelings, appetite, aggression, escape, and combined measures, which are also present in the financial market.<sup>58</sup> Conducting these studies demonstrates a remarkable scientific development concerning the "spiritual interior of man". These studies allow us to understand our behaviour, emotions, so important even for the functioning of the market. Of course, there is the question of the applicability in practice of the results achieved. In the literature on the subject one can come across the demand for their use in the development of the financial market security system. This could be achieved by developing methods and tools that "will not only study the processes occurring in the brain, in terms of the security of the banking sector, but would also allow consideration of neuro-risk in supervisory regulations and will be used in the process of selecting bank employees."<sup>59</sup> Nowadays regulations are created which give the financial market supervising authorities the right to influence the process of selecting the executives of financial institutions, particularly those in management positions. However, in the author's opinion, one cannot agree with the thesis that the development of neuroeconomics and the results of its research will allow the introduction of "supervisory regulations, restricting people in the process of risk management in the banking [financial – T.N.] sector, whose structure and functioning brings about unacceptable willingness to take risks."<sup>60</sup> The realisation of this kind of postulate would be an extremely dangerous precedent, with very feeble ethical and moral foundations, leading to the creation of social engineering, so far only found in science fiction. There is no doubt that the sources

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<sup>57</sup> S. Flejterski, *Neurobankowość. Nauki o finansach w poszukiwaniu nowych paradygmatów*, op. cit., p. 532.

<sup>58</sup> A broadened analysis of the problem of neurobanking can be found in the extremely interesting publication by J. Koleśnik, entitled *Bezpieczeństwo systemu finansowego. Teoria i praktyka*, Warszawa 2011, pp. 266-296.

<sup>59</sup> *Ibidem*, pp. 266-296.

<sup>60</sup> *Ibidem*, p. 285.

of all the crisis derive from human nature, its emotions, greed, inclination to take risks, etc. Often it is the case that the management of financial institutions and the financial resources at their disposal are entrusted to the wrong people, of dubious reputation.<sup>61</sup> Is it right, however, that in the name of the security of the system, the legislator should allow the possibility of making supervisory decisions, guided by a brain scan? Should single investments, which already now require evaluation of the client's risk inclinations on the basis of a survey, be made dependent on more detailed examinations (medical)? Of course, these questions can be considered somewhat exaggerated. However, they must be asked. So too must be asked the question that is most important from the point of view of the problem analysed in this Chapter, and which concerns the possibility of the acceptance of the achievements of behavioural sciences in the study of (financial market) law. The answer to this question is not possible without an analysis of selected examples of the existing legal solutions, or without the behavioural concept of law created in the last few years. In the first case, attention should be focused on the discussion of the regulations concerning the broader situation of the participant in the financial services market, with particular emphasis on the consumer's position. This broad approach includes the assumption that by standardising the market situation, the legislator should contribute to the building of the stability and security of this market, which is necessary to create trust. The consideration of the proposals formulated by the theory of behavioural finance is important in understanding the financial market, as it expands the catalogue of the factors taken into account by market participants in their decisions. At the same time, one should accept the view of Czesław B. Martysz that the legislator is expected to protect the market and its participants against their own irrationality and it is impossible to create a perfect system, in which the above errors will be eliminated.<sup>62</sup>

The rational legislator must nevertheless, in the name of the common good, take into account the latest achievements of science, including those related to the way (of how) law affects the attitudes and behaviour of its addressees, and thus draw on the achievements of the behavioural concept of law, which, as has already been signalled here, draws on the achievements of psychology and behavioural economics which, basing on empirical methods, demonstrate the lack of full rationality in the activities of man. This man is a denial of the idea of *homo oeconomicus*, who, had he existed, would have been able to think like Albert Einstein, would have had memory like Big Blue IBM and the strong will of Mahatma Gandhi.<sup>63</sup> The reality is that man is emotional, makes cognitive mistakes, thinks in shortcuts (heuristically), shows excessive confidence and often yields to herd

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<sup>61</sup> See G. Anderson, *Cityboy. Skandaliczne oblicze londyńskich bankowców*, Warszawa 2009.

<sup>62</sup> C.B. Martysz, *Manipulacje instrumentami finansowymi i insider trading*, op. cit., pp. 128-129.

<sup>63</sup> R.H. Thaler, C.R. Sunstein, *Impuls. Jak podejmować właściwe decyzje dotyczące zdrowia, dobrobytu i szczęścia*, op. cit., p. 17.

instinct.<sup>64</sup> He is therefore, in the opinion of the author, an intelligent being but one subject to emotions, who cannot always control his situation, but passively surrenders to events created by the market. He is like *a homo sapiens oeconomicus passivus*.

### 3. The consumer in the financial market – rational or conscious (prudent)?

The behaviourist approach to the modern world seems to explain many phenomena so far unknown to man. Of course, it is one of dozens of study methods. However, according to the characteristics presented, it is based on scientific principles, and firmly rooted in empiricism. The result of this is the opportunity to consider the use of the results obtained in such a way, both in practice and in theory. In the latter case it applies in particular to the fields of science which so far have approached less enthusiastically the behavioural concept of the reality. Among them was the science of law although not completely. Indeed, when we examine more closely the individual concepts developed by legal scholars, we can find that often in their deliberations they, more or less consciously, penetrate the nature of human behaviour that leads to committing a crime<sup>65</sup>, avoidance or evasion of taxation<sup>66</sup> or the manipulation of stock prices on the stock exchange.<sup>67</sup>

Knowledge of the sources of these behaviours, and – more importantly – their consequences should be taken into account by the legislator in the process of making and enforcing law. This legislator, perceived as the architect of choice described above, organises a specific context of choice for society. By placing the reality around us in the framework of the law, he affects our choices or decisions to a greater or lesser extent. A situation can even be imagined in which, in an arbitrary manner, for our own good, the legislator prevents the emergence of such conditions which in his opinion will damage the common good, for example, the security and stability of the financial market. Preventative action as the one described above carries the risk of making arbitrary choices by the legislator. Therefore, it is important that in the process of making law he takes into account also non-legal factors, including the reaction of the addressees to the solutions adopted. It is important at the same time to combine these two elements, the pragmatic with the empirical. Law is in fact a part of social reality and that is why we

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<sup>64</sup> See also K. Glinka, *Behawioralne aspekty decyzji inwestycyjnych a otoczenie instytucjonalne rynków finansowych*, in: A. Wojtyna [ed.], *Kryzys finansowy i jego skutki dla krajów na średnim poziomie rozwoju*, Warszawa 2011, pp. 149-154.

<sup>65</sup> W. Pływaczewski [ed.], *Przeciwdziałanie patologiom na rynkach finansowych od edukacji ekonomicznej po prawnotkarnie środki oddziaływania*, Warszawa 2015.

<sup>66</sup> R. Sowiński, *Uchylanie się od opodatkowania*, Poznań 2009, passim.

<sup>67</sup> C.B. Martysz, *Manipulacje instrumentami finansowymi i insider trading*, op. cit., pp. 258-341.

ought to analyse the practical conditioning of its operation, following the realists in the perception of law not only as a legal text (law in books), detached from reality, but primarily as an action (law in action), the consequences of which relate to the individual beings who create a given society. This concept, in the author's opinion, is extremely important from the point of view of financial market regulation, the existence of which would not be possible without the activity of thousands of people, saving and entrusting their funds to be managed (in a better or worse way) by financial institutions.

The regularity of this has not gone unnoticed by the European legislator who, as discussed in the previous Chapter of this book, for decades has consistently been realising the concept of building a single financial market which is a part of the EU's internal market. One of the elements of these activities is to ensure the protection of the weaker party who is the consumer of financial services. The model of this protection has been developed over several dozen years and has led to the creation of **the model of a rational consumer**. The model whose value derives from the fact that at the centre of it there are questions and dilemmas that arise in discussions about the possibility of moving law onto the territory of behavioural issues. What is more, the combination of the new model with financial market law clearly shows the need for reflection on this subject, and its indicator may be the following questions. Is this model ideal and real? How do the assumptions on which it is based relate to the behavioural concept from which emerges a picture of a rational, logical subject, but one subjected to unconscious and regular emotions? This is a subject who sometimes wanders logically while processing the excess of information provided, to which "equal" and uninterrupted access becomes the touchstone of fair and effective regulation.

It is worth at this point looking at this new concept, which has not been selected by the author at random. Choosing this new one from many examples of regulated issues is primarily designed to point out the dilemmas that accompany the legislator creating modern financial market law. The law, which is to protect the security and stability of the market while protecting trust in it, gives priority to the protection of the individual. Although, as shown by the perspective of law in action, it is not always possible to accomplish this postulate. The author who decides to present the model described above has some doubts arising from the nature of the matter analysed in this work i.e. financial market law. This matter is extremely broad and multi-layered and its detailed discussion is not possible in a single monograph. Besides, it would be pointless and could be reduced to the description, or perhaps exegesis, of certain regulations. This is not the author's intention; his aim is rather to provide a voice in the discussion on the challenges of the modern process of the creation and enforcement of financial market law, seen from the perspective of its economisation. Therefore, from the first pages of the book the author has been seeking to implement his aim to prove the thesis

concerning the need to base this process on a clearly outlined concept (philosophy), assuming the perception of the financial market not so much as a soulless machine to multiply money, but an important element of the social system that works for and thanks to the individuals creating it, subjected at the same time to numerous external influences affecting their decisions. The role of the legislator is to include this regularity in the process of creating the legal order as Jerzy Wróblewski wrote, through the normative, instrumental, axiological and social character of law.<sup>68</sup> It is through law in fact, that specific models of behaviour are created, this behaviour is influenced, certain social relationships are maintained or changed and, finally, certain values are promoted. Therefore, analysing the law, we should look at it through the "mind of an individual", whose life it affects. An individual, who besides being a citizen, is also a consumer whose behaviour as has been shown in the previous Chapter can significantly affect the stability of the economic and therefore the social system.<sup>69</sup> That is why it is worth looking at the model of consumer protection, developed across the world in recent decades, and in particular on both sides of the Atlantic.

### **3.1. The model of rational consumer protection as an optimal model?**

The analysis of the concept of consumer protection should begin first of all with the definition of the subject studied and secondly, by placing it in a broader context. In the latter case it seems appropriate to refer to the considerations of the environment of a knowledge-based economy, the existence of which has become a fact and significantly changed the functioning of the modern world. The technological revolution combined with globalisation has led, among other things, to many complexities, as well as to the previously described asymmetry of information.<sup>70</sup> Modern man in fact makes use of a wide range of conveniences and innovations, he is also smarter than a few decades ago, but compared to his ancestors he has been overwhelmed by the amount of information, which

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<sup>68</sup> J. Wróblewski, *Zasady tworzenia prawa*, Warszawa 1989, p. 8.

<sup>69</sup> When creating financial market law, it is important to be familiar with the current trends in the behaviour of consumers in these markets. Therefore, it is worth recommending here the extremely rich literature, including S. Smyczek, *Nowe trendy w zachowaniach konsumentów na rynkach finansowych*, Warszawa 2012; D. Maison, *Polak w świecie finansów*, Warszawa 2013; R. East, M. Wright, M. Vanhuele, *Zachowania konsumentów*, Warszawa 2011; M. Goszczyńska, S. Kołodziej, A. Trzcińska, *Uwikłani w świat pieniądza i konsumpcji*, Warszawa 2012; M. Goszczyńska, M. Górnik-Durose [eds], *Psychologiczne uwarunkowania zachowań ekonomicznych*, Warszawa 2010; D. Fatuła, *Zachowania polskich gospodarstw domowych na rynku finansowym*, Kraków 2010.

<sup>70</sup> M.K. Hogg, G. Howells, D. Milman, *Consumers in the Knowledge-Based Economy (KBE): What creates and/or constitutes consumer vulnerability in the KBE?*, in: *Journal Consumer Policy*, No 30 2007, p. 152.



he cannot process successfully. This information concerns various spheres of his life, and the most exposed are those concerning consumer products, pharmaceuticals, and recently also the financial products offered to him. Sometimes one can meet with the view that the regulatory philosophy applied to the food and pharmaceutical markets was a model for solutions in the transmission of information subsequently used in the financial market. It was at the same time aiming to eliminate one of the imperfections of this market, in which, on the one side there are financial institutions and professional facilities, and on the other side individual consumers. It was accepted at the same time that the market can only be competitive in a situation where the consumer is adequately informed, for example by placing relevant information on the terms and conditions of the contract (as well as on the content of the product or unwanted side effects of medication). Such information should be at the same time easily accessible, transparent and understandable (though already the imposition of such requirements should be considered as the beginning of potential problems in their implementation). At the root of this process there was the belief about the weakness of one of the parties, which in this case was the consumer, the definition of whom, including the characteristic features, was left to the doctrine and jurisprudence.

Seeking the universal definition of a "consumer" it is necessary to identify the possible ways in which a consumer may be perceived. Because of the subject of this book it is reasonable to reach for the two approaches to the issue – economic and legal. In the first in which the consumer is perceived as an economic institution, attention is focused on the man who in the field of economy occurs in at least three roles: the manufacturer, the citizen and the consumer. The consumer is the one who makes use of the utility of the product. He consumes (uses) the purchased products (services). And in this sense he does not have to be identified only with a specific person, but also with a group of people, an enterprise and even an organisation.<sup>71</sup> The concept of an economic consumer is believed to have been present in the market at least since the 18<sup>th</sup> century.<sup>72</sup> In contrast, the perception of the consumer through the prism of legal solutions which are to protect the weaker party to the legal relationship, appeared only in the twentieth century. It was on 15 March 1962 that the then US President John F. Kennedy, standing in front of the US Congress, began his speech with the famous sentence "*Consumers, by definition, include us all (...)*" and gave rise to a new era in the field of the protection of the consumer, who was to be guaranteed protection, including the four

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<sup>71</sup> J. Kufel, H. Mruk, *Konsument jako instytucja ekonomiczna i prawna*, in: J. Kufel [ed.], *Ochrona prawna konsumenta w uregulowaniach publicznoprawnych*, Zeszyty Naukowe AE w Poznaniu, Vol. 263 1998, pp. 7-9.

<sup>72</sup> A. Kołodziej, *Konsumentenckie prawo odstąpienia od umowy sprzedaży rzeczy*, Warszawa 2006, p. 22.

basic rights, which are: the right to security; right to information<sup>73</sup>; the right to choose from among many products and services at competitive prices; as well as the right to express opinions.

Awareness of consumer rights began to spread around the world, reaching also Europe, where beginning with the adoption of the Maastricht Treaty it has become one of the autonomous and fundamental objectives of the policy of the European Community. Its primary aim was to create the conditions for the consumer to make the sovereign and rational decisions that will be most beneficial for him.<sup>74</sup> At the same time the very concept of his protection, as the weaker party concluding an agreement, was based on the paradigm of transparency of information combined with the need to ensure a certain level of consumer education. It was also acknowledged that the consumer's weakness is primarily due to the deficit of information concerning the offers addressed to him and his rights. This deficit does not occur in principle on the other side of the relationship, represented by active market participants with appropriate knowledge, or intellectual and financial facilities that can guarantee them a stronger and more secure position compared with the one held by the consumer.<sup>75</sup>

Based on such an assumption, the European Union began to shape the model of consumer protection, the concrete expression of which were the subsequent legal acts which were certainly influenced by relevant judicial decisions which also contributed to the development of a specific model of the European consumer. It should be emphasised at this point that the very concept of "consumer" was not defined in the primary law of the European Union, although we can find it many times in the provisions of the Treaties. It appears, however, in most directives regarded as part of consumer law. Despite the adoption of the principle of the necessity for an autonomous and uniform interpretation of a given notion in a specific EU regulation, there has been a tendency in recent years to standardise the definition of the concept of the "consumer".<sup>76</sup> In short, it can be defined as a natural person acting in a non-professional way, that is in a way which should not be identified with the variously defined economic activities. It is noted that the basis of the search for a legal definition of the consumer was the dichotomy

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<sup>73</sup> See also B. Pachuca-Smulka, *Prawo do informacji i edukacji podstawą ochrony interesów konsumenta*, in M. Królikowska-Olczak, B. Pachuca-Smulka [eds], *Ochrona konsumenta w prawie polskim i Unii Europejskiej*, Warszawa 2013, pp. 42-47.

<sup>74</sup> Now Article 169 (1) of the The Treaty on the Functioning of the European Union – consolidated version, 7 June 2016, OJ C 202/1 which states that "in order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, security, and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests."

<sup>75</sup> R. Stefanicki, *Pojęcie i wzorzec konsumenta w prawie europejskim*, in: *Radca Prawny*, No 5 2006, p. 22.

<sup>76</sup> S. Łazarewicz, *Konsument – pojęcie i jego europejski model*, in: M. Królikowska-Olczak, B. Pachuca-Smulka [eds], *Ochrona konsumenta w prawie polskim i Unii Europejskiej*, op. cit., p. 30.

consumer – professional, which, as was correctly noted, was not quite the best solution because it concerned a typical model situation. Therefore, developing the concept of the definition of the consumer, other criteria were taken into account, including the use of goods (services) for private or commercial purposes, as well as the criterion of the professionalism of the given transaction (i.e. one of the parties had to be a professional).<sup>77</sup>

In the literature on the subject it is pointed out that EU policy concerning consumer protection is the natural consequence of the integration policy. At the same time it is recognised as one of the basic tools of struggle for a free market, based on the idea of transparency and honesty, especially in the relationship between the active and passive participants. As Anna Tischner noted appropriately, the main weapon in the fight for the interests of the European consumers is information, thanks to which consumers will be able to enjoy the richness of the offer, identified with the benefit of the EU market.<sup>78</sup> This consumer, thanks to his knowledge and the available information, has to have the opportunity of self-determination of his market choices that should be in this regard conscious, critical and rooted in social reality. State activity (the European Union), but also legislators have to aim at shaping these kinds of attitudes among citizens of the Member States and develop the already mentioned model of the average (reasonable, rational) consumer whose misinformation, prevention or restriction of his freedom of evaluation and decision, will be treated as a violation of his right to information.<sup>79</sup> At the same time it is noted that the regulations of substantive law of the European Union do not describe the model of the consumer's personal characteristics, such as, for example, knowledge and experience of the market and the degree of common sense and criticism towards the information transmitted to him.<sup>80</sup> Writing about him, Anna Mokrysz-Olszyńska perversely (though accurately) indicates that the average European consumer has not to be necessarily reasonable, but informed.<sup>81</sup>

In spite of this, there is consistently promoted through the judicial activity of the Court of Justice of the European Union, a model of the reasonably circumspect consumer, able to use the information delivered to him, on the basis of which he shall take certain (rational) decisions.<sup>82</sup> He is characterised by a variety of attrib-

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<sup>77</sup> A. Kunkiel-Kryńska, *Metody harmonizacji prawa konsumenckiego w Unii Europejskiej i ich wpływ na procesy implementacyjne w państwach członkowskich*, Warszawa 2013, p. 261.

<sup>78</sup> A. Tischner, *Model przeciętnego konsumenta w prawie europejskim*, in: *Kwartalnik Prawa Prywatnego*, issue 1 2006, pp. 201-202.

<sup>79</sup> E. Łętowska, *Prawo umów konsumenckich*, Warszawa 1999, p. 149.

<sup>80</sup> S. Łazarewicz, *Konsument – pojęcie i jego europejski model*, op. cit., p. 33.

<sup>81</sup> A. Mokrysz-Olszyńska, *Europejska strategia ochrony konsumenta przez informację*, in: A. Janik [ed.], *Studia i rozprawy. Księga jubileuszowa dedykowana profesorowi Andrzejowi Całusowi*, Warszawa 2009, p. 636.

<sup>82</sup> See for example European Union Court of Justice of 20 February 1979. *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*. Reference for a preliminary ruling: Hessisches Finanzgericht - Germany. Case 120/78, in: *European Court Reports 1979 -00649 Judgment of the Court of 20*

utes, of which the most commonly used ones are those describing him as: duly informed, conscious, reasonable, sensible, prudent, critical, observant or independent, but also properly educated as well as suspicious.<sup>83</sup> Referring to them, it should be emphasised that the adjectives used to describe the average consumer would require a separate discussion. It is one thing however, to be reasonable, rational and another to be conscious (prudent), as already pointed out in the earlier part of this work. Common sense is associated with caution, so directing oneself by reason based on rational assumptions. Acting consciously, although based on rational behaviour as well, seems to focus more on the relationships that exist between the internal phenomena (thought processes) and external phenomena. In the description of the model of an average European consumer the dominant narrative is one which uses the first of the characterised concepts. Thus, we have to deal with the reasonable consumer, resembling a kind of superhero who on the basis of the information transferred to him makes a cool, rational calculation, in order to take the decision most beneficial for him. This kind of view does not take into account behavioural elements, like the emotions, cognitive ability, level of education, etc., which in an obvious way (as evidenced by research) influence the decision-making process. In order for this process to be put into practice in the way adopted by the European legislator, it is necessary, apart from the existence of the decision-maker of course, that one other condition must be satisfied, namely that appropriate information is provided to him for his subsequent analysis.

And at this point there is the basic dilemma (discussed in the literature on regulatory policy) of such an assumption, also seen in the financial market (discussed below), and which can be reduced to the question: what, how much and in what way information should be given to the consumer who will make future decisions on its basis. Should the leaflet about a drug contain the information that its excessive consumption may lead to death? Would it not have the opposite effect to the intended one and will it not make the patient refrain from taking this medication? Will the detailed data about the amount of fat protect the consumer from the risk of overweight? And finally, will providing information about the real annual interest rate allow the average consumer to determine accurately the level of risk that will appear in relation to his loan?

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May 1992. Commission of the European Communities v Federal Republic of Germany. Case C-290/90, in: European Court Reports 1992 I-03317; Judgment of the Court (Fifth Chamber) of 6 July 1995. Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH. Reference for a preliminary ruling: Landgericht Köln – Germany, Case C-470/93, in: European Court Reports 1995 I-01923; Judgment of the Court (Fifth Chamber) of 2 February 1994. Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH. Reference for a preliminary ruling: Landgericht Berlin - Germany. Case C-315/92, in: European Court Reports 1994 I-00317. These and other cases were discussed in detail in the publication of A. Tischner, *Model przeciętnego konsumenta w prawie europejskim*, op. cit., pp. 199-243.

<sup>83</sup> S. Łazarewicz, *Konsument – pojęcie i jego europejski model*, op. cit., pp. 33-34.

The purpose of asking these, perhaps exaggerated, questions at this point, is to show the significance of the problem also indicated in the debate on the model of the consumer. A common example in this regard are the cited disparities that exist in the perception of a consumer in the individual member countries. At one extreme there is often the Italian model which assumes a realistic vision of the consumer as a mature person, intelligent, sceptical towards messages (advertising) addressed to him. At the other, we see the German model, perceiving the consumer as a person who is uninformed, careless, unreasonable and reckless, and so it would be proper to say, requiring a paternalistic approach, expressing itself in the protection of such a consumer through, among other things, information.<sup>84</sup> The problem of the legislator is therefore to find the proverbial "golden mean", which is obviously a very difficult task. It cannot, however, be accepted that by imposing further information requirements on one, usually the stronger side of the legal relationship, the legislator will confirm his belief in his clear conscience towards these more vulnerable consumers, who are armed with dozens of pieces of information and their own brains and will take rational decisions which are the best for them. That will not happen, and such an assumption should be considered fictional. It does not account for the real side of the law related to its operation in practice. Practice, which is not ideal and is created by real people (individuals), not superheroes not always with the appropriate knowledge or skills, who despite receiving the information do not use it as intended, thus in a rational way that is the best for them. Yet, it cannot be accepted either that they will be covered by infinite protection, without suffering the consequences of their actions.

The model of the consumer should thus evolve towards the image of a conscious (prudent) subject, who, although non-professional and not always rational, is nevertheless aware of the complexity of the surrounding world and must take into consideration the consequences and risks involved in his activities. It is the role of the State to create such conditions which will support the protection of the security and stability of the system, which can be achieved thanks to the protection of values in the form of trust in it. How difficult a task it is shows that the regulation of the financial market, it should be emphasised, must be accompanied by the promotion of educational activities that are so important in shaping financial awareness. The average consumer, using the benefits of the financial market, must be educated from an early age in such a way as to be aware of the fact that although it seems that the financial market is an abstract entity, it has its consequences in real life, and one of its inseparable elements is risk. Is this idea realised in practice? In order to answer this question, it is worth looking at the assumptions which are at the root of the regulations of selected activities in the financial market of the European Union, which directly or indirectly apply to its consumers.

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<sup>84</sup> S. Łazarewicz, *Konsument – pojęcie i jego europejski model*, op. cit., p. 34.

### 3.2. The consumer in the financial market

The financial market should be considered a segment of the economy in which the focus is on all the most important contemporary dangers awaiting the average consumer, within the meaning adopted by the European Union. It is important to note that he is not the only participant in this market because as has been indicated in the introduction to this Chapter, the category of "market participants" includes all the subjects representing the supply side as well as the demand side, so therefore both, the more and the less professional.<sup>85</sup> All of them are familiar

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<sup>85</sup> This division can be seen, among other things, in the regulations of the European capital market, in which the legislator decided on a classification of customers according to their knowledge and transactional experience, which in turn, have an influence upon the scope of information obligations towards them. In the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173/349 – hereinafter referred to as the MiFID2 Directive, the European legislator recognised the following three categories of entities (investors): eligible counterparties (Article 30), professional clients (professional) – Article 4 (1), point 10, and retail clients – Article 4(1) point 11. One can see in them a gradation of professionalism on which depends the range of investment obligations towards its customers. It is worth giving here a brief description of the individual categories. And thus the contractors, authorised pursuant to Article 30(2) MiFID2 Directive, are acc. to the European legislator, inter alia, investment firms, credit institutions, insurance companies, UCITS and their management companies, pension funds and their management companies. The category of "professional customer" includes entities qualified intellectually (knowledge and experience). The least experienced is the retail customer, and therefore, according to Article 4 (1) point 11 a client who is not a professional customer. The lower the level of knowledge and experience the higher the level of protection of information used by a retail customer. Following Piotr Tereszkievicz it should be emphasised that this division into the particular categories, particularly professional and retail customers, demonstrates a significant difference as against the widespread in private law dichotomy entrepreneur-consumer (p. 176). As an example, one can point to a situation where the retail customer may also be small and medium-sized enterprises such as the one whose balance sheet does not exceed 20 million Euro and net turnover is less than 40 million Euro (see Annex II paragraph I point 2 of the MiFID2 Directive). The author quoted points out and discusses in detail the specific duties towards the retail customers who, in his view, should be seen not only on the basis of the model investor in need of information, but above all, on clarification and guidance to take the best direction for their investment. We must agree with the thesis expressed in the quoted monograph by Tereszkievicz that the unprofessional consumer is also uninformed, irrational, prone to certain weaknesses in the decision-making process and basically helpless against certain practices of the financial sector (p. 178). The consequences of these features are among others numerous information obligations of investment firms towards retail customers, including the obligation to exploration (and therefore getting to know the customer), in terms of investment objectives, types of financial risks, knowledge and experience of the customer. These issues, along with the theses presented above and cited page numbers was discussed in detail in the monograph by P. Tereszkievicz *Obowiązki informacyjne w umowach o usługi finansowe. Studium instrumentów ochronnych w prawie prywatnym i prawie unijnym*, op. cit., pp. 162-250. See also N. Moloney, *How to Protect Investors: Lessons from the EC and the UK*, Cambridge 2010, p. 30; N. Moloney, *EU Securities and Financial Markets Regulation*, Oxford 2014, pp. 770-854; H. Dagan, S. Hannes, *Managing Our Money: The Law of Financial Fiduciaries As a Private Law Institution*, in: A. Gold, P.B. Miller [eds], *The Philosophical Foundations of Fiduciary Law*, Oxford 2014, pp. 91-121; J. Kołacz, *Prawo inwestora do informacji na rynku kapitałowym*, Warszawa 2012,

with the action of behavioural factors that must be taken into account in the process of creating legal solutions which regulate the functioning of the financial market. Understanding the specifics of the regulated matter, including the laws of the market, its functions, as well as defects of the participants must be a part of the state regulatory policy in this area. It is believed that the special role of consumers who are not professionals in this regard stems not so much from the desire to offer protectionist treatment, but rather from having to compensate for the shortcomings of their knowledge, experience, and to set-off their lost chances in today's markets.<sup>86</sup>

These markets offer "products" that cannot be compared to other goods offered to consumers every day. It is somehow natural that the financial instrument, apart from the fact that it is charged with high economic risk, implies many benefits, but also potential risks and costs. The modern legislator, aware of the growing hegemony of the financial markets, decides to face them, introducing further legal solutions aimed at embracing, within a legal framework, the expanding activity of financial institutions. It is no different in the case of the European Union, whose activity in this respect has been characterised in the previous section.<sup>87</sup> Analysing its individual solutions to financial market regulations, we can distinguish the following elements (discussed in detail in the second Chapter of this work):

1. Regulatory philosophy, which is based on the assumption that the financial market is an important element of the integration process and should be treated as one of the elements of the European internal market.<sup>88</sup>
2. The concept of maximum harmonisation, which will give effect to continue the integration process, and which will materialise in the form of the financial market, which is one of the most important elements of the global financial architecture and at the same time serves further development of the European economy.
3. The supranational structure of the financial market of the European Union is created both by public and private legal entities. The first ones are, besides the already well known EU bodies, such as for example, the European Commission, to be identified primarily with the macro- and micro-

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pp. 103-144; C.B. Martysz, *Manipulacje instrumentami finansowymi i insider trading*, op. cit., pp. 275-296; K. Szemczuk, *Zasada najlepszej realizacji zlecenia na rynku pozagiełdowych instrumentów finansowych po wejściu w życie MiFID*, in: *Prawo Bankowe*, No 2 2008, pp. 80-93.

<sup>86</sup> A. Janiak, *Przywileje bankowe w prawie polskim*, Warszawa 2003, p. 61.

<sup>87</sup> See also P. Cartwright, *Consumer Protection in Financial Services: Putting the Law in Context*, in: P. Cartwright [ed.] *Consumer Protection in Financial Services, the Hague 1999*, pp. 1-20; F. Cafaggi, A. Nicita, *The evolution of consumer protection in the EU*, in: T. Eger, H.B. Schäfer [eds], *Research Handbook on the Economics of European Union Law*, Cheltenham 2012, pp. 263-288.

<sup>88</sup> See Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions. Reformed European financial sector, Brussels, 15 May 2014, COM(2014) 279 final.

prudential supervising structures, established for this purpose, specialised entities equipped with numerous, efficient legal instruments of action.<sup>89</sup>

4. Information, and more precisely access to it. A detailed analysis of the legal solutions adopted legal solutions shows that the legislator intends to control the sector by creating countless information requirements, the implementation of which affects all market participants. Financial institutions are required to transfer particular information to the entities that supervise them, which on its basis assess, among other things, the degree of risk in the activities conducted by these institutions. However, the same institutions are obliged to provide their clients with specific sets of information which, as has been presented, after having been examined will enable them to make beneficial investment decisions. Among these clients are professional and non-professional ones. Belonging to one of these categories is important because it affects the specific obligations of financial institutions towards them. It should be noted, however, that the information requirements apply also to clients of financial institutions who, wishing to use the services offered by these institutions are obliged to provide some specified data. Moreover, these data are continuously collected and used, for example when assessing the creditworthiness of the client.
5. The extensive clearing and settlement infrastructure aimed at supporting the functioning of the market, ensuring implementation of transactions in real time.
6. The intensification of efforts to revive the retail financial services market, i.e. a market with the average consumer as described above, who encouraged by the richness and diversity of the offer will benefit from it, and will do so on a European scale. This happens, for example, when selecting financial products offered by entities from different Member States, while at the same time being granted a high degree of protection created by the previously mentioned elements. Without this protection (security) it will not be possible to create a cross-border EU retail market of financial services, for which the barrier, which is often emphasised, is not so much the price of services, but rather language barriers, cultural factors, as well as the geographical distance.<sup>90</sup> Currently, in the European Union there is an ongoing debate on the challenges facing the retail financial market. We should point here to the recently published "Green Paper on the retail fi-

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<sup>89</sup> Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union, Brussels, 30.9.2015 COM(2015) 468 final.

<sup>90</sup> K. Marak, K. Poroś, *Ochrona konsumenta usług finansowych w świetle prawa wspólnotowego – wybrane zagadnienia*, in: B. Gnela [ed.], *Ochrona konsumenta usług finansowych*, Warszawa 2006, pp. 135-146.



financial services market”.<sup>91</sup> It is intended to serve as part of a new strategy for the single market.<sup>92</sup> It contains an interesting formulation of the challenges, which include: the emergence of new entities and new techniques in the digital market; the use of new financial products (e.g. peer-to-peer lending also known as crowdfunding) and new payment products (e.g. by text messages) or the fragmentation of the market.<sup>93</sup>

Assuming the above, it should be noted that the European legislator recognises the challenges of the contemporary world and sees the necessity of looking at the contemporary markets through the prism of its participants, with particular emphasis on their role in shaping trust in the market. This vision of a consumer as a reasonable and enlightened entity should be regarded as too optimistic. However, we must agree with the view that his protection is set in the broader context of the protection of certain goods and values, necessary for the functioning and development of the financial market.<sup>94</sup> In this respect it is necessary to comment on the specificity of financial services under the contract, which commonly are referred to as financial instruments. The development of the concept of the consumer in the European Union took place through the analysis of his situation when the “traditional” consumer goods (cosmetics, chocolate bars or eggs) were offered to him, but financial instruments are by no means such traditional products. However, there is a view presented that financial products can be compared to consumer goods and as such should be subject to similar rules (for example, product liability).<sup>95</sup> We must agree with the concept of including financial services in the category of credence goods, i.e. those whose quality the buyer is not able to

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<sup>91</sup> Green Paper on retail financial services market. Better products, wider choice and greater opportunities for the consumer and economic enterprise, Brussels, 10.12.2015, COM(2015) 630 final.

<sup>92</sup> See more in: Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions upgrading the Single Market: more opportunities for people and business, 28.8.2015, COM(2015) 550 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The reformed European financial sector, Brussels, 15 May 2014, COM (2014) 279 final.

<sup>93</sup> It is intended in this plan, among other things, to establish EU standards for responsible mortgage lending; improving rules on disclosure of information and increasing standards in the field of financial consultancy and financial product distribution; increasing asset protection of retail investors; increasing transparency and comparability of fees for keeping a bank account, the introduction of simpler and faster procedures for the transfer of a bank account as well as universal access to the basic bank account. These measures aim at increasing consumer confidence in the markets and financial products. See more in: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The reformed European financial sector, Brussels, 15 May 2014, COM (2014) 279 final, p. 8.

<sup>94</sup> E. Rutkowska-Tomaszewska, *Ochrona prawna klienta na rynku usług bankowych*, Warszawa 2013, p. 27.

<sup>95</sup> P. Tereszkievicz, *Obowiązki informacyjne w umowach o usługi finansowe. Studium instrumentów ochronnych w prawie prywatnym i prawie unijnym*, op. cit., pp. 33-34.

determine at the moment of purchase (or even after), which often entails certain consequences.<sup>96</sup> Therefore, in shaping the information policy in relation to the consumers of these services, so much attention is paid to the information process, which will take into account the explanation of the nature of the products on offer.<sup>97</sup>

The question arises whether this kind of treatment is able to provide consumer protection in an appropriate manner. It refers to the problem analysed in the literature of the structure of financial products and the ability to perceive the risks involved. The first issue focuses on the fact that there are financial products whose risks are not fully recognised and they are practically unlimited.<sup>98</sup> From the point of view of the protection of trust in the market, this kind of product either should not be offered or the entity offering it should fairly inform its client. In the case of an inability to meet the last condition (advice and information), it seems that the best solution will be the first one of the proposed, that is the inability to offer a specific investment product. Such a solution is apparent in one of the recently adopted EU regulations, namely Regulation No 600/2014 of 15 May 2014 on the markets of financial instruments and amending regulation (EU) No 648/2012.<sup>99</sup> Point 29 of the Preamble to this Regulation provides for the possibility of supplementing the powers of the competent supervisory authorities with the special **mechanism introducing the ban** or restriction in marketing, distribution and sale of any **financial instruments** or structured deposits that cause serious threats to investor protection, to the correct functioning and integrity of financial markets or commodity markets, or the stability of the entire financial system or a part of that system. This postulate was materialised in Article 40 of the Regulation, pursuant to which the European Securities and Markets Authority (ESMA)<sup>100</sup> received permission for temporary intervention under certain conditions, and the temporary ban or restriction in the European Union of the marketing, distribution or sale of certain financial instruments or financial instruments with certain specific characteristics, operations or financial practice.

This example, however, should be regarded as an exception, whose originality stems from its strong interferential character. In the past such solutions were neither known nor practised. The very creation of such a possibility should be read as a desire to show the determination of the European legislator to protect

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<sup>96</sup> Ibidem, p. 38.

<sup>97</sup> It has been subjected to a comprehensive and extremely valuable, both from a practical and theoretical point of view, analysis of the monograph by P. Tereszkievicz, *Obowiązki informacyjne w umowach o usługi finansowe. Studium instrumentów ochronnych w prawie prywatnym i prawie unijnym*, passim.

<sup>98</sup> P. Tereszkievicz, *Obowiązki informacyjne w umowach o usługi finansowe. Studium instrumentów ochronnych w prawie prywatnym i prawie unijnym*, op. cit., p. 242.

<sup>99</sup> Regulation of the European Parliament and Council Regulation No 600/2014 of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173/84.

<sup>100</sup> The European Securities and Markets Authority – commonly known as ESMA.

some of the main market goods which are its stability and security. The standard, however, is the will of the European legislator to authorise certain solutions (innovations) in the financial market. This task on the legislative side is not easy as it requires the legislator to **create the definition** of these products, which is not always possible. Therefore, in practice, we can see that often it is restricted only to the characteristics of the selected structural elements of the instruments which, in the form of a catalogue, are placed in the annex to a given legislative act.

An example of this type of situation is the regulation of payment services contained in Directive 2015/2366 on payment services (hereinafter referred to as PSD2)<sup>101</sup>, one of whose aims was **to ensure conditions of transparency and information requirements** from the payment services providers and a simultaneous guarantee of the rights and duties (mainly of the consumers) related to the provision and use of payment services, defined in a rather general manner in Annex I (e.g. as issuing payment instruments or acquiring payment transactions, or services initiating payments).<sup>102</sup> This guarantee of the rights and obligations related to the users of payment services is to be ensured by providing them with information about payment services, this information to be characterised by a uniformly high level of clarity which will allow making conscious decisions and

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<sup>101</sup> Directive of the European Parliament and of the Council (EU) No 2015/2366 of 25 November 2015 on payment services in the internal market amending Directives 2002/65/EC, 2009/110/EC, 2013/36 / EU and Regulation (EU) No 1093/2010 and repealing Directive 2007/64/EC, OJ L 337/35 (Directive commonly called PSD2 will come fully into force on 13 January 2018) – hereinafter referred to as PSD2.

<sup>102</sup> The problem of payment services was discussed in detail in the following publications: A. Zalcewicz, *Proces integracji europejskiego rynku usług płatniczych – wyzwania regulacyjne*, in: *Prawo i Ekonomia*, 2011, Vol. VII, pp. 321-340; A. Zalcewicz, *Instytucja płatnicza na gruncie regulacji europejskich*, in: *Przegląd Ustawodawstwa Gospodarczego*, No 5 2011, pp. 7-15; A. Zalcewicz, *Nadzór Komisji Nadzoru Finansowego nad rynkiem usług płatniczych – nowe uregulowania prawne w zakresie kompetencji i zadań nadzorczych*, in: E. Fojcik-Mastalska, E. Rutkowska-Tomaszewska [eds], *Nadzór nad rynkiem finansowym. Aktualne tendencje i problemy dyskusyjne*, Wrocław 2011, pp. 137-145; A. Zalcewicz, *Biuro usług płatniczych na tle obowiązujących regulacji prawnych*, in: *Przegląd Ustawodawstwa Gospodarczego*, No 3 2012, pp. 4-10; A. Zalcewicz, *Problem poprawności implementacji art. 52 ust. 3 dyrektywy PSD do polskiego porządku prawnego (opłata tzw. surcharge, zniżka za korzystanie z instrumentu płatniczego)*, in: *Przegląd Ustawodawstwa Gospodarczego*, No 10 2013, pp. 14-19; D. Cyman, *Wykorzystanie elektronicznych instrumentów płatniczych jako element zwiększający konkurencyjność przedsiębiorcy*, in: M. Juchniewicz [ed.], *Zarządzanie przedsiębiorstwem w warunkach konkurencji. Determinanty konkurencyjności przedsiębiorstw*. Część 1, Olsztyn 2006, pp. 171 et seq.; M. Chrzan, *Obowiązki informacyjne dostawcy usług płatniczych*, in: *Monitor Prawa Bankowego*, No 9 2012, pp. 59-71; Z. Długosz, *Opłaty związane ze świadczeniem usług płatniczych*, in: *Monitor Prawa Bankowego*, No 9 2012, pp. 72-84; J. Byrski, A. Wachowska, *Cloud computing w działalności instytucji płatniczej*, in: *Monitor Prawa Bankowego*, No 9 2012, pp. 59-73; K. Korus, *Pojęcie usługi płatniczej w ustawie o usługach płatniczych*, in: *Monitor Prawa Bankowego*, No 9 2012, pp. 30-42; W. Srokosz, *Status prawny biura usług płatniczych*, in: *Monitor Prawa Bankowego*, No 9 2012, pp. 52-58; M. Grabowski, *Ustawa o usługach płatniczych. Komentarz*, Warszawa 2012; R. Kaszubski, *Ł. Objeżdża, Karty płatnicze w Polsce*, Warszawa 2012; T.R. Smus, *Spełnianie świadczeń pieniężnych za pomocą pieniądza elektronicznego*, Warszawa 2010.

the free selection of offers of these services throughout the European Union. The European legislator, adopting the PSD2 directive has instituted the harmonised requirements needed to ensure the administration of payment services to the users with necessary, sufficient and understandable information regarding the payment service contract and the payment transactions. The Directive distinguishes between the information requirements for single payment transactions, and the transactions covered by the framework contract made in respect of a greater number of payment transactions (in practice, framework contracts and payment transactions covered by them are far more common and economically more important than single payment transactions). The consumer, in principle, should receive basic information on finalised payment transactions at no additional cost. In designing the regulations discussed, it was also decided that in order to boost consumer confidence (trust) in the harmonised payment services market, users of payment services must be provided with information on the real costs and charges of payment services in order to make an informed choice. In addition to PSD2, this goal is to be achieved by the adoption of the whole package of legislative acts on the transparency of payment services, including the level of interchange fees which in many Member States were too excessive to the result that they not only were damaging to the interests of small retailers, but also had a considerable negative impact on the development of the payment services market.<sup>103</sup> These examples of information policy have been contained in Title III of PSD2 which deals with the transparency of conditions and information requirements for payment services. The pro-consumer character of this act may be seen in the solution adopted in Article 41 which obliges Member States to adopt the regulation according to which it is the responsibility of the payment service providers to prove that the information requirements defined in Title III have been satisfied. Another example of an interesting solution is contained another regulation of the same Directive which concerns the rights and obligations in relation to the provision and use of payment services and related to an unauthorised payment transaction. Member States have been obliged to impose the requirement according to which if the user of a payment service denies having authorised an executed payment transaction or claims that the payment transaction was not correctly executed, then the payment service provider must prove that the transaction was authenticated, accurately recorded, entered in the books and that the transaction had not been affected by a technical breakdown or some other deficiency related to the service provided by a given payment service provider (Article 72). Safeguarding the rights of the users of payment services is to be introduced in the rule D+1, which would curtail improper

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<sup>103</sup> Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, OJ L 123/1; See also W. Szpringer, M. Szpringer, *Nowe zjawiska w regulacji rynku usług płatniczych (wybrane problemy na tle projektu noweli do dyrektywy PSD)*, in: e-mentor, No 4 2014, pp. 73-83.

practices of “detention” of client’s funds by financial institutions, in the case of a client’s instruction, for example, to effect a transfer by remittance order. Often in fact it happened that funds disappeared temporarily from the clearing system, to the benefit of the financial sector. Therefore, the current standard is to be the requirement that the provider of payment services undertakes that the account he keeps in the name of the recipient of the service will be credited with the sum of the payment transaction not later than by the end of the business day following the date on which the transaction was made. This time limit may be extended by another business day following the payment transactions initiated on paper.

The solutions of PSD2 presented here are but a few of those that can provide for its exceptionally pro-consumer and informative nature. Besides, this Directive fits in the previously described new philosophy of the regulation of the EU financial market, evident in the creation of extremely detailed and complex legislation (in line with the principle of maximum harmonisation).

**Consumer protection** is treated in the doctrine as a **definitional element of the security of the financial services market**.<sup>104</sup> However, it is possible to envisage a situation where these interests may be opposed to each other. Despite the fact that the judicial decisions delivered within the EU with respect to its financial market are not numerous, there are two extremely interesting rulings which indicate the need to settle the issue of the individual interest of the consumer present in the financial market. When we analyse the situation in the light of case C-384/94 *Alpine Investments BV v Minister of Finance*<sup>105</sup> we can see the importance that the European Court of Justice attaches to trust as one of the fundamental elements of the functioning of the EU financial market. This trust is treated as a supplementary part of a larger whole, which extends to the liquidity and security of the market as well. Its essence is responsible for the fact that trust may even become one of the conditions restricting the freedom to provide services.<sup>106</sup> As the Court held, the protection of the reputation of the financial services sector must also be taken into account.<sup>107</sup> In the decision quoted it was stated that the Dutch regulations limiting the freedom to provide services known as cold calling (offering financial services via the telephone)

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<sup>104</sup> E. Rutkowska-Tomaszewska, *Ochrona prawna klienta na rynku usług bankowych*, op. cit., pp. 84-85.

<sup>105</sup> Judgment of the Court of 10 May 1995. *Alpine Investments BV v Minister van Financiën*. Reference for a preliminary ruling: *College van Beroep voor het Bedrijfsleven – Netherlands*, Case C-384/93, in *The European Court Reports 1995 I-01141*.

<sup>106</sup> See point 46 of the judgment: “As the Netherlands Government has justifiably submitted, in the case of cold calling the individual, generally caught unawares, is in a position neither to ascertain the risks inherent in the type of transactions offered to him nor to compare the quality and price of the caller’s services with competitors’ offers since the commodities futures market is highly speculative and barely comprehensible for non-expert investors, it was necessary to **protect** [the bold type – T.N.] them from the most aggressive selling techniques.”

<sup>107</sup> P. Craig, G. de Búrca, *EU Law. Text, Cases and Materials*, Oxford 2002, p. 821.

were necessary and limited the freedom to provide services only to the extent necessary, while protecting the goodwill (reputation) of the national financial sector.<sup>108</sup> It is believed that the above ruling confirms the possibility of restricting the freedom to provide services in the name of, as we would say, a higher value, i.e. **the protection of an investor's trust in the financial market**. It has to be stressed, however, that such proceedings must be based on reasonable grounds, that is the need to protect the general interest – the public good (and more precisely the reputation of the financial sector). This kind of motivation brings about, however, the danger of its abuse by the Member States which may use it to protect their domestic markets. Therefore, it is repeatedly emphasised that national regulations should be applied only to the extent in which they comply with EU primary law<sup>109</sup> in the use of which the interpretation of certain provisions by the Court of Justice of the European Union becomes extremely helpful. Also with regard to the issue of the “public good” this Court has often confirmed the possibility of the Member States to preserve their national regulations, on condition though, that they do not constitute barriers to the freedoms of the Single European market. The protection of public order, security and public health, as well as consumer rights should be considered as indications for the application of this rule. Moreover, according to the Court, national rules restricting any of the freedoms introduced for the protection of the interests of the public or of public order, are not contrary to the Treaty if they apply and are binding equally to domestic and foreign entities.<sup>110</sup>

Another important judgment, in which two important interests worthy of protection clashed, i.e. **the public interest and the interests of individuals** is the case of Peter Paul and others v Federal Republic of Germany (C-222/02)<sup>111</sup> concerning the liability of the German financial supervisory authority performing its activities solely in **the public interest**. The Court had to decide in whose interest the supervisory activities had been carried out: the State's or that of the individuals. Is the State's liability for damages excluded because of the existence of an equivalent protection system of deposits. This case was so interesting because in its earlier judgments (see Case C-252/83 Commission v Denmark, as well as in Case C-101/94, the European Commission v Italy), the Court stated

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<sup>108</sup> D. Miąsik, *Zasady ogólne (podstawowe) prawa Unii Europejskiej*, in: A. Wróbel [ed.], *Stosowanie prawa Unii Europejskiej przez sądy*, Kraków 2005, p. 282; See also M. Szipnar, *Swobody gospodarcze*, in: Z. Brodecki [ed.], *Wolność gospodarcza*, Warszawa 2003, p. 143.

<sup>109</sup> L. Oręziak, *Rynek finansowy Unii Europejskiej*, Warszawa 1999, pp. 39-42; W. Szpringer, *Europejskie regulacje bankowe*, Warszawa 1997, pp. 152-154.

<sup>110</sup> Judgment of the Court of 25 July 1991. Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media. Reference for a preliminary ruling: Raad van State - Netherlands. Case C-288/89, in *The European Court Reports* 1991 I-04007.

<sup>111</sup> Judgment of the Court (Full Court) of 12 October 2004. Peter Paul, Cornelia Sonnen-Lütte and Christel Mörkens v Bundesrepublik Deutschland. Reference for a preliminary ruling: Bundesgerichtshof – Germany, Case C-222/02, in *The European Court Reports* 2004 I-09425.

that **the protection of consumers of financial products remains in the field the public interest**. It was further held that national restrictions imposed on the Treaty freedoms **whose aim is to protect investors**, were contained within **the meaning of the public interest**. The scope of such protection may be extended to potential consumers of financial services, albeit depending sometimes on the assessment of a given case. This thesis seems to be confirmed by the analysis of the judgment in the case of Peter Paul, which touches upon several important issues, including, the security and stability of the system.<sup>112</sup> An important role in maintaining this stability relies on administrative bodies entrusted by the legislator with the implementation of tasks which take the form of so-called *ex ante* action and *ex post* actions. Whereas the former are preventive in nature (e.g. aid activities of the deposit guarantee scheme<sup>113</sup>), the latter generally apply to specific actions which may take the form of direct intervention into the activities of a given financial entity (e.g. supervisory activities). Entities which “are burdened” with the measures under discussion, are in particular the financial supervision authorities, as well as the bank deposit guarantee scheme.<sup>114</sup> The tasks of these entities focus on crisis prevention by reducing the frequency of disturbances in financial markets as well as crisis management.<sup>115</sup> It is an obvious fact that the decision to take this kind of action should be based on specific, detailed procedures that will govern the competences and responsibilities of the individual entities, ensuring at the same time the security of funds deposited by bank clients.<sup>116</sup> For the latter, the recovery of their “lost” savings will be just as important as determining the entity guilty of the situation and charging it with the responsibility for its occurrence. This, in turn, could imply a possible financial liability for the loss of funds or potential profits. The search for “perpetrators” will probably focus on two categories of entities. Firstly, on the people managing the financial entity and secondly, on the bodies responsible for monitoring the operation of the market and, above all,

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<sup>112</sup> M. Tison, *Do Not Attack the Watchdog! Banking supervisor's liability after Peter Paul*, in: *Common Market Law Review*, No 3 2005, pp. 639-675; C. Proctor, *Regulatory Liability for Bank Failures. The Peter Paul Case*, in: *Euredia*, No 1 2005, p. 73 et seq.

<sup>113</sup> See B. Zdanowicz, *Typologia systemów gwarantowania depozytów*, in: *Prawo Bankowe*, No 1 2008, pp. 54-67; T. Obal, *Teoretyczne aspekty systemu gwarantowania depozytów*, in: *Bezpieczny Bank*, No 2 2004, pp. 47-65.

<sup>114</sup> R. Mroczkowski, *Instytucjonalnoprawne aspekty zarządzania kryzysem finansowym*, in: J. Głuchowski, A. Pomorska, J. Szolno-Koguc [eds], *Uwarunkowania i bariery w procesie naprawy finansów publicznych*, Lublin 2007, p. 87.

<sup>115</sup> A.M. Jurkowska, *Nowa architektura sieci bezpieczeństwa jednolitego rynku finansowego Unii Europejskiej*, in: J. Węclawski [ed.], *Bankowość. Zjazd Katedr Finansowych: instytucje, instrumenty i strategie finansowe w dobie integracji gospodarczej*, Lublin 2006, p. 121.

<sup>116</sup> It is important here to define appropriately the dependence that exists between the regulatory discipline and market discipline, where common elements are the two related components, which include: monitoring, or the ability to assess the situation of banks and to generate on its basis appropriate signals, as well as exercising certain influence on the banks. See K. Jackowicz, *Wpływ dyscypliny regulacyjnej na dyscyplinę rynkową w bankowości*, in: *Bank i Kredyt*, No 1 2003, p. 40.

on the supervising authority, deposit guarantee scheme, the central bank and the government. It was no different in the case of Peter Paul, in which several issues were considered, including the possibility of awarding the claimants damages for the late transposition of Directive 94/19<sup>117</sup> (concerning the obligation to establish a system to guarantee bank deposits scheme) and negligence in supervision (as they alleged) on the part of the then Bundesaufsichtsamt für das Kreditwesen (Federal Office for Supervision of Credit Institutions).

Referring to the issue of the responsibility of the supervisory authorities, having analysed the provisions of the bank directives then applicable, the Court found that it was not their purpose to grant rights to depositors in the event of the unavailability of their deposits due to defective supervision on the part of the competent national authorities. Besides, as noted by the Court, as under German law so also in some other Member States, the liability of national supervisors of credit institutions towards individuals for negligence in supervision is exempted. This is due to the complexity of financial supervision, under which the competent authorities must protect many interests, and the stability of the banking system in particular. Furthermore, compliant with EU law were also the national regulations according to which the tasks of the national supervisory authority of credit institutions are **carried out** exclusively in **the public interest**, which under the national law excludes the possibility of seeking damages or compensation of any kind by individuals for negligence in the supervision on the part of that authority. Thus, as can be seen, the ultimate judicial decision provided for the possibility of an exemption from the liability for negligence in supervision towards individuals, if committed by the national supervisory authority.<sup>118</sup>

This ruling was widely echoed in the literature which, indicating the specific nature of its character, highlighted the fact of the violation of the so far undisputed principle of referring directly to EU law in the case of the “wrong” implementation of a Directive, that was rooted in the case of Francovich.<sup>119</sup> According to some authors, the European Court of Justice significantly departed from the existing

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<sup>117</sup> Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, OJ L 135/5.

<sup>118</sup> This issue was extensively discussed in the publication of T. Nieborak, *Stabilność polskiego systemu finansowego a odpowiedzialność organów go nadzorujących w aspekcie sprawy Peter Paul i inni przeciwko Republika Federalna Niemiec (C-222/02)*, in: P.J. Lewkowicz, J. Stankiewicz [eds], *Konstytucyjne uwarunkowania tworzenia i stosowania prawa finansowego i podatkowego*, Białystok 2010, pp. 652-666.

<sup>119</sup> Judgment of the Court of 19 November 1991. Andrea Francovich and Danila Bonifaci and others v Italian Republic. References for a preliminary ruling: Pretura di Vicenza and Pretura di Bassano del Grappa - Italy. Joined cases C-6/90 and C-9/90, in European Court Reports 1991 I-05357. An extremely interesting publication dealing with this subject is the book by N. Półtorak, *Odpowiedzialność odszkodowawcza państwa w prawie Wspólnot Europejskich*, Zakamycze 2002, See also N. Łojko, M. Sendrowicz, *Kiedy można dochodzić odszkodowania za naruszenie przez państwo członkowskie prawa wspólnotowego?*, in: *Prawo i Podatki*, No 1 2006, p. 9 et seq.



line of reasoning in arriving at its final decision.<sup>120</sup> However, what is worth emphasising here from the point of view of the issues discussed in this section of the book, is the recognition of the stability of the system, the essence of which may prevail over the interests of individuals, but who may anyway be enjoy the right to be compensated for the actions (or failure to act) of the supervisory authority.

The two cases described here (Alpine Investments as well as Peter Paul) which came before the European Court of Justice, together with the examples of selected regulations of the European Union's financial market law, demonstrate the complexity of consumer protection in the financial services market, which should be counted as part of a larger whole. Today there is the trend towards protection, which is necessary in order to maintain the stability and security of the market, and therefore to maintain trust in it. It would appear that the objective of consumer protection pursued through the information policy is complementary to the purpose of the protection system. Another issue is whether and how to implement this information policy. At present, it can be reduced to formulating specific obligations towards financial institutions. Looking at the list of solutions adopted in the area of the payment services market and the capital market, we can note their sometimes very different scopes. The common element to them, however, is the requirement of a certain information process, which would result in the fact that the unprofessional consumer should receive information not only about a given service or product, but also on the conditions of the contract and the consequences of its conclusion. In this respect the form, time and place of the transfer of such information is important.

The variety of the solutions as presented above leads to the conclusion that it is difficult in the case of the financial market to speak of one universal model of a consumer of the services this market offers. And although frequently it can be the same person, he will behave differently in the role of an investor, and differently when making a transaction using one of the payment services. This dissimilarity seems to be perceived by the European legislator who determines a different range of information obligations for individual market segments. And yet, the impression remains that the proposed solutions are sometimes of a rather fictional character, not congruent with the real behavioural abilities of the consumers present in the market. The main disadvantage of the adopted assumption, apart from the naively assumed rationality of the recipient of information that has already been widely discussed here, is the way in which information is presented, its amount and the actual possibility of its assimilation. It should once again be emphasised that the degree of detail of the required information must take into consideration the cognitive abilities of its recipient. Excessive information will result in negative consequences, or a confused consumer, or a consumer burdened

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<sup>120</sup> M. Tison, *Do Not Attack the Watchdog! Banking Supervisor's Liability After Peter Paul*, op. cit., pp. 639-675.

with the cost of its delivery.<sup>121</sup> While insufficient information (in whatever way this is understood and it is difficult to define) will have a similar effect.

Another very important and it seems rarely analysed aspect of the debate on the protection of the interests of consumers of financial services is **the remuneration** of persons representing financial institutions selling financial products. Two aspects can be considered. One is remuneration of the person in direct contact with the consumer, often serving in an advisory capacity as well. The other relates to the remuneration of executives in financial institutions. Regarding the latter, there are some ethical implications arising from the fact that even if the management of the funds entrusted by clients to financial institutions was not always effective, this did not affect the salaries of those who were responsible for poor management, who in addition to their high salaries also received other forms of remuneration in the form of various options, bonuses, etc. This was the case also during the last crisis, and even when assistance programs for the financial market sector supported by public funds had already been put in place. Hence, it is not surprising that this was later the subject of heated debate, to the effect that currently new legal solutions are being worked on to enable the capping of executives' salaries and other bonuses in the financial sector.<sup>122</sup> Some solutions have already been adopted in Directive No 2013/36<sup>123</sup> (hereinafter referred to as the CRDIV Directive) and Regulation No 575/2013<sup>124</sup> (hereinafter referred to as the CRR Regulation), which among other matters, deal with remuneration policy, in this case, in credit institutions and investment firms. The intention of the European legislator is to make remuneration depend on the results achieved by a given entity, which are also influenced by the degree of risk taken. In point 62 of the Preamble to the CRDIV Directive we read that remuneration policies encouraging excessive risk-taking may undermine adequate and effective risk management in credit institutions and investment firms. Therefore, countries which are members of the G-20 pledged to implement the principles of the Financial Stability Board in terms of sound remuneration practices and standard regulations to eliminate the potentially harmful effects of defective remuneration systems on the due risk

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<sup>121</sup> D. Wojtczak, *Poziomy, instrumenty, mechanizmy i modele ochrony konsumenta usług bankowych. Stan obecny i perspektywy*, in: *Prawo Bankowe*, No 3 2008, pp. 53-55.

<sup>122</sup> S. Okoń, *Polityka wynagrodzeń a profil ryzyka firmy inwestycyjnej*, in: *Przegląd Prawno-Ekonomiczny*, No 28 2014, pp. 64-75; K.J. Murphy, *Regulating Banking Bonuses in the European Union: a Case Study in Unintended Consequences*, in: *European Financial Management*, Vol. 19 No 4 2013, pp. 631-657.

<sup>123</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176/338.

<sup>124</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176/1.

management and control of the risk taken by individuals. The goal of the directive under discussion (supplemented by the CRR Regulation and the legislative acts issued on its basis) is to “implement international principles and standards at the European Union level by imposing express obligation on credit institutions and investment firms to establish and maintain remuneration policies and practices for categories of staff whose professional activities have a material impact on the risk profile of credit institutions and investment firms, such policies to be consistent with effective risk management. Importantly, the European legislator has left the implementation of these provisions to the European supervisory authorities whose tasks are to include among other things the revision of remuneration policies in entities whose activities they supervise. It must be once again emphasised that this policy must take into account the readiness, or risk-appetite of financial institutions (or their managers) to undertake risk as well as the values and terms of the investments made. In order to ensure that institutions have remuneration policies in place, it is appropriate to specify clear principles on governance and on the structure of remuneration policies. For that purpose, the assessment of the performance-based component of remuneration should be based on long-term performance and take into account the current and future risks associated with that performance (see points 62 and 63 of the Preamble to the CRDIV Directive).

This issue is a part of the very important trend of considerations relating to the relationship that should exist between the regulation of the financial market and the issues related to human rights. We can see here a strong axiological element referring to the problems of the social responsibility of financial institutions<sup>125</sup> and obligations arising from their role in society. We must agree with the thesis that the experience of recent years has contributed to the integrated approach towards financial products, which must be geared to the management of the client’s capital. As Włodzimierz Szpringer rightly notices this results, among other things, from the specificity of the market which offers an increasing number of financial services, which the suppliers promote on the basis of a narrative highlighting their advantages in order to obtain new sources of funding (not always necessary for consumption needs), speaking reluctantly about the risks involved for consumers. It is often the case in a situation where some of these services create a risk for the consumer, destroy his livelihood and increase social exclusion.<sup>126</sup> It may result in increased activity on the part of the legislator whose aim will be consumer protection achieved by imposing information obligations referred to above, addressing the problem of unfair terms of contract and even interest rates, as well by ensuring investment advice. The latter is certainly an important element in building trust

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<sup>125</sup> See more on this topic in: W. Szpringer, *Spółeczna odpowiedzialność banków. Między ochroną konsumenta a osłoną socjalną*, Warszawa 2009, pp. 91-144.

<sup>126</sup> W. Szpringer, *Instytucje nadzoru w sektorze finansowym. Kierunki rozwoju*, Warszawa 2014, p. 255.

in the market, which is achieved by ensuring its security and stability. Therefore, in the process of the creation and enforcement of financial market law special emphasis should be put on the issue of the fair treatment of consumers and the need to focus, apart from the quality of the product offered, on the whole interaction with the consumer too. The need for such an approach can be exemplified by the creation in the United Kingdom of a new body – the Financial Conduct Authority, whose task is, *inter alia*, safeguarding the fair treatment of consumers.<sup>127</sup> One of the solutions that would ensure fairness would be the separation of the consulting sphere from the sphere of financial services whose primary goal is to sell a product, which obviously raises the risk of selling it at any price. “The customer should understand the essence of the product, and mere information does not suffice.”<sup>128</sup> A tool that could be helpful in achieving this objective would be a piece of reliable financial advice which would primarily cater for consumer’s interests, not the commission earned on a sold product (false advice). Therefore, it is proposed that it is the client who should decide on the form of fees for advice that could be based, for example, on a model that combines the consulting fee and the commission. The introduction of regulation in this respect is certainly not going to be easy because it is a confirmation of the thesis of the complexity of the policy related to consumer protection in financial services, which, however, is one of the most important elements of the modern process of creating and enforcing financial market law. It is also a part of one of the models of this process, highlighted by Magdalena Fedorowicz, which is the standard model for the safe treatment of clients and, it seems, associated with it model of the transparent financial institution at every stage of its operations in the market from the moment it commences operations throughout its active life until its liquidation or restructuring.<sup>129</sup>

In conclusion, it should be noted that the regulation of information obligations imposed by the European legislator on financial institutions must be seen as only one fragment of an extensive catalogue of the problems encountered in financial market law.<sup>130</sup> It forms at the same time the model example of the Scylla and Charybdis dilemma, which has to be faced by every architect of the legal system. On the one hand, in order to guarantee the security of the system, he appears to focus his attention on protecting the most vulnerable subjects by providing them with opportunities which (due to lack of necessary knowledge) they will not be able to use anyway. On the other hand, in the name of economic freedom and development, he permits activities that involve genetically programmed risk, by creat-

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<sup>127</sup> *Ibidem*, p. 30.

<sup>128</sup> *Ibidem*.

<sup>129</sup> M. Fedorowicz, *Rola i zadania teorii prawa rynku finansowego UE*, in: *Bezpieczny Bank*, No 1 2016, *passim*.

<sup>130</sup> See also P. Tereszkiwicz, *Obowiązki informacyjne w umowach o usługi finansowe. Studium instrumentów ochronnych w prawie prywatnym i prawie unijnym*, op. cit., pp. 162-249; C.B. Martysz, *Manipulacje instrumentami finansowymi i insider trading*, op. cit., pp. 258-273.

ing thousands of regulations (see Chapter II) which are familiar only to a small group of specialists with the necessary knowledge to interpret and apply them. This raises the question about the source of such an approach. Does it result from a desire to regulate all aspects of activity in the financial market? And is this done at all costs, regardless of the consequences? Is it accompanied by a reflection on the social impact of such actions? In such a situation, does the law not become merely an artificial machine, a façade justifying the activity of the legislator? Admittedly, it is difficult to find answers to these questions, because the reality of the modern market is unusually complicated and multi-layered. Sometimes there is the impression that, perhaps deliberately, by seemingly protecting the most vulnerable by ensuring their access to information, it is in fact the financial sector which is getting strengthened (as the only one able to keep pace with the inflation of regulations). Such excessive information instead of increasing the security of the system, in fact weakens it. In this hyperactivity of the legislator, however, in the author's view, there is a place for reflection and exploration, which would rationalise the initiatives, aiming, among other things, at creating smart regulation, where less means more.<sup>131</sup> Its source may be the inclusion in the process of the creation and enforcement of law, also behavioural concepts that originated in psychology and are increasingly being transferred to the field of law. Their inclusion, however, requires the development of new principles and new concepts that will enable their use in practice. Of course, it is also necessary to understand the essence of these concepts put forward by legal scholars.

#### 4. The behavioural concept of law – an analysis

An analysis of the behavioural concept of law should begin with the statement that it is one of the best examples of the symbiosis between economics and law. This relation perfectly captures the already quoted comment that “economics provides a behavioural theory which serves to predict the response of people to the law.”<sup>132</sup> The behavioural trend, as has been shown, comes from economics, which in turn draws on the achievements of other sciences. The concepts created within this framework are developed primarily within the economic analysis of law, when some researchers felt it was necessary to eliminate the simplistic assumption of human rationality, traditionally one of the foundations of economics. The consequence of this change is the development of the behavioural trend, and it is believed that owing to the combination of economics, cognitive psychology

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<sup>131</sup> M. Kawiński, *Ochrona konsumenta w agencji Europejskiego Nadzoru Ubezpieczeń i Funduszy Emerytalnych. Kierunki zmian*, in: J. Monkiewicz, M. Orlicki [eds], *Ochrona konsumentów na rynku ubezpieczeniowym w Polsce*, Warszawa 2015, p. 198.

<sup>132</sup> R. Cooter, T. Ulen, *Ekonomiczna analiza prawa*, Warszawa 2011, p. 4.

and behavioural economics it allows us to predict more precisely the actual effects of the law.<sup>133</sup> Certainly, this kind of approach should be considered important from a practical point of view, as evidenced in the philosophy of regulating the position of the consumer in the financial market. The possibility of creating a single, coherent theory of human behaviour that can be used in the context of law<sup>134</sup> remains an open question.

There surely exists a need for such a theory, particularly in regulations concerning the functioning of financial markets, inextricably linked with the human factor. The behavioural concept in fact, as its name suggests, refers to behaviour, actions or human practices that are influenced by law the creation of which is an extremely complex social process, resulting in legal standards with specific contents, binding particular social groups. The legislator seeks to shape (create) certain relationships and human behaviour, as if anticipating them. However, in recent years, there has appeared the opposite trend, based on the fact that the actions of a legislator are sequential, that is, are forced by events and operations that create certain situations, and which then, because of the need to maintain stability in the country, must be included within a legal framework. This interdependence was most probably the impetus to explore new concepts, to explain the very essence of law from a conservative perspective, taking into account the most recent results of research into human nature, especially in the psychological sphere. The literature on the subject provides the thesis that law is in itself a behavioural instrument and one of the hitherto seldom studied areas of knowledge is its effect on behaviour. They indicate the possible causes of this kind of “negligence”, which are<sup>135</sup>:

1. Difficulty in determining the boundaries within which law influences behaviour;
2. Difficulties of the conceptual and methodological basis associated with the above described evaluation of the effectiveness of law; because certain behaviour does not always arise from a desire to conform to legal standards, but for example to other kinds of social norms, or simply to chance;
3. As well as the fact that the impact of law on behaviour may be symbolic, especially when it serves the institutionalisation prevailing in the customs of a given community.

In the discussion on the behavioural meaning of law, it is often seen as a paternalistic instrument, used for example in order to limit a procedure carrying risk and occurring in various spheres of human life (e.g. insurance as discussed earlier, but

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<sup>133</sup> K. Metelska-Szaniawska, *Ekonomiczna analiza prawa (Law&Economics) – Introduction*, in: R. Cooter, T. Ulen, *Ekonomiczna analiza prawa*, Warszawa 2011, p. XXVIII.

<sup>134</sup> *Ibidem*.

<sup>135</sup> G.B. Melton, *Introduction: The Law and Motivation*, in: G.B. Melton [ed.], *The Law as a Behavioral Instrument*, Nebraska 1985, pp. XV-XVIII.

also requirements concerning for instance safety belts, etc.), including risk associated with financial products.<sup>136</sup> This “paternal care” is particularly evident in the realm of public law and often subjected to criticism, based on the argument that: 1) it often leads in practice to taking decisions on someone else’s behalf, which is the case in a situation where the errors which are to be eliminated are non-systematic, concerning all members of the regulated population<sup>137</sup>; 2) people involved in the process of creating law are themselves influenced by behavioural tendencies; 3) it can be used by governments to justify their specific activities, motivated by the desire to eliminate scientifically proven negative irrational behaviour; 4) its actual result will be to manipulate the behaviour of the addressees of these norms.<sup>138</sup> This has probably contributed to the emergence of the concept based not so much on hard paternalism, but rather on its weaker version, referred to as soft paternalism or the light-handed approach. It combines regulatory concepts of which the common element is the assumption that on the basis of the experience of the behavioural sciences, it is still assumed to be possible to influence the outcome of the activities affected by cognitive distortions, but without the use of coercion and at the lowest cost incurred by people less willing to surrender to the rule of the legislator. The free will of individuals taking certain actions is emphasised at the same time. Trying to place of paternalism formulated in such a way, it can be put between direct control (command and control regulation) and the concept of *laissez-faire*.<sup>139</sup> It would appear that in this space there is also, among others, the concept of libertarian paternalism and policy of impulses (nudges) described earlier.

Its elements, in the author’s view, can also be found in the regulation of the financial market. Examples include those aimed at minimising the negative aspects of the phenomenon of moral hazard in the banking market. Modern legal solutions concerning systems of deposit protection are designed on the basis of the concept of hidden incentives, which are simply impulses to make well thought out, rational decisions related to entrusting savings to a particular bank. Such an impulse is certainly behind the decision of the legislator to mark the upper limits of protected deposits (e.g. for 100% of deposits, but not exceeding 100 000 Euros). As a result, a person investing resources in excess of these limits in one entity, should estimate more accurately the risk of his decision, resulting from the financial situation of the entity, or diversify this risk through the allocation of funds into smaller amounts deposited in several banks. The case described above is an example of a lighter version of paternalism. Although the legislator intervenes in the

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<sup>136</sup> R.J. Bonnie, *The Efficacy of Law as Paternalistic Instrument*, in: G.B. Melton [ed.], *The Law as a Behavioral Instrument*, op. cit., pp. 131-201.

<sup>137</sup> See J. Arlen, Comment: *The future of behavioral law and economics*, in: *Vanderbilt Law Review*, Vol. 51 No 6 1998, p. 1766.

<sup>138</sup> H. Luth, *Behavioural economics in consumer policy*, Antwerp 2010, pp. 108-112.

<sup>139</sup> *Ibidem*, p. 72.

market system, he nevertheless leaves, to a certain extent, some space for the free choice of its participants, who are partly to be blamed for their own irrationality.<sup>140</sup>

Moreover, this example shows that, certainly in the realm of law, there is space for discussing the new behavioural approach whose precursors are commonly believed to be Christine Jolls, Cass R. Sunstein and Richard H. Thaler, the authors of the article *A Behavioral Approach to Law and Economics*, published in 1997. It gained widespread publicity and has become a part of the debate, joined by one of the icons of the economic analysis of law – Richard A. Posner.<sup>141</sup> The uniqueness of this article stems from the fact that on the basis of very detailed case studies, methodologically well grounded, the authors demonstrate their thesis about the need to move away from the current assumption about the rationality of an individual, on which classical economics is based, and from which is drawn the classical mainstream economic analysis of law. An alternative to it is the new approach, which to a greater extent than before takes into account observations concerning the true nature of man. The proof may lie in an analysis based on three categories: positive, prescriptive and descriptive. This leads the authors to the conclusion about the need to enhance the existing traditional perception of reality, economic and legal, a more realistic concept of human behaviour, while indicating the need to develop it more on the theory of perspective, rather than utility (discussed in the first Chapter of this work).<sup>142</sup> In order to justify their claims empirically proved assumptions should be sought in: the limitations of human rationality, so called bounded rationality, limited willpower – that is action which, although harmful, is nevertheless undertaken<sup>143</sup> bounded willpower<sup>144</sup>, limited management of self-interest, thereby taking into account, in some cases the interest of other entities (bounded self-interest), or recognised as a key concept of the effect of ownership (endowment effect).<sup>145</sup>

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<sup>140</sup> Other examples of interventional strategies based on the concept of *soft paternalism* were discussed in H. Luth, *Behavioural economics in consumer policy*, op. cit., pp. 76-82; See also J.U. Franck, K. Purnhagen, *Homo Economicus, Behavioural Science, and Economic Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis*, in: K. Mathis [ed.], *Law and Economics in Europe. Foundations and Applications*, Dordrecht 2014, pp. 329-365.

<sup>141</sup> R.A. Posner, *Rational Choice, Behavioral Economics, and the Law*, in: *Stanford Law Review*, Vol. 50 1997-1998, pp. 1551-1575; J. Arlen, *Comment: The future of behavioral law and economics*, in: *Vanderbilt Law Review*, Vol. 51 No 6 1998, pp. 1765-1787. In Polish literature on this topic special attention should be paid to the publication by M. Małecka. See M. Małecka, *O behawioralnym podejściu do badania prawa, paradoksy, do którego prowadzi i sposobie jego przezwyciężenia*, op. cit., pp. 29-42; M. Małecka, *Prawo, ekonomia, ludzkie działanie. Dyskusja nad zastosowaniem ekonomii behawioralnej do analizy prawa*, op. cit., pp. 15-28.

<sup>142</sup> It is worth noting here the comparison with respect to these two concepts by T.S. Ulen. More on this in: T.S. Ulen, *Behavioral law and economics*, in: M. Altman [ed.], *Handbook of contemporary behavioral economics. Foundations and developments*, Armonk 2006, pp. 671-688.

<sup>143</sup> For example, any kind of stimulants abuse.

<sup>144</sup> See F.B. Cross, R.A. Prentice, *Law and Corporate Finance*, Cheltenham 2007, p. 79.

<sup>145</sup> Based in brief, on the fact that by selling the good with which we associate our memories we demand generally a higher price from the buyer, than the one we would be prepared to offer ourselves.



The presentation of behavioural concepts should be based on the formulation of the most important research topics that create it and determine its understanding. As observed by Jolls, it draws from both the development and inclusion of the descriptions of behaviour based on psychological observations. This approach is so important because some, in principle undeniable, economic assumptions become unrealistic in the face of human nature (behaviour).<sup>146</sup> Behavioural legal and economic analyses focus at the same time on demonstrating the relationship between certain legal norms and their influence on the behaviour of the individual. Their identification and, above all, the analysis is subsequently the basis for conclusions that should be taken into account in the process of the creation and enforcement of law.

**The phenomenon of distortion (bias)** is considered to be one of the more important relationships between the law and the individual. In psychology it refers to the process of human thought, considered from the perspective of rationality. Transferring it into the field of law, a structure was created and recognised by the term “debiasing through law”.<sup>147</sup> It is used to describe the legislative policy aimed at reducing the erroneous, biased behaviour of specific entities.<sup>148</sup> This concept focuses primarily on the evaluation of errors, which in turn is a necessary element to determine the appropriate policy for making and enforcing law. This law is intended to serve as an instrument to minimise the “partisan” actions undertaken by subjects to whom certain legal norms are applied.<sup>149</sup> With the appropriately created law it is possible to work on the errors made by an individual, while at the same time eliminating their consequences. The sources of these errors are of course elements of human behaviour, such as limited rationality, will-power and personal interest. This concept can be applied to various branches of law, including financial law, and in particular financial market law.<sup>150</sup>

The problem of distortion, or bias focuses mainly on the addressee of the norms, - an individual. However, as is rightly noted by Russell B. Korobkin and Thomas Ulen no less important is the element of **the context** that accompanies and influences human preferences. However, the choices are not based primarily

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See N. Schandler, *Note on Behavioral Economics*, in: E. Krecké, C. Krecké, R.G. Koppl [eds] *Cognition and Economics*, Amsterdam 2007, pp. 277-283.

<sup>146</sup> C. Jolls, *Behavioral Law and Economics*, in: John M. Olin, Center for Studies in Law, Economics, and Public Policy, Yale Law School, Research Paper, No 342 2006, p. 3.

<sup>147</sup> C. Jolls, C.R. Sunstein, *Debiasing through law*, in: NBER Working Paper Series, Working Paper 11738, 2005, p. 34.

<sup>148</sup> This characteristic will be based primarily on the theses contained in the publication by C. Jolls, C.R. Sunstein, *Debiasing through law*, op. cit.

<sup>149</sup> See C. Jolls, *Behavioral Law and Economics*, in: P. Diamond, H. Vartiainen [eds], *Behavioral Economics and Its Application*, Princeton 2007, pp. 137-140.

<sup>150</sup> T. Nieborak, *Behawioralna koncepcja prawa jako nurt Law&Economics*, in *Ekonomia i Prawo*, Vol. VIII, No 1 2012, pp. 27-38; See also D. Hirshleifer, *Psychological Bias as a Driver of Financial Regulation*, in: *European Financial Management*, Vol. 14 No 5 2008, pp. 856-874.

on comparing the results of alternative decisions. The fundamental importance, according to them, lies in fact in situational variables, which Korobkin and Ulen analyse in detail.<sup>151</sup>

Writing about the context of the decisions which should be predicted by the legislator in the process of law-making, it can refer, following the authors quoted here, to customs, traditions, habits, and also desires.<sup>152</sup> What characterises them, is the relationship that exists between the past and the present. We can find it for example, in human reactions based on habits, when while thinking in brief (heuristically), he reduces the cost of his decision basing it on the experience of the past. This relationship is important in the process of legislation because when trying to encourage or discourage certain behaviours and taking into account the context of these factors (e.g. customs), we should be aware that their omission will result in the lower efficacy of the adopted solutions.<sup>153</sup> Efficacy can be defined as the achievement of the established goal by the legislator. What is more, when creating law, the legislator should take into account the extent to which it has also to be a tool for the protection against “evil” customs, traditions or wishes.<sup>154</sup>

The relationships described above characterise also the process of making and enforcing financial market law, including that of the European Union. As has been shown, it is not easy, owing among other things, to the need to take into account the diversity of traditions and customs in the Member States whose individual financial markets are to be a part of a larger whole, and this whole is the European Union financial market.<sup>155</sup> Therefore, most probably, even taking into account behavioural aspects, it is so difficult to create universal legal solutions which would contribute to the realisation of the dream of the European legislator of the integrated retail financial services market. The legislative activity means also activities focused on individuals, who are to be protected from those “bad” elements of the context, as for example: the misleading use of confidential information (insider trading) or manipulation in the stock market. Their effect is also the concept of the reasonable, or rational customer discussed and questioned earlier.

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<sup>151</sup> R.B. Korobkin, T.S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, in: California Law Review, Vol. 88 Issue 4 2000, p. 1143.

<sup>152</sup> Ibidem, pp. 1113-1119.

<sup>153</sup> See also T. Ulen, *The growing pains of behavioral law and economics*, in: Vanderbilt Law Review, Vol. 51 No 6 1998, pp. 1749-1750.

<sup>154</sup> R.B. Korobkin, T.S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, in: California Law Review, Vol. 88 Issue 4 2000, pp. 1115-1116.

<sup>155</sup> Differences are also visible in other regulatory areas, such as tax law. In the case of Europe the policy of individual states must in fact take account of the mental element, materialising itself in two types of mentality: northern and southern, which are taken into account when designing a tax system based on sources from either direct or indirect taxes. More on this, in: J. Małecki, A. Gomułowicz, *Podatki i prawo podatkowe*, Warszawa, pp. 268-294; See also C. Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, in: C.R. Sunstein, [ed.], *Behavioural Law and Economics*, Cambridge 2000, pp. 288-301.

The example of the European Union may be used to illustrate the thesis according to which understanding of the behavioural elements of individuals is certainly helpful in constructing a legal system that encourages in them conduct useful both for them and the whole community.<sup>156</sup> Using law for this purpose can be done on two levels. One, *ex ante*, is designed to ensure protection against potential threats (risks), for example by prohibiting certain investments. And the other one, based, apparently, on helping individuals to overcome their debiasing (which has its source in the distortion described above), for example by creating an architecture of choice from among the options most favourable to them.<sup>157</sup> Of course, in such a situation the allegation arises again that the legislator creates reality by imposing upon individuals solutions which are in his opinion, the best for them. However, in the case of the European Union it is difficult enough, as already indicated, because the EU legislator is forced to move around in different contexts. Moreover, enforcement of the law in a United Europe must also take into account the element of multi-centricity as discussed in the previous Chapter. Helpful in this regard can be **the responsive behavioural regulation** proposed by Kai Purnhagen<sup>158</sup> who stated that the application of this regulation will make it possible to take into account all the elements of the functioning of law, and not only those associated with its role in shaping reality (political objectives), but also those recognising the realities of everyday life (bottom-up regulation).<sup>159</sup> These examples prove that the European legislator “wishing well” does not always take into account the realities (as for example in the event of a dispute concerning the possibility of the production of traditional cheeses from unpasteurised milk)<sup>160</sup>, which often are a part of the local identity of EU citizens (e.g. in France, Portugal or Italy). Failure to take account of this, in some sense behavioural factor, will certainly contribute to the resistance towards European structures, which themselves have more positives than negatives.<sup>161</sup> This relationship should definitely be taken into consideration also in the process of making financial market regulations.<sup>162</sup>

On this occasion we should note one more very important aspect of the behavioural regulation of the financial market and financial awareness, or literacy

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<sup>156</sup> K. Mathis, A.D. Steffen, *From Rational Choice to Behavioural Economics*, in: K. Mathis [ed.], *European Perspective on Behavioural Law and Economics*, Heidelberg 2015, p. 41

<sup>157</sup> *Ibidem*, p. 42.

<sup>158</sup> K. Purnhagen, *Why Do We Need Responsive Regulation and Behavioural Research in EU Internal Market Law?*, in: K. Mathis [ed.], *European Perspective on Behavioural Law and Economics*, *op. cit.*, p. 53.

<sup>159</sup> J.J. Rachlinski, *Bottom-up versus Top-down Lawmaking*, in: G. Gigerenzer, C. Engel [eds], *Heuristics and the Law*, Cambridge 2006, pp. 159-173.

<sup>160</sup> K. Purnhagen, *Why Do We Need Responsive Regulation and Behavioural Research in EU Internal Market Law?*, *op. cit.*, p. 55.

<sup>161</sup> *Ibidem*, pp. 54-58.

<sup>162</sup> R. Baisch, R.H. Weber, *Investment Suitability Requirements in the Light of Behavioural Findings*, in: K. Mathis [ed.], *European Perspective on Behavioural Law and Economics*, *op. cit.*, pp. 159-192.

concerning the financial expertise of their addressees.<sup>163</sup> Even if the legislator takes up an active role in creating conditions ensuring the stability and security of the market and transactions performed, which he does by, among other things, protecting certain groups of subjects present in the market, his efforts will be thwarted if financial education, broadly understood, is neglected.<sup>164</sup> The advantages of education have been confirmed in many studies, which support the thesis that it should be a part of the broad process of the creation and enforcement of financial market law. What is more, it is cheaper than a system based on promoting information and there is a link between the level of financial knowledge and the well-being of individuals.<sup>165</sup>

Summing up the reflections on the behavioural concept of law, it must be accepted that it is still at a developmental stage. Like each new sphere of activities it also raises numerous questions and concerns. Some of them, presented earlier, deal with its basic assumptions, which following Magdalena Małecka can be summed up in the following statements:<sup>166</sup>

1. Behavioural theories provide explanations regarding the behaviour and decisions made by people in legal contexts;
2. Law should be developed according to the knowledge about the regularities that govern behaviour;
3. Law is an instrument to influence behaviour.

According to Małecka, the first two claims, however, stand in contradiction to the last one, leading to the paradox that legal norms whose content corresponds to descriptions of behaviour cannot influence behaviour.<sup>167</sup> She sees its sources in the low methodological awareness of proponents of the behavioural approach,

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<sup>163</sup> U. Reifner, *Financial Education*, in: U. Reifner [ed.], *Financial Literacy in Europe*, Baden-Baden 2006, pp. 9-14; A.C. Lyons, U. Neelakantan, *Potential and Pitfalls of Applying Theory to the Practice of Financial Education*, in: *The Journal of Consumer Affairs*, Vol. 42 No 1 2008, pp. 106-112; J. Kozup, J.M. Hogarth, *Financial Literacy, Public Policy, and Consumers' Self-Protection – More Questions, Fewer Answers*, in: *The Journal of Consumer Affairs*, Vol. 42 No 2 2008, pp. 127-136; H.H. Kotz, M. Weber, *Increasing Financial Literacy: A Public Policy Challenge*, in *Kredit und Kapital*, 40. Jahrgang, Heft 2 2007, pp. 175-187; A. Lusardi, *Financial Literacy: An Essential Tool for Informed Consumer Choice?*, in: Center for Financial Studies Working Paper, Frankfurt am Main, No 2008/19; D. Widdowson, K. Hailwood, *Financial literacy and its role in promoting a sound financial system*, in: Reserve Bank of New Zealand, *Bulletin*, Vol. 70 No 2 2007, pp. 37-47; *Improving Financial Literacy. Analysis of issues and policies*, OECD Report 2005.

<sup>164</sup> More on this topic in: T.S. Ulen, *A Behavioral View of Investor Protection*, in *Loyola University Chicago Law Journal*, Vol. 44 2013, pp. 1365-1372; W. Szpringer, *Edukacja finansowa oraz mobilność konsumentów na jednolitym rynku finansowym UE – inicjatywy i kierunki rozwojowe*, in: *Prawo Bankowe*, No 1 2007, pp. 106-115.

<sup>165</sup> A. Lusardi, P.C. Michaud, O.S. Mitchell, *Optimal Financial Knowledge and Wealth Inequality*, in: NBER Working Paper No 18669, Januar 2013.

<sup>166</sup> M. Małecka, *O behawioralnym podejściu do badania prawa, paradoksy, do którego prowadzi i sposobie jego przezwyciężenia*, op. cit., p.34.

<sup>167</sup> *Ibidem*, p. 35.

resulting in, among other things the lack of a definition of the effect on behaviour, for example through beliefs, emotions or values. Without going at this point into the discourse concerning these notions, in the author's opinion, the above quoted assumptions of the behavioural concept of law can be found, however, in the regulations of the financial market. Of course this is so, because at present we can talk about selected examples, owing to the lack of acceptance of the behavioural concept by the legislator who creates the legal framework for the functioning of the financial market. We must agree with the claim of Małecka that creating legal solutions based on the theory of operation with their sources in the behavioural experiences, it is necessary to define the subject matter of this theory, to determine the relationship between law and extra-legal phenomena, and to develop autonomous methods and objects of research.<sup>168</sup>

As has been demonstrated, the financial market can be considered an ideal area for the application of behavioural concepts. Using the achievements of the behavioural sciences, we are already able to explain the causes of the characteristic behaviour of a man acting in a particular legal context, for example, with the guarantee of access to information, based on which he has to make investment decision that are the best for him. It turns out, however, that such a requirement could lead to a situation in which the given individual will be overwhelmed by information overload, which as a result he will not use when making his decisions. This will be, among other things, due to his level of education, personality or other factors. The legislator, taking into account this regularity is able to "change the strategy" and influence the behaviour in a different way. At this point it should be noted that it is also important to use the proper wording to describe the activities of the legislator. One thing is to "influence", and another "to create" impulses (nudges). Certainly, in the first case pressure is a noticeable element, while in the "creation" of impulses it is better to point to various incentives. In the case of the influence of the financial market we will deal with, for example, the moment of adopting provisions that will force a financial institution to carry out a compulsory assessment of its client in terms of risk. "Impulsive" actions of the legislator will be connected with the regulations obliging the relevant authorities to conduct educational activities, conferring on them, for example, free statutory airtime, to promote knowledge about the functioning of the financial market (as is the case with the Polish Financial Supervisory Authority). The result should be increased the financial awareness of potential investors and, consequently, reduction of the potential risk of loss, and thereby protection of goods in the form of market stability and security, which represent trust in it. As we can see, it is possible to develop a coherent concept of the inclusion of behavioural concepts in the system of creating and enforcing law. However, this requires a systemic approach.

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<sup>168</sup> *Ibidem*, p. 39.

The best proof of this will be the actions taken in recent years in the United States and Great Britain, where special entities were established, whose task is to support local authorities through the use of the achievements of behavioural science. These entities are in the United States – The Office of Information and Regulatory Affairs (headed by one of the founders of the behavioural concept of law – Cass R. Sunstein) and in the UK – The Cabinet Office Behavioural Insights Team.

On 15 September 2015 the President of the United States of America – Barack Obama issued a presidential decree entitled *Using Behavioral Science Insights to Better Serve the American People*. This legislative act should be regarded as a breakthrough because probably for the first time in history, the significance of the achievements of the behavioural sciences has been confirmed in such a way. As we read in the decree the experience and findings of behavioural scientists used in the work of the state administration are to serve, for example, to ensure that proper conditions are created for citizens to participate actively in retirement savings or educational programs, but also that more efficacious transmission of selected types of information to citizens is available. Evaluation of their performance will certainly constitute excellent research material for scholars of different branches of knowledge, in whose orbit of interests there are behavioural issues.

## 5. Summary

The aim of this Chapter was to close, in some way, the deliberations conducted in this book, which focus on identifying the principles that would form the basis for the modern process of the creation and enforcement of financial market law. The originality of this law stems from the fact that it affects many issues of a social nature related to the role financial markets play in the modern world, and is at the same time the premise for the increased interest in these markets and the activity of the legislator creating their regulation. The evolutionary and extremely dynamic nature of the matter he controls, seems to force him to include in this law-making and law enforcement process also non-legal elements. What this means is that the results of studies that explain the behaviour and decisions made by people in legal contexts ought to be taken into account and law must be created on the basis of knowledge about them. Law influences the behaviour of its addressees too. These assumptions are the basis of behavioural theories which have recently experienced a renaissance, driven among other things by the financial crisis.<sup>169</sup> It is not accidental to use the word “renaissance”, as the concepts of law, containing

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<sup>169</sup> We should note here again the voices which undermine the rationality of certain assumptions of the behavioural concepts of law and are based on the assumptions presented. See M. Małecka, *O behawioralnym podejściu do badania prawa, paradoksy, do którego prowadzi i sposobie jego przewyciężenia*, op. cit., pp. 29-42.

a behavioural factor were already known in the past, as can be seen for example in legal realisms or when analysing the concepts developed by Petrażycki.

Does this mean that the behavioural concept of law should be considered as a new paradigm of financial market law? The answer to this question is not easy. First of all, it requires a brief explanation of the concept of “paradigm”. Assuming it is understood as presented by Thomas S. Kuhn in his work entitled *Structure of Scientific Revolutions*, as a set of concepts and theories, forming the basis of the given science, that are creatively-cognitive<sup>170</sup>, the behavioural treatment of financial market law can be considered as the new paradigm. It is a paradigm that, it should be emphasised, is in its embryonic stage, requiring further development and improvement. This is due to the fact that financial market law, as has been proposed in this book, has not been as yet the subject of deeper reflection. One might have the impression that it was created on the basis of generally accepted principles which were not accompanied by deeper reflection of a humanistic and axiological nature that would seek answers to questions concerning the nature of financial market regulations, their efficacy, influence on the functioning of societies, or economy. Perhaps this was due to the complex nature of the regulated matter, the knowledge of which can surely be declared as exclusive. The reasons for this state of affairs should be sought in the dynamics of financial market law, the effect of which is, among other things, the creation of hundreds of new regulations, with which the legislator aims at embracing in a legal framework the most important manifestations of financial activity (an example of which are the solutions of European Union law). As a result, financial market law grows to monstrous proportions. It includes dozens of new definitions and it is forced to reach into new forms of regulation, such as soft law. This means that the financial law from which financial market law has evolved requires the revision of the existing paradigms and the adoption of new ones. In fact, we should agree with the view of Kuhn, that for a mature science the characteristic way of development is transition in the process of revolution from one paradigm to another.<sup>171</sup> “The scientific world is changing qualitatively and is qualitatively enriched by fundamentally new facts as well as theories.”<sup>172</sup> This concerns also financial market law.

Owing to the features mentioned above, financial market law is certainly not an easy area of research, and it requires the adoption of specific optics and assumptions. The experience and analysis of the current achievements of both the legislator and doctrines have contributed to the creation of the concept of this book. The book, which is based on an acceptance of, it must once again be repeated, the thesis that contemporary financial markets can exist and function if their ba-

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<sup>170</sup> T. Kuhn, *Struktura rewolucji naukowych*, Warszawa 2011, p. 32.

<sup>171</sup> Ibidem, p. 195 et seq.

<sup>172</sup> T. Kuhn, quoted after J. Ratajewski. *Elementy naukoznawstwa i kierunki rozwoju nauki europejskiej*, Katowice 1993, pp. 128-129.

sic values and goods are protected and this protection is ensured by the legislator. The stability and security of the market, which are used to provide protection by encouraging trust in the market should be regarded as fundamental. Trust in turn is based on relationships (interactions) among people. Thus, the road leading to it is through the understanding of human nature, its emotions, behaviours, reactions, etc. This is not possible without delving into the experience of the behavioural sciences, such as psychology, sociology, economics, as well as law (which is still awaiting, however, new research techniques to be developed by legal scholars and philosophers, which could be subsequently followed by other branches<sup>173</sup>). This is especially true, since, as has been proved, research conducted by representatives of these other sciences is not pure abstraction, but have an empirical foundation.

This assumption has been complemented by the statement that the legislator is an architect of choice who through his activity gives impetus to activities important from the point of view of the community. Of course, at the root of this kind of action there will always be a certain axiological basis. It is important that the search for them be accompanied by a reflection about the addressees of the created norms. This is important for the regulation of the financial market, which for decades has been based on the concept of the rational man, taking rational decisions based on the information provided to him. In the author's view this assumption is mistaken and does not take into account existing reality. It is therefore necessary to redefine this extremely important condition and assume that a man present in the financial market, recognised as the participant (and in particular the consumer), must be seen as a rational being, but subject to emotions, who does not always have control over his situation, passively submitting to events created by the market. He is certainly not the textbook *homo oeconomicus*, but more like *a homo sapiens oeconomicus passivus*.

Therefore, the model of rational consumer protection should change because it does not include the real side of the law, which is related to its operation in practice. Practice, which – and this should be repeated once more, is not ideal, but created by real individuals, not superheroes but people who do not always have the appropriate knowledge or skills. The need for change in this respect stems from the fact that consumer protection is regarded in doctrine as a definitional element of the security and stability of the financial market, which is a pillar of the protection of trust in it. Accepting erroneous assumptions may result in fact in the ineffectiveness of adopted solutions and, consequently, in the emergence of successive crises. Thus change in the philosophy of financial market regulation (which to some extent is taking place in the European Union) should be postulated by including in it behavioural elements, while at the same time ensuring market supervision (in the micro and macro scale), which, although not always popular, as

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<sup>173</sup> It is necessary to develop a comprehensive, coherent theory supported by studies on the impact of legal norms on behaviour and of this behaviour on the creation of legal norms.



the analysis of past experience and the increasingly complex nature of the financial market shows, is absolutely necessary. Is it worth it? From the point of view of even greater economic gains perhaps not entirely. They will probably still be high enough, though not as high as some co-owners of financial institutions would like them to be. In spite of that, the creation of structures based on trust, leading to stability and security, certainly in the long term will be of benefit to the whole economy, and therefore the financial sector as well.

## Final remarks

Summing up the deliberations presented in this book, reference must once again be made to its title: "Creation and enforcement of financial market law in the light of the economisation of law". Its essence is contained in the last three words. They refer to the relationship that exists between law and economy, a relationship which is not indifferent to the process of creating and enforcing law.<sup>1</sup> This relationship has been accurately expressed by Leon Petrażycki who said: "Very odd, strange and abnormal is the condition and the relationship of two important and valuable sciences: the science of law in general and civil law in particular on the one hand and the theory of economic phenomena on the other. These two sciences, actually researching the same thing, but approaching it from different sides, do not know each other, exist separately not recognizing their mutual relationship or the fact that they share the same object of research, on the grounds of their presence fall in considerable misunderstanding."<sup>2</sup> This state of affairs is particularly apparent in the case of financial market law which in recent years has been growing into a separate branch of law, feeding on the legacy of public law (financial law) and private law (broadly understood civil law).

This hybrid structure is a result of the nature of the regulated matter which is very extensive and complicated and consequently requires a new philosophy on the basis of which a legal framework could be built with laws to be observed by the entities to which it applies. This philosophy is still being researched and numerous solutions that have already been proposed are of varied territorial and legal scope. The best example here is the activity of the EU's legislator. This activity, perceived as somewhat excessive, aims at regulating all the main aspects of the functioning of the European financial market. The use of the adjective "European" is rather arbitrary. What is certain is the global, supranational character of contemporary financial markets, which also means that the supervision authorities developed for these markets extend beyond national borders. What is more, these

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<sup>1</sup> L. Balcerowicz, *Prawo a ekonomia*, in: *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No 2 2006, pp. 88-93.

<sup>2</sup> L. Petrażycki, *Teoria prawa i państwa w związku z teorią moralności*, Vol. II, Warszawa 1960, p. 599.

supervision and control bodies are equipped with instruments of soft law<sup>3</sup> which until recently have mainly been present in international law, but take a completely new form in financial market law. They include recommendations, guidelines and opinions but also binding technical standards. Their “flexibility” is to be the feature that will help us to cope effectively with all the challenges of the financial market which, together with the legislator, participates in a sort of game called “regulatory dialectics” and which started together with the emerging epoch of market triumphalism to cite Michael Sandel, dating back to the years preceding the financial crisis of 2008. In Sandel’s opinion, this epoch is now coming to an end because “the financial crisis not only cast a shadow on the market capabilities of efficient risk management, but also produced a universal perception that the market has detached itself from morality and now the two must be somehow joined back together. No one really knows though, how to go about it”.<sup>4</sup>

Certainly it is law, and more precisely broadly understood financial market law, that should serve as a link here. The proposed optics requires that ‘nuances’ of the adopted solutions be noticed. An example will be prudential regulations which although naturally considered as elements of the public law sphere, do exercise a certain impact of the private law sphere as well. These regulations are intended to have a supervisory function over the risk undertaken by financial institutions (public sphere) which are in turn compelled to implement solutions that require the development of certain relationships between financial institutions and their clients (private sphere). Thus when talking about financial market law, a tendency that is present in this market i.e. publicisation (as well as Europeisation) is emphasized. The public law optics have largely dominated the considerations presented in this book. This was so because much deeper thought was needed and answers to many questions needed to be found. What is more, some preliminary assumptions on how law is to be understood and its role in society had to be made.<sup>5</sup> When formulating these assumptions, the author drew on some anthropological studies which

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<sup>3</sup> Z. Ofiarski, *Rola soft law w regulacji rynku finansowego na przykładzie rekomendacji i wytycznych Komisji Nadzoru Finansowego*, in: A. Jurowska-Zeidler, M. Olszak [eds], *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, Warszawa 2016, pp. 137-160.

<sup>4</sup> M. Sandel, *Czego nie można kupić za pieniądze*, Warszawa 2013, p. 19.

<sup>5</sup> A work worthy of note here is a publication which is a result of an in-depth study by P. Chmielnicki, A. Dybała and M. Stachura entitled: *Reguły działania człowieka gospodarującego w społeczeństwie jako źródło norm prawnych (Rules of behaviour of economic man in society as the source of legal norms)*, Warszawa 2010, pp. 7-10. It commences with important questions asked by the authors, and include such ones as: How do changes that occur in the economy correlate with the creation of certain types of legal norms?; Does the number of sources of law relating to specific matters result from the principles of the legislative techniques and the political will of the decision making centre, or does it depend on the demand for specific regulations, which is contingent upon the phenomena occurring in the economy?; Is the creation of certain types of legal norms ahead of certain macroeconomic phenomena, or do the tendencies occurring in the economy come first and are followed by legal regulations adopted subsequently?; How do the principles of market behaviour and the rules according to which social structures are built correlate?

he felt particularly close to his own beliefs<sup>6</sup>, and which have also been referred to in economic publications on the financial market, in which, among other things, two possible perspectives of perceiving the world around us have been identified: the perspective of an effective equilibrium and the perspective of the common good. According to Paul. H. Dembinski, the anthropological reference in the context of the first "is ensured by a classical *homo oeconomicus*, or in other words his grandson *homo financierius*. The anthropological foundations of the common good are fundamentally different; the common good refers to a person not to an individual and a human being becomes a person through entering into relationships with other human beings. Thus no one, as an autonomous entity, is entirely independent of others. The self or one's self develops by constant relationship (entered into) with others."<sup>7</sup>

The question may of course be asked whether such an anthropological perception of law is at all possible and whether a legislator is capable of implementing the assumptions that lie at its foundations. The answer to this question shows that in fact the lack of an anthropological perception was most certainly among the reasons for the recent crisis. Numerous regulations had been adopted and enforced, but they were frequently detached from reality. They did not account for its specific features, failed to take into consideration its complexity, or, more importantly, the behavioural aspects which, as is the case of financial markets, occur on both sides, i.e. the financial institutions (or managers of those) and clients (those with less professional knowledge, in particular, consumers). Adding to that there is information overload<sup>8</sup> and the advancing financialization of life<sup>9</sup> which manifests itself in the growing presence of the financial sector in our everyday lives. And yet, as Garry S. Becker and Richard A. Posner noted. There are many "non-obviousnesses" (uncommon sense) present in the financial sector<sup>10</sup>, and thus a new look at the process of creating and enforcing law is needed.<sup>11</sup>

The above observations, and the deliberations presented in this book in particular, allow us to formulate some concluding remarks, which should begin with the statement that the process of creating and enforcing financial market law must be carried out with the conviction that a financial market as part of a financial system constitutes one of the pillars of a social system. Therefore the legislator's activity ought to focus on the protection of certain goods and values that are im-

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<sup>6</sup> See also R.H. Thaler, *From Homo Economicus to Homo Sapiens*, in: *Journal of Economic Perspectives*, Vol. 14 No 1 2000, pp. 133-141.

<sup>7</sup> P.H. Dembinski, S. Beretta, *Kryzys ekonomiczny i kryzys wartosci*, Kraków 2014, p. 99.

<sup>8</sup> J. Fazlagić, *Zjawisko „nadmiaru informacji” a współczesna edukacja*, in: *e-mentor*, No 4 2010, pp. 37-42.

<sup>9</sup> See E. Engelen, *The Case for Financialization*, in: *Competition&Change*, Vol. 12 No 2 2008, pp. 111-119.

<sup>10</sup> G.S. Becker, R.A. Posner, *Nieoczywistości. Ekonomiczna teoria wszystkiego*, Warszawa 2013.

<sup>11</sup> See also D. Heremans, K. Bosquet, *The Future of Law and Finance After the Financial Crisis: New Perspectives on Regulation and Corporate Governance for Banks*, in: *University of Illinois Law Review*, No 5 2011, pp. 1551-1576.

portant for the society. In the case of a financial market, these goods include safety and stability, which are indispensable for the protection of the supreme value in that market (and therefore in the social system as well), which is trust. As shown in the book, this approach can be noted in the activity of today's legislator, especially the EU's legislator. In a number of EU legislative acts the importance of trust and the need to protect it is emphasised.

This need is most certainly the driving force of many initiatives whose aim, apart from protection, is the regulation of the main aspects of financial market activity. A detailed analysis of the EU legislation leads to the conclusion that especial focus has been put on comprehensive regulation of all the current and future activity of the financial market. As a result there are countless legislative acts and other forms of regulations taking the form of opinions, directives, recommendations and the like. There are so many of them that practically no one is capable of knowing them all, even in respect to only one selected segment of the market. We may thus only hope that enforcing these regulations will be still possible because recently financial market supervisory authorities being introduced in the EU are equipped with many powers, including the right to intervene in situations where such intervention had been till recently reserved for Member States only. This change has been enforced by the changing market in which international entities (e.g. financial conglomerates) started to play a dominant role, often making very risky investment decisions. As stated earlier, risk may be analysed in two ways: as a risk of a loss and a risk of potential profits. The concept of the first type, a loss risk predominates in the common conscience and it has negative connotations arising from the experience of previous crises originating in financial markets. Speaking about crises, there is a thesis expressed by Anna Kociółek-Pęksa which is worthy of mention although is not frequently heard. It states that a crisis is a necessary mechanism of meliorism. Meliorism is a situation in which, within one system, institutions and structures are not only capable of self-regulation, but owing to their considerable ability to adapt, are capable of self-improvement as well.<sup>12</sup> This thesis ought to be developed, proposing that law is an important factor in this self-improvement. However, "the discourse of law making cannot ignore a phenomenon such as an economic crisis. There are at least two reasons why an economic crisis plays a role in law-making: firstly, because it may be an impulse prompting (taking) legislative activity aimed at eliminating or mitigating the crisis and its consequences.<sup>13</sup> Secondly, because the change which it exerts in the economic, social and political conditions influences the legislative processes already implemented or planned for the future."<sup>14</sup>

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<sup>12</sup> A. Kociółek-Pęksa, *Kryzys jako konieczny mechanizm melioryzmu*, in: J. Oniszczyk [ed.], *Normalność i kryzys. Jedność czy różnorodność*, Warszawa 2010, p. 81.

<sup>13</sup> See A.N. Rechtschaffen, *Capital markets, Derivatives and The Law*, Oxford 2014, pp. 3-62.

<sup>14</sup> S. Wojtczak, *Kilka uwag o sposobie patrzenia na kryzys gospodarczy z prawniczej perspektywy*, in: J. Oniszczyk [ed.], *Normalność i kryzys. Jedność czy różnorodność*, op. cit., p. 309.

These processes constitute an element of law which should be approached in the context of a law policy according to which law ought to be used to achieve set goals. The notion "law policy" in jurisprudence extends on the policy of law-making as well as the policy of its enforcement.<sup>15</sup> Law may also be regarded as a tool serving to direct praxeologically a relationship between a regulation and the reality to which this regulation is to apply.<sup>16</sup> As Artur Nowak-Far has rightly noted, the problem which appears here arises from the fact that each regulatory intervention in more complex social-economic phenomena requires knowledge of these phenomena as well as of the praxeological relations between them and the adopted regulation.<sup>17</sup> The process of financial market regulation which refers to the law policy should be understood broadly and imply, apart from creating and enforcing law, also the axiological and sociological elements related to it. Law as a cultural phenomenon is built upon certain values and its purpose is to realise and protects these values. Values on the other hand are an inseparable element of each culture, be it moral, scientific, political or any other. In the case of a financial market, and this must be emphasized once again, trust is such a value. The essence of this value is examined in this book. (See Fig. 1).

The need for this value originated in the conviction that the notion of "trust" so frequently referred to in legislative acts regulating the financial market is not an element requiring deeper thought. One might get the impression that trust is a universally known and understood phenomenon. However, when analyzed more deeply, it may lead to similar conclusions as those formulated by St Augustine on the notion of "time". In his *Confessions* St Augustine asks "What is time? If no one asks me about it, I know; but when I am trying to explain to the one who has asked, I don't know."<sup>18</sup> The same words may be applied to the notion of "trust" which is easy to describe but more difficult to define, and even much more so to put in a framework of legal deliberations. However, as it turns out, "law as it is today, made up of extensively elaborated sets of rules and principles of behaviour, rules about granting competences to act, or determining the consequences of certain behaviours, is very strongly tied to the relationship between people and this relationship is called trust. It seems to me that this aspect of law has largely remained unnoticed by lawyers who have analysed and shaped the practice of the creation and enforcement of law as well as those who have attempted to describe, explain, understand or design such practice."<sup>19</sup>

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<sup>15</sup> S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, Poznań 1997, p. 125.

<sup>16</sup> A. Nowak-Far, *Wątroba Prometeusza. Kryzys jako czynnik wyzwajający prometeizm prawa*, in: J. Oniszcuk [ed.], *Normalność i kryzys. Jedność czy różnorodność*, op. cit., p. 242.

<sup>17</sup> *Ibidem*.

<sup>18</sup> Święty Augustyn, *Wyznania*, Warszawa 2001, p. 234.

<sup>19</sup> T. Stawecki, *Prawo i zaufanie. Refleksja czasu kryzysu*, in: J. Oniszcuk [ed.], *Normalność i kryzys. Jedność czy różnorodność*, op. cit., p. 117; On the relationship between social capital and trust also

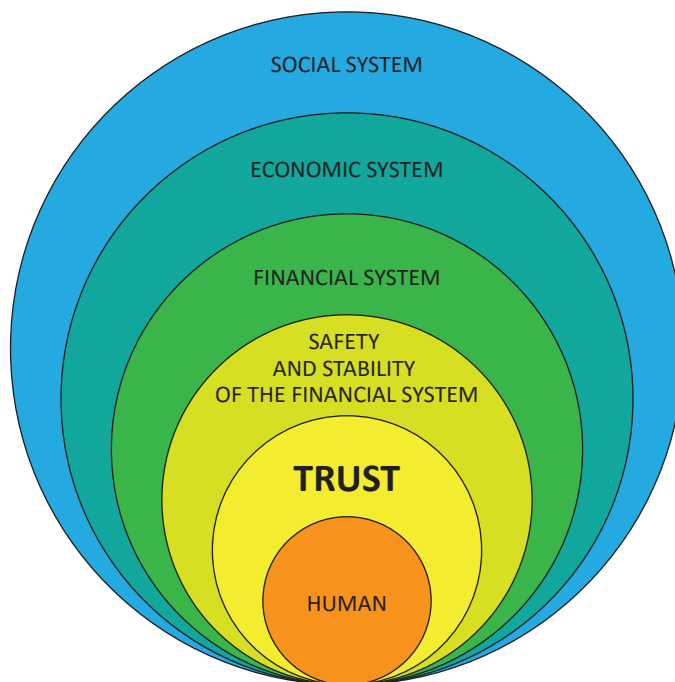


Figure 1. Trust as a fundamental value of a financial market

Source: the author's own study

Therefore, when determining the essence of financial market law by analysing values such as trust perceived as a subject of protection, as a recognized legal value lying at the basis of the process of creating financial market law, it is necessary that the legislator take into account the social and political mechanisms of a given society which are not indifferent to the law mentioned above, created in an organized and systematic manner. The functioning of these mechanisms is based on individuals who make up a given community, and those who belong to it, whose conduct, reactions and emotions have been referred to by Leon Petrażycki. Understanding these elements which among others refer to the behavioural aspects of the functioning of a human being ought to be an important part of the politics of law, and of financial market law in particular. A behavioural approach draws on the achievements of the sciences of economics and psychology and most certainly may be applied to law.<sup>20</sup> It is believed that behavioural economy developed as an answer to the insufficiency of using only theoretical economic models for describing empiri-

see R. Hardin, *Zaufanie*, Warszawa 2009, pp. 83-106; T. Szlendak, *Zaufanie*, in: M. Boguni-Borowska [ed.], *Fundamenty dobrego społeczeństwa. Wartości*, Kraków 2015, pp. 331-364.

<sup>20</sup> See also R. Veil, *Challenges for Academic Research and Teaching*, in: R. Veil [ed.], *European Capital Markets Law*, Oxford 2013, pp. 59-67.

cal discoveries. An analysis of socio-economic rules allows us to depart from the ideal of "economic man" in favour of "real man".<sup>21</sup> This "real man" constitutes the most important element of financial market regulation. It can be seen, for example, in the concepts of the EU legislator which, through the legislative acts passed, has led to the development of the idealistic model of a "reasonable consumer", a kind of superhero who, on the basis of information provided, makes rational decisions. In this context information is considered to be a guarantee of the values and goods of the financial market. It is obvious that such an assumption is only theoretical and there are numerous examples of legal solutions which have been analysed in this book. Such a theoretical assumption enforces a situation of information overload on the one hand, and on the other it fails to take into account the behavioural elements referred to above, and whose existence has been proved empirically.

A legislator must take into account the dynamics of the changing world but must also remain faithful to the values on the basis of which he constructs a given legal system. Thus, it must be said, to repeat once again the conclusions formulated at the end of the last Chapter of the book, that due to its characteristics as described above financial market law is certainly not an easy area of research and requires adopting, beforehand, a certain optics (viewpoint) and some assumptions. Experience as well as an analysis of the existing legislation and the doctrine have been the basis upon which the concept of this book was constructed. Further, and this also needs to be repeated again, this concept was developed based on the adoption of the thesis that the existence of contemporary financial markets is contingent upon the protection of values and goods which the legislator ensures (using new forms of regulation such as for example soft law as well as extensive supervisory systems). Fundamental goods include the safety and stability of the market, which in turn serve to protect a value in the form of trust. Trust is based on interhuman relationships (interactions).<sup>22</sup> Thus the road to trust leads through the understanding of human nature, emotions, behaviours and the like. This is impossible to achieve without reference to behavioural sciences such as psychology, sociology, economics or law. The latter, however, has been waiting very long for a research workshop which could subsequently be adopted by other branches of science<sup>23</sup>. This is particularly true, especially since the research done by repre-

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<sup>21</sup> M. Czerwonka, *Finanse behawioralne a klasyczna teoria finansów*, in: J. Ostaszewski [ed.], *Finanse*, Warszawa 2010, p. 43.

<sup>22</sup> It must be remembered that trust is also an important component of authority. As analyses show, apart from personal trust there is institutional trust which builds up in situations where the whole institutional system guarantees security of transactions, contracts and other forms of activity. For more see A. Kojder, *Autorytet i zaufanie*, in: A. Kojder, Z. Cywiński [eds], *Socjologia prawa. Główny problem i postacie*, Warszawa 2014, pp. 40-44.

<sup>23</sup> It is necessary to develop a comprehensive and coherent theory supported by experimental research on the impact of legal norms on people's behaviour and the impact of this behaviour on the legal norms being created.



sentatives of the above mentioned sciences is (as is shown in the book) not just abstract, but the theses formulated in them are grounded in empirical studies.

This assumption has been completed with the thesis that a legislator is in fact an architect of choice, someone who gives impulses that trigger off acts that are important from the point of view of a given society. The axiological grounds will of course always be there, underlying the actions taken.<sup>24</sup> It is important though, that a consideration of the addressees of the norms created was always there. This is of great importance for the regulation of the financial market, which for dozens of years has been laid on the concept of a reasonable man who makes rational decisions based on information provided. The author believes that such an assumption is wrong and does not account for existing reality. Thus a redefinition of this important assumption is needed as well as acceptance of the fact that a human participant in the financial market (and a consumer in particular) must be perceived as a reasonable being who is, however, subject to emotions and not always able to control the situation, passively submitting himself to the events created by the market. He is certainly not *a homo oeconomicus* as described in handbooks, but rather closer to *homo sapiens oeconomicus passivus*, a reasonable human being but a passive one, and thus subject to a great many impulses beyond his control.

Therefore development of this relatively young branch of law, as financial market law has recently been referred to increasingly frequently, ought to be accompanied by a reflexion similar to that articulated by representatives of economics, a social science related to law. Some of them express the opinion that the classical theory of finances is based on too many simplifications and assumptions detached from reality, which undermine its cognitive value and hinder its practical application by financial market participants.<sup>25</sup> "It seems that one of the greatest simplifications occurring in the classical theory of finance, with far-reaching cognitive, methodological and practical consequences, was the assumption that all financial market participants are fully reasonable human beings (*homo oeconomicus*). Too much emphasis was put on normative issues ("what it should be") at the cost of descriptive aspects ("what it really is"). In consequence, the actual behaviours of investors in the market as well as the functioning of the whole market at the aggregated level remained not fully understood."<sup>26</sup> This observation, when made

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<sup>24</sup> On the dependencies between a legal system realistically approached and its determinants and on explaining its conception of axiological neutralization of values in law, see: K. Pałeczki, *Neutralization of Values in Law – Main Concepts*, in: K. Pałeczki [ed.], *Neutralization of Values in Law*, Warszawa 2013, pp. 22-59.

<sup>25</sup> A. Szyszka, *Systemowe zmiany na rynkach finansowych a poszukiwanie adekwatnej teorii finansów*, in: W. Frąckowiak, J. Szambelańczyk [eds], *Ku nowemu paradygmатовi nauk o finansach*, Uniwersytet Ekonomiczny w Poznaniu, Zeszyty Naukowe No 144, Poznań 2010, pp. 98-103.

<sup>26</sup> M. Czerwonka, J. Ostaszewski, M. Rzeszutek, M. Walczak, *W poszukiwaniu mainstreamu w dyscyplinie finanse*, in: J. Ostaszewski, E. Kosycarz [eds], *Rozwój nauki o finansach. Stan obecny i pożądane kierunki jej ewolucji*, Warszawa 2014, p. 25.

in respect of making and enforcing financial market law, means that this market ought to be grounded in the axiological context in which not only the human factor is accounted for, but also the role of financial markets in economic development, and therefore society. These markets have been stigmatized so often (although at times at their own request) but they are indispensable as a source of capital, an account settlement site, or a centre of innovation which contributes to the development of new investments, even if frequently difficult to understand and risky. Hence the legislator's role to regulate the matter in such a way that it ensures its stable and safe development, and thereby help to maintain the trust in the whole system. This role, however, must have a realistic function, among other things by initiatives undertaken to shape certain behaviours, for instance promoting education leading to increased financial awareness. Being an architect of choices, a legislator must send impulses to the addressees of norms. The nature of these norms and behaviours that they trigger (researched by behavioural scientists) must also be accounted for in the legislation created and by those who apply the regulations adopted. Behavioural concepts constitute a helpful tool for explaining the behaviours of a human being and the decisions he makes in legal contexts, as the latter are influenced by law and must also account for human behaviour. There are still many exciting issues to be researched, topics to be discussed and other challenges before researchers in financial market law who will have to collaborate with scientists representing other branches to develop new theories and research methods. This task is a real challenge and must be treated as confirmation of the thesis that law is dynamic, focusing first and foremost on the present and the future (*lex prospicit, non respicit*), although it may, and at time it must draw on the heritage of the past, as shown in Petrážycki's ideas which, it seems, owing to financial markets and their regulations, has been brought back to life.



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"The author's deliberations concern, among others, questions of legal theory, economics and in part philosophy and psychology considered with the aim of presenting better the problems of the creation and application of financial market law. His multi-disciplinary approach uses a novel and in such a wide context as yet unpractised view of financial market law from the point of view of the manifestations of human nature and of the influence of law and economic stimuli on individual behaviour. It often departs from the widely accepted, although regularly disputed by economists, paradigm of *homo oeconomicus* and might offer an answer to the current need for an understanding of factors determining the functioning of financial markets so as to enable their proper regulation and to create and apply financial market law."

*From a review by Professor Anna Zalcewicz*

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