

# CUSTOMS & BUSINESS PARTNERSHIP

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## CUSTOMS REPRESENTATION IN POLAND

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### *Abstract*

*The article is devoted to considering customs representation as one of the legal institutes facilitating relationships between customs and business partners. The EU and Polish Customs regulations are analysed to determine the forms of representation. The special procedural requirements for performing the function of the customs broker in Poland are defined. The recommendations as to unification of the market of customs representation services are made.*

*Keywords: representation, transactions, regulations, power of attorney, customs, entrepreneurs, brokers.*

### **Introduction**

Freedom of business activities, both on a domestic and on international market, is one of the basic rules of democratic political and economic systems. It has been expressed in the simplest way in “Charter of Fundamental Rights of the European Union”<sup>1</sup>. In this fundamental document, Article 16 entitled “Freedom to conduct a business”, it states that “The freedom to conduct a business in accordance with Community law and national laws and practices recognised.”<sup>2</sup>

Business transactions encompass the institute of contracts for representation or intermediation. Representation in business activities is one of the legal institutes which allows facilitation of conduct of business. This also regards activities in the international commercial turnover. Yet, there it is related to [governed by] specific regulations of the civil law as well as of the EU and national customs laws. Thus, the conditions of the “Charter of Fundamental Rights of the European Union” are met, as the regulations recognise both the EU and Polish norms of law.

### **1. Representation and power of attorney in the Polish civil law**

Regulations of the Polish Civil Code broadly allow for the possibility of conducting legal transactions via a representative. To understand the institute of representation, it is

<sup>1</sup> “Charter of Fundamental Rights of the European Union”. The text with explanations of the Convention Secretariat, Cracow, 2002, see also: [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>2</sup> Ibid. p.30. „Article 16: Freedom to conduct a business: The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.”

necessary to distinguish between its two types:

- statutory representation – a parliamentary act or a court’s order is the source of the representative’s authorization to act,
- power of attorney – a declaration of will by the principal is the source of the representative’s authorization to act on behalf of the principal in relation to third parties.

Such a differentiation in the Civil Code regulations clearly points out to substantial differences between the above mentioned forms of representation in business transactions. Two important characteristics of transactions performed by a representative are worth mentioning here: first, he acts on behalf of another person; and, second – legal transactions performed by a representative bear legal effects not for him but directly for the grantor. Therefore, in the course of legal transactions a legal relationship is created, participated in the capacity of a party not by him but by directly by the grantor, who does not participate in the legal transactions. “For such a transaction to be validly performed on behalf of another person, it must result from the transaction’s contents that the person who performs it, acts as a representative (...). Also, the declaration of will by the representative must indicate the represented person<sup>3</sup>.”

Power of attorney is a unilateral legal transaction – it is granted by way of the grantor’s declaration of will and it authorizes the representative to act on the grantor’s behalf in relation to third parties within the strictly-defined limits of the authorization granted to him – the power of attorney can be general, specific or special.

Under general power of attorney the representative may perform acts of ordinary management (transactions consisting in ordinary, everyday use of property, e.g. entering contacts for rent or lease, paying taxes, etc.). For acts exceeding the scope of ordinary management specific power of attorney for a certain type of legal transactions (e.g. real property sale), or special power of attorney regarding a defined legal transactions (e.g. a deed of declaration of acceptance or rejection of inheritance) must be entered before a public notary or a court of law. It is worth stressing here that a transaction performed by a representative within the scope of power of attorney granted to him bears direct effects for the grantor.

Provisions of the Polish Civil Code on representation have the nature of general regulations in relation to specific parliamentary acts regarding the performance of transactions by a representative including, in relation to the Community Customs Code’s regulations.

## **2. Forms of representation in the EU and Polish Customs regulations**

Legal regulations directly referring to the institute of representation in customs matters are included in:

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<sup>3</sup> Prawo i postępowanie celne [Customs Law and Practice], scientific editor: W. Czyżowicz, WSHiP, Warsaw 2001, p. 258.

- the Community Customs Code (Modernized Customs Code – [EC Regulation 450/2008])<sup>4</sup>,
- the Act of 19 March 2004 on the Customs Code (Journal of Laws of the Republic of Poland No. 68, item 622)
- the Act of 19 March 2004 – Regulations implementing the Act - the Customs Code (Journal of Laws of the Republic of Poland No. 68, item 623),
- the Ordinance of the Minister of Finance of 17 May 2004 on the customs brokers licensure exam and the entry of customs brokers (Journal of Laws of the Republic of Poland No. 117, item 1223),
- the Ordinance of the Minister of Finance of 9 November 2011 changing the Ordinance on the customs brokers licensure exam and the entry onto the list of customs brokers (Journal of Laws of the Republic of Poland No. 257, item 1540),
- the Ordinance of the Minister of Finance of 22 April 2004 on the designation of the Director of the Regional Customs Office ( Izba Celna) in Warsaw to care for certain customs matters (Journal of Laws of the Republic of Poland No. 87, item 830),
- the Act of 18 March 2008 on the rules of acknowledging professional licenses obtained in the European Union Member States (Journal of Laws of the Republic of Poland No. 63, item 394),
- the Ordinance of the Minister of Finance of 6 January 2009 on the adaptation internship and the customs brokers qualifications test in the course of the customs brokers' licenses acknowledgement proceedings (Journal of Laws of the Republic of Poland No. 13, item 71)
- the Act of 18 March 2011 on amending the Act on the Goods and Services Tax (VAT) and the Act – Measurements Law (Journal of Laws of the Republic of Poland No. 64, item 332).

Under the EU customs regulations (Article 11 and Article 4, point 6 of the EU Modernized CC) the function of a representative may be held by a natural person permanently residing within the Community or a legal person, or an association of persons deemed capable of performing legal transactions but not being a legal person, whose registered office stipulated in the Articles of Organization, its main registered office or a its permanent registered office is located within the Community. The condition of having a registered office within the Community does not regard persons who declare transit of goods or temporary customs clearance, or make sporadic customs declarations, provided that customs authorities accept these acts as justified. Under the Polish customs regulations (Article 75 of the Customs Law), the legislator indicates an exemplary list of representatives: customs agencies, forwarding agents, carriers. Yet, it should be noted that, under Article 11, excerpt 11 of the EU Modernized CC, everyone may appoint a representative to act on his behalf before customs authorities with the aim of meeting all the formal requirements provided for in the customs law.

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<sup>4</sup> REGULATION (EC) No 450/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code), Official Journal of the European Union, L 145/1, 4.6.2008



It is the duty of a representative to provide a customs authorities with written power of attorney (in the original or in the form of an officially certified copy) specifying the type of the granted representation (direct, or indirect) and the scope of transactions which the representative is authorized to perform, indicating the person to whom the power of attorney have been granted. In case of noncompliance with the above mentioned requirements, the person acting as the representative shall be deemed as a person acting in his own name and behalf. This rule is of a vital importance for customs regulations, as in each case it allows the customs authorities to determine the identity of the owner of goods, the declaring person, and the person responsible for the customs debt. According to Article 77 of the Polish customs law, the representative may grant further authorizations to perform specified transactions, yet solely if so permitted by the grantor of the power of attorney, by way of substitution. It is worth indicating, though, that such a right is legally entertained by customs agencies only, and the entity to which the right may be transferred shall be another customs agency. In case of substitution, the financial liability towards the customs authorities for the payment of the customs debt by improper or untimely performance, or a failure to perform the transaction without an authorization, shall be borne jointly and severally by the customs agencies.

Under the UE customs regulations, the Member States shall be free to regulate certain matters, among others, as regards representation performed by a customs broker. Under Article 5 excerpt 2 of the Community Customs Code <sup>5</sup>, the Member States may define the right to make customs declarations on their territories in the form of direct or indirect representation so that to ensure that the representation is performed by practicing customs brokers. Using the above mentioned right, Poland has reserved direct representation as the only one possible to be performed by customs brokers.

Despite, being ruled by the uniform legislation (the customs law, the customs procedures and the customs tariff), the legal construct of customs representation in the European Union states is characterized by various differences in the functioning of customs representatives, which is subject to the domestic law. Here we can identify three main patterns: the first one regards cases where customs brokers are the only entities authorized to perform customs representation (e.g. Portugal); the second one provides for a free choice of persons providing customs representation services, with the reserved form of direct representation (e.g. Poland, Italy) or indirect representation (e.g. Belgium) as the only one possible to be performed by the brokers; and the third one allows for complete freedom in provision of customs services by entities bearing various names (e.g. in Germany, Great Britain).

Among the EU Member States, only Spain, Greece, Italy, France, Malta, Cyprus, Lithuania, Latvia, Poland and Portugal have the issue of customs representation regulated by the law. As confirmed by statistics, these states have a relatively low number of customs frauds and irregularities, as compared to the states which have not regulated the issue in their legal systems.

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<sup>5</sup> Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, (OJ EC L 302, p. 1)

## 2.1 Direct representation

Direct representation occurs if the representative acts in the name and on behalf of another entity (Article 11 of the Modernized CC) and, therefore– as a result of his transactions performed on behalf of the represented person - the representative produces effects directly for the represented person.

According to the Code, the representative may not be the same as the person making the declaration. As he is not the declaring person, consequently he does not take liability towards the customs authorities for the customs debt, which may arise also as a result of his improper performance. A direct representative may not also declare goods using the each customs procedure in the customs office proper for his place of residence, or the represented person's registered office. From the point of view of the liability borne, this form of representation is more advantageous for the representative. The table below presents a breakdown of persons authorized to represent Polish entrepreneurs by way of direct representation.

**Table 1. The persons authorized to represent Polish entrepreneurs by way of direct representation**

Customs declaration	<ul style="list-style-type: none"> <li>- customs broker</li> <li>- a person (e.g. a customs agency), in the name and on behalf of who the employee entered in the list of customs brokers act</li> <li>- an employee of the interested person</li> </ul>
Customs declaration of: <ul style="list-style-type: none"> <li>- non-commercial goods,</li> <li>- the postal turnover</li> </ul>	<ul style="list-style-type: none"> <li>- a natural person permanently residing within the Community</li> <li>- a legal person whose registered office stipulated according to registration or another registered office is located within the Community.</li> </ul>
Customs declaration: <ul style="list-style-type: none"> <li>- for the transit procedure,</li> <li>- for temporary clearing,</li> <li>- sporadically, provided that the customs authorities deem transactions justified</li> </ul>	<ul style="list-style-type: none"> <li>- a natural person</li> <li>- a legal person</li> <li>- an association of persons deemed capable of performing legal transactions but not having the status of a legal person</li> </ul>

Source: W. Czyżowicz, *The on-line version of the customs manual*, available on [http://www.mf.gov.pl/sluzba\\_celna/podrecznik\\_celny/](http://www.mf.gov.pl/sluzba_celna/podrecznik_celny/), 10 November 2011.

## 2.2 Indirect representation

Indirect representation is the second form of representation provided for business in the EU customs regulations. Its construct stipulates that the representative acts in his own name but for [on behalf of] another person, which means that based on the customs regulations, he may be the declaring person (according to Article 4 point 11 of the Modernized CC) and a debtor who bears liability for his actions jointly and severally with the person for whom the customs declaration is being made. It departs from the rule of acting on behalf of another person and, therefore, this form of representation in customs matter, though similar to representation established by will of the represented entity, specified in the Polish Civil Code, it has features characteristic of customs law only.

This form of representation is less advantageous for the representative and more advantageous for the entrepreneur. The table below presents a breakdown of persons entitled to represent Polish entrepreneurs by way of indirect representation.

**Table 2. The persons entitled to represent Polish entrepreneurs by way of indirect representation**

Customs declaration	<ul style="list-style-type: none"> <li>- a natural person permanently residing within the Community</li> <li>- a legal person whose registered office stipulated according to registration or another registered office is located within the Community.</li> <li>- an association of persons deemed capable of performing legal transactions but not having the status of a legal person</li> <li>- whose registered office stipulated in the Articles or another registered office is located within the Community.</li> </ul>
Customs declaration of: - non-commercial goods, - the postal turnover	
Customs declaration: - for the transit procedure, - for temporary clearing, - sporadically, provided that the customs authorities deem transactions justified	<ul style="list-style-type: none"> <li>- a natural person</li> <li>- a legal person</li> <li>- an association of persons deemed capable of performing legal transactions but not having the status of a legal person</li> </ul>

Source: W. Czyżowicz, *The on-line version of the customs manual*, available on [http://www.mf.gov.pl/shuzba\\_celna/podrecznik\\_celny/](http://www.mf.gov.pl/shuzba_celna/podrecznik_celny/), 10 November 2011.

### **3. Procedural requirements for performing the function of the customs broker in Poland**

The main procedural requirement for performing the function of the customs broker in Poland is an entry onto the list of customs brokers. Within the last more than ten years the list was held by various institutions, first by the President of the Central Board of Customs – GUC <sup>6</sup>, then by Minister of Finance, and currently it is being held by the Director of the Customs Office (Izba Celna) in Warsaw <sup>7</sup>.

The separate institution of a customs broker in the Polish regulations was introduced by the Act – Customs Code of 9 January 1997 <sup>8</sup>. (The persons who took the exam from 1 January 1992 to 31 December 1997 had qualifications to perform the activities of a customs agency. Practically speaking, the regulations regarding the procedural requirements in this scope have remained unchanged since the year 1998 (small changes are a logical result of Poland's entry into the European Union), although since that time the Polish Customs Law <sup>9</sup> has been amended many times.

Under the provision of Article 80 excerpt 1 of the Polish customs law, a natural person may be entered onto the list who:

1. has the place of residence within the Community;
2. has a full capacity to perform legal transactions;
3. enjoys full civil rights;
4. has the minimum of a secondary school graduation certificate;
5. has not been sentenced with a final judgment for an offence against credibility of documents, or against property, financial and securities turnover, an economic or a fiscal offence;
6. by his conduct, warrants proper performance of the duties of a customs broker;
7. has passed the customs brokers licensure exam in front of the examination board appointed by the Ministry of Finance or has obtained a decision on the acknowledgement of his licence to perform the job of a customs broker, issued pursuant to separate regulations;
8. applied for an entry onto the list of customs brokers not later than within 2 years from the day of passing the exam.

<sup>6</sup> On 30 April 2002, after 40 years and two months from its establishment, the Main Customs Office (GUC) was liquidated and the position of the President of the Main Customs Office was abolished.

<sup>7</sup> An authorisation to keep the list was included in the Ordinance of the Minister of Finance of 22 April 2004 on the designation of the Director of the Customs Chamber in Warsaw to care for certain customs matters (Journal of Laws of the Republic of Poland No. 87, item 830)

<sup>8</sup> Journal of Laws of the Republic of Poland of 1997, No. 23, item 117, amendment in Journal of Laws of the Republic of Poland No. 64, item 407, the Act became effective on 1 January 1998.

<sup>9</sup> The Act of 19.03.2004 - Customs Law (Journal of Laws of the Republic of Poland, No. 68, item 622)



It is one of the important requirements for an entry onto the list of customs brokers to pass the customs brokers licensure exam. Verifying the candidate's knowledge is aimed not only at securing the state's interests but also interests of entities participating in the international trade. That is why, the requirement of having broad knowledge in the areas of customs law, as well as administration, taxation or commercial law is a prerequisite of his due and professional performance of the job.

The mode of conducting the customs brokers licensure exam, and the manner of appointing the examination board, qualifications of the board's members, the scope and manner of conducting the exam, as well as the level of the exam fees designated for covering the costs of the board's functioning and remuneration of the board's members, as well as the manner of keeping, and the mode of making entries onto, the list of customs brokers have been specified in the Ordinance of the Minister of Finance on the matter of the customs brokers licensure exam and the entry onto the list of customs brokers <sup>10</sup>.

Taking the exam is conditioned by the candidate's filing of an application to be allowed to seat for the exam, together with an entry fee (20% of the examination fee), the remaining part (80%) shall be paid not later than on the day of taking the exam but before the beginning of the exam <sup>11</sup>.

The exam consists of two parts. The first of them is conducted in the form of a test consisting of 100 questions covering the areas of customs, taxation and administration law needed for the proper performance of the duties of customs brokers, and in particular, the questions regard:

1. assigning goods to customs approved treatment or use,
2. customs representation,
3. certain topics regarding calculations,
4. privileged transactions ,
5. customs debt,
6. certain topics regarding commodity science and the knowledge of the customs tariff, as well as regulations regarding trade policy instruments,
7. administration law in the scope used in customs matters,
8. the goods and services tax on import of goods,
9. means of calculating the excise tax, the turnover of excise goods, excise exemptions and securities
10. taxation law regulations applied for excise tax, customs control and the rules of special tax supervision,
11. INTRASTAT (statistical) declarations.

The text lasts not longer than 150 minutes and the positive result is guaranteed by providing the right answers to at least 81 questions. This is also the condition for moving

<sup>10</sup> The Ordinance of the Minister of Finance of 17 May 2004, JoL of the Republic of Poland , No. 117, item 1223.

<sup>11</sup> The amount of the exam fee, the entry fee (20% of the exam fee) and the remaining part (80% of the exam fee), as well as the date of the exam are published on the Customs Service website: [http://www.mf.gov.pl//sluzba\\_celna/agenci\\_celni](http://www.mf.gov.pl//sluzba_celna/agenci_celni), the exam fee for the persons who filed the applications in the 4th quarter of 2011 is PLN 719, 20% of the exam fee is PLN 144, and the remaining part of the fee is PLN 575.

on to the second part of the exam. The second part of the exam regards the candidates' practical skills and it consists in:

- filling in prints and forms of documents obligatory in import of goods to the EU common customs area and export from this area;
- preparing documents needed to assign goods to customs approved treatment or use, including the filling out of a customs declaration,
- filling out of the accompanying administrative document, the simplified administrative document, a tax return and documents related to the excise tax.

In case of obtaining a failing grade from the second (oral) part of the exam, the examined person may take it for the second time, after having filed an application with the Head of the Examination Board, yet not later than within 2 months of the date of obtaining the results. If a failing grade is obtained once again from this part of the exam, the exam shall be retaken in whole.

Obtaining two passing grades (from the first and the second parts of the exam) and receiving a certificate of passing the exam, confirmed by the Head of the Examination Board does not authorize one to perform the job yet. The procedure continues. The person must file an application with the body making the entries onto the list (currently, the Director of the Regional Customs Office in Warsaw), attaching certified copies of the documents: confirming the minimum of a secondary school education, a current certificate clean criminal record (valid for 6 months from its issue by the National Court Register – KRS), and a certificate of the NIP (Tax Identity) number assignment. The authority making the entries may request originals of the above mentioned documents in case of doubt as to their credibility.

An entry onto the list of customs brokers is made in the form of an administrative decision, and it includes the number and date of the entry, the surname, the first (and the middle) name(s), the date of birth, the place and address of residence and the appropriate tax identity number.

An entry onto the list of customs brokers may also be applied by persons who have obtained a decision on the acknowledgement of the licence to practice as customs brokers, apart from those, who have obtained a passing grade from the customs brokers licensure exam. This has been made possible by the ordinance on the adaptation internship in the course of the proceedings for the acknowledgement of the licence to practice as a customs broker in the EU Member States<sup>12</sup>. Provisions of this ordinance are applicable to citizens of the EU Member States licensed to practice as customs brokers in their home state, who are going to perform the job of a customs brokers in Poland.

If, in the course of the proceedings for the acknowledgement of the licence, the Minister of Finance establishes that there are substantial differences as to the rules for obtaining the licence to practice in Poland and in the state where it was obtained, he may

<sup>12</sup> The Act of 18 March 2008 on the rules of acknowledging professional qualifications obtained in the EU Member States (JoL of the Republic of Poland, No. 63, item 394) and the Ordinance of the Minister of Finance of 6 January 2009 on the adaptation internship and the skills test in the in the course of the proceedings for the acknowledgement of the licence to practice as a customs broker (JoL of the Republic of Poland, No. 13, item 71).

subject the decision on the acknowledgement of the licence to the passing the adaptation internship or taking a skills test. After the adaptation internship has been passed or the test has been taken (the choice to be made by the person applying for the acknowledgement of his licence) the Minister of Finance makes the choice to acknowledge the applicant's licence to practice as a customs broker on the territory of Poland, or not.

A person entered onto the list of customs brokers in accordance with Article 80 excerpt 2 of the Polish Customs Law, may be obligatorily deleted from the list in three cases of:

- breaching one of the requirement for the entry to be made,
- non-performance of the job of a customs broker for the minimum period of 5 years,
- the person's death.

The right to perform the job of a customs broker may also be suspended for the period of criminal proceedings initiated against him for an offence against credibility of documents, against property or against financial or securities turnover, economic or fiscal offences. A deletion or suspension of a customs broker is always made in the form of an administrative decision.

Since 1 May 2004 tax advisors may also perform the job of customs brokers but only a few of them use this opportunity, due to the low profitability of the jobs in the customs services. Since 2011 (April) <sup>13</sup> customs brokers in Poland may also act as tax advisors in the case of import of goods and the following intercommunity delivery of goods. In this case the customs broker is entitled to keep, in the name and on the behalf of the taxpayers, the documentation and the record for the needs of the goods and services tax, as well as for preparing, in the name and on the behalf of the taxpayers, tax returns and summary information, i.e. certain activities so far reserved for tax advisors and professional bookkeepers.

## Summary and concluding remarks

Customs representation in Poland, like in the remaining Member States of the European Union, though based on Article 11 of the Modernized Customs Code, contains specific regulations regarding the legal requirements for professional customs servants (customs brokers), subject to national regulations, which means that there is a lack of uniformity on the market of customs representation services. Perhaps this issue might also be standardized in the law systems by introducing uniform criteria allowing practicing as customs brokers.

## Endnotes

1. "REGULATION (EC) No 450/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code)", *Official Journal of the European Union*, L 145/1, 4.6.2008

<sup>13</sup> Act of 18 March 2011 on the amendment of the act on the goods and services tax – Measurement Law, JoL of the Republic of Poland, No. 64, item 332)

2. "Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code", *OJEC L 302*, p. 1
3. "The Act of 19.03.2004 - Customs Law", *Journal of Laws of the Republic of Poland*, No. 68, item 622
4. "The Act of 19 March 2004 – Regulations implementing the Act - the Customs Code", *Journal of Laws of the Republic of Poland*, No. 68, item 623
5. "The Act of 18 March 2008 on the rules of acknowledging professional qualifications obtained in the EU Member States", *Jolt of the Republic of Poland*, No. 63, item 394
6. "The Act of 18 March 2011 on the amendment of the act on the goods and services tax – Measurement Law", *JoL of the Republic of Poland*, No. 64, item 332).
7. "The Ordinance of the Minister of Finance of 17 May 2004 on the customs brokers licensure exam and the entry of customs brokers", *Journal of Laws of the Republic of Poland*, No. 117, item 1223
8. "The Ordinance of the Minister of Finance of 22 April 2004 on the designation of the Director of the Customs Chamber in Warsaw to care for certain customs matters", *Journal of Laws of the Republic of Poland*, No. 87, item 830
9. "The Ordinance of the Minister of Finance of 6 January 2009 on the adaptation internship and the skills test in the in the course of the proceedings for the acknowledgement of the licence to practice as a customs broker", *JoL of the republic of Poland*, No. 13, item 71
10. "The Ordinance of the Minister of Finance of 9 November 2011 changing the Ordinance on the customs brokers licensure exam and the entry onto the list of customs brokers", *Journal of Laws of the Republic of Poland*, No. 257, item 1540
11. *Prawo i postępowanie celne [Customs Law and Practice]*, scientific editor W. Czyżowicz, WSHiP, Warsaw 2001
12. Czyżowicz, W 2011, *The on-line version of the customs s manual*, viewed 10 November 2011, [http:// www.mf.gov.pl/sluzba\\_celna/podrecznik\\_celny//](http://www.mf.gov.pl/sluzba_celna/podrecznik_celny//)
- 13."Charter of .Fundamental Rights of the European Union", The text with explanations of the Convention Secretariat, Cracow, 2002, [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)