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The Phenomenon of Decausalization as a Challenge for Financial Market Regulation

Zjawisko dekauzalizacji jako wyzwanie dla regulacji rynku finansowego

ABSTRACT

The purpose of the article is to verify the thesis on possible interconnection between the phenomenon of decausalization observed in the French legal system and financial market law regulations. The concept of decausalization was mainly exposed and emphasized in connection with one of the largest amendments of the French Civil Code introduced in 2016, and is understood as the gradual displacement of causa as the imperative element of the legal relationship. A different approach to the existence of causa may be considered as a concept that could be adapted in financial market law due to the way in which the definition of a financial instrument is regulated in both Polish and French law. These regulations refer directly or indirectly to the contractual obligations, which makes them sensitive to potential conceptual changes in this matter. The methodology used by the author is related to the functional approach of the comparative legal method, the historical-descriptive and the dogmatic method, with special focus on the French law regulations. The adopted method will allow to understand the described regulations in a much broader context, i.e. at the supranational level. The potential broader use of the decausalization concept may have a significant importance especially on the financial market, that is a very specific legal framework marked by the influence of the common law system and substantial presence of soft-law rules. The fact that the phenomenon of decausalization was not a scope of deeper analysis in Polish law, makes that the present article may not only be considered as a presentation of this phenomenon but also as an impulse for further interdisciplinary studies and interesting conclusions. In particular, the postulate of referring to the concept of contractual obligations within the financial market law may constitute

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an alternative to the creation of new regulations in this matter and be one of the elements enabling the adaptation of legal regulations to dynamic technological progress.

Keywords: causa; French law; financial market law; financial instrument

INTRODUCTION

The impact of the civil law on the development of the financial market is not limited only to the possibility of using the principle of freedom of contract as a basis for creating new forms of financial instruments, but may have a much broader aspect. A very important element of this process may also be the influence of the phenomenon of decausalization of contractual obligation to the transactions concluded on financial markets. This term, for the purposes of this paper, is understood as the gradual displacement of causa as the necessary element of the legal relationship, which may consequently lead to greater openness to new forms of transactions that most often appear first on the financial market. The above process was very clearly recognized during one of the largest amendments to the French Civil Code, introduced by Ordinance No. 2016-131 of 10 February 2016.[1] The analysis of selected aspects of the changes that have been introduced in French law in the field of contractual obligations may be important from the point of view of the Polish legislator, who very often followed the concepts introduced in the French legal system. This is particularly interesting regarding the fact that in Polish civil law the principle of causality of legal acts in its subjective concept was based on the initial model introduced in French law and that the doctrine also developed the concept related to the lack of causality of legal acts in general. It should also be underlined that the issue of causality of legal acts concerns a problem that was widely discussed in the doctrine and that, due to its complexity, has never lost its scientific value.[2] Of course, the formal limitation of the volume of the present article will not allow to describe the historical perspective of the evolution of the discussion on the causality, but it is worth noting that the doctrine was not unanimous on this point.[3] In this aspect, the doctrine observed that the systemic transformation in Poland after 1989 was an impulse for important changes in this regard related to the new regulation of the Civil Code and of the concept of freedom of contract.[4] In the author's opinion, the indicated changes in French law in 2016, and

[1] Ordinance No. 2016-131 of 10 February 2016 reforming the law of obligations, the general system and proof of obligations.

[2] M. Gutowski, *Zasada kauzalności czynności prawnych w prawie polskim*, "Państwo i Prawo" 2006, no. 4, p. 3.

[3] A. Dyrda, *Spory o kauzalność zobowiązań w dwudziestoleciu międzywojennym*, [in:] *Ex contractu, ex delicto. Z dziejów prawa zobowiązań*, eds. M. Mikuła, K. Stolarski, Kraków 2012, p. 149.

[4] M. Olechowski, *Generalna zasada kauzalności – czy rzeczywiście przebrzmiały spór?*, "Studia Iuridica" 2016, vol. 64, s. 115.

the technological progress that is much faster than expected, may constitute a new current impulse for further in-depth reflection on this matter.

The purpose of this article is to verify the thesis on possible interconnection between the phenomenon of decausalization observed in the French legal system and financial market law regulations. In particular, the author is going to verify if the different approach to the existence of causa that was presented in the French civil law may have an influence or may be used in the financial market law regulations. This may be one of the crucial factors of ensuring a better responsiveness of the legal system to new economic phenomena, especially within the financial market, that quickly incorporates technological progress and new practices related to social changes.[5] To verify this thesis, the author is going to analyze the selected provisions related to the definition of financial instrument both in France and in Poland in order to discuss whether there is a need or not of the causa in the financial instrument construction. It is worth to underline that until today, the lack of causa in the new French Civil Code was noticed by the doctrine,[6] but there are no studies related to the potential direct recognition of this phenomenon on the example of the financial market regulations. In the doctrine of the financial market, only some general works related to the use of different concepts of civil law were already presented, but the decausalization process was not a part of a separate study.[7]

The novelty of the discussed issue is not only related to the introduction of the French concept of decausalization, but also its recognition on the specific framework of financial market law both in Poland and in France. In order to achieve the assumptions and goals of the article within the research methods that are used, special attention is given to the comparative legal method and the dogmatic method. Comparative law may be considered as a science, a research method and the effects of research obtained from the application of the comparative method.[8] It is worth to underline that comparative law is not a separate branch of law and has no substantive or procedural law, but only a methodological aspect.[9] Analyses that have a part comparing selected aspects of different legal systems are especially welcome in the legal environment that has a cross-border nature. It is this aspect that makes comparative

[5] M. Fedorowicz, A. Zalcewicz, *Challenges Posed to the EU Financial Market by the Implementation of the Concept of Sustainable Financing*, "Białostockie Studia Prawnicze" 2024, vol. 29(1), pp. 47–48; T. Nieborak, *Central Bank Digital Currency as a New Form of Money*, "Białostockie Studia Prawnicze" 2024, vol. 29(1), p. 189.

[6] M. Lemonnier, *Zmiany we francuskim kodeksie cywilnym w 2016 roku*, [in:] *Prawo prywatne w służbie społeczeństwu. Księga poświęcona pamięci prof. Adama Jedlińskiego*, eds. P. Zakrzewski, D. Biernacki, Sopot 2019, p. 176.

[7] M. Mariański, *Problematyka regulacji rynku finansowego w ujęciu transgranicznym. Analiza na przykładzie prawa polskiego i prawa francuskiego*, Olsztyn 2020, p. 141.

[8] I. Szymczak, *Metoda nauki o porównywaniu systemów prawnych*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2014, no. 3, p. 37.

[9] R. Tokarczyk, *Komparatystyka prawnicza*, Warszawa 2008, p. 25.

research extremely important for the financial market law, that is characterized by a cross-border and often international character. The free movement of capital and payments is particularly emphasized on the financial market, which is a specific legal environment in which the norms of public law coexist with the norms of private law.[10] The characteristic of the financial market is also related to its innovative nature both at technical and at legal aspect, because it is a place where new constructions and legal concepts used to appear for the first time.[11] The present article may also be a part of the doctrinal discussion about the extent to which the legislator can take into account the interest of clients and users within financial market law.[12] In this aspect, there is also a reflection about the lack of the need to create new constructions specially dedicated to a financial market, as alternatively we can also refer to the legal constructions that already exist in civil law.

BASIS OF THE DECAUSALIZATION CONCEPT – REFORM OF THE FRENCH CIVIL CODE

The basis for the concept of decausalization was related to the reform of the French Civil Code of 2016, and more specifically to the Act No. 2015-177 of 16 February 2015 on the modernization and simplification of law and procedures in the field of justice and home affairs. In Article 8 of the aforementioned Act, we can find a number of assumptions of the discussed amendment, that the goal was to adapt the Civil Code to the contemporary characteristics of legal relations. In particular, it is worth mentioning that we can find the provisions related to the consolidation of the principle of good faith (Fr. *bonne foi*), and the principles of freedom of contract (Fr. *liberté contractuelle*).[13] One of the most important assumptions of the reform, which had significant consequences for transactions on financial markets, was to clarify the provisions on cancellation and declaration of invalidity of a contract, sanctions related to the conditions of validity of a given contract, and in particular the status of the concept of causa.[14]

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[10] M. Mariański, *Rynek finansowy jako miejsce przenikania się norm prawa prywatnego i prawa publicznego*, "Studia Prawno-Ekonomiczne" 2016, no. 100, p. 123.

[11] Like virtual currencies, see T. Bonneau, T. Verbiest, *Fintech et Droit. Quelle régulation pour les nouveaux entrants du secteur bancaire et financier?*, Paris 2017, p. 11; K. Zacharzewski, *Bitcoin jako przedmiot stosunków prawa prywatnego*, "Monitor Prawniczy" 2014, no. 21, p. 1132.

[12] A. Zalcewicz, *Human Nature versus Financial Market Law Norms – Behavioural Factors in the Process of Enacting Financial Market Regulations*, "Financial Law Review" 2020, vol. 18(2), p. 48.

[13] B. Fages, *Le processus de formation du contrat (Rapport français)*, [in:] *La réforme du droit des obligations en France, 5e journées franco-allemandes*, eds. R. Schulze, G. Wicker, G. Mash, D. Mazeaud, Paris 2015, p. 41.

[14] F. Chénedé, *La cause est morte… vive la cause?*, "Contrats Concurrence Consommation" 2016, vol. 4–5, pp. 21–22.

However, before a detailed analysis of the issue of decausalization, it is worth mentioning other assumptions of the reform, the effect of which was to increase the attractiveness of French law in the framework of supranational competition of legal systems, especially in the context of transnational transactions, that are one of the characteristics of modern on financial markets. In this regard, we should pay attention to the simplification of the rules relating to the terms of the contract's validity, in particular the ability to conclude it, representation and the content of the contract itself. It is worth noting that for this purpose, the concept of the subject of the contract was removed from the code regulation and replaced with the concept of the content of the contract, which is more understandable for the average recipient. In the latter case, the report of the President of the French Republic emphasizes the importance of information obligations, abusive clauses and provisions allowing to sanction entities that take advantage of the weakness of the other party of the contract.[15] It was also important from the point of view of applying the law of contractual obligations to the financial market to specify the provisions regulating issues of the interpretation of the contract, with particular emphasis on the rules of the so-called adhesion contracts.[16] In this regard, following the example of the common law system, the role of the courts was significantly increased, which gained far-reaching powers to change the contract in a situation where the conditions that accompanied the conclusion of a given legal relationship were disrupted. The new French Civil Code, unlike the previous version, also regulates issues relating to the duration of the contract, in particular by prohibiting outright perpetual obligations and specifying in detail the regulations of conditional, fixed, cumulative, alternative, facultative and joint obligations. It has also been modified the wording of the provisions on the burden of proof, legal presumptions and the conditions for accepting factual evidence and legal evidence.[17]

It is worth noting that the process of decausalization of legal transactions, despite its literal translation, is not leading to the elimination of the case at all, but only to the removal of this concept from the normative regulations. Thus, the causa ceased to be a necessary element of the contractual relationship, which may prove crucial for the legal classification of many contracts concluded on the financial market and based on the purpose or motive of a given contract. The literature points to the key role of Article 1162 of the French Civil Code, which states that a contract should not introduce exceptions to public policy, neither through its content nor through its purpose, regardless of whether the parties knew about this fact at the time of conclud-

[15] Rapport au Président de la République, *Relatif a l'ordonnance no. 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, Paris 2016, p. 3.

[16] The concept of *contrats d'adhésion* was also developed in France by the lawyer R. Saleilles. See more F. Chénédé, *Le contrat d'adhésion de l'article 1110 du Code civil*, "La Semaine Juridique" 2016, vol. 27, p. 776.

[17] M. Lemonnier, *Zmiany…*, pp. 175–176.

ing the contract.[18] In this article, we can observe the reference to the conflict-of-law construction of the principles of public policy, that results in a right to choose either the construction of causa (basis of legal relationship) or the construction of consideration (goal of legal relationship). We can also read that such a reform of the Civil Code may be considered as the French legislator's response to the globalization process – that is also one of the characteristics of the modern financial market.[19] Of course, it is worth noting that the principle of causality in Polish law does not have a strictly normative nature but is present in an intermediary way in the norms, making the validity of a legal act dependent on its content and purpose, contained especially in Articles 58 and 353[1] of the Polish Civil Code.[20] However, we should not ignore the fact that the principle of general causality of legal acts was in its subjective version inspired by the old French model.[21] In this aspect, we should not exclude the possible future interaction in this field, this time in relation to the new French model, that results from the reform of the Civil Code from 2016.

The use of updated civil regulations adapted to the modern economy could increase the efficiency of legal regulation. In this context, removing the legal constructions that are hard to define (such as causa or convention) may be another step of the process that will lead to a significant simplification of the structure of the civil regulation not only in France but also in other at least European countries.

CONCEQUENCES OF DECAUSALIZATION FOR FINANCIAL MARKET

It was also important from the point of view of applying the law of obligations on the financial market that one of the motives for the decausalization of legal acts emphasized in the French doctrine was also to ensure an appropriate level of legal security.[22] The basic element of legal security was the postulate to remove from the content of the Civil Code many historical concepts and constructions which, apart from their mentioning in the Code, have not been or are not clearly defined. An example of such constructions was also the concept of causa that is the subject

[18] Original version of Article 1162: "Le contrat ne peut déroger à l'ordre public ni par ses stipulations, ni par son but, que ce dernier ait été connu ou non par toutes les parties".

[19] M. Mariański, *Problematyka regulacji…*, p. 147.

[20] In details, see K. Czub, *Art. 353[1]*, [in:] *Kodeks cywilny. Komentarz aktualizowany*, eds. M. Balwicka-Szczyrba, A. Sylwestrzak, LEX/el. 2024.

[21] M. Wrzołek-Romańczuk, *W stronę pragmatyzmu – między koncepcją kauzy a doktryną consideration*, [in:] *Między ideowością a pragmatyzmem – tworzenie, wykładnia i stosowanie prawa. Księga jubileuszowa dedykowana Profesor Małgorzacie Gersdorf*, eds. B. Godlewska-Bujok, E. Maniewska, W. Ostaszewski, M. Raczkowski, K. Rączka, A. Ziętek-Capiga, Warszawa 2022, p. 1142 ff.

[22] F. Ancel, B. Fauvarque-Cosson, *Le nouveau droit des contrats*, Paris 2019, pp. 97–98.

of this paper. In consequence, as the financial market is a place where new constructions are being created, the fact that they do not have to contain obligatory reference to causa may accelerate their development and may not constitute some preliminary limits to their construction and development. Thus, the current wording of Article 1128 of the French Civil Code states that only three elements are necessary for a contract to be valid: a declaration of will by the parties, a contractual capacity and a certain and lawful content. Thus, the absence of the word "causa" in the content of the amended Civil Code means that this element does not have to, but may, occur within a given obligation relationship, and its absence does not automatically result in the invalidity of a given relationship.[23]

It is worth to underline that the intentional omission of the causa in the content of the French Civil Code was also an expression of the next stage of strengthening the role of jurisprudence by the French legislator, which may be important for transactions concluded on the financial market, dominated by practice and soft-law norms.[24] The approach described above somehow relieves the need to constantly update the provisions of the Code, because it is the jurisprudence and doctrine that will be responsible for specifying the statutory regulations, and consequently also for ensuring the broadly understood legal security. Thus, it cannot be ruled out that the requirement of causa will be introduced by the jurisprudence as a necessary element of selected contractual transactions, while in relation to other such a condition will not be formulated.

The decausalization process is also presented by some doctrine representatives as an element that may potentially increase the attractiveness of a given legal system.[25] Also, this process may be one of the elements that will realize the postulate of the adaptation or subsidiary use of civil law constructions by the financial market authorities.[26] Contractual obligations constitute the core of economic processes, primarily from the point of view of the global and cross-border markets.[27] Considering the quite significant link between financial markets and the common law system, it is the difference between the concept of causa (a legal basis) in the continental system and the concept of consideration (purpose of the contract) in

[23] D. Mazeaud, *Présentation de la réforme du droit des contrats*, "Gazette du Palais" 2016, vol. 8, p. 16.

[24] Z. Ofiarski, *Rola soft law w regulacji rynku finansowego na przykładzie rekomendacji i wytycznych Komisji Nadzoru Finansowego*, [in:] *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, eds. A. Jurkowska-Zeidler, M. Olszak, Warszawa 2016, p. 137.

[25] F. Chénedé, *La cause est morte…*, p. 21.

[26] M. Mariański, *Problematyka regulacji…*, p. 309.

[27] M. Lemonnier, *Droit des marchés financiers en Pologne et le contrat*, [in:] *La réforme du droit des contrats en France – réflexions de jurists européens*, eds. M. Lemonnier, R. Schulze, D. Skupień, Łódź 2019, p. 153.

the Anglo-Saxon system that could be an obstacle to recognizing many new forms of contractual obligations created by the practice.

The potential consequences of decausalization on the financial market may also be related to the broader application of the other civil law construction by the users operating on the market. The above statement is related to the fact that abandoning causa as necessary requirement will allow not only to eliminate the basic difference between the continental and Anglo-Saxon systems, but also to open the EU contract law to many new legal constructions based on the common law principles.

If we take the example of the influence of decausalization on the definition of financial instruments, that will be analyzed in detail in the next part of the study, it could in theory help to cover these instruments by the traditional civil regulations. Namely, in order not to create new regulations related to financial instruments we could use the already existing principles of obligations law. In the other words, the substantive validity of a contract involving financial instruments, especially with its cross-border nature, will be related either to the existence and validity of causa, or to the existence and validity of the consideration, depending on the nature and on the character of a given legal relationship. The above may contribute to the further development of the contractual concept of financial instruments or financial assets by considering them to be classified as contractual obligations and to apply selected principles of contract law. Thus, many legal constructions, characteristic of modern financial markets, such as derivative rights (like option, swap, forward, future contracts) could be analyzed through the prism of contract law.[28] This would increase the private law protection of the parties to these contractual obligations. Thus, on a cross-border basis, decausalization increases the attractiveness of a given legal system and makes it more competitive and potentially more often chosen by parties exercising the freedom to choose the law under conflict of law regulations. In this aspect, according to Article 3 of Regulation 593/2008 related to law applicable to contractual obligations[29] a whole contract or only its part may be governed by the law chosen by the parties, that they can manifest expressly or it can clearly result from the circumstances of the case.[30] In this aspect, the newest publications are even considering the possibility of application of the Rome I regulation, designed for contractual obligations, to the new category of crypto-assets,[31] that were regulated

[28] A. Jakubiec, *O zasadności kodyfikacji niektórych umów zawieranych na rynku kapitałowym*, [in:] *Instytucje prawa handlowego w przyszłym kodeksie cywilnym*, eds. T. Mróz, M. Stec, Warszawa 2012, p. 479.

[29] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177/6, 4.7.2008).

[30] S. Lerman-Balsaux, *Wybór prawa dla zobowiązań umownych na gruncie rozporządzenia Rzym I 2007*, Warszawa 2022, pp. 167–168.

[31] M. Mariański, *Reflections on the Possible Application of Rome I Regulation to Obligations Related to Crypto-Assets*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2024, no. 4, p. 23 ff.

recently by the European Union[32] and generated international discussion about this new type of financial market assets.[33]

EXAMPLES OF POSSIBLE INTERACTION WITH DECAUSALIZATION PROCESS IN POLISH AND FRENCH LAW

A good example of the possible implications of the decausalization process may be given in both Polish and French law on the example of the definition of financial instrument in these countries. The choice of given subject of analysis is related to the fact that basically contractual character of financial instrument makes this institution sensitive to any changes in civil law concepts, which include also the status of causa. Another justification for the choice of these two countries for comparative analysis is related to the fact that the Polish capital market was modeled on French law in the early stages of the transformation in the 1990s.

The changes related to the concept of financial instrument were mainly related to the process of dematerialisation that may be considered as an early stage of today's digital evolution and that initiated a doctrinal discussion in that field about the new status of these assets.[34] In France, this process was started in the early 1980s by Act no. 81-1160 of 30 December 1981 and Decree no 83-359 of 2 May 1983.[35] The latest changes and amendments from 2016 have updated the definition of financial instrument contained in French Monetary and Financial Code (Fr. Code monétaire et financier) and the definition of financial instruments.[36]

The provisions of the Monetary and Financial Code divided the concept of financial instrument into two main categories: financial titles (Fr. *titres financiers*) and financial contracts (Fr. *contrats financiers*). Both types of instruments have a contractual nature that is the reason why a possible application of the concepts coming from civil law can be considered as applicable, including the phenomenon of decausalization. The French regulations introduced a classification due to the form of instruments that is close to the market requirements, establishing the principle of

[32] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No. 1093/2010 and (EU) No. 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (OJ L 150/40, 9.6.2023).

[33] D.A. Zetzsche, J. Sinnig, A. Nikolakopoulou, *Crypto Custody*, "Capital Markets Law Journal" 2024, vol. 19(3), p. 207; F. Krysa, *Taxonomy and Characterisation of Crypto Assets in Private International Law*, [in:] *International and Comparative Business Law and Public Policy*, eds. A. Bonomi, M. Lehmann, S. Lalani, Leiden 2023, p. 157.

[34] M. Osiak, *Czy dematerializacja czyni pojęcie i klasyczną koncepcję papieru wartościowego anachronizmem?*, "Przegląd Prawa Handlowego" 2022, no. 1, p. 24.

[35] M. Lemonnier*, Europejskie modele instrumentów finansowych. Wybrane zagadnienia*, Warszawa 2011, p. 38.

[36] Ordinance No. 2016-520 of 28 April 2016 on money bills.

freedom of issue of financial securities as soon as they fall into one or another defined category. The division of financial instruments into "financial titles" and "financial contracts" is fundamental from the logical point of view and excludes the possibility of leaving a certain group of securities outside the listed categories.[37]

The main provisions related to financial instruments in the French Monetary and Financial Code are listed in the section starting with Article L211 and next. The first and main article of this section, namely Article L211-1, states that financial instruments are financial titles and financial contracts.[38] In the second point of this regulation, it is specified that the term of financial titles refers to equity securities issued by joint-stock companies, debt securities and units or shares of undertakings for collective investment.[39] The third point of Article L.211-1 adds, dispelling any doubts in this matter, that derivative instruments, the list of which is included in a separate decree, are also considered as financial contracts. This is particularly important as the French legislator stated clearly that bills of exchange and checks are not considered as financial instruments (point IV of Article L.211-1), which is related to their non-dematerialized nature.

The legal definition of financial contracts, given in Article L211-35 of the Monetary and Financial Code, may be considered, in the author's opinion, as compatible with decasualization process. This is due to the fact that this definition states that no one may, in order to evade the obligations resulting from financial contracts, avail himself of Article 1965 of the Civil Code, even though these operations would be resolved by the payment of a simple difference.[40] It is worth noting that we have an express link to civil law regulations, in this case related to Article 1965 of the Civil Code, which states that the law does not grant any action for a gambling debt or for the payment of a bet. Also, we can observe that the way financial contracts are presented mostly refers to some sort of contractual obligation, without describing its causa. Another key instruction, contained in the Monetary and Financial Code, can be found in Article L211-14. This article points to negotiability (Fr. *négociabilité*) as a basic feature of all financial instruments, emphasizing the French concept of negotiable titles (Fr. *titres négociables*).[41] Additionally, Article L211-15, that is

[37] M. Lemonnier, M. Mariański, J.J. Zięty, *Ewolucja koncepcji papieru wartościowego w prawie polskim i francuskim*, "Przegląd Prawa Handlowego" 2011, no. 8, p. 47.

[38] "Les instruments financiers sont les titres financiers et les contrats financiers".

[39] "Les titres de capital émis par les sociétés par actions; Les titres de créance; Les parts ou actions d'organismes de placement collectif".

[40] "Nul ne peut, pour se soustraire aux obligations qui résultent de contrats financiers, se prévaloir de l'article 1965 du Code civil, alors même que ces opérations se résoudraient par le paiement d'une simple différence".

[41] M. Lemonnier, M. Mariański, *Francuska koncepcja tytułu zbywalnego (titre négociable) a regulacje rynków finansowych*, [in:] *Regulacje finansowe. FinTech – nowe instrumenty finansowe – resolution*, ed. W. Rogowski, Warszawa 2017, pp. 52–53.

emphasizing full dematerialization, also underlines the aspect of transferability of rights from financial instruments, and specifies that titles are transferred by transfer from one account to another or by recording a command in a shared electronic system.[42] This regulation is detailed by Article L.211-16, that prevents the return of financial titles purchased in good faith from the holder of a properly recorded account of these titles or from a person who has been correctly identified and thus authenticated in the electronic registration system. Another regulations refer to the method of transferring rights from financial instruments. It follows from Article L.211-17 and next that the transfer of ownership of titles is related to their entry in the relevant account of the buyer or the registration of the titles for the benefit of the buyer by submitting an appropriate instruction in a shared electronic system. A direct reference to the law of obligations and a subsidiary application of the relevant provisions of the Civil Code is also mentioned in Article L.211-17-1, where the French legislator uses the terms of the seller and buyer of financial instruments. The above-mentioned regulations are showing that the modern financial instruments, at least in French law, does not have to contain an expressly visible causa, but have to enter into the regulatory framework described in the Monetary and Financial Code. What is also important, the French legislator is trying to operate on technologically neutral language, in order to allow the possible adaptation of current legal regulations to the new types of financial instruments that may develop in the future as a result of technological progress.

As for the definition of financial instrument in Polish law, we have to admit, that due to the EU directives,[43] there should not be an important difference with French law. However, some minor differences exist, mainly because directives, unlike regulations, are not directly applicable in the Member States, as they only set a framework within which national regulations should operate.

As a consequence, the Polish law also refers to the concept of financial instrument as a main category and is also marked by the dematerialization process.[44] Another common point is that in both Polish and French law, we cannot find a classical material definition of financial instruments, that opened in both countries a doctrinal discussion in this field.[45] Despite the fact that in Poland we have three legal acts that are referring to the definition of financial instrument (the Act on trading in financial instruments, the Civil Code and the Accounting Act[46]), only the definition

[42] H. Causse, *Droit bancaire et financier*, Paris 2016, p. 356.

[43] Especially 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, 12.6.2014).

[44] J. Jastrzębski, *Pojęcie papieru wartościowego wobec dematerializacji*, Warszawa 2009, p. 78.

[45] T. Komosa, *Papiery wartościowe*, "Przegląd Prawa Handlowego" 1995, no. 4, p. 1

[46] Act of 29 September 1994 on accounting (consolidated text, Journal of Laws 2023, items 120, 295, as amended).

coming from the Accounting Law has all the elements needed to be considered as a complete one. This statement results from the fact that the amendment of the Civil Code introduced by the Act of 28 July 1990,[47] that introduced to this regulation Title XXXVII "Transfer and Securities", has a very general and abstractive nature. The second regulation, the Act of 29 July 2005 on trading in financial instruments,[48] reduces the concept of a security to an element of the meaning of the concept of a financial instrument. The third act in which the Polish legislator raises the issue of the legal nature of financial instrument is the Accounting Act, and especially the Announcement of the Minister of Development and Finance of 25 January 2017 on the consolidated text of the Regulation of the Minister of Finance on detailed rules for recognition, valuation methods, the scope of disclosure and the method of presenting financial instruments.[49]

The above-mentioned Regulation of the Minister of Finance provides a very interesting way of defining several types of financial instruments. For example, in § 3 (4) of this Regulation we can find a definition of derivative instruments that have to meet three conditions in order to be qualified as part of category of financial instruments. Namely they must have a value that depends on the change in the value of the underlying instrument, their the acquisition does not involve any initial expenses or the net value of these expenses is low compared to the value of other types of contracts whose price is similarly affected by changes in terms market, and finally their settlement will take place in the future.

Another type of definition is given in relation to the different types of derivative instruments. For example, in § 3 (5) the forward contract is defined as an agreement requiring one party to deliver and the other party to collect assets in a specified amount at a specified future date and at a specified price, agreed at the time of the contract conclusion. On the other hand, in § 3 (7) the option is defined as contract where an entity acquires the right to buy – in a form of option to buy (call option) or option to sell (put option) on the underlying asset at a predetermined price and time.[50] Another example is the definition of swap contained in § 3 (8), where this type of financial instrument is described as an agreement of replacement (conversion) of future payments on terms predetermined by the parties.

What we can observe in the definitions given by the Polish legislator in the regulation specifying the dispositions of the Accounting Act, is that they are all disposed of classical causa and are focusing either on the goal (consideration) of a given con-

[47] Act of 28 July 1990 amending the Act – Civil Code (Journal of Laws 1990, no. 55, item 321).

[48] Act of 29 July 2005 on trading in financial instruments (consolidated text, Journal of Laws 2023, items 646, 825, as amended).

[49] Journal of Laws 2017, item 277.

[50] A. Jakubiec, *Opcja jako instrument finansowy rynku kapitałowego. Analiza cywilnoprawna*, Łódź 2014, p. 131.

struction. This may be an indication that on the financial market the decausalization process is a fact, and that especially in the field of financial instrument law we do not need a classical causa to recognize some titles as legal objects of trade.

In addition, the above-mentioned differences in the way that financial instruments are regulated in Polish and French law have already had a practical implication. Namely when a new category of assets appeared in the form of virtual currencies, the French law was more adapted to apply the existing provisions to these structures than Polish law.[51]

CONCLUSIONS

We can observe a successive change in the character of causa, not only in French civil law regulations but also in the intermediary way in other specialisations like financial market law, which very often refers to private law regulations. Financial market law is also a specific interdisciplinary part of financial law where challenges related to implementation of new technologies and new legal constructions are very frequent.[52]

In the author's opinion, the analysis in the present article showed that there may be an interconnection between the phenomenon of decausalization observed in the French legal system (civil law) and financial market law regulations. This interconnection is related to the fact that the lack of obligatory existence of causa, as presented in the French civil law, may be an impulse for legal qualification of new forms of financial instruments that will appear on the market. This process of decasualization, that was not clearly recognized and described before, is particularly important as in selected provisions related to the definition of financial instrument, both in French and in Polish law, we can observe the direct or indirect references to civil law concepts. In the Polish doctrine, these references remain not clear, as there is a discussion related to the issue when a contract becomes a financial instrument and when it cannot be considered as such an asset.[53]

The impact of the presented reflection related to the decausalization process, in particular in the discipline of legal sciences, may result in a further reflection related to the adaptation of the legislator to a current technological revolution, which is happening much faster than originally expected. In the past, we have observed

[51] M. Mariański, *Problematyka kwalifikacji prawnej wirtualnej waluty we Francji*, "Państwo i Prawo" 2015, no. 10, p. 92.

[52] A. Zalcewicz, *New Technologies in the Control of Public Finances and Building Public Confidence in the State*, "Białostockie Studia Prawnicze" 2023, vol. 28(2), p. 23.

[53] A. Chłopecki, *Umowa jako instrument finansowy*, "Przegląd Prawa Handlowego" 2022, no. 10, p. 4.

a lot of discussions in that field and a lot of problems related to the constructions that did not have all the elements of a classical definition, like in the case of the lack of the issuer within the construction of virtual currencies. Especially, in the author's opinion, the lack of obligatory causa, as a new legal approach, may be considered as a possible way of the realization of the principle of technological neutrality of the law,[54] that is particularly important in the field of modern financial market regulations. The described process may also be an impulse for further studies and analyses in this field, related to the introduction of a direct link between the financial market law and civil law regulations. In other words, in the Polish Financial Instruments Trade Act a direct link to the provisions of Civil Code related to contractual obligations may be considered as one of possible solutions. The above will allow for the direct use within the financial market law, on a *mutatis mutandis* basis, of the existing civil law concepts, without the need to create new regulations in this matter that will only deepen the phenomenon of regulatory inflation within the financial markets, both at the national and European level.

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[54] For more on the neutrality of law, see M. Chmieliński, M. Rupniewski, *Justification of Legal Change: In Search for a Model of Neutrality*, "Studia Iuridica Lublinensia" 2021, vol. 30(5), p. 124.

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ABSTRAKT

Celem artykułu jest weryfikacja tezy o możliwym powiązaniu obserwowanego we francuskim systemie prawnym zjawiska dekauzalizacji z regulacjami prawa rynku finansowego. Pojęcie dekauzalizacji zostało wyeksponowane i zaakcentowane głównie w związku z jedną z największych nowelizacji francuskiego Kodeksu cywilnego wprowadzoną w 2016 r. i jest rozumiane jako stopniowe wypieranie postrzegania kauzy jako niezbędnego elementu stosunku prawnego. Odmienne podejście do istnienia kauzy można uznać za koncepcję, którą można byłoby zaadaptować w prawie rynku finansowego z uwagi na opisany zarówno w prawie polskim, jak i w prawie francuskim sposób regulacji definicji instrumentu finansowego. Regulacje te pośrednio lub bezpośrednio odwołują się do prawa zobowiązań, co czyni je wrażliwymi na potencjalne zmiany koncepcyjne w tej materii. Stosowana przez autora metodyka związana jest z funkcjonalnym podejściem do metody prawnoporównawczej, historyczno-opisowej i dogmatycznej, ze szczególnym uwzględnieniem regulacji prawa francuskiego. Przyjęta metoda pozwoli zrozumieć opisywane regulacje w znacznie szerszym kontekście, gdyż na poziomie ponadnarodowym. Potencjalne szersze zastosowanie koncepcji dekauzalizacji może mieć istotne znaczenie zwłaszcza na rynku finansowym, czyli w bardzo specyficznych ramach prawnych naznaczonych przez wpływ systemu *common law* i znaczną obecność reguł *soft law*. Fakt, że koncepcja dekauzalizacji nie była w prawie polskim przedmiotem głębszej analizy, powoduje, że artykuł może być traktowany jako przedstawienie tej koncepcji, a także może stanowić impuls do dalszych interdyscyplinarnych badań i interesujących wniosków. W szczególności postulat odwoływania się do koncepcji prawa zobowiązań na rynku finansowym może stanowić alternatywę dla tworzenia nowych regulacji w tej materii i być jednym z elementów pozwalających na adaptację regulacji prawnych do dynamicznego postępu technologicznego.

Słowa kluczowe: kauza; prawo francuskie; prawo rynku finansowego; instrument finansowy