

Penal Law Protection of Professional Secrecy Concerning the Pension Funds Activities

Anna PŁOŃSKA

University of Wrocław, Poland

Abstract: This article is intended to introduce the Reader to the definition of professional secrecy as defined by Polish Organization and Functioning of Pension Funds Act (OFPF Act) and to highlight the essence of the most extensive legal protection of professional secrecy related to the activities of pension funds, which is the penal law protection.

Keywords: professional secrecy, offence, pension funds

JEL codes: K42, G29

1. Introduction

In the case of pension funds the first law inserting penal law protection of professional secrecy was The Organization and Functioning of Pension Funds Act of 28 August 1997 (OFPF Act) (Journal of Laws 1997, No. 139, item. 934). It defined the professional secrecy as an information related to the pension fund, the pension fund members register, the regulations of fund members in case of death and specified in the regulations statements (statements on asset relations existing between the pension fund member and his spouse), disclosure of which could affect the interests of fund members or the interests of participants of public securities exchange. According to Dadak (2000:

259), professional secrecy definition, adopted at that time, took into account the future role of pension funds within the securities exchange.

The only modification of the definition mentioned above was made by the amendment of 2005, where the term "participants of the regulated market" was replaced by "participants of public securities exchange". Whereas the regulations on penal law protection of professional secrecy has not changed since 1997. Therefore, criminal liability for the disclosure or use of professional secrecy offence will bear the perpetrator who, being obliged to maintain the confidentiality of professional secrecy concerning the pension funds activities, disclose or use it (Article 220 § 1 OFPF Act). The legislator also predicted a qualified type of this offense, which occurs when the perpetrator commits it in order to gain a financial or personal benefit (Article 220 § 2 OFPF Act). The implementation of penal regulations of protecting professional secrecy into the law, which regulates the pension funds organization and operation is mainly caused by the need to ensure equal access to information for all pension funds members.

2. Secrecy and professional secrecy definition

At the beginning of analysis undertaken in this paper it should be noted that the term of secrecy does not have a specified, general and unambiguous legal definition. This is due to the lack of the need of clarifications of such a definition on the one hand, and, on the other hand – due to the problem of an eventual normative specification, what that secrecy is (Kunicka-Michalska, 2006: 250). Interpretational difficulties are mainly due to the fact that all the legal provisions guaranteeing protection of the secrecy, apply only to the certain scope of it. In most acts, the specific legislative provision, which guarantees the protection of the secrecy, defines also its scope, thus it guarantees the protection of a particular type of a secrecy as well. The same is also the case of professional secrecy concerning the pension funds activities. In the context of specificity of the generally understood capital market, professional secrecy penal law protection can be considered in a positive aspect - understood as a guarantee of security, order and fairness of trading on this market. On the other hand, the its negative aspect is understood as a too strong intervention of legislator in the functioning of that market (Sucharski, 2006: 104). Such a bipolar approach to penal law protection shows the extraordinary complexity of discussed problem.

The object of a secrecy is an information (Kozłowska-Kalisz, 2006: 19), a message (Rusinek, 2007: 17), which is based on secrecy that determines both: the content, as well as the boundaries of the secrecy (Kunicka-Michalska, 2006: 5). Polish language dictionaries defines a secrecy as an absolute secret, that is unknown, unexplored and riddle fact. In the common sense the secrecy is understood as the message or the fact known only to a restricted group of people, which is confidential, discretion demanding and should not be divulge (Szymczak et al., 1995: 572). It should be added that the message itself is not subject to the protection of penal law only because it was considered by the legislature for a certain kind of mystery (Krawczyk, 2000: 66). It should be noted that a legally protected secrecy can only be a comparative secrecy, ie. known to one person or a certain group of people (Kucharczyk, 2005: 78).

In the legal sense, in the doctrine, the secrecy is defined as an obligation to maintain the confidentiality of a particular message, which is known only to a restricted group of people (Rusinek, 2007: 17), or as a need to preserve the specific information in a closed group of people and not to disclose it to any unauthorized person or entity (Góral, 2007: 457). Another definition specifies the secrecy as a message, which is not widely available, and its processing, understood among others as the acquisition and sharing, would violate the legal order (Fisher, Świerczyńska-Głównia, 2006: 13). The secrecy is also known as a special kind of information (Kunicka-Michalska, 2000: 493). Rusinek (2007: 17) noted, that the key to the definition of secrecy within the Polish legal system is its confidentiality, defined by both: its content and its border. Value of this secrecy refers to an information about a specific fact.

Widely comprehended protection of the secrecy should be understood as a set of diverse of legal, organizational, administrative and physical measures, which are intended to protect certain information from being disclosed to unauthorized persons. This protection reflects primarily in the legal system, acquainted them to appropriately trained persons, in the creation of procedures guaranteeing the preservation of secret information as well as protecting it from unauthorized disclosure or use system (Dobrodziej, 2000: 9).

Analysing the penal law protection of the secrecy it should be mainly kept in mind its essence, which is the confidentiality (Kunicka-Michalska, 1972: 5). The regulations of the Article 49 § 2 OFPF Act, define the professional secrecy as "the information related to the pension fund investments, the pension fund members registry, pension fund members ordinances in a case of death and statements mentioned in the Article 83 OFPF Act, disclosure of which could undermine

the pension fund members interests or the interests of regulated market trading participants (according to the Trading in Financial Instruments Act of 29 July 2005 (TFI Act)). Whereas to maintain the professional secrecy required are four groups of entities, ie. the pension fund board members, individuals who remains in an employment relationship with the pension fund, those who remains with the pension fund in a mandate contract or other legal relationship of a similar nature, as well as employees of the entities which remains in such a ratio with the pensions fund.

3. A statutory duty to maintain the professional secrecy

However, the statutory duty to maintain the professional secrecy by groups of entities mentioned above is not absolute. The legislator foresaw a numerous situations where it does not apply (art. 220 § 3 and 4 OFPF Act). Such cases are related to disclose the professional secrecy to a prosecutor according to the suspicion of committing a crime, to the General Inspector of Fiscal Control (GIFC) and to the Fiscal Control Office Director (FCOD), in the scope and on terms specified in other regulations, or at the request of the prosecutor or the court or other competent state bodies, according to ongoing cases concerning the activities of the pension fund, the pension company or the depositary, including also the request of the supervisory authority according to his supervision over the pension fund activities exercising. Besides that, the exemption from the maintaining professional secrecy duty occurs in a situation when secrecy information is disclosed to an administrative enforcement authority and to the central liaison office (see: Article 9 of the Mutual Assistance for the Recovery of Taxes, Duties and Other Monetary Claims Act of 11 October 2013), with regard to data included in the agreements on conducting the Individual Pension Account or Individual Pension Security Account (IKE or IKZE) with the pension fund, as well as in the accession program declarations (see: Article 18 § 1 of the Employees' Pension Programs Act of 20 April 2004).

The specificity of professional secrecy regulated by OFPF Act penal law protection stems from the particular nature of the pension fund activities, and not, as is the case of classic professional secrets, from professional activity acted by specific individuals (Rusinek, 2007: 47). The main objective of penal law protection of professional secrecy concerning the activities of pension funds should be considered as a guarantee of an access to legally provided information related to its activities given to pension fund members, with simultaneous restrictions of access to

the professional secrecy. And the fundamental goal of the professional secrecy institution is the protection of the secrecy realm, to which everyone has access, and to ensure the profession's prestige, which is reflected in the trust given to specific professions by people entrusting their confidential information as well as future disposers of a secrecy (Kunicka-Michalska, 1972: 5).

As it was mentioned above, according to the Article 49 § 2 of OFPF Act the definition of professional secrecy is understood as an information related to the pension fund investments, the pension fund members register, the pension fund members instructions in a case of death as well as claims concerning the assets relations between spouses, one of which make a contract with a pension open fund, if the disclosure of such information would undermine the interests of pension fund members or interest of regulated market trading participants (within the meaning of TFI Act). It should be noted that the generic subject of penal law protection of any professional secrecy is not only the interest of an entity whose professional secrecy is concerned, but also the interests of individuals interested in maintaining secrecy, although it does not concern them directly. Therefore, the legal protection of professional secrecy fulfills an important role also for the community, by strengthening the confidence of individuals to institutions relevant for its functioning (Dadak, 2000: 247).

Within the pension funds activities, to maintain the professional secrecy obliged are: the company's statutory authorities members; persons remaining with the pension company in an employment relation; persons remaining with the pension company or the pension fund in mandate relation or other legal relation of a similar nature; as well as employees of the entities of the company or the fund in respect of the order or other legal relationship of a similar character. It should be noted that the duty to maintain the professional secrecy exists also after the termination of the legal relation imposing it upon certain person. This obligation however does not apply in cases of: professional secrecy disclosing to the prosecutor due to the suspicion of committing an offense, providing the information covered by professional secrecy to the GIFC and to the FCOD, within the scope and under the terms stated in separate regulations, or at the prosecutor's, court's or other's competent state authorities request due to ongoing proceedings concerning the activities of the pension fund, company fund or the depositary, including also the request of the supervisory authority due to the exercise of his supervision over the activities of pension funds (Article 49 § 3 OFPF). Thus, as it is inferred from OFPF Act, the obligation of maintaining the professional secrecy is not absolute. However, it should be borne in mind that in a case of providing legally protected

information to specified individuals or bodies, the disclosure duty also extends to them. For example GIFC is obliged to maintain the professional secrecy, which he obtained according to the tax offence or tax petty offence processing conducted by fiscal control authorities. Therefore it should be remembered, that in each case a person whose professional secrecy has been disclosed according to the law, has a duty to preserve it.

The essence of the professional secrecy concerning the pension funds activities protection is shown by providing the criminal liability for its violation. According to the Article 220 of OFPF Act is considered as an offence the perpetrator's obliged to maintain the professional secrecy behavior which involves disclosure or use of it. It also needs to be noted that under the Article 222 OFPF Act a criminally liable for an offense of disclose or use of professional secrecy is also a person who has committed it by acting on legal entity behalf. The legal object of protection of this offence is the interest of the pension fund members, who admittedly are not directly involved in trading on financial instruments, but their capital resources do so. Therefore, any signs of illegal behavior, which include also disclosing or using the professional secrecy can unjustly affect also the interests of pension fund members (Płońska, 2012: 240).

4. The offence of disclosure or taking advantage of professional secrecy related to the pension fund activities

The analysis of the disclosure or use of professional secrecy related to the pension fund activities offence requires an explanation of the key concepts relating to causative act, which are the terms 'disclosure' and 'use of' the professional secrecy. In polish language dictionaries the behavior of the disclosure is defined as "making explicit, publicity of something what was kept in secret" or "making known to others something what was previously kept in secret". Whereas the doctrine defines the disclosure as any behavior opening to any other person access to professional secrecy information, regardless of whether that person become actually familiarize with it and use it or not. This last circumstance gains importance only at the level of social harmfulness assessment (Majewski, 2001: 29). The penalization of professional secrecy disclosure does not apply to situations, when an individual is legally obliged to discloses it or discloses it under versus-typical legal situation (Razowski, 2014: 982).

According to the point of view adopted in the doctrine, the disclosure of professional secrecy is understood as any behavior that allows the other person access to confidential information, regardless of whether the person actually uses the resultant possibility and in fact get acquainted with these information or not. On the basis of the foregoing, the professional secrecy disclosure will also include leaving unsecured documents containing confidential information in a place where bystanders are staying, even if none of these people are not acquainted with the content of unsecured documents (Majewski, 2001: 20). In addition, as disclosure of professional secrecy is considered also an authoritative confirmation of previous rumors or conjecture. Disclosure may be also understood as giving the access to the workplace, such as a computer or a password to an encrypted data set, to an unauthorized person. The object of the professional secrecy disclosure offence is therefore allowing, by the conscious action, to become acquainted to the contents of information constituting professional secrecy by an unauthorized person (Sucharski, 2006: 107).

Within the analysis of discussed offence's causative act which consists in the use of professional secrecy, it should be noted that the concept of the use is defined as "the use of something to achieve a certain goal, a profit". Thus, through the use of professional secrecy should be understood the perpetrator's use of information constituting such secrecy for a particular purpose, aimed to achieve benefits for themselves or a third person (Majewski, 2001: 20). According to the case law the use of information is defined as any action taken by the perpetrator, for which knowledge of information was the main impulse of action aimed at obtaining specific benefits. The use of professional secrecy can therefore say when the perpetrator, after become acquainted with it made a certain decisions, actions or activities (Court of Appeal in Białystok dated Feb. 12th 2013, II Aka 2/13).

The use or disclosure of professional secrecy concerning the activities of the fund offence stated in the Article 220 § 1 OFPF Act committed by the perpetrator obligated to not disclose it is punishable by a fine of up to 1 million PLN or imprisonment for up to 3 years. However, if the perpetrator commits a qualified type of this offence stated in the Article 220 § 2 OFPF Act, involving the use or disclosure of professional secrecy in order to achieve material or personal benefit, is liable to a fine up to 5 million PLN, or imprisonment for up to 5 years. There is no doubt that committing this offense in order to achieve the benefits is characterized by a much higher level of social harmfulness than the use or disclosure of professional secrecy, to which such a benefit was not directed.

5. Conclusion

In conclusion it should be noted that the penal law protection of professional secrecy concerning the activities of pension funds is based on two directives. The first of them - the subsidiarity directive is based on the principle that the penalties should be abandoned wherever the same effect can be achieved by economical self-regulations, business ventures and administration regulations. The second one - the proportionality directive means that only a pathological acts which highly threaten over-individual economic interests should be criminalized. In addition, it should be noted that the penal law protection of professional secrecy concerning the activities of pension funds slightly differs from the classic form of maintaining a professional secrecy duty. The discretion duty stated in UFPF Act results from a specific type of activity conducted by organizational unit (pension fund). However, the statutorily designated obligation of discretion on specified entities is related to the pursue of their profession, and is therefore covered by the professional secrecy. Particular emphasis is placed on the inner aspect of professional secrecy, understood as the circumstances connected with the practicing and organizing professional services (Rusinek, 2007: 48).

Literature:

- Dadak, W. (2000). Prawnokarna ochrona tajemnicy państwowej w obrocie papierami wartościowymi, *Czasopismo Prawa Karnego i Nauk Penalnych* 1: 247.
- Dobrodziej, E. (2000). *Ochrona tajemnicy – przepisy, komentarze, wyjaśnienia*. Bydgoszcz: Biblioteka Menedżera i Służby Pracowniczej.
- Fisher, B.; Świerczyńska-Głownia, W. (2006). Dostęp do informacji ustawowo chronionych. *Zarządzanie informacją* 13.
- Góral, R. (2007). *Kodeks karny. Praktyczny komentarz z orzecnictwem*: 457.
- Kozłowska-Kalisz, P. (2006). *Odpowiedzialność karna za naruszenie tajemnicy przedsiębiorstwa*: 19.
- Krawczyk, T. (2000). Problematyka przedmiotu ochrony art. 175 i 176 Prawa o publicznym obrocie papierami wartościowymi kryminalizujących praktyki „insider trading”. *Prokuratura i Prawo* 9: 60.
- Kucharzyk, M. (2005). Kwestia ujawniania tajemnicy państwowej, służbowej, zawodowej i funkcyjnej w wyjaśnieniach oskarżonego. *Państwo i Prawo* 2: 78.
- Kunicka-Michalska, B. (1972). *Ochrona tajemnicy zawodowej w polskim prawie karnym*: 5.
- Kunicka-Michalska, B. (2006). *Przestępstwa przeciwko ochronie informacji*. In: Wąsek, A. (ed.). *Kodeks karny. Część szczególna*: 250, 493.

- Majewski, J. (2001). Odpowiedzialność karna za naruszenie obowiązku dyskrecji w obrocie papierami wartościowymi. *Prawo Papierów Wartościowych* 9: 29.
- Płońska, A. (2012). *Karnoprawna ochrona informacji na rynku kapitałowym*: 240. PWN *Słownik języka polskiego*: 1043, 1543.
- Razowski, T. (2014). In: Giezek, J. (ed.). *Kodeks karny. Część szczególna. Komentarz*: 982.
- Rusinek, M. (2007). *Tajemnica zawodowa i jej ochrona w polskim systemie prawnym*: 17.
- Sucharski, M. (2006). *Prawnokarna ochrona giełdowego obrotu papierami wartościowymi*: 104.
- Szymczak, M. (ed.) (1995). *Słownik języka polskiego*: 572.
- Wyr. s. apel. w Białymstoku z dn. 12 lutego 2013 r., II AKa 2/13, Lex nr 1294723
- Żmigrodzki, P. (ed). *Wielki słownik języka polskiego*, PAN, available at: www.wsjp.pl, (accessed: 10.12.2016)

Karnoprawna ochrona tajemnicy zawodowej dotyczącej działalności funduszy emerytalnych

Streszczenie

Karnoprawna ochrona tajemnicy zawodowej związanej z działalnością funduszy emerytalnych opiera się na dwóch dyrektywach: dyrektywie subsydiarności oraz dyrektywie proporcjonalności. Pierwsza z nich opiera się na zasadzie, iż z sankcji karnych należy zrezygnować wszędzie tam, gdzie ten sam efekt może zostać osiągnięty za pomocą samoregulacji gospodarczej, przedsięwzięciami gospodarczymi oraz unormowaniami administracyjnymi. Druga natomiast oznacza że kryminalizowane powinny być tylko takie patologiczne zachowania gospodarcze, które w szczególnie wysokim stopniu zagrażają ponadindywidualnym dobrom gospodarczym. Specyfika karnoprawnej ochrony tajemnicy zawodowej dotyczącej działalności funduszy emerytalnych odbiega nieco od obowiązku zawodowej dyskrecji w klasycznym kształcie, wynika ona bowiem nie tyle z samej działalności zawodowej wykonywanej przez konkretne osoby, co ze szczególnego rodzaju działalności prowadzonej przez jednostkę organizacyjną (fundusz emerytalny). Niemniej jednak obowiązek dyskrecji ciążyący na ustawowo wskazanych podmiotach ma związek z wykonywaniem przez nich zawodu, a zatem jest objęty tajemnicą zawodową.

Słowa kluczowe: tajemnica zawodowa, fundusz emerytalny, przestępstwo, art. 220 u.o.f.f.e.