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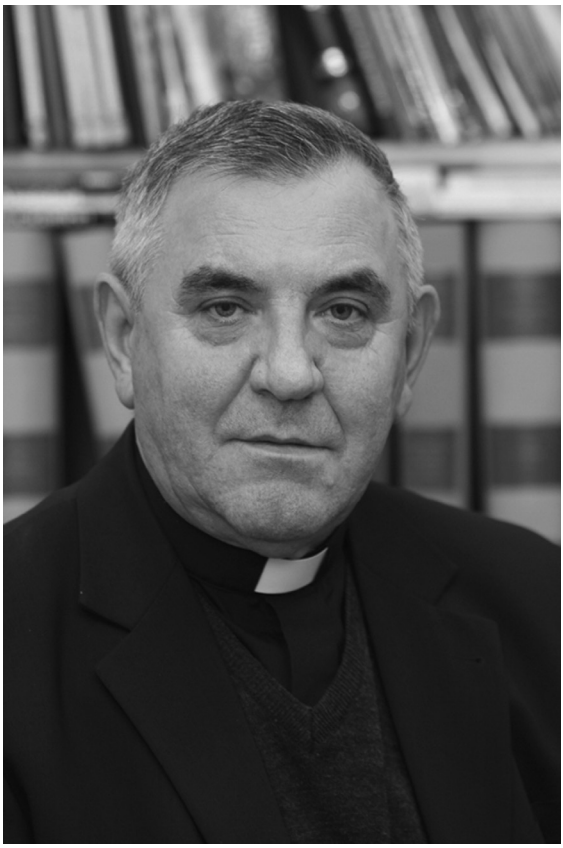

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Applications of homo oeconomicus concept in economic analysis of Polish administrative agreement

Zastosowania modelu homo oeconomicus w analizie ekonomicznej ugody administracyjnej (art. 114 k.p.a.)

1. Introduction

The starting point of economic analysis of law can be dated since early 1960s. It is widely accepted that the begginnings of modern *Law & Economics* are connected with the publication of two landmark articles – Ronald H. Coase's *The Problem of Social Cost* and Guido Calabresi's *Some Thoughts on Risk Distribution and the Law of Torts*[1]. Nowadays, it is one of the most important and most influential research currents in the theory and philosophy of law. *Law & Economics'* scholars analyzed issues releveant for such branches of law as: contract law, property rights, criminal law, penal law or constitutional law[2]. It seems that the best studied (using tools of economic ananlysis) areas of law are civil and penal law. Therefore, the question arises, why there are so few studies concerning economic issues of legal institutions of administrative law. Unfortunately, there is no simple and

[1] R. Cooter, T. Ulen, *Law & Economics,* Boston 2012, p. 1.

[2] See: T. J. Miceli, *Economics of the Law: Torts, Contracts, Property, Litigation*, Oxford 1996; T. J. Miceli, *The Economic Approach to Law,* Stanford 2004; B. Bouckaert, G. De Geest (eds.), *Essays in Law and Economics II: Contract Law, Regulation, and Reflections on Law and Economics*, Antwerpen-Maklu 1995, p. 306; A. M. Polinsky, *Risk Sharing Through Breach of Contract Remedies*, „The Journal of Legal Studies" 1983 Vol. 12, No. 2, p. 427-44; C. G. Veljanovski, *The Coase Theorems and the Economic Theory of Markets and Law*, „Kyklos" 1982 Vol. 35, No. 1, s. 53-74; G. Becker, *The Economic Approach to Human Behavior*, Chicago 1976; G. Tullock, *Does Punishment Deter Crime?*, „The Public Interest" 1974, Vol. 36, p. 103 – 111;W. Landes, R. Posner, *The Economic Structure of Intellectual Property Law,* Cambridge, Massachusetts 2003.

direct answer to this question. Perhaps the reason is that economic approach fits mostly to civil and penal problems – there are used economic models that were created most of all to deal with contract matters[3]. However there are researches that use economic anaysis to solve administrative legal problems[4]. Nevertheless, the most interesting thing is the methodological question about rightness of application of *homo oeconomicus* concept in economic analysis of law. The model of economic man is the basic presumption of the whole *Law & Economics* trend. This is also widely criticised theory in the philosophy of law. The aim of this article is to defend the thesis that the *homo oeconomicus* concept can be successfully applied in economic analysis of administrative law. This paper will be divided into four parts. In the first one there will be presented issues related with economic analysis of administrative law. Then, the author will describe the model of rational man which is used in economic approach to law. In the third part author will apply the *homo oeconomicus* model through economic analysis of Polish administraive agreement. The last chapter will be devoted to conclusions and critical analysis of this subject.

2. *Homo oeconomicus* as the basic assumption of *Law & Economics*

Contrary to what everybody may expect, economic analysis of law is not consistent research programme. There are few schools which differ from each other in terms of presumptions and research methodology. For instance, Chicago School (positive approach) uses the assumption of ractional actor who makes decision in order to maximize its own utility[5]. On the other hand New Haven School (normative approach) focuses on market failures that can be eliminated by government regulations. This school uses its methodology to justify the public intervention

[3] See: R. H. Coase, *The Firm, the Market, and the Law,* Chicago and London 1990; F. Parisi, *The Economic Structure of the Law*. *The Collected Papers of Richard A. Posner: Volume I*, Cheltenham and Lyme 1998; R. Posner, *Economic Analysis of Law,* New York 2011; R. D. Cooter, S. V. Marks, R. H. Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, „The Journal of Legal Studies" 1982, Vol. 11, pp. 225-251.

[4] J. S. Hill, J. E. Brazier, *Constraining Administrative Decisions: A Critical Examination of the Structure and Process Hypothesis*, „The Journal of Law, Economics, and Organization" 1991, Vol. 7, No. 2, pp. 373-400; J. L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Devopment*, „Journal of Law, Economics, and Organization" 1990, Vol. 6, pp. 267-298.

[5] J. Bełdowski, K. Metelska-Szaniawska, *Law & Economics – geneza i charakterystyka ekonomicznej analizy prawa,* „Bank i Kredyt" 2007, Vol. 38, No. 10, 2007, pp. 59 – 60.

in free market[6]. In turn, scientists from Virginia School (functional approach) apply *Public Choice Theory* to analyze whether legislation process is conducted in effective manner[7]. Finally, *Institutional Law & Economics* is concentrated on the impact of economics on law, the process of law-making, legal dispute and the relations between law (especially changes in legal norms) and economy[8]. All of this demonstrates, that *Law & Economics* is very varied and heterogeneous current.

The author claims that the *homo oeconomicus* concept is the basic assumption of economic analysis of law[9]. However, there was nothing aforementioned about this model. It must be emphasized, that the most influential and most popular kind of economic analysis of law is Chicago School. This positive approach applies *Rational Choice Theory, Game Theory* and other economic models, which are based on methodological individualism[10]. This means that rational human agent is the core of this type of economic analysis of law. But what the *homo oeconomicus* really is? Unfortunately, there is not very much scientific descriptions abut this theory – in practice there is no coherent study on this subject. Nevertheless, legal theorists indicate that the model of rational actor is one of the basic presumptions of *Law & Economics*[11]. It helps to point out whether particular legal-theoretical view belongs to *Law & Economics* current or not[12]. Nonetheless, it is possible to describe the structure of model of economic man which is used in economic analysis of law.

Examined concept is built of two elements – the formal and the material one[13]. The formal factor means that individual behaves in instrumentally rational manner[14]. In other words – such actor chooses adequate means to achieve its goals, what corresponds to the statement using the language of the *Rational Choice Theory*,

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[6] *Ibidem,* p. 60 – 61.

[7] *Ibidem,* p. 61 – 62.

[8] *Ibidem,* p. 62 – 63.

[9] This view is also presented in: J. Stelmach, B. Brożek, W. Załuski, *Dziesięć wykładów o ekonomii prawa,* Warszawa 2007, pp. 18 – 19; J. Stelmach, *Spór o ekonomiczną analizę prawa* (in:) J. Stelmach, M. Soniewicka (eds.), *Analiza ekonomiczna w zastosowaniach prawniczych,* Warszawa 2007, p. 14.

[10] H. Kerkmeester, *Methodology: General* (in:) B. Bouckaert, G. De Geest (eds.), *Encyclopedia of Law and Economics*, http://reference.findlaw.com/lawandeconomics/0400-methodology-general.pdf, p. 385 (5.08.2018).

[11] J. Stelmach, B. Brożek, W. Załuski, *Dziesięć…,* pp. 18 – 19; J. Stelmach, *Spór o ekonomiczną…,* p. 14.

[12] J. Stelmach, B. Brożek, W. Załuski, *Dziesięć…,* pp. 18 – 19.

[13] W. Załuski, *Człowiek jako homo oeconomicus* (*Human Being as Homo Oeconomicus*) (in:) O. Bogucki, S. Czepita (ed), *System prawny a porządek prawny* (*Legal and Legal Order*), Szczecin 2008, p. 298; J. Stelmach, B. Brożek, W. Załuski, *Dziesięć…,* pp. 18 – 19.

[14] W. Załuski, *Człowiek jako…,* p. 298.

that rational actor aims to maximize its utility function[15]. Thus, *homo oeconomicus* considers and calculates potential benefits and potential losses, and then it chooses the best option[16]. The economic man wants to meet his targets in the possibly most effective way – to maximize benefits and advantages, and to minimize losses. *Rational Choice Theory* differentiate two kinds of decision situations, in which model entity operates – non-strategic and strategic[17]. In non-strategic situations the consequences of options chosen by individual are determined by the abstract states of the world – not by the behaviour of other people (situations of this kind are analyzed within the framework of *Decision Theory*)[18]. On the other hand, in strategic situations the consequences of options chosen by given individual are co-determined by the behaviour of specific people that the entity attempts to predict (situations of this kind are examined within the framework of *Game Theory*)[19]. These two types of decision situations can be classified into subsequent types, however it is not the aim of this study to thoroughly examine *Rational Choice Theory.* At this moment, it is sufficient to emphasize that *Decision Theory* indicates various criteria of rationality (i.e. Laplace criterion, Hurwicz criterion, Wald criterion or Savage criterion[20]) that shows, which option must be chosen by given entity in order to behave rationally. Referring to strategic situations, the basic rationality criteria is Nash equilibrium and its various refinements[21].

According to material element it signifies, that economic man set egoistic targets – such entity cares only about itself[22]. Its sole purpose is to multiply its own good. Nonetheless, there is possibility to distinguish two types of *homo oeconomicus* – the strong version, and the weak one[23]. The strong version is based on the fact that individual acts rationally because it worries about material goods[24]. In the weak type of model of economic man the individual cares rather about immaterial goods, than about tangible properties[25].

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15 J. Stelmach, B. Brożek, W. Załuski, *Dziesięć…,* p. 18.

16 W. Załuski, *Człowiek jako…,* p. 298.

17 W. Załuski, *Człowiek jako…,* p. 299; see: M. Peterson, *An Introduction to Decision Theory*, Cambridge 2009, p. 5.

18 W. Załuski *Człowiek jako…,* p. 299.

19 *Ibidem.*

20 *Decision theory selection criteria* (in:) *Policonomics*, http://policonomics.com/decision-theory-selection-criteria/, (5.08.2018).

21 W. Załuski, *Człowiek jako…,* p. 299.

22 J. Stelmach, B. Brożek, W. Załuski, *Dziesięć…,* p. 19.

23 W. Załuski, *Człowiek jako...,* p. 298.

24 *Ibidem.*

25 *Ibidem.*

This model is strongly criticized by cognitive psychologists who indicates that in its descriptive version this theory is simply counterfeit[26]. Nonetheless, it seems that this model can be defended as a normative postulate – both its formal and material element[27]. Regardless of criticism this concept is applied in law through economic analysis. For instance, *The Coase Theorem*[28] to be adequately used requires people who behave as *homo oeconomicus.* Only rational entity can assign high subjective value to given good, thanks to which effective allocation of goods is possible. The model of economic man is also applied in *Prisoners Dilemma,* which is economic model used to optimize legal regulations within contract law. Only rational man has such order of preferences that allow accordingly apply *Prisoners Dilemma* in economic analysis of contract law.

It is possible to indicate other applications of *homo oeconomicus* concept in economic analysis of law and thus – in law. This model is used in economic analysis of practically every branch of law. Aforesaid, there were mentioned examples of usage of this theory in civil law, nonetheless this concept is also used in criminal law, penal law, civil procedure, tort law, constitutional law (*Public Choice Theory*) or intellectual property law. In light of this, it is justified to consider the question, whether *homo oeconomicus* model can and should be applied in economic analysis of administrative law? What is the role of this concept in such applications? Which legal institutions can be examined by economic tools? The author will try to answer these questions in the next chapter.

3. Economic analysis of administrative law

3.1. Introductory remarks

In Polish as well as in Continental literature legal theorists formulated different definitions of administrative law[29]. Thereat, it is hard to directly indicate what

[26] See: T. Gilovich, D. Griffin, D. Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment*, Cambridge 2002; S. Schmitz, S. T. Koeszegi, B. Enzenhofer, Ch. Harrer, *Quo Vadis Homo Economicus? References to Rationality/Emotionality in Neuroeconomic Discourses*, Vienna 2015.

[27] The author is preparing PhD thesis in which he defends this model as normative assumption, therefore this issue will be developed in that work.

[28] In accordance with *The Coase Theorem* it states, that if trade in an externality is possible and there are sufficiently low transaction costs, bargaining will lead to Pareto efficient outcome regardless of the initial allocation of property. See: J. Stelmach, B. Brożek, W. Załuski, *Dziesięć…*, p. 110.

[29] Thorougly review of such different approaches to administrative law is presented in: T. Guzik, *Perspektywy zastosowania ekonomicznej analizy w prawie administracyjnym,* „Internetowy Przegląd Prawniczy TBSP UJ" 2017, Vol. 30, No. 6, pp. 68 – 69.

kind of human activity this branch of law regulates. Such clarification is needed for discussion about economic analysis of law and about applicability of the *homo oeconomicus* concept in law. For example, in *common law* administrative law is uderstood as the part of the legal framework for public administration[30]. Howbeit, public administration is there recognized as a very wide part of social life. Peter Cane pointed out that this is „the day-to-day implementation of public policy and public programmes in areas as diverse as immigration, social welfare, defence, and economic regulation – indeed in all areas of social and economic life in which public programmes operate"[31]. He also illustrated, that administrative law concerns three aspects of public administration[32]:

a) its institutional framework,
b) it creates „normative" framework – it imposes certain normative constraints on public administration; this branch of law is concerned with all norms that regulate public administration;
c) it is concerned with enforcement of the norms that regulate public administration.

In legal systems as English system of law, administrative law as well as public administration is defined broadely. Nonetheless, for the purposes of this study the author accepts definition created by him in other article – this definition read as follows: administrative law regulates the activities of state authorities – both internal ones, which concern relations between particular state bodies, and external ones, that refer to relationship between state and entity[33]. This means, that legal norms established in administrative law are applied always when the individual enters into the relationship with public body[34]. Thereupon, the scope of administrative law is probably unlimited.

According to the economic analysis of administrative law most studies regards to tax law. The definition proposed by author allows to classify tax law as a kind of administrative law[35]. Research areas of economic analysis of tax law were connected with optimal taxation[36], the comparison between Consumption

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30 P. Cane, *Administrative Law,* Oxford-New York 2011, p. 3.

31 *Ibidem.*

32 *Ibidem,* p. 11 – 14.

33 T. Guzik, *Perspektywy zastosowania...,* p. 69.

34 *Ibidem.*

35 However, it is commonly approved that administrative law includes tax law.

36 R. D. Cooter, *Optimal Tax Schedules and Rates: Mirrlees and Ramsey,* „American Economic Review" 1978, Vol. 68, No. 5, pp. 756-768; R. D. Cooter, E. Helpman, *Optimal Income Taxation for Transfer Payments Under Different Social Welfare Functions*, „Quarterly Journal of Economics" 1974, Vol. 88, No. 4, pp. 656-670.

Tax, Value Added Tax, Excise Tax and Sales Tax[37] or optimal techniques of redistribution[38]. In those studies the model of *homo oeconomicus* and Pareto efficiency was applied especially in research during which scholars examined the thesis whether which form of taxation is more efficient – income tax or consumption tax? In one of examplary analysis the sample individual had to make choices between[39]:

a) differently taxed by consumption tax rate goods (in this study authors used prunes and figs);
b) consumption of goods now or in the future (it relates to issue whether to accumulate savings or spend money on various goods presently).

Scholars used those tools to examine which tax form (assuming that entities acting in our society are instrumentally rational egoists) leads to Pareto efficiency. Pareto optimality is a such state of allocation of resources when it is impossible to reallocate so as to make any one individual better off without making at least one individual worse off[40]. This approach to economic analysis of tax norms seems to be justified. However, administrative law is much more broader than tax law. In the next section the author will explore, whether *homo oeconomicus* model can be successfully applied in economic analysis of other branches of administrative law.

3.2. Legal regulation of the Polish administrative agreement

As a clear example of applicability of the economic man model in administrative law, the author will conduct the economic analysis of administrative agreement – the Polish legal institution set in art. 114 of the Code of Administrative Procedure (hereinafter referred to as „CAP"). Pursuant to this article „the parties may reach an agreement, if the nature of the case supports it and if it is not contrary

[37] A. Warren A., *Would a Consumption Tax Be Fairer Than an Income Tax?*, „The Yale Law Journal" 1980, Vol. 89, No. 6, pp. 1081-1124; D. A. Weisbach, J. Bankman J., *The Superiority of an Ideal Consumption Tax over an Ideal Income Tax*, „Stanford Law Review" 2006, Vol. 58, No. 5, pp. 1413-1456.

[38] L. Kaplow, S. Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, „Journal of Legal Studies 1994", Vol. 23, No. 2, pp. 667-681; S. Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, „American Economic Review" 1981, Vol. 71, No. 2, pp. 414-418.

[39] D.A. Weisbach, J. Bankman, *The Superiority of …*, pp. 1422 – 1428.

[40] W. Załuski, *The Limits of Naturalism: a Game – Theoretic Critique of Justice as Mutual Advantage*, Kraków 2006, p. 69.

to specific provisions"[41]. This provision corresponds with general principle for amicable settlement of cases expressed in art. 13 § 1 point 1 and 2 of CAP[42]. The doctrine of administrative law indicates that the administrative agreement is a form of action of the parties, not of the administration body[43]. However, in accordance with art. 118 § 1 of the CAP the public body has the control whether to confirm agreement or not. This power of public body arises also from the art. 118 § 3 of the CAP, which includes the norm whereby "the public administration body shall refuse to confirm any agreement that breaches the law, that does not take into account the position of a body referred to in § 2, or which is against the public interest or the proper interests of the parties".

It is significant that administrative agreement when confirmed has the same legal effects as administrative decision. In accordance with art. 120 § 1 of the CAP "the agreement shall be enforceable from the date on which the ruling confirming it becomes final". Even apart from economic reasons amicably settlement of the case is preferred by legal rule laid down in art. 13 § 2 and art. 11 of the CAP. Pursuant to this provisions the priority is to implement the administrative decision by the parties without the need for coercive measures. It is obvious that commonly found solution of the problem will be easier to realize than the authoritarian decision issued by the public administration authority. The author also want to note that the characteristic of administration agreement is the fact that this institution may be applied only between at least two parties of administrative procedure. The reason is that this institution relates to administrative matters where is the multiplicity of parties. This means that administrative agreement must not be made by party and public administration body, or by party and subject with the rights of a party, or even by party and the third party with factual interest[44]. Notwithstanding, there was emphasized in the literature that settlement can be sign only in the matter where there is a conflict of interests between parties[45]. The essence of the administrative agreement is to make mutual concessions by the parties in respect of their rights and obligations[46]. To a large extent, the administrative agreement resembles a settlement reached

[41] The Act of 14 June 1960 – Administrative Proceedings Code, Journal of Laws of 2000, No. 98, Item 1071.

[42] P.M. Przybysz, *Kodeks postępowania administracyjnego. Komentarz aktualizowany*, LEX/el. 10688; T. Woś, *Postępowanie administracyjne,* Warszawa 2017, p. 432.

[43] W. Dawidowicz, *Ugoda w postępowaniu administracyjnym* (in:) *Kodeks postępowania administracyjnego po nowelizacji*, Warszawa 1980, p. 137.

[44] T. Woś, *Postępowanie…*, p. 433.

[45] *Ibidem,* p. 434.

[46] *Ibidem,* p. 432.

by the parties in civil procedure[47]. In both examples parties have contradictory interests, thereupon they must come to a common position, which will result in their mutual concessions.

As a consequence, the administrative agreement can be reached when the administrative matter is moot[48]. In other words, when parties have opposing interests. The opposing interests can be understood as situations while granting the right to one party will be expense for the other, who will have to respect the right of the first party[49]. Another situation when the parties have contradict interests is a circumstance where granting of the right to one party will exclude granting it to the other. Finally, there may be factual states in which the interests of the parties cross each other and they can be associated with various obligations arising from the administrative decision.

1.1. The Economic Analysis of Polish Administrative Agreement

As an example that parties can reach administrative agreement there will be used the administrative procedure of land consolidation (hereinafter referred to as "CEP)[50]. Such illustration meets legal requirements concerning reaching administrative agreement, which are listed above. Participants of this administrative proceedings in practice always have opposing interests. In this procedure administrative body section off plots, whereby they have different borders than before this process (art. 1 (1) of the CEP). The main assumption of this procedure is that new plots have the same area as previous ones (art. 8 (1) of the CEP). Obviously, there are cases in which implementation of this assumption is impossible. The aim of marking new plots' borders in administrative procedure is to improve the functionality of lands. For instance, there may be circumstances when the boundaries of the land overlap (two different lands contain themselves) or two plots that belong to one owner are separated by land of different owner, what consequently hinders cultivations. All of this is a perfect example to apply administrative agreements. Each party has its own material interests that can be easily counted and expressed by mathematics. In fact, similarities to the situation in which the parties negotiate the terms of the contract are visible to the naked eye.

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[47] *Ibidem,* p. 433.

[48] *Ibidem,* p. 434.

[49] C. Martysz (in:) G. Łaszczyca, C. Martysz, A. Matan, *Kodeks postępowania administracyjnego. Komentarz. Tom 1*, Warszawa 2010, p. 155.

[50] The Act of 26 March 1982 of Consolidation and Exchange of Plots, Journal of Laws of 1982, No. 11, Item 80.

The author will conduct the economic analysis of administrative agreement using bargaining theory[51]. The model of bargaining theory is appropriate to carry out suchlike analysis, because bargaining situations are such kind of game in which parties have opposing interests, what exactly correlates with cases in which administrative agreement can be reached. As W. Załuski emphasized, "in bargaining situations, the interests of agents partly converge (because each of them wants to reach wants to reach a better outcome than her initial position) and partly diverge (because they have opposing preferences regarding which of at least two different Pareto-optimal outcomes should be reached)"[52].

Assume that party named John has two plots (plot A and plot B) that both are worth 50 000 USD. Plot A and plot B cover the area of 1 ha. The second party which name is Richard has parcel (land C) that separate John's plots. His land has a surface area of 0,1 ha and is worth 5000 USD. The aim of administrative procedure of land consolidation is to join John's estates what can significantly increase their value (one of the consequences of such procedure is change of the value of plot – the price can increase or decrease). On the other hand, Richard has to obtain plot with different boundaries (practically a land located in different area). Suppose that as a result of proceedings the value of both immoveables rises and participants can choose between only following two options:

a) John receives one property that is worth 60 000 USD and Richard obtains one estate priced 5 500 USD;
b) John gets property rated 51 000 USD and Richard can take plot worth 6 000 USD.

We assume that surface area of new plots is the same as before consolidation. In this case the situations of all parties improve, because the value of each land increases. However, each of them wants to make as great profit as possible. Both parties have the price limit, which means that they have the minimum value that they can accept to take part in the administrative procedure of land consolidation. Those price limits are specific spots named *status quo* which are starting points for negotiations between parties. And if those attempts fail, the parties remain in those basic positions. In this example John's price limit is 50 000 USD, and Richard's price limit amounts 5 000 USD. The reason is those prices are the values of their properties before starting the administrative proceedings. As it was mentioned, the parties want to keep at least the same material situation as before the commencement of the consolidation process, but primarily they

[51] J. Stelmach, B. Brożek, W. Załuski, *Dziesięć…*, p.32; W. Załuski, *The Limits of …*, p. 73-77.
[52] W. Załuski, *The Limits of…*, p. 74.

want to improve their financial status. Therefore, aforementioned both options lie within the negotiation space, thanks to which the parties can negotiate the outcome of administrative procedure in which they participate.
This case was shaped in the way that all options maximize the social welfare. However, let's expand this example and propose, that there were also two additional possibilities:

c) Johns receives property priced 70 000 USD and Richard gets estate worth 4000 USD;
d) John obtains plot which value is 45 000 USD and Richard receives land priced 7000 USD.

This shows, that among four possibilities only two of them give the chance to reach agreement, that will satisfy all parties. The reason is, that options C and D include proposals that exceeds price limits of John and Richard. The parties will be only interested in the choice between option A and B. Thus, the administrative agreement forces parties to choose only such option, which maximizes utility of all actors. In this factual state the parties among four options will choose only that one, which increases the utility of all of them (so, it will be option A or B). Consequently, the social welfare will also rise[53].

One of the greatest difficulties that the parties have to overcome is - in considered case - to determine by the parties which option they will choose. This obstacle is a consequence of application of *homo oeconomicus* concept in this analysis. We assume that parties are economic men what signifies that they are instrumentally rational egoists. As it was described above, instrumental rationality means, that actor calculates each option and chooses that one, which maximizes his utility in the largest range. According to cited example, John and Richard will estimate each option a, b, c and d and they will choose that one, which will be the best from their perspective. However, this case shows, that alternative which maximizes John's utility (option C) does not boosts Richard's utility, and *vice versa* (option D). For the sake of the fact that John and Richard are rational in the instrumental sense, both of them know, which variant they have to choose to make the best choice in order to reach the agreement, what is the best solution.

Because of the fact, that parties (using the nomenclature of Game Theory – "players") mentioned in this example are *homines oeconomici,* they are also egoistic. For this reason John will strive for reaching such agreement that will

[53] P. Dolan, *The measurement of individual utility welfare and social*, „Journal of Health Economics" 1998, Vol. 17, No. 1, p. 42.

sanction that option, which maximizes only his utility. Nonetheless, Richard will be guided by the same motive as John. Despite the fact that options A and B give the surplus both for John and Richard (what makes the negotiations between them much easier), the egoistic nature of players significantly hinders reaching the agreement. In spite of this, thanks to specific features of *homo oeconomicus* concept, the parties will choose alternative which maximizes John's and Richard's utility, and as a consequence – the utility of the whole society. Both parties will aim to reach the agreement. If so, they will have to respect the limit price of the other participant - otherwise, it will be impossible to reach the agreement. However, conclusion of a settlement eliminates a very high risk which consist on the following aspects:

- incurring additional proceeding costs related with continuation of the process;
- costs related with waiting for the sentence (in our case it connects with uncertain situation regarding the borders of plot, what consequently makes impossible to conduct business in this area – it is loss of *lucrum cessans*);
- uncertainty about division of plots.

According to the third aspect, from among four options, the public administration body may choose that one, which constitutes a deterioration of utility of one party. Then, despite some negotiation barriers that are consequences of the fact that players are *homines oeconomici*, an instrumentally rational actor driven by selfish motives knows, that he will gain the most when he leads to reaching the agreement. Therefore, the *homo oeconomicus* model indicates, which alternative will be the most profitable not only for the parties, but also for the whole society.

4. Critical analysis

Aforementioned theses are supported by researches conducted by other scholars. In one work there was mentioned, that if the voluntary agreement can be concluded, two requirements must be met. First, proposed alternatives can not exceed parties' price limits[54]. Second, parties must agree on the price that is located in the negotiation space (what mean's that is higher than price limit)[55].

[54] J. Stelmach, B. Brożek, W. Załuski, *Dziesięć…,* p. 34.
[55] *Ibidem.*

Fulfillment each of those requirements is a necessary condition to reach satisfying agreement[56]. The same conclusions can be drawn from the case discussed above. Scholars indicate that a contract (in this case an administrative settlement) constitutes an improvement in the Pareto sense only if it meets aforementioned conditions, thus if each party rationally estimated the value of the subject of the contract. This signifies, that supposition that parties are *homines oeconomici* leads to conclusion that administrative agreements reached by them will be improvements in the Pareto sense. Due to the fact that the principal aim of Economic Analysis of Law is to indicate legal solutions that maximize social utility, this research programme must be underpinned by the assumption of human rationality. Nevertheless, in the above-cited studies the following thesis was proved: if contract is concluded voluntarily, and whether its subject has been reasonably estimated, its conclusion leads to Pareto-optimal improvement of social welfare. In this work, the author used the bargaining theory in economic analysis of Polish administrative agreement. Nevertheless, it is also allowed to find any other legal institution of administrative law, which could be modeled by the prisoner's dilemma or by any other Game Theory's tools applied in the economic analysis of law. However, any freely chosen tool of economic analysis of law requires application of the assumption of human rationality. In his master's thesis, the author of this article proved that in the tools used in economic law analysis such as Coase Theorem, Prisoner's Dilemma or various inequalities used to optimize criminal sanctions, the *homo oeconomicus* concept performs a very important function.

It is also worth noting that legal institutions of administrative law can be easily analyzed by economic tools. The reason is that the subject of administrative process as well as material administrative law can be simply quantified. Very often there is possibility to clearly summarize profits and losses of particular alternative, especially in various types of building proceedings[57], tax procedures[58], consolidation and exchange processes[59] or even environmental procedures[60]. In different part of this article the author pinpointed possible areas of administrative law in which an economic analysis can be effectively applied. Depending on the examined legal problem or the analyzed legal institution it is possible to

[56] *Ibidem.*

[57] The Act of 7 July 1994 – Construction Law, Journal of Laws of 1994, No. 89, Item 414.

[58] The Act of 29 August 1997 – Tax Ordinance, Journal of Laws of 1997, No. 137, Item 926.

[59] The Act of 26 March 1982 of Consolidation and Exchange of Plots, Journal of Laws of 1982, No. 11, Item 80.

[60] The Act of 27 April 2001 – Environmental Law, Journal of Laws of 2001, No.62, Item 627.

use various economic models and tools[61]. Moreover, the underpinning of every such tool is the assumption of a man who is an instrumentally rational egoist, what in turn illustrates in an emphatic manner the significance of this concept for the law.

The author entirely disregards the critics of the *homo oeconomicus* concept. Responding to allegations of criticism is not the purpose of this article. Its aim was to demonstrate the applicability and usefulness of this model in administrative law (more precisely - in the economic analysis of administrative law), what in the author's opinion was successfully realized. It has been shown that application of this theory allows to indicate legal solutions that optimize and maximize social wealth. On the other hand, it may seem that entities appearing in administrative procedures (both parties and public administration body) due to quantifiable nature of this procedures, will behave much more definitely as *homo oeconomicus* than entities in other branches of law. Public body has an access to rich intellectual resources of office holders who acts on behalf of such body. What is more, the same relates to legal person – it has a group of people who make decision on behalf of such person. It is widely known that choices discussed by number of people and made as a result of heated discussion are better and more rational than made by emotional entity. However, it may be supposed that natural person who is a party in administrative procedure – because of the nature of such process – can behave more rational than usual.

5. Closing remarks

The *homo oeconomicus* concept is the basic assumption of economic analysis of law. This model consist of two elements: formal factor and the material one. The formal element means that people make decisions in instrumentally rational manner. Then, the material element signifies that they are also egoists. This model is applied in law through economic analysis of law. The author showed that *Law & Economics* scholars primarily were focused on such branches of law as civil law, criminal and penal law or civil procedure. Unfortunately, legal theorists did not used economic analysis more widely to study administrative legal institutions. However, as author of the article proved, economic tools can be succesfully used in examination of administrative legal norms. Due to the nature of administrative law and administrative procedure economic models can

[61] T. Guzik, *Perspektywy zastosowania…*, pp. 75 – 78.

be effectively applied to optimize this branches of law. Finally, because *Law & Economics* may be profitably adopted in administrative law, therefore the *homo oeconomicus* model is a concept, which can play a significant role in the theory and philosophy of law.

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Streszczenie

W teorii i filozofii prawa jednym z najważniejszych nurtów jest program badawczy *Law & Economics.* Projekt ten, choć niejednorodny badawczo, oparty jest na założeniu, iż twórcą i podmiotem prawa jest *homo oeconomicus.* Pomimo tego, iż przedstawiciele ekonomicznej analizy prawa bardzo dogłębnie zbadali takie gałęzie prawa jak prawo cywilne (procesowe i materialne), prawo karne, prawo konstytucyjne czy prawo ochrony środowiska, to w literaturze przedmiotu można odnaleźć śladowe ilości przeprowadzonych analiz ekonomicznych instytucji prawnych o charakterze administracyjnoprawnym. Autor stawia tezę (którą następnie broni), iż koncepcja *homo oeconomicus* może być z powodzeniem stosowana w analizie ekonomicznej instytucji administracyjnoprawnych. W tym celu przeprowadza on – na stworzonym przez siebie przykładzie procedury scalania gruntów – stosowną analizę ugody administracyjnej uregulowaną w art. 114 kodeksu postępowania administracyjnego. Artykuł składa się czterech części. W pierwszej z nich przybliżona zostaje koncepcja modelu *homo oeconomicus* oraz całego nurtu ekonomicznej analizy prawa. W kolejnym rozdziale pogłębionej analizie zostaje poddane zagadnienie analizy ekonomicznej prawa administracyjnego. Dyskutowane są rozmaite definicje prawa administracyjnego oraz omówiona zostaje instytucja ugody administracyjne. Po tym autor dokonuje przedmiotowej analizy ekonomicznej ugody administracyjnej. Ostatnia część to analiza krytyczna przedstawionych badań.

SŁOWA KLUCZOWE: *homo oeconomicus,* ugoda administracyjna, procedura administracyjna, ekonomiczna analiza prawa, teoria i filozofia prawa

Summary

One of the most important research currents in theory and philosophy of law is *Law & Economics.* Despite the fact, that this research project is heterogenous, it is based on the assumption according to which the subject and the creator of law is *homo oeconomicus.* In spite of the fact, that scholars deeply analyzed such branches of law, as civil law (material one and civil procedure), criminal law, constitutional law or environmental

law, in the literature there are only few papers concerning economic analysis of administrative law. The author defends the thesis, that the *homo oeconomicus* concept can be successfully applicable in economic analysis of administrative law. For this purpose he conducts (using created by him factual state) economic analysis of administrative agreement set in art. 114 of Polish Code of Administrative Procedure. The article is divided into four parts. In the first section the *homo oeconomicus* concept and the whole current of economic analysis of law are presented. Then, the author shows deep research about economic analysis of administrative law. There are discussed various definitions of administrative law. What is more, legal institution of administrative agreement is also presented. Finally, the author conducts economic analysis of Polish administrative agreement. The last part is critical analysis of demonstrated research results.

KEY WORDS: *homo oeconomicus,* administrative agreement, administrative procedure, economic analysis of law, theory and philosophy of law

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