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Supervision of the State Electoral Commission over electoral committees during the election campaign

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Summary: The subject of this article is the problem of the supervisory tasks of the National Electoral Commission (the NEC) in relation to electoral committees. Within the meaning of the Polish Electoral Code, the NEC is the most important supervisory body over the observance of the electoral law. While the NEC's supervision does not raise any doubts with regard to lower-level electoral bodies, so controversy arises in the context of entities involved in the electoral process, but which are not part of electoral administration. Among these entities there are mainly electoral committees. In this article the author analyzes the means by which the NEC may influence the activity of electoral committees during the election campaign. In the article the procedure of examining notifications about the establishment of electoral committees was discussed as well as the Commission's impact on committees through guidelines issued by it, explanations and other documents (positions, appeals and information).

Key words: National Electoral Commission, supervision, electoral committee, electoral law, electoral campaign.

Nadzór Państwowej Komisji Wyborczej nad komitetami wyborczymi w toku kampanii wyborczej

Streszczenie: Celem niniejszego artykułu jest analiza zadań nadzorczych Państwowej Komisji Wyborczej (PKW) realizowanych względem komitetów wyborczych. Zgodnie z Kodeksem wyborczym PKW jest najważniejszym organem nadzoru nad przestrzeganiem prawa wyborczego. O ile nadzór ów nie budzi większych wątpliwości w odniesieniu do organów wyborczych niższego stopnia, tak kontrowersje pojawiają się w kontekście podmiotów zaangażowanych w proces wyborczy, lecz niebędących częścią administracji wyborczej. Do podmiotów tych bez wątplenia zaliczyć należy komitety wyborcze. W niniejszym artykule analizie poddano środki, jakimi PKW może oddziaływać na działalność komitetów wyborczych w toku kampanii wyborczej. Szczegółowo omówiono przede wszystkim procedurę badania zawiadomień o utworzeniu komitetów wyborczych, a także oddziaływanie Komisji na komitety poprzez wydawane przez nią wytyczne, wyjaśnienia oraz inne dokumenty (stanowiska, apele czy informacje).

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Słowa kluczowe: Państwowa Komisja Wyborcza, nadzór, komitet wyborczy, prawo wyborcze, kampania wyborcza.

1. Introduction

In accordance with the regulations contained in the Election Code, the State Electoral Commission (PKW) has been shaped as the supreme election organ². Thus, the legislator has legalized it as the most important organ in the whole structure of the Polish electoral administration³. Consequently, the Commission's actions are considerably connected with coordinating the activities of other election organs, ensuring the uniformity of their functioning and verifying their compliance with electoral law. It should be emphasized though that in accordance with the Election Code, PKW has been entitled to exercise supervision over compliance with electoral law. What is more, this duty has been placed at the top of the Commission's catalogue of duties by the legislator. In turn, such systematics – as it seems – allows to make an observation that the legislator has assigned a special meaning to this duty. Yet, a problematic issue in this context appears to be the personal and material scope of the Commission's supervision. The analysis of the provision of article 160 § 1 point 1 of the Election Code indicates that the scope of PKW's supervision over compliance with electoral law has not been strictly assigned to the group of entities or to a concrete group of matters governed by electoral law. Therefore, a view has been accepted in the doctrine that this supervision should be interpreted broadly as the one which includes all entities taking part, within any scope, in the election process⁴. However, as it appears, such a conclusion is too far-reaching due to the nature of the supervision institution. In view of the fact that supervision, by its nature, energetically enters into the sphere of independence of the supervised entity, it should be considered reasonable that each time the scope of supervision should be reconstructed considering the literal wording of the provisions that establish it⁵. Nevertheless, supervisory competences with respect to any entities should not be presumed⁶. Adopting a different thesis could lead to unrestricted extending of supervisory competences to any desired entities, and, as a result, to unjustified restricting of the freedom of their actions. This state of affairs, in turn, would be difficult to reconcile with the principle of legalism, mentioned, *inter alia*, in art. 7 of the Constitution of the Republic of Poland⁷. To sum up, it should

² Cf. art. 157 § 1 of the Law of 5 January 2011 – Election Code (consolidated text, OJ of 2017, Item 15); hereinafter referred to as k.w.

³ A. Sokala, *Election administration in the current Polish legislation*, Torun 2010, p. 65.

⁴ *Idem*, p. 79 and S. J. Jaworski, *The State Electoral Commission as the organ of law control and protection*, [in:] F. Rymarz (Ed.), *Iudices electionis custodes (judges as custodians of the elections)*. The memorial book of the State Electoral Commission, Warsaw 2007, p. 80.

⁵ A. Filipowicz, *The concept and functions of supervision in administration*, Wrocław 1984, p. 4; M. Stec, *Regional chambers of auditors. The political characteristics and comments on the law*, Warsaw 2010, LEX, art.11.

⁶ L. Bar, *The legal situation of a state-owned enterprise in the area of administrative law*, Warsaw 1968, p. 123-124.

⁷ The Law of 4 April 1997 – The Constitution of the Republic of Poland (OJ of 1997, No. 78, Item 483 as amended).

be assumed that the personal scope of the Commission's supervision as well as the catalogue of its supervisory measures do not result exclusively from the general competition provision contained in art. 160 § 1 of the Election Code, but they should be reconstructed in each case relying on specific detailed provisions⁸.

Taking the above-mentioned considerations into account, it should be stated that supervisory competences of PKW extend primarily to the lower-level election organs. This is a consequence of the hierarchical structure of election administration whereas the supervision of PKW should be qualified, in that regard, as internal and directive supervision⁹. The legislator explicitly has pointed out the range of supervisory measures which the Commission exercises with regard to these organs¹⁰. Quite contrary appears to be the issue of supervision over other entities participating in the election process that are not organizationally connected with PKW. The reference is made here particularly to the entities, taking part in the election campaign, which are only functionally connected with the election process. An excellent example of entities of this type are electoral committees. There is no doubt that due to their role in the election process, the correct application of electoral laws is particularly significant.

However, the supervision of PKW as the supreme body of supervision over compliance with electoral law with regard to electoral committees is virtually illusory. The law – in most cases – allows the Commission to influence the activity of electoral committees only by means of the supervision measures *sensu largo* which do not have a typical sovereign character¹¹. The further part of this paper analyses the measures exercised by PKW with regard to the indicated entities during the election campaign.

2. The examination of notices of establishing electoral committees

The issue of the Commission's supervision over electoral committees is particularly important due to the fact that in the Polish electoral law it is these entities that have a special position – they are the most important executors of electoral actions¹². In accordance with the Election Code, electoral committees execute electoral

⁸ A. Kisielewicz, *Comments on art. 160 of k.w.*, [in:] K. W. Czaplicki et al., *The Election Code. Comments*, Warsaw 2014, LEX, art. 160.

⁹ The issue of directive supervision characteristic of centralized systems in which the principle of hierarchical subordination is emphasized, is mentioned, inter alia, by J. Starościk, *Decentralization of administration*, Warsaw 1960, p. 12-14.

¹⁰ It is worth mentioning here the right of PKW to handle complaints about the activities of regional electoral commissions and electoral commissioners, issuing guidelines binding electoral commissioners and lower-level electoral commissions, evading the resolutions of regional and district electoral commissions and the resolutions of electoral commissioners made without respecting the law or not compliant with the Commission's guidelines or a competence relying in dismissing the electoral commissioner or the member of the regional or district electoral commission in the cases provided for in the Code.

¹¹ A. Pyrzyńska, *Supervisory tasks of the State Electoral Commission in the Polish electoral law*, unpublished doctoral thesis in the collection of the Centre for Electoral Studies UMK, Torun 2017, p. 369.

¹² Jarosław Szymanek emphasizes that electoral committees are an exclusive provider of electoral activities; cf. J. Szymanek, *Legal regulation of electoral committees in the Electoral Code*, [in:] K. Skotnicki (ed.), *Election Code. Preliminary assessment*, Warsaw 2011, p. 77, 81, 84. See: T. Gąsior, *The control of electoral committees participating in parliamentary elections in the light of law and practice*, "Przegląd Sejmowy"

actions¹³, including submitting candidates as well as conducting an election campaign in favour of these candidates on an exclusive basis¹⁴.

It is difficult to clearly define electoral committees as there is no legal definition of this institution. Relevant literature has developed several different ways of understanding the term of “the electoral committee”, yet, neither of them fully expresses the nature and legal position of the committee. For example, Andrzej Sokala claims that the electoral committee is “an organisational form provided for by the provisions of electoral law, in which the entities entitled to submit candidates (or lists of candidates) and to conduct other electoral actions (political parties and their coalitions, voters and associations and social organisations) participate in the election process¹⁵”. Anna Rakowska-Trela, based on the broad review of viewpoints, states that the questioned institution is “an organisational form provided for by electoral legislation of a statutory rank, being in fact (...) <<an episodic legal entity>>, created under the procedure regulated by law, by authorised entities, having exclusive right to undertake electoral actions, including primarily submitting candidates, participating in the election campaign and conduction the election agitation in favour of the submitted candidates, in accordance with the principles laid down in the applicable legislation, in particular in the electoral law¹⁶”. Marta Czakowska highlights that the committee shall be established in order to “implement fundamental principles of electoral law, especially the principle of free elections and the principle of equity¹⁷”. As far as the relationship between supervisory duties of PKW and the institution of the electoral committee is concerned, there is no doubt that it is already revealed in the procedure of submitting notifications on establishing the electoral committee and their examination by the competent electoral organ. For within this scope PKW, or, in the situations referred to in the Code¹⁸ – the electoral commissioner – acting as

2007, No. 2, p. 223; A. Rakowska-Trela, *Forms and boundaries of election campaigns according to the Election Code*, [in:] K. Skotnicki (ed.), *Election Code...*, op. cit., p. 114; M. Czakowska, P. Rażny, *The legal construction of the electoral committee in the context of the equal opportunities principle*, “Studia BAS” 2011, No. 3, p. 82 et seq.

¹³ In the literature there is no comprehensive definition of “the electoral action”. Anna Rakowska-Trela reports that “electoral actions consist of all activities related to elections and focused on elections, undertaken by the participants the election process, i.e. by electoral authorities and electoral committees during the election campaign and afterwards, until the day of determining the election results, namely, from the day of announcing the act of the competent body about calling elections to announcing the election results”; cf. A. Rakowska-Trela, *Election campaign in legislation and in practice*, Łódź 2015, p. 156.

¹⁴ Cf. art. 84 § 1 of k.w. It is noteworthy that pursuant to the amendment of the Election Code made by the Act of 11 January 2018, electoral agitation during campaign can be conducted not only by the electoral committee but also by every voter, including the collection of signatures supporting submitted candidates after obtaining a written consent of the electoral representative; Cf. art. 5 point 49 of the Act of 11 January 2018 on amending some laws to increase the involvement of citizens in the process of electing, functioning and controlling of some public organs (OJ of 2018, Item 130).

¹⁵ A. Sokala, [in:] A. Sokala, B. Michalak, P. Uziębło, op. cit., s.v. electoral committee.

¹⁶ A. Rakowska-Trela, *Election campaign...*, op. cit., p. 150. “The episodic character” of the electoral committee is also mentioned by M. Czakowska and P. Rażny, cf. M. Czakowska, P. Rażny, op. cit., p. 79.

¹⁷ M. Czakowska, *The institution of the electoral committee in the Polish electoral legislation*, Toruń 2016, unpublished doctoral thesis in the collection of the Centre for Electoral Studies UMK, p. 112.

¹⁸ Such a situation occurs in local elections with regard to the electoral committee of the organization and the electoral committee of voters when they intend to submit candidates for councilors only in one voivodeship. In this case, the authority competent to adopt the notice and later to issue a relevant resolution is the delegate

the Commission's representative, have the measures of binding influence, deciding whether and from which moment a given electoral committee will be competent to perform actions during the election campaign. Making a decision by PKW (or by the electoral commissioner) on accepting the notification on establishing the electoral committee is a condition to conduct effective electoral actions. The notification itself should meet numerous formal requirements which decide about the positive outcome of the electoral organ. Such a notification shall be prepared in accordance with electoral legislation and submitted under the stipulated procedure. Therefore, the electoral organ's duty is supervision over compliance with electoral law in the aforementioned aspects. Electoral organs when examining the submitted notifications, may issue a decision on the adoption of the notice, call the representative to supplement defects (if any) or to make the most rigorous settlement – a decision refusing to adopt the notification¹⁹. Obviously, each of these settlements shall result in other consequences.

The most far-reaching consequence is preventing the committee from taking part in the electoral procedure due to failing to meet the statutory conditions of the notification.

Notifications of establishing electoral committees along with required attachments are submitted, as a rule, in person in the registered office of the competent electoral organ²⁰. The deadline for submitting the notification on establishing the electoral committee is a fixed deadline and shall not be restored²¹. If the notification is submitted directly in PKW or to the commissioner in the registered office, the person who receives the documents shall issue the acknowledgement of submission to the one who files the notification. The person who receives the notification pre-checks whether the document meets the statutory conditions and whether it is accompanied by required attachments. If the person who receives documents notices any formal defects, they should instantly report them orally to the person submitting the notification, provided that the final verification of the documents is conducted by PKW or the electoral commissioner. It should be also added that the verification conducted by electoral organs is of the formal and legal nature. They shall not interfere with the substantive issues of the notification. If the notification on establishing the electoral committee, mentioned in art. 86 § 2, art. 87 § 5, art. 88 § 3, art. 89 § 4 and art. 90 § 5 of k.w., satisfies the formal requirements specified in the Election Code, the

representative of PKW – the electoral commissioner competent respectively for the seat of the organization (in case of the electoral committee of the organization; cf. art. 402 § 1 of the Election Code) or competent for the seat of the electoral committee of voters (art. 403 § 3 of k.w.).

¹⁹ Cf. art. 97 of k.w.

²⁰ Delivery of documents by post is also possible – in this case, the date of receipt by PKW or the electoral commissioner determines whether the notification has been submitted within the fixed time limit; cf. art. 9 § 1 of k.w. and remarks to point 6 of the Information on establishing the electoral committee of a political party in the elections to municipal and county councils and provincial assemblies as well as elections for voys, mayors and city presidents, which are to be ordered on 16 November 2014, ZPOW-703-109/14. See also: K.W. Czaplicki, cf. K. W. Czaplicki, *Commentary to art. 97 of k.w.*, [in:] K.W. Czaplicki, B. Dauter, S.J. Jaworski, A. Kisielewicz, F. Rymarz, op. cit., p. 258 and Resolution of the Supreme Court of 14 December 2011, ref. no. III SW 173/11 (OSNP 2012, no. 11-12, Item 149).

²¹ K. W. Czaplicki, *Commentary to art. 97 of k.w.*, [in:] K.W. Czaplicki, B. Dauter, S.J. Jaworski, A. Kisielewicz, F. Rymarz, op. cit., p. 258.

electoral organ, within 3 days of delivery, decides about the adoption²². In this event the electoral committee may obtain and spend the funds from the date of issuing the decision on the adoption of the notification²³, which additionally depends on prior opening of the bank account. Likewise, receiving the decision about the adoption of the notification opens the way to start up the activities connected with submitting the lists of candidates.

Another solution permitted by the legislator under supervision over notifications on establishing the electoral committee is calling the electoral representative by the electoral authority to rectify the procedural defects of the notification within 5 days, if these defects are detected during the verification of the notification. The Commission or the electoral commissioner shall do so within 3 days of delivery of the notification. The reference is made here – as stated by the Supreme Court in one of its decisions – to “removable deficiencies²⁴”. These are definitely not defects including missing personal signatures of support under the notification. Their removal would require collecting additional signatures or correcting mistakes by the people who signed in the wrong way²⁵. The examples of removable defects include similarity of the name of the submitted electoral committee and the name of the already submitted another electoral committee, usually the electoral committee of voters²⁶, or clerical errors or other obvious mistakes concerning designation of surname, address or PESEL number of the citizens providing their support to the committee. It is assumed that such correction can be made if the mistakes relate to a small number of citizens and in the first place if the type of defects allows for recognizing that the list contains all required and true information.

If the defects pointed out by the electoral authority are not removed on time, PKW (alternatively the electoral commissioner) shall refuse to accept the notification. Then, a decision concerning the case along with the justification shall be instantly provided to the electoral representative. A similar settlement is delivered to the person giving a notification on establishing the electoral committee if deficiencies detected by the electoral organ are indelible. It is noteworthy that the electoral organs decision refusing to accept the notification is contestable as provided in art. 97 § 3 of k.w. The electoral representative has the right to bring actions against such a decision. The competent organ, in turn, depends on the type of elections and the electoral committee challenging the decision. In parliamentary elections, in the elections to the European Parliament, for the office of the President of the Republic of Poland and local government elections (provided that PKW has been notified of establishing the electoral committee), the electoral representative is entitled to bring actions before the Supreme Court against the decision made by PKW about refusing to accept the notification on establishing the electoral committee. Once the Supreme Court recog-

²² Cf. art. 97 § 1 of k.w.

²³ Cf. art. 129 § 2 point 1 of k.w. and art. 129 § 3 point 1 of k.w.

²⁴ Resolution of the Supreme Court of 29 August 2011, ref. no. III SW 8/11 (OSNAPiUS 2012 no. 11-12, Item 150, p. 493).

²⁵ Resolution of the composition of Seven Judges of the Supreme Court of 19 September 2002, ref. no. III SW 28/02 (OSNAPiUS 2003 no. 4, Item 89).

²⁶ K.W. Czaplicki, *Commentary to art. 97 of k.w.*, [in:] K.W. Czaplicki et al., op. cit., p. 259.

nizes the complaint, PKW immediately accepts the notification on establishing the electoral committee as the Court's decision in this case has a cassation nature. Thus, recognizing the complaint by the Court means that there exist the conditions set out in the Election Code for accepting the notification and implementing by the electoral committee subsequent electoral actions provided for in the election calendar²⁷. The situation is slightly different in case of appealing against decisions concerning the refusal of accepting the notification of establishing the electoral committee in the event of local government elections with regard to the electoral committee of an organization, constituted in order to submit candidates for city council members only in one voivodeship and to the electoral committee of voters set up to submit candidates in one voivodeship. If this is the case, it is the electoral commissioner that is the competent organ to issue a decision. Then, the electoral representative brings an action not to the Supreme Court but they exercise their right to appeal before PKW as a superior authority to the commissioner. If PKW recognizes the appeal, the electoral commissioner is immediately obliged to accept the notification.

On the basis of the above-mentioned provisions regulating the procedure of bringing actions against decisions of electoral organs concerning the refusal to accept the notification of establishing the electoral committee, special attention should be paid to the practical problem regarding the possibility of taking electoral actions in the event of finding the complaint or appeal justified by PKW or the Supreme Court and, at the same time, the time limit to do the electoral activity under the election calendar expires. When discussing this issue, it is worth mentioning the facts which took place during the parliamentary elections in 2011. The case concerned a notice of establishing the Electoral Committee of Voters of the New Screen Civic Electoral Lists, submitted on 22 August 2011 by the representative of the committee to PKW. Having examined the questioned notice on 23 August 2011, PKW passed a resolution refusing to accept the notice. The reason for refusal was a failure to attach to the notice at least 1,000 signatures of citizens entitled to elect to the Sejm of the Republic of Poland, supporting the establishing of the committee, which, in the Commission's opinion, constituted an infringement to art. 204 § 7 point 3 of k.w. The Commission did not call the electoral representative to remove the deficiency of the notice pursuant to art. 97 § 2 of k.w. because – as the Commission claimed – the deadline for submitting notifications expired and therefore, removing that deficiency was not feasible. That resolution was appealed against by the representative of the electoral committee and two allegations were made. The first one regarded the infringement of art. 97 § 2 of k.w. consisting of failing to call the committee to remove the deficiencies of the notice. The second one was connected with the qualification made by PKW with regard to signatures supporting the establishing of the committee. The Supreme Court in its decision of 31 August 2011 considered the appeal as justified²⁸. Therefore, in accordance with art. 205 § 2 *in fine* k.w., PKW instantly – on the same day, 31 August 2011 – passed a resolution on the acceptance of the notice about es-

²⁷ B. Dauter, *Commentary to art. 205 of k.w.*, [in:] K.W. Czaplicki et al, op. cit., p. 507.

²⁸ Resolution of the Supreme Court of 31 August 2011, ref. no. III SW 10/11 (OSNAPiUS 2012 no. 11-12, Item 151, p. 495).

establishing the committee on 22 August 2011, and - more importantly – set the date of submitting by the indicated committee the lists of candidates for deputies or senators until 7 September 2011 to 12 p.m.²⁹. The Commission considered it necessary to “restore” the legal status of the day when the notification of establishing the electoral committee would be handled and declared free from defects. The deadline for submission of the lists of candidates for deputies and senators expired on 30 August 2011 at 12 p.m.³⁰. The Court’s decision considering the electoral representative’s appeal as justified, issued on 31 August 2011, and on the same day PKW accepted the notice of establishing the committee. This means that, as a result of exercising the complaint procedure *a limine*, the committee was deprived of the real chance of pursuing electoral actions under the election calendar. As the provisions of the Election Code do not clearly refer to a situation of this type, PKW decided in its resolution that setting a deadline for submitting the lists of candidates by enforcement of relevant provisions of art. 204 § 6 second sentence, art. 97 § 1, art. 98, art. 205 § 2 fourth sentence and art. 211 § 1 of k.w., would be the most relevant and would protect the committee against negative consequences of exercising the statutory right to implement the complaint procedure from art. 205 § 1 of k.w. The Commission highlighted that in the case of accepting, on 23 August 2011, the notice of establishing the committee as the one which satisfied the conditions specified in the act – which however did not occur – the committee would have 7 days to perform the actions concerning the submission of the lists of candidates for deputies and senators. Thus, PKW, in its settlement, set an equivalent period for the committee to perform the electoral action.

The above-illustrated example clearly shows how important role can be played by PKW during the election procedure. Firstly, in the mentioned case, the Commission, by passing a resolution, filled the detected legal loophole which was actually a real loophole³¹. The legislator did not foresee a situation where exercising the complaint procedure could lead to expiry of the deadline for performing a further electoral action, rudimentary from the point of view of the electoral committee’s participation in the election procedure, for which the deadline had been determined. The acceptance of the presented settlement by PKW resulted from referring to purposive rationales. The resolution settlement itself, in accordance with the decision of the Supreme Court about accepting the notice of establishing the committee, was pointless because that committee would not have a legal possibility to effectively submit the lists of candidates in those elections. In addition, the Supreme Court, in its decision, did not refer to this problem at all. It should be admitted that in a deadlock situation PKW exercised its supervisory rights in the scope of observing the electoral law. However, the question arises with regard to the boundaries of independent activity of PKW also in the context of the legalism principle. Undeniably, when passing

²⁹ Resolution of the State Electoral Commission of 31 August 2011 concerning the acceptance of the notification on establishing the electoral committee – The Electoral Committee of Voters of the New Screen Civic Electoral Lists in the elections to the Sejm and Senate of the Republic of Poland, ordered on 9 October 2011, ZPOW-540-106/11.

³⁰ Pursuant to art. 211 § 1 of k.w.

³¹ Cf. L. Morawski, *The principles of law interpretations*, Toruń 2010, p. 149-152.

a resolution this organ – as it can be presumed – based on the general competence provision contained in art. 160 § 1 Point 1 of k.w. in relation to art. 205 § 2 *in fine* k.w. – enabled the committee to participate in further electoral actions. On the other hand, it seems that the Commission encroached on the competence of the legislator and exercised a supervision measure which was not directly stipulated in applicable provisions, yet, it strongly affected the participants of the election process and the process itself. Art. 160 § 1 Point 1 of k.w. does not provide a direct basis to act unless another provision specifies a concrete supervisory measure to implement it. In the case mentioned above, the Commission weighed the values of the committee's electoral right to effectively participate in the elections and of the strict interpretation of law with priority given to the former one³².

3. Electoral committees and the acts enacted by PKW

Supervision of PKW over electoral committees, to a certain extent, is updated also by the Commission's determining activity. In view of the fact that the formal supervision of PKW over electoral committees is very limited, in practice, the Commission gives numerous guidelines, explanations³³, viewpoints³⁴ as well as appeals addressed indirectly or directly to electoral committees³⁵. Their main purpose is to facilitate understanding of election procedures and to ensure that the actions of committees across the country are uniform. Sometimes, PKW's acts play an even more important role with regard to committees. For example, not all matters concerning organizing the elections have been stipulated directly by the legislator. If so, it is PKW that is in charge of making them more precise. Thus, using the above-mentioned documents, the Commission may recommend the rules of procedure together for all participants of the election process. Significant as it seems to be is the fact that the Commission shall not independently or directly initiate any legislative changes.

The acts of PKW being especially meaningful in the context of the Commission's supervision over electoral committees may include first of the guidelines and

³² It should be added that PKW, under the task specified in art. 160 § 1 pkt 8 of k.w., highlighted the problem of the legal loophole in the Information about the implementation of the Election Code provisions in the elections to the Sejm and Senate of the Republic of Poland of 2011. The Information indicated it was required to determine – in art. 205 § 2 of k.w. and respectively in other provisions of the Code – if the committee's complaint about PKW's refusal to accept the notification on establishing the electoral committee, is recognized by the Supreme Court, the Court shall set in its decision a fixed time limit for the committee to perform the actions provided for in the Act, whose deadlines have already expired or have been shorter. This provision has not been amended so far. Likewise, B. Dauter, cf. B. Dauter, *Commentary to art. 300 of k.w.*, [in:] K.W. Czaplicki et al., op. cit., p. 649.

³³ Cf. e.g. Explanations of PKW of 28 November 2014 on the procedure concerning the surplus of funds gained by the electoral committee against incurred expenditures (ZKF-703-202/14), or the explanations of PKW of 22 September 2014 on using the images of public persons in the election materials, (ZKF-756-13/14).

³⁴ Cf. e.g. The viewpoint of PKW of 9 February 2015 on the election campaign of candidates for the President of the Republic of Poland occupying public functions (ZPOW-654-1/15).

³⁵ Cf. e.g. The appeal of PKW of 31 August 2015 on conducting the election campaign during the so-called electoral silence (ZPOW-557-4/15).

explanations directly stipulated by the Election Code. The basic provision regulating the process of giving guidelines by PKW is art. 161 § 1 of k.w. This is a specific sort of resolutions made by the Commission which *ipso iure* bind electoral commissioners, lower-level electoral commissions, and since 2018 also electoral clerks. Guidelines may apply to all matters covered by the competence of PKW, particularly, the ones which refer to the duties of lower-level electoral organs and require harmonization of these activities. From the formal-legal viewpoint, guidelines comprise the source of internally applicable law and they are primarily – based on the hierarchical structure of electoral administration – a tool which harmonizes the activities of electoral organs. Besides, these acts are also intended to regulate the issues which have not been clarified by the legislator, as subordinate to the general rules of preparing and conducting the elections stipulated in the act. In practice, guidelines settle a number of detailed issues necessary for correct and comprehensive conducting of the elections. However, the review of the guidelines given so far by PKW, allows one to observe that the entities mentioned in art. 161 § 1 of k.w. are not always the exclusive addressees of regulations specified in these guidelines. On the contrary, an in-depth analysis of the questioned acts, in many cases, makes one to support the thesis that the guidelines, considering their contents *de facto* could provide the source of generally binding law and not only an instrument of influence on entities organizationally subordinated to PKW³⁶.

In practice, guidelines often regulate the procedure for a wider group of entities including candidates or even electoral committees, precisising the principles of their participation in the election process. This kind of guidelines can be illustrated by the resolution of PKW of 22 December 2014 concerning guidelines for electoral commissioners as well as territorial and district electoral commissions on preparing and conducting the elections to municipal and county councils and provincial assemblies and district councils of the capital city of Warsaw as well as elections for voyts, mayors and city presidents during the term of 2014-2018³⁷. It may seem that, as the name of the resolution suggests, the resolution is only addressed to electoral commissioners and lower-level electoral organs in relation to the PKW level – district and territorial electoral commissions competent for conducting local government elections. Yet, the analysis of the act suggests that the range of its influence covers definitely more entities including electoral committees. These guidelines indicate, for instance, which committees can take part in the second-ballot elections, supplementary, early elections or elections to new councils, and they also specify the principles of submitting notifications on their establishing. Moreover, the guidelines referred to also bind financial representatives of electoral committees participating

³⁶ A. Pyrzyńska, *About the acts of PKW with legal provision qualities*, [in:] M. Zubik, R. Puchta (ed.), *The sources of law after fifteen years of adopting the Constitution*, Warsaw 2013, p. 153.

³⁷ Resolution of PKW of 22 December 2014 on the guidelines for electoral commissioners as well as territorial and district electoral commissions concerning preparedness and conducting the elections to municipal and county councils and provincial assemblies and district councils of the capital city of Warsaw as well as elections for voyts, mayors and city presidents during the term of 2014-2018 (M.P. of 2015, Item 66); hereinafter referred to as: *The Guidelines of PKW for electoral commissioners as well as territorial and district electoral commissions in local government elections*.

in supplementary or early elections, inter alia, by imposing on them the obligation of submitting a relevant financial report³⁸. Therefore, a doubt arises whether acts in the form of guidelines should be still binding as only internal acts since directives contained in them have practically a much wide range. Not by chance, for some time it has been rightly postulated in the electoral law doctrine for constitutionalisation of PKW which could open a formal possibility of establishing acts of generally binding law in the form of regulations³⁹. This postulate shall be definitely supported. There is no doubt that guidelines should be regarded as one of measures of direct supervision over electoral committees. Although committees have not been directly specified as the addressees of the guidelines in art. 161 § 1 of k.w., it is hard to imagine efficient election process if committees notoriously refused to apply directives from these acts. Such a procedure, as one may presume, would simply end up in most cases with a refusal to accept the notice on their establishing and preventing effective electoral actions.

The second type of acts by means of which PKW can influence these electoral committees within the scope of their supervisory tasks are explanations. In this case, the impact of the Commission is far clearer as electoral committees as the addressees of explanations are clearly mentioned in art. 161 § 1 of k.w. It is noteworthy, though, that the legislator has not indicated committees as the entities “bound” by explanations of the Commission, it only emphasized that these acts are issued “for” several groups of entities, including committees⁴⁰. Explanations like guidelines comprise a specific kind of PKW resolutions⁴¹, which formally are not binding and are less formalized from the technical point of view. The primary objective of explanations is to ensure uniform interpretation of electoral laws, in particular, in the event of controversial issues. In its explanations, PKW determines how to clear any doubts resulting while exercising electoral laws⁴². Sometimes, relevant literature rightly points that explanations are acts of legal interpretation of significant substantive importance⁴³. Formally, it is not a binding interpretation and rather it expresses the Commission’s opinion with regard to particular matters. Attention should be paid to the effect of this sort of documents. As a rule, addressees of explanations do not avoid exercising directives resulting from these explanations. This is related to great authority of PKW and its superior position in the structure of the Polish electoral administration.

³⁸ Cf. point I.3 of the Guidelines of PKW for electoral commissioners as well as territorial and district electoral commissions in local government elections.

³⁹ Cf.: A. Sokala, [in:] A. Sokala, B. Michalak, P. Uziębło, op. cit., s.v. The guidelines of PKW; A. Kisielewicz, *Commentary to art. 161 of k.w.*, [in:] K.W. Czaplicki et al., op. cit., p. 393; F. Rymarz, *Constitutionalisation of the State Electoral Commission (conclusions de lege ferenda)*, [in:] F. Rymarz (ed.), *Democratic electoral standards of the Republic of Poland. Theory and practice*, Warsaw 2005, p. 250; A. Pyrzyńska, *About the acts of PKW...*, op. cit., p. 153-154; M. Jabłoński, [in:] B. Banaszak, J. Zbieranek, *Constitutionary poll*, Warsaw 2011, p. 65.

⁴⁰ Other entities being the addressees of explanations include government administration, local administration as well as their subordinate organizational units performing a task connected with conducting the elections, and radio and television broadcast; cf. art. 161 § 1 of k.w.

⁴¹ A. Sokala, [in:] A. Sokala, B. Michalak, P. Uziębło, op. cit., s.v. explanations of PKW.

⁴² Ibidem.

⁴³ A. Kisielewicz, *Commentary to art. 161 of k.w.*, [in:] K.W. Czaplicki et al., op. cit., p. 392.

One more aspect related to this issue is also worth mentioning. Namely, the fact of accepting by PKW a definite way of interpreting electoral laws has an impact on the conduct of interpretation and indicates the method of settling matters in the field of organizing and conducting the elections. It is necessary to agree with Stanisław Gebethner who claims that explanations are “the announcement of how PKW is going to conduct when it comes to deciding on a particular matter⁴⁴”. The actions of the addressees of guidelines in a way different than interpretational clues officially presented by PKW, may lead to some discrepancies and consequently prevent from effective co-operation during the election process and even extend the actions. Normally, the bodies of local government units, voyts or electoral committees try to avoid this sort of situations not to complicate electoral procedures.

An example of explanations in which PKW included a range of useful information for electoral committees are the Explanations of PKW of 25 August 2011 concerning the indication of occupation in the submission of the list of candidates for deputies or senators in case of a candidate holding the management position or employed in central or local government administration⁴⁵. In this document, the Commission stated that for submission of the list of candidates for deputies or a candidate for a senator, with regard to the candidate occupying a management position or employed in central or local government administration, as their occupation, it is allowed to provide the following information respectively: “the employee of state administration” or “the employee of local government”. Furthermore, providing in such a case a position that the person holds or the function played by the person – a candidate for e.g. “the voyt”, “minister”, “starost” or “councillor” shall be treated as a deficiency of the notice. The last of the cases mentioned above shows how significant role can be played by the content, as it should be emphasized here, of formally binding explanations. Indication the candidate’s function as an occupation in the submission, in accordance with the directive of the Commission, shall be considered by the electoral commission as the deficiency of the notice and, as a result, following the Code, this Commission shall call the person submitting the list to remove this deficiency within 3 days, and in the event of failing to remove it, to refuse to register the candidate. As a matter of fact, the person submitting the list has the right to appeal against the decision of the district electoral commission on the refusal to register, to PKW, nevertheless, as it appears, it is unlikely that in such a situation PKW, during the appealing proceedings, would issue a decision contrary to the explanations given by it before. Therefore, as the above-mentioned example illustrates, explanations, despite the formal lack of binding capacity, can in practice significantly influence the field of electoral rights, sometimes even leading to depriving of these rights. Thus, in this context, it should be ascertained that explanations comprise a significant measure of supervision over the activities of electoral committees.

⁴⁴ S. Gebethner, *The Elections to Sejm and Senate. Commentary to the Act of 12 April 2001 – Electoral ordinance to the Sejm and Senate of the Republic of Poland*, Warsaw 2001, p. 55.

⁴⁵ Explanations of PKW of 25 August, 2011 concerning the indication of occupation in the submission of the list of candidates for deputies and the candidate for a senator in case of a candidate holding the management position or employed in central or local government administration (ZPOW-503-107/11).

It is also worth mentioning that explanations are also an important supervisory measure of educational nature. They can be delivered on PKW's own initiative and then they assume the form of general information directed to all addressees. Sometimes, however, explanations are stated by the Commission at the request of entities involved in the election process if they have doubts as to how interpret the law and even how to proceed in the situations not regulated by the legislator⁴⁶. In such cases, explanations become more individualised and are normally addressed just to electoral committees. An example of educational impact of explanations can be information contained in the Explanations of 11 January 2016 concerning the rules of financing the election campaign in the supplementary elections to the Senate of the Republic of Poland, ordered on 6 March 2016⁴⁷, in which PKW, when discussing the issue of the financial representative's responsibility for non-pecuniary proprietary rights of the electoral committee, clarified that solidary responsibility specified in art 130 § 3 of k.w. "means that the creditor can demand whole or part of allowance from all those liable for payment jointly, from several of them or from each individually". What is more, The Commission added that the principles of solidary responsibility are set forth in art. 366-378 of the Civil Code. In this case, as it appears, the Commission assuming a pragmatic approach determined that legal awareness in the society can be insufficient. Therefore, in order to facilitate the addressees of standards the implementation of the provisions stipulated in the Code and directives ensuing from the guidelines, clarified a concrete institution of civil law. Such proceedings of the Commission should be well received.

In addition to the actions mentioned above, supervisory duties of PKW with regard to observance of electoral laws by electoral committees can be supported by appeals, announcements or positions adopted by the Commission. Even though they cannot oblige addressees to conduct in certain circumstances in a defined way under pain of imposing sanctions, they are intended to influence the conduct of elections in accordance with law and the principles of electoral laws. The Commission's activity in this field is particularly noticeable in relation to electoral committees in the situations which have not been clearly regulated by the legislator and required taking relevant actions to prevent infringement of basic rules by those in charge of elections. Among the examples of this type of the Commission "interference" into the activities of electoral committees, there should be mentioned in the first place the appeal of PKW of 2005 addressed to electoral committees in relation to the coincidence of electoral silence during the parliamentary elections to the office of the President of the Republic of Poland⁴⁸. In the questioned case, the commencement of electoral silence during the parliamentary elections began at 12 p.m. on 23 September 2005, that is, during the time of the election campaign in the presidential elections⁴⁹. Thus,

⁴⁶ A. Żukowski, *The electoral system to the Sejm and Senate of the Republic of Poland*, Warsaw 2004, p. 78.

⁴⁷ Explanations of PKW of 11 January 2016 concerning the rules of financing the election campaign in the supplementary elections to the Senate of the Republic of Poland, ordered on 6 March 2016, ZKF-5721-1/15.

⁴⁸ Refers to the voting falling on 9 October 2005; Cf. Decision of the Speaker of the Sejm of the Republic of Poland of 23 May 2005 on ordering the elections for the President of the Republic of Poland (OJ of 2005, No. 6070, Item 766).

⁴⁹ This case was mentioned by K.W. Czaplicki, *The role and duties of PKW during the mass media election*

it was problematic to conduct agitation activities by electoral committees involved in the presidential elections which at the same time were connected with political parties supporting candidates in the parliamentary elections.

In the appeal of PKW of 4 July 2005, it was stated: “the State Electoral Commission refers, in the name of pursuing clear rules of the election game and well understood political culture, to all electoral committees of candidates for the President of the Republic of Poland to resign from conducting the electoral campaign during these elections from 12 p.m. on 23 September 2005 to 8 p.m. on 25 September 2005, especially to avoid broadcasting election programmes in public and non-public programmes of radio and television broadcasters⁵⁰”. More importantly, the appeal referred to the need of respecting the principle of equality in two aspects. Firstly, equality understood as equal opportunities of the candidates in the parliamentary elections, where the continuation of the campaign by entities connected with candidates for the office of the President of the Republic of Poland could infringe the opportunities of other participants of parliamentary elections. Secondly, equalities in the presidential elections, in this context the appeal was intended to “silence” all committees taking part in the presidential elections, not only the ones which could be related with the early parliamentary elections. Making that appeal resulted just from the lack of proper legislative solutions which could regulate the proceedings in case of electoral silence being coincident with the campaign of another pending election process. The Commission does not have any other measures which could be applied in such a situation to effectively prevent any committee from conducting agitation activities. This could be perceived as interfering of the electoral organ with the area of law-making which, as it should be highlighted here again, PKW is not formally entitled to. The appeal, which was de facto an informal request to prevent committees from agitation, was supported by purposive reasons including, as stated in the appeal, the need to consider beyond the letter of the law also “the spirit of that appeal⁵¹”. It is also worth mentioning that PKW when predicting the occurrence of such a situation, informed the Speaker of Sejm already in November 2004, and then during legislation works on amendments in election acts at the beginning of 2005.⁵² Unfortunately, the postulates of the Commission were not taken into consideration by the legislator. Yet, the conduct of electoral committees deserves approving, because they, as a rule, complied with the appeal, and the National Radio and Television Council which appealed on 19 July 2005 to public and non-public radio and television broadcasters to resign from broadcasting payable election programmes during this “problematic” period

campaign, [in:] F. Rymarz (ed.), *Iudices electionis...*, op. cit., p. 27-28. Besides, the comments on the described situation are included in the Report of the State Electoral Commission regarding the elections to the Sejm and Senate of the Republic of Poland conducted on 25 September 2005, http://pkw.gov.pl/pliki/1456228037_43209.pdf [10.09.17].

⁵⁰ Appeal of PKW of 4 July 2005 regarding not conducting the election campaign during the presidential elections during the electoral silence in the elections to the Sejm and Senate of the Republic of Poland, pkw.gov.pl/pliki/1456148112_29430.rtf. [10.09.2017].

⁵¹ *Ibidem*.

⁵² K.W. Czaplicki, *The role and duties...*, op. cit., p. 27.

in the name of respect for electoral silence⁵³. These activities primarily followed the idea of electoral silence to provide voters participating in the parliamentary elections with proper conditions to finally and carefully think over the election decision in the atmosphere free of persuasive pressure of the election campaign⁵⁴.

4. Conclusion

There is no doubt that competences of PKW within supervision over electoral committees are quite limited and require modification so that to allow real and sovereign influence on the activity of these entities during the election process. As it appears, the provision of art. 160 § 1 Point 1 of k.w. does not exclude the option of extending the competences of PKW to new entities, on the contrary, its general and therefore comprehensive formula lends space for formal extension of the area of supervisory tasks also to other than electoral committees, entities taking part in the elections. Such a solution would be, by no means, sanctioning of the current practice of PKW, but with the difference that relevant measures at the disposal of PKW would be binding for electoral committees. However, as mentioned before, such competences of the Commission shall be strictly defined in specific laws. Supervision always goes hand in hand with the restricted sphere of freedom of subordinate entities if another entity called a supervisory entity is given the right to exert a sovereign impact on the entity being supervised. In case of electoral committees, it is a particularly important issue as these are the key participants of electoral competition. Thus, compliance by them with electoral law shall be subject to fast and effective mechanisms of verification. Therefore, it should be postulated to extend the formal supervision of PKW to these entities by conferring to the Commission the competence of sovereign impact on their activities during the election process.

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⁵³ Appeal of the National *Radio and Television Council of 19 July 2005*, „Newsletter of the National Radio and Television Council” 2005, no. 5-9, p. 62.

⁵⁴ Interesting comments on *ratio legis* electoral silence cf., inter alia: A. Rakowska-Trela, *The rights of voters in the election campaign*, “Election Studies” 2015, vol. XX, p. 28-31; M. M. Wiszowaty, *Institution of electoral silence. Genesis, legal regulations, ratio existendi*, “Election Studies” 2012, vol. XIV, p. 7 and subsequent; M. Zaborski, *The guard of democracy or relic from the past? Discussions about the reasons for implementing electoral silence*, “Political Preferences” 2015, no. 7, p. 25 and subsequent.

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