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# INSTITUTIONAL AND LEGAL ARRANGEMENTS FOR THE MACRO- PRUDENTIAL SUPERVISION ACTIVITIES OF THE FINANCIAL STABILITY COMMITTEE

**ABSTRACT:** The article is devoted to the Financial Stability Committee, which bridged the institutional gap that emerged after the 2008 crisis. The purpose of the paper is to analyse its institutional and legal capacity for macro-prudential supervision. The study presents its contemporary organisation, highlighting its internal stratification and the decision-making processes. An important issue addressed in the study is the role of the NBP in the composition of the Committee. This is followed by an examination of the law-making capacities of the Financial Stability Committee (FSC), which are limited. The Committee does not have the authority to issue generally and internally applicable legislation. The final part of the article is dedicated to the Committee's ability to influence the effective stabilisation of the financial system. It employs soft law instruments for this purpose, including positions, recommendations and opinions. In the conclusion, the author presents arguments for and against the hypothesis put forward.

**Keywords:** institutions of economic administration, macroprudential supervision, financial system regulation, crisis

## INTRODUCTION

The financial crisis that took place in 2008 demonstrated significant deficiencies in macro-prudential supervision. It also debunked the paradigm that adequate micro-prudential supervision and competently conducted monetary policy could safeguard the stability of the financial system. There had been too much faith in the capability of the financial system to take corrective action. The existing regulatory gaps therefore, required immediate follow-up. Although central banks had signalled this much earlier, the problem was not addressed. In response to the situation, the European Union (EU) established the European Systemic Risk Board (ESRB) in 2011. Individual countries also took steps to introduce institutions responsible for macro-prudential supervision.

The study will examine how the Financial Stability Committee (FSC) is organised, its legislative capabilities and its powers in the field of macro-prudential supervision. The purpose of this article is to analyse the institutional-legal capacity of the FSC for macro-prudential supervision. In Poland, the legislator has addressed the regulatory gap by assigning the responsibility for macro-prudential supervision of the financial system to the FSC. The stated objective is pursued from the perspective of political and administrative sciences, and the research methods are subordinated to this. The following methods were used in the study: the institutional-legal method, the system method and the decision method. The institutional-legal method involved a rigorous examination of the legal acts regulating the functioning of the FSC. Its scope extends the field of research to the sphere of macro-prudential supervision regulations. The system method made it possible to show the final shape of the FSC as well as to examine the interconnections between the entities that comprise it. The decision method was used to investigate the law-making capacity held by the Committee and its impact on the financial system in Poland.

The hypothesis of the study is that the institutional and legal arrangements for the functioning of the FSC in the field of macroprudential supervision, despite some limitations, offer the possibility of having an effective impact on stabilising the financial system. The Committee is composed of all key institutions forming the state security system. The manner in which the FSC adopts its resolutions strengthens the position of the National Bank of Poland (NBP). The autonomous *soft law* instruments applied by the Committee have an indirect stabilising effect on the financial system.

The research questions to verify the hypothesis are as follows: Is the current shape of the Committee optimal for the exercise of macroprudential supervision? How is the leading role of the NBP ensured? What does the rotating chairmanship of the Committee bring? What is the nature of the division of tasks? What are the Committee's law-making capacities? What instruments does the FSC use to influence the stabilisation of the financial system? How are these instruments strengthened?

## ORGANISATION OF THE FINANCIAL STABILITY COMMITTEE

Models for the functioning of macro-prudential supervision come in two forms. The first involves oversight responsibility by the country's central bank, while the second consists of a collegiate body operating within or outside the structures of the central bank.<sup>1</sup>

Ultimately, the Law on Macroprudential Supervision and Crisis Management, passed in Poland in 2015,<sup>2</sup> did not provide for the creation of a Systemic Risk Board as it had been included in the drafts of the law. Instead, it increased the capacity of the existing FSC. The newly established Committee is still a collegiate body. The legislator, therefore, did not take the opportunity to create a model in which the framework of its structure would provide for exclusive responsibility for macro-prudential supervision to the central bank. The collegial model of macro-prudential supervision introduced by the Law operates outside the country's central bank. Under this arrangement, the body responsible for macro-prudential supervision should include representatives of the key institutions comprising the financial safety net.<sup>3</sup> This was the case with the appointment of the members of the FSC. It is composed of the President of the NBP, the Minister of Finance (MF), the Chairman of the Financial Supervision Authority (FSA) and the President of the Management Board of the Bank Guarantee Fund (BGF). This composition is obligatory. Optionally, individuals with adequate knowledge or experience in the tasks assigned to the Committee may participate in the Committee's deliberations in an advisory capacity.

In principle, the final shape of the Committee aligns with the *Recommendations on the macro-prudential mandate of national authorities* issued by the European Systemic Risk Board (ESRB).<sup>4</sup> They were adopted by the Member States, including Poland, in 2015 into their internal legislation, despite their non-legally binding nature. They provided a model for the creation of institutional and legal solutions for macro-prudential supervision in Poland. Countries adopting the Recommendations on the macro-prudential mandate into their legislation, in most cases, followed this regulation as a normative model for national macro-prudential supervisory authorities.<sup>5</sup>

By introducing an obligatory composition of the Committee, the law in question ensures cooperation between public law entities that, by their nature, should collaborate

<sup>1</sup> I. Kras, "Rozwiązania instytucjonalne w polityce makroostrożnościowej Unii Europejskiej," in I. Kras (ed.), *Zarządzanie gospodarcze Unii Europejskiej w drugiej dekadzie XXI wieku*, Warszawa 2016, p. 77.

<sup>2</sup> *Act of 5 August 2015 on Macroprudential Supervision of the Financial System and Crisis Management in the Financial System*, Journal of Laws 2015, item 1513.

<sup>3</sup> See B. Scheubel, L. Stracca, *What do we Know about the Global Financial Safety Net? Rationale, Data and Possible Evolution: No. 177, September 2016*, European Central Bank 2016, pp. 4-6.

<sup>4</sup> *Recommendation of the European Systemic Risk Board of 22 December 2011 on the Macro-Prudential Mandate of National Authorities*, Official Journal of the European Union, ESRB/2011/3, 2012/C 41/01.

<sup>5</sup> M. Fedorowicz, "Osiągnięcie konwergencji nadzorczej mikroostrożnościowej i makroostrożnościowej w prawie rynku finansowego Unii Europejskiej," *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, vol. 80, no. 4 (2018), p. 165.

in performing the tasks assigned to them. Experience shows that, in practice, cooperation between the President of the NBP, the Ministry of Finance and the Chairman of the Financial Supervision Authority has been unsatisfactory.<sup>6</sup> The Polish legislator, therefore, considered it necessary to make these entities cooperate more effectively with each other for the stability of the financial system in Poland and established the FSC. The law establishing the Committee provides for effective cooperation between its members regarding the implementation of the crisis management objective. Such a provision does not exist in the case of the implementation of the macro-prudential objective.<sup>7</sup> However, it seems evident that effective cooperation is also required in the implementation of this objective, despite the absence of a relevant provision. For the sake of clarification, the wording on effective cooperation should also be added for the macro-prudential objective.

The inclusion of the Financial Ombudsman (FO) in the structure of the Committee, which has become a constituent institution of the financial safety net, is still to be considered. He or she may optionally participate in the debates of the FSC but is deprived of voting rights. Adverse developments in the financial market that undermine the security of customers have a considerable impact on the stability of the financial system and may entail systemic risks. The FO is informed of such activities. The information and insights arising from the FO's handling of customer complaints are crucial for the formulation of conclusions and observations of a general nature, which could be useful to the Committee in issuing positions and recommendations.<sup>8</sup>

In the obligatory composition presented, the Committee debates, as the title of the Act<sup>9</sup> indicates, on the implementation of two objectives: macroprudential supervision and crisis management. As a result, each objective has been assigned specific tasks. This has led to an internal stratification of the FSC. The President of the NBP has been granted a leading role in macro-prudential supervision, while the Ministry of Finance is responsible for crisis management. The newly created institution is, therefore, hybrid in nature. Consequently, the NBP handles the supervision tasks, and the management tasks are carried out by the MF.

Macro-prudential supervision is closely linked to crisis management. Above all, it has a strong preventive character, although in some cases it may serve a corrective function. Crisis management is a strategic action aimed at maintaining or restoring lost financial stability. It is, therefore, corrective or corrective-preventive in nature. As a result of these interrelationships, the Committee's actions will be complex, linking preventive measures to corrective actions.<sup>10</sup>

<sup>6</sup> See I. Kraś, *Rola Narodowego Banku Polskiego w polityce gospodarczej Polski w latach 1997-2010*, Częstochowa 2013, pp. 89-95.

<sup>7</sup> *Act of 5 August 2015 on Macroprudential Supervision...*, Art. 1, Para. 2 and Art. 2, Para. 2.

<sup>8</sup> A. Jurkowska-Zeidler, "Rzecznik Finansowy: nowa instytucja ochrony klienta na rynku usług finansowych," *Gdańskie Studia Prawnicze*, vol. 38 (2017), pp. 363-366.

<sup>9</sup> *Act of 5 August 2015 on Macroprudential Supervision...*

<sup>10</sup> W. Oziębala, *Współczesne tendencje kształtowania się nadzoru bankowego. Nadzór makro- i mikroostrożnościowy*, Warszawa 2020, p. 139.

The division of tasks in the pursuit of the stated objectives may prove vague. Problems may arise not only in theoretical considerations, but also – or especially – in the day-to-day operation of the Committee. This may constitute a conflict factor between the President of the NBP and the MF. In a possible situation concerning an interpretive bias in favour of the MF, the establishment of a leading role for the central bank in macro-prudential supervision becomes purely formal. This creates an opportunity for the MF to pursue policy objectives; however, these are severely limited due to the voting procedure.<sup>11</sup> In the case of the MF chairmanship of the Committee's crisis management deliberations, unanimity among all members is required during voting. In such a situation, there is a *veto* right. This gives the President of the NBP, as well as the other members of the Committee, the ability to reject a crisis management resolution serving ad hoc political objectives. Additionally, the absence of, for example, the President of the NBP at the Committee meeting during the voting prevents the adoption of the resolution. The adoption of resolutions on macroprudential supervision also requires the presence of three Committee members, including the President of the NBP. An additional strengthening of the *primus inter pares* of the NBP within the composition of the Committee is a provision stating that in the case of an equal distribution of votes, the Chairman (i.e., the President of the NBP) has the casting vote.

It also seems that the title of the Act<sup>12</sup> follows the correct sequence starting with macro-prudential supervision of the financial system then pointing to crisis management of the financial system. This is the correct order because supervision is preventive and precautionary in nature and should appear first, while management is a follow-up activity. It occurs in the case of a crisis (i.e., when a systemic risk becomes a reality). Dividing the name of the Act into two parts was also a result of the legislator's intention to highlight the role of the authorities responsible for supervision and management (i.e., the NBP and the MF, respectively).

The mandatory composition of the FSC incorporates the principle of cooperation between the key public law entities forming the state's financial security network, namely the NBP, MF, BGF and FSA. The essence of their activity, which consists of caring for the stability of the financial system, should by its very nature aim at collaboration in the implementation of the tasks assigned to these entities.

Assigning two objectives to the Committee leads to its internal stratification in terms of its substantive resolutions and its technical service, which does not contribute to good organisation. The rotating chairmanship and division of tasks within the FSC create a conflict platform between the President of the NBP and the MF. The arrangement is hybrid in nature. It weakens the *primus inter pares* of the NBP in the composition of the Committee. The voting procedure proposed by the Act limits the potential opportunities for the MF to pursue political objectives while chairing the Committee. On the other hand, the solutions for the adoption of resolutions by the FSC strengthen the position of the NBP in the Committee.

<sup>11</sup> Ibid., p. 140.

<sup>12</sup> *Act of 5 August 2015 on Macroprudential Supervision...*

## LAW-MAKING COMPETENCE OF THE FINANCIAL STABILITY COMMITTEE

The correction of the legal position of the FSC as a result of the enactment of the 2015 Act changes its role in the state's financial system. According to the Act, the Committee has the status of the competent authority for macroprudential supervision and crisis management, making it responsible for supervision and policy in the aforementioned area. It is also a designated body.<sup>13</sup> The competence of the authority has been divided between the Committee itself and the MF. The Committee, as the designated body, is responsible for analysing changes in the intensity of macro-prudential or systemic risks in the financial system that could have serious adverse effects on both the system and the real economy.<sup>14</sup> The MF, on the other hand, has the power to take domestic measures to mitigate changes in the intensity of macroprudential and systemic risks. It tightens general prudential requirements. It addresses, among other things, the level of own funds, the capital conservation buffer, liquidity requirements or risk weights for speculative bubbles relating to the residential and commercial real estate sector.<sup>15</sup> In such a competence arrangement of the competent authority, only the MF has the status of a full competent authority, as it acts within the Committee itself and simultaneously possesses independent powers. The introduction of this distinction is a consequence of the MF's implementation of a regulatory function concerning the entire financial system in Poland.

The Committee does not have law-making competence, which means that it cannot issue acts of universally and internally binding law. The legislator has introduced a closed catalogue of sources of universally binding law in Poland. These include the Constitution, laws, ratified international agreements, regulations and acts of local law.<sup>16</sup> Regulations, according to the constitutional provision, may be issued by designated authorities based on a specific authorisation contained in a law and for the purpose of its implementation. The authorisation should specify the competent authority that may issue a regulation, the scope of matters delegated for regulation and guidelines for the content of the act. However, the body authorised to issue a regulation may not delegate its competence to another body.<sup>17</sup> The Constitution indicates which bodies are authorised to issue ordinances. The President of the Republic of Poland, pursuant to Article 142 of the Constitution, is authorised to issue regulations and ordinances. Another entity is the Council of Ministers (CM), which issues ordinances within the scope and

<sup>13</sup> Ibid., Art. 3, Para. 1 and 2.

<sup>14</sup> *Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on Prudential Requirements for Credit Institutions and Investment Firms and Amending Regulation (EU) No 648/2012*, Official Journal of the European Union, L 176/1, 26.6.2013, Art. 458, Para. 1.

<sup>15</sup> Ibid., Art. 458, Para. 2, Letter D, Para. 5 and 10.

<sup>16</sup> Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws, no. 78, item 483 as amended), Art. 87.

<sup>17</sup> Ibid., Art. 92, Para. 1 and 2.



principles set out in Article 146 of the Constitution and the laws. Similar powers, regulated in Article 148 of the Constitution, are granted to the President of the Council of Ministers (PMC) and the ministers in charge of the branches of government administration. The group of entities authorised to issue regulations, pursuant to Article 213 of the Constitution, also includes the National Broadcasting Council (NBC). Thus, the FSC is not among the listed entities. Consequently, it does not have the power to issue regulations as acts constituting the source of universally binding law.

It is also difficult to classify the Committee as a body issuing internally binding acts. The FSC issues decisions in the form of resolutions. Pursuant to Article 93 of the Constitution of the Republic of Poland, resolutions and orders are internal in nature and may be issued by the CM and PMC. They are only binding on units subordinate to the body issuing these acts. Therefore, the Committee is not among those authorised to issue resolutions. The resolutions that the FSC issues are universally binding and apply to institutions within the financial system. With regard to macro-prudential supervision, they are adopted by open vote, by majority, in the presence of at least three members, including the chairperson. In the event of a tie, the chairperson has a casting vote. Such a solution is due to the fact that the adopted resolutions in the scope presented may be addressed to the competent entities (i.e., institutions forming the FSC). Resolutions on crisis management are adopted in an open vote, unanimously, in the presence of all members of the Committee.<sup>18</sup>

Similarly, the NBP authorities issued resolutions as acts of law.<sup>19</sup> The Constitutional Tribunal (CT) held that the leading role of the NBP as a bank of banks, despite the independence of commercial banks, results in their dependence in the area of monetary policy, allowing it to be described as functional subordination. In this situation, the CT held that organisational subordination should be understood more broadly to include functional subordination. Despite previous doubts, it recognised resolutions of NBP bodies as acts of internal law. In its ruling, the CT also expressed that such a broad understanding of subordination could lead to a distortion of the constitutional concept of internal law.<sup>20</sup> Created by the CT, the functional subordination of the NBP – commercial banks as a form of organisational subordination – has a weak legal basis. On the positive side of the CT ruling, it applies to an entity promoted to constitutional status (i.e., the central bank of the state).<sup>21</sup> It will, therefore, be difficult to translate the case law presented directly into solutions for Polish macro-prudential supervision and to consider the FSC's resolutions as internally applicable law.<sup>22</sup>

<sup>18</sup> *Act of 5 August 2015 on Macroprudential Supervision...*, Art. 12, Para. 1-3.

<sup>19</sup> See I. Kraś, *Rola Narodowego Banku Polskiego...*, pp. 76-81, 104-109, 113-117.

<sup>20</sup> *Ruling of the TK of 28 June 2000 on the Right of the Organs of the National Bank of Poland to Issue Universally Binding Resolutions*, Official Collection of Judgments of the Constitutional Tribunal, Ref. K 25/99, OTK ZU, No. 5/2000.

<sup>21</sup> Constitution of the Republic of Poland..., Art. 227, Para. 1.

<sup>22</sup> M. Fedorowicz, *Nadzór makroostrożnościowy w Polsce*, Poznań 2019, p. 213.

The Financial Stability Committee is not a public administration body and is not competent to issue administrative decisions. Its decisions are not of an authoritative nature and, therefore, it cannot use administrative coercive measures to implement orders or prohibitions addressed to the financial system in Poland. The legislator has not permitted any legal forms that meet the criteria allowing them to qualify as wielding power. The FSC does not have direct powers to issue normative acts or individual administrative decisions addressed to entities operating in the financial system.<sup>23</sup> Due to its law-making arrangements, the FSC has been defined as an analytical and prognostic<sup>24</sup> or otherwise consultative and advisory body.

The FSC is not a tenure body, which means that it can operate indefinitely. Such a solution seems logical as its composition includes representatives of institutions permanently embedded in the institutional arrangements of the Polish financial system. The tenure of individual representatives on the Committee has been ensured by the institutional arrangements for each of the institutions constituting the FSC. This emphasises that it is not the personal dimension of the Committee, but the institutional one. Meetings of the Committee are held on an as-needed basis.

Due to the limited lawmaking capacity manifested in the inability to enact universally and internally binding laws, the position of the FSC is weakened. Entities within the Committee, such as the MF and the Chairman of the KNF, have the ability to exert a firm influence on the financial system in Poland. It would, therefore, appear that the very establishment of the FSC was merely consultative in nature, with the aim of enhancing cooperation between the constituent entities. This is also confirmed by the division of competences as a competent authority between the Committee itself and the MF. In this respect, the FSC as an entity only implements it with regard to macroprudential supervision. The Committee's resolutions also cannot be considered acts of internal law in relation to the CT ruling presented. This is because it is not an institution of a constitutional nature, as is the case with the NBP.

## THE MACRO-PRUDENTIAL SUPERVISION POWERS OF THE FSC

The Financial Stability Committee has an indirect impact on the financial system in Poland. It does not have the power to issue direct acts regulating the activities of this system due to legal considerations arising, in particular, from the Constitution of the Republic of Poland.

The literature describes various divisions of macroprudential instruments.<sup>25</sup> There is, therefore, no single recognised division on this issue. The Committee has

<sup>23</sup> M. Ochwat, "Prawne formy działania Komitetu Stabilności Finansowej," *Przegląd Prawa i Administracji*, vol. 115 (2018), pp. 110-111.

<sup>24</sup> *Act of 5 August 2015 on Macroprudential Supervision...*, Art. 5, Para. 2.

<sup>25</sup> See P. Smaga, "Wpływ procykliczności na sprawowanie nadzoru makroostrożnościowego," *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, vol. 76, no. 1 (2014), pp. 147-159; D. Rosati, "Regulacje makroostrożnościowe a stabilność sektora bankowego," *Bank i Kredyt*, vol. 45, no. 4 (2014), pp. 389-



independent instruments at its disposal that it can use in relation to the financial system. Under the Act, these include positions, recommendations and opinions.<sup>26</sup> They are adopted through resolutions,<sup>27</sup> which should be considered as a form of action of the body exercising macro-prudential supervision in Poland. Positions and recommendations, adopted in the form of resolutions, may be made public in the Official Journal of the NBP or by publishing them on the internet.<sup>28</sup> The distinguished stand-alone FSC instruments can be categorised as instruments *sensu largo* (i.e., soft, indirect effects on the financial system). Nevertheless, they can interact with instruments *sensu stricto* (i.e., those with direct binding force).

Referring to the doctrine of administrative law, the FSC's positions are proposed to be defined as acts of awareness of the existence of a systemic phenomenon, issued as a result of continuous monitoring and analytical activities aimed at identifying it.<sup>29</sup> The positions issued by the FSC are implemented when sources of high systemic risk are identified. The Committee itself determines when such a response is necessary. The Act does not specify the level of systemic risk required to initiate action.<sup>30</sup> Thus, the legislator has left some discretion to the Committee in this respect. The position presented by the FSC can be addressed not only to the financial system, but also its environment. Therefore, the scope of influence of this instrument is wide. At the discretion of the FSC, there is also a need to communicate the type of source of systemic risk, the extent of its impact and the foreseen effects on the financial system. The addressees of the positions under the Act are the relevant entities, which include those that make up the FSC, namely the NBP, the Minister of Finance, the KNF, the BGF and the entities that make up the financial system or part of it, including those that manage products or use market infrastructures.<sup>31</sup> They can be divided into two groups. The first consists of the institutions responsible for macro-prudential supervision, which are part of the financial safety net established by the Polish legislator. The second group comprises the participants in this system and its environment (i.e., businesses). It follows that the Committee's positions are directed towards itself and, at the same time, it is responsible for presenting them. As can be seen from the outlined division of addressees, positions are addressed to both the public and private spheres, such as commercial banks.

The positions that the Committee takes when sources causing systemic risk are identified are based on its powers. It is not an absolute obligation under the regulatory arrangements. The Act only states that 'the Committee may take a position'.

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396; M. Fedorowicz, *Nadzór makroostrożnościowy...*, pp. 259-260; W. Oziębala, *Współczesne tendencje kształtowania...*, p. 162.

<sup>26</sup> *Act of 5 August 2015 on Macroprudential Supervision...*, ch. 4 and Art. 39.

<sup>27</sup> *Information on the Results of the Audit: Ensuring the Stability of the Banking Sector*, NIK (Supreme Audit Office), Warszawa 2018, p. 24.

<sup>28</sup> *Ibid.*, Art. 12, Para. 5.

<sup>29</sup> M. Ochwat, "Prawne formy działania Komitetu...", pp. 115-116.

<sup>30</sup> W. Oziębala, *Współczesne tendencje kształtowania...*, p. 165.

<sup>31</sup> *Act of 5 August 2015 on Macroprudential Supervision...*, Art. 17.

Consideration should be given to replacing it with the wording 'is obliged to take'. This would then create an obligation for the FSC to take its position.

The positions issued by the FSC are of an informative nature, organising and explaining the possible effects of the observed risks that may arise in the financial system.<sup>32</sup> This nature of positions allows participants in the financial system to be prepared in the event of intervention. Thus, positions should take precedence over other legal forms that have a binding character. This is particularly relevant for the calibration of instruments, which can be shaped by trial and error by the regulator. The consequences of such decisions include adjustment actions by financial system actors and higher costs of access to financial services. Therefore, proper communication and the establishment of predictable rules by the FSC are crucial for positions.<sup>33</sup>

It is clear from the statutory provision that the Committee, when issuing a position, can only present specific information on sources of systemic risk. Thus, it is not a statement of intent but rather a statement of knowledge. In the position statement, the Committee does not resolve anything; it does not impose any obligation to apply the instrument. It is used as information about the source of systemic risk and its possible effects on the financial system. However, the entity to which the position is addressed should take action to reduce the growing systemic risk and, consequently, eliminate it.<sup>34</sup> In the absence of precise regulations, the intensity of an entity's commitment to a position may vary. Consequently, there may be differing reactions within the financial system regarding the execution of actions arising from that position.

The structure of the Committee's position<sup>35</sup> indicates what action should be taken by those to whom it is addressed. It contains information on the entities to which it is addressed. In the resolution, the Committee justifies the actions to be taken, indicating that their implementation depends primarily on the will and determination of the entities mentioned.

The position is not a commonly used instrument compared to recommendations. It has a signalling function and refers to a wide spectrum of entities forming the financial system in Poland. It is, therefore, regrettable that it is not used more often by the Committee, given the broad spectrum of addressees proposed by the legislator. The position does not contain a specific action plan regarding the indicated objective to be achieved by the listed entities.

The second autonomous instrument used by the Committee is recommendations. Pursuant to the Act, these may be put forward by the Committee to the relevant

<sup>32</sup> M. Fedorowicz, *Nadzór makroostrożnościowy...*, p. 261.

<sup>33</sup> M. Ochwat, "Prawne formy działania Komitetu...", p. 116.

<sup>34</sup> K. Kowalczyk, "Uprawnienia i obowiązki Komitetu Stabilności Finansowej w zakresie nadzoru makroostrożnościowego nad systemem finansowym w Polsce," *Przegląd Ustawodawstwa Gospodarczego*, vol. 851, no. 5 (2019), p. 17.

<sup>35</sup> "Resolution 47/2021 of the Financial Stability Committee of 19 March 2021 on the Statement Regarding the Functioning of the Cooperative Banking Sector," *Narodowy Bank Polski*, at <https://www.nbp.pl/nadzormakroostroznościowy/podstawa/U47.pdf>, 25 September 2022.

entities.<sup>36</sup> Consequently, this instrument, similar to the position, is not obligatory. This means that the Committee may or may not use it. In the case of this instrument, there is a narrow range of addressees: NBP, MF, FSA & BGF. It follows that the Committee addresses its recommendations to itself. The introduced limitation concerning addressees significantly reduces the Committee's field of influence on the financial system. This is because it does not take into account other entities applicable to the position instrument (e.g., commercial banks), which are the backbone of the Polish banking system. In this way, the banks have been deprived of the possibility to react directly to the Committee's recommendations. Their actions, on the other hand, will depend on the degree to which recommendations are implemented by the relevant entities.<sup>37</sup> The FSC informs the identified entities of the need for action to mitigate systemic risk by the relevant entities. The recommendations introduced by the Committee are directed at itself. In this structure, they are 'processed' by its component entities. This is done to adapt them to the macro-prudential characteristics of the activities and to the individual relevant entities whose actions are coordinated through the Committee.<sup>38</sup> Recommendations are an autonomous instrument used far more frequently than positions.

The catalogue of actions that the Committee may recommend is not closed. As the Act indicates, due to the regulatory possibilities, recommendations are mainly addressed to the MF and the KNF. These entities possess instruments with direct binding force. In the case of the MF, it has the power to issue the relevant regulations, while the Chairman of the FSC issues administrative decisions. The Committee calculates the countercyclical indicator benchmark on a quarterly basis.<sup>39</sup> The MF, in issuing the regulation for this indicator, takes into account the Committee's recommendation on the intensity of cyclical systemic risk and the amount and adequacy of the countercyclical buffer rate.<sup>40</sup> For the systemic risk buffer, the MF in issuing a regulation on this indicator takes into account the Committee's recommendation. It relates to the height of the systemic risk buffer rate, the types of exposures and the categories of institutions to which it is to be applied.<sup>41</sup> In accordance with Article 458 of the Capital Requirements Regulation (CRR), in a situation of systemic risk, the Committee may issue a recommendation addressed to the MF, indicating the need to use national measures concerning the level of own funds, large exposure requirements, public disclosure requirements, the level of the capital conservation buffer, liquidity requirements, risk weights

<sup>36</sup> *Act of 5 August 2015 on Macroprudential Supervision...*, Art. 18.

<sup>37</sup> W. Oziębala, *Współczesne tendencje kształtowania...*, p. 166.

<sup>38</sup> M. Fedorowicz, *Nadzór makroostrożnościowy...*, p. 261.

<sup>39</sup> See I. Kraś, "Rozwiązania regulacyjne w zakresie zastosowania buforów kapitałowych i ich wykorzystanie w dobie pandemii," *Przegląd Prawa Publicznego*, no. 7-8 (2022), pp. 168-179.

<sup>40</sup> *Act of 5 August 2015 on Macroprudential Supervision...*, Art. 23 and Art. 24, Para. 3, Point 1.

<sup>41</sup> *Ibid.*, Art. 49, Para. 9, Point 9.

for speculative bubbles relating to the residential and commercial real estate sector and intra-financial sector exposures.<sup>42</sup>

When issuing a recommendation, the Committee may indicate the date by which, in its view, action to mitigate systemic risk should be taken by the relevant entities (i.e., the NBP, the MF, the KNF and the BGF). Such a solution creates time pressure on the relevant entities and constitutes an additional instrument of the Committee's influence. In this way, it establishes the optimum date for the implementation of a recommendation, after which any action taken can be considered effective. This is an important indication that reinforces the process of implementing the recommendation itself. It means that not only is the recommendation issued, but it should also be implemented by a specific deadline. This solution, thus, limits some of the freedom of the relevant entities to set the deadline for its implementation themselves. In the event of a failure to do so, the Committee is relieved of responsibility for the ineffectiveness of its actions.

Recommendations, as already mentioned, count as *soft law* instruments without direct binding force. The Committee is not in a position to force the addressees (i.e., the competent entities) to implement the recommendations. Therefore, the European Systemic Risk Board (ESRB) monitors compliance with its recommendations via an 'act or explain' mechanism.<sup>43</sup> Relevant entities address the Committee's recommendations in two ways. The first is that they inform the Committee of the actions taken to mitigate systemic risk. If they do not take such action, they provide the Committee with an explanation for not doing so. In doing so, they take responsibility for their actions, which is transferred to the addressee; thereby, the Committee's position is strengthened. The principle adopted serves as an instrument for enforcing compliance with the recommendations of the competent entities. It is intended to create a certain compulsion to cooperate by establishing communication.

A further reinforcement of the 'act or explain' principle is the possibility for the FSC to make public the actions that have been taken by competent entities in relation to the implementation or failure to implement a recommendation, provided that they do not constitute legally protected information. In this way, the public becomes aware of the actions of competent entities and has the ability to influence them. This is particularly evident in the case of the MF. In its actions, it is not only guided by legal regulations, but can also pursue ad hoc political objectives. Making public its failures or lack of action in an area for which it is responsible poses the risk of a loss of political support. This will occur, however, with adequate legal and economic awareness among the public. The above analysis shows that the recommendations are not devoid of any authoritative elements.<sup>44</sup>

<sup>42</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013..., Art. 458, Para. 2, Letter d.

<sup>43</sup> A. Dobrzańska, "Wzmocnienie stabilności finansowej poprzez wykorzystanie polityki makroostrożnościowej – cel, organizacja, instrumenty," in A. Alińska, B. Pietrzak (eds), *Stabilność systemu finansowego – instytucje, instrumenty, uwarunkowania*, Warszawa 2012, p. 41.

<sup>44</sup> Z. Ofiarski, "Status prawny i funkcje rekomendacji wydawanych przez Komisję Nadzoru Finansowego oraz Komitet Stabilności Finansowej," *Przegląd Ustawodawstwa Gospodarczego*, vol. 9 (2017), p. 7.

Recommendations further develop the legislative process by becoming an important element of it. They precede the issuance by the MF of the relevant regulations on the countercyclical and systemic buffer rates and enable the Committee to significantly influence the content of the issued regulations.

Despite their different names, the statements and recommendations that the FSC issues are equivalent to the warnings and recommendations of the ESRB. By doing so, the Committee can have a comparable impact on the actors in the financial system as the ESRB, but only with regard to the national market.<sup>45</sup> In choosing similar solutions regarding the use of instruments, the Polish legislator decided that the Committee would only be able to use soft instruments to influence the financial system. The introduction of such a solution means a considerable limitation of the FSC's real impact on the financial system in Poland. With this model, the macro-prudential supervisor relies heavily on the behaviour of the entities to which the statements and recommendations are addressed. They may or may not comply with them. This solution leaves a great deal of freedom to the addressees in terms of their response to the instrument used. It also appears that the solution adopted is not adequate to the gravity of the objective pursued by the FSC, which is to ensure financial stability treated as a public good. If this stability is breached, a crisis may arise.

The FSC also provides the opinions necessary for the KNF to issue a decision. These concern the identification of another systemically important institution, the imposition of a systemically important institution buffer on it and the recognition of another systemically important institution as a global systemically important institution, along with its assignment to one of the categories.<sup>46</sup> A provision from the Code of Administrative Procedure (CAP) applies to the opinions issued by the Committee.<sup>47</sup> The authority issuing the opinion has a fixed period of time to do so. It is obliged to issue it no later than two weeks from the date of receiving the request. The opinion of the FSC takes the form of an order. However, the FSC, as the applicant, is not bound by the contents of the opinion. It follows that it may recognise it in whole, in part or ignore it. The supervisory authority is only obliged to request the opinion. However, administrative decisions issued by the FSC are binding, despite its individual powers to assess the systemic importance of global systemically important institutions and non-global systemically important institutions.<sup>48</sup> This is because the FSC is constrained by the obligation to consider the guidelines of the European Banking Authority (EBA) and the Committee's opinion.<sup>49</sup> In order to determine the circumstances surrounding

<sup>45</sup> I. Kraś, "Europejska Rada ds. Ryzyka Systemowego jako nowy organ polityki regulacyjnej," *Przegląd Europejski*, vol. 44, no. 2 (2017), p. 68.

<sup>46</sup> *Act of 5 August 2015 on Macroprudential Supervision...*, Art. 39, Para. 1-3.

<sup>47</sup> *Act of 14 June 1960 Code of Administrative Procedure*, Journal of Laws 1960, No. 30, item 168, as amended, Art. 106.

<sup>48</sup> M. Ochwat, "Prawne formy działania Komitetu...", p. 121.

<sup>49</sup> "Identyfikacja innych instytucji o znaczeniu systemowym," *Komisja Nadzoru Finansowego*, 14 November 2016, at [https://www.knf.gov.pl/knf/pl/komponenty/img/instytucje\\_o\\_znaczeniu\\_systemowym\\_OSII\\_14\\_11\\_2016\\_54988.pdf](https://www.knf.gov.pl/knf/pl/komponenty/img/instytucje_o_znaczeniu_systemowym_OSII_14_11_2016_54988.pdf), 28 October 2022.

the impact of a bank failure on the market or the economy – and the possibility of providing financial support if this does not threaten the liquidity or solvency of the entity providing the support – the KNF may seek the Committee's opinion.<sup>50</sup> The opinion is taken into account when the FSC makes its decisions.

The Committee's opinions are also issued with regard to recommendations of the KNF. They concern recommendations related to good practices for prudent and stable management of banks (i.e., issues related to macro-prudential supervision).<sup>51</sup> An example of such an opinion is the opinion on the revision of the S Recommendation concerning good practices in the management of mortgage-backed credit exposures.<sup>52</sup>

The Board of the Bank Guarantee Fund (RBGF) may consult the Committee, assessing how the failure of a national entity could affect the financial positions of other financial market entities, as well as the stability and state of the economy.<sup>53</sup> This is also required if the recommendation made by the BGF, due to the size of the entity or groups may impact the stability of the national financial system or the level of systemic risk.<sup>54</sup>

The Committee's opinion, at the request of the FSA and the BGF, does not stem from a desire to directly influence the final content of the regulations they issue. It is intended as a substantive and preventive assessment by the FSC of the specific actions that may trigger the build-up of systemic risk.<sup>55</sup>

The Financial Stability Committee, through autonomous instruments such as positions, recommendations and opinions, may indirectly influence the financial system in Poland. These instruments are categorised as *soft law* without binding force. Positions are not an absolute regulatory obligation; they constitute a statement of knowledge rather than a statement of intent. They are used as information about the source of systemic risk and are of a signalling nature.

Recommendations are an instrument that the FSC may or may not use. They provide information on the necessity of actions related to the mitigation of systemic risk to be taken by competent entities, which include the NBP, the MF, the KNF and the BGF. Thus, recommendations are addressed to the institutions comprising the Committee. Their catalogue is not closed.

By indicating a deadline for the implementation of the recommendations, the Committee places time pressure on the competent entities, which serves as a means of influencing them. Regarding the enforcement of recommendations, the 'act or explain' principle applies. This principle is reinforced by the Committee's public disclosure of

<sup>50</sup> *Act of 29 August 1997 Banking Law*, Journal of Laws 1997, No. 140, item 939, Art. 141, Para. 3.

<sup>51</sup> *Ibid.*, Art. 137, Para. 2.

<sup>52</sup> Opinion of the Financial Stability Committee on the revision of Recommendation S on *good practice in managing mortgage-backed credit exposures* <https://www.nbp.pl/nadzormakroostroznosciowy/podstawa/U31-zal.pdf>, 28 October 2022.

<sup>53</sup> *Act of 10 June 2016 on the Bank Guarantee Fund, Deposit Guarantee Scheme and Resolution*, Journal of Laws 2016, item 996, Art. 90, Para. 3.

<sup>54</sup> *Ibid.*, Art. 95, Para. 1.

<sup>55</sup> M. Ochwat, "Prawne formy działania Komitetu...", p. 121.



the failures of competent entities to act. This is particularly sensitive for the MF, as potential negligence can lead to a loss of political support for the represented political group. As a result of the 'act or explain' principle, the soft law instruments at the Committee's disposal are not devoid of authoritative elements. On the other hand, the entities that independently possess instruments of a binding nature for their addressees, and are simultaneously part of the Committee, are the MF and the Chairman of the FSC. The former has the power to issue regulations, while the latter has the power to issue administrative decisions within the scopes assigned to them.

The Committee's positions, as opposed to recommendations, are aimed at a wide range of addressees. In contrast, recommendations are used much more frequently than positions. Within its autonomous instruments, the Committee may provide opinions necessary for the FSC to issue decisions and recommendations. The opinions of the FSC shall take the form of a decision. The Committee may also issue opinions for the purposes of the BGF. The Committee's opinion may or may not be recognised by the supervisory authority (i.e., the FSC). It is, however, obliged to request it.

*Soft law* regulation, by being more flexible, takes into account changes in the financial system on an ongoing basis. The speed with which regulators react to emerging systemic risks is of key importance. It is also important that regulations introduced are prepared by individuals with relevant subject matter expertise and practical experience.

## CONCLUSION

The hypothesis presented in the introduction to the study – that the institutional and legal solutions for the functioning of the FSC in the field of macroprudential supervision, despite certain limitations, allow for a considerable impact on stabilising the financial system – has been positively verified. The conclusions reached by applying the methods used in political and administrative sciences are presented as follows.

The finally formed mandatory composition of the FSC includes the key institutions that make up the state's financial security network. By doing so, the legislator has created a formal platform for cooperation between them, which in the past was not always satisfactory. The substantive knowledge accumulated by these institutions and their prominence in the state's financial system provide a mandate to formulate suggestions on how to reduce the likelihood of systemic risk. Consequently, this prevents the threat of destabilisation of the financial system.

The procedural solutions employed for the adoption of resolutions by the Committee strengthen the *primus inter pares* status of the NBP within its composition, which should positively influence decision-making. This is due to the NBP's substantial analytical base and high degree of institutional independence. Resolutions on macroprudential supervision require the presence of the President of the NBP, who has the deciding vote in the event of an equal division of votes. For votes on crisis management, unanimity is required. In such situations, a vote against by one entity, such as the President of the NBP, prevents the adoption of the resolution. The *veto* right may also be

exercised by other members of the Committee, which further limits the possibility for the MF to pursue ad hoc political objectives.

The system of rotation for the appointment of the Chairman of the Committee allowed macroprudential supervision issues to be assigned to the NBP, bearing in mind the operation of the FSC until August 2015. In this way, the legislator clearly marked the presence of the country's central bank in the composition of the Committee, as recommended by the ESRB. This was an expression of recognition of competence in this respect. Central banks, including the NBP, had been informally ensuring the stability of the financial system long before the crisis. Thus, they are institutions with extensive experience in this area.

The autonomous instruments of influence available to the FSC, categorised as *soft law*, indirectly influence the financial system. They do not have binding force and are of a signalling nature. They are used as a source of information, which is why the FSC is referred to as an analytical and advisory body. In the case of positions, information reaches a wider range of parties operating in the financial system. This ensures that a broader range of actors is covered by information on potential sources of systemic risk.

The recommendations issued by the Committee only affect the key institutions of the state's financial security network that constitute its membership. They enable a direct impact on the NBP, MF, KNF and BGF. An important reinforcement of the implementation of the recommendations is the exertion of time pressure concerning the timing of their implementation. Thus, the Committee indicates the optimum time for their introduction, after which the actions taken can be considered effective. This introduces discipline regarding the simultaneous implementation of recommendations by the relevant entities, thereby removing their discretion in this matter.

Recommendations, which constitute the FSC's *soft law* instrument, are not devoid of any authoritative elements. The introduction of the 'act or explain' principle should be regarded as a key solution in this matter. It represents a significant strengthening of the effectiveness of the Committee's influence on the stabilisation of the state's financial system. If a recommendation is not followed, the competent entities provide the Committee with an explanation for the omission. In this way, responsibility for omissions is transferred to the competent entities.

Making public by the FSC information on actions related to the implementation or non-implementation of recommendations reinforces the FSC's position. By doing so, the public becomes aware of the actions of the relevant actors. This is particularly sensitive from the point of view of the MF, which can pursue ad hoc political objectives. Making public its omissions or manifestations of inaction may lead to a loss of political support.

*Soft law* tools such as positions, recommendations and opinions at the disposal of the FSC constitute a kind of early warning system. A properly functioning financial system, with risks and vulnerabilities eliminated through the proper application of the above-mentioned instruments, reduces the likelihood of a crisis arising or helps to limit its impact.

There are also arguments that weaken the hypothesis. The assignment of two objectives by the legislator results in the allocation of corresponding tasks. This leads to an internal stratification of the Committee. In fact, the President of the NBP is made responsible for implementing the objectives in the field of macro-prudential supervision, while the MF is given the right to chair the Committee on a rotating basis in the area of crisis management. This contributes to undermining the effectiveness of the Committee and creates a confrontational dynamic between the President of the NBP and the MF, especially as the division of tasks is vague. This is a hybrid solution not often utilised in this type of arrangement.

The Committee has limited law-making capacity. It does not have the ability to issue universally and internally applicable laws. This results in a limitation of its effectiveness. The Committee cannot influence the financial system using hard tools. This was a conscious act of the legislator, whose intention was to establish an institution of a consultative nature, without the possibility of issuing the aforementioned acts. The jurisprudence of the Constitutional Tribunal also does not permit the Committee's resolutions to be regarded as acts of internally binding law. Unlike the NBP, the Committee does not have the status of an institution of a constitutional nature.

As far as opinions issued by the Committee are concerned, there is only an obligation for the supervisory authority to request such an opinion. However, it is not obliged to take it into account. Opinions are intended to provide a substantive and preventive assessment by the Committee of specific actions that may give rise to systemic risk.

The further prospect of the operation of the FSC requires some consideration regarding increasing its size. Perhaps it should be enlarged to include the Financial Ombudsman. The Financial Ombudsman possesses knowledge that can be of considerable use in the final formulation of positions and recommendations. It has also become an institution that is part of the state's financial safety net. At present, s/he can participate in the Committee's debates on an optional basis without voting rights.

The Committee's activity as an analytical and advisory body should be assessed positively. It has been operating in its current form for a relatively short period, so the model of cooperation between individual entities is still under development. The legislator has created a unique platform for cooperation that provides a forum for discussion among the key entities responsible for the stability of the financial system in Poland.

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