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INTERNATIONAL SCIENTIFIC CONFERENCE "LAW, LEGALITY, JUSTICE AND JURISPRUDENCE – MODERN ASPECTS AND NEW CHALLENGES"

Editors:
Željka Primorac, Ranka Jeknić

BOOK OF PROCEEDINGS

Split, 16 May 2025

Faculty of Law, University of Split

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FOREWORD

The International Scientific Conference "Law, Legality, Justice and Jurisprudence – Modern Aspects and New Challenges" took place on May 16, 2025, at the Faculty of Law, University of Split. This one-day event convened legal scholars and practitioners from several countries to examine contemporary issues across a wide spectrum of legal disciplines. The conference was organized and hosted by the Faculty of Law in Split, reflecting the Faculty's commitment to advancing legal scholarship through international academic collaboration. The conference program opened with a keynote address by Hendrik Bosshammer of the OECD, which focused on policy reforms to strengthen integrity in Croatia.

Following this keynote, the schedule was structured into ten themed plenary sessions that highlighted both enduring questions of law and emerging challenges. Each session featured multiple scholarly presentations and was followed by open discussion, providing an opportunity for critical debate among participants. This format ensured that the exchange of ideas was robust and that insights from various legal fields could be shared in a collegial setting. A significant portion of the discussions was devoted to criminal law and procedure. Researchers presented on the use of intelligence data as evidence in criminal proceedings and on recent legislative reforms in criminal procedure.

Other contributions in this area addressed the treatment of vulnerable participants in the justice system and new developments in criminal legislation—such as the implementation of an EU Directive on environmental protection through criminal law and the legal measures for protecting victims of violent crime. These topics underscored the conference's focus on how criminal justice is adapting to modern requirements and societal needs. Administrative law and public governance were also prominent themes. One panel offered comparative insights into administrative justice reforms, examining recent innovations in the appeals process for administrative disputes. Another presentation analyzed fundamental aspects of administrative acts in public law.

Issues of good governance and integrity in public administration were discussed as well, including the responsibilities of public officials and the impact of international organizations on national legal systems. Through these discussions, the conference highlighted ongoing efforts to improve accountability and effectiveness in governance and administrative legal frameworks. The impact of digitalization on law emerged as a central theme across multiple sessions. Participants explored how technology is reshaping legal and economic relationships: for example, one study examined labor protections for individuals working via digital platforms, while another assessed the shift toward digital

taxation systems in the European Union. Presenters also discussed the rise of crypto-assets in business, analyzing new methods of corporate financing through cryptocurrencies. In addition, considerable attention was given to the legal challenges posed by artificial intelligence. Discussions ranged from questions of liability for harm caused by AI systems to frameworks for regulating AI under European Union law. These technology-oriented debates underscored the need for legal systems to adapt to rapid innovation and to develop appropriate regulatory responses. Importantly, the conference included perspectives from legal history and theory.

Many contributions also adopted international and comparative viewpoints, reflecting the global scope of modern legal issues. Cross-border legal questions were a recurrent subject: one session examined European family law and private international law matters (such as the recognition of personal names and child abduction across jurisdictions), while another addressed transnational economic and environmental challenges. Notably, a case study of an innovative treaty between Australia and Tuvalu provoked discussion on the implications of international law for the statehood of small nations.

By incorporating diverse jurisdictions and legal traditions, the conference emphasized a worldwide perspective on law, legality, and justice. In sum, the conference provided a comprehensive forum for scholarly exchange on the modern aspects and new challenges facing the law today.

The Faculty of Law, University of Split as a host, proved to be a hub for advanced legal scholarship and dialogue. It is expected that the research findings and insights presented during the conference will inspire further academic inquiry and collaboration, thereby continuing to enrich the field of legal studies.

Ratko Brnabić, PhD, Associate Professor
President of the Conference Program Committee
Dean of the Faculty of Law, University of Split, Croatia

Split, May 16, 2025.

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POSSIBILITIES AND PITFALLS OF USING INTELLIGENCE DATA AS EVIDENCE IN CROATIAN CRIMINAL PROCEEDINGS

ABSTRACT

In today's world, the reactive approach of law enforcement agencies often cannot fully respond to the challenges posed by certain forms of crime, especially (but not exclusively) those that are narratively committed in a covert manner and that cannot be investigated and prosecuted using conventional criminal methods. Therefore, there is a need for increasingly proactive approaches by law enforcement agencies when solving conceptually complex crimes. Sometimes there may also be a need to use intelligence information, and in this sense, the information and evidence collected by security intelligence agencies in their covert work in the performance of their duties are often extremely valuable. This paper will primarily use comparative and teleological methods to investigate possible legal prerequisites for the lawful use of evidence collected by security intelligence agencies in their work, as well as possible restrictions on the use of such evidence in criminal prosecution. Special attention will be given to the fairness of the use of such evidence in criminal proceedings, as well as possible violations of the right to protection of private and family life, all in accordance with the fundamental postulates of the rule of law. If necessary, de lege ferenda proposals will be presented for possible future changes to the normative framework for the Republic of Croatia.

Keywords: *intelligence service, intelligence data, criminal procedure, evidence admissibility*

1. INTRODUCTION

The work of intelligence agencies at first glance does not have a close relationship with criminal and criminal procedural law. Such a conclusion could be derived from normative rules regulating intelligence agencies on the one hand, and criminal procedure on the other hand. It is evident that the Croatian police and public prosecution service have a primary task to investigate criminal offence, respectively to undertake actions in the event of a criminal offence, according to the Criminal Procedure Act,[1] The Police Duties and Powers Act, [2] Rulebook on the manner of acting of police officers.[3] They collect data that can be relevant to the determination of the criminal offence and the identity of the perpetrator. The task of the police and public prosecutor's office is different from the task of the intelligence agencies namely because they act on after the crime has already been committed. They act according to the principle of ex officio preliminary investigation (police) and principle of legality of prosecution (public prosecution service) that require from those organisations that they undertake all prescribed acts in the case of the suspicion of the criminal offence.[4]

Intelligence agencies on the other hand have a primary goal of the long term tracking and collecting data on the threats to the national security. As Badžim nicely described, the intelligence agencies process security threats through criminological-phenomenological approach and the wider national-security context. They are additionally directed to the content which are prior to the commission of the criminal offence and on the content which form the context of the generation of the criminal offence.[5]

[1] Criminal Procedure Act (Croatian: Zakon o kaznenom postupku) Official Gazette, No. 152/2008, 76/2009, 80/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017, 126/2019, 126/2019, 80/2022, 36/2024 (hereinafter: CPA).

[2] The Police Duties and Powers Act (Croatian; Zakon o policijskim poslovima i ovlastima) Official Gazette No. 76/2009, 92/2014, 70/2019 (hereinafter: Police Act).

[3] Rulebook on the manner of acting of police officers (Croatian: Pravilnik o načinu postupanja policijskih službenika), Official Gazette No. 20/2022, 37/2023, 114/2023 (hereinafter: Police Rulebook).

[4] The principle of legality of criminal prosecution (mandatory criminal prosecution) is applied as a rule in the Republic of Croatia, while the principle of opportunity of criminal prosecution (prosecutorial discretion) is an exception that is applied in individual, precisely prescribed cases by law. Article 2 (3) of the CPA; see also in: Krapac D., *Kazneno procesno pravo, Prva knjiga: institucije,* Narodne Novine, Zagreb, 2015, p. 101. The goal of police is to prevent the criminal offence and in the case of its commitment to carry the criminal investigation on the ex post facto basis. Malnar D., Sigurnosno obavještajne studije, Jesenski i Turk, 2024., p. 23-24.

[5] Badžim J., *Obavještajna državna tijela i kriminalitet*, Split, 2014., p. 234.

Furthermore, the intelligence agencies are directed to collecting information, while the police led intelligence is directed to collecting evidence in the sense of immediate conversion of such information to the evidence admissible in criminal procedure.[6] Therefore it can be concluded that intelligence agencies can easier collect information about criminal offences because they can recognize possible environmental conditions which can indicate the possible development of criminal offence and gather valuable evidence from its creation stage. As Badžim wrote, intelligence agencies from the basis of its wider knowledge of the criminological and security context and with the help of inductive/deductive method can conclude and make connections of the interconnection between for example criminal offence of forgery of documents and terrorism, which can contribute to the better qualification of the criminal offence.[7] Because of limitations that traditional criminal investigation bodies face, some authors concluded "that the traditional approaches to address criminality and which are reflected in the Criminal Law, are almost exhausted and overcome in the context of new security challenges (international organized crime, terrorism, cybercrime, etc.)." [8]

Regardless of the above mentioned, intelligence agencies frequently get in touch with criminal offences in the execution of their authorities since they are competent to investigate security threats constituting very often some criminal offences (e.g. terrorism, organised and economic crime, extremism, espionage from other states, organisations and individuals, jeopardizing the safety of protected persons, objects and spaces, unauthorized access to protected information systems/cyberattacks, disclosure of classified information and other security threats). All mentioned activities contain large number of criminal offences, therefore the connection of intelligence agencies with criminal law is more than evident. Intelligence agencies are obliged to notify State Attorney's Office in the case when the collected data indicate that the criminal offence (for which the prosecution is made on the *ex* officio basis) is about to be committed or is already committed. [9] That notification can exceptionally contain data on the method of data collection. Furthermore, directors of intelligence agencies are authorized to seek the State Attorney to postpone further criminal investigation if

[6] Potparič D., Veić P., *Uporaba proaktivne kriminalističke obavještajne djelatnosti u borbi protiv teških kaznenih djela i organiziranog kriminaliteta*, Policija i sigurnost, Vol 29., No. 4, Zagreb, 2020., p. 359.
[7] Badžim, J., *op.cit., note* 5, p. 313.
[8] Vaško, A., *Intelligence information within criminal proceedings*, DANUBE: Law, Economics and Social Issues Review, ISSN 1804-8285, De Gruyter, Warsaw, Vol. 10, Iss. 3, 2019, p. 280.
[9] Act on the Security-Intelligence System of the Republic of Croatia, (Croatian: Zakon o sigurnosno-obavještajnom sustavu Republike Hrvatske), Official Gazette, No. 79/2006, 105/2006 (hereinafter: SIS Act) Art. 56 (1).

it's continuation would jeopardize execution of tasks of intelligence agencies or it's sources of information.[10]

Therefore, the most important question is whether information collected by intelligence agencies can be used as evidence in criminal proceedings. That is very complex question, definitely not researched enough in criminal procedure law science. Therefore, we will try to shed light on this issue below.

The topic of the paper is analysis of present legal provisions in Croatian legal system. Because of the limited scope of the paper, we will present only very limited comparative analysis (Netherland and United Kingdom). A more comprehensive proposals de lege ferenda will be the subject of another paper, preceded by an analysis of the practice of the European Court of Human Rights and broader comparative national legal systems. We pose two hypotheses that we will prove in this paper: 1) Due to their organization, specialized multidisciplinary knowledge, and broader information gathering capabilities, intelligence services are able to collect a lot of evidence about the commission of a criminal offense that is very difficult to collect by criminal prosecution bodies, and therefore the possibility of using this information would significantly contribute to the effectiveness of criminal prosecution for certain types of criminal offenses. 2) The legislative framework in Croatia is inadequate to fully use the potential benefits of intelligence data.

2. DIFFERENT SORTS OF INTELLIGENCE MEASURES AND INTELLIGENCE INFORMATION AS POSSIBLE EVIDENCE OF SIGNIFICANCE TO THE CRIMINAL PROCEEDINGS

2.1. Various measures that intelligence services use to gather information

Intelligence agencies use a wide range of intelligence disciplines for data collection, e.g., OSINT, HUMINT, SIGINT, MASINT, IMINT, FININT, GEOINT[11]. Intelligence agencies are authorized according to article 33 of the SIS

[10] SIS Act Art. 56 (3).

[11] OSINT means an intelligence discipline of data gathering from open sources such as: public media, social networks, internet blogs, public reports, commercial data. HUMINT means an intelligence discipline of data gathering from persons such as: informers, associates or intelligence agents, while SIGINT shortly means an intelligence discipline of data gathering from the intercepted communications or signals in are, for that and other above-mentioned disciplines. Furthermore MASINT means an intelligence discipline which collects and analyzes measurable data (e.g. optical and acoustic measurements).

Act to carry on the clandestine operation measures if the data cannot be gathered in other way or if the gathering of data would be disproportionately difficult. Intelligence agencies shall apply measure which is less intrusive to protected constitutional rights. Clandestine operation measures are almost identical with its content to the special evidentiary actions from the article 332 of the CPA. Some clandestine operation measures (clandestine oversight of telecommunication traffic data, clandestine oversight of location of data subject, clandestine oversight of international telecommunication connections, clandestine surveillance and observation with photo recording of data subjects in open/public area, and clandestine repurchase of documents and items) can be done with the approval of director of intelligence agencies while other more intrusive clandestine operations (clandestine oversight of the content of communication, clandestine oversight of postal and other packages, clandestine oversight and technical recording closed areas/interior, clandestine oversight and observation with audio recording in open areas/public spaces) can as a rule be applied with the warrant of judge from the Supreme Court of Croatia. The main difference from special evidentiary measures from the CPA is that the proposition for issuing the warrant for clandestine operation measures to the Supreme Court does not have to satisfy the element of grounds for suspicion (Croatian: *osnove sumnje*). Still, only the name of the clandestine operation measure, name of the person who will be observed, explanation of the reasons for conducting that measure and the term or duration of measure and it is issued from the Supreme Court judge and not the investigative judge of County Court.[12] In that sense it can also briefly be mentioned that the level of "grounds for suspicion" that the person has committed criminal offence is a legal standard for the application of the special evidentiary measures in the criminal procedure and it has to precede the special evidentiary measures, concretely refer to the committed criminal offence (no speculations). Furthermore, the legal standard points that the specific criminal offence is committed[13] and those indicate that there could be a significant distinction between special evidentiary measures and clandestine operation measures which are conducted by the intelligence agencies.

IMINT means an intelligence discipline which is related to the collection, analysis and interpretation of pictorial records. FININT means an intelligence discipline which collects and analyzes financial data, respectively by tracking financial activities and the cash flow. GEOINT means an intelligence discipline of collection and analysis of the marks of the geographically defined space (e.g. records of military movement, buildings and satellite images), see more in: Malnar, *op.cit*. note 4, p. 153-174.

[12] Article 36 and 38 of the SIS Act. According to article 332 (1) of the CPA the special evidentiary measures can be pointed only to persons for whom there are grounds for suspicion that they have committed specific criminal offence from the list of article 334. of the CPA, along with other conditions stipulated in the CPA.

[13] See more in: Burić, Z. e*t al*, *Upotrebljivost rezultata masovnog nadzora komunikacija kao dokaza u hrvatskom kaznenom postupku – slučaj SKY ECC*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 30., No.2., 2023., p. 261-262.

Aside above-mentioned clandestine operation measures, intelligence agencies can get in touch with criminal offences and possible evidence during for example oversight of open sources, through informants, recorded conversations with citizens[14] or even during execution of security vetting. Security vetting is a part of preventive work of intelligence agencies which is necessary in order for individual to access classified information or to be appointed to specific public duties.[15] Security vetting is done in accordance with special regulations.[16] If we look at the content of the questionnaire[17] of the security vetting, it is clear that intelligence agencies in that procedure gather wide range of data, for example data on assets, health data, data on prior convictions, previous contacts with criminal offenders, foreign intelligence agencies, telecommunication data etc. It is evident that those data can indicate to possible criminal offence and at least be a basis for conducting the police investigation.[18]

Criminal offences relevant to the intelligence agencies are primarily those that satisfy two requirements. Objective element is that the criminal offences pose the threat to the national security while the subjective element is that the perpetrators are directed against the interests of a national security. Those criminal offences are characterized with the high level of organisation, covert action, duration of activities so the optimal way of combat with that crime is with the help of intelligence agencies, which are specialized in the long-term collection of

[14] According to article 27 (2) of the SIS Act, intelligence agencies are authorized to conduct conversations with citizens in the official areas of intelligence agencies. Conversations are technically recorded and the minutes (document) is held while citizens confirm with their signature that the conversation was voluntary, truth and complete.

[15] Croatian Security and Intelligence Agency (hereinafter: SOA) has conducted 6626 security vetting procedures in 2022 (last public report). See: Security and Intelligence Agency, *Annual Report for 2022*, available online via URL: https://www.soa.hr/files/file/Public-Report-2022-en.pdf (retrieved on 16th of February 2025).

[16] Security Vetting Act, Official Gazette, No. 85/2008, 86/2012; Data Secrecy Act, Official Gazette, No. 79/2007, 86/2012; Regulation on the content, appearance, filling in and handling of the Security Vetting Questionnaire, Official Gazette, No. 114/2008.

[17] Questionnaire is available online via URL: https://www.uvns.hr/UserDocsImages/en/dokumenti/info-security/2016/I_Degree_Security_Vetting_Questionnaire.pdf (retrieved on 23th February 2025).

[18] Cf. Arslan, who explained that within the system of Turkish Criminal Procedure, it is quite common to utilize intelligence (and data that have similar attributes) in following 5 purposes: a) Utilization of Intelligence before the Perpetration of the Crime (During Pre-Crime Investigation / During Preliminary Inquiries), b) Utilization of Intelligence after the Perpetration of the Crime, for the Purpose of Initiating the Investigation (Suspicion of an Overt Act), c) Utilizing Intelligence for the Purpose of Taking Cautionary Measures, after the Perpetration of the Crime, d) Utilization of Intelligence for the Initiation of Prosecution and e) Utilization of Intelligence for the Sentencing. Arslan, C., *Intelligence in Criminal Procedure Law*, 2013/ 2 Ankara Bar Review, p. 54-56.

data/information, clandestine operation measures and high level of organisation.[19] From the above mentioned it is evident that examples of those criminal offences are mainly from the Chapters IX, XXIV, XXXII and XXX of the Criminal Code.[20]

2.2. Different sorts of information gathered by intelligence agencies as possible evidence in criminal procedure

Now that we explained some basics of connection between intelligence agencies and law enforcement bodies it can further be elaborated that intelligence agencies can gather different sorts of evidence such as documents, technical recordings, items and personal evidence.[21]

Documents[22] can be collected during for example reception of various documents from public bodies and legal persons and can be also made by intelligence agencies for example in the form of minutes from conversation with citizens or when informing beneficiaries in the form of reports.[23]

Furthermore, technical recordings[24] can be collected during for example clandestine operation measures of oversight and technical recording of closed areas/interior, clandestine oversight and observation with audio recording in open areas/public spaces. It is more than obvious that intelligence can be collected in this sense in textbook case of recorded criminal offence of drug trafficking or even taking bribe or buying a weapon. Intelligence services can also collect information from clandestine operations of clandestine oversight of the content of communication (*e.g.,* SMS, WhatsApp massages, phone calls etc.).

Items can be collected during for example clandestine repurchase of documents and items such as forged documents. At the same time, personal evidence can be

[19] Badžim, J., *op.cit.*, note 5., p. 234-273.
[20] Criminal Code, Official Gazette, No. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021, 114/2022, 114/2023, 36/2024 (hereinafter: Criminal Code). For example: Treason, Giving/receiving bribes in business dealings, Recruitment of mercenaries, Terrorism, Financing of Terrorism, Criminal Enterprise etc.
[21] Badžim J., *op.cit*. note 5, p. 326.
[22] Documents represent any record which contains a set of linguistic signs with a specific meaning content that serves to establish facts in criminal proceedings, Krapac, D., *op. cit*., note 4, p. 508.
[23] See provisions of articles 25, 27 and 55 of the SIS Act
[24] Technical recordings can be photos, recordings, audio and television photo records, Krapac, D., *op.cit.,* note 4, p. 515.

broad from information from citizens, intelligence agents or even informants.[25] All of them can be possible witnesses in the later stage of criminal proceedings.

3. LEGAL OBSTACLES AND CREDIBILITY ISSUES TO USING INTELLIGENCE DATA IN CRIMINAL PROCEEDINGS

Intelligence data have numerous credibility issues regarding its possible use in criminal proceedings. One of the main general challenges and obstacles is that intelligence data is collected for the purpose of protection of national security which generally results in the confidentiality of such data. Collected intelligence data is the ownership of intelligence agencies so they can classify that data with one of the four levels of classification (top secret, secret, confidential and restricted). Right of access to documents (top secret, secret, confidential) can be realized only if that is necessary for the execution of public tasks and with the security clearance[26], while the access to restricted documents can be accessed if that is necessary for the execution of public tasks and with the security informing.[27] In the criminal procedure there is a possibility that the court or the state attorney request the intelligence agency to declassify intelligence data but the intelligence agencies as data owners of data reach a decision will the data be declassified or not and intelligence agencies have to ask an opinion on the declassification from The Office of the National Security Council.[28] In that sense it can also be mentioned that aside documents, for example personal evidence (testimony of intelligence agents) is an obstacle in criminal proceedings since intelligence agents are obliged to keep as a secret all data which they have found out during clandestine operation measures so they are relatively incapable for witnessing as long as they are obliged to keep a secret (they can be relieved that obligation from the intelligence agency) and to protect public interest which is stronger than the interest of criminal procedure.[29] Secrecy is mandatory since intelligence agencies cannot afford to reveal information what do they know and how they acquired information to the for example terrorists (as possible

[25] According to article 29. of the SIS Act intelligence agencies are authorized to collect data from informants/secret associates.
[26] See provisions of articles 2, 4 and 18 of the Data Secrecy Act.
[27] See Article 4 (2) of the Regulation on information security measures, Official Gazette No. 46/2008.
[28] See Article 264 of the CPA and Article 16 of the Data Secrecy Act.
[29] See Article 284 of the CPA; Krapac, *op. cit.,* note 4, p. 488.

defendants) because they would change their behaviour and possibly endanger national security and perform terrorist attack.[30]

Furthermore, intelligence agencies have the main mandate to inform its end users of possible threats to the national security so the end users (for example, State president, prime minister, ministers, public officials[31]) can develop and reach decisions for the protection of national security.[32] So, they are not assigned with the task of criminal prosecution but informing end users through the various reports as the final product of the intelligence cycle.[33] Those reports can be in written or oral form and they contain accurate intelligence data about possible threats to national security to end users and they represent the final stage of intelligence cycle which must be made in the manner so the end users can make political decisions based on information which are processed with the help of intelligence analysts.[34] From the above mentioned it can be concluded that such reports do not contain information which is relevant for criminal proceedings namely because they are not intended for that purpose. Another obstacle in that sense which can compromise credibility of such evidence is that original or raw documents, items, records *etc* can be processed in different ways so they no longer present original data[35] and their originality as well as accuracy and integrity may be put in question. Furthermore, intelligence agencies have a duty to protect its sources and methods of work. That could be another problem in the sense of credibility of intelligence reports as possible evidence in criminal proceedings so even the reports cover all data which are not necessary to the needs of end users.[36] In that sense it can also be written that those reports mostly rely on statements of the individuals who are not being questioned by the court or the accused, so those reports constitute hearsay evidence and rely on anonymous/protected sources so they reliability is questionable.[37]

Besides final reports, there are also authentic intelligence data which is made at the first stage of intelligence cycle or during the collection of data[38]. Those data

[30] Waxman, C. M.; Barak Erez, D., *Secret Evidence and the Due Process of Terrorist Detentions*, Columbia Journal of Transnational Law 3, 2009, p. 5.
[31] Malnar*, op.cit.,* note 4, p. 196-198.
[32] Hasanovic, A. *et al*, *Nacionalna sigurnost Republike Hrvatske u 21. stoljeću – knjiga 2*, Jesenski i Turk, Zagreb, 2023, p. 86-88.
[33] Intelligence cycle represents the process of planning, collecting, analysing and distribution of intelligence data to end users. Tuđman, M.; Akrap, G.; Matošić, V., *Leksikon izvještajnog nazivlja,* National Security and the Future, 1-2 (22), 2021., p. 145.
[34] See more in: Malnar, *op. cit.,* note 4., p. 193-210.
[35] See more in: Badžim, *op. cit.,* note 5, p. 418-419.
[36] *Ibid,* p. 405.
[37] See more in: Vogel, B., *Secret Evidence in Criminal Proceedings,* Max Planck Institut fur auslandisches und internationals Strafrecht, Duncker & Humblot, Berlin, 2021, p. 19.
[38] They are not yet processed by analysts and put in form of final report to end users

are "raw" and can contain data which are of interest for the public prosecutor since they can better express details which are of interest to the proving of criminal offence and the perpetrator (for example video records of committed criminal offence). But those data are mainly intended to the internal reporting of intelligence agencies. Those reports still have a problem with secrecy of the intelligence sources so the problem of credibility still exists.[39] Another obstacle to the possible use of such data as evidence in criminal proceedings can be encryption of the data since criminals usually use encryption methods during communication which is intercepted. Therefore, in the criminal proceeding there can be a necessity to conduct the expertise in order to adequately understand the content of communication.[40]

Intelligence agencies informants can have some valuable information and their testimony as witnesses in court could also be possible evidence in criminal procedure but there is always a problem of credibility since the informants usually come from criminal circles.[41] For the assessment of the credibility of that evidence it can be mentioned that for example police have four levels of credibility of informants; reliable source, mostly reliable source, mostly unreliable source, indeterminate source (depends mostly on the accuracy of the former information given to law enforcement bodies).[42]

4. ANALYSIS OF THE LEGAL GROUNDS FOR THE POSSIBLE USE OF INTELLIGENCE INFORMATION AS EVIDENCE IN CRIMINAL PROCEEDINGS IN THE REPUBLIC OF CROATIA

The legal framework in the Republic of Croatia does not provide a clear answer as to which results of the work of security and intelligence services could be used as evidence in criminal proceedings. Moreover, the above-mentioned issue is not mentioned at all in the main acts that are supposed to resolve these issues, with the exception of Art. 187 (5) of the CPA. Apart from the above provision, the CPA only mentions security services in relation to legal aid in Art. 191, which has no

[39] Badžim, *op.cit.,* note 5, p. 327.
[40] See more about encryption methods in: Čukljaš, Đ., *Tajno komuniciranje špijuna*, Ministarstvo unutarnjih poslova, Zagreb, 1994.
[41] According to some sources, one third of criminal offences cannot be solved without the help of informants, , at least in the first stages of criminal investigation which is usually conducted by the police. See more in: Karas, Ž., *Uvod u kriminalistiku*, Ministarstvo unutarnjih poslova, Zagreb, 2012, p. 162., See more about credibility of witnesses in general in: Krapac, *op.cit*., note 4, p. 500.
[42] See article 54 of the Police Rulebook.

connection with the problem under consideration. The Act on the State Attorney's Office and the Act on the Office for the Suppression of Corruption and Organized Crime mention security services exclusively in the context of security checks during employment, while the Rules of Procedure of the State Attorney's Office, apart from the above, only in the context of secrecy or classification of data (Art. 79). The same is true in the Act on Courts, the Act on Police Affairs and Powers, and the Act on the Police.

On the other hand, the Act on the Security Intelligence System of the Republic of Croatia (SIS Act) does not mention the word "evidence" anywhere, nor the term "criminal proceedings" in the context that could be expected for a body that could often have valuable information about perpetrators of certain criminal offences. Only in Articles 18 and 20 of SIS Act is the CPA mentioned, but in the sense of establishing the OTC[43] and other technical issues. The main point of contact between SIS Act and criminal proceedings is Article 56 of SIS Act, which establishes the duty of security intelligence agencies to notify the State Attorney's Office if the information collected indicates the preparation or commission of a criminal offence that is prosecuted ex officio. Paragraph 2 of that article stipulates the exceptional possibility that the aforementioned notification may also contain information on the method of data collection.

This state of the laws leaves us very little room for reaching a conclusion about the usability of the results of the work of the security intelligence services as evidence in criminal proceedings, but it offers us at least some starting point. Even in the scientific literature, the situation is not much better. Very little has been written about the mentioned problem, mostly without offering specific answers. The most important statement of domestic authors on this issue can be found in the textbook of criminal procedural law, which has not been changed for the last twenty years. Thus, Krapac states that the technical recordings obtained by measures of secret data collection for the purposes of national security, which are obtained by officers of the security-intelligence agency based on a written reasoned order of the judge of the Supreme Court of the Republic of Croatia, cannot be used as evidence in criminal proceedings without further ado, because

[43] Operational and Technical Center for Telecommunications Supervision (Croatian: Operativno-tehnički centar za nadzor telekomunikacija), an operational-technical body that, in the performance of tasks from its scope of work prescribed by the Act on the Security and Intelligence System of the Republic of Croatia, communicates with bodies authorized to apply measures of secret telecommunications surveillance and telecommunications operators. https://www.otc.hr/.

the state attorney is only exceptionally informed about the method of data collection and the results of such measures. [44]

Krapac warns that those recordings are kept as the strictest secret. However, the court could use such secret technical recordings of security and intelligence agencies in criminal proceedings only after the approval of the competent authority in accordance with the provisions of the current law regulating the issue of data confidentiality.[45] The above understanding is interesting for analysis in many ways. Namely, Krapac nowhere mentions restrictions on the criminal offenses for which such evidence could be used. Since the SIS Act has not been amended since 2006, based on the provisions of its Art. 56, it should be taken to mean all criminal offenses for which prosecution is carried out ex officio. Furthermore, the author speaks of technical recordings that were created on the basis of a written and reasoned order of a Supreme Court judge. Unfortunately, he does not state anything about technical recordings that would be created by secret measures determined by the director of the Intelligence Agency, and without a court order under Art. 38 of the SIS Act. The above issue can potentially be of great importance if the existence of an order from the judicial authority is taken as a criterion for the legality or usability of the results of the actions of security and intelligence services.

Among other authors, Badžim should be highlighted, who has dealt with this issue in more detail. He examines in detail all the actions and measures of the security and intelligence services and their evidentiary potential, and in principle he is in favour of the legality or illegality of certain evidence that is the result of the work of the security and intelligence bodies, but without establishing any clear criteria, he advocates leaving specific cases to judicial practice and free assessment of evidence. It is not possible to enter into a detailed polemic about everything presented here, but for the purposes of this paper it is sufficient to state that Badžim unequivocally declares himself in favour of the possible use of the results of the work of the security and intelligence services as evidence in criminal proceedings, whereby the courts will have to address the issues of fairness of the procedure, the legality of such evidence and its credibility in each specific case.[46]

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[44] Krapac, D. et al., *Kazneno procesno pravo*, Prva knjiga, institucije VIII. amended and supplemented edition, Narodne novine, Zagreb, 2020, p. 510, footnote 210.

[45] Ibidem. The same position is found in earlier editions of the book, including the 2007 edition. The author states that approval from the competent authority is required in accordance with the provisions of the Protection of Data Secrecy Act. The aforementioned Act was passed in 1996, and was replaced in 2007 by the Data Secrecy Act, which is currently in force and amended in 2012. Since there have been many changes in relation to the observed issues during that period, the aforementioned understanding should be taken with caution.

[46] Badžim, J., *op. cit*., note 5.

Case law is very scarce. We will mention two court decisions.[47] In 2007, the first-instance court presented at the hearing, for the criminal offense of drug abuse – from Art. 173 (2)of the Criminal Code, evidence obtained by reading the printouts of mobile phone and telephone numbers from the SOA,[48] while in 2012, the Supreme Court of Croatia concluded that the evidentiary proposal to obtain from the SOA and the Ministry of Internal Affairs data on the criminal processing of A. M. in connection with the murder of I. H. was correctly rejected because this data cannot be used as evidence in these proceedings.[49] In any case, a broader analysis of case law on this issue would be desirable in some future research.

Since only Art. 187 (5) of the CPA offers some answers, it is necessary to analyze the text of the legal provision. It should be emphasized right away that the aforementioned provision refers only to criminal offenses from the catalogue that is an integral part of the provision. This section does not address the content of the catalogue, which refers to the narrowest area of interest of security and intelligence services, and has been somewhat changed since 2008. to the present day through amendments to the CPA. It is sufficient to state that this provision does not apply to the vast majority of criminal offenses at all. Therefore, personal data used to determine the identity of the defendant, collected by security and intelligence services, can exceptionally be used as evidence in cases for criminal offenses from the catalogue. At first glance, the observed provision is not so simple for drawing conclusions, and it is necessary to analyze it logically. Given everything previously stated in our literature, the assumption is that this provision represents only a fragment in the broader picture of the use of the results of the work of security and intelligence services as evidence in criminal proceedings.

The first conclusion that arises from the analysis of the observed provision is that personal data used to establish the identity of the defendant, collected by intelligence services, cannot be used as evidence for acts not listed in the catalogue, and for acts from the catalogue only exceptionally.[50] If we relate the

[47] The authors tried to find the relevant judgment by searching available sources of court decisions on search engines available on the websites https://odluke.sudovi.hr/, the Constitutional Court website, and the case law search engine on the IusInfo portal. The keywords and parts of the words "SOA" "obavještajn.." "sigurnosn.." were used as search criteria, and only these two decisions were found.
[48] VSRH I Kž 705/2008-5 of 3. March 2010.
[49] I Kž-Us 22/11-11 of 8. February 2012.
[50] The meaning of the expression "exceptionally" could be interpreted differently. It is possible that the aforementioned exceptionality is exhausted in the fact that for other criminal acts the observed data cannot be used, but can be used for criminal acts from the catalogue. If we consider that for crimes not in the catalogue, this data cannot be used as evidence, and for crimes in the catalogue, it can only be used exceptionally, it is still not entirely clear what this exceptionality means. Does it refer to the fact that the identity cannot

aforementioned conclusion to the provision of Art. 56 of the ZSOS, it follows that intelligence services must report to the state attorney on the collected data related to all criminal acts prosecuted ex officio, but if this data relates to personal data on the identity of the defendant, then it cannot be used as evidence in criminal proceedings, except for catalogue criminal acts for which this can only be done exceptionally.

However, everything stated in Art. 187 (5) of the CPA tells us nothing about other data collected by security and intelligence services in their work, which do not fall into the category of personal data. If personal data can only be used exceptionally, does this mean that other data can be used for evidentiary purposes without exception? Or, conversely, does it mean that other data cannot be used exceptionally? We also do not know whether the catalogue of criminal offences from Art. 187 (5) of the CPA also refers to other data on criminal offences or only to the aforementioned personal data. After all, how can we make a clear distinction between the data obtained in terms of whether they contain personal data on the identity of the defendant or “only” some other data?

If we start from the previously mentioned concept according to which the results of the work of security and intelligence services could be used as evidence if the authorized body removes the classification mark from the obtained data, then we could say that the "exception" from the provision of Art. 187 (5) of the CPA refers to declassification. However, this again does not give us an answer as to what happens with other data that does not relate to identity. Logically speaking, a closer solution would be that other data could be used as evidence if the authorized body removes the classification mark, because strictly personal data is "more protected" than ordinary data. Such an interpretation pushes us further into deeper problems. Namely, does the catalogue from Art. 187 (5) of the CPA also apply to other data? The impression is that there is such an expectation, but this simply does not follow from the aforementioned article of the CPA. The logical and consistent regulation according to which the security and intelligence services of the state attorney must report on collected data related to all criminal offenses prosecuted ex officio does not work, and this data can only be used as evidence if the classification is removed from it, whereby the catalogue of criminal offenses applies to personal data, and this catalogue does not apply to other data.

The concept of the broad possibility of applying the results of the work of security and intelligence services as evidence in criminal proceedings, whereby the courts

be established in any other way, or does it depend on whether the data will be declassified, which will only happen exceptionally.

will in each specific case have to deal with issues of the fairness of the proceedings as a whole, and judge and weigh the issue of the legality of the evidence obtained and its credibility, is also not easy to reconcile with the provision of Art. 187 (5) of the CPA. Namely, it is unclear whether such a concept should be applied only to criminal offences from the catalogue or even more broadly. The impression is that there is again an expectation that the concept should be applied only to criminal offences from the catalogue, since the aforementioned criminal offences fall within the focus of the work of security and intelligence services, and that expanding its application for evidentiary purposes to criminal offences that are not in the catalogue would be unacceptable from the point of view of the principle of fairness, i.e. it would represent an overly broad intrusion into the privacy of the defendant.

If we look at the problem in terms of content and applying only legal logic, the provision of Art. 187 (5) of the Criminal Procedure Code refers only to establishing the identity of the defendant, and not generally to the commission of a criminal offense, which is a broader concept. Therefore, the catalogue of criminal offenses from the aforementioned article refers only to the issue of establishing the identity of the defendant. Security and intelligence services gain knowledge about all criminal offenses through their work, and the issue of applying the results of such knowledge as evidence in criminal proceedings should be resolved outside the provisions of Art. 187 (5) of the Criminal Procedure Code. Such a broad scope, outside the "catalogue", is very controversial. Namely, if we look only at the application of measures for secret data collection from Art. 33 of the SIS Act, we indirectly open up the possibility of applying such data as evidence even more widely than the application of the results of special evidentiary actions carried out in accordance with the provisions of the CPA, for which there is a clear catalogue in Art. 334 of the Criminal Procedure Act. It is quite clear that such a thing is unacceptable.

The solution could be sought within the framework of "weighing" or the application of Art. 10 (3) of the CPA, whereby the application of evidence originating from security and intelligence sources would not be possible for criminal offences under the jurisdiction of the municipal court, or would possibly only be possible for serious forms of criminal offences under the jurisdiction of the county court, where the interest of criminal prosecution and punishment outweighs the violation of rights. It is unlikely that the legislator opted for a solution that relies in advance on the application of evidence obtained by violating the rights and freedoms under Art. 10 (2) of the CPA, but will still be declared

lawful due to "weighing".[51] On the one hand, such an approach is frivolous from the aspect of the efficiency of criminal prosecution, and on the other hand, it would simply have to be contrary to the Constitution of the Republic of Croatia, if we look at the whole matter from the aspect of fairness.[52]

If the legislator intended to broadly allow the use of the results of the work of security services as evidence in criminal proceedings, the concept of only fragmentary disclosure of personal data relating to the identity of the defendant is completely unclear. Regardless of whether the emphasis is on the issue of declassification or leaving it to the court to judge and decide in each specific case on the issue of the legality of the evidence obtained or the fairness of the treatment of the defendant as a whole, the current legal framework is not good.

Finally, it is necessary to consider whether the earlier assumption that the provision of Art. 187 (5) of the CPA is only a fragment in the broader picture of the use of the results of the work of security and intelligence services as evidence in Croatian criminal proceedings is actually completely wrong. It is necessary to consider the understanding according to which the aforementioned provision provides us with a complete legal framework. Namely, a restrictive interpretation of the completely exceptional application of the results of the work of security and intelligence services as evidence in criminal proceedings does not lead us to the problems presented earlier. The aforementioned interpretation would be reduced to the fact that the results of the work of security and intelligence services cannot be used as evidence in criminal proceedings, except exceptionally. The aforementioned exception is prescribed precisely by the provision of Art. 187 (5) of the CPA. Therefore, only if the identity of the defendant cannot be established in any other way, and it concerns a criminal offense from the catalogue, it is possible to establish the identity of the defendant on the basis of personal data obtained through the work of intelligence services.[53] It is reasonable to assume that in the above case, too, the issue of data confidentiality must be taken into account.

[51] It is difficult to imagine what problems the court may encounter if we take into account issues related to, for example, incidental findings modelled on special evidentiary actions or the doctrine of the fruits of the poisonous tree.

[52] It is interesting in this sense the understanding of Grubač, who, commenting on a factually identical problem in Serbia, considers any use, including legal regulation of the use of evidence obtained by secret services, to be illegal and ultimately contrary to the Constitution, in violation of the current law on criminal procedure. Cf. Grubač, M., *Krivično procesno pravo*, Law Faculty of Union University in Belgrade, Belgrade 2008, p. 248.

[53] Garačić and Novosel state that the provision of Art. 187 (5) of the CPA generally refers to cases of arrest of persons for whom there is reasonable suspicion that they have committed one of the offences from the catalogue, and whose identity cannot be established on the basis of existing records kept in the Republic of Croatia or in another country. Garačić, A.; Novosel, D., *The Law on Criminal Procedure in Judicial Practice - Book One*, Libertin Publishing House, Rijeka 2018, p. 467.

The provision of Article 56 (1) and (2) of the SIS Act could be interpreted in the same sense. Namely, if the collected data indicate the preparation or commission of a criminal offense that is prosecuted ex officio, security intelligence agencies report to the state attorney's office. This notification may exceptionally contain information on the method of data collection. Therefore, there is a duty to report to the state attorney about all criminal offenses, but security intelligence services only provide complete information that could be used as evidence in exceptional cases. It is precisely in Article 187 (5) of the CPA that the exception is made, namely data on the identity of the defendant in the case of criminal offenses from the catalogue. For other criminal offenses, evidence of identity may not be officially provided, but only "bare" information about the criminal offense, and the state attorney must proceed further and prove it, if possible, according to the rules of the CPA.[54]

Such a restrictive interpretation is justified by the very purpose of the activities of security and intelligence services. Their work is not aimed at proving or obtaining evidence, but at pure knowledge without formal traces. They oppose crime by (secret) knowledge, not by proving it. Security and intelligence services collect data, establish and maintain collections and registers of personal data and other records, in accordance with Article 39 of the SIS Act, and this data constitutes a strictly guarded secret. The provision of Article 187 (5) of the CPA, as well as the provision of Article 39 of the SIS Act, speak predominantly about personal data. Furthermore, it has already been pointed out that the SIS Act does not mention the term evidence at all, but speaks exclusively about data. For example, Article 33 of the SIS Act speaks about measures for the secret collection of data if the data cannot be collected in any other way or their collection is associated with disproportionate difficulties. The justification for such an interpretation can be seen in the example.

To put it simply, the provision of Art. 18. of SIS Act established the Operational and Technical Centre for Telecommunications Surveillance (hereinafter: OTC), in order to perform tasks related to secret surveillance measures over telecommunications for the purposes of applying special evidentiary actions according to the CPA and secret surveillance measures according to Art. 33. of SIS Act. For example, a secret recording of the content of a telephone conversation can be viewed, from which it appears that the subject being monitored has committed a criminal offense. If the mentioned recording was created as a result

[54] In certain complex cases, the directors of security and intelligence agencies may propose to the Attorney General to postpone further action within his jurisdiction if this would jeopardize the further execution of tasks within the scope of the security and intelligence agencies or the safety of employees and sources of security and intelligence agencies (Art. 56 (3) of the SIS Act).

of a special evidentiary action from Art. 332. (1) (1). CPA, approved by the investigation judge at the request of the state attorney, in terms of criminal procedural law, it is a technical recording as evidence on which a conviction can be based. However, if the exact same recording was created as a result of the secret data collection measure from Art. 33 (3) (1) a of SIS Act, approved by a judge of the Supreme Court of the Republic of Croatia at the request of the director of the security and intelligence agency, then in terms of criminal procedural law it is not a technical recording as evidence. It can be said that the said recording does not actually exist for the criminal proceedings body. It is the subject of processing and analysis by the security and intelligence agency, and the result of that analysis is data that is entered into collections and registers of personal data and other records, in accordance with Art. 39 of SIS Act, and this data constitutes a strictly guarded secret. The state attorney or the criminal proceedings body may only receive such "bare" data, and only exceptionally may the report contain data on the method of data collection, if it is a case from Art. 187 (5) of the CPA.

5. A BRIEF COMPARATIVE LAW ANALYSIS OF SOME REPRESENTATIVE EUROPEAN COUNTRIES

Although comparative law analysis will be the subject of a separate article, here we will give a brief overview of some comparative law solutions in the Netherlands and the United Kingdom that allow the use of intelligence agency information in criminal proceedings.

These two countries were chosen because, unlike most other European countries, they have introduced provisions in their criminal legislation that enable the use of intelligence services as evidence in criminal proceedings. Another reason is that they do it in different ways, thus representing two different models; The Netherlands through special examining magistrates and the United Kingdom by appointing special advocates.

5.1. Netherlands

In the Netherlands (as in the vast majority of European countries) there is a strict separation between the intelligence agencies and the public prosecutor's office. These organizations work under their own legal regime, have different tasks, powers and responsibilities. Yet, legal provisions provide possibility of “intensive

information flow between them".[55] In case of terrorist crimes, intelligence information that could be useful for the investigation and prosecution can at the discretion of the Dutch General Intelligence and Security Service (AIVD) be provided to the Netherlands Public Prosecutor Service in the form of official written report (Dutch: *Ambtsbericht*) that contains testimonies by officials and informants.[56]

But now the question arises of the possibility of using such information as evidence in criminal proceedings. In order to create the possibility of using such information as evidence, in September 2006 the Dutch legislator passed the "Act on Shielded Witnesses" (Dutch: Wet Afgeschermde Getuigen). This Act opens the possibility of questioning a protected witness, an employee of the intelligence service, in a special procedure in the pre-trial phase, ex parte and in camera, in case disclosure of the identity of the witness could endanger the witness or national security.[57] These witnesses are examined by a 'special' examining magistrate (Dutch: Rechter-Commissaris). It is his duty to decide whether, in the interest of national security, particular information must remain secret and whether the identity of witness should be kept secret. A special section of the Rotterdam District Court is in charge for this procedure in pre-trial phase. As s rule, the trial participants are not present during shielded witness hearing, but they can give a list of questions for the witness to the special examining magistrate.[58]

Since the European Court of Human Rights has warned in several of its decisions that a conviction cannot be based exclusively or predominantly on the testimony of a witness whom the defense has not had the opportunity to examine, Article 344a of the Dutch Code of Criminal Procedure also stipulates that " the court may not find that there is evidence the defendant committed the offence as charged in the indictment exclusively or to a decisive extent on the basis of written materials containing statements of persons whose identity is concealed". Therefore, Eijkman and van Ginkel , warn that "this is a crucial concern in relation to the Act" because the officers of Dutch General Intelligence and Security Service (AIVD) "will hardly ever be able to produce any extra information that supports the official written report that is submitted as evidence".

Described provisions could be described as an attempt to reconcile the need to use extremely valuable intelligence information as evidence in criminal proceedings with the requirements of the principle of fair procedure. Yet, number of human

[55] Eijkman, Q.; Van Ginkel, B., *Compatible or incompatible intelligence and human rights in terrorist trials*, Amsterdam Law Forum, 3(4), 2011, p. 8.
[56] Ibid.
[57] Ibid.
[58] Ibid., p. 9.

rights concerns remain, one of the most important being the fact that in testing reliability and lawfulness, the trial judge has to rely completely on the marginal assessment of the examining magistrate. [59] Not only trial judge, but also the defence counsel need to rely completely on the work of special examining magistrate.[60]

5.2. United Kingdom

As another example of a comparative legal system that has adopted legislative changes to enable the use of intelligence information in criminal proceedings, we have chosen United Kingdom. The reason for this is that the British legislator has chosen a somewhat different model of reviewing this information before it is included in the evidence. While the Netherlands has entrusted this task to examining magistrates, in United Kingdom the so-called special advocates play a significant role in the process of evaluating intelligence in criminal trials.[61]

In UK, this institute has its roots in immigration law and introducing the appointment of a special advocate in deportation proceedings on national security grounds. After the European Court of Human Rights ruling in the case of Chahal v. UK,[62] the legislator introduced Special Immigration Appeals Commission Act

[59] Vervaele, J. A. E., *Terrorism and information sharing between the intelligence and law enforcement communities in the US and the Netherlands: emergency criminal law*?, International Review of Penal Law (Vol. 76), p. 441.

[60] Eijkman, Q.; Van Ginkel, B., *op. cit*., note 55., p. 9-10. Eijkman and van Ginkel also rightly emphasize the problematic situation where the intelligence dana had been collected not by Dutch AIVD, but by foreign intelligence agenca and then just given to AIVD.

[61] Some authors state that the United Kingdom (UK) is a pioneer with regard to counter-terrorism legislation because of its history and that its legislative response had been initiated because of the terrorist crimes of the Irish Republican Army, Sinn Fein and the Ulster Freedom Fighters. Bennet, G., *'Legislative Responses to Terrorism: A View from Britain'*, The Penn State Law Review 2005-109, No. 4, pp. 947-966., as cited in: Eijkman, Q.; Van Ginkel, B., *op. cit*., note 55., p. 14.

[62] Chahal v. United Kingdom, App. No. 22414/93. In this very significant case, EctHR prohibited member states of the Convention from deporting people to other countries if they would be exposed to the risk of being tortured there. On importance of this case on the development of the British special advocate system, see: Jenkins, D., *There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology*, Columbia Human Rights Law Review 42, 2011, pp. 282-288. In its decision, the ECtHR was guided by the example of Canada, which was the first to start with the model of using special advocates. However, Jenkins, analyzing in detail that ECtHR decision and the law and practice of Canada, warns that the stated analysis of special advocate system was inaccurate in three important respects. He states that "the ECHR therefore not only overlooked three important limitations built into the Canadian special advocate system itself, but failed to make any macro-comparison whatsoever between the two national legal systems". Ibid., p. 300-301.

of 1997. (SIAC Act) which authorises such appointments. Special advocates are lawyers, appointed to represent the interests of defendants in circumstances where sensitive information may need to be withheld from them in the name of national security. This mechanism has primarily been implemented in the realm of terrorism-related cases, where trials often contain classified evidence that the accused cannot access.[63]

Justice and Security Act of 2013 has defined the authority and procedures for appointing these advocates while balancing national security interests with the rights of defendants under common law and human rights legislation.[64]

It must be emphasized that the special advocate may not communicate with the appellant once he or she has received the secret information. That is one of the biggest concerns regarding the respect of fair trial principle. Although opinions differ on this, the authors believe that it is difficult to say that it is a matter of full compliance with Art. 6 of the European Convention on Human Rights in that case.[65]

6. SOME PROPOSALS REGARDING POSSIBLE LEGISLATIVE CHANGES IN ORDER TO INCREASE THE POSSIBILITY OF USING INTELLIGENCE DATA IN CRIMINAL PROCEEDINGGS WITHOUT HARMING FAIR TRIAL PRINCIPLE

After the above analysis, it can be concluded that there are certainly certain difficulties in using intelligence data in criminal proceedings that pose barriers to the use of such data as evidence in criminal proceedings. Intelligence data is a valuable source of knowledge that is useful in directing criminal investigations, i.e. in the initial stages of criminal investigations when criminal proceedings have not yet been formally initiated, since intelligence agencies have, by narrative, significantly broader capacities than criminal prosecution bodies in terms of a multidisciplinary approach to resolving issues within their jurisdiction, i.e. the

[63] When information is withheld from the appellant on national security grounds, the special advocate is appointed by the UK Attorney General.
[64] Section 9 of Justice and Security Act of 2013, available at: https://www.legislation.gov.uk/ukpga/2013/18/section/9
[65] The Joint Committee on Human Rights issued their report on Counter-Terrorism Policy and Human Rights in 2011 and warned that the use of secret evidence and special advocates in United Kingdom needs an "urgent and comprehensive review .... in all contexts in which they are used". As cited in: Eijkman, Q.; Van Ginkel, B., *op. cit*., note 55. p. 14.

ability to perceive security threats, which can at the very least direct criminal prosecution bodies and thus significantly assist them in collecting evidence for the purposes of criminal proceedings.

On the other hand, the structure of contemporary crime is such that there are increasingly cases in which it is difficult to prove the commission of certain serious crimes dangerous to the community without using information collected by intelligence services. Therefore, bearing in mind the limited scope of this paper, we will present below some individual proposals that should be considered when making possible amendments to the law if we wish to use intelligence services' information to a greater extent in criminal proceedings. Therefore, the following ideas and proposals, without any pretensions to completeness, are by no means the most important or the only ones, but merely food for thought before a more comprehensive treatment of the aforementioned issue.

6.1. Possible limited changes to the rules on admissibility of evidence in the Criminal Procedure Code

Taking into account that intelligence data is a valuable source of information about perpetrators and criminal acts, namely the above-mentioned serious criminal acts that are characterized by permanence, concealment and organization, it could also be considered to introduce a more precise normative exception into the Criminal Procedure Code and prescribe that in the event that there is no other evidence about the committed criminal act and the perpetrator, evidence collected by intelligence agencies may exceptionally be used in criminal proceedings, which, among other things, indicate sources of information about the committed criminal act and perpetrators, and only in relation to catalogued serious criminal acts based on Article 187 (5) or de lege ferenda its proposed regulation with the previously stated expansion of security checks, but on the condition that the content of such evidence and its credibility in terms of confrontation and the right to equality of arms can be appropriately reviewed by the defense, so as not to undermine the fairness of the proceedings as a whole.[66] The advantage of a special provision in criminal procedural law instead of individual court interpretations based on

[66] As stated, the practice of the ECHR on the issue of admissibility of data obtained by intelligence services will be analyzed in a future article, but it can already be stated that the Croatian legislator should not be satisfied with only respecting the minimum standards set by the European Court of Human Rights, because, as Đurđević points out, the rules which are set up by the European Court of Human Rights on admissibility of evidence are actually quite low. Đurđević, Z., *Admissibility of evidence, judicial review of the actions of the European public prosecutor's office and the protection of fundamental rights. Protecting fundamental and procedural rights from the investigations of OLAF to the future EPPO* / edited by Valentina Bazzocchi, 2014, p.126.

general rules is also pointed out by Jimeno Bulnes, who states that „an explicit provision in the Criminal Procedure Act would also be desirable… Such specific provision appears more essential when a new form of evidence (even when close to expertise) is appreciated and defended by judicial practice and scholarship, taking into account the fundamental rights that are at stake.[67]

In conclusion, it can be stated that the subject of interest of intelligence agencies is the supervision of extremely serious forms of illegal actions that threaten national security and that can potentially take deep root in government structures and, in addition to the government, threaten the security of the territory of the Republic of Croatia and its inhabitants as state elements. [68] Omitting such regulation would make it more difficult to prove criminal acts that are inherent in today's society, especially in the area of organized crime, qualified forms of cybercrime and war crimes in the broader sense of the word, as well as terrorism and criminal acts against state security, the proof of which inevitably requires appropriate engagement of intelligence agencies and proactive action, with mandatory respect for all principles of criminal procedural law, especially the principles of fair trial and, in this regard, equality of arms, confrontation and the right to privacy of the defendant.

It was also stated in the Final Report of the Council of the European Union on Anti-Terrorism from 2004, in which it was essentially emphasized that it is extremely important to ensure the use of intelligence data as evidence in criminal proceedings in terrorist cases by the member states of the European Union, all in order to strengthen the national capabilities to fight terrorism,[69] and the above certainly applies to other serious criminal offenses that, among other things, threaten national security, especially taking into account that these are criminal offenses which are difficult to prove, and which have incalculable consequences on the fundamental elements of the state. Therefore, one should certainly keep in mind the reflections of the professor Damaška, who emphasized that in situations where the focus of interest is shifted only to ensuring human rights in criminal proceedings, then the proceedings become neurotic. This part will end with a quote from the Damaska: "*...a fair procedure would be a procedure that finds an*

[67] Jimeno Bulnes, M., *The use of intelligence information in criminal procedure: A challenge to defence rights in the European and the Spanish panorama*, New Journal of European Criminal Law, 8(2), 2017, p.187.
[68] See more at: Lalović D., *Suverena država – temeljni pravnopolitički projekt moderne* (2), Politička misao, Vol. XLII, No.3, 2005, p. 28.
[69] Council of the European Union - Final report on the Evaluation of National Anti-Terrorist Arrangements, 18th November 2005, available online via URL: https://www.eumonitor.eu/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vi3aoj3pl4xq/f=/blg6836.pdf (accessed 11th March 2025).

acceptable balance between the need to protect society from crime on the one hand and the need to protect human rights on the other." [70]

6.2. Security checks for procedural subjects as a prerequisite for participation in the part of the criminal proceedings dealing with evidence collected by intelligence services

A possible solution for evidence dmissibility of inteliigence data could be the expansion of the security check system to judges and prosecutors working on serious criminal offences,[71] which it is advisable to specify in a taxonomic - catalogue manner,[72] so that they are security checked for processing sensitive data and in this sense, perhaps considering introducing security checks for lawyers who would be on the list of lawyers on duty in proceedings for such serious criminal offences and who would have full rights to challenge and confront such evidence and the right to access the secret case file, which would more easily meet the standards of the principle of fair trial, especially the right to confrontation and to examine prosecution witnesses, in the context of the case law of the European Court of Human Rights. In this regard, one could additionally refer to the already described example of Great Britain. [73] Such legislative solution ensures that intelligence agents as witnesses are also cross-examined and that secret information is not revealed to the defendants and their regular lawyers.[74] The defendant's ability to challenge the testimony of a prosecution witness is the

[70] Damaska M., *Dokazno pravo u kaznenom postupku: oris novih tendencija,* Pravni fakultet u Zagrebu, 2001, p. 8.

[71] Pursuant to Article 37 (7) of the Courts Act (Official Gazette, No. 28/2013, 33/2015, 82/2015, 82/2016, 67/2018, 126/2019, 130/2020, 21/2022, 60/2022, 16/2023, 155/2023, 36/2024), only judges and civil servants who have successfully completed a security check may work on cases within the jurisdiction of USKOK, while Article 13 (1) (4) of the Security Checks Act stipulates that persons working in specialized bodies for combating organized crime and corruption must undergo a basic security check. Similar provisions can be found in Article 99 (2) and Article 122 (3) of the State Attorney's Office Act for deputy state attorneys and for employees of the state attorney's office.

[72] Wise consideration is needed regarding the catalogue of serious crimes whose prosecution would be possible based on evidence collected by security intelligence agencies, in order to avoid an excessive strengthening of their powers and the focus of the powers of security intelligence agencies on combating crime, which is not their task.

[73] See, s*upra,* chapter. 5.2

[74] Declassification, or the release of intelligence agents from keeping secret everything they learned in the course of their duties for the purposes of criminal proceedings, cannot adequately protect national security, since it is illusory, not to say naive, to expect that defendants for serious crimes or even their lawyers, who may pose a security risk in the event of failure to conduct a prior security check in terms of acquaintances of intelligence personnel or the criminal underworld, will keep secret everything they learned during criminal proceedings or the investigation phase simply because they were warned to do so by the court or criminal prosecution authority.

equality of parties in taking procedural actions, which is again one of the aspects of the principle of equality of arms.[75]

After the hearing, the court assesses the probative value of such evidence, the reliability of the evidence and the credibility of the witnesses.[76] Of course, the above includes amendments to several provisions of the Criminal Procedure Code, with an emphasis on the provisions on witnesses and the rules of the preparatory hearing, as well as the provisions on the confidentiality of data and proceedings. Jimeno Bulnes also emphasises that "the major risk here is a probable collision between intelligence information and/or reports and fundamental rights" and that "in terms of criminal procedure, the observance of such fundamental rights especially presupposes the protection of the principle of contradiction (or confrontation), jointly with the enforcement of procedural guarantees, and other defence rights."[77]

It would also be advisable to consider expanding the catalogue of criminal offences under Article 187 (5) of the Criminal Procedure Code and to provide a normative path for establishing the identity of the defendant from personal data collected by intelligence agencies for criminal offences in the areas of, for example, organised crime, war crimes, crimes against humanity, genocide and cybercrime[78] committed against the state information infrastructure. In the context of the aforementioned article, it should also not be forgotten that there is a need to use clearer normative wording regarding the meaning of "exception" in order to

[75] Ivičević Karas, E., *Okrivljenikovo pravo da ispituje svjedoke optužbe u stadiju istrage kao važan aspekt načela jednakosti oružja stranaka u kaznenom postupku: u povodu presude Europskog suda za ljudska prava u predmetu Kovač protiv Hrvatske,* Hrvatski ljetopis za kazneno pravo i praksu, 14(2007), 2, p.1000.

[76] See more on this in: Vervaele J., *Posebne postupovne mjere i poštovanje ljudskih prava*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 16, No. 2, 2009, p. 951.

[77] Jimeno Bulnes, M., *op. cit*., p. 190.

[78] With the entry into force of the Cybersecurity Act (Croatian: Zakon o kibernetičkoj sigurnosti, "Official Gazette" Nr. 14/24), the SOA becomes the central state body for cybersecurity, or rather its National Cybersecurity Centre, which, according to the narrative of its multidisciplinary work, will certainly obtain operational knowledge about the commission of criminal offences in the field of cybersecurity, and in this sense, its knowledge in this area will also be a valuable source of knowledge for criminal prosecution bodies that do not have as many capacities to fight technologically sophisticated crime and evidence is not easily available through classic investigative actions. Article 59 (1) (4) of the aforementioned Act provides that the bodies responsible for implementing cybersecurity requirements closely cooperate and exchange information with criminal prosecution bodies when incidents are the result of criminal activities, which additionally indicates the great importance of the SOA in particular in the analysis of security incidents that are often the result of the commission of criminal offences in the field of cybercrime. See more about this in: Kuzior, A.; Tiutiunyk, I.; Zielińska, A.; Kelemen, R., *Cybersecurity and cybercrime: Current trends and threats*, Journal of International Studies, 17(2), 2024, pp. 220-239.

reduce the possibility of different interpretations, and in this regard, the legislator needs to more clearly state, for the purposes of legal certainty, which are the exceptional situations when intelligence agency data can be used to establish the identity of the defendant, as stated above.[79]

7. CONCLUSION

The issue of using intelligence data in criminal proceedings represents a point of contact between the work of intelligence agencies and law enforcement agencies. From this meeting of the two bodies, and taking into account their structure and the objective and legal possibilities for collecting information, law enforcement agencies could certainly benefit more if they used data collected by intelligence services. The hypotheses set out at the beginning are proven by the analysis in the paper. In the sections dealing with the organization of intelligence services and lesser legal restrictions on data collection, it was determined that the collection of data on perpetrators of certain criminal acts that also threaten national security is significantly less demanding for intelligence agencies compared to criminal prosecution bodies. Furthermore, a detailed analysis of legal provisions, primarily the Croatian Criminal Procedure Act, determined that the existing legal regulations should be interpreted in such a way that the use of intelligence services' knowledge as evidence in criminal proceedings is only exceptionally possible, based on the express provision of Art. 187 (5).

One of the main obstacles to such cooperation is the general reluctance of intelligence agencies to share their sources of knowledge with criminal prosecution authorities and thus reveal their informants, methods of operation and data collection. Compared to the main goal, which is to preserve their own capacities for the long-term preservation of national security, intelligence agencies consider information assistance in proving criminal proceedings through evidence presented contradictory to the hearing as a secondary goal, which is abandoned if it jeopardizes the primary goal.

If there is such willingness to share information and sources as evidence in criminal procedure, there is no doubt that cooperation between intelligence agencies and criminal justice can provide great benefits to law enforcement agencies, but the sensitivity of this issue cannot be emphasized enough since, as Vervaele warns, "it clearly emerges that the use of intelligence in the administration of criminal justice touches upon the foundations of a fair trial".[80] It

[79] See supra, chapter 4.
[80] Vervaele, J. A. E., *op. cit*. note 59. p. 439.

is not ruled out that in the near future the Croatian legislator, pressured by the increasing difficulties that criminal prosecution authorities have in detecting and proving certain forms of serious crimes that also threaten national security, will decide, like some other European countries, to "liberalize" the possibility of using intelligence data in criminal proceedings. As we can conclude from brief comparative law analysis presented in the text, such changes stand in the way of a whole series of things, namely the principle of adversarial justice and the principle of fair procedure in general, with a special emphasis on the right of the defense to question prosecution witnesses. Therefore, such legislative changes would eventually be acceptable only if the procedure for entering them into the evidentiary material was set up in a way that would not harm the fairness of the procedure and the rights of the defense. Some of such possibilities, modelled after some comparative systems, are presented in the paper. Taking into consideration the above mentioned, it can be said, as Manget F. observed, that the interaction between intelligence and criminal law can result in spectacular mountains and valleys, although sometimes there can be occasional earthquake or volcano between the two.[81]

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THE NEW DIRECTIVE (EU) 2024/1203 ON THE PROTECTION OF THE ENVIRONMENT BY CRIMINAL LAW AND CORPORATE CRIMINAL LIABILITY

ABSTRACT

Inefficiency in the application of normative solutions in the area of standards of protection of the environment was stated by the European Union upon bringing in new Council Directive 2024/1203 on the protection of the environment through criminal law which was enacted in May 2024. The aim of this new directive is significant widening of the Directive on the protection of the environment by criminal law 2008/99/EC in terms of new criminal offences, types and measures of sanctions, particularly for legal entities. Given that ecological crime has become a very lucrative criminal activity the huge profit attracts even criminal associations across borders. The new Council Directive (EU) 2024/1203 especially emphasizes the duty of Member States to also put in place effective mechanisms against organized corporative ecological crime. This Council Directive (EU) 2024/1203 sets a range of EU member state obligations which by 21 May 2026 must be harmonized with national legislations in the area of environmental protection. This paper contains an overview of key Council Directive (EU) 2024/1203 provisions relating to the liability of legal entities for criminal offences against the environment and a review of the implications on the normative regulation of legal entity liabilities in the Republic of Croatia. The aim of this paper is to offer the legislator, by comparing a range of laws in the area of Croatian criminal law, the provisions of which are also applicable to legal entities, a review of the most significant changes which should be made in relation to the punishability of legal entities for ecological crimes.

Keywords: *environmental crimes, legal entities, EU directives, corporate criminal liability, organized environmental crimes*

1. INTRODUCTION

The environment is a supreme good the protection of which is regulated by a large number of international documents from the United Nations, the European Union

and the Council Europe.[1] It is primarily protected by non- criminal legal mechanisms due to the point of view that effective preventative effects can be achieved by the application of administrative punishments and sanctions of a reparatory nature. However, concern about the possibility of harmful effects to the environment and human health ordered accepting protection and criminal law instruments whereby a combined system of administrative, misdemeanor and criminal sanctions is accepted. The first, Council Directive (EU) 2008/99/EC (with 2009/123/EC on ship-source pollution),[2] listed criminal acts against the environment which the EU Member States had to include in their national legislature if offences were committed intentionally or with at least serious negligence. But, according to the assessment of the European Commission, it turned out that the directive did not have much effect in practice[3] and was replaced by Council Directive (EU) 2024/1203 of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC.[4] Given that this last Council Directive (EU) 2024/1203, which entered into force in May 2024, had the aim of significantly amending and widening provisions of Directive 2008/99/EC, in the interests of clarity totally replaced it.[5]

Due to the increasing severity of the consequences of corporative negligence to the ecosystem, the directives ordered members whose law prescribed criminal liability for legal entities,[6] to prescribe effective, deterring, and proportional types

[1] More in Cvitanović, L., *Napomene uz kaznenopravnu zaštitu okoliša*, Kaznenopravna zaštita okoliša, HAZU, Zagreb 2017, p. 21-29.
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[5] Recital (71) Council Directive (EU) 2024/1203.
[6] In the German administrative system with the power to give high fines should be compensated by the inability to criminal prosecution of companies, but the Dieselgate case in which Volkswagen received administrative sanctions of up to 1 a billion Euro led to great

and levels of criminal sanctions towards legal entities. The biggest threat to the environment are precisely large corporations working in the area of excavating, processing and using various natural resources (oil, gas, metal, and the like.) chemical companies, agricultural holdings, energy and transport companies, all in the aim of maximizing profits.[7] The reality shows that they are responsible for the biggest ecological catastrophe and largest environmental pollution in recent decades.[8] Ecological crime has become a very lucrative criminal activity, the huge profit of which attracts criminal association across borders and some legal entities have been formed in order to commit such crimes or to mainly carry out crime.[9] It has become the third most lucrative industry for organized criminal groups generating up to 280 billion US dollars per annum[10] Environmental crime is highly lucrative, it can be as profitable as illegal drug trafficking, but the sanctions are much lower, and it is harder to detect. These factors make it highly attractive,[11] especially for well-structured organizations capable of connecting at a local and international level.[12] Europol has mapped 821 highly threatening criminal networks operating within the EU. Among these networks, four specialize in waste and pollution crimes, while three focus solely on wildlife crimes. Additionally, 12 networks engage in environmental crime alongside other criminal activities, primarily drug trafficking.[13] EU priorities are on trading in waste and disposing of dangerous waste[14] and trading in wild bird species and the Council Directive (EU)

criticism as being inadequate for environmental protection. Colantoni, L.; Sarno, G. S.; Bianchi, M., *Fighting Environmental Crime in Europe. An Assessment of Trends, Players and Action,* Rome, IAI and AMBITUS, May 2022, p. 24.

[7] Kuznetsova, N.; Urda, M., *Back to the problem of criminal liability of legal entities: two views on the problem (using the example of environmental crimes),* Russian Journal of Criminology*,* vol. 17, 6/2023, pp. 567-576.

[8] Derenčinović D., *Zakon o odgovornosti pravnih osoba za kaznena djela, s uvodnim napomenama, komentatorskim bilješkama, pojmovnim kazalom i prilozima*, Nocci d.o.o., Zagreb 2003, p. 14.

[9] See *Uhm, D. P.; Nijman, R. C. C., The convergence of environmental crime with other serious crimes: Subtypes within the environmental crime continuum,* European Journal of Criminology, 19 4/2022, pp. 542-561.

[10] Olsen Lundh, C., *The Revised EU Environmental Crime Directive Changes and Challenges in EU Environmental Criminal Law with Examples from Sweden,* Eucrim, 2/2024, p.164, https://eucrim.eu/articles/, 20 February, 2025.

[11] The annual value of transnational environmental crime is estimated to be worth USD 70 to 213 billion annually. https://www.europol.europa.eu/crime-areas/environmental-crime, 10 March, 2025.

[12] Colantoni, *et al., op.cit.* note 6*,* p. 79.

[13] Olsen Lundh, *op. cit.*, note 10, p. 164.

[14] Trading in waste is one of the biggest criminal offences because of the possibility of international trade, complexity of regulations and the increasing wish of many companies to save on managing waste which is more and more expensive due to stricter environmental rules. Organized crime routes for smuggling waste are those which include Italy and eastern European countries, and waste is imported/exported from countries outside of the EU, e.g., from China. Colantoni, *et al*., *op. cit.* note 6*,* p. 79. This is due to the fact that in this crime of smuggling dangerous waste is mostly done by organized criminal groups is additionally

2024/1203 also regulates instruments to combat, uncover and prosecute those and other forms of serious crime.

Corporate crime in general today and the international nature of this crime is emphasized due to multinational corporations and global technological development and demonstrates a strong correlation with other types of crime, in particular white collar crime, economic and organized crime.[15] In the criminal sense, ecological crime also belongs to the concept of organized transnational crime and the concept of economic or „white collar" crime because perpetrators and motives are mainly economic[16] while organized crime undermines the legal activity of companies, for example in the area of waste disposal.[17] Therefore, the participation of multinational corporations in the commission of crimes against the environment with the acquisition of huge profits represents a great threat to world security.[18] The assessment that serious danger exists that only symbolically criminalizing the violation of environmental protection rules without any guarantees of effective implementation,[19] has led to the bringing in of the new Directive, the aim of which is to harmonize national criminal legislation.[20]

Given that the Council Directive (EU) 2024/1203 compels Member States by 21 May 2026 to adopt laws and other necessary regulations in order to harmonize national legislation, this paper methodologically includes an overview of key demands related to punishing legal entities. The example of Croatian criminal legislation is used. Protection of the environment was the most comprehensive and demanding area in the Republic of Croatia's accession to the EU and included

made more difficult due to the fight against ecological crime. Bugarski, T. D., *Challenges of organized environmental crime,* Zbornik Radova Pravnog fakulteta u Novom Sadu, 49, 3/2015, p. 1097-1108.

[15] Šikman, M., *Corporate Crime - New Approaches and Future Challenges.* Ed. Čaleta, D., Vršec, M., Management of Corporate Security-New Approaches and Future Challenges. Ljubljana: Institute of Corporate Security, 2013, pp. 103-114.

[16] Vagliasindi, G. M., *Environmental crime and the EU*, 2015, http://efface.eu, 25 February, 2025.

[17] Eurojust, Press release, 29 October 2019, http://www.eurojust.europa.eu/press/, 15 February, 2025.

[18] Those criminally gained means raise the question of the possibility of also financing terrorism. See Wang, S.; Tian, Z., *New challenges in financial supervision: environmental crime terrorism financing*. Trends Organ Crim 27, 2/2023, pp. 212–228.

[19] Faure, M., *The Development of Environmental Criminal Law in the EU and its,* RECIEL 26, 2/2017, pp. 139-146.

[20] In its proposal the European Commission goes from aims of environmental protection policies towards judicial cooperation to strengthen the autonomy of the Union in this area. Rizzo, A., *Criminalizing" environmental wrongdoings under European Union law: a proposal from the European Commission in the light of old and new challenges*, Rivista.eurojus.it, 1/2022, pp. 69-91, https://rivista.eurojus.it/wp-content/uploads/pdf/Here5.pdf, 15 February, 2025.

around 300 legal documents.[21] However, the data show that, also in Croatian judicial practice, protection is inadequate because for example from 2019-2023 only a total of 71 legal entities were reported for crimes against the environment, of which only 13 legal entities were found guilty of ecological crime. In most cases, small fines or suspended sentences were issued.[22] An overview of key Council Directive (EU) 2024/1203 determinants in this paper focuses on an analysis of introducing new criminal acts against the environment, the quantitative or qualitative threshold necessary for dealing with the presented criminal offence, form of guilt, incitement, aid and abetting and attempt, aggravating and mitigating circumstances, sanctions and other measures for legal entities and instruments the Council Directive (EU) 2024/1203 prescribed for preventing organized and across borders ecological crime. The aim of this paper is to provide insights into the numerous duties ordered by the Council Directive (EU) 2024/1203 and help harmonize national legislation in matters dealing with liability of legal entities for ecological crimes to ensure more effective protection of the environment.

2. OVERVIEW OF KEY COUNCIL DIRECTIVE (EU) 2024/1203 PROVISIONS

The Council Directive (EU) 2024/1203 establishes minimal rules for defining criminal acts and sanctions and measures for preventing and combatting criminal offences against the environment with the aim of effective implementation of EU law in that area. Simultaneously, the Council Directive (EU) 2024/1203 together with obligations prescribes that Member States can bring in or keep stricter rules in the area of criminal law.

2.1. Widening the concept of ecological criminal offence

Equalizing criminal provisions starts from a demand that criminal offences against the environment are defined the same way in all EU Member States ensuring precise and faithful application of legal provisions.[23] In relation to previous

[21] Pavlović, Š., *Kazneni zakon. Zakonski tekst, komentari, sudska praksa*. Libertin naklada, Rijeka 2015, p. 889.
[22] Data from the Government Department of statistics, legal entities in Croatia most often due to profits gained by committing offences are liable for economic crime and due to this violation of duty of supervision and for criminal offences against general safety, https://podaci.dzs.hr/, 28 February, 2025.
[23] Criminal legislature for continental legal system in based on the principle of *nullum crimen, nulla poena sine lege* which demands predictability precision of offence and punishment. The importance of precision was emphasized by the Court of the European

directives, the new directive significantly widens the list of criminal offences against the environment and contains 21 various offences.[24] The Council Directive (EU) 2024/1203 deals with a wide spectrum of ecological policy issues, in particular with controlling pollution (including mercury pollution), waste managements, dangerous activities in plants, polluting offshore installations, pollution of radioactive substances, invasive species, implementation of interventions/assessment of impact on the environment, dispatching waste, recycling ships, pollution from ships, work of plants, radioactive materials, placing goods on the market /illegal wood trading, substances that destroy the ozone layer, fluorinated greenhouse gases, illegally capturing water, killing/possessing endangered species, illegal trade of wildlife/CITES and habitat deterioration.[25]

Some criminal offences include a qualitative threshold for the conduct to constitute a criminal offence, namely, that such conduct causes the death of, or serious injury to, a person or substantial damage to the quality of air, water or soil, or to an ecosystem, animals or plants.[26] The majority of these offences could be classified as "concrete endangerment offences" because they require that a specified threshold of environmental harm be met.[27] There are also "abstract endangerment offences," which do not depend on a threshold of environmental harm being met.[28]

Article 3. the Council Directive (EU) 2024/1203 defines criminal offences as unlawful behaviour,[29]and in paragraphs 2 and 3 states it as behaviour with intent,

Union while the concepts used in defining illegal behavior must be interpreted according to definitions EU law on environmental protection. Olsen Lundh, *op. cit.,* note 10, p. 165.

[24]As opposed to the Directive of 2008 which contains a total of nine criminal offences (including three offences related to checking pollution, two offences related to waste management, three biodiversity offences and one atmospheric pollution management offences) Council Directive (EU) 2024/1203 introduces 12 new criminal offences. Pereira, R., *A Critical Evaluation of the New EU Environmental Crime Directive2024/1203*, Eucrim, 2/2024, p. 159, https://eucrim.eu/articles/, 25 February, 2025.

[25] *Loc.cit.*

[26] Recital (13) Council Directive (EU) 2024/1203.

[27] Under the Council Directive (EU) 2024/1203, the threshold of environmental damage for most offences is typically that the prohibited conduct causes or is likely to cause "the death of, or serious injury to, any person, substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants." Pereira, *op. cit.,* note 24, footnote 46, p. 162.

[28] E.g., the ship recycling offence (Art.3(2) point h); the trade in ozone depleting substances offence (Art. 3(2) point s) and the trade in fluorinated greenhouse gases offence (Art.3(2) point t). *Ibid.*

[29] Behavior is illegal if it violates: (a) Union rights contributing to the achievement of a Union political aim in the area of the environment as stated in article 191(1) of UFEU; or (b) the law or other Member State regulation or a decision reached by an authoritative Member State body which implements Union law from point (a).

and in paragraph 4 if the behaviour is at least with extreme carelessness.[30] The important innovation is that an act is also unlawful if it is committed under an authorization granted by a competent authority of a Member State, if that authorization was obtained fraudulently or through corruption, extortion or coercion or if such authorization is in manifest breach of relevant substantive legal requirements (art. 3 paragraph 1). If the proscribed unlawful behaviour leads to serious consequences, it is a qualified criminal offence on the condition that it causes:

(a) destruction or far reaching and significant damage, which is either irreversible or long term, is great or of significant value to the ecosystem, or for the habitat within a protected area; or

(b) widespread and considerable damage, which is irreversible or long term or to the quality of the air, soil or water (art. 3 paragraph 3).[31]

[30] Member States ensure that behavior stated in 2 points from (a) to (d), points (f) and (g), points from (i) to (q), point (r) subpoint ii. and points (s) and (t) represent a criminal offence of that behavior is illegal and committed out of gross negligence.

[31] In Art.3(3) points a) and b) the Council Directive (EU) 2024/1203 introduces two new qualified offences for acts comparable to ecocide, largely thanks to the interventions of the European Parliament in the course of the directive negotiations. Pereira, *op. cit.* note 24, p. 160. On the need that ecocide is declared an international crime for the authority would be ICC and that those who destroy the environment are punished in times of war and peace above all big companies multinational corporations more Stock, C*., A Fifth core crime: Crime of ecocide as a new puzzle of the international criminal law,* Yearbook of International & European Criminal and Procedural Law, vol.1, 1/2022, pp. 248-284. That in particular due to the Statute of Rome supporting explicit authority of the ICC for crimes against the environment in particular because EU supervision regarding cooperation in the area of criminal law and ecological standards is shared with the authority of member states. Rizzo, A., *In Search of Ecocide Under EU Law. The International Context and EU Law Perspectives* Freedom, Liturity & Justice: European Legal Studies, 3/2021, pp. 163-196. More on considering crime against the environment as crime against humanity and the concept of ecocide as an international law Fronza, E., *Towards a new crime of ecocide: the moving frontiers of international criminal law*, Strafrecht und Systemunrecht Festschrift für Gerhard Werle zum 70. Geburtstags, 2022, pp. 93-104, https://www.mohrsiebeck.com/buch/strafrecht-und-systemunrecht-9783161588624/, 20 February, 2025.; Alberro, H.; Daniele, L., *Ecocide: why establishing a new international crime would be a step towards interspecies justice*, 2021, The Conversation, https://theconversation.com/ecocide-why-establishing-a-new-international-crime-would-be-a-step-towards interspecies-justice-162059, 10 February, 2025.; Sarlième, M., *Ecocide: Past, Present, and Future Challenges*, in book: Life on Land 2021, pp. 233-243 https://www.researchgate.net/publication/347137341, 10 February, 2025.; Higgins, P.; Short, D.; South, N., *Protecting the planet: a proposal for a law of ecocide,* Crime Law Soc Change, Springer, 2013, https://www.researchgate.net/profile/Damien-Short/publication/257552825, 10 February, 2025.; Sziebig, O. J., *The Crime of Ecocide through Human Rights Approach The "Universal" Right to a Healthy Environment as a Driving Force Calling for Ecocide Legislation*, ACTA HUMANA, 2/2024, pp.75–89 and Hansen, O. T., *Accountability for Environmental Crimes in Conflict Zones: Why Expanding the International Criminal Court's Jurisdiction Is Not the Best Solution*, New York University Journal of International Law and Politics 56, 3/2024, pp. 879-923.

The Council Directive (EU) 2024/1203 also provides the elements for assessing the extent of the damage or likely damage as significant or non-significant.[32] Regarding criminal law institutes, the Council Directive (EU) 2024/1203 in art.4 orders punishment for inciting and aiding and abetting in criminal offences against the environment and for attempting these acts: inciting and assisting in relation to the commission of intentional criminal acts from art. 3 paragraphs 2 and 3 and attempting to intentionally commit a criminal act which causes or is likely to cause death or serious injury to persons or which causes or is likely to cause significant damage to the environment or in another way is considered particularly harmful.[33] Therewith the concept of „attempting" is interpreted in keeping with national law. The definition of criminal acts in the Council Directive (EU) 2024/1203 includes commission, as well as omission, that is, failure to fulfil legal duties.

2.2. Presumptions of liability of legal entities

The concept of a legal entity includes every legal subject of that status on the basis of applicable national law, apart from state or public bodies executing government functions and public international organizations (art. 2 paragraph 2 (a). Art. 6 paragraph 1 stipulates those legal entities are liable for criminal offences from

[32] Member States shall ensure that, in assessing whether the damage or likely damage is substantial, as regards conduct listed in paragraph 2, points (a) to (e), point (f) subpoint ii, points (j) to (m), and point (r), one or more of the following elements is taken into account, where relevant: a) the baseline condition of the affected environment, b) whether the damage is long-lasting, medium-term or short-term, c) the extent of the damage, d) the reversibility of the damage. Member States shall ensure that, in assessing whether conduct listed in paragraph 2, points (a) to (e), point (f)(ii), points (i) to (m), and point (r), is likely to cause damage to the quality of air or soil, or the quality or status of water, or to an ecosystem, animals or plants, one or more of the following elements is taken into account, where relevant: (a) the conduct relates to an activity which is considered to be risky or dangerous for the environment or human health, and requires an authorization which was not obtained or complied with; (b) the extent to which a regulatory threshold, value or another mandatory parameter set out in Union or national law referred to in paragraph 1, second subparagraph, points (a) and (b), or in an authorization issued for the relevant activity is exceeded; (c) whether the material or substance is classified as dangerous, hazardous or otherwise listed as harmful to the environment or human health.
Member States shall ensure that in assessing whether a quantity is negligible or non-negligible for the purposes of paragraph 2, point (f)(i), and points (g), (n), (o) and (p), one or more of the following elements is taken into account, where relevant: (a) the number of items concerned; (b) the extent to which a regulatory threshold, value or another mandatory parameter set out in Union or national law referred to in paragraph 1, second subparagraph, points (a) and (b), is exceeded; (c) the conservation status of the fauna or flora species concerned; (d) the cost of restoration of the environment, where it is feasible to assess that cost.).

[33] Taken from art. 3(2) points of (a) to (d), points (f) and (g), points from (i) to (m) and points (o), (p), (r), (s) and (t), punishable as a criminal act.

Articles 3 and 4 of the Council Directive (EU) 2024/1203, if such criminal offences were committed for the benefit of those legal entities by any person who has a leading position within the legal entity concerned, acting either individually or as part of an organ of that legal entity, based on:

(a) a power of representation of the legal entity;
(b) an authority to take decisions on behalf of the legal entity; or
(c) an authority to exercise control within the legal entity.

Member States are ordered to ensure that legal entities are responsible and if non implementation of supervision or checks on the part of such persons enabled another person supervisory to the legal entity to commit a crime from articles 3 and 4 in favor of the legal entity (art. 6 paragraph 2). Furthermore, liability of legal entities must not prevent criminal proceedings against natural persons who are perpetrators, and those who incite or assist in criminal acts from articles 3 and 4 of the Council Directive (EU) 2024/1203 (art. 6 paragraph 3).

2.3. Types of sanctions and measures for legal entities

The Council Directive (EU) 2024/1203 in art. 7 stipulates a duty for Member States to ensure that sanctions or measures for legal entities considered liable on the basis of Article 6 paragraphs 1 or 2 for criminal offences from Articles 3 and 4 to include criminal or non-criminal fines and other criminal or non-criminal sanctions or measures such as the following(a) an obligation to: i. restore the environment within a given period, if the damage is reversible, or ii. pay compensation for the damage to the environment, if the damage is irreversible or the offender is not in a capacity to carry out such restoration; (b) exclusion from entitlement to public benefits or aid; (c) exclusion from access to public funding, including tender procedures, grants, concessions and licences; (d) temporary or permanent disqualification from the practice of business activities; (e) withdrawal of permits and authorisations to pursue activities that resulted in the relevant criminal offence; (f) placing under judicial supervision; (g) judicial winding-up; (h) closure of establishments used for committing the offence; (i) an obligation to establish due diligence schemes for enhancing compliance with environmental standards; (j) where there is a public interest, publication of all or part of the judicial decision relating to the criminal offence committed and the penalties or measures imposed, without prejudice to rules on privacy and the protection of personal data.

Furthermore, the Council Directive (EU) 2024/1203 stipulates that Member States ensure that, at least for liable legal entities, criminal offences contained in Art. 3 paragraph 2 punishable by criminal or non-criminal monetary fines the amount of which is commensurate with the seriousness of the behaviour, and individual,

financial, and other circumstances of that particular legal entity. Moreover, Member States are free to choose the amount of fine for legal entities between amount of turnover of the legal entity or determining a fixed amount. For the worst breaches of the environment fines must be at least 5% of their overall world profits[34] or a fixed amount of 40 million euro[35] and for other breaches 3% of profits or 24 million euro.[36] Member States must ensure that liable legal entities for offences contained in Art. 3 paragraph 3 of the Council Directive (EU) 2024/1203 (qualified offences against the environment) can be punished with stricter criminal or non-criminal sanctions or measures than those applicable to summary offences (contained in Art. 3 paragraph 2). The highest level of monetary fines should be applied to the most serious offences committed by financially strong legal entities.[37]

The Council Directive (EU) 2024/1203 in Art. 8 stipulates the circumstances when determining the amount of fine, one or more pf which do not characterize offences against the environment, consider as aggravating if (a) the offence caused the destruction of, or irreversible or long-lasting substantial damage to, an ecosystem; (b) the offence was committed in the framework of a criminal organization within the meaning of Council Framework Decision 2008/841/JHA; (c) the offence involved the use by the offender of false or forged documents; (d) the offence was committed by a public official when performing his or her duties; (e) the offender has previously been convicted by a final judgment of offences of the same nature as those referred to in Article 3 or 4; (f) the offence generated or was expected to generate substantial financial benefits, or avoided substantial expenses, directly or indirectly, to the extent that such benefits or expenses can be determined; (g) the offender destroyed evidence, or intimidated witnesses or complainants; (h) the offence was committed within an area classified as a special protection area pursuant to Article 4(1) or (2) of Directive 2009/147/EC, or a site designated as a special area of conservation in accordance with Article 4(4) of Directive

[34] In the financial year preceding when the criminal offence was committed or in the financial year preceding the decision on issuing a fine, Member States can establish rules for cases where it is not possible to determine the amount of fine based on overall world profit of the legal entity and determine a method to calculate these highest levels of fines including their particular conditions (Recital (34) Council Directive (EU) 2024/1203).
[35] The highest levels of such fines should be applied to the most serious forms of criminal offences as defined in the Council Directive (EU) 2024/1203 committed by financially strong legal entities.
[36] Pingen, A.; Wahl, T., *New EU Rules on Protection of the Environment through Criminal Law,* Eucrim, 1/2024, pp. 32-33, https://eucrim.eu/news/, 26 February, 2025.
[37] Member States are asked to regularly examine the level of fines set in fixed amounts taking into consideration rates of inflation and other fluctuations in monetary value.

92/43/EEC or a site listed as site of Community importance in accordance with Article 4(2) of Directive 92/43/EEC.[38]

Mitigating circumstances are considered to be if: a) the offender restores the environment to its previous condition, where such restoration is not an obligation under Directive 2004/35/EC, or, before the start of a criminal investigation, takes steps to minimize the impact and extent of the damage or remediates the damage; (b) the offender provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to: i. identify or bring to justice other offenders; ii. find evidence.

The Council Directive (EU) 2024/1203 obliges Member States to also prescribe *sui generis* the tracing, identifying, freezing and confiscation of instrumentalities and proceeds from the environmental crimes.[39]

In Art. 11 of the Council Directive (EU) 2024/1203 minimum rules are prescribed for deadlines for statute of limitations for processing offenders of ecological crime and executing sanctions, existing general rules for statute of limitations are applicable from the moment of commission of offence that is, date of enforceability of judgement. However, Member States are given the right to foresee that the deadline for statute of limitations commences from the moment the offence is committed, on condition that the moment is clearly confirmed pursuant to national law. Furthermore, establishing a shorter statute of limitations deadline is permissible, but no less than five years on condition that it is possible to terminate or suspend such a deadline in the case of precisely determined acts.[40]

2.4. Instrumentalities to combat organized ecological crime

The Council Directive (EU) 2024/1203 emphasizes the need in criminal proceedings and trials that the inclusion of organized criminal groups is taken into consideration. These groups work in ways that have a negative impact on the environment.[41]Therefore, criminal proceedings related to criminal offences against the environment must deal with corruption, money laundering, cybercrime

[38]Aggravated circumstances from point (a) of this article is not applied in qualified criminal offences against the environment.
[39] Art.10 Council Directive (EU) 2024/1203.
[40] Art.11(4) Council Directive (EU) 2024/1203.
[41] Transnational ecological crime is specially organized, because it demands across border cooperation among various public and private participants. Stefes, Ch., *Environmental crime and the EU : Synthesis of the research project 'European Union Action to Fight Environmental Crime' (EFFACE),* 2016, p. 40, http://efface.eu/sites/default/files/publications, 27 February, 2025.

and forging documents as well as, where business activities are concerned, offenders aim to achieve the greatest profits possible or cut costs (Recital (28) Council Directive (EU) 2024/1203). Namely, these criminal offences are often related to serious forms of criminal offences against the environment causing significant damage to the environment and people's health including devasting effects on nature. The Council Directive (EU) 2024/1203 considers as particularly concerning that some committed criminal offences against the environment where authority administration or officials carrying out their duties, tolerate or actively support.[42] Therefore, such behaviour is illegal even if it is carried out on the basis of authorization issued by the authorizing body of Member States if such authorization is gained by deceit or corruption, extortion or coercion.

This Council Directive (EU) 2024/1203 emphasizes that Member States shall take the necessary measures to ensure that effective and proportionate investigative tools are available for investigating or prosecuting environmental crimes. Where appropriate, those tools shall include special investigative tools, such as those used in combatting organized crime or in other serious cases of crime (Art. 13 Council Directive (EU) 2024/1203).[43] Furthermore, Art. 14 of the Council Directive (EU) 2024/1203 obliges Member States to protect persons who report criminal offences against the environment or assist in the investigation of these offences, in a way that, pursuant to national law, allows access to measures of support and help within the framework of criminal proceedings.

3. COUNCIL DIRECTIVE (EU) 2024/1203 INFLUENCE ON NORMATIVE REGULATION OF LEGAL ENTITY LIABILITY FOR ECOLOGICAL CRIME IN CROATIA

Normative regulation of legal entity criminal liability in Croatia has been contained for over 20 years in a special Law on Liability of Legal Persons for Criminal Offenses,[44] which expressly prescribes that to legal entities subsidiarily

[42] Examples of such behavior are inspections within which a blind eye is turned to violating the law in the area of protection of the environment or people remain silent; intentionally leaving out inspections or checks, for example related to whether the permit holder respects permit conditions; supporting decisions or voting in favor of issuing illegal permits or issuing forged or inaccurate favorable reports.

[43] Such investigative tools include intercepting communication, hiding supervision, electronic supervision, checking deliveries, checking bank accounts and other tools of financial investigation.

[44] Law on Liability of Legal Persons for Criminal Offenses, Official Gazette, No. 151/2003, 110/2007, 45/2011, 143/2012, 114/2022, 114/2023 (hereinafter: LLPCO).

are also applicable provisions of Criminal Code,[45] Criminal Procedure Act,[46] and Law on Office for Combatting Corruption and Organized Crime.[47] Given that in Croatia there is no one special catalogue of criminal offences for which legal entities are liable, they can also answer for all criminal offences as natural persons. Therefore, this overview begins with Council Directive (EU) 2024/1203 demands in relation to the catalogue of ecological criminal offences.

3.1. Duties of incriminating certain unlawful acts

Normative extraction of criminal offences against the environment as a separate chapter of criminal offences was already done in CC in 1997 due to the fact that those offences correlate, on the one hand, with criminal offences against security in general, and on the other hand offences against people's health.[48] Also, the old judicature often mixed offences against the environment with acts that threaten safety in general of people and property by a dangerous act or substance.[49] Due to obligations arising from the Directive 2008/99/EC and 2009/123/EC chapter XX. of the current CC of 2013 has been widened with eight new criminal offences against the environment.[50] Does Republic of Croatia in relation to defining criminal offences against the environment and their qualified forms widen the current catalogue? A comparison of proscribed illegal behaviours and quantitative or qualitative threshold necessary for such behaviour pursuant to the Council Directive (EU) 2024/1203 to represent a criminal offence demonstrates that the Croatian criminal legislator must harmonize the current normative situation in the following way. Primarily, it is necessary to list new criminal offences:
a) the manufacture, use, storage, import or export of mercury, mercury compounds, mixtures of mercury, and mercury-added products where such conduct is not in compliance with the requirements set out in the European

[45] Criminal Code, Official Gazette, No. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021, 114/2022, 114/2023, 36/2024 (hereinafter: CC).
[46] Criminal Procedure Act, Official Gazette, No. 152/2008, 76/2009, 80/2011, 121/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017, 126/2019, 126/2019, 130/2020, 80/2022, 36/2024.
[47] Law on Office for Combatting Corruption and Organized Crime, Official Gazette, No. 76/2009, 116/2010, 145/2010, 57/2011, 136/2012, 148/2013, 70/2017.
[48] Thus Cvitanović, *op. cit.,* note 1, p. 26.
[49] *Loc. cit.*
[50] On the legal framework on protection of wildlife in Croatia see Vuletić, I., *Review of the Ecocentric Model of Environmental Protection in Croatian Criminal Law. Ten Years after EU Accession*, Journal of Legal Theory and Practice of The Bar Association of Vojvodina, Novi Sad, vol. XCV, 4/2023, pp. 1305- 1341; Sokanović, L., *Die strafrechtliche Verantwortlichkeit der juristischen Personen im lichte des neuen kroatischen umweltstrafrechts,* Zbornik radova Pravnog fakulteta u Splitu, Split, year 50, 4/2013, pp. 977-990.

regulation of the environmental protection and causes or is likely to cause the death of, or serious injury to, any person, substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants;[51]
b) the unlawful and intentional production, placing on the market, import, export, use, or release of fluorinated greenhouse gases, whether alone or as mixtures, or the production, placing on the market, import, export or use of products and equipment, and parts thereof, containing fluorinated greenhouse gases or whose functioning relies upon those gases or the putting into operation of such products and equipment[52] and c) the unlawful and intentional recycling of ships.[53]

Therefore, the criminal offence of Environmental Pollution from art. 193 CC must be supplemented by bringing in the expressions „material" and „energy" and incriminating: (a) the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation, into air, soil or water which causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants; (b) the placing on the market, in breach of a prohibition or another requirement aimed at protecting the environment, of a product the use of which on a larger scale, namely the use of the product by several users, regardless of their number, results in the discharge, emission or introduction of a quantity of materials or substances, energy or ionising radiation into air, soil or water and causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants (provided that it is prohibited or restricted by European regulations).[54]

Obligations arising from the criminal offence of Endangerment of the Ozone Layer from art. 195 CC is to include „emitting substances" among acts and incriminating that the act also refers to „products and equipment, and parts thereof, containing ozone-depleting substances or whose functioning relies upon those substances."[55]
To the criminal offence of Endangerment of the Environment with Waste from art. 196 CC it is necessary to supplement commission of acts with „the collection, transport or treatment of waste, the supervision of such operations and the after-care of disposal sites, including action taken as a dealer or a broker, where such conduct concerns hazardous waste and it concerns a non-negligible quantity of such waste or concerns waste which is not hazardous but causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the

[51] Art.3(2) point d) Council Directive (EU) 2024/1203.
[52] Art.3(2) point t) Council Directive (EU) 2024/1203.
[53] Art.3(2) point h) Council Directive (EU) 2024/1203.
[54] Art.3(2) point a) and b) Council Directive (EU) 2024/1203.
[55] Art.3(2) point s) Council Directive (EU) 2024/1203.

quality of air, soil or water, or substantial damage to an ecosystem, animals or plants."[56]

In the criminal offence from art. 197 CC of Environmental hazard caused by a plant, it is necessary to include a new form of act comprising „the construction, operation and dismantling of an installation, where such conduct and such an installation fall within the scope of the European directives, and such conduct causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants."[57]

Obligations related to the existing criminal offence of Destruction of Protected Natural Values (art. 200), Destruction of Habitat (art. 201) and Trade in Protected Natural Values (art. 202) deal with entering the following characteristics into legal descriptions: „the killing, destruction, taking of, possession, sale or offering for sale of a specimen or specimens of a species of wild fauna or flora and of a specimen or specimens of the species, the trade of a specimen or specimens, or parts or derivatives thereof of a species of wild fauna or flora, and import of a specimen or specimens, or parts or derivatives thereof, of such species, except where such conduct concerns a negligible quantity of such specimens and any conduct which causes the deterioration of a habitat within a protected site, or the disturbance of animal species within a protected site, where such deterioration or disturbance is significant."[58]

The legal description of the criminal offence of Unlawful Introduction of Wild Species or GMOs into the Environment from art. 203 should be widened into punishing „the bringing into the territory of the Union, placing on the market, keeping, breeding, transporting, using, exchanging, permitting to reproduce, growing or cultivating, releasing into the environment, or the spreading of invasive alien species of Union concern, where such conduct breaches restrictions set out in European legislature and causes or is likely to cause the death of, or serious injury to, any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants".[59]

Making the legal description of the offence of Change in the Water Regime from art. 210 more precise is related to committing the offence of „the abstraction of surface water or groundwater within the meaning of Directive 2000/60/EC of the European Parliament and of the Council, where such conduct causes or is likely to

[56] Art.3(2) points f) and g) Council Directive (EU) 2024/1203.
[57] Art.3(2) points j) and k) Council Directive (EU) 2024/1203.
[58] Art.3(2) points n), o) and q) Council Directive (EU) 2024/1203.
[59] Art.3(2) point r) Council Directive (EU) 2024/1203.

cause substantial damage to the ecological status or ecological potential of surface water bodies or to the quantitative status of groundwater bodies".[60]

It is also necessary to supplement commission of the act necessary for the criminal offence of Devastation of Forests from art. 209 with the act of „the placing or making available on the Union market or the export from the Union market of relevant commodities or relevant products, in breach of the prohibition set out in Article 3 of Regulation (EU) 2023/1115, except where such conduct concerns a negligible quantity".[61]

For in practice the common offence of Unlawful construction from art. 212 CC, it is significant that the Council Directive (EU) 2024/1203 prescribes punishment for the execution of projects within the meaning of Art. 3 paragraph 2 point (a) of the Council Directive (EU) 2024/1203 where such conduct is carried out without a development consent and causes or is likely to cause substantial damage to the quality of air or soil, or the quality or status of water, or substantial damage to an ecosystem, animals or plants.[62]

More serious forms of criminal offences against the environment from art. 214 CC must be linked to all in CC prescribed criminal offences against the environment on condition that they caused consequences from art. 3 paragraph 3 of the Council Directive (EU) 2024/1203. In Croatian criminal law for almost all ecological offences negligent commission of acts is also punishable.[63] It would be necessary to enter corrections into CC regarding punishability for attempted criminal offences against the environment because the Council Directive (EU) 2024/1203 also demands punishment for attempting the fundamental forms of the offence of Discharge of Polluting Substances from a Vessel (art. 194), Endangerment of the Environment with Waste, Destruction of Protected Natural Values, Destruction of Habitat and Devastation of Forests.

Criminal offences against the environment can be carried out by commission, negligence or omission,[64] and most acts are blanket legal descriptions because in

[60] Art.3(2) point m) Council Directive (EU) 2024/1203.
[61] Art.3(2) point p) Council Directive (EU) 2024/1203.
[62] Art.3(2) point e) Council Directive (EU) 2024/1203.
[63] Member State shall ensure that the conduct listed in paragraph 2, points (a) to (d), points (f) and (g), points (i) to (q), point (r)ii., and points (s) and (t), constitutes a criminal offence where that conduct is unlawful and carried out with at least serious negligence (Art. 3(4)).
[64] Widening punish ability is ensured by the general institute of criminal law so-called warranty liability, which states that whoever fails to avert the consequence which is an element of a criminal offense described under the law shall be liable for omission if he or she is legally bound to avert such a consequence (art. 20 paragraph 2 CC). Sokanović, L.; Mladinić, N.; Kurtović Mišić, A., *The Protection of Marine Waters and Organisms through*

order to be applied they point to the norms of administrative law and a large number of ecological legal and sublegal regulations.[65] The consequence of most acts is abstract endangerment i.e. removing the danger to protected good, whereas for punishment in principle behaving negligently is enough for punishment.[66]

3.2. Conditions of legal entity liability

The circle of legal entities that can be punished for ecological criminal offences in Croatia matches the entities that pursuant to the Council Directive (EU) 2024/1203 have legal entity status, apart from in art. 6 of LLPCO, it would be necessary to also include public international organizations.[67] It would be necessary to consider whether in art. 3 and 4 of LLPCO to expressly state that a legal entity is liable for criminal offences by the responsible person who acted either independently or as a member of a body of that legal entity. The accepted normative model of derived or indirect legal entity liability with the model of identification or alter ego, also suits Council Directive (EU) 2024/1203 demands as well as delegation where liability is also widened to persons to whom powers of managing are transferred. Namely, legal entity liability also exists where commission of the criminal offence came about due to lapses in supervision or checks on the part of responsible persons who manage legal entities' business dealings on the person to whom management of business dealings is assigned.[68] However, the Council Directive (EU) 2024/1203 demands that ecological criminal offences are committed for the benefit of that legal entity. According to the accepted model of borrowed guilt in Croatia, the responsible person's guilt is accounted to the legal entity.[69] In such a parallel or shared criminal liability of the natural person and the legal entity in which the institutes of criminal material and procedural law are applied,[70] an

Criminal Law in the Legislation and Practice of the Republic of Croatia, Journal of Legal Theory and Practice of The Bar Association of Vojvodina, Novi Sad, 2/2024, p. 587.

[65] The most important laws are Environmental Protection Act, Nature Protection Act, Animal Protection Act, Act on Cross-Border Traffic and Wildlife Trade, Sustainable Waste Management Act and etc.

[66] Börner, R., *Umweltstrafrecht.* Springer, Berlin, 2019, pp. 31-58.

[67] LLPCO absolutely excludes the states' responsibility and limits county and town and municipality responsibility, because they cannot be punished for crimes committed in company business dealings and other activities not the prerogative of state government (*iure gestionis*). Member States can bring in stricter rules including rules on criminal liability of criminal liability of public bodies.

[68] Art. 3 paragraph 2 LLPCO.

[69] Art. 5 paragraph 1 LLPCO. All apologetic or mitigating circumstances impacting on guilt are transferrable to the legal entity.

[70] Legal entity liability is not necessary to be especially proven, because it is automatically presumed by established (*praesumptio iuris et de iure*) when the liability of the responsible natural person is established. Vuletić, I., *Corporate Criminal Liability: An Overview of the*

exception is autonomous criminal liability of the legal entity where the responsible person is unknown or inaccessible in which case his/her guilt is presumed.[71]

3.3. Duties in type of sanctions and measures for legal entities

The biggest challenge for the Croatian criminal legislator is implementation of Council Directive (EU) 2024/1203 demands in the area of sanctions and measures for legal entities. The Croatian system of criminal law sanctions for legal entities contains only two types of sanctions: punishments and security measures. The Council Directive (EU) 2024/1203 stipulates considerably higher amounts of monetary fines[72] in the fixed amount of or in the percentage of world profits of the legal entity.[73] Given that the Council Directive (EU) 2024/1203 in art. 5 prescribes the lowest levels of maximum duration of prison sentence for natural persons, LLPCO will have to harmonize fines linked to prescribed punishments for criminal offences against the environment.[74]

The measure of court order for liquidation in Croatian criminal law called the punishment of terminating the legal entity i.e. losing legal personality which is implemented by striking from the company register.[75] Croatia must normatively enable supplementary measures so that the liable legal entity must renew the environment within a certain deadline if the damage is reversible or pay damages if caused damage to the environment is irreversible or if the offender is not able to carry out such renewal.[76] Also, the measure of determining court supervision over

Croatian Model after 20 Years of Practice. Laws 12/2023, p. 27, https://www.mdpi.com/journal/laws, 27 February, 2025.

[71] Art. 5 paragraph 2 LLPCO.

[72] Depending on the severity of the criminal offence a fine spanning from 5.000,00 euro to 25.000.000,00 euro can be issued.

[73] Pursuant to art. 10 paragraph 5 of LLPCO if the aim of punishment is not achieved by issuing a fine in the stated span, the legal entity can be punished with a fine of up to do 10 % of the total profits of the legal entity earned in the financial year preceding the year the judgement is passed. The Council Directive (EU) 2024/1203 demands that Member States undertake the necessary measures in order to ensure that legal entities for qualified forms of criminal offences against the environment can be punished with strict criminal or non-criminal sanctions or measures than those prescribed for basic offences.

[74] Art. 10 of LLPCO prescribes the amount of fine for legal entities.

[75] This punishment pursuant to art. 12 paragraph 1 of LLPCO can only be issued if the legal entity with cause commits criminal offences or has mainly used their position to commit criminal offences and cannot be issued to public bodies, political parties and unions.

[76] On the contrary CC in art. 213 stipulates for legal entities application of provisions of effective remorse by court permission that five criminal offences against the environment (Pollution of the Environment, Emitting polluted substances from vessels, Endangering the Environment with Waste, Endangering the Environment by Plants and Endangering by radioactive substances) can exempt the perpetrator from punishment on condition that before harm came into effect they voluntarily removed the danger or state caused.

the legal entity must be introduced.[77] Most sanctions and measures for legal entities are provided in LLPCO as security measures for prohibiting carrying out certain activities or jobs, forbidding doing business with users of state and local budgets and prohibiting acquisition of licenses, authorizations, concessions or subsidies. However, it would be necessary to introduce new and harmonize existing with formulations from the Council Directive (EU) 2024/1203: cancelling rights to public funds and assistance; exclude from being able to access government financing, exclusions from public imposition procedures, non-refundable monies, concessions and permits; temporary or permanent ban on carrying out business activities and revocation of licenses and approvals to carry out activity leading to the relevant criminal offence and closing down premises used for commission of the criminal offence. In particular, it will be necessary to formulate normative regulation of the duty to establish a program of duty of care to improve harmonization with environmental protection standards.[78]

An additional measure for making public the overall court judgement, or part thereof, which is related to the committed criminal offence and expressed sanction or measure, not bringing into question the rules on privacy and protection of personal data, in Croatian criminal law, the measure of publicizing the judgement on the costs of the convicted legal entity is ensured.[79]

Changes relating to aggravated circumstances upon issuing punishments are also related to the existence of amassing criminal offences against the environment and other acts. For example, an aggravating circumstance from art. 8 c) of the Council Directive (EU) 2024/1203 is that criminal offences against the environment included the use of false or forged documents on the part of offenders in Croatian criminal law will represent the acquisition of criminal offences against the environment and the criminal offence of forging documents from art. 278 of CC. Regarding mitigating circumstances, LLPCO also prescribes the possibility of exemption from punishment for the legal entity that reports the criminal offence of the responsible person before it is uncovered or before knowing that the offence has been uncovered (art. 12a).

[77] By example of art. 131-39 of the French Penal Code: „*3° Le placement, pour une durée de cinq ans au plus, sous surveillance judiciaire,*" https://www.legifrance.gouv.fr/codes/texte_lc/ 1 March, 2025.

[78] This deals with the duty companies to introduce programs of duty of care to improve harmonization with standards of environmental protection and to encourage economic subjects to have officials whose duty is to harmonize with Union law where the environment is concerned.

[79] The Court can always determine this when, given the meaning of the criminal offence, establish that justifiable reasons exist for the public to be informed of the enforceable court judgement (art. 21 paragraph 1 of LLPCO).

Given the fundamental criminal law that no one can keep property benefit acquired by committing a criminal offence, LLPCO also prescribes the measure of taking away such acquired benefit.[80] Given that the Council Directive (EU) 2024/1203 suggests undertaking measures which would enable the seized financial benefit to be used to finance renewing the environment or fixing damage caused or for damages for the environment, it would be necessary to consider such a possibility in national environmental protection law.[81]

It will certainly be necessary to harmonize deadlines of statute of limitations for criminal prosecution against legal entities and implementation of given sanctions, given the fact that statute of limitations deadlines are calculated according to the prescribed punishment for the committed criminal offence.[82] Statute of limitations commences on the day when the offence was committed and exceptionally if the consequence characterizing the criminal offence occurs later, statute of limitations commences from that moment.[83] Implementing given monetary fines for legal entities are subject to statute of limitations after six years has passed of the fine being given[84] whereas implementing the punishment of cancelling the legal entity is not subject to statue of limitations.[85]

3.4. Mechanisms of processing corporative ecological organized crime

Instrumentalities for combatting organized crime in Croatia is the consequence of the UN Convention on transnational organized crime[86] and for the participation of organized criminal groups in the commission of criminal offences against the environment the provisions of CC and Law on Office for Combatting Corruption and Organized Crime can be applied. It is particularly significant for the prosecution of organized criminal groups active in the area of across border ecological crime.[87] With articles 328 and 329 of CC, there is provision for liability

[80] Art. 19 of LLPCO. Establishing damage to the environment is problematic in the amount of reparation costs e. g. in the case of illegal waste disposal sites or in cases of sea pollution, coastlines, land, and total cost to the ecosystem. The report by the main State Attorney of the Republic of Croatia on the work of state attorneys in 2023 pp. 230-236, https://dorh.hr/sites/default/files/dokumenti/2024-04/, 2 March, 2025.
[81] Recital (49) Council Directive (EU) 2024/1203.
[82] Art. 21a paragraph 1 LLPCO.
[83] Art. 82 CC.
[84] Art. 21a paragraph 2 LLPCO.
[85] Art 21a paragraph 3 LLPCO.
[86] United Nations Convention against Transnational Organized Crime, Official Gazette, International treaties, No. 14/2002.
[87] More Pleić, *op.cit.,* note 3, p. 612. About organized corporate crime and American conspiracy theory Babin, A., *Corporate criminal liability*, American Criminal Law Review, 58 (3 Annual Survey of White Collar Crime), 2021, p. 682.

for organizing or leading or committing criminal offences within a system of criminal association. Criminal association comprises at least three persons who have banded with the common aim of one or more criminal offences for which a prison sentence of three or more years can be given and which does not include association of persons coincidentally for directly committing a criminal offence.[88] Within the authority of the Croatian Office for Combatting Corruption and Organized Crime (hereinafter: Office), criminal offences are prosecuted related to corruption, influence trading, money laundering, coercion, extortion and blackmail, for the criminal offence of revealing the identity of vulnerable persons or protected witnesses related to the commission of a crime falling into the authority of the Office and for offences committed related to group activity or criminal organizations for which a prison sentence of more than three years is prescribed and the offence is committed within two or more countries or a significant part of its preparation or planning is executed in another country.[89] Given that ecological crime in the across border context demands strict standards of proving guilt,[90] instrumentalities for processing organized legal entity crime are normative solutions of Office on undertaking special evidential and particularly speedy actions in cases of money laundering and corruption stipulated in art. 17 paragraph 3 of Law on Office for Combatting Corruption and Organized Crime.[91] Also, given that the Council Directive (EU) 2024/1203 demands effective investigatory tools, it would be a good idea to consider the need for improving procedural provisions aimed at processing corporative ecological crime.[92]

[88] Art. 328 paragraph 4 CC. Art. 329 paragraph 1 of CC prescribe heftier punishment for the person who knows the aim of the criminal organization or its criminal activity and commits a criminal offence within such an association or encourages others to commit such a crime within such as association.

[89] Art. 21.

[90] Nomani, M.Z.M. *et al*., *Prevention of Transnational Environmental Crime Under Convention on Protection of Environment Through Criminal Law: Agenda and Implementation,* International Journal of Advanced Science and Technology, vol. 29, No. 5s, 2020, pp. 606-612

[91] On the significance of persecution of across border forms of endangering the ecosystem is the Department for International Cooperation and Investigation of Office or common investigative teams. Pleić, *op. cit.,* note 3, p. 606.

[92] So, Member States should consider that cases related to the environment are given to specialized investigative units, prosecutors and specialized judicial councils that would have technical professional knowledge at their disposal (Recital (61) Council Directive (EU) 2024/1203).

3.5. Need for precise limitation of applying administrative and criminal law in enviromental protection

The Croatian system of environmental protection is a combination of administrative and criminal instrumentalities in which the environment nevertheless primarily is protected by non- criminal administrative instrumentalities whereas criminal legal protection is accessory and *ultima ratio societatis*.[93] Due to this, defining the area of application of administrative and criminal law in relation to punishable offences against the environment while strictly respecting the principle of *non bis in idem* and *res judicata* will be a demanding and complex task given the existence of a huge number of regulations containing a range of sanctions and measures for misdemeanours. For limitation in this area of the law an important Council Directive (EU) 2024/1203 provision is the fact that an official authorization does not preclude criminal liability if it is obviously and materially unlawful means that this accessoriness under administrative law is broken and companies have no or only very limited protection of legitimate expectations in this respect.[94]

4. CONCLUSION

Given that in the EU the trend is a constant increase in ecological crime, in particular transnational and organized, often remaining uncovered, the Council Directive (EU) 2024/1203 certainly as its main aim has improving the role of criminal law in environmental protection and equalizing the system of criminal law protection of the environment at Member State level. The duty imposed by normative harmonization of member state national regulation, in particular those relating to legal entities and organized ecological crime, will also make a contribution to establishing adequate protection of the environment. Reality shows that punishing legal entities is key to effective protection of the environment, so

[93] Sokanović, L.; Boko M., *Maritime Pollution in Croatia – Old Questions and New Developments,* Proceedings Book of the 3rd International Scientific Conference on Maritime Law –ISCML, Split, 2021, p. 296.

[94] In the German criminal law system criminal liability depends, among other things, on the administrative act and action in principle is not punishable if it is given with adequate authorization, because different forms of official authority are considered as reasons for justification. Cappel, A.,Naujack, C.,*The new EU Directive 2024/1203: Extending environmental protection under criminal law in the European Union and its impact on Germany,* Norton Rose Fulbright, 2024, https://www.nortonrosefulbright.com/en/knowledge/publications/1ad9c021/the-new-eu-directive-2024, 5 March, 2025.

the Council Directive (EU) 2024/1203 represents an important step towards a stronger framework at EU level.

Duties ordered by the Council Directive (EU) 2024/1203 will have special significance in those Member States where there is a certain gap between legislation and court practice, wherein Croatia also finds itself. Although Croatia even from 2013 widened its catalogue of acts against the environment, by which it implemented high European standards, processing legal entities for those acts is negligible. Data from the State Department of Statistics show that criminal law protection of the environment from unlawful acts by legal entities in Croatia are ineffective because there are less and less reported, accused and convicted legal entities. Due to covering up crimes by legal entities, and non-acceptance of legal possibilities of their autonomous criminal liability of legal entities, in practice exclusively natural persons are more often reported as individual offenders. Given that such a state of inadequate protection is present in all EU Member States, the new Council Directive (EU) 2024/1203 orders harmonization of national regulations so Croatia will have to amend not only CC but also LLPCO as well as other relevant regulations in order to ensure its effective application. In the first place it will, apart from the duty to widen existing and incriminating new legal descriptions of ecological acts, certainly be obligated to harmonize the system of sanctions for legal entities, especially prescribing additional sanctions or measures which are considered for legal entities more effective than financial sanctions. Also, it will be necessary to change procedural laws, in particular in relation to organized corporative crime and contemplate the possibility that enable the interested public to act on behalf of the environment as a public good, and all this in the aim of effective criminal prosecution. In conclusion, it is expected that the new national normative framework for punishing legal entities raises consciousness among them of the dangers to the environment and people's health and their responsibility towards a sustainable environment.

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Review paper

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THE LEGAL NATURE OF PRECAUTIONARY MEASURES AND THE CONSEQUENCES OF THEIR NON-COMPLIANCE IN THE CONTEXT OF PROTECTING VICTIMS OF VIOLENT CRIME AND THE RIGHTS OF THE DEFENDANT

ABSTRACT

In this paper, the authors, using the normative and teleological method, analyze existing legal solutions regarding the content and duration of precautionary measures before and during criminal proceedings, as well as the possibility of their imposition and duration after a (non-)final court verdict, with an emphasis on specific cases of victim protection through the application of precautionary measures, either as a substitute for pre-trial detention or by applying independent precautionary measures, especially when criminal proceedings last for a more extended period of time. Also, in the context of the level of violation of precautionary measures, various legal consequences are analyzed, which are reflected not only in the replacement of the imposed precautionary measure with a procedural instrument, pre-trial detention, but also in the conduct of new criminal proceedings for the (new) criminal offense of non-execution of a court decision under Art. 311, para. 3 of the Criminal Code, which can potentially articulate the constitutional principle of equality of citizens before the law due to different sanctions for non-compliance with substantively the same measures, as well as the principle of fairness in the context of trial within a reasonable time when the "responsibility" for the expiration of the maximum terms of pre-trial

detention is "shifted" to the defendant, while, essentially, the responsibility for trial within a reasonable time lies with the court.

Keywords: *precautionary measures, pre-trial detention, criminal proceedings, enforceability of judgment, protection of victims' rights*

1. INTRODUCTION

The right to personal liberty was postulated in 1215 in the Great Charter (Magna Carta), and to this day, it has been proclaimed in numerous international and regional documents.[1] Although it is not absolute because it can be derogated under certain conditions, it is "a true and proper object of protection of the state and its legal order."[2] The inviolability of personal liberty is a constitutional postulate, and no one may be deprived of or restricted in their freedom except when this is determined by law, which the court decides.[3] Therefore, the Constitution itself justifies the restriction of fundamental human rights and freedoms, in two cases, in particular when there is a probability that a person has committed a certain criminal offense and when there is a danger that, by exercising their fundamental rights and freedoms, they would jeopardize the initiation or goal of criminal proceedings.[4] The commission of criminal offenses, especially severe ones, results in the deprivation or restriction of liberty, whereby the state, as the holder of the monopoly of physical coercion, exercises its repressive role. Since after the commission of a criminal offense, and due to the defendant's escape risk, collusion[5] or iteration risk[6], circumstances may arise that make it challenging to conduct criminal proceedings against the defendant, as well as the execution of the criminal sanction after the proceedings have been legally concluded, it is necessary to ensure the defendant's presence. To ensure the defendant's presence

[1] The right to freedom was proclaimed by a series of international documents such as the Universal Declaration of Human Rights from 1948, the International Covenant on Civil and Political Rights (ICCPR) from 1966, and regional human rights documents such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) from 1950, the Charter of the European Union on Fundamental Rights (CFR) from 2000, the African Charter on Human and Peoples' Rights from 1981, etc.

[2] Đurđević, Z.; Tripalo, D. *Trajanje pritvora u svjetlu međunarodnih standarda te domaćeg prava i prakse*, Hrvatski ljetopis za kazneno pravo i praksu, vol. 13, no. 2, 2006, Zagreb, p. 553.

[3] Art. 22 of the Constitution, Official Gazette, No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

[4] Cf. Krapac, D. *Kazneno procesno pravo*, Prva knjiga: Institucije, Narodne novine, Zagreb, 2020, p. 355.

[5] Lat. *collusio* (secret/deceptive understanding) - the risk of obstructing criminal proceedings by destroying evidence or influencing witnesses.

[6] Lat. *iteratio* (the action or a process of iterating or repeating) - risk of reoffending.

before and during criminal proceedings, the Criminal Procedure Act (hereinafter: CPA)[7] in Chapter IX. regulates "Measures to ensure the presence of the defendant and other precautionary measures," which *per se* represent more or less severe interference with the fundamental right of citizens to personal freedom. Measures to ensure the defendant's presence in the proceedings are regulated according to the severity of the interference with individual rights and concerning the goal sought to be achieved by their application. For the above reason, the legislator grades them from the lightest to the most severe measure and includes a summons to the defendant (Art. 96 of the CPA), compulsory appearance (Art. 97 of the CPA), precautionary measures (Art. 98-101 of the CPA), bail (Art. 102-105 of the CPA), arrest (Art. 106-111 of the CPA), detention (Art. 112-118 of the CPA), home detention (Art. 119-121 of the CPA), and pre-trial detention (Art. 122-144 of the CPA). As evident, precautionary measures are measures of medium intensity of interference with an individual's freedom, which is reflected in the restrictions of certain contents of rights in order to prevent specific dangers to the course of criminal proceedings. Over the past decades, the legislator has gradually expanded the catalog of precautionary measures, which include various bans and restrictions – from prohibition on movement and contact with certain persons to seizure of documents or removal from home – to ensure the smooth flow of criminal proceedings and protect victims.[8] Therefore, the legislator has envisaged a wide range of measures that ensure the presence of the defendant not only before and during criminal proceedings but also after their conclusion, and that does not deprive the defendant's freedom but only restricts it "to the extent necessary for the smooth conduct of criminal proceedings."[9] Although there is scholarly debate as to whether some of these measures are punishments in themselves,[10] it is

[7] Criminal Procedure Act, Official Gazette, No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 130/20, 80/22, 36/24.

[8] Precautionary measures include 1) prohibition to leave a residence; 2) prohibition to visit a certain place or territory; 3) obligation of the defendant to call periodically a certain person or authority; 4) prohibition to approach a certain person; 5) prohibition to establish or maintain contacts with a certain person; 6) prohibition to engage in a certain business activity; 7) temporary seizure of passport or other document which serves to cross the state border; 8) temporary seizure of a license to drive a motor vehicle, which have been incorporated into Croatian criminal procedure legislation since 1997. The 2013 amendment added two more precautionary measures, namely the 9) prohibition on stalking or harassing the victim or another person and 10) removal from the home (Official Gazette, No. 145/2013), while the 2020 amendment added another precautionary measure of 11) prohibition of Internet access (Official Gazette, No. 126/2019). Art. 98, para. 2, of the CPA.

[9] See Tuntevski, N. *Eligibility of precautionary measures from the influence of basic principles of criminal procedure - advantages and disadvantages of the security measures related to the detention*, Knowledge - International Journal, vol. 20, no. 2, 2017, p. 827.

[10] See Kos, D. *Istražni zatvor krajnja mjera prisutnosti okrivljenika, a ne kazna*, 2014, http://www.vsrh.hr/easyweb.asp?pcpid=386; Cesare Beccaria also stated that preventive detention of the defendant (pre-trial detention) is considered, admittedly, a punishment but

indisputable that they serve multiple purposes in the criminal proceeding. Precautionary measures, as an alternative to pre-trial detention, correlate with the same substantive legal assumptions and aim to achieve the purpose of pre-trial detention without applying this most severe measure of deprivation of liberty, and are manifested by restrictions on certain content of the law to prevent specific dangers to the course of criminal proceedings. Although they are conditioned by the existence of pre-trial detention reasons from Art. 123 of the CPA, their duration exceeds the duration of pre-trial detention, given that the legislator postulated their independent existence after the expiry of the pre-trial detention terms if the circumstances justifying the imposition of pre-trial detention still exist, which imposes the independence of this criminal procedure institute. Recent amendments to the CPA (Official Gazette, No. 36/24) did not affect the alternative character and catalog of precautionary measures. Still, concerning specific categories of victims, as a novelty, mandatory consideration of "the results of the individual assessment of the needs of the victim and the victims' closely related person and the needs of the victim's protection" was incorporated when deciding to impose a precautionary measure as a milder form of criminal law repression against the defendant instead of pre-trial detention.

This paper, using a normative and teleological method, analyzes *de lege lata* legal solutions regarding the content and duration of precautionary measures as an alternative to pre-trial detention, before and during criminal proceedings, and the possibility of their imposition and duration after a (non-)final court verdict, with an emphasis on specific cases of protection of victims of violence. Also, in the context of the level of violation of precautionary measures, various legal consequences are analyzed, which are reflected not only in the replacement of the imposed precautionary measure with a procedural legal instrument, pre-trial detention, but also in the conduct of new criminal proceedings for the (new) criminal offense of non-execution of a court decision under Art. 311. para. 3. of the Criminal Code (hereinafter: CC),[11] which can potentially articulate the constitutional principle of equality of citizens before the law due to different sanctions for non-compliance with substantively the same measures, but also the principle of fairness in the context of trials within a reasonable time when the "responsibility" for the expiration of the longest terms of pre-trial detention is "shifted" to the defendant, against whom it is possible to apply independent precautionary measures even after the expiration of the longest terms of pre-trial detention under Art. 133 of the CPA.

one that, unlike all other punishments, is a necessary condition for establishing guilt. Beccaria, C. (1984). O zločinima i kaznama, chap. XXIX.

[11] Criminal Code, Official Gazette, No 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021, 114/2022, 114/2023, 36/2024.

2. LEGAL NATURE OF PRECAUTIONARY MEASURES

The legal basis for standardizing precautionary measures as a procedural institute stems from the constitutional principle of proportionality, which requires that any restriction of freedom or rights must be proportionate to the nature of the need for the restriction in each individual case,[12] i.e., that it does not exceed the strictly necessary measure.[13] Apart from the proportionality of its application, precautionary measures are also characterized by a temporary character and a preventive nature.[14] Therefore, in the case where there are pre-trial detention circumstances (Art. 123 of the CPA) due to which pre-trial detention is possible or has already been ordered, the court and the state attorney, taking into account the results of the individual assessment of the needs of the victim and those close to the victim and the need to protect the victim, will, if a precautionary measure can achieve the same purpose, order the application of one or more such measures in a reasoned ruling (Art. 98, para. 1 of the CPA). In doing so, the defendant will be warned that in the case of failure to comply with the imposed measure, it will be replaced by pre-trial detention. Thus, precautionary measures are considered milder measures applied in criminal proceedings to ensure the purpose of applying pre-trial detention;[15] that is, they are legal measures "applied as milder alternatives to pre-trial detention"[16] that "are still effective in preventing danger."[17] Precautionary measures consist of restricting certain rights and freedoms of the defendant rather than depriving them, which is evident from the nature of the rights they relate to.[18] They represent restrictions on certain contents of rights to prevent specific dangers for the course of criminal proceedings and are manifested by the inability to establish and maintain (potentially dangerous) social contacts,[19] perform (business) activities,[20] or freedom of movement,[21] and visit certain places. The escape risk, collusion (the risk of disrupting the course of criminal

[12] Art. 16, para. 2, of the Constitution.
[13] Krapac, *op. cit.* note 4, p. 358.
[14] Cf. Andrescu, A. *The incidence of the principle of proportionality in the case of precautionary measures ordered in the Romanian criminal process*, Lex ET Scientia International Journal, vol. 31, no. 1, 2024, p. 153.
[15] Supreme Court of the Republic of Croatia, II Kž 506/2020-4 of December 7, 2020.
[16] County Court in Bjelovar, Kž 493/2024-4 of November 14, 2024.
[17] Supreme Court of the Republic of Croatia, II Kž 29/2018-4 of January 26, 2018.
[18] Cf. Pavišić, B. *Komentar Zakona o kaznenom postupku s prilozima*, Templar-book, Šmrika, 2015, str. 152.
[19] Prohibition of approaching a certain person, prohibition of establishing or maintaining contact with a certain person, prohibition of stalking or harassing the victim or another person, removal from the home, prohibition of Internet access.
[20] Prohibition to engage in a certain business activity.
[21] Prohibition of leaving a residence, obligation of the defendant to call periodically a certain person or authority; temporary seizure of passport or other document which serves to cross the state border; temporary seizure of a license to drive a motor vehicle.

proceedings), or iteration risk (the risk of re-committing criminal offenses) can be successfully eliminated by precautionary measures that contain a minimum of social caution that can successfully fulfill the purpose of applying the basis for pre-trial detention under Art. 123 of the CPA.[22] Case law states that precautionary measures are used to eliminate the risk of reoffending criminal offenses, to ensure the defendant's presence during the proceedings,[23] or to prevent his escape.[24] Some court decisions state that precautionary measures can be applied in criminal proceedings to ensure the safety of the victim or the public[25] or the safety of other persons.[26] As independent measures, precautionary measures are applied in criminal proceedings to protect the victim[27] "when pre-trial detention is no longer possible," whereby "the court is obliged to assess the existence of a well-founded suspicion that the accused has committed a criminal offense."[28]

Precautionary measures may not entail the restriction of a defendant's right to his own home and to unimpeded connections with members of his household, spouse or common-law partner, parents, children, adopted child, or adoptive parent unless the criminal proceedings are conducted for a criminal offense committed to the detriment of one of these persons.[29] In addition, precautionary measures may not restrain the right of a defendant to unimpeded communication with his defense counsel.[30] The Supreme Court of the Republic of Croatia stated that by imposing a precautionary measure prohibiting the defendant from leaving the residence at the address in S., provided that he does not leave the area of the City of S., the defendant "is not prevented from establishing contact with his defense counsel, since, in addition to the possibility of his defense counsel coming to him from S. to S., he has at his disposal other means and forms of communication that are more frequently used in this modern era than direct physical contact."[31]

[22] Decisions of the Supreme Court of the Republic of Croatia, II Kž 522/2020-4 of December 21, 2020; II Kž 506/2020-4 of December 7, 2020; II Kž 45/2019-4 of February 8, 2019.
[23] Decisions of the Supreme Court of the Republic of Croatia, VSRH II Kž 506/2020-4 of December 7, 2020; II Kž 456/2020-4 of November 2, 2020; II Kž 439/2020-4 of October 23, 2020; II Kž 78/2020-4 of February 21, 2020; II Kž 428/2019-4 of November 28, 2019; II Kž 45/2019-4 of February 8, 2019; II Kž 284/2018-7 of August 7, 2018; II Kž 18/2018-4 of January 18, 2018; II Kž 205/2016-4 of June 13, 2016; II Kž 810/2009-3 of December 16, 2009.
[24] Decisions of the Supreme Court of the Republic of Croatia, I Kž 513/2000-3 of August 2, 2000; II Kž 320/2018-6 of August 17, 2018; II Kž 202/2017-6 of July 7, 2017.
[25] Supreme Court of the Republic of Croatia, II Kž 436/2020-4 of October 15, 2020.
[26] Supreme Court of the Republic of Croatia, II Kž 313/2018-4 of August 2, 2018.
[27] County Court in Bjelovar, Kž 487/2024-4 of November 7, 2024.
[28] County Court in Varaždin, Kžzd 74/2024-4 of August 7, 2024.
[29] Art. 98, para. 3, of the CPA.
[30] Art. 98, para. 4, of the CPA.
[31] Supreme Court of the Republic of Croatia, II Kž 456/2020-4 of November 2, 2020.

2.1. Independent precautionary measures

Amendments to the CPA (Official Gazette, No. 126/19) introduced the legal term "independent precautionary measures" in Art. 98a. Independent precautionary measures were introduced into criminal procedure legislation when it was shown in case law that the terms of pre-trial detention for some criminal offenses are quite short for the conduct of the proceedings, and these are criminal offenses with particularly serious circumstances of commission.[32] They are analogous in content to the precautionary measures from Article 98 of the CPA but are not linked to the formal assumption, i.e., the duration of the longest terms of pre-trial detention. Therefore, if in relation to the defendant, there is still a general condition from Art. 123, para. 1 of the CPA, i.e., a reasonable suspicion that he has committed the criminal offense for which he is charged, but also a special condition from Art. 123, para. 1, item 1 to 5 of the CPA for the continuation of pre-trial detention, and since the maximum duration of pre-trial detention has expired under the provisions of Art. 133 of the CPA, the court may order independent precautionary measures against the defendant.[33] However, when the first-instance court, according to Art. 98 of the CPA orders precautionary measures as independent measures, it is not bound to the pre-trial detention basis on which pre-trial detention was previously ordered or extended, "however, then the operative part of the ruling must indicate the provision of the CPA from which it is evident on which specific pre-trial detention basis from Art. 123 of the CPA the first-instance court bases its decision, and this must be explained".[34]

3. CONDITIONS OF APPLICATION

The determination of precautionary measures is conditioned by the investigative-prison grounds (Art. 123 of the CPA), which is evident from the provision of Art. 98, para. 1 of the CPA, which states that precautionary measures may be imposed not only when pre-trial detention has been ordered, but also when there are circumstances due to which it is possible to order it, meaning even when it was not ordered before or during the proceedings. Therefore, the court may order one or more precautionary measures from Art. 98, para. 2 of the CPA with the cumulative fulfillment of two assumptions: (1) the existence of circumstances from Art. 123 of the CPA due to which it is possible to order pre-trial detention or pre-trial detention has already been ordered and (2) if a precautionary measure can

[32] Rizvić, D., Burić, Z. *Izricanje istražnog zatvora i mjera opreza radi zaštite žrtava*, Priručnik za polaznike/ice, Pravosudna akademija, Zagreb, 2023, p. 48.
[33] County Court in Osijek, Kž 345/2023-2 of August 18, 2023.
[34] County Court in Varaždin, Kž 496/2023-4 of August 28, 2023.

achieve the same purpose. This means that a precautionary measure essentially represents a substitute for pre-trial detention, which is applied when that measure can achieve the same purpose as a milder measure compared to pre-trial detention. Therefore, to use the precautionary measure, it is necessary, first of all, to establish the existence of pre-trial detention assumptions, both general assumptions from Art. 123, para.1 of the CPA and special assumptions related to one or more legal bases prescribed by Art. 123, para. 1, items 1 to 5 of the CPA. After that, the court is obliged to evaluate whether the same purpose that would be achieved by applying the pre-trial detention measure could be successfully achieved by applying a milder measure, i.e. by one or more precautionary measures.[35] Namely, when choosing a precautionary measure, the court should consider the functionality of the measure and the goal it wants to achieve, and assess the adequacy and effectiveness of the applied precautionary measure. Finally, the application of precautionary measures must be properly justified,[36] and it is necessary to "identify and adequately evaluate all those circumstances that influence the decision on the possibility of replacing the measure of pre-trial detention, taking into account the need and expediency of applying a particular precautionary measure, their form and quantity, as well as their enforceability."[37]

In addition to precautionary measures, which depend on the duration of pre-trial detention, the court can also impose precautionary measures as independent measures that are not bound by the pre-trial detention terms,[38] whereby the violation of independent precautionary measures is a new criminal offense from Art. 311 of the CC, which entails additional sanctions.[39] Independent precautionary measures may only be imposed if there are circumstances for imposing pre-trial detention under Art. 123 of the CPA (i.e., there is still a risk of

[35] Supreme Court of the Republic of Croatia, II Kž 48/2018-4 of February 5, 2018.
[36] Supreme Court of the Republic of Croatia, II Kž 18/2018-4 of January 18, 2018.
[37] Supreme Court of the Republic of Croatia, II Kž 48/2018-4 of February 5, 2018
[38] The Final Proposal for the Law on Amendments to the Criminal Procedure Code of 5 December 2019, p. 14, https://sabor.hr/sites/default/files/uploads/sabor/2019-12-06/134905/PZE_776.pdf (hereinafter: Proposal) states that independent precautionary measures prescribed by Art. 98a of the CPA can exist independently and are not tied to pre-trial detention periods and can be determined even after the expiry of the longest periods of pre-trial detention from Art. 133 of the CPA, and just as with precautionary measures from Art. 98 of the CPA, their determination depends on the existence of pre-trial detention reasons from Article 123 of the CPA and can be applied until the judgment becomes final and enforceable. See Turudić, I., Bujas, I., Pavelin, T. *Osma novela Zakona o kaznenom postupku*, Informator, 2020.
[39] County Court in Pula-Pola, Kž 396/2023-6 of September 12, 2023.

escape or reoffending,[40] and to ensure the safety of the victim[41] in the form of a prohibition on approaching, establishing, or maintaining contact with certain persons or places), and the longest terms for pre-trial detention under Art. 133 of the CPA have been expired. After bringing a non-final judgment with a suspended sentence, independent precautionary measures may not be ordered or prolonged but must be immediately vacated.[42]

The decision to apply a precautionary measure, as mentioned, is based on the assessment of the judicial body on the need for such a measure, considering the circumstances of each case and the risk of reoffending.[43]

4. DURATION OF PRECAUTIONARY MEASURES

According to legal provisions, precautionary measures may be ordered before and during criminal proceedings. Before the indictment is filed, precautionary measures are ordered, prolonged, and vacated by the state attorney's ruling and by the investigating judge when deciding on pre-trial detention. After the indictment is filed and until the verdict becomes final and enforceable, these measures are ordered, prolonged, and vacated by the court.[44] Precautionary measures may last as long as necessary, but the legislator nevertheless limits their duration to no longer than until the judgment becomes enforceable when it comes to precautionary measures that are determined due to the existence of circumstances that a person is on the run or there are special circumstances indicating a danger of escaping (Art. 123, para. 1, item 1 of the CPA), when special circumstances indicate a risk that person will reoffend or complete an attempted criminal offense, or perpetrate a felony he threatens to commit, for which the law foresees imprisonment for a term of five years or more (danger of repetition, Art. 123, para. 1, item 3 of the CPA) or when pre-trial detention is deemed necessary for undisturbed conducting of the proceedings due to especially grave circumstances of the offense and a sentence of long-term imprisonment is prescribed for such an offense (Art. 123, para. 1, item 4 of the CPA). Another limitation on the duration of precautionary measures is until the finality of the verdict when they are ordered

[40] County Court in Zadar, Kž 62/2023-3 of February 15, 2023; High Criminal Court of the Republic of Croatia, II Kž 247/2022-5 of June 15, 2022; County Court in Vukovar, Kž 273/2021-6 of December 15, 2021.
[41] County Court in Varaždin, Kž 574/2024-4 of August 16, 2024; County Court in Pula-Pola, Kž 396/2023-6 of September 12, 2023; County Court in Osijek, Kž 345/2023-2 of August 18, 2023.
[42] County Court in Bjelovar, Kž 360/2022-5 of December 19, 2022.
[43] Supreme Court of the Republic of Croatia, II Kž 810/2009-3 of December 16, 2009.
[44] Art. 98, para. 6, of the CPA.

due to the existence of special circumstances indicating that offender will destroy, hide, alter or forge items of evidence or traces of importance to the criminal proceedings or that he shall impede the criminal proceedings by influencing witnesses, expert witnesses, coprincipals or accessories after the fact (so-called collusion risk, Art. 123, para. 1, item 2 of the CPA), and if the duly summoned defendant evades appearance at the trial (Art. 123, para. 1, item 5 of the CPA).[45] When the defendant has fully complied with the precautionary measures ordered to him as an alternative to pre-trial detention due to the existence of a collusion risk,[46] and there are no longer any special circumstances that would indicate a risk that the defendant would obstruct the criminal proceedings by influencing the victim of the criminal offense, so no longer exists any legal conditions for the application of the pre-trial detention measure from Art. 123, para. 1, item 2 of the CPA, and thus, no conditions for prolonging precautionary measures on the same grounds.[47]

The novelty introduced by the 2024 amendment to the CPA (Official Gazette, No. 36/24) relates to the possibility of the duration of precautionary measures until sent to serve a prison sentence, intending to fill the legal gap from the finality of the judgment until the convict begins to serve the sentence. In this way, the time when precautionary measures ceased with the finality of the judgment was bridged, given that according to Art. 55, para. 2 of the Act on the Execution of Prison Sentences,[48] the ruling on referral to serving a prison sentence was issued within eight working days from receipt of the transcript of the judgment. The period from the finality of the judgment to the issuance of the ruling on referral to serving a prison sentence has left the possibility of a legal gap in terms of preserving the objective of the criminal proceedings, so it was necessary to ensure that precautionary measures could last, following the model of the duration of pre-trial detention after the finality of the judgment, until the finality of the ruling on referral to serving a prison sentence.

The body that ordered the precautionary measure (before filing the indictment) is obliged, or the court is obliged, to review every two months the existence of the need to continue the measure and, if necessary, prolong or vacate the measure (unless the precautionary measure was ordered as a condition of bail, in which

[45] Art. 98, para. 6, of the CPA.
[46] In accordance with Art.125, Para. 1, Item 8 of the CPA, pre-trial detention ordered due to the "collusion risk," must be revoked as soon as the evidence for which security it was ordered has been collected or presented, but no later than the end of the hearing.
[47] Supreme Court of the Republic of Croatia, II Kž 406/2020-4 of October 1, 2020.
[48] Act on the Execution of Prison Sentences, Official Gazette, No. 14/21, 155/2023.

case the control is not carried out).[49] The above brings into life the verification of the necessity and proportionality of the imposed precautionary measures, which is essential from the aspect of Art. 6 of the ECHR in the context of respecting the right to a fair trial.[50] However, according to the position of the Supreme Court of the Republic of Croatia, after a non-final judgment has been rendered, there is no longer any need to review the application of the precautionary measure after two months from the date of the finality of the previous ruling on the precautionary measure. This is because precautionary measures are ordered in cases where there are circumstances from Art. 123 of the CPA due to which it is possible to order pre-trial detention or such detention has already been ordered, and the same purpose can be achieved by a precautionary measure. As soon as the circumstances from Art. 123 of the CPA cease to exist, it is necessary to vacate precautionary measures, so the provisions mentioned above clearly indicate that the application of precautionary measures is linked to the existence of circumstances for the imposition or extension of pre-trial detention.[51]

However, although the order of a precautionary measure is conditional on the existence of some of the circumstances that are a cumulative prerequisite for the imposition of pre-trial detention, if reasonable suspicion of the commission of a criminal offense exists even after the expiry of the pre-trial detention terms, precautionary measures may be ordered as independent measures (Art. 98a of the CPA).[52] The reason for introducing this provision can be found in examples from case law where, after the expiry of the terms for ordering or prolonging pre-trial detention, a precautionary measure could not be imposed "because the precautionary measure is related only as an alternative to detention."[53] Therefore, given that precautionary measures imposed as independent measures can no

[49] However, despite the explicit legal provision, the Supreme Court of the Republic of Croatia found in two cases that the two months had been exceeded, but that this had no impact on the regularity and legality of the decision (ruling) made, given that "it is not a preclusive period, but a period of an instructive nature, so its expiration does not lead to the termination of the precautionary measure." (Supreme Court of the Republic of Croatia, II Kž 284/2018-7 of August 7, 2018. See also Supreme Court of the Republic of Croatia, II Kž 490/2017-4 of December 28, 2017). Also, the regularity and legality of the ruling to prolong precautionary measures were not affected even when it was made before the expiry of the statutory period of two months from the entry into force of the previous ruling, i.e., 12 days earlier. (High Criminal Court of the Republic of Croatia, II Kž 340/2021-5 of September 22, 2021).

[50] Lupu, S. A. *The procedure of verifying precautionary measures in criminal proceedings*, Lex ET Scientia International Journal, vol. 31, no. 2, 2024, p. 121.

[51] Supreme Court of the Republic of Croatia, II Kž 206/2018-4 of May 14, 2018.

[52] Giunio, M.A. *(Pre)velik oprez s mjerama opreza u kaznenom postupku*, Informator. No. 6566 of March 18. 2019.

[53] Decisions of the Supreme Court of the Republic of Croatia, Kžm 18/07-3 of April 25,2007 and I Kž 1185/04-3 of February 2, 2005.

longer, in the case of the defendant's failure to comply, be replaced by pre-trial detention, the defendant's failure to comply with the certain precautionary measure as an independent measure constitutes a criminal offense within the existing criminal offense of non-execution of a court decision from Art. 311, para. 3 of the CC.

Precisely because of the possibility of imposing independent precautionary measures upon the expiry of the terms of pre-trial detention due to the existence of the circumstances referred to in Art. 123 of the CPA, there were no legal grounds for replacing the precautionary measures with pre-trial detention when the legally prescribed terms had expired, and a ruling should have vacated them.[54] If the court considered that there were still reasons for imposing pre-trial detention, it could have acted following Art. 98a, para. 1 of the CPA and impose on the defendant precautionary measures as independent, and not replace the existing precautionary measures, the duration of which had expired, with pre-trial detention.[55] Also, in an analogous situation, there is no legal grounds for prolonging precautionary measures for the defendant, when the legally prescribed terms have expired, given that the court, if it considered that there were still reasons for ordering pre-trial detention, could have imposed precautionary measures on the defendant as independent precautionary measures, and not extended the existing ones.[56]

4.1. Duration of precautionary measures in the context of the principle of proportionality

The application of precautionary measures against the defendant has proven to be debatable in situations where criminal proceedings last for a more extended period of time. Namely, although cases of domestic violence require urgent action, the aspect of "urgency" in cases in which precautionary measures have been ordered is not assessed "as urgent" as in cases in which pre-trial detention has been ordered against the defendant, which consequently results in "the precautionary measures imposed may then represent a greater restriction of the defendant's rights and freedoms than with the application of a much shorter measure of pre-trial detention."[57] Thus, the defendant questioned the principle of proportionality, stating that it is jeopardized by the fact that the precautionary measure lasts for a year and a half, a duration which would not be justified assuming that it was replaced by pre-trial detention. However, the Supreme Court of the Republic of

[54] County Court in Slavonski Brod, Kž 211/2023-4 of July 20, 2023.
[55] Ibid.
[56] County Court in Slavonski Brod, Kž 194/2023-4 of July 10, 2023.
[57] Cf. Rizvić, Burić, *op. cit.* note 32, p. 38.

Croatia did not consider such an objection to be well-founded, given that "Art. 98a of the CPA separates the duration of precautionary measures from the duration of pre-trial detention by stipulating that, in the case of the expiry of the terms of pre-trial detention referred to in Art. 133 of the CPA, the court may, by ruling, order precautionary measures as independent precautionary measures."[58] Since there is no obstacle to applying precautionary measures after the expiry of the terms of pre-trial detention, this cannot be considered a violation of the principle of proportionality. Nor was the principle of proportionality violated when the application of a precautionary measure was extended to the defendant, with previously determined bail and a measure of pre-trial detention, given that "the principle of proportionality, prescribed by the provision of Art. 122, para. 2 of the CPA, applies to the measure of pre-trial detention, and therefore the application of the precautionary measure to date has not violated the principle of proportionality".[59] *A contrario*, the Supreme Court of the Republic of Croatia found a significant violation of the provisions of criminal procedure when the first-instance court, in the explanation of the ruling replacing pre-trial detention with a precautionary measure, stated "that there has been a violation of the principle of proportionality, and then that there is still a risk of reoffending, but that it can be successfully prevented by applying the precautionary measure imposed, namely the obligation to report to the Z Police Station regularly."[60] The Supreme Court of the Republic of Croatia stated that "if, due to a violation of the principle of proportionality, the measure of pre-trial detention cannot be ordered or should be vacated, then the application of a milder measure that represents a substitute for pre-trial detention cannot be ordered either."[61]

4.2. Imposition and duration of precautionary measures after a non-final verdict

According to the position of the Supreme Court of the Republic of Croatia, "since the existence of the legal conditions from Art. 123 of the CPA is not examined after the pronouncement of a non-final verdict, the existence of which is a prerequisite for the application of precautionary measures, by appropriate application of the provision of Art. 131, para. 3 of the CPA, nor are the legal conditions for further applying precautionary measures examined after the pronouncement of a non-final verdict".[62] Also, after the pronouncement of a non-

[58] Supreme Court of the Republic of Croatia, II Kž 110/2020-4 of March 13, 2020.
[59] Decisions of the Supreme Court of the Republic of Croatia, II Kž 285/2019-4 of August 7, 2019 and II Kž 428/2019-4 of November 28, 2019.
[60] Supreme Court of the Republic of Croatia, II Kž 129/2016-4 of April 15, 2016.
[61] *Ibid.*
[62] Supreme Court of the Republic of Croatia, II Kž 403/15-4 of November 25, 2015.

final verdict imposing a suspended sentence on the defendant, following Art. 125, par. 1, item 6 of the CPA, the possibility of ordering or prolonging pre-trial detention against the accused is eliminated, i.e., if it was ordered, it must be immediately vacated. At the same time, the above also constitutes an obstacle to ordering or prolonging any precautionary measures (including independent precautionary measures) after issuing a non-final judgment imposing a suspended sentence on the accused, i.e., if they were previously ordered, they must also be immediately vacated.[63]

5. NOVELTIES IN RESPECT OF STRENGTHENING THE ROLE OF THE VICTIM

With the latest amendments to the CPA (Official Gazette, No. 36/24), the legislator has strengthened the position and role of the victim through nomotechnical and substantive improvements to the existing legal provisions. However, some amendments were subject to criticism by the session of the Criminal Department of the Supreme Court during the process of public debate and adoption of law because they didn't represent any improvement.[64] The recent amendments to the CPA didn't affect the alternative character and catalog of precautionary measures. Still, concerning specific categories of victims, as a novelty, mandatory consideration of "the results of the individual assessment of the needs of the victim and the victim's closely related person and the needs of the victim's protection" was incorporated when deciding to order a precautionary measure as a milder form of criminal law repression against the defendant instead of pre-trial detention. Considering specific categories of victims (victims of criminal acts of violence against women, domestic violence, and violence against closely related persons), the legislator orders the body that decides on precautionary measures, regardless of whether it orders, prolongs, or vacates them, to hear the victim before deciding the circumstances of the existence of a threat to her personal safety or the safety of her family members and closely related persons, and when making a decision on ordering, prolonging, or vacating a precautionary measure, to take into account the statement on the proposal for the application of the precautionary measure as well as the results of the individual assessment of the victim's needs.[65] Since these are urgent procedures, in order to facilitate the implementation of this new obligation, the legislator prescribes that this does not involve "interrogating" the

[63] County Court in Bjelovar, Kž 360/2022-5 of December 19, 2022.
[64] See Kos, D. *Ojačavanje položaja i uloge žrtve u kaznenom postupku izmjenama zakona u 2024*., Novine u kaznenom zakonodavstvu - 2024., Zbornik radova Opatija, May 16 – 17, 2024, p. 10.
[65] *Ibid*, p. 14.

victim within the meaning of the CPA, but rather the need to "hear" the victim, which can also be done by using information and communication technologies or in another appropriate manner.[66] Also, one of the novelties in the context of applying precautionary measures is the provision of Art. 125.a of the CPA on informing the victim about releasing a pre-trial prisoner against whom the criminal proceeding is ongoing. The victim must then be informed of the measures, if any, taken for its protection.

6. CERTAIN TYPES OF PRECAUTIONARY MEASURES – A REVIEW OF CASE LAW

Precautionary measures imposed to protect the victim in criminal proceedings, especially domestic violence and related criminal offenses, are an alternative to the measure of pre-trial detention under Art. 123, para. 1, item 3 of the CPA (iteration risk – the risk of reoffending), and are intended to prevent potentially dangerous social contact. The most commonly imposed measures are prohibiting approaching within a certain distance and measures prohibiting establishing direct or indirect contact with the victim. In addition to the above measures, the precautionary measure of removal from the home is sometimes imposed. To a somewhat lesser extent, the measure prohibiting harassment and stalking of the victim is applied, while the measure prohibiting visiting a certain place or area is rarely ordered.[67] Apart from the stated purpose of protecting the victim, precautionary measures, as seen from case law, are primarily adopted as a substitute for the pre-trial detention measure from Art. 123, para. 1, item 1 of the CPA (escape risk) in the form of prevention of leaving the place of residence. Since the paper emphasizes specific cases of victim protection through the application of precautionary measures, the following will present cases from case law in the context of only those precautionary measures ordered to protect victims (of violence).

6.1. Prohibition of approaching a certain person and prohibition of establishing or maintaining contact with a certain person

Measures of prohibiting approaching a certain person and establishing or maintaining contact with a certain person are "the least onerous measures in restricting the rights of the accused" but "at the same time equally effective in

[66] *Ibid.*
[67] See Rizvić, Burić, *op. cit.* note 32, p. 37.

eliminating the possibility of the accused reoffending."[68] In other words, the restrictions on the rights that the accused is obliged to submit to (refraining from communicating with the victim and prohibiting approaching the victim) are minimal, in proportion to the interests of the criminal proceedings that are thereby achieved.[69] Applying the aforementioned precautionary measures prevents direct contact between the accused and the certain person, as well as any connection between them, and thus prevents the accused from further unlawful conduct.[70] The provision of Art. 99, para. 4 of the CPA prescribes the content of the ruling ordering the precautionary measure of prohibiting approaching a certain person in such a way that in that ruling, the competent authority is obliged to determine the distance below which the accused may not approach the certain person. In the context of the precautionary measure of prohibition of establishing or maintaining contact with a certain person, according to the provisions of Art. 99, para. 5 of the CPA, the competent authority shall prohibit establishing or maintaining direct or indirect contact with a specific person. The decision to prolong or vacate the precautionary measure is based on the court's assessment of the existence of a threat to the victim's safety and other relevant circumstances of the case, as well as the victim's testimony. Namely, the provision of Art. 98, para. 3 of the CPA stipulates that when deciding to order, prolong, or vacate a precautionary measure, the victim's stance will be considered, especially concerning the fact that there is a danger to her personal safety and the safety of her family members. Thus, the court concluded that there were no longer any conditions for extending the precautionary measures, especially since the victim herself stated that she "is not afraid of the defendants, her son and daughter-in-law, that they are her only support in the world and that she wants them to return home as soon as possible".[71] *A contrario*, the precautionary measures ordered for the defendant were prolonged, namely the prohibition of approaching the victim at a distance of fewer than 200 meters, the prohibition of establishing or maintaining contact with the victim, and the prohibition of stalking and harassing the victim, because according to the court's understanding, they represent a sufficient guarantee that the defendant at liberty will not commit a new criminal offense to the detriment of the victim, taking into account that the defendant and the victim live at different addresses and that the defendant has not been convicted of the same or similar criminal offenses.[72] However, the precautionary measure of prohibiting approaching the victim, unless it was imposed at the same time as the precautionary measure of removing the

[68] High Criminal Court of the Republic of Croatia, II Kž 373/2021-5 of October 21, 2021.
[69] High Criminal Court of the Republic of Croatia, II Kž 485/2024-5 of October 30, 2024.
[70] Supreme Court of the Republic of Croatia, II Kž 313/2018-4 of August 2, 2018.
[71] County Court in Varaždin, Kž 142/2024-6 of May 7, 2024.
[72] Supreme Court of the Republic of Croatia, II Kž 153/2015-4 of April 20, 2015. See also the decision of the Supreme Court of the Republic of Croatia, II Kž 252/2015-4 of July 13, 2015.

defendant from home, is not useful if the offender and the victim have the same place of residence and live in the same household because specific precautionary measures cannot be implemented.[73]

6.2. Removal from the home

The provision of Art. 98, para. 2, item 10 of the CPA provides the possibility of applying the precautionary measure of removal from the home, whereby the competent authority is obliged to determine, per Art. 99, para. 10 of the CPA, the address of the home from which the accused is removed. The purpose of this provision is to effectively protect the victim from further unlawful conduct by the accused who resides in the same home, at the same address as the victim, precisely by removing him from that home.[74] Therefore, to achieve the purpose of pre-trial detention, it will be sufficient to prolong the application of the precautionary measures from Art. 98, para. 2, items 3, 4, 5, and 10 of the CPA, which prevent the accused from contacting the victims and thereby repeating the criminal offense to their detriment, and given his physical separation from the victims because he has changed his place of residence.[75] The first-instant court assesses that the purpose of the measure of pre-trial detention in the specific situation can be achieved by applying precautionary measures, namely by prohibiting approaching the victim at a distance of fewer than 200 meters, by prohibiting establishing or maintaining direct or indirect contact with the victim, and by removing him from home and the address of residence, whereby the court evaluated the fact that the defendant had not previously come into conflict with the law.[76]

6.3. Prohibition of stalking or harassing the victim or another person

Prohibition of stalking or harassing the victim or another person is most often imposed in addition to measures prohibition approaching a certain person and prohibition establishing or maintaining contact with a certain person as adequate for eliminating those circumstances that indicate the existence of an iteration risk (Art. 123, para. 1, item 3 of the CPA),[77] but are also "justified, efficient and, in terms of their content and scope, a sufficient substitute for the measure of pre-trial detention on the basis of the collusion risk".[78]

[73] County Court in Varaždin, Kž 574/2024-4 of August 16, 2024.
[74] Supreme Court of the Republic of Croatia, II Kž 75/2016-4 of March 4, 2016.
[75] Supreme Court of the Republic of Croatia, II Kž 88/2020-4 of February 26, 2020.
[76] County Court in Zagreb, Kov-iz-3/2020 (Kov-6/2020) of February 5, 2020.
[77] Supreme Court of the Republic of Croatia, II Kž 75/2016-4 of March 4, 2016.
[78] Supreme Court of the Republic of Croatia, II Kž 235/2014-4 of 27 June 2014.

6.4. Prohibition to visit a certain place or territory

In the ruling ordering the precautionary measure of prohibition to visit a certain place or territory, the competent authority shall specify the place or area and the distance below which the defendant may not approach them (Art. 99, para 2 of the CPA). The ordered precautionary measures of prohibition to visit a certain place or territory and the prohibition to approach a certain person "are a disciplinary corrective for the future behavior of the defendant, who is aware that his behavior is now under certain increased scrutiny and supervision," because he is expected to refrain from visiting a specific place (the Home for the Elderly in B.) and from approaching and establishing or maintaining contact with the victims, who are employees of the facility in relation to which there is a prohibition on visiting.[79] The aforementioned measures are also "adequate for preventing the risk of reoffending."[80] When the victim's employment ends in relation to the object for which there is a prohibition on visiting, there is no longer a basis for extending the precautionary measure of the ban on visiting the object in question.[81]

7. LEGAL CONSEQUENCES OF VIOLATING PRECAUTIONARY MEASURES

When dealing with a violator of precautionary measures, special urgency is required, especially when the matter concerns a violation of the precautionary measure of a prohibition on approaching a certain person, a prohibition on harassing or stalking the victim or another person, and a precautionary measure of removal from the home.[82] The legal consequences of violating precautionary measures are differentiated depending on whether they are determined as a substitute for pre-trial detention (Art. 98, para. 1 of the CPA) or as independent measures (Art. 98a, para. 1 of the CPA). Accordingly, in the first situation, the defendant will be warned that in the case of failure to carry out the ordered precautionary measure(s), they will be replaced by pre-trial detention (Art. 98, para.1 of the CPA). In contrast, if an independent precautionary measure is determined, the court will warn the defendant that non-compliance with the imposed measure is a criminal offense of non-execution of a court decision (Art. 98a, para. 1 of the CPA).

[79] County Court in Bjelovar, Kž 427/2024-4 of October 2, 2024.
[80] *Ibid.*
[81] County Court in Karlovac, Kž 155/2023-2 of April 7, 2023.
[82] Kos, *op. cit.* note 64, p. 16.

7.1. Violation of precautionary measures as an alternative to pre-trial detention

In the context of violating precautionary measures, the legislator introduced a new provision in the X.th Amendment to the CPA that authorizes the police to arrest "a defendant for whom there are grounds for suspicion that he has acted contrary to the precautionary measure imposed on him" (Art. 107, item 4 of the CPA). However, suppose the police determine that the defendant has acted contrary to the measures ordered but does not consider it necessary to arrest him (the police are authorized to arrest but do not have this obligation).[83] In that case, the police will inform the court of this. Therefore, before the indictment is filed, the state attorney submits a proposal to the investigating judge to replace the precautionary measure with pre-trial detention, and after the indictment is filed, a session of the extrajudicial council is convened.[84] The investigating judge, or the council determines whether the measures have indeed been violated and whether the conditions for ordering pre-trial detention exist, and will order pre-trial detention by a special ruling.

As for the court's actions in the case of a violation of precautionary measures, it is clear that some judges, in case of even the slightest infringement of precautionary measures, immediately vacate the precautionary measures and order pre-trial detention, starting from the point of view that the defendant has been warned of the legal consequences of violating the precautionary measures that he knowingly violated.[85] Other judges, however, upon notification of a violation of precautionary measures, do not change the precautionary measures to pre-trial detention if it is a violation of "less intensity" or if it is not a "reoffending", and on council session only warn the accused that he must not do this again because otherwise, the court will order pre-trial detention.[86] Thus, there are evident cases in case law when the defendant undoubtedly violated ordered precautionary measures, but they were not replaced by pre-trial detention, even though the court found that the defendant "did not fully comply with the precautionary measures ordered to him since he violated the precautionary measure of the prohibition on establishing or maintaining any direct or indirect relationship with the victim by attempting to establish contact with her via mobile phone calls and SMS messages", while "persuading her to return to his apartment and to live together again, threatening her that he would take her life if she did not return to him and that their minor son

[83] Ibid.
[84] Ibid.
[85] Decisions of the County Court in Varaždin, Kž 674/2024-4 of September 27, 2024; Kž 445/2024-4 of June 21, 2024; Kv II 178/2024-3 of May 24, 2024; and the County Court in Sisak, Kv II 107/2024-14 of April 18, 2024.
[86] Rizvić, Burić, *op. cit.* note 32, p. 55.

would be left without parents, that she would be the culprit if that happened and that the newspapers would write about her if she did not return to him", and he also failed to comply with the precautionary measure of regularly reporting to the competent authority since "from the contents of the report II. Police station, it appears that the defendant last reported to that police station in March 2017, while during April, May, June, July, and August, no reporting by the defendant was recorded.[87] Despite this state of affairs, the first-instance court, even though it notes that the defendant partially complied with the imposed precautionary measure under Art. 98, para.2, items 4 and 5 of the CPA, concludes that there are no legal requirements for replacing the imposed precautionary measure with pre-trial detention.[88]

7.2. Violation of independent precautionary measure

Violating an independent precautionary measure is a criminal offense of non-execution of a court decision from Art. 311 para. 3 of the CC, for which a prison sentence of up to two years is prescribed. In the latter case, a new criminal proceeding is initiated for a new criminal offense. Since the imposition of an independent precautionary measure is not bound by pre-trial detention terms, i.e., it is ordered upon their expiration, its violation cannot result in a substitute for pre-trial detention, but only in the commission of a new criminal offense – non-execution of a court decision, about which the defendant is expressly warned. The fact that the contact with the victim was not directly established, in a situation where the special precautionary measures did not only refer to the prohibition of approaching the victim at a distance of fewer than 100 meters, but also the prohibition of approaching the home at the address where the victim lives at a distance of fewer than 100 meters, is not relevant for the violation of precautionary measures. Given that the defendant not only passed by but also parked his vehicle in front of the victim's house, and frequently visited a restaurant less than 100 meters from the victim's home, the first-instance court found that the defendant violated independent precautionary measures, that he was aware of this, knowing that independent precautionary measures were in effect and what the consequences of violating all measures were.[89]

[87] Supreme Court of the Republic of Croatia, II Kž 18/2018-4 of January 18, 2018.
[88] Ibid.
[89] County Court in Pula-Pola, Kž 396/2023-6 of September 12, 2023. See also the decision of County Court in Varaždin Kž 389/2023-5 of July 26, 2023.

7.2.1. Conducting new criminal proceedings for violation of an independent precautionary measure

In the context of the different legal consequences that a violation of precautionary measures produces, in particular, on the one hand, by replacing the imposed (alternative) precautionary measure with pre-trial detention, while a breach of independent precautionary measures, on the other hand, results in the conduct of new criminal proceedings for the (new) criminal offense of non-execution of a court decision under Art. 311, para. 3 of the CC, this potentially articulates the constitutional principle of equality of citizens before the law due to different sanctions for failure to comply with substantively the same measures. However, the essence of the principle of equality is not violated by these "apparently" different sanctions, since the formal assumptions for the imposition of precautionary measures under Art. 98 and 98a of the CPA are significantly different, although the material conditions for their application are the same and consist of the existence of the circumstances under Art. 123 of the CPA. Given the above, the impossibility of imposing pre-trial detention due to the expiry of the statutory terms *a priori* leads to the impossibility of imposing precautionary measures under Art. 98 of the CPA, but in that case, provided that the circumstances under Art. 123 of the CPA (still) exist, it is possible to impose precautionary measures as independent measures. The legislator has opted for the above solution because the expiry of pre-trial detention terms, which represent the concretization of the principle of proportionality, does not imply the cessation of the existence of the circumstances under Art. 123 of the CPA, eliminating which is necessary even after the expiry of the terms of pre-trial detention.[90] Consequently, "alternative" precautionary measures (Art. 98 of the CPA) can be imposed (only) when there are grounds for imposing pre-trial detention or such detention has already been ordered, i.e., within the pre-trial detention terms under Art. 133 of the CPA, while "independent" precautionary measures (Art. 98a of the CPA) can be determined after the expiration of the pre-trial detention terms from Art. 133 of the CPA, but under the circumstances that the danger still exists, that is, the reasons from Art. 123 of the CPA, for which pre-trial detention can be ordered. Considering the existing distinction, i.e., the circumstance that independent precautionary measures are ordered after the expiry of pre-trial prison terms, their violation cannot result in a substitute for pre-trial detention, but the only possible solution is that their violation constitutes the criminal offense of non-execution of a court decision, i.e., the ruling ordering the independent precautionary measure.

[90] Cf. Pleić, M., Budimilić ,T. *Mjere opreza u kaznenom postupku – prijepori oko samostalne opstojnosti i trajanja te druga otvorena pitanja*, Hrvatski ljetopis za kaznene znanosti i praksu (Zagreb), vol. 28, no. 2, 2021, p. 285.

Concerning the observation that the imposition of independent precautionary measures calls into question the principle of fairness, in the context of a trial within a reasonable time, because the "responsibility" for the expiry of the longest terms of pre-trial detention is "shifted" to the defendant, against whom it is possible to apply independent precautionary measures even after the expiry of the longest legal terms of pre-trial detention referred to in Art. 133 of the CPA, drawing attention to two circumstances is necessary. First, precautionary measures represent (only) a restriction of individual rights and freedoms, not their deprivation. Therefore, their longer duration is possible without significant consequences for the defendant's rights, which is evident from the legal formulation that "precautionary measures may last as long as there is a need for it." Second, the individual duration of precautionary measures has no impact on the (total) length of criminal proceedings since they aim at eliminating specific dangers that affect the course of criminal proceedings. It should be remembered that precautionary measures are not a "privilege" for the defendant, nor is pre-trial detention a "punishment," but both are measures to ensure the defendant's presence in proceedings for which guilt has not yet been determined.[91]

8. HEARING THE VICTIM IN RESPECT OF ORDERING, PROLONGING AND VACATING OF PRECAUTIONARY MEASURES

The court shall consider the victim's statements by Art. 98, para. 3 of the CPA, according to which, before issuing a ruling ordering, prolonging, or vacating a precautionary measure in the case of a criminal offense of violence against women, domestic violence, and violence against closely related persons, it shall hear the victim on the circumstances of the existence of a danger to her personal safety and consider her statement on the proposal for the application of precautionary measures. Thus, the first-instance court, acting per the aforementioned provision of Art. 98, para. 3 of the CPA, heard the victim of violence against a closely related person on the circumstances of the existence of a danger to her personal safety and considered her statement on the need for further application of precautionary measures to the defendant. The victim stated at the prosecution council session that he did not see the need for further precautionary measures, adding that he missed his father and that he believed that the duration of the pre-trial detention and precautionary measures so far had sufficiently influenced the defendant to not commit any more criminal offenses in the future.[92] With this argument, the first instance court, with the addition of the finding that the defendant did not violate

[91] Cf. Tuntevski, *op. cit.* note 9, p. 827.
[92] County Court in Varaždin, Kžzd 104/2024-4 of November 19, 2024.

the precautionary measures and that he had not been convicted of any misdemeanor or criminal offense, determined that the defendant's risk of reoffending had ceased (Iteration risk).[93] Also, considering the findings above and the victim's statement that there was no longer a risk to her safety, which is why she wants the defendant to return to the home where they lived together and that the defendant had not been convicted of any criminal offense, the first instance court correctly determined that there was no longer a risk of reoffending, which is why it was justified to vacate certain precautionary measures.[94] Finally, the precautionary measures that were imposed on the defendant by the state attorney's ruling to prevent the risk of reoffending were vacated with the explanation "that there is no longer a risk of reoffending (iteration risk), which arises from the consistent statements of the defendant and the victim that the defendant complied with certain precautionary measures, that they reconciled and that the victim has forgiven everything to the defendant, who is her nephew, and wants the defendant to return to the home where they lived together, with the defendant admitting his unlawful behavior and expressing regret."[95]

However, it should be emphasized that the legal norm from Art. 98, para. 3 of the CPA refers to cases when the court and the state attorney need to decide on the ordering, prolonging, or vacating of precautionary measures as milder legal measures regarding the application of the most stringent measure of procedural coercion, pre-trial detention. Therefore, this is a procedural-legal situation where the court and the state attorney have the option, or rather the choice, between pre-trial detention and precautionary measures. However, when it comes to imposing independent precautionary measures following Art. 98a of the CPA, there is no longer a legal possibility of choosing between the aforementioned procedural measures because the maximum term of pre-trial detention from Art. 133 of the CPA has expired. In such a procedural-legal situation, the court is not obliged to act under Art. 98, para. 3 of the CPA.[96]

9. CONCLUSION

The right to personal liberty is inherent to every human being and enjoys special protection in all modern legal systems. However, the right to personal liberty is not absolute; it can be derogated and subject to certain limitations, especially when violating criminal law norms. The aforementioned is because the state responds

[93] Ibid.
[94] County Court in Varaždin, Kž 673/2024-6 of November 7, 2024.
[95] Ibid.
[96] County Court in Varaždin, Kžzd 74/2024-4 of August 7, 2024.

with a punitive reaction towards offenders when the highest legal rights (such as life, physical, and personal integrity) are violated, which is reflected in the deprivation or restriction of freedom as a fundamental human right. To effectively conduct and complete criminal proceedings, the legislator prescribes precautionary measures as alternatives to pre-trial detention, which aim to achieve the purpose of pre-trial detention without applying the most severe measure of deprivation of liberty. Although they are conditioned by the existence of pre-trial detention reasons from Art. 123 of the CPA, the duration of precautionary measures exceeds the duration of pre-trial detention, given that they can be imposed as independent measures even after the expiry of pre-trial detention terms if the circumstances justifying the imposition of pre-trial detention still exist.

It is precisely in the context of the various legal consequences that the violation of precautionary measures produces, especially by replacing the precautionary measure with pre-trial detention or conducting a new criminal proceeding for the commission of a (new) criminal offense of non-execution of a court decision from Art. 311 para. 3 of the CC may dispute the constitutional principle of equality of citizens before the law due to different sanctions for non-compliance with substantively identical measures, as well as the principle of fairness in the context of a trial within a reasonable time. However, the principle of equality is not violated by the (apparent) different sanctioning of precautionary measures that are essentially the same in content since they differ in the formal assumptions of their imposition. Namely, the precautionary measures from Art. 98 of the CPA depend on the duration of pre-trial detention terms; they are limited by the longest pre-trial detention terms. Therefore, they are considered alternative measures. On the other hand, the measures from Art. 98a of the CPA are independent precautionary measures that can exist independently and are not bound by pre-trial detention terms. Concerning the mentioned formal aspect of their application, i.e., the (un)connection to the duration of pre-trial detention terms, it is clear that the violation of precautionary measures as alternative and independent measures cannot result in the same consequences, although their determination depends on the existence of (the same) substantive legal assumptions, i.e., pre-trial detention reasons from Art. 123 of the CPA. From the above, another essential conclusion is derived, namely that the principle of proportionality is not violated if the duration of (independent) precautionary measures exceeds the terms of pre-trial detention since the legislator explicitly separates the duration of independent precautionary measures from the terms of pre-trial detention. Therefore, there is no obstacle to applying precautionary measures even after the expiry of pre-trial detention terms. Finally, in the context of the principle of fairness of trial within a reasonable time, when the "responsibility" for the expiry of the longest terms of pre-trial detention is "shifted" to the defendant who is "subject to" the application of independent precautionary measures even after the expiry of the statutory terms of pre-trial

detention from Art. 133 of the CPA, it is clear that they have no impact on the (total) duration of criminal proceedings since they are aimed at eliminating specific dangers that affect the course of criminal proceedings. The above measures aim to ensure the safety of the victim, to prevent reoffending, or to eliminate the risk of escape through a prohibition on approaching a certain person, a prohibition on establishing or maintaining contact, or other precautionary measures that ensure control over the defendant, which must be purposeful and applicable. From the above, it is derived that the precautionary measures represent (only) a restriction of certain rights and freedoms and not their deprivation; therefore, their longer duration is possible without significant consequences for the defendant's rights. In fact, their duration at no stage of the criminal proceedings is related to the gravity of the criminal offense, but the legislator prescribes that they can last as long as "there is a need," which is (however) limited by the onset of enforceability, i.e., the finality of the judgment or referral to serve a prison sentence. In doing so, the existence of a "need" for the further application of a precautionary measure is not assessed according to the overall duration of the measure, but according to the (non)existence of legal prerequisites for its application.

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SOME NEW ASPECTS IN EXTENDING THE COMPETENCIES OF LATIN-TYPE NOTARIES IN THE LEGISLATION OF THE REPUBLIC OF CROATIA – A NEW CONTRIBUTION TO THE MODERNISATION OF THE JUDICIARY*

ABSTRACT

In recent years, we have witnessed the trend of extending the competences of Latin-type notaries in certain European jurisdictions, including in the Republic of Croatia. The dual nature of the notary service and the expertise of notaries are elements that make this service particularly suitable for entrusting powers in non-contentious proceedings. In this paper, the authors give an overview of some procedures in which a notary public acts as a court commissioner. The Act on non-contentious proceedings expanded the range of non-contentious proceedings in which notaries participate as court commissioners. It is about the non-contentious procedure of consensual arranging of abuttal, dissolution by mutual consent of the joint ownership and the procedure of declaring a missing person dead and proving death. From November 2022, amendments of the Land Registers Act made it possible to entrust the work of establishing or renewing the land register to notaries public as court commissioners. Since 2023 Croatian Obligatory Relations Act also provides for the establishment of a Register of lifelong support contracts and contracts for support until death, which should be established and managed by the Croatian Chamber of Notaries. In some legislation the Family Act has given notaries the power to proceed divorces where spouses are in agreement and there are no minor children involved. In this paper we will include short analysis and discussion of notarial divorce from a Croatian perspective, because they still do not have that competence in our legislation. Therefore, the aim of this paper is to try to answer the question of what are the advantages and what are the disadvantages of the powers of notaries in certain procedures. The aim is to analyse and discuss the competence of the Latin-type notaries in the field of civil law.

Keywords: *notary public, court commissioner, disburden the courts, non-contentious procedure.*

1. INTRODUCTION

The modern notary public services in the Republic of Croatia were introduced by the Notary Public Act[1] of 29 July 1993, which came into force on 1 October 1994.[2] The reform of the legal system in the Republic of Croatia after the attainment of independence, which was also reflected in the adoption of regulations on trading companies, a reorganisation of property relations and the need to transfer some administrative and judicial functions to other bodies, made it necessary to reintroduce the notary public's office as a special public service in the Republic of Croatia.[3] The Croatian legislator decided in favour of the Latin type of notary public, which implies the autonomy, independence and separation of the institution of the notary public from the institution of the court and the legal profession.[4] The Latin type of notary is widespread in neighbouring countries (Bosnia and Herzegovina, Croatia, Macedonia, Serbia, Slovenia, Hungary, Albania, Montenegro), but also in European countries and beyond (Austria, Belgium, Greece, Luxembourg, Italy, Germany, Portugal, Spain, Vatican, Switzerland, as well as in South American countries, the majority African countries, Japan and China) and it defines the activity of the notary public as the activity of a person to whom the state has delegated part of the public powers.[5]

In the Republic of Croatia, efforts have been made in recent decades to modernise the judiciary, reduce its workload, redefine the basic functions of the court and electronise legal transactions. Notaries, as persons of public trust, are independent and autonomous holders of their office and can also act as court commissioners in some proceedings. With their work, they contribute to the legal security of citizens

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[1] Notary Public Act, Official Gazette No. 78/93 (hereinafter: NPA).

[2] For more see: Crnić, I., *Početak djelovanja javnih bilježnika u Republici Hrvatskoj*, Zbornik Pravnog fakulteta u Zagrebu, vol. 59. no. 6., 2009., pp. 1355-1374.

[3] See: Šago, D., *Neki aspekti uloge javnog bilježnika kao povjerenika suda u sudskim postupcima u Republici Hrvatskoj*, Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, no. 18., 2021., Mostar, p. 173.

[4] Also Butković, M., *Pravni režim obavljanja javnobilježničke djelatnosti u Europskoj uniji*, Javni bilježnik, Časopis Hrvatske javnobilježničke komore, XVII, May, 2013., no. 38., pp. 32 – 42., *op. cit*. p. 33.

[5] See: Bodul, D., *Prilog raspravi o normativnoj konvergenciji Europskoga latinskoga javnog bilježništva*, Zbornik radova Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća, Split: Sveučilište u Splitu, Pravni fakultet, 2015, pp. 357 – 389.

and legal entities and directly relieve the workload of the courts by exercising the delegated judicial powers in certain proceedings. They are an important part of the Croatian judicial system, whose tasks and competences are constantly growing. In the context of relieving the courts, certain types of non-contentious proceedings have been entrusted to notaries as court commissioners. In recent years, there have been some interventions in the existing IT structure of the Croatian Chamber of Notaries – for example, the establishment of an information system for remote work, the digitisation of notarial archives, the connection of the Croatian Chamber of Notaries' information system with the *eSpis* system for tasks performed by notaries as court commissioners, the connection with the court register, the establishment of a register for certified and notarial deeds and a register for all enforcement titles.

The "One-Stop-Shop" (OSS) – a single point of access to land register and cadastral data – enables land register extracts to be issued and authorised users (notaries, lawyers and state attorneys) can submit applications for the registration of properties electronically. The concept of notaries as court commissioners in inheritance matters was already accepted in 1993.[6] Article 156 of the NPA stipulated that the powers of notaries to conduct inheritance hearings would be governed by the law that would regulate inheritance proceedings. The Succession Act[7] stipulates that inheritance proceedings are conducted in the first instance before the municipal court or before a notary as a court commissioner and that the court entrusts the notary with the conduct of the inheritance proceedings and hands over the death certificate to him (Article 176, paragraphs 1 and 3 of the SA). When a notary acts as a court commissioner in inheritance proceedings, he is authorised, in the same way as the judge and the court advisor of a municipal court, to perform all acts in the proceedings and to make all decisions, with the exception of decisions for which the SA provides otherwise (Article 176, paragraph 4 of the SA). This defines the limits of the notary's actions in inheritance matters. Art. 244 of the SA stipulates when a notary is obliged to return the file to the competent court (paragraph 2) and when he may only make decisions with the consent of all parties to the proceedings or, if there is no consent, is obliged to return the file to the competent court (paragraph 3). The criterion used by the legislator for the division of powers between notaries and courts is based on whether or not certain facts are in dispute between the parties. If some facts are in dispute, the notary is not authorised to decide on the matter but must return the file to the competent court. It should be noted at this point that the European Certificate of Succession can also be issued by a municipal court or a notary as a court commissioner

[6] See: Kontrec, D., *Javni bilježnici u Republici Hrvatskoj kao povjerenici sudova u ostavinskom postupku*, Javni bilježnik, Časopis Hrvatske javnobilježničke komore, no. 32., 2010., pp. 27 – 36

[7] Succession Act, Official Gazette no. 14/19 (hereinafter: SA).

(Regulation (EU) No 650/2012 of the European Parliament and of the Council).[8] The municipal court or notary who issued the certificate may correct, amend or revoke it ex officio or at the request of a party who can demonstrate a legal interest.

Article 157, paragraph 1 of the NPA provides for a relatively far-reaching possibility of entrusting notaries with certain tasks. Thus, a court or other authority may entrust a notary with the inventory and sealing of estate assets and bankruptcy assets, the valuation and public sale of movable and immovable property in non-contentious proceedings, in particular in voluntary sales, the conduct of hearings on the distribution of the sale price in enforcement proceedings, the preparation and examination of accounts submitted by custodians or administrators of major assets, and any other tasks that may be assigned to them under specific legal provisions. These are all tasks that are entrusted to notaries and for which they act as commissioners. In this context, the notary, as commissioner of the court or other authority, is subject in an appropriate manner to the provisions on the procedure in which he is entrusted with the performance of certain tasks, in particular the provisions on exemption, service and obtaining legal assistance and information (Art. 158 para. 2 NPA).

The 2020 amendment to the Enforcement Act[9] made significant structural changes to the provisions on enforcement based on an authentic instrument. Notaries, who were originally responsible for enforcement based on an authentic instrument, were converted into court commissioners. Accordingly, applications for enforcement based on an authentic instrument are automatically entrusted to notaries as court commissioners, in alphabetical order of their surnames, in accordance with the provisions on the notaries' jurisdiction and seat (Article 39a, paragraph 4 of the Enforcement Act). When a notary performs procedural acts in enforcement proceedings, he does so as a court commissioner (Article 278, paragraph 2 of the EA).[10]

When a notary receives a proper application from the enforcement officer, the application for enforcement is served on the party against whom enforcement is sought together with a notice and a demand for fulfilment of the debt. After

[8] Act on the Implementation of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, Official Gazette no. 152/14, in force since 17 August 2015.

[9] Enforcement Act, Official Gazette no. 112/2012, 25/2013, 93/2014, 55/2016, 73/2017, 131/2020, 114/2022, 6/2024 (hereinafter: EA).

[10] For more: Maganić, A., *Dejudicijalizacija ovršnog postupka u Hrvatskoj i nekim zemljama njezina okruženja,* Zbornik Pravnog fakulteta u Zagrebu, vol. 68, no. 5-6, 2018, pp. 707-737.

"dispatch" of this notice to the party against whom enforcement is sought, if the creditor does not withdraw the enforcement application within fifteen days, the notary will issue an enforcement decision and serve it on the parties. In addition, the Act on Amendments to the Enforcement Act 20 prescribes a standardised fee for the activities of notaries in compulsory enforcement. If a notary performs procedural acts in enforcement proceedings after the Act on Amendments to the Enforcement Act 20 came into force, he does so as a court commissioner.[11]

2. SOME NEW POWERS OF THE NOTARY FROM THE LAND REGISTER ACT

2.1. The role of the notary in the digitalization of land registers

The Land Register Act 2019 (hereinafter: LRA 2019) introduced a new competence of notaries, namely Art. 105, which was further amended by the Act on Amendments to the Land Register Act of 2022 (hereinafter: LRA 2022).[12] The LRA 2019 introduced the rule that the land register is kept exclusively electronically, but it was still possible for applications for entry into the land register to be submitted in writing.[13] The LRA 2022 stipulates that an application for entry into the land register must be submitted exclusively electronically, via notaries, attorneys, the competent state attorney's office as mandatory users of electronic communication with the court, via the Joint Information System.[14] The introduction of exclusively electronic submission of applications for registration through notaries and attorneys does not restrict or impede access to the court, as the offices of notaries and attorneys are geographically dispersed throughout the territory of the Republic of Croatia. However, the question arises as to why users of the e-Citizens *(e-Građani)* system can no longer submit a registration proposal but must also use the services of notaries and attorneys, even though this is also an electronic method of communication. In cases where other public law bodies submit their decisions for implementation in the land register, they are also obliged to communicate electronically with the land register departments.[15] Also

[11] Aras Kramar, S., *Ovrha na temelju vjerodostojne isprave prema Noveli Ovršnog zakona iz 2020. godine*, Pravo i porezi, no. 12., 2020, p. 16.
[12] Act on Amendments to the Land Register Act, Official Gazette no. 128/2022.
[13] See Simić Rukavina, A., *Podnošenje prijedloga za upis u zemljišnu knjigu elektronički – putem javnog bilježnika*, Javni bilježnik, Časopis Hrvatske javnobilježničke komore,. XXIII, October 2019., no. 46., p. 58.
[14] Šago, D.; Boban, M., *Neki aspekti novina u elektroničkoj komunikaciji pred sudovima*, V. Međunarodno savjetovanje Aktualnosti građanskog procesnog prava - nacionalna i usporedna pravnoteorijska i praktična postignuća, Split, Hrvatska, 2019. pp. 471 – 497.
[15] See Bulka, Z., *Što donosi novela Zakona o zemljišnim knjigama*, Pravo i porezi, no. 1., 2023. p. 49.

prescribed is the obligation of the notary to submit a proposal for registration after the preparation of a notarial deed, notarisation or verification of the signature on the document that is the basis for registration in the land register, unless the party expressly objects to this.[16]

In addition to the application for registration, all other submissions to the land registry court are also submitted electronically. Art. 105 of the LRA 2022 prescribes the obligation to submit a proposal and to transmit documents that form the basis for registration (registration, provisional registration and annotation). This raises the question of what about other submissions that the parties make to the court that do not lead to an entry in the land register. The problem is that the involvement of legal professionals is not required in the preparation of documents in property transactions. If we look at the provision of Art. 196 of the LRA 2022, which stipulates that applications for registration of something that is not registered in the Land Register, as well as objections that an entry or its order of priority should be amended, supplemented or deleted must be submitted in writing, it can be concluded that the legislator did not have in mind the complete abolition of written applications and objections in favour of exclusive recourse to the land register court through the mediation of the Joint Information System. On the one hand, this is done for notaries via the *eNotar* system, which provides for the transmission of applications in accordance with Article 105 of the LRA 2022, and on the other hand, we have the legislator's wish that all types of submissions to the land registry offices be transmitted via the mediation of authorised users. We believe that the intention was to involve lawyers more in the process of submitting applications to the land registry department through the Joint Information System, especially when they are also the authorised representatives of the parties in a particular court case which due to their complexity require the involvement of lawyers.[17]

The court will reject a submission that is not filed electronically via the Joint Information System. Such a provision could affect the parties' right of access to the court, especially in view of the fact that the parties have a certain number of documents that they have not submitted for entry in the land register and now have to go to a notary or lawyer to submit an application for those documents. The aforementioned provision is contrary to the efforts to make the data in the land registers as accurate as possible and to register as many rights in rem as possible in the land registers, i.e. to reduce "off-book ownership" as much as possible and

[16] For more: Maganić, A., *Javni bilježnik u elektroničkom pravnom prometu*, Zbornik radova Pravnog fakulteta u Zagrebu 63, no. 2., 2013., pp. 383 - 431.
[17] See Šago, D., *Neki aspekti uloge javnog bilježnika kao povjerenika suda u sudskim postupcima u Republici Hrvatskoj*, Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, no. 18., 2021., Mostar, pp. 183 – 187.

to increase security and the application of the principle of trust in the land register.[18]

With regard to the electronic submission of applications, the LRA 2022 also provides that the notary or lawyer through whom the application has been submitted is not the authorised representative of the party, unless he or she meets the requirements for an authorised representative under special regulations. This means that a lawyer or notary who cannot refuse to submit an application for registration is not obliged to read the document for which he is submitting the application or to point out to the party any defects and irregularities in the document if he has not drafted it himself. In this way, there is a possibility that some of the applications submitted to the land registry courts through lawyers and notaries will be rejected due to defects in the documents or unenforceability due to the state of the land register. The question arises of how parties who do not have the necessary legal knowledge will understand the fact that the submission of the application for registration by a lawyer – who is undeniably a competent professional for the matter – does not automatically mean that the land registry court will rule favourably on the application.

The continuation of electronic land register management was also continued by the provision of the LRA 2022, which states that the file in the regular land register procedure is kept in electronic form. Until the aforementioned amendment, the minister responsible for judicial matters was required to issue a decision that the file would be kept in electronic form at a specific court if the technical requirements were met. The LRA 2022 provides for the collection of documents to be kept in electronic form.

Applications must be signed with a qualified electronic signature, which has the same legal effect as a handwritten signature and a stamp impression issued by a qualified service provider. All attachments specified therein must be included with the application and amendment in electronic form. If the application for registration and the amendment to the application are submitted via an online service, they may be electronically signed with a valid certificate issued by the authorised user's system administrator. Written attachments submitted in original or certified copy (photocopy) are transferred into electronic form by the authorised user and each attached document is provided with a qualified electronic signature. The problem with this is that the party submitting the document only has a copy and the notary guarantees with his advanced signature that it corresponds to the original (or certified copy or authenticated copy or printout of an electronic

[18] Also Hoblaj, H.; Nikolić, V.; Grbac, M., *Javni bilježnici i zemljišnoknjižni postupci*, Pravo i porezi, no. 3., 2023., pp. 14 – 16.

document on paper) that he has seen and scanned, which would not be the case in the latter example.[19] Unlike the certification of a copy, which a notary makes as part of his regular work and where the nature and details of the certification are read out in the certification stamp itself, only the notary's qualified signature is present when signing documents sent to the land registry.[20]

The land registers will be fully digitised, which means that collections of documents will also be digitised, not just the main registers as was previously the case.[21] In accordance with the new Art. 30 of the LRA 2022, the collection of documents will be kept exclusively in electronic form.[22]

Original documents or attachments for the electronic submission of applications for entry in the land register that are submitted via notaries and lawyers will be stored by them in accordance with their own retention regulations. The Land Register Department stores attachments in the collection of documents in electronic form, thus creating the conditions for the creation of an electronically managed collection of documents.[23]

2.2. Establishment and renewal of the land register

The idea of entrusting the execution of the procedures for the establishment and renewal of the land register to notaries was envisaged due to the adoption of the multi-annual programme for the cadastral survey of construction areas for a period of ten years, but there are courts that do not have a sufficient number of their officials for the smooth operation and execution of the procedures for the establishment and renewal of the land register. It is therefore planned to entrust this work to public notaries.

The procedure for the renewal and establishment of the land register should also regulate the linking of the land register with the book of deposited contracts, where this has not yet been done. Pursuant to the Regulation on the Linking of the Land Register and the Book of Deposited Contracts and the Registration of Ownership

[19] *Ibid.*, p. 14.
[20] For more: Grbac, M.; Grbac, A., *Javne isprave i elektronički zemljišnoknjižni upisi*, Javni bilježnik, Časopis Hrvatske javnobilježničke komore, XXII, November 2018., no. 45., pp. 9 – 24.
[21] Turković, M., E-upis u zemljišne knjige putem javnih bilježnika, accessed 21 January 2025., http://www.iusinfo.hr/DailyContent/Topical.aspx?id=30288.
[22] On January 1, 2022, the minister issued a decision that the collection of documents for all courts shall be maintained in electronic form.
[23] See Bulka, Z., Novela Zakona o zemljišnim knjigama iz 2022., https://www.iusinfo.hr/strucni-clanci/novela-zakona-o-zemljisnim-knjigama-iz-2022

of a Special Part of the Property (Condominium Ownership), the procedure for linking the Land Register and the Book of Deposited Contracts must be initiated by the property manager, who should be involved in it on behalf of all co-owners. The Land Register Act authorises notaries to link the Book of Deposited Contracts and the Land Register as part of the procedure for renewing or establishing the Land Register, which is entrusted to them by the courts. The Ministry of Justice and Public Administration believes that the involvement of notaries public in the renewal of land registers will speed up the entire procedure, as the courts are overloaded with other cases.

At the end of October 2022, the Act on Amendments to the Land Register Act was passed, which, among other things, added nine new articles under Art. 186, numbered from 186a to 186i, which introduced notaries as court commissioners in the procedures for establishing and renewing the land register on the basis of a new cadastral survey. The explanatory memorandum to the Act states that the procedures for the establishment and renewal of the land register are matters of interest to the Republic of Croatia and have a direct impact on the growth of economic activity. Due to the large number of establishment and renewal procedures in some areas and also due to the large number of land register cases, the competent courts are not able to properly carry out the procedures for the establishment and renewal of the land register with the existing human resources. In view of this, these amendments to the Land Register Act provide that court presidents who at any given time do not have a sufficient number of employees to regularly perform the tasks in the land register departments and to carry out the procedures for the establishment and renewal of the land registers may decide by resolution that the task of establishing or renewing the land register for a particular cadastral municipality be entrusted to a notary.[24]

The establishment and renewal of the land register shall be carried out ex officio by the court in whose territory the cadastral municipality for which the land register is being created or renewed is located, on the basis of a decision by the Minister of Justice. In the decision, the Minister of Justice specifies the period within which the procedure for the establishment or renewal of the land register must be completed and, together with the decision, submits to the competent court his opinion on the assignment of the tasks of establishing and renewing the land register to a notary, taking into account the burden of land register cases on the competent courts, the procedures already initiated for the establishment and renewal of the land register, the available number

[24] Also Šćulac, N., *Mogu li javni bilježnici kao povjerenici suda u postupku osnivanja odnosno obnove zemljišne knjige ubrzati rješavanje problema s neusklađenošću zemljišnih knjiga*, Pravo i porezi, no. 10, 2023, p. 71.

of clerks and court counsellors at a given court and other circumstances that may affect the efficient conduct of the procedure for the renewal of the land register, all subject to the prior opinion of the Minister of Finance.

After the court has received the decision and opinion on the delegation of the tasks of establishing and renewing the land register to a notary, the president of the court may by decision delegate the procedure for establishing or renewing the land register to a notary. The court shall notify the Ministry of Justice, the body responsible for the cadastre and the notary to whom the procedure has been delegated of the decision to delegate tasks, as well as of the cancellation of tasks when this occurs. If several notaries have their seat in the district of the court, the cases are assigned to them for processing equally in alphabetical order of the notary's surname. Tasks entrusted to notaries may also be undertaken by notarial advisors or assessors in the notary's office. In exceptional cases, the notary who carried out the land register renewal procedure may also conduct a hearing for rectification or issue a decision in accordance with the rules of the non-contentious procedure.

If notaries in a certain area are overburdened with procedures for the establishment and renewal of the land register, if there is a shortage of notaries in a certain area and the like, the court may, by prior decision of the Ministry of Justice, transfer the execution of the procedure for the establishment or renewal of the land register outside the official area for which the notary was appointed. If the notary has not carried out the procedure for the renewal or establishment of the land register within the prescribed time limit, he may submit a report to the court; the court may extend the time limit or withdraw the notary's right to continue carrying out the procedure.[25]

Time will tell whether the procedures for establishing and renewing land registers will really be speeded up by transferring them to notary's offices.

[25] Hoblaj, Nikolić, Grbac, *op. cit.* note 18, pp. 14 – 16.

3. NEW AUTHORISATIONS OF NOTARIES FROM THE ACT ON NON-CONTENTIOUS PROCEEDINGS

The Act on Non-Contentious Procedure entered into force on 10 June 2023.[26] It is important to emphasise that the decision contained in Article 56, paragraph 2 of the ANCP, including the decision contained in Article 52 of the ANCP on the entrustment of notaries with certain non-contentious proceedings, (only) entered into force on 1 September 2023 (Article 123 of the ANCP). In addition, within 60 days of the entry into force of the provisions of Article 52 of the ANCP (i.e. from 1 September 2023), the Minister responsible for judicial affairs shall issue regulations on the manner of assigning cases to a notary and on the amount of remuneration and reimbursement of costs of a notary as court commissioner for tasks assigned to him by the ANCP (Article 121, paragraph 1 in conjunction with Article 123 of the ANCP).

The third chapter of the first part of the ANCP regulates the participation of notaries in non-contentious proceedings. In this context, the provisions that determine the behaviour of notaries on the basis of their original competence and as court commissioners, appeals against notarial decisions, supplementary decisions and corrective decisions, cases entrusted to a notary and issues related to court and notarial fees in non-contentious proceedings are relevant.[27] There is also the provision of Article 52 of the ANCP, which contains the basis for the issuance of regulations by which the minister responsible for judicial matters is to prescribe the type of case assignment and the amount of remuneration and reimbursement of costs for notaries as court commissioners.

The ANCP still sets relatively narrow limits to the competence of notaries in non-contentious proceedings: by specifying two particular non-contentious proceedings that the court must entrust to them, proceedings that are not otherwise regulated in the ANCP itself (Article 52 of the ANCP); by specifying the court's duty to entrust notaries with the conduct of proceedings to establish the death of a missing person and proof of death (Articles 54-67); by establishing the "original" (concurrent) competence of notaries to conduct the procedure for voluntary appraisal and sale (Articles 58 to 66 of the ANCP) and to conduct the procedure for the establishment, administration and liquidation of notarial deposits (Articles 77 to 100 of the ANCP). The adoption of the ANCP was not used to significantly expand the competence of notaries in those non-contentious proceedings in which the parties can freely dispose of their rights, for example to expressly regulate the

[26] Act on Non-Contentious Procedures, Official Gazette no. 59/2023 (hereinafter: ANCP).
[27] See Aras Kramar, S., *Proglašenje nestale osobe umrlom i dokazivanje smrti*, Pravo i porezi, no. 7-8, 2023., pp. 65-69.

procedure for divorce by mutual consent if the spouses have no minor children in this act. In this context, notaries could also have been entrusted with the settlement of property relations between former spouses. The opportunity was not taken to explain the possibility of notarial preservation of evidence in more detail. The opportunity to make a significant contribution to relieving the burden on the courts by extending the competence of notaries in non-contentious proceedings and to entrust all matters that fall within the competence of the courts, which do not require a hearing in the narrower sense and are essentially dispositive in nature, to notaries, who have so far proven themselves in practise through their expertise and speed in resolving non-contentious inheritance and enforcement matters, was therefore not utilised.

3.1. Regulation of abuttals and dissolution of joint ownership at the notary

The court shall entrust the conduct of the proceedings to a notary established in the territory of the competent court if the parties have submitted: 1. a proposal for the amicable settlement of abuttals; 2. a proposal for the amicable dissolution of joint ownership.

The provision of paragraph 1 of Article 52 of the ANCP establishes the obligation of the court to entrust notaries with the conduct of two types of non-contentious proceedings – proceedings that are not otherwise regulated in the ANCP. These are proceedings initiated by an application for amicable settlement of abuttals and proceedings initiated by an application for amicable dissolution of joint ownership.

Since the Act on Ownership and Other Real Rights[28] essentially only laid down the substantive legal requirements for the decision on applications to initiate the aforementioned proceedings, but that these provisions implicitly referred to the application of the statutory provisions of the Act on Judicial Non-Contentious Procedure from 1934 to these proceedings, which until the entry into force of the ANCP, regulated a special non-contentious procedure for the regulation of abuttals and for the dissolution of joint ownership, rules whose application ceased with the entry into force of the ANCP (Article 122 of the ANCP), the question arises as to the rules on the basis of which the aforementioned non-contentious procedures

[28] Act on Ownership and Other Real Rights, Official Gazette no. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15, 94/17 (hereinafter: AOORR).

should be conducted after the entry into force of the ANCP.[29] The absence of specific provisions for these two procedures that are not contained in the AOORR – for the dissolution of joint ownership in Articles 48 to 56 and for the regulation of abuttals in Article 103 - i.e. provisions that are actually of a substantive nature, inevitably points to the corresponding application of the general provisions of the ANCP. Since the general provisions of the ANCP cannot serve as a sufficient basis for the regulation of special procedures for the regulation of abuttals and the dissolution of joint ownership, it can be assumed that, in the absence of corresponding special provisions in the ANCP, these procedures will continue to be carried out under the corresponding application of the special legal norms of the Act on Judicial Non-Contentious Procedure on these procedures, insofar as they do not contradict the general provisions of the ANCP.

The Minister responsible for judicial matters will issue an ordinance specifying the manner in which cases are to be assigned to a notary and the amount of the notary's remuneration and reimbursement of costs as court commissioner for the aforementioned matters.

3.2. The procedure for declaring a missing person dead and proving death before a notary public

With the entry into force of the ANCP, the application of the legal norms of the Act on Judicial Non-Contentious Procedure for the Kingdom of Yugoslavia from 1934[30] ceases to apply, and the provisions of the Act on the Declaration of Missing Persons as Dead and Proof of Death from 1974 no longer apply (Art. 122 of the ANCP). The provisions of the ANCP on the declaration of missing persons as dead and proof of death are modernised solutions to the 1974 Act.[31] According to the ruling contained in provision of Art. 119, para. 1 of the ANCP, proceedings that were initiated, but have not been concluded before the entry into force of the ANCP are concluded in accordance with the regulations and legal rules in force or applied until the entry into force of the ANCP. However, an exception is also provided for in relation to the entrusting of notaries with proceedings to establish the death of a missing person and to provide proof of death.

[29] Also Dika, M., *O „općem statusu" javnih bilježnika u izvanparničnom postupku prema Zakonu o izvanparničnom postupku iz 2023*, Javni bilježnik, vol. XXXVIII., no. 51., 2024., pp. 18-19.
[30] Act on Judicial Non-Contentious Procedure for the Kingdom of Yugoslavia (Non-Contentious Procedure) with the Introductory Law from 1934, Official Gazette no. 175-XLV.
[31] Act on the Declaration of Missing Persons as Dead and on the Proof of Death from 1974, Official Gazette of the SRH, No. 10/74; Official Gazette no. 53/91.

Exceptionally, upon the entry into force of the provisions of Articles 52 and 56, paragraph 2 of the ANCP, the court will entrust cases for which the ANCP has determined that they be entrusted to notaries public, and in which the court has not taken any action until the date of entry into force of the ANCP, to notaries public (Article 119, paragraph 2 of the ANCP). The ANCP stipulates that the court will entrust the conduct of the procedure for declaring a missing person dead and for proving death to a notary public at the official seat in the territory of the competent court.

The provision of Article 55 of the ANCP regulates the conditions for establishing the death of a missing person and proving the death of a person for whose death there is no proof provided for in the Act on State Registers, as well as the procedure for deciding on this.

A missing person may be declared dead if there has been no news of his/her life in the last five years and seventy years have passed since his/her birth; if there has been no news of his/her life in the last five years and the circumstances under which he/she disappeared make it probable that he/she is no longer alive; if he/she disappeared in a shipwreck, aircraft crash, traffic accident, fire, flood, earthquake or other imminent danger of death and there has been no news of his/her life for six months from the time when this danger ceased to exist; if he/she disappeared during the war or in connection with war events and there was no news of his/her life for one year from the date of the cessation of hostilities; if he/she disappeared during the Homeland War or in connection with war events and there was no news of his/her life for one year from 30 June 1996.

All time limits are counted from the day on which the missing person was unequivocally alive according to the latest news. If this day cannot be precisely determined, these time limits shall begin to run at the end of the month or year in which it was established that the person was alive.

The municipal court in whose territory the missing person last resided is responsible for determining the death of the missing person and providing proof of death. If the person had no place of residence, the municipal court in whose territory the person had their last place of residence is responsible.

In addition, there is the decision contained in paragraph 2 of Article 56 of the ANCP, which provides that the court shall entrust the conduct of the proceedings

to a notary according to the place of jurisdiction in the territory of the competent court (from Article 56, paragraph 1 of the ANCP).[32]

A proposal to declare a missing person dead may be submitted by any person who has a legal interest in doing so, the state attorney, and the Croatian Institute of Social Work. The application must contain the applicant's data, the name, surname and date of birth of the missing person whose death declaration is proposed, their last place of residence or temporary residence and their personal identification number, if they had one. In addition, the application must also contain the facts on which the application is based and the evidence of these facts.

If the court or notary concludes that the conditions for determining the death of a missing person are likely to be met, it appoints a temporary representative for the missing person and notifies the Croatian Institute of Social Work or requests the Croatian Institute of Social Work to appoint a special guardian within a certain period of time and to carry out the procedure. The final decision to declare a missing person dead is submitted to the competent civil registrar for entry in the state registers. If they conclude that the conditions for initiating the procedure are not met, the court or notary will reject the proposal.

4. REGISTER OF LIFELONG SUPPORT CONTRACTS AND CONTRACTS FOR SUPPORT UNTIL DEATH

An innovation in the regulation of contracts is the introduction of the Register of lifelong support contracts and contracts for support until death, which is established and maintained by the Croatian Chamber of Notaries (Article 4 of the Act on Amendments to the Obligatory Relations Act 2023).[33] The content and manner of keeping the register, the registration fee and the right of direct access to the data from the register, as well as the issuance of a certificate on the data from

[32] The draft ZIP from March 2023 envisaged the participation of a notary public as a court commissioner in a larger number of non-contentious proceedings, specifically in relation to proposals for amicable boundary settlements, amicable division of joint ownership, amicable divorce of spouses without minor children, amicable termination of life partnership if no minor child lives in the partnership, as well as for declaring a missing person deceased and proving death. However, these projections in the area of status-related non-contentious proceedings were partially abandoned between the two readings in the Croatian Parliament. See the Proposal for the Law on Non-Contentious Proceedings, first reading. P.Z.br.458, Zagreb, March 2023., https://www.sabor.hr/prijedlog-zakona-o-izvan-parnicnom-postupku-prvo-citanje-pz-br-458-predlagateljica-vlada-republike?t=137552&tid=211439 (25 May 2023.).

[33] Obligatory Relations Act, Official Gazette no. 23/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23.

the register, are determined by a regulation of the Minister responsible for judicial matters (Article 580a, paragraph 7).[34]

According to the data of the Croatian Chamber of Notaries, 5,123 lifelong support contracts were concluded before notaries in 2023, of which 2,677 were in the form of a notarial deed, and 2,446 were solemnised. In the same period, 1,542 contracts for support until death were concluded, of which 608 were concluded in the form of a notarial deed and 934 were solemnised, with a multi-year growth trend in the number of lifelong support contracts concluded before notaries.[35]

The register is set up to systematise and verify the number of contracts concluded.[36] The register shall ex officio record data on: contracts concluded, their amendments, termination, proceedings initiated for their amendment, termination, nullity or annulment, the manner of final termination of these proceedings and the termination of the obligations arising from these contracts (Article 580a, paragraph 2). The judge and the notary must, ex officio, immediately enter data on the conclusion, modification and termination in mutual agreement of lifelong support contracts or contracts for support until death in the register (Article 580a, paragraph 3).[37] The court of first instance must, ex officio and without delay, enter in the register information on the proceedings initiated for the modification, termination, annulment or cancellation of a lifelong support contract or contract for support until death (Article 580a, paragraph 4). The same court shall also enter the information on the manner of final termination of the said proceedings in the register. The support provider may apply to a notary to register the termination of the obligations arising from the contract by fulfilment. The application must be accompanied by the lifelong support contract or contract for support until death and a document proving the death of the support recipient in accordance with the Act on State Registers (Article 580a para. 6).[38]

It is important to note that before any notarisation, i.e. the drawing up of a contract, the notary or judge must check the register of lifelong support contracts and

[34] Regulation on the Register of lifelong support contracts and contracts for support until death, Official Gazette no. 65/2024.
[35] Ombudswoman's Report for the year 2023, Analysis of the state of human rights and equality in Croatia, Zagreb, March 2024, Accessed on 28 January 2025. https://www.ombudsman.hr/hr/interaktivno-izvjesce-za-2023/ p. 65.
[36] Bukovac Puvača, M., *Novo uređenje ugovora o uzdržavanju u Zakonu o obveznim odnosima*, *Novi Informator*, no. 6820 from 29. January, 2024., pp. 1-4.
[37] See Nikolić, V.; Marčinko, I.; Grbac, M., *Ugovori o doživotnom i dosmrtnom uzdržavanju uz pregled izmjena zakona iz 2023. godine te osvrt na način postupanja javnih bilježnika,* Javni bilježnik, vol. XXVIII., no. 51, 2024., pp. 69-94.
[38] See Aras Kramar, S., *Registar ugovora o doživotnom i dosmrtnom uzdržavanju*, Pravo i porezi*,* no. 6., 2024., pp. 55-58.

contracts for support until death to see the number of support recipients with whom the support provider has entered into lifelong support contracts and/or contracts for support until death.[39]

The new regulation also prescribes the time limits within which the court of first instance must enter information in the register on the manner in which the procedure for amending, terminating, annulling or cancelling the above-mentioned contracts has been concluded, namely within 30 days of the decision becoming final if no appeal has been lodged against it, or within 30 days of notification of the final decision of the higher court. If it decides on an extraordinary appeal, changes to the information on the manner in which the proceedings were concluded must also be entered within 30 days of the decision on the extraordinary appeal becoming final.

Practise will show how easy it will be to implement the envisaged solutions in the register in practise and what possible difficulties the contracting parties and authorised representatives will face.

5. POSSIBILITIES OF EXPANDING NOTARY JURISDICTION IN THE FIELD OF STATUS-RELATED NON-CONTENTIOUS PROCEEDINGS

Among the topics of modernising the judiciary and relieving the courts, the question of the possibility of settling divorce before notaries also arose.[40] As justification for establishing notaries' competences in this area, the simplification, flexibility and acceleration of the procedure for the parties were emphasised. The last reform of family legislation simplified and accelerated the divorce of spouses who do not have common children over whom they exercise parental care by prescribing a non-contentious procedure as a method of legal protection (Article 50, paragraph 1, Article 453 - Article 460 of the Family Act).[41]

Under Croatian law, in non-contentious proceedings for divorce by mutual consent of spouses who do not have common children over whom they exercise parental

[39] For more Šago, D., *Novo uređenje ugovora o uzdržavanju u zakonodavstvu Republike Hrvatske,* Zbornik radova X. Međunarodnog savjetovanja Aktualnosti građanskog procesnog prava - nacionalna i usporedna pravnoteorijska i praktična dostignuća, Šago, Dinka; Dika, Mihajlo; Uzelac, Alan et al. (ur.). Split: Pravni fakultet Sveučilišta u Splitu, 2024. pp. 505-526.
[40] Also Maganić, A., *Javni bilježnik u izvanparničnom postupku*, Javni bilježnik, vol. 26, no. 49, 2022, pp. 25-34.
[41] Family Act, Official Gazette no. 103/15, 98/19, 47/20, 49/23, 156/23.

care, the court issues a decision on the basis of the spouses' agreement to divorce. The prerequisite for a divorce by mutual consent is not the mutual division of the marital property and the settlement of other issues of their property relations. The judge's task is to grant the divorce on the basis of the spouses' mutual application. The spouses may settle the division of marital property, maintenance and their property relations on the basis of the divorce by mutual agreement before a notary (Art. 45, Art. 302 of the Family Act 15).[42] In this context, the role of the notary in requesting an appropriate registration of the transfer of rights to real estate on the basis of an agreement between the spouses should also be mentioned. The provisions of Art. 105, para. 1 of the Land Register Act provide for the possibility of submitting an electronic proposal for entry in the land register through a notary, among others. The recent reform of family law and family procedure has simplified the divorce by mutual consent of spouses without common children over whom they exercise parental care, as well as the competences of notaries in relation to the amicable settlement of property relations between spouses and the possibility of submitting land register proposals for registration by electronic means, and raises the question of prescribing the competences of notaries for amicable divorce in the form of a notarial deed.[43] In addition to the reasons of gradualness, simplification, modernisation and electronisation of justice, the principle of "everything in one place" also speaks in favour of prescribing such a form of divorce by mutual consent. In addition to the divorce, the spouses could also reach an agreement with a notary on certain issues relating to their property relations, maintenance and the division of marital property and ask the notary to submit the corresponding land register applications electronically for registration. This would considerably simplify and speed up these procedures and would also have a positive impact on the issue of the costs of such procedures. It should be emphasised that in our legal system there is no mandatory legal representation of spouses in a divorce by mutual consent, which should be taken into account when analysing the costs of the notarial form of divorce by mutual consent from a Croatian perspective.

Our system is based on the principle that an agreement between the spouses on the division of marital property and other property issues is not a prerequisite for a divorce by mutual consent.

[42] Aras Kramar, S., *Javnobilježnički razvod braka u reformiranom slovenskom pravu*, Pravni vjesnik, 36., no. 3-4, 2020., pp. 239-241.
[43] Also Aras Kramar, S., *Širenje nadležnosti javnih bilježnika na području obiteljskopravnih odnosa*, Zbornik radova s III. međunarodnog savjetovanja Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća, Split, Pravni fakultet Sveučilišta u Splitu, 2017., pp. 299-321.

Considering the Croatian legal system, in particular the fact that the last reform of family law and procedure simplified and accelerated the procedure in the area of divorce by mutual consent of spouses who do not have common children over whom they exercise parental care, and thus there is no obligation for mandatory counselling, reasons of gradualness speak in favour of prescribing the competence of notaries for divorce by mutual consent of such marriages in the form of a notarial deed. In this case, the notary has no judicial function but draws up a notarial deed if the conditions for such a form of divorce by mutual consent are met (free will of the spouses, no common children over whom parental care is exercised).

At European level, the adoption of the new Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)[44] should also be mentioned. BU II *ter* expressly recognises such forms of divorce by mutual consent and the competencies of notaries. This creates the basis and the possibility for the recognition, acceptance and legal transactions involving notarial deeds on divorce by mutual consent even in those EU Member States that do not (yet) recognise such competences of Latin-style notaries (see point 70 of the preamble to BU II ter).[45]

On the other hand, possible objections to the possibility of divorce by mutual consent before notaries are that this leads to hasty and ill-considered divorce decisions, and that the understanding of marriage as an institution requires a conventional approach, the judicial divorce procedure. We believe that the argument of gradualness should be taken into account when regulating a divorce by mutual consent before a notary and that this option should be prescribed for those spouses who do not have common children over whom they exercise parental care. At the same time, consideration should certainly be given not only to simplifying and speeding up such procedures for a divorce by mutual consent, but also to the costs of the procedure itself. Arguments of completeness and coherence of the regulation would also support the provision of notaries' competencies for the dissolution of a civil partnership, analogous to the solutions that would apply to an amicable divorce of married spouses.

[44] Council Regulation (EU) 2019/1111 of June 25, 2019, on jurisdiction, recognition, and enforcement of judgments in matrimonial matters and matters relating to parental responsibility, and on international child abduction (recast). ST/8214/2019/INIT SL L 178, 2.7.2019, p. 1–115.
[45] Aras Kramar, S., *Javnobilježnički razvod braka u reformiranom slovenskom pravu*, Pravni vjesnik, 36., no. 3-4, 2020., p. 241.

6. INSTEAD OF A CONCLUSION – FURTHER POSSIBILITIES FOR EXPANDING NOTARY COMPETENCIES

The ANCP regulates the position of notaries in non-contentious proceedings in a fragmentary manner in relation to proceedings whose implementation is entrusted to notaries by a court decision. In procedures in which courts and notaries are originally competent, the actions of notaries, when they do not make concrete decisions but only draw up deeds, raise various implementation problems in practise, above all the question of the possibility and manner of controlling the way in which the notaries will implement the said procedures. The question of the possibility for a dissatisfied party to initiate corresponding proceedings in court after being denied the right to the legal protection it seeks by the notarial deed could also be raised here.

The legislator will have to review the way in which these procedures are regulated, in particular the possibility of judicial control of their implementation, which would further protect the rights of the parties involved. The Republic of Croatia has finally adopted the ANCP in 2023, but now it should be examined how the already existing special legal regulations for certain non-contentious procedures can be brought into line with the ANCP, how to review these regulations, but also considered should be the possibility that some of the non-contentious procedures – e.g. the court non-contentious procedure for the provision of evidence (Art. 272 to 276 of the Civil Procedure Act)[46] and the non-contentious procedure for concluding a court settlement (Art. 321 to 324 of the CPA) – could be adapted to be applied by notaries. In the case of a notarial settlement, for example, the notary could be authorised to conduct this procedure with the powers of an arbitrator, which could give such a settlement the status of a specific court settlement. The adoption of the ANCP should also be taken as an opportunity to examine the possibility of entrusting notaries with the resolution of certain non-contentious, essentially dispositive family and status-related legal matters, such as the conduct of proceedings for divorce by mutual consent. Also reviewed should be the possibility of notaries to, based on prior consent given by the parties in an underlying contract, issue appointments, set deadlines and take other actions in the same way as courts are authorised to do without the prior consent of the parties

[46] Civil Procedure Act, Official Gazette of the SFRY no. 4/1977, 36/1977, 36/1980, 6/1980, 69/1982, 43/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990, 35/1991, Official Gazette no. 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 25/2013, 89/2014, 70/2019, 80/2022, 114/2022, 155/2023 (hereinafter: CPA).

(Articles 117 and 118 of the ANCP). This should also include the possibility for the parties to authorise the notary to do so by subsequent agreement.[47]

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EMPLOYEES' RIGHTS IN BANKRUPTCY PROCEEDINGS - A COMPARATIVE ANALYSIS OF THE CROATIAN AND GERMAN LEGAL SYSTEM*

ABSTRACT

Bankruptcy proceedings are a complex legal procedure aimed primarily at satisfying the claims of the insolvent debtor's creditors. In the course of these proceedings, the employees of the insolvent employer often become one of the most vulnerable groups, as their jobs are at risk and their claims for work performed may be jeopardised. The protection of employees' rights during insolvency proceedings is one of the core issues of insolvency law and belongs to a category of creditors who enjoy special legal protection during insolvency proceedings. In the Croatian legal system, the protection of employee rights in the event of employer insolvency is primarily regulated by the Labour Act, the Act on the Protection of Employee Claims in the Event of Employer Insolvency and the Bankruptcy Act. This legal framework ensures the realisation and protection of certain employee rights as well as special legal protection trough the Insurance Agency for Employee Claims. However, the practical application of these provisions is associated with numerous challenges and shortcomings, which often lead to inadequate protection for employees. In the German legal system, this issue is primarily governed by the Insolvency Code (Insolvenzordnung - InsO) and various other laws. In addition, the protection of employees is guaranteed by the application of insolvency money (Insolvenzgeld), a mechanism by which the state takes over the payment of outstanding wages to employees during insolvency proceedings. The aim of

this article is to analyse and compare the legal protection of employees' rights in bankruptcy proceedings in Croatia and Germany and to offer suggestions for improvements to Croatian legislation. The comparative analysis of these two legal systems will show the advantages and disadvantages of the existing solutions and identify elements that could contribute to a more effective protection of employees' rights in bankruptcy proceedings in Croatia.

Keywords: *Employer's insolvency, employment relationship, protection of employees' rights, employees' claims.*

1. INTRODUCTION

Bankruptcy proceedings, as a special non-contentious legal procedure, play a crucial role in ensuring legal certainty and protecting the rights of creditors while simultaneously facilitating the equitable distribution of the debtors remaining assets. One of the most vulnerable groups affected during the course of these proceedings are the employees who face job losses, unpaid wages, and uncertainty. In fulfilling obligations derived from international legal sources, particularly those related to the harmonization of domestic legislation with the EU asquis, Croatian legislation specifically regulates the rights of employees in bankruptcy proceedings against their employer. Accordingly, this paper will provide an overview of the relevant European Union directives and International Labour Organization (hereinafter: ILO) conventions that serve as the foundation for the special legal framework governing employee rights in bankruptcy proceedings. It will also examine the potential consequences of such proceedings and the rights of employees in the event of employer insolvency under both the Croatian and German legal systems. So, the objective of this paper is to analyze both the special and general *de lege lata* legal norms regulating these legal relationships, to assess the relevant case law, to highlight existing deficiencies in the legal framework (particularly in light of comparative legal solutions) and to propose recommendations for improving Croatian legislation to ensure the effective legal protection of employees in bankruptcy proceedings.

2. CONVENTIONS OF THE INTERNATIONAL LABOUR ORGANIZATION AND DIRECTIVES OF THE EUROPEAN UNION AS THE BASIS FOR THE SPECIAL LEGAL REGULATION OF WORKERS' RIGHTS DURING BANKRUPTCY PROCEEDINGS

2.1. Conventions of the International Labour Organization

The ILO was established in 1919 at the Versailles Peace Conference with the objective of supporting states in the development of labour law legislation as well as other regulations aimed at promoting, safer and more humane working conditions**,** equal employment opportunities, the strengthening of social protection, and the enhancement of social dialogue.[1] Croatia has been a member of the ILO since 1992, and has ratified numerous ILO conventions[2], which in accordance with Article 140 of the Constitution of the Republic of Croatia[3], form an integral part of the domestic legal order. The ILO has adopted several conventions regulating workers' rights during bankruptcy proceedings; however, the Republic of Croatia has not ratified the majority of the conventions governing this area. One of the key instruments in this context is Convention No. 17 on Workmen's Compensation for Accidents[4] adopted by the ILO on June 10, 1925, which Croatia has ratified.[5] The Convention imposes an obligation to ensure compensation for workers who have suffered injuries as a result of an industrial accident, as well as for their dependents, under conditions that are at least equivalent to those prescribed by the Convention.[6] Additionally, the Convention mandates that national legislation must regulate situations involving the insolvency of the employer or insurer, in order to guarantee the payment of compensation to workers or their dependents in the event of the worker's death.[7]
In the context of worker protection during bankruptcy proceedings, it is also important to mention Convention No. 173 on the Protection of Workers' Claims (in the Event of Employer Insolvency), which was adopted by the ILO on June 23,

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[1] See more: Buklijaš, B., Bilić, A., *Međunarodno radno pravo*, Pravni fakultet Sveučilišta u Splitu, Split, 2006. p. 31. – 63.

[2] The Republic of Croatia has ratified 61 conventions and 1 protocol. Source: https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102700 (January 20, 2025)."

[3] Constitution of the Republic of Croatia (Ustav Republike Hrvatske), Official Gazette No. 56/90, 135/97, 8/98 – consolidated text, 113/00, 124/00 – consolidated text, 28/01, 41/01 – consolidated text, 55/01, 76/10, 85/10 – consolidated text, and 5/14. (hereinafter: Constitution of the Republic of Croatia).

[4] Convention No. 17 – Convention concerning Workmen's Compensation for Accidents, 1925. Available at: https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C017 (Janiary 20. 2025.), hereinafter: Convention No. 17.

[5] Convention No. 17 on Convention on Compensation Paid to Workers in the Event of Occupational Accidents, Decision based on the Notification of Succession, Official Gazette – International Treaties, No. 6/95 and 1/02.

[6] Article 1 of the Convention on Compensation Paid to Workers in the Event of Occupational Accidents (Official Gazette – International Treaties No. 1/02).

[7] Article 11 of the Convention on Compensation Paid to Workers in the Event of Occupational Accidents.

1992, but has not been ratified by the Republic of Croatia. This Convention provides two mechanisms for the protection of workers' claims. As a first way of protection, Convention uses *Priority status* – Workers' claims which are recognized as preferential claims (claims with priority in settlement)[8]. Second way of protection is trough guarantee institution. [9] [10]

Convention No. 173 also revises Convention No. 95 on the Protection of Wages which was adopted by the ILO on July 1, 1949, but has not also been ratified by the Republic of Croatia. Convention No. 95[11] establishes that workers must be treated as priority creditors concerning unpaid wages, covering a period determined by national legislation or up to a certain amount specified by national law in the event of bankruptcy or judicial liquidation. [12] Furthermore, workers' claims for unpaid wages are granted the status of priority claims over other bankruptcy creditors.[13] The Convention leaves it to the signatory states to determine, the specific status and ranking of these claims in relation to other priority claims, within their national legal frameworks.[14]

It is also important to mention Convention No. 181 on Private Employment Agencies, which was adopted by the ILO on June 19, 1997[15] but has not been ratified by the Republic of Croatia. This Convention primarily regulates employment through private employment agencies, the protection of workers' rights who are engaged directly by these agencies or placed in employment through their mediation. Additionally, it establishes measures that must be taken

[8] Article 5. – 8. Convention No. 173 – Convention concerning the Protection of Workers' Claims in the event of the Insolvency of their Employer, 1992. Available at:: https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C173 (20. January 2025.),hereinafter: Convention No.

[9] Articles 9–13 of the Convention No. 173.

[10] Additionally, under Article 3 of the Convention on the Protection of Workers' Claims (in the Event of Employer Bankruptcy), states are given discretionary authority to choose either one method or the other to secure workers' claims, or they may opt to apply both methods.

[11] Convention No. 95 - Convention concearing Labour Clausesin Public Contracts, 1949. Available at: https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312239 (January 20. 2025.), hereinafter: Convention No. 95.

[12] Article 11, paragraph 1 of the Convention No. 173.

[13] Article 11, paragraph 2 of the Convention No. 173.

[14] Article 11, paragraph 3 of the Convention No. 173.

[15] Convention No. 181 – Convention concerning Private Employment Agencies, 1997. Along with this Convention, Recommendation No. 188 on private employment agencies was adopted as a supplementary document to Convention No. 181, providing guidelines for its implementation. Available at: https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326) (January 20. 2025).

concerning compensation in the event of bankruptcy and the protection of claims for these workers.[16]

2.2. European Union Directives

The obligations arising from the Stabilization and Association Agreement between the Republic of Croatia and the European Communities and their member states, signed in Luxembourg on October 29, 2001[17], as well as the subsequent Treaty of Accession of the Republic of Croatia to the European Union[18], require the harmonization of Croatian legislation with the legal framework of the European Union. This chapter will provide an overview of relevant EU directives, while the subsequent sections of this paper will assess whether Croatian legislation governing workers' rights in bankruptcy proceedings is aligned with EU directives.[19] A key role in the protection of workers' rights in the event of employer insolvency is played by Directive 2008/94/EC on the protection of employees in the event of their employer's insolvency.[20] The Directive establishes several key rights for workers. First, it imposes an obligation on Member States to establish guarantee institutions that will ensure the payment of outstanding claims to employees. This includes unpaid wages as well as severance payments following the termination of employment, provided that these claims have arisen from an employment contract or employment relationship in the event of the employer's

[16] Article 11 of the Convention on Private Employment Agencies
[17] Stabilization and Association Agreement between the Republic of Croatia, on one side, and the European Communities and their Member States, on the other side, Official Gazette – International Treaties No. 14/01, 1/05.
[18] Accession Treaty of the Republic of Croatia to the European Union, Official Gazette – International Treaties No. 2/2012.
[19]It should certainly be noted that workers' rights to claim protection in the event of employer insolvency are also prescribed by the European Social Charter (revised). See: Smokvina, V., Bodul, D. i Vuković, A.; *O načelu socijalnog postupanja u stečajnom postupku s naglaskom na prava radnika*. Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 34 (1), 2013., p. 530.
[20] Directive 2008/94/EC of the European Parliament and Council of 22 October 2008 on the protection of employees in the event of their employer's insolvency (OJ L 283, 28. 10. 2008). This Directive repeals: Council Directive 80/987/EEC, Council Directive 87/164/EEC, and Directive 2002/74/EC of the European Parliament and Council on the approximation of the laws of Member States regarding the protection of employees in the event of their employer's insolvency. These Directives were primarily aimed at harmonizing the legislation of Member States and promoting the working and living conditions of workers by protecting them in the event of their employer's insolvency. See more: Bodiroga - Vukobrat, N; *Osiguranje potraživanja radnika za slučaj insolventnosti poslodavca u europskom pravu u svjetlu Smjernice 80/987/EEZ i Smjernice 2002/74/EZ, s osvrtom na rješenja u hrvatskom pravu*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 26 (1), 2005., p. 457.

insolvency.[21] Furthermore, regarding social security, the Directive mandates that Member States implement protective measures within their legal frameworks. Specifically, in cases where an employer has failed to pay social security contributions before the insolvency, this must not adversely affect the rights of the employee, provided that the employee's share of contributions was deducted from their wages.[22] Additionally, the Directive ensures that workers and their heirs do not lose additional pension entitlements in the event of the employer's insolvency.[23] The Directive 2015/1794 of the European Parliament and the Council, adopted on October 6, 2015, amended Directive 2008/94/EC which concerns the protection of seafarers' rights in cases of employer insolvency.[24] When addressing workers' rights during bankruptcy proceedings, it is also essential to mention Council Directive 2001/23/EC, which concerns the approximation of the laws of Member States relating to the protection of employees' rights in the event of the transfer of undertakings, businesses, or parts of undertakings or businesses.[25] The aforementioned Directive provides for the possibility of derogation from the protection of workers' rights as established by this Directive in cases of employer insolvency.[26] Additionally, Council Directive 98/59/EC on the approximation of the laws of Member States relating to collective redundancies regulates collective dismissals[27] is used as a mean of employers reorganization aimed at preventing insolvency.

[21] Articles 3–5 of Directive 2008/94/EC on the protection of employees in the event of their employer's insolvency, hereinafter: Directive 2008/94 EC.
[22] Article 7 of Directive 2008/94/EC.
[23] Article 8 of Directive 2008/94/EC.
[24] Article 1 of Directive 2015/1794 of the European Parliament and Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC, and 2002/14/EC of the European Parliament and Council and Council Directives 98/59/EEC and 2001/23/EC regarding seafarers (OJ L 263/1, 8 October 2015). This Directive aims to improve the legal protection of seafarers in the event of their employer's insolvency and ensure the appropriate application of European standards for labor rights protection in this sector.
[25] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of Member States relating to the protection of employees' rights in the event of the transfer of undertakings, businesses, or parts of undertakings or businesses (OJ L 82, 22 March 2001).
[26] Article 5 of Council Directive 2001/23/EC on the approximation of the laws of Member States relating to the protection of employees' rights in the event of the transfer of undertakings, businesses, or parts of undertakings or businesses.
[27] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies (OJ L 225, 12 August 1998).

3. WORKERS' RIGHTS DURING BANKRUPTCY PROCEEDINGS IN CROATIAN LAW

The opening of bankruptcy proceedings can significantly negatively impact employees, as this bring uncertainty regarding employment and wages and, in many cases, job losses. For this reason, workers' rights during bankruptcy proceedings represent one of the key issues in insolvency law, as employees are categorized as creditors who receive special legal protection under bankruptcy law.

In the Croatian legal system, the protection of workers' rights in the event of employer insolvency is regulated by the Labour Act,[28] which provides the general legal framework for employment relationships, as well as by specific legal provisions contained in the Bankruptcy Act[29] and the Workers' Claims Guarantee Act.[30]

However, this special legal framework, including specific provisions regulating the protection of workers' rights during bankruptcy proceedings, is ambiguous and insufficiently defined with numerous gaps that need to be addressed. These legal shortcomings are the subject of analysis in this paper. The following sections will seek to provide answers to unresolved issues arising from this special legal framework, identifying key deficiencies and proposing necessary legislative improvements.

3.1. Generally about the initiating of Bankruptcy Proceedings

Bankruptcy procedure is a legally regulated, formal process initiated when a business entity—whether a company, sole proprietorship, or another type of employer—is unable to meet its financial obligations or when a lack of funds prevents it from conducting regular business operations.[31] The primary objective of bankruptcy procedure is the liquidation of the debtor's assets and the

[28] Labour Act (Zakon o radu), Official Gazette No. 93/14, 127/17, 98/19, 151/22, 64/23.
[29] Bankruptcy Act (Stečajni zakon), Official Gazette No. 71/15, 104/17, 36/22, 27/24.
[30] Workers' Claims Guarantee Act (Zakon o osiguranju radničkih tražbina), Official Gazette No. 70/17, 18/23.
[31] Tomas Živković, I.; Bodul, D.; Tomas, N., *Pitanja pravnog transplantiranja stečajnog zakonodavstva: kolizija pravne tradicije i ekonomskih čimbenika*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 35 (2), p. 555.

distribution of the realized funds to creditors, while also ensuring adequate protection for employees and other parties involved in the bankruptcy process.[32] The court will issue a decision to open bankruptcy procedure if, based on a petition for the initiation of bankruptcy, it determines the existence of a bankruptcy reason, namely that the potential debtor[33] is unable to pay its debts (insolvency) or is over-indebted.[34]

Based on a petition for the initiation of bankruptcy proceedings, the court may issue a decision to initiate a preliminary procedure to determine whether the conditions for opening bankruptcy proceedings are met (preliminary procedure) or it may dismiss the petition. An appeal against the decision to initiate the preliminary procedure is not permitted. The preliminary procedure must be completed within a maximum period of 60 days from the date when the bankruptcy proposal was submitted.[35]

Alternatively, the court may issue a decision to initiate bankruptcy procedure without conducting a preliminary procedure in the following cases: First, if based on a proposal for the initiation of pre-bankruptcy proceedings, the court determines the existence of a bankruptcy reason. Second, if the Financial Agency (FINA)[36] submits a petition for the initiation of bankruptcy proceedings pursuant to Article 110, Paragraph 1 of the Bankruptcy Act. Third, if the petition for the initiation of bankruptcy proceedings is submitted by a person authorized to represent the debtor according to law or by the debtor as a natural person. Fourth, if a creditor submits a proposal for the initiation of bankruptcy proceedings and the debtor acknowledges the existence of a bankruptcy reason. The last case is if a previously opened pre-bankruptcy proceeding ends unsuccessfully.[37]

[32] See more: Bodul, D., *Pluralitet ciljeva stečajnog postupka,* Zbornik Pravnog fakulteta u Splitu, 54 (3), str. 587-613.
[33] The bankruptcy debtor is a legal or natural person against whom bankruptcy proceedings have been initiated because they are unable to meet their due financial obligations, or in which one of the bankruptcy reasons exists (Article 137, paragraph 1 of the Bankruptcy Act).
[34] For the legal consequences of the opening of bankruptcy proceedings, see: Dika, M., *Pravne posljedice otvaranja stečajnog postupka*, Zagreb: Narodne novine, 2002.
[35] Article 115, paragraphs 1 and 3 of the Bankruptcy Act.
[36] The Financial Agency (FINA) is a state-owned company in Croatia that performs a wide range of financial and administrative services, including the enforcement of monetary claims (account seizures), business registration, processing of annual financial statements, and provision of digital services such as electronic invoicing and digital certificates. More information available at: https://www.fina.hr (March 27, 2025)
[37] Article 116 of the Bankruptcy Act.

3.2. Workers as Bankruptcy Creditors and Creditors of the Bankruptcy Estate

Bankruptcy creditors are creditors who hold property-related claims against the debtor at the time of the opening of bankruptcy proceedings.[38] These creditors can only enforce their claims against the debtor within the framework of the bankruptcy proceedings.[39]

The position of workers and their claims in bankruptcy proceedings depends on when their claims arose, specifically whether they arose before or after the opening of bankruptcy proceedings. As a result, workers may take on different roles within the proceedings: If their claims arose before the opening of bankruptcy proceedings, they are treated as bankruptcy creditors with claims that can only be settled within the bankruptcy process (Workers as bankruptcy creditors), and If their claims arose after the opening of bankruptcy proceedings, they are considered creditors of the bankruptcy estate, meaning their claims have a different status in terms of priority for settlement (Workers as creditors of the bankruptcy estate). It is also possible for the same worker to hold both roles simultaneously, depending on the nature and timing of the claims. Additionally, a worker may also qualify as a secured (separatist) creditor or preferential (pledge) creditor, depending on the specific legal circumstances.[40]

Bankruptcy creditors are classified according to their claims into payment ranks, specifically: higher-ranking claims (*priority claims*) and lower-ranking claims (*subordinated claims*). Under the principle of priority, creditors with lower-ranking claims are entitled to payment only after the full satisfaction of higher-ranking creditors.[41] Within the same payment rank, creditors are satisfied proportionally to the amount of their claims, in accordance with the principle of parity.[42]

Claims of workers and former workers of the debtor which arose before the opening of bankruptcy proceedings and are based on an employment relationship, as well as claims of state authorities, agencies or funds related to the corresponding portion of total wage costs or wage compensation, are classified as first-priority

[38] Article 137, paragraph 1 of the Bankruptcy Act.
[39] Article 167 of the Bankruptcy Act.
[40] See more: Eraković, A., *Izlučna i razlučna prava u stečaju*, Zbornik pravnog fakulteta u Rijeci, v. 24, br. 1., 2003., p. 639-675.
[41] Eraković, A., *Radni odnosni u slučaju stečaja poslodavca*. Zagreb: Pravni Fakultet u Zagrebu, Organizator,
Zagreb, 2007., p. 775.-776.
[42] Article 137 paragraph 2 of the Bankruptcy Act.

claims. This also includes: Severance payments, up to the amount prescribed by law or a collective agreement, and Compensation claims for work-related injuries or occupational diseases. The payment of these claims is carried out in accordance with special regulations governing the payment of wages, mandatory social security contributions, taxes, and surtaxes.[43]

Furthermore, second-priority claims include all other claims, except those classified in lower payment ranks.[44] Thus, the order of payment from the bankruptcy estate is as follows: *Bankruptcy proceedings costs* – These are settled first, except for secured creditors (separatist creditors), who are paid separately. Then, *Higher-ranking claims* – First-priority claims are satisfied before second-priority claims. At the end, *Lower-ranking claims* – These are settled only after the full satisfaction of all higher-ranking creditors.

The registration of claims is submitted to the bankruptcy administrator who is responsible for compiling a list of all claims of employees and claims of former employees of the debtor, that became due before the opening of bankruptcy proceedings, both in gross and net amounts. Additionally, the bankruptcy administrator is required to present the list of claims to the employees for signature in two copies.[45] If an employee or former employee of the debtor does not submit a claim independently, their claims are considered to have been submitted in accordance with the list prepared by the bankruptcy administrator.[46]

After the verification of claims at the examination hearing,[47] but before the distribution of funds, the bankruptcy administrator compiles a final list of claims that will be included in the distribution process and which are published on the e-Oglasna ploča sudova.[48] [49] Furthermore, regarding workers as creditors of the

[43] See more: Pezo, S., *Isplate plaće radniku u slučaju stečaja poslodavca*. Available at: https://www.rrif.hr/clanak-22508/ (20.02.2025.)
[44] Article 138 of the Bankruptcy Act.
[45] Similarly, the High Commercial Court in its decision, case no. Pž-2717/01, of May 31, 2001, states*: 'The bankruptcy administrator is required to compile a list of all claims of the employees and former employees of the debtor due before the opening of the bankruptcy proceedings and present it to them for signature as their claims.*"
[46] Article 257 paragraphs 3 and 4 of the Bankruptcy Act.
[47] The examination hearing is crucial in bankruptcy proceedings, as it is the hearing where the claims of bankruptcy creditors are examined. The bankruptcy administrator is obligated to provide a statement on each reported claim, specifically to clearly state whether it is accepted or disputed.
[48] e-Oglasna ploča sudova, *eng. The e-Notice Board of the Courts* is an official online platform used in Croatia for the publication of court notices, including those related to enforcement and insolvency proceedings. See: https://mpudt.gov.hr/vijesti/e-oglasna-ploca-sudova/10121 (March 27, 2025)
[49] Article 274 of the Bankruptcy Act.

bankruptcy estate, it is first necessary to specify which obligations are settled from the bankruptcy estate and in what order. Even the creditors of the bankruptcy estate are classified into two payment ranks: *First payment rank* – Creditors whose claims arise from the costs of the bankruptcy proceedings and *Second payment rank* – All other obligations of the bankruptcy estate. [50]

The costs of bankruptcy proceedings[51] include, among other things, claims for unpaid wages of workers in gross amounts, as determined in the bankruptcy proceedings. These claims apply to amounts exceeding three unpaid wages, which the worker is entitled to under special regulations, but only up to three unpaid minimum wages in the Republic of Croatia. However, this provision does not apply to individuals authorized to manage the company's affairs.[52]

However, other obligations of the bankruptcy estate include, among other things, claims of the debtor's employees that arose after the opening of bankruptcy proceedings. [53]

Unlike bankruptcy creditors, creditors of the bankruptcy estate do not submit their claims to the bankruptcy administrator. Instead, they can simply request payment from the bankruptcy administrator for the amounts owed to them from the bankruptcy estate. Additionally, creditors of the bankruptcy estate have the right to file a condemnatory lawsuit, meaning they can initiate legal proceedings to demand payment and enforce their claims through an enforcement procedure, subject to the limitations set out in Article 170 of the Bankruptcy Act.[54]

3.3. Termination of the Employment Contract as a Consequence of the initiating of Bankruptcy Proceedings

According to the provisions of the Labour Act, both the employer and the employee have the right to terminate the employment contract.[55] The opening of bankruptcy proceedings does not automatically terminate employment contracts

[50] Čuveljak, J., *Utjecaj otvaranja stečaja na prava iz radnog odnosa*, Pravo i porezi, br. 3/10.
[51] Article 155 of the Bankruptcy Act.
[52] Article 155 of the Bankruptcy Act, regarding the costs of bankruptcy proceedings, see more in: Bodul, D.; Vuković, A., *Fond za namirenje stečajnog postupka - između ciljeva i mogućnosti.* Available at: https://informator.hr/strucni-clanci/fond-za-namirenje-troskova-stecajnoga-postupka (February 25, 2025)
[53] Article 156, paragraph 1, points 1-4 of the Bankruptcy Act
[54] Čuveljak, J., *Komentar Stečajnog zakona (NN 71/15, 104/17)*, Zagreb: Narodne novine, 2018., p. 509.
[55] Article 114 of the Labour Act.

concluded with the debtor as the employer.[56] Nevertheless, the opening of bankruptcy proceedings constitutes a justified[57] reason for the termination of an employment contract.[58]

Although the Bankruptcy Act's special legal framework does not explicitly specify whether the termination of an employment contract in bankruptcy proceedings constitutes regular or extraordinary dismissal, it does establish a notice period of one month, unless a shorter period is prescribed by law. From this, it can be concluded that termination in bankruptcy proceedings qualifies as a regular dismissal.[59] Thus, in addition to the grounds for regular dismissal provided under the general labour law framework (the Labour Act), the Bankruptcy Act introduces an additional specific ground for regular termination of employment contracts.[60] Since this constitutes a regular dismissal, the employee (if they meet the conditions prescribed by law) is entitled to certain rights under general labour law provisions, such as severance pay[61] and compensation for unused annual leave.[62]

Thus, following the initiation of bankruptcy proceedings, the bankruptcy administrator must decide whether to terminate the employment contracts of the employees still employed by the debtor. The administrator is not required to consider social criteria prescribed by general labour law provisions[63]. The

[56] Article 191, paragraph 1 of the Bankruptcy Act.
[57] From the legal understanding established in case law, it follows that the decision of the bankruptcy administrator to terminate the employment contract cannot be altered by the bankruptcy court with its ruling. High Commercial Court of the Republic of Croatia, case no. Pž – 1649/00 of April 18, 2000."
[58] Article 191, paragraph 2 of the Bankruptcy Act.
[59] Article 191, paragraph 3 of the Bankruptcy Act.
[60] This legal understanding is also upheld in the decision of the Supreme Court of the Republic of Croatia, Revr-918/09 of December 9, 2009: '...The assessment is correct that the opening of bankruptcy proceedings against the defendant constitutes a justified reason for regular termination of the employment contract under Article 120 of the Bankruptcy Act, in addition to the justified reasons for regular dismissal prescribed by the Labour Act."
[61] Severance pay is a monetary amount that the employer pays to the employee whose employment contract is terminated after two years of continuous service, as a means of securing income and mitigating the adverse effects of the termination of the employment contract. (Article 126, paragraph 1 of the Labour Act).
[62] In the event of termination of the employment contract, the employer is obliged to pay the employee compensation instead of taking annual leave if the employee has not used their annual leave. (Article 82, paragraph 1 of the Labour Act). In accordance with the above, the right to compensation for unused annual leave, belongs to every worker whose employment contract is terminated, regardless of the manner of termination, including in the case of extraordinary dismissal.
[63] An employer who employs more than 20 workers, when deciding on a business-related dismissal, must take into account the duration of the employment relationship, the age of the worker, and maintenance obligations (so-called social criteria) that burden the worker. (Article 115, paragraphs 2 and 3 of the Labour Act).

bankruptcy administrator may terminate employment contracts regardless of their agreed duration and irrespective of statutory or contractual provisions protecting employees.[64] This means that, in bankruptcy proceedings, the administrator can dismiss all employees, including those protected under the Labour Act's provisions prohibiting dismissal.[65] The mere fact that bankruptcy proceedings have been initiated against the employer constitutes a sufficient reason for termination, and the administrator is not required to provide any additional justification or circumstances for the dismissal.[66] However, an employee who believes that their dismissal was not in accordance with the law may seek legal protection of their rights in accordance with the provisions of the Labour Act.[67]

During the course of bankruptcy proceedings, the bankruptcy administrator may also enter into new fixed-term employment contracts, if all conditions prescribed by the special legal framework are met, specifically: the administrator has obtained court approval for entering into such contracts, and the contracts are necessary to complete already initiated tasks or to prevent potential damage. The Bankruptcy Act explicitly stipulates that the restrictions on fixed-term employment contracts prescribed by general labour law provisions (Labour Act) do not apply to such contracts concluded during bankruptcy proceedings.[68]

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[64] Article 191, paragraph 3 of the Bankruptcy Act.

[65] The Labour Act protects certain categories of workers from dismissal by prohibiting employers from terminating employment contracts in specific cases (e.g., Article 38 of the Labour Act: prohibition of dismissal in case of temporary incapacity due to a work injury or occupational disease, Article 34 of the Labour Act: prohibition of dismissal during pregnancy, maternity, parental, adoption, or paternity leave…). However, in relation to the Labour Act as the general provision, the Bankruptcy Act serves as a lex specialis, meaning that under this law, it would still be permissible to terminate the employment contract even for these protected categories of workers. This legal understanding was upheld in the decision of the Supreme Court of the Republic of Croatia, Revr 49/06 of July 11, 2007: '...Only after the opening of bankruptcy proceedings can the bankruptcy administrator terminate the employment contract, regardless of the legal provisions protecting employees...

[66] Supreme Court of the Republic of Croatia, Revr 1488/2009-2 of March 31, 2010.

[67] Article 191, paragraph 4 of the Bankruptcy Act. For the protection of individual workers' rights, see: Perkušić, T.; *Mogućnosti zaštite individualnih prava radnika u kontekstu postupovnog pravnog uređenja na kojeg upućuju odredbe zakona o radu* // Zbornik radova IX. međunarodnog savjetovanja Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća / Šago, Dinka; Čizmić, Jozo; Dika, Mihajlo et al. (ur.). Split: Pravni fakultet Sveučilišta u Splitu, 2023. p. 337-364

[68] Article 191, paragraph 5 of the Bankruptcy Act. According to this special legal framework, the provision of Article 12 of the Labour Act does not apply to these contracts, which, among other things, means that the legal consequences of concluding a fixed-term employment contract in violation of the provisions of the Labour Act or if the worker continues to work for the employer after the expiration of the period for which the contract was concluded, as regulated by the Labour Act, will not apply. This legal understanding was upheld in the decision of the Supreme Court of the Republic of Croatia, Revr 236/13 of August 19, 2014: „...the plaintiff's continued employment does not result in the

The bankruptcy administrator, with court approval, determines the wages and other employment-related entitlements for workers employed during bankruptcy proceedings, according to law and any applicable collective agreements.[69] Additionally, wages and other entitlements arising from employment contracts concluded after the opening of bankruptcy proceedings are classified as obligations of the bankruptcy estate and are settled accordingly.[70]

However, the special legal framework governing bankruptcy proceedings is ambiguous and lacks clarity regarding the determination of wages. Specifically, while the bankruptcy administrator has the authority to set wages for employees hired under new fixed-term contracts, a key question arises: what happens to employees whose contracts were concluded before the opening of bankruptcy proceedings? It is important to emphasize that the opening of bankruptcy proceedings does not alter the rights and obligations arising from existing employment contracts. Workers continue to use the same rights, including the right to receive their pre-agreed wages, as well as all other entitlements stemming from their employment contract or collective agreement.[71] Given these legal uncertainties, the answer to this issue must be found by interpreting the general provisions of the Labour Act in conjunction with the Bankruptcy Act as a special regulation.

Thus, regarding existing employment relationships, the bankruptcy administrator may reduce wages only if there is mutual consent between the employee and the administrator (as the legal representative of the debtor) or by applying the institution of dismissal with an offer of an amended employment contract. It is important to emphasize that, when applying this legal mechanism, the bankruptcy administrator can only offer the employee a fixed-term employment contract. Furthermore, this can only be done if the cumulative legal requirements set out in the special provisions of the Bankruptcy Act for concluding a fixed-term employment contract are fulfilled.

presumption under Article 10, paragraph 5 of the Labour Act because the provisions of the special law (Article 120, paragraph 5 of the Bankruptcy Act) do not allow for the conclusion of a permanent employment contract...".

[69] Article 191, paragraph 6 of the Bankruptcy Act.

[70] Article 191, paragraph 7 of the Bankruptcy Act.

[71] Op. cit. note 55., p. 605.

3.4. The termination of Workers' Right to Co-Determination as a Consequence of the Opening of Bankruptcy Proceedings

In accordance with general labour law provisions, employees have the right to participate in decision-making on matters related to their economic and social rights and interests. Therefore, employees elect a works council, [72] which has the authority to conclude written agreements with the employer.[73] The fundamental powers of the works council in relation to the employer are information,[74] consultation,[75] and co-decision[76]. Additionally, the works council ensures compliance with laws, work regulations, collective agreements and other regulations, as well as overseeing whether the employer fulfills their obligations regarding contributions.[77] If the works council has not been elected, despite the existence of the necessary conditions, then its rights and obligations with respect to the employer (except for the appointment of a worker representative to the employer's governing body) are assumed by the trade union representative. In situations where multiple trade unions operate within the employer's organization, they must agree on which representative or representatives will assume the role of the works council, and they must inform the employer in writing about the specific agreement reached.[78] According to the special legal framework of the Bankruptcy Act, with the opening of bankruptcy proceedings, agreements with the works council do not bind the bankruptcy administrator, and the rights of employees to co-decision cease.[79]

In legal doctrine it is emphasized that, according to this special legal framework of the Bankruptcy Act, with the opening of bankruptcy proceedings, all rights of the works councils or trade union representatives that took their role (such as information, consultation, co-decision, and the right to enter into agreements with the employer) cease. [80]. According to the legal understanding established in the case law: "...after the opening of bankruptcy proceedings, the bankruptcy administrator, on behalf of the employer, can terminate the employment contract

[72] Workers have the right to elect a works council (if the employer employs twenty or more workers, except in state administrative bodies) for the purpose of representing them to the employer in order to promote and protect their rights and interests. Article 140 of the Labour Act.
[73] Article 160 of the Labour Act.
[74] Article 149 of the Labour Act.
[75] Article 150 of the Labour Act.
[76] Article 151, paragraphs 1 and 2 of the Labour Act.
[77] Article 148 of the Labour Act.
[78] Article 153, paragraphs 3 and 4 of the Labour Act.
[79] Article 192 of the Bankruptcy Act.
[80] Potočnjak, Ž., *Neki problemi primjene Direktive o kolektivnom otkazivanju ugovora o radu u hrvatskom zakonodavstvu i praksi*, Aktualnosti hrvatskog zakonodavstva i pravne prakse, Milković, Darko (ur.). Zagreb: Organizator, 2016. str. 262. – 263.

of any employee, regardless of the agreed duration of the contract or any agreed exclusion of the right to regular dismissal, and even regardless of legal or contractual provisions protecting the employee. Therefore, when dismissing an employee, the bankruptcy administrator is not required to consult with the works council or apply provisions prohibiting the dismissal of certain categories of employees...". [81] The explanation is that the provisions of the Bankruptcy Act, as a lex specialis, take precedence over the Labour Act, as the general regulation. However, legal doctrine points out that this special legal framework, which does not require consultation or co-decision, even in cases of collective redundancies, is not in line with Council Directive 98/59/EC. This directive which concerns the harmonization of the legislation of Member States regarding collective dismissals. It is argued that the opening of bankruptcy proceedings should be a reason for consultation with employee representatives, rather than leading to the termination of this right.[82]

3.5. Workers' Rights in the Event of the Opening of Bankruptcy Proceedings According to the Special Legal Regulation of the Workers' Claims Guarantee Act

Since the recovery of workers' claims in lengthy and uncertain bankruptcy proceedings is extremely low. The protection of these workers is ensured through special legal regulations since their social security is, among other things, threatened by the bankruptcy process. As previously stated, according to the provisions of the Bankruptcy Act, workers' claims (as well as the claims of former employees of the debtor which arose before the opening of bankruptcy proceedings from the employment relationship) are classified as first-priority claims.

The special legal framework of the Workers' Claims Guarantee Act guarantees that certain material rights[83] of the worker arising from the employment relationship in the event of the opening of bankruptcy proceedings against the employer[84] are

[81] Supreme Court of the Republic of Croatia, Revr 1488/2009-2 of March 31, 2010.
[82] Op. cit. note 81., p. 259.-264..
[83] According to this special legal framework, a worker is a natural person, in accordance with the general labour law provisions, who is in an employment relationship with the employer at the time of the opening of bankruptcy proceedings, as well as a person whose employment relationship with the employer ended within twelve months before the opening of bankruptcy proceedings. (Article 3, paragraph 1, point 4 of the Workers' Claims Guarantee Act).
[84] According to this special legal framework, the employer against whom bankruptcy proceedings have been opened is a natural or legal person, in accordance with the general labour law provisions, against whom bankruptcy proceedings have been opened under the

fully exempt from enforcement.[85] In other words, a special protection is provided for part of the creditor claims arising from the employment relationship in cases of bankruptcy proceedings against the employer. This protection is applied at a socially acceptable level and ensures that the payment of that part of the claim is covered by the state budget through the Agency for the Guarantee of Workers' Claims (hereinafter: the Agency). Meanwhile, the remaining portion of the claim worker can achieve within the bankruptcy proceedings.[86]

According to the special legal framework arising from the Workers' Claims Guarantee Act, employees, in the event of the opening of bankruptcy proceedings against the employer (under certain conditions), are entitled to the payment of: - Unpaid wages or wage compensation[87] (up to the amount of the minimum wage)[88] for each month of the protected period, - Unpaid sickness benefits for the protected period, which the employer was obliged to pay from their funds according to health insurance regulations, up to the amount of the minimum wage for each month spent on sick leave, - Unpaid compensation for unused annual leave to which the worker was entitled before the opening of the bankruptcy proceedings, under the conditions specified by law, up to the amount of the minimum wage, as equivalent to the monthly wage specified in the first point. Workers are also antitled to severance pay under the conditions set by law, amounting to half the severance pay determined in the bankruptcy proceedings, but no more than half the highest amount of severance pay prescribed by law and legally awarded compensation for damage due to a work-related injury or occupational disease (up

specific provisions regulating bankruptcy proceedings (Article 3, paragraph 1, point 1 of the Workers' Claims Guarantee Act).

[85] Article 8, paragraph 2 of the Workers' Claims Guarantee Act.

[86] Final Proposal of the Act on Amendments to the Act on the Protection of Workers' Claims, Zagreb, 2022. Available at: https://www.sabor.hr/hr/sjednice-sabora/konacni-prijedlog-zakona-o-izmjenama-i-dopunama-zakona-o-osiguranju-radnickih (February 20, 2025).

[87] Wages or wage compensation, according to this special legal framework, is the total amount of income that includes the contribution amounts from the base, the amounts of income tax and surtax, and the net amount for payment, which the employer or another person on behalf of the employer is obliged to pay to the worker based on the employment relationship, in the amount, for the period, and under the conditions established by the collective agreement, work regulations, employment contract, or specific regulation (Article 3, paragraph 1, point 3 of the Workers' Claims Guarantee Act).

[88] According to Article 3, paragraph 1, point 6 of the Workers' Claims Guarantee Act, the minimum wage is the monthly gross salary that the worker is entitled to for full-time work, in accordance with the Regulation of the Government of the Republic of Croatia on the amount of the minimum wage.

to one-third of the final compensation amount awarded by a court).[89] [90] The period during which protection and the guarantee of rights are provided in the event of the opening of bankruptcy proceedings is known as the protected period, it is defined as: -the last five months before the opening of bankruptcy proceedings against the employer, or the last five months before the termination of the employment relationship, if the employment relationship was terminated within twelve months prior to the opening of bankruptcy proceedings.[91]

In addition to the above, when paying wages, wage compensation, and compensation for unused annual leave, the Agency is obligated to calculate and pay contributions for mandatory social insurance based on the applicable base, as well as the relevant taxes and surtaxes. Furthermore, this special legal framework provides for the conversion of monthly amounts of certain rights into daily amounts, as well as the rights of part-time employees.[92] It is important to emphasize that these rights are inheritable. [93]

3.5.1. Agency for the Guarantee of Workers' Claims

The Agency for the Guarantee of Workers' Claims was established to ensure the implementation of the above-mentioned special legal framework. It is a public institution governed by the regulations applicable to institutions, unless otherwise specified by the Workers' Claims Guarantee Act.

The founder of the Agency is the Republic of Croatia, and the founding rights and obligations are exercised by the Government of the Republic of Croatia. The Agency is registered in the court register, and its headquarters is located in Zagreb.[94] The administrative tasks related to the Agency are also carried out by

[89] The last mentioned right, according to Article 26, paragraph 3 of the Workers' Claims Guarantee Act, is exceptionally granted to a worker who has not received payment of a final judgment for compensation due to a work injury or occupational disease, regardless of when their employment relationship ended, provided that they submitted a request to the employer for the enforcement of the final judgment within the voluntary execution period or requested compulsory enforcement before the opening of bankruptcy proceedings.
[90] Article 8, paragraph 1 of the Workers' Claims Guarantee Act.
[91] Article 3, paragraph 1, point 5 of the Workers' Claims Guarantee Act
[92] Articles 9 and 10 of the Workers' Claims Guarantee Act. See: Iljazović, B.; *Isplata plaće radniku u slučaju stečaja, odnosno blokade računa poslodavca*, Radno pravo, br. 10/13, Zagreb, 2023. p. 24. – 29.
[93] If, during the process of exercising the right, the worker passes away, the rights are determined by the legal heirs based on the final inheritance decision (Article 12 of the Workers' Claims Guarantee Act).
[94] Article 16 of the Workers' Claims Guarantee Act.

the Croatian Employment Service and HP (Hrvatska pošta d.d.)[95] with the mutual rights and obligations regarding the performance of these tasks regulated by a Business Cooperation Agreement.[96] In the event of the employer's bankruptcy, the Agency ensures and, makes the payment of part of the bankruptcy claims arising from the employment relationship at the expense of the state budget (i.e., it pays the employee part of the unpaid wages and other entitlements earned during the protected period).

Claims that the Agency pays based on this special legal framework transfer then to the Agency upon payment, and the Agency acquires all procedural rights of the bankruptcy creditor concerning the acquired claims, for the purpose of recovering funds for the state budget. The competent court in the bankruptcy proceedings will correct the list of examined claims, based on a notification from the Agency , and a copy of the corrected decision on the determination of claims will be published on the e-Oglasna ploča sudova.[97]

3.5.2. The Procedure for Exercising Rights in the Event of the Opening of Bankruptcy Proceedings Against the Employer

The special legal framework of the Workers' Claims Guarantee Act also regulates the procedures for exercising the previously mentioned rights of employees in the event of the employer's bankruptcy. The procedure for exercising these rights depends on whether the bankruptcy proceedings have been opened and are being conducted. If the bankruptcy proceedings are not being conducted, or if the claims are related to employees of a foreign employer, the procedure may differ.[98]
It is important to emphasize that the rights prescribed in the event of the opening of bankruptcy proceedings against the employer cannot be exercised by members of the management board of a company, members of the supervisory board, executive directors, or managers of cooperatives, regardless of when these roles were performed. [99] In accordance with this, the following part of this paper will first analyze the provisions concerning the guaranteeing of claims when

[95] Hrvatska pošta d.d., *eng. HP – Croatian Post Inc.* is the national postal operator in Croatia. It is a state-owned company providing postal and logistics services, including the delivery of mail, parcels, and registered court documents. Croatian Post also offers certain financial and digital services. More information available at: https://www.posta.hr (March 27, 2025)
[96] Article 17 of the Workers' Claims Guarantee Act.
[97] Article 32 of the Workers' Claims Guarantee Act.
[98] The Workers' Claims Guarantee Act specifically regulates the procedure for securing claims of workers from foreign employers; however, due to the limited scope of this paper, a broader analysis of this special legal framework will not be provided.
[99] Article 26, paragraph 4 of the Workers' Claims Guarantee Act.

bankruptcy proceedings are opened and conducted, and then the provisions for the guaranteeing of claims in cases where the opened bankruptcy proceedings are not being conducted.

3.5.2.1. The Procedure for Securing Claims When Bankruptcy Proceedings Are Opened and Ongoing

When bankruptcy proceedings are opened and conducted, the rights prescribed in the event of the opening of bankruptcy proceedings against the employer can be exercised by the worker whose claim has been recognized in the bankruptcy proceedings, provided that the worker has timely and properly submitted a request.[100] This request can be submitted either directly to the Agency or to the regional office of the Employment Service (according to the location of the employer's registered headquarters or business unit) or to the HP - Hrvatska pošta d.d. office. The request can also be submitted electronically to the Agency via the e-Citizens system, further simplifying the process for workers. The worker must submit the request within a preclusive period of 30 days from the eighth day after the publication of the decision on established and disputed claims on the website e-Oglasna ploča sudova. If the claim is disputed and the worker is referred to litigation to determine the disputed claim, the deadline for submitting the request is 30 days from the receipt of the final judgment establishing the amount of the claim and the payment rank.[101] The request must be submitted on a specific form (RPS-01), the content and attachments of which are prescribed based on the Regulation on the content of the request form for workers to exercise their rights in the event of the employer's bankruptcy.[102] At the Agency's request, for the purpose of verifying the data arising from the worker's request, bankruptcy administrators, employers, and individuals are required to provide, within 15 days from the receipt of the request, all the necessary data for the implementation of the claims securing procedure.[103] However, many workers are insufficiently informed about the rights arising from this special legal framework. For this reason, it should be concluded that the provisions of the Bankruptcy Act, which pertain to the duties of the bankruptcy administrator, *de lege ferenda*, should be amended to include an obligation for the bankruptcy administrator to inform workers via the e-Oglasna ploča sudova about their rights under the Workers' Claims Guarantee Act, as well

[100] Article 26, paragraph 1 of the Workers' Claims Guarantee Act.
[101] Article 28, paragraphs 1, 2, and 3, points 1 and 3 of the Workers' Claims Guarantee Act.
[102] Regulation on the content of the worker's request form for exercising rights in the event of the employer's bankruptcy (Pravilnik o sadržaju obrasca zahtjeva radnika za ostvarivanje prava u slučaju stečaja poslodavca), Official Gazette No. 92/17, 38/23.
[103] Article 29 of the Workers' Claims Guarantee Act.

as the procedures for exercising these rights.[104] The Agency decides on the worker's request by issuing a decision within 15 days from the date of submission of the properly completed request. Against this decision a worker can file an appeal. The Ministry responsible for labor then decides about this appeal in period of 30 days from the date of submission of the properly filed appeal. There is no further appeal against the decision of the Ministry, but an administrative dispute can be initiated. The Agency is obligated to pay the secured amount within 15 days from the date the decision becomes final.[105]

In bankruptcy proceedings involving employers with employed workers the bankruptcy administrators are required to open a special purpose account for the bankruptcy debtor to receive the payment of the secured workers' claims.

No later than 8 days after the Agency makes the payment, the bankruptcy administrator must carry out, along with the direct payment of the recognized claims to workers, the calculation and payment of the related taxes and surtaxes, as well as the contributions for mandatory social insurance that are calculated based on the base and on the base itself. Within the following 15 days, the bankruptcy administrator must provide the Agency with proof of the payments made, including: - a bank statement showing changes in the transaction account, indicating the amount and purpose of the funds deposited, - a report on income, income tax, surtax, and contributions for mandatory insurance using the JOPPD form, confirmed by the competent state financial authority, showing the individual payments and purpose of the funds.Since the payment of workers' claims is linked to costs, it has been determined that the costs for opening and closing the account are considered bankruptcy proceedings costs to be covered from the bankruptcy estate. If there are no funds in the bankruptcy estate, the costs are covered by the Fund for the Settlement of Bankruptcy Procedure Costs.[106]

[104] Similary, see: Madunić, I.: *Problemi u ostvarivanju prava radnika u slučaju stečaja i blokade računa poslodavca*, Informator, br. 6595, Zagreb, 2017. p. 2. – 4. In legal doctrine, it is stated (Bodul, D., *Analysis of the 2023 Amendment to the Workers' Claims Guarantee Act: To what extent should the protection of workers' rights in the event of employer bankruptcy in Bosnia and Herzegovina be aligned with the legal system of the Republic of Croatia*?, Proceedings of the Collection of Papers on Current Issues of Civil and Commercial Legislation and Legal Practice, No. 20, Mostar, 2023, pp. 283-284) that the rules of the Bankruptcy Act regarding early warning of the debtor and access to information (which rules are in accordance with Directive (EU) 2019/1023 of the European Parliament and Council of 20 June 2019 on frameworks for preventive restructuring, debt discharge, and bans, and measures to improve the efficiency of procedures relating to restructuring, insolvency, and debt discharge, and amending Directive (EU) 2017/1132 (Directive on Restructuring and Insolvency) (OJ L 172/18)) are insufficient for addressing this issue.
[105] Article 30 of the Workers' Claims Guarantee Act.
[106] Article 31, paragraphs 1, 3, 4, and 5 of the Workers' Claims Guarantee Act

3.5.2.2. The Procedure for Securing Claims in the Case When an Opened Bankruptcy Proceeding is Not Being Conducted

When bankruptcy proceedings are not conducted, the rights prescribed in the event of the opening of bankruptcy proceedings against the employer can be exercised by the worker if they have timely and properly submitted a request for payment.[107] Thus, the procedure is initiated upon the worker's request, which must be submitted within 30 days from the eighth day after the publication of the decision on the opening and closure of the bankruptcy proceedings on the e-Oglasna ploča suda.[108]

The request is submitted in the manner described in the chapter on the guaranteeing of workers' claims when bankruptcy proceedings are opened and conducted, and there is no difference in either the method or the deadlines within which the Agency must make a decision. The payment of workers' claims is made within 15 days from the date the decision becomes final. However, if the opened bankruptcy proceedings are not conducted against an employer with employed workers, the bankruptcy administrator is obligated (based on a court decision) to open a special purpose account for the bankruptcy debtor to receive the payment of the secured workers' claims.[109] Within the following 8 days, the bankruptcy administrator is required to carry out the calculation and payment to the worker, as well as the calculation and payment of the corresponding taxes and contributions. Regarding the bankruptcy administrator's obligations to provide the Agency with evidence of the payment made, as well as the costs of opening and closing the account, there is no difference compared to what is stated in the chapter on the guaranteeing of workers' claims when bankruptcy proceedings are opened and conducted.

From the above mentioned, it follows that the legislator, with the aim of ensuring the most efficient exercise of rights arising from this special legal framework, has prescribed a large number of strict deadlines. However, in legal doctrine, [110] it is reasonably pointed out that the legislator failed to clearly define the deadline for opening the special purpose account of the bankruptcy debtor. It is argued that *de lege ferenda*, the provisions of the Workers' Claims Guarantee Act should be amended to specify a 15-day deadline for opening the account from the date of the court's decision.

[107] Article 26, paragraph 2 of the Workers' Claims Guarantee Act.
[108] Article 28, paragraphs 2 and 3, point 2 of the Workers' Claims Guarantee Act.
[109] Article 31, paragraph 2 of the Workers' Claims Guarantee Act.
[110] See: Op. cit. note 105., p. 285.

4. WORKERS' RIGHTS DURING BANKRUPTCY PROCEEDINGS ACCORDING TO GERMAN LAW

4.1. Legislative Framework

Certain aspects of the protection of workers' rights in bankruptcy proceedings according to German law are regulated by the Bankruptcy Act (*Insolvenordnung - InsO*) [111], the Social Security Code III – Book III (*Sozialgesetzbuch III*)[112], the Works Constitution Act (*Betriebsverfassungsgesetz - BetrVG*)[113], and the Dismissal Protection Act (*Kündigungsschutzgesetz – KSchG*) [114]. Therefore, to fully understand and analyze the rights of workers in the event of the employer's bankruptcy under German law, it is essential to examine and address each of these laws individually. In the following sections, the key provisions of each of the aforementioned laws will be discussed in relation to the rights of workers and their protection in the event of the employer's bankruptcy.

4.1.1. German Insolvency Act - *Insolvenordnung (InsO)*

The starting point for analyzing workers' rights in the event of the employer's bankruptcy under German law is the German Bankruptcy Act *(Insolvenordnung - InsO*), which contains specific provisions designed to protect workers' rights in the case of an employer's bankruptcy.

InsO applies a general principle, the debtor's right to manage and dispose of assets belonging to the bankruptcy estate is transferred to the bankruptcy administrator with the opening of bankruptcy proceedings.[115] According to the decision to open bankruptcy proceedings, the bankruptcy court calls on all creditors (including workers) to file their claims, specifying a period of at least two weeks to three

[111] Insolvenzordnung vom 5. Oktober 1994 (BGBl. I S. 2866), die zuletzt durch Artikel 6 des Gesetzes vom 15. Juli 2024 (BGBl. 2024 I Nr. 236) geändert worden ist, hereinafter: InsO.
[112] Sozialgesetzbuch (SGB) Drittes Buch (III) - Arbeitsförderung - (Artikel 1 des Gesetzes vom 24. März 1997, BGBl. I S. 594), hereinafter: SGB III.
[113] Betriebsverfassungsgesetz in der Fassung der Bekanntmachung vom 25. September 2001 (BGBl. I S. 2518), das zuletzt durch Artikel 1 des Gesetzes vom 19. Juli 2024 (BGBl. 2024 I Nr. 248) geändert worden ist, hereinafter : BetrVG.
[114] Kündigungsschutzgesetz in der Fassung der Bekanntmachung vom 25. August 1969 (BGBl. I S. 1317), das zuletzt durch Artikel 2 des Gesetzes vom 14. Juni 2021 (BGBl. I S. 1762) geändert worden ist, hereinafter: KSchG,
[115] § 80 of the InsO.

months.[116] Workers' claims relating to the period before the opening of the bankruptcy proceedings can only be asserted as bankruptcy claims.[117]

In principle, employment relationships remain valid even after the opening of bankruptcy proceedings and continue with effect towards the bankruptcy estate. An employment relationship in which the debtor holds the right to the service may be terminated by the bankruptcy administrator or the other contracting party, regardless of the agreed duration of the contract or exclusion of the right to regular dismissal. The maximum notice period is three months, calculated from the end of the month, unless a shorter notice period applies. This applies even if a longer notice period is stipulated in the employment contract or collective agreement.[118] If the bankruptcy administrator terminates the contract, the other contracting party may claim compensation for damages[119] as a bankruptcy creditor due to the premature termination of the employment relationship.[120]

The costs of bankruptcy proceedings and other obligations of the bankruptcy estate are settled first from the bankruptcy estate.[121]Costs of the bankruptcy proceedings include court fees for the bankruptcy process, as well as the remuneration and expenses of the temporary bankruptcy administrator, the bankruptcy administrator, and the members of the creditors' committee.[122]

Workers' claims based on the employment relationship (e.g., unpaid wages) are classified as other obligations of the bankruptcy estate if they arose after the opening of bankruptcy proceedings.Therefore, workers who continue to work after the opening of bankruptcy proceedings are entitled to wages as an obligation of the bankruptcy estate. These wages as priority claims and include: Wages for the period after the opening of bankruptcy proceedings, Wage compensation in the event of sickness after the opening of bankruptcy proceedings and Annual leave entitlements acquired after the opening of bankruptcy proceedings. [123]

[116] § 28 in connection with § 174 of the InsO.
[117] § 108, paragraphs 1 and 3 of the InsO.
[118] See: Federal Labour Court (Bundesarbeitsgericht-BAG), judgment of February 27, 2014, case no. 6 AZR 301/12.
[119] Compensation for damages can only be claimed for the period between the given dismissal and the actual duration of the notice period, as it would have been if bankruptcy proceedings had not been opened against the employer.
[120] § 113 od the InsO. A similar legal framework existed in Croatian law until the enactment of the Bankruptcy Act in 2015.
[121] § 53 of the InsO.
[122] § 54 of the InsO.
[123] § 55 of the InsO.

The bankruptcy estate is used to settle the claims of creditors who have property-based claims against the debtor which already existed at the time the bankruptcy proceedings were opened (bankruptcy creditors).[124] Workers with unpaid wages before the opening of the bankruptcy proceedings are considered bankruptcy creditors. They must submit their claims to the bankruptcy administrator and wait for payment from the bankruptcy estate. These obligations are settled after the creditors of the bankruptcy estate are paid, and payments are made proportionally (*based on a quota*).[125]

4.1.2. Social Security Code III – Book - *Sozialgesetzbuch III.*

The German Social Code - Book III (Sozialgesetzbuch III – SGB III) contains key provisions relating to workers' rights in the event of the employer's bankruptcy. SGB III primarily regulates unemployment benefits, insolvency compensation (*Insolvenzgeld §165-172 SGB III*) and active employment policy measures, which are of significant importance for workers who are facing the consequences of their employer's bankruptcy.

4.1.2.1. Insolvency Benefit (*Insolvenzgeld*)

One of the most important protective measures for workers in the event of the employer's bankruptcy is the insolvency compensation (*Insolvenzgeld*),[126] which ensures the payment of wages owed to workers for the last three months[127] before the opening of bankruptcy proceedings against the employer. This compensation is paid by the Federal Employment Agency (*Bundesagentur für Arbeit: the*

[124] § 38 of the InsO.
[125] § 174 of the InsO.
[126] Eng.: Insolvency Benefit, Ger.: Insolvenzgeld is directly translated as "compensation in case of insolvency" or "bankruptcy compensation."
[127] Regarding Articles 3 and 4 of Directive 2008/94/EC on the protection of employees in the event of their employer's insolvency, and in relation to the duration of the protected period, see the ruling of the European Court of Justice in the case, Virginie Marie Gabrielle Guigo v. Fonds 'Garantirani vzemania na rabotnitsite i sluzhitelite', C-338/17, of July 25, 2018.

Agency)[128].[129] By making the insolvency compensation payment, the Agency steps into the position of the worker as a bankruptcy creditor. [130]

Employees are entitled to insolvency compensation if, at the time of the insolvency event[131], they have unpaid claims based on the employment relationship for the previous three months. However, if the employee continued or started working without knowledge of the insolvency event, the right to insolvency compensation applies only to the three months of the employment relationship preceding the date of knowledge of the insolvency event. It should be emphasized that the right to insolvency compensation is inheritable.[132] [133]

The right to insolvency compensation is excluded for claims arising from the employment relationship that stem from the termination of the employment relationship or relate to the period after the termination. This right is also excluded if the claims were acquired through a legal procedure that can be contested under the Bankruptcy Act (*InsO*) or through a legal transaction that could be contested in the event of the opening of bankruptcy proceedings, or if the bankruptcy administrator refuses to pay based on their right to refuse payment.[134] In the event that insolvency compensation is paid despite these limitations, it must be repaid.[135] For the worker to exercise their right, they must submit a request for the payment of insolvency compensation within two months from the occurrence of the insolvency event. However, if the worker missed the deadline due to reasons for which they are not responsible, the request can be submitted within two months from the moment the reason that caused the missed deadline has ceased to exist.[136]

[128] On the Federal Employment Agency, see: https://www.arbeitsagentur.de/ (March 1, 2025).
[129] The competent Employment Agency is the one within whose jurisdiction the payroll office of the employer falls. If the employer does not have a payroll office in the country, the competent Employment Agency is the one within whose jurisdiction the bankruptcy court falls. (§ 327, paragraph 3 SGB III).
[130] § 55 of the InsO.
[131] According to § 165 SGB III., an insolvency event is considered to be: the opening of bankruptcy proceedings against the employer's assets, the refusal of a bankruptcy application due to lack of assets, or if there has been a complete cessation of business activities in the country, and if the application for bankruptcy proceedings has not been filed and it is clear that bankruptcy proceedings cannot be conducted due to a lack of assets.
[132] § 165 SGB III.,
[133] LSG Bayern (10th Senate), in its decision under case no. L 10 AL 36/17, of October 25, 2017, states: 'The right to insolvency compensation does not arise if the business activity has merely ceased, unless it is clear that bankruptcy proceedings cannot be conducted due to a lack of assets.
[134] See the decision of the Federal Labour Court (BAG), ruling of July 27, 2017, 6 AZR 801/16.
[135] § 166 SGB III.
[136] § 324, paragraph 3 SGB III.

The request is submitted to the competent Agency using the prescribed form, either through personal submission of documentation or electronically via their official website. [137] The insolvency compensation covers the net wages of the worker as well as wage supplements. (e.g., Christmas bonuses, commissions, bonuses to which the worker would otherwise be entitled), along with social security contributions, if these have not been paid by the employer.[138]

The maximum amount of insolvency compensation is limited to the upper threshold of unemployment insurance contributions and is €7,550 per month in Western Germany and €7,450 per month in Eastern Germany. Furthermore, advance payments for insolvency compensation are provided if the following conditions are cumulatively met: -a proposal for the opening of bankruptcy proceedings against the employer's assets has been submitted, -the employment relationship has ended there is a probability that the legal conditions for insolvency compensation are met. The Agency determines the amount of the advance payment based on its discretionary assessment. The advance is deducted from the final amount of insolvency compensation, or must be repaid if the right to insolvency compensation is not recognized.[139]

The bankruptcy administrator is obligated, upon the Agency's request, to provide a confirmation (*Insolvenzgeldbescheinigung*) for each worker who may be entitled to insolvency compensation.[140] The funds for the payment of insolvency compensation are secured through monthly contributions *(Insolvenzausfallgeld)* that employers pay into a special fund.[141]

4.1.3. Works Council Act – Betriebsverfassungsgesetz (BetrVG)

The Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG*) contains important provisions regarding the rights and co-determination of the works council, which are applicable even in the event of the employer's bankruptcy. Since bankruptcy of a company often affects a large number of workers, the works council plays a crucial role in negotiations concerning social plans, collective redundancies, and the possibility of continuing business operations. Generally, the

[137] The form for submitting a request for insolvency compensation is available at: https://www.arbeitsagentur.de/datei/antraginsolvenzgeld_ba031800.pdf (March 1, 2025).
[138] § 167 SGB III.
[139] § 168 SGB III.
[140] For the content of the mentioned confirmation, see § 314 SGB III.
[141] The German Ministry of Labour and Social Affairs announced on December 18, 2024, that from January 1, 2025, the rate prescribed in § 360 SGB III will apply again, namely 0.15% of the worker's gross salary.

works council must be informed[142] and consulted about significant changes in the company (Betriebsänderung), including bankruptcy.[143]
The works council remains an active participant in the bankruptcy proceedings and has the right to be informed and co-decide on matters related to the restructuring of the company. It can negotiate on the social plan and collective dismissals.[144] Members of the works council cannot be dismissed without special legal protection, even in the case of bankruptcy.[145]

4.1.4. Employment Protection Act - *Kündigungsschutzgesetz (KSchG)*

The German Dismissal Protection Act (*Kündigungsschutzgesetz – KSchG*) also contains several provisions that protect workers in the event of the employer's bankruptcy. Although the opening of bankruptcy proceedings does not automatically terminate employment relationships, the termination of an employment contract in this context must be carried out in accordance with this law (unless the Bankruptcy Act specifies otherwise). The general protection against unjustified dismissal still applies, meaning that the dismissal must be socially justified. This means that the employer (or bankruptcy administrator) must provide reasons for the dismissal, which in the case of the employer's bankruptcy are often closure of the business or restructuring.[146] Thus, although the bankruptcy administrator can make decisions regarding terminations, these must comply with the KSchG to avoid legal consequences. Additionally, the bankruptcy administrator is required, if planning to dismiss a large number of workers, to report the dismissals to the Employment Agency and consult the works council.[147]

5. CONCLUSION

The bankruptcy process plays a crucial role in ensuring legal certainty and protecting creditors, but it also represents a significant challenge for workers, who are often among the most vulnerable groups in this process. The loss of employment, unpaid wages, and uncertainty about future employment are just some of the issues that workers face during bankruptcy proceedings. For this reason, the protection of workers' rights during bankruptcy is of paramount

[142] § 17 InsO, § 80 BetrVG.
[143] § 111 BetrVG.
[144] § 112a BetrVG, § 17 KSchG.
[145] § 15 KSchG, stipulates that members of the works council cannot be dismissed without approval from the labour court.
[146] § 1 KSchG
[147] § 17 KSchG – Collective dismissals (*Massenentlassung*)

importance, both in the context of national legislation and in accordance with international legal frameworks and European standards. A comparative analysis of the Croatian and German legal systems reveals that, while both systems recognize the need to protect workers in bankruptcy proceedings, there are significant differences in the methods of implementing this protection.

The Croatian system provides protection through the Workers' Claims Guarantee Agency, which covers certain employee claims for a limited period of time. In contrast, the German model ensures the payment of insolvency compensation from a fund financed by employer contributions. Introducing a special fund to cover employees' claims in insolvency proceedings would also be beneficial in Croatia, particularly if it was structured so that the cost of protecting workers' rights is borne either by all employers or by those considered to pose the highest risk — for example, based on the number of employees, the number of days of delayed wage payments, or other relevant factors.

While Croatian legislation removes workers' rights to co-determination upon the opening of bankruptcy proceedings, the German legal system requires consultation with the works councils. This consultation is used particularly in the case of collective redundancies, ensuring the participation of workers in decision-making processes. By using the German legal system as the role model, the role of the works council should be strengthened in all aspects of the bankruptcy process, ensuring better protection for workers.

The fact that the opening of bankruptcy proceedings enables the bankruptcy administrator to terminate the employment of any employee regardless of standard worker protections places employees in an even weaker position under Croatian law. In particular, employees from vulnerable groups may be discouraged from asserting their rights, as they no longer benefit from the usual protections that apply outside of bankruptcy proceedings. This problem further got worse by the complexities of bankruptcy law and the strict deadlines for submitting wage claims, often causing workers to lose guaranteed entitlements simply because they lack timely information or resources. Hence, the *lex specialis* approach governing Croatian bankruptcy not only risks coming into direct conflict with EU law, but may also significantly hinder employees' ability to protect their claims during bankruptcy procedures. It would thus make sense to clearly determine under Croatian bankruptcy law how European and national worker protections have to be integrated into bankruptcy and restructuring proceses.

The analysis of the two legal systems suggests that while Croatian legislation nominally guarantees a certain level of protection for workers in bankruptcy proceedings, in practice, it faces numerous challenges that undermine its

effectiveness. As previously noted, workers are often not timely informed about their rights and protection mechanisms, which can lead to situations where they miss deadlines for submitting claims for unpaid wages. To improve legal certainty and protection for workers in bankruptcy proceedings, certain legal reforms need to be implemented. It is essential to ensure better awareness among workers about their rights, including the obligation of bankruptcy administrators to inform them in a timely manner about the possibilities for claiming unpaid wages through the Workers' Claims Guarantee Agency.

In conclusion, although the Croatian legal framework contains basic mechanisms for the protection of workers in bankruptcy proceedings, further improvements are necessary to ensure more effective implementation of the law, as argued throughout this paper.

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"PURE PRE-PACK" – THE CURRENT TREND IN INSOLVENCY PROCEEDINGS*

ABSTRACT

The paper focuses on the monetisation of a debtor's business through pre-pack procedures, which represent the current European trend in insolvency proceedings first introduced by the Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law in 2022 (the "Proposal for a Directive"). The aim of this paper is to verify whether the Proposal for a Directive requires the completion of pre-pack sales with additional rules (i.e. their specification) ensuring the fulfilment of the purpose pursued by the introduction of pre-pack sales (achieving a higher yield from the monetisation of the assets through a pre-pack sale than the potential yield from the monetisation of the business in a standard insolvency proceedings). In the individual parts of the paper we analyse the process of monetisation of the debtor's business with an emphasis on the so-called "pure pre-pack" sale, pointing out the possible doubts raised in connection with this process, in particular with regard to the protection of creditors' property interests. Our paper also includes an assessment of the pre-pack sale in the author's own opinion, and suggestions for further development of the legislation presented by the Proposal for a Directive by the Member States. The final part is devoted to the inspiration of the regulation of the pre-pack sale of the debtor's business within the countries where this process is currently used. The author's contribution provides inspiration for embedding pre-pack sales in the national insolvency landscape (de lege ferenda proposals), highlights the potential risks and recommends the embedding of guarantees to strengthen the credibility of the process. In writing the paper, the author used several scientific methods, in particular the method of analysis and comparison, but also the method of induction, deduction, analogy.

Key words: *"pure pre-pack", asset monetisation, insolvency proceedings*

1. INTRODUCTION

Under Slovak law, monetization of the debtor's business in insolvency proceedings is perceived as one of the specific sales of the debtor's assets. The individual methods (procedures) of monetisation of assets are defined by Act No. 7/2005

Coll. on Bankruptcy and Restructuring and on Amendments and Additions to Subsequent Acts, as amended,[1] in Section 92(1) as an option of the bankruptcy trustee:

a) launch a public tender procedure;
b) authorise an auctioneer to sell the assets;
c) authorise a securities dealer to sell the assets;
d) organise an auction, a bidding or other competitive process leading to the sale of the assets; or
e) sell the assets by any other appropriate means.

The above list of ways of monetising assets is not exhaustive, i.e. other alternative ways of monetising assets are also possible, which is, after all, also declared by the above provision in point (e).

We would like to start by mentioning that the monetisation of the debtor's business[2] in the context of standard insolvency proceedings is not considered to be a special way of monetising the assets - also in this case the trustee makes use of monetisation mainly by public bidding, voluntary auction or any other appropriate procedure (e.g. electronic auction).[3]

The first and basic prerequisite for monetization of an enterprise is its functionality. Otherwise, movable or immovable property or rights or other assets (i.e. a set of assets)[4] are included in the insolvency estate separately, not as assets belonging to the business. In fact, the prerequisite for the fulfilment of the criterion

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[1] Act No. 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments and Additions to Certain Acts, as amended, is the key legal regulation of insolvency proceedings in the Slovak Republic.

[2] The legal definition of an enterprise is contained in Section 5 of Act No. 513/1991 Coll. (Commercial Code): *„For the purposes of this Act, an enterprise shall be understood as a set of tangible as well as personal and intangible components of a business. An enterprise includes things, rights and other property belonging to the entrepreneur and serving the operation of the enterprise or, by their nature, intended to serve that purpose.".* On the definition of the term "enterprise" in the context of the Slovak legal order, see, e.g. Ďurica, M.; Kubinec, M.; Ušiaková, L. *et al., Obchodné právo I. Všeobecné ustanovenia. Obchodné spoločnosti a družstvo. Vysokoškolská učebnica,* Belianum, Published by the University of Matej Bel in Banská Bystrica, Banská Bystrica, 2024, pp. 58-60.

[3] In application practice, most often by direct sales (Dolný, J.; Cukerová, D., *O pre-pack postupoch v konkurznom práve: Ďalšia harmonizácia na obzore?,* In: KŠENŽIGHOVÁ, A., KUBINEC, M., DZIMKO, J., eds., *Neštandardné legislatívne zásahy štátu v neštandardných situáciách. Pocta profesorovi Milanovi Ďuricovi. Recenzovaný zborník vedeckých prác,* Belianum, Published by the University of Matej Bel in Banská Bystrica, Banská Bystrica, 2023, p. 138).

[4] Štofková, P., *Speňažovanie nehnuteľností v konkurze*, In: Súkromné právo, year 2015, 6-7/2015, https://www.legalis.sk/sk/casopis/sukromne-pravo/spenazovanie-nehnutelnosti-v-konkurze.m-156.html, 5 March, 2025.

of the functionality of the business is the continuation of the operation of the business after the debtor's assets have been declared bankrupt[5] by the trustee in bankruptcy, which is, from our point of view, very demanding, especially from a personal and time perspective. We probably do not need to elaborate on the time aspect, as it is obvious that managing a company and organising its employees is indeed a time-consuming activity. As far as the personal aspect is concerned, we were referring to the necessary knowledge to run and manage a company. However, it is not excluded that the insolvency trustee may, for example, entrust the running of the business to an employee of his or her own or to a third party with the necessary knowledge and experience.[6] Adamus states, in an amusing but at the same time very pertinent way, on the issue of the debtor's business being run by the trustee in bankruptcy, that as long as the business continues to be run after the bankruptcy has been declared, the trustee in bankruptcy should take all measures to ensure that the value of the business is at least not diminished.[7]

Recent innovations in European legislation seek to bring greater efficiency to the monetisation of debtors' assets - namely the monetisation of a business. The first intention to introduce a more innovative monetisation of the debtor's business was introduced by the Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law[8] (hereinafter: Proposal for a Directive), which defines pre-pack procedures as *„expedited liquidation proceedings that allow for the sale of the business of the debtor, in whole or in part, as a going-concern to the best bidder, with a view to the liquidation of the assets of the debtor as a result of the established insolvency of the debtor"*.[9] As pre-pack monetisation is already known in several foreign legislations, either in the form of its legislative grasp or only in its application, the Proposal for a Directive applies to all Member States that have to introduce a more efficient process of monetisation of the debtor's business.

The harmonisation process in the field of insolvency law and, more specifically, pre-pack procedures for the monetisation of assets was initiated by the judgment

[5] On the continuity of the business after the bankruptcy of the debtor's assets, see for more details Ďurica, M., *Zákon o konkurze a reštrukturalizácii. Komentár,* 4th edition, C. H. Beck, Prague, 2021, pp. 720-730.
[6] Section 11 of Act No. 8/2005 Coll. on Administrators and on Amendments and Additions to Certain Acts.
[7] Adamus, R., *Liquidation of the bankruptcy estate in Poland,* In: Bratislava Law Review, year 4, 1/2020, p. 119, https://blr.flaw.uniba.sk/index.php/BLR/article/view/156/155, 5 March, 2025.
[8] European Commission, 2022. Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, Bruxelles, COM (2022) 702 final, 2022/0408 (COD).
[9] Article 2(p) of the Proposal for a Directive.

of the Court of Justice of the European Union (CJEU) in the Heiploeg case (C-237/20) of 28 April 2022,[10] which considered the monetization of assets by pre-pack procedures and concluded that the said procedural procedure of monetization must be included in the legal systems of the Member States for the sake of legal certainty - it must be legislated. This is confirmed by the Explanatory Memorandum to the Proposal for a Directive: *„Title IV on pre-pack proceedings aims to ensure that these proceedings, generally considered effective for value recovery for creditors, are available in a structured manner in the insolvency regimes of all Member States."*

In the following sections of this paper we will analyze the methods of monetization of debtor's assets by pre-pack procedures as a novelty of the insolvency framework in order to test the following hypothesis: The proposal for a Directive introducing pre-pack sales inevitably requires further fine-tuning by Member States, in particular in order to fulfil the objective pursued (to achieve a higher yield from the monetisation of the business through a pre-pack sale than the potential yield from the monetisation of the business in a standard insolvency procedure) and to ensure that creditors' proprietary interests are not prejudiced.

2. MONETISATION OF THE DEBTOR'S BUSINESS BY PRE-PACK PROCEDURES

The basic essence of monetisation of the debtor's assets by pre-pack procedures is to carry out a rapid process of monetisation of the assets with the aim of maintaining the continuous running of the business (i.e. an economically productive unit is monetised), which implies a higher yield from the monetisation

[10] Judgement of the Court, 2022. Heiploeg judgement (C-237/20), ECLI:EU:C:2022:321: *„53. It is necessary in that respect to verify, in each situa-tion, whether the pre-pack procedure and the insolvency proceedings at issue were carried out with a view to the liquidation of the undertaking as a result of the established insolvency of the transferor and not with a view to the mere reorganisation of that undertaking. In addition, it is necessary to establish not only that those proceedings have as their primary objective to satisfy to the greatest extent possible the claims of all the creditors, but also that the implementation of the liquidation through the transfer of the undertaking or a part thereof as a going concern, as prepared in the pre-pack procedure and carried out following the insolvency proceedings, enables the achievement of that primary objective. Accordingly, the aim of the use of the pre-pack procedure, for the purposes of liquidating a company, is to enable the insolvency adminis-trator and the supervisory judge appointed by the court after the declaration of that company's insolvency to increase the chances of satisfying the creditors' claims."* (Thery, A., *The pre-pack regulation in the EU Commission proposal for a second insolvency directive,* In: European Insolvency and Restructuring Journal, year 4, 2023, pp. 3-4, https://eirjournal.com/article/view/18096/20135, 5 March, 2025.).

and thus a higher satisfaction of the claims of the insolvency creditors. The whole idea is thus based on an efficient liquidation process of the debtor's business.

By comparison, the monetisation of (any) debtor's assets in insolvency proceedings is only carried out after the first meeting of creditors,[11] which is held sometime between 105 and 120 days after the date of the declaration of bankruptcy on the debtor's assets. In our opinion, such a long period (more than 3 months) may have a significant impact on the economic value of a business which is registered as an asset subject to bankruptcy and whose business activity is stagnating.

The Proposal for a Directive establishes a clear line of implementation of the procedural aspect of monetisation of assets by pre-pack procedures. In principle, it speaks of two options from which a Member State has the option to choose. Both options foresee two implementation phases, which differ in content depending on the further setting of the procedural procedure.

(i) The first phase - the preparation phase - involves the selection of an acquirer of the debtor's business.[12] The aim of this phase is to select the most suitable buyer (investor)[13] before the insolvency proceedings are opened.

(ii) The second phase - the liquidation phase - involves monetising the business and redistributing the proceeds to the bankrupt's creditors.[14] As we have indicated, depending on the model of pre-pack practices, each of the above phases is modified in content. The Member State has the choice of a "pure pre-pack" model or an "imperfect pre-pack" model.

(i) The "pure pre-pack" model is the monetisation of a business in the liquidation phase, based on the results achieved in the preparation phase without any further competitive process. That is - the preparation phase ensures (ideally through a competitive process) the selection of the most suitable buyer, this being subject to the

[11] Sudzina, M., *Právna úprava konkurzného konania v Slovenskej republike po zmenách vykonaných zákonom č. 309/2023 Z. z.*, In: ACTA IURIDICA RESOVIENSIA, year 43, 4/2023, p. 138, https://repozytorium.ur.edu.pl/server/api/core/bitstreams/3aba704d-232a-4698-ab90-34a02c03a66c/content, 5 March, 2025.
[12] Article 19(1)(a) of the Proposal for a Directive.
[13] Cioroiu, C. G.; Lipara, D., *Pre-Pack Proceeding - A Hybrid and Derogatory Safeguard Tool. Member States' Future Obligation of Integrating a New Mechanism in Their National Insolvency Law.,* In: Ovidius University Annals. Economic Sciences Series, year 23, 1/2023, pp. 305 – 306, https://stec.univ-ovidius.ro/html/anale/RO/2023-i1/Section%203/8.pdf, 5 March, 2025.
[14] Article 19(1)(b) of the Proposal for a Directive.

approval of the court,[15] and the liquidation phase carries out the sale. At the same time, under the guarantees given by the Proposal for a Directive, this model is intended to represent a process of asset monetisation characterised by competitiveness, transparency and fairness.[16] The whole process is to take place before the formal opening of the insolvency proceedings.[17]

(ii) The "imperfect pre-pack" model, as opposed to the "pure pre-pack" model, assumes that a competitive process (auction)[18] is carried out in the liquidation phase, making effective use of the results achieved in the preparation phase, on the basis of which a floor for the lowest bid (initial bid)[19] is set. The purpose of using the results of the preparation phase is to prevent the monetisation of assets in the liquidation phase at a lower purchase price than that offered in the preparation phase. [20] Another difference of this model from the "pure pre-pack" model is that the public auction (liquidation phase) is carried out only after the formal opening of the insolvency proceedings.[21]

Evaluating the above-described models of pre-pack procedures for monetization of the debtor's business, we conclude that the "pure pre-pack" model represents a procedurally faster procedure. However, this procedure also raises doubts about the possibility of undervaluing the business (i.e. selling it below market value), whereby the efficiency of the process would take a back seat to the interest in obtaining the highest possible yield from the monetisation. On the other hand, the "imperfect pre-pack" model, on the basis of the above, applies the rule: „Measure twice and cut once". The competition process is carried out twice in total, both in the preparation phase and then in the liquidation phase (by auction), which, from our point of view, can contribute positively to achieving the highest possible yield from monetisation. However, as we have already mentioned, the sale is time-limited - a prerequisite is the formal opening of the insolvency proceedings, which detracts from the speed of the proceedings.

[15] Article 26(1) of the Proposal for a Directive.
[16] Explanatory Memorandum to the Proposal for a Directive.
[17] Plomp, J., *Revival of the Dutch pre-pack by the CJEU,* In: leidenlawblog, 2022, https://www.leidenlawblog.nl/articles/revival-of-the-dutch-pre-pack-by-the-cjeu, 7 March, 2025.
[18] The auction is to take place within 2 weeks of the commencement of the liquidation phase, with a total duration of no more than 4 weeks (Article 26(2) of the Proposal for a Directive).
[19] Article 26(2) of the Proposal for a Directive.
[20] Also referred to as the 'stalking horse' bid (Explanatory Memorandum to the Proposal for a Directive).
[21] This is also the reason why the Proposal for a Directive explicitly provides that the winding-up phase is to be considered as insolvency proceedings (Article 20(1) of the Proposal for a Directive).

Since more questions have been raised by the "pure pre-pack" model and the Proposal for a Directive provides for certain guarantees ensuring the credibility of this process, we will focus this paper in the next section on a more detailed analysis of the process of monetisation of the debtor's assets by the "pure pre-pack" model - i.e. on the process of monetisation of the debtor's business in the liquidation phase on the basis of the most advantageous offer for the purchase of the assets.

3. THE ESSENCE OF THE "PURE PRE-PACK"

In order to maintain credibility in the "pure pre-pack" monetisation process, the Proposal for a Directive, as we have already announced, enshrines certain guarantees. One of the guarantees is the monitor as the entity overseeing the whole process of monetisation of the company. Interestingly, Article 22(1) of the Proposal for a Directive automatically provides for the appointment of a monitor if the debtor so requests. We can see that the court has a really insignificant position in pre-pack procedures - as long as the debtor makes the request, the court appoints the monitor and does not investigate further. In our view, it is difficult to answer the question whether this is an appropriate solution or not. In principle, we are of the view that if it is the intention of the legislature to effect a monetisation without more substantial judicial intervention, it should be the court-appointed monitor who should be empowered to assess the appropriateness/inappropriateness of monetising the debtor's business in this way. However, it will be up to the national legislation of the Member State concerned to finalise the Proposal for a Directive.

The position of the monitor is governed by Article 22 of the Proposal for a Directive. The explanatory memorandum to the Draft Directive refers to the monitor as the main actor in the preparation phase.[22] According to the Proposal for the Directive, a person meeting the criteria of a bankruptcy trustee may be appointed to the function of a monitor[23] if it is also possible to appoint him as a

[22] With the appointment of the monitor, the preparatory phase begins (Article 22(1) of the Proposal for a Directive).

[23] In the Slovak legal order, pursuant to Section 21(1) and Section 22(1-2) of Act No. 8/2005 Coll. on Administrators and on Amendments and Additions to Certain Acts, as amended: *„A natural person may be entered in the list of trustees who (i) is a citizen of the Slovak Republic, another Member State of the European Union or another Contracting State to the Agreement on the European Economic Area (hereinafter referred to as "another Member State"), (ii) has full legal capacity may be entered in the list of trustees, (iii) has permanent residence in the territory of the Slovak Republic or in the territory of another Member State, (iv) is of good repute and trustworthy, (v) is professionally qualified, (vi) has had at least three years of professional practice in the field of law or economics, (vii) has not been struck off the list of trustees pursuant to Section 26(1)(a) of the Act on*

trustee in the liquidation phase, which in our opinion is a positive element - it contributes to ensuring the professional aspect of the monitoring entity.

The main mission of the monitor is to oversee the monetisation of the enterprise, in the following way:

(i) Administration - the monitor is required to document in detail the monetisation of the business;

(ii) Verification - the monitor is to verify the competitiveness, transparency, fairness of the process, and justify that the sale meets market standards;[24]

(iii) Selecting an acquirer - the monitor is to recommend the most suitable offer for the purchase of the business;

(iv) Protecting the interests of creditors - the monitor is to ensure that the best interests of creditors test is considered in relation to the most advantageous offer.[25]

The Proposal for a Directive is silent on the selection of the "most appropriate" offer, leaving the choice to the Member States' legislation, which is characteristic of the selection from among competing offers in standard insolvency proceedings.[26] In the context of the legal regulation of insolvency proceedings in the Slovak Republic, the implementation of a public bidding procedure would perhaps be the most effective way of achieving the foregoing. The public bidding procedure is a relatively quick and formally simple process in which the bankruptcy trustee addresses an invitation to submit bids (which is published in

Trusteeship of the Slovak Republic or of another Member State in the last five years, (viii) has not been struck off the list of trustees pursuant to Section 26(1) of the Act on Trusteeship of the Slovak Republic or of another Member State. 1 or 35(1)(b). A public company may be entered in the list of trustees if (i) its members are only natural person trustees, (ii) its member is not a member of another legal person entered in the list of trustees, (iii) all members are authorised to act on its behalf individually and without limitation, (iv) it has its registered office in the territory of the Slovak Republic, (v) it is of good repute and trustworthy and its members are of good repute and trustworthy, and (vi) it has not been struck off the list of trustees pursuant to section 26(1) of the Act on the protection of the rights of the trustees in the last five years. 2 or 35(1)(b). A limited partnership may be entered in the list of trustees if (i) its general partners are only natural person trustees, (ii) its general partner is not a partner of another legal person entered in the list of trustees, (iii) all general partners are authorised to act on its behalf individually and without limitation, (iv) it has its registered office in the territory of the Slovak Republic, (v) it is of good repute and trustworthy and its partners are of good repute and trustworthy, and (vi) it has not been struck off the list of trustees pursuant to section 26(1) of the Act on the protection of the rights of the trustees within the last five years. 2 or § 35(1)(b)."

[24] Competitiveness, transparency and fairness of the process are seen as elementary principles of pre-pack monetisation (Article 24(1) of the Proposal for a Directive).

[25] Article 22(2) of the Proposal for a Directive.

[26] Article 30 of the Proposal for a Directive.

the Commercial Gazette) to an undetermined number of entities, the subject of which is the purchase of the monetised assets of the debtor.[27] In doing so, he shall specify all the conditions that the bidder must fulfil in order to be considered as a bidder or as a potential acquirer of the debtor's assets. These include, in most cases, the condition of payment of at least part of the price offered by the bidder ('deposit') by the expiry of the deadline for the submission of bids, [28] the conditions relating to the bid itself - form, deadline for submission, method of submission, etc., whereas the bid received may be considered only if it complies with the predefined conditions. The administrator shall evaluate as successful the offer with the highest price offered for the disposal of the property. Multiple bids with the same offered consideration shall determine the winning bid by lot.[29] In our view, if the abovementioned tender process were to be applied in the preparatory phase, it would need to be adapted to the requirement of speed of the procedure. Traditionally, public bidding is carried out in up to three rounds. This would obviously not be sustainable in the case of pre-pack monetisation, and we would therefore propose to provide for a maximum of two rounds for the submission of bids to the insolvency administrator, if not one round. The number of rounds would, in our view, depend on the circumstances of the particular case (e.g. the number of entities known to the administrator that the administrator is able to approach for a bid within the time limit).

If the monitor certifies the selection of the most suitable bid, the judicial authority (as a further guarantee of the credibility of the process) enters the proceedings and authorises the sale of the business in relation to the selected acquirer. It is important to note that the court here, similarly to the inspector, enters into the monetisation process as the entity certifying the appropriateness of the sale of the business in a pre-pack procedure and thus that the monetisation in question actually fulfils the pre-determined purpose - the efficiency of the monetisation, while achieving a higher yield from the monetisation of the debtor's assets than would be the case with the traditional methods of monetisation of assets in insolvency proceedings. We view the entry of the judicial authority into the procedural aspect of the proceedings positively in the context of pre-pack procedures, as the process itself already has two relatively trustworthy entities with sufficient expertise overseeing

[27] Pospíšil B, In: Pospíšil, B. *et. al., Zákon o konkurze a reštrukturalizácii. Komentár,* 2nd supplemented and revised edition, Wolters Kluwer, Bratislava, 2016, p. 524.
[28] Here, the legislator sets a floor for the deadline for submitting offers, which is 10 calendar days, with the beginning of the deadline being determined by the publication of the offer to purchase the assets in the Commercial Gazette (Section 167p(1) of Act No. 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments and Additions to Certain Acts, as amended).
[29] ĎURICA, M. *op. cit.* note 5*,* pp. 1215-1216.

the process. This increases the credibility of third parties (creditors but also the public) in divesting the business in this way.

However, the following wording of Article 24(2) of the Proposal for a Directive may raise doubts: *„If only one binding offer is made in the sale process, this offer shall be deemed to be the offer corresponding to the market price."*. In our view, this fiction raises a few questions. Applying the above:

- *Is it possible to monetise the debtor's business by the pre-pack procedure for any amount offered and therefore below market value?*
- *Is the monitor still obliged to verify (i) competitiveness, (ii) transparency and (iii) fairness of the process?*
- *Will the purpose pursued by introducing pre-pack realisation procedures into the laws of the Member States be achieved, namely that a higher yield from realisation is to be achieved than would potentially be achieved in the case of realisation by other typical insolvency procedures?*

Regarding the first question:
Thus, the Proposal for a Directive specifies that the single bid submitted will not be further verified as to whether the value offered for the purchase of the business corresponds to the market value.[30]

First of all, it is necessary to take a closer look at the concept of 'market value'. T. Krabec speaks of a 'normal market' when defining market value, where market value could be seen as an estimate of the price achievable in this normal market. In defining a 'normal market', where 'normal conditions' could be examined in the context of valuing a business (as a mass thing), he works with (i) a hypothetical market, which he understands as a capital market in which he sees the business as an asset yielding the owner a cash flow of a certain riskiness, alternatively with (ii) the comparable businesses method, where real data is worked with and the value of a comparable business in the relevant market is used as a starting point. He also points to International Valuation Standards (hereinafter: IVS),[31] which define market value as: *„(...) an estimate of the amount for which an asset should be exchanged at its valuation date between a willing buyer and a willing seller in*

[30] Market value is a concept relevant in relation to the valuation of assets and corporate finance. In corporate finance, market value is seen as the objective of the business - maximising market value represents maximising value for the owners of the business. (Krabec, T., *Oceňování podniku a standardy hodnoty,* Grada Publishing, Prague, 2009, p. 118*).* In the field of valuation, some authors identify market value with exchange value, by which they mean the so-called "market price", which is determined by the relationship between supply and demand (Mařík, M. In: Marek, P. *et. al.*, *Studijní průvodce financemi podniku*, Ekopress, Prague, 2006, p. 523).
[31] International Valuation Standards. IVSC, London, 2007.

a transaction between separate and independent parties after careful marketing in which both parties have acted knowledgeably, reasonably and without coercion.". As we can see, the definition of the market value of a business is not entirely straightforward. We are inclined towards the definition given by the IVS, with some modification, namely that the market value of an undertaking is given by the relationship between supply and demand in the relevant market under ideal conditions.

But to bring us back to the question posed, whether it is possible to monetise a business by the pre-pack procedure at a price that does not correspond to the market value. In our view, the Proposal for a Directive, by formulating the fiction that the single bid submitted corresponds to the market value, makes it possible to monetise a business even below the market value, which we derive from the fact that the other provisions of the Proposal for a Directive do not regulate the minimum bid amount (and thus also the single bid) in any way, which makes it possible to submit essentially any bid. From the point of view of the interests of creditors, this clearly does not have a positive effect on the pre-pack procedure - the speed of the procedure here takes a backseat to the originally pursued purpose of obtaining a higher yield from the monetisation of the business as an economically functioning unit (i.e. assuming the continued operation of the business).

This also creates room for speculative behaviour by the debtor. The preparation phase is a non-public phase - there is no obligation to inform any entities that may be affected by the monetisation process or to publish a notice of the commencement[32] of the pre-pack monetisation of the debtor's assets.[33] This gives the possibility to carry out the monetisation process in a narrow circle of subjects and thus, for example, to buy out the company at a price not corresponding to the market value to the person preferred by the debtor.

[32] For example, in the information register concentrating detailed information on insolvency proceedings - the register of bankrupts (the register of bankrupts will be replaced by the insolvency register from September 2025, as of the effective date of the amendment to Act No. 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments and Additions to Certain Acts).

[33] Creditors (especially unsecured creditors) become aware of pre-pack procedures only at the liquidation stage, i.e. only at the moment of commencement of the insolvency proceedings (Dolný, J.; Cukerová, D., *op cit.* note 3*,* p. 138; Lund, A., *Cooperative Difference in Insolvency Proceedings: Pre-Pack Sales, Fiduciary Duty and the Oppression Remedy,* In: McGill Law Journal. Revue de droit de McGill, year 68, 2/2023, p. 135, https://id.erudit.org/iderudit/1110112ar, 5 March, 2025).

For example, a person related to the debtor may be such a preferred entity.[34] The question of the close relationship between the debtor and the entity potentially acquiring the business is also addressed in the Proposal for a Directive itself in Article 32, where additional guarantees are provided for this case. It is not precluded that a person closely related[35] to the debtor acquires the business through a pre-pack procedure, even if the only offer is made by such a person, as long as the monitor verifies that the sale satisfies the best interest of creditors test. The draft Directive also foresees that Member States will impose additional guarantees (conditions) in the context of the sale of a business to a person closely linked to the debtor, the fulfilment of which will be conditional upon the sale of the business being authorised.

When incorporating the pre-pack procedure into the legal systems of the Member States, due to the facts described above, it would be recommended that Member States include safeguards to strengthen the prevention of divestment of a business for less than market value (e.g. by submitting an expert's report, or the possibility of selling the business to a related entity only on the condition of submitting an expert's report certifying the value of the business, etc.).

Regarding the second question:
The second question posed examines whether the monitor remains obliged to verify the competitiveness, transparency and fairness of the process[36] in

[34] Related persons are defined in Section 9 of Act No. 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments and Additions to Certain Acts, as amended.
[35] The parties closely linked to the debtor are explicitly defined in Article 2(q) of the Proposal for a Directive: *„'party closely related to the debtor' means persons, including legal persons, with preferential access to non-public information on the affairs of the debtor. Where the debtor is a natural person, closely related parties shall include in particular: (i) the spouse or partner of the debtor; (ii) ascendants, descendants, and siblings of the debtor, or of the spouse or partner, and the spouses or partners of these persons; (iii) persons living in the household of the debtor; (iv) persons who are working for the debtor under a contract of employment with access to non-public information on the affairs of the debtor, or otherwise performing tasks through which they have access to non-public information on the affairs of the debtor, including advisers, accountants or notaries; (v) legal entities in which the debtor or one of the persons referred to in points (i) to (iv) of this subparagraph is a member of the administrative, management or supervisory bodies or performs duties which provide for access to non-public information on the affairs of the debtor. Where the debtor is a legal entity, closely related parties shall include in particular: (i) any member of the administrative, management or supervisory bodies of the debtor; (ii) equity holders with a controlling interest in the debtor; (iii) persons which perform functions similar to those performed by persons under point (i); (iv) persons which are closely related in accordance with the second subparagraph to the persons listed in points (i), (ii) and (iii) of this subparagraph."*
[36] Certification of competitiveness, transparency, fairness of the process and that the offer corresponds to market value would not be required if the imperfect pre-pack model is applied (Article 24(3) of the Proposal for a Directive).

accordance with Article 22(2)(b) of the Proposal for a Directive. The answer to the question posed is found in Article 26(1) of the Proposal for a Directive, according to which the court examines whether the conditions set out in (inter alia) Article 22(2) have been met. The mentioned fiction refers only to the market value - it is irrelevant in relation to the other prerequisites, and in our opinion the monitor will thus still be obliged to verify the other conditions set out in Article 22(2) of the Proposal for a Directive.

If the court concludes that the conditions laid down in Article 22(2) are not fulfilled and therefore does not confirm the sale of the business, the insolvency proceedings continue in the liquidation phase without a pre-pack sale.[37]

Regarding the third question:
We have already partially outlined the answer to the third stated question in the analysis of the first stated question. The analysed provision of the Proposal for a Directive raises doubts as to the fulfilment of the purpose of the pre-pack asset monetisation procedures, namely that the sale of the business as an economically viable unit will ensure that a higher yield from the monetisation of the assets will be achieved.

Doubts arise in particular because of the absence of any competitive process, since in the preparation phase a single bid will be submitted, which will be viewed as corresponding to market value due to the application of the fiction, and as long as the monitor justifies the competitiveness, transparency and fairness of the process and the court authorises the sale of the business, the sale of the business will be based solely on the single bid submitted.

In our view, the conclusion presented does not in any way verify that the business will be monetised in a pre-pack procedure for a higher yield than would be obtained by monetising the business in insolvency proceedings. Moreover, as we have already mentioned, the proceedings at this stage are essentially non-public compared to standard insolvency proceedings, which means that there is no knowledge of the initiation of the realisation by creditors or other potential participants in the process, as is the case with the mandatory publication of notices of the realisation of the debtor's assets in standard insolvency proceedings. At the same time, any verification of the market value of the business by experts is absent. Moreover, in the case of a single bid, we reiterate that there is no competitive process.

[37] Explanatory Memorandum to the Proposal for a Directive; Cioroiu, C. G.; Liapara, D. *op. cit.* note 13, p. 306.

In conclusion, we consider that, despite the fact that the business is transferred to the acquirer in a pre-pack procedure while maintaining the operation of the business as an economically productive unit, it cannot be said with certainty that, if a (standard) competitive process were to be carried out after the formal opening of the insolvency proceedings, the proceeds obtained by monetisation through this procedure would not be higher than the proceeds obtained by monetisation through the pre-pack procedure when a single bid for the business was made in the preparation phase.

Returning to the procedural aspect of pure pre-pack procedures, the preparation phase is followed by the liquidation phase - that is, the phase where the sale of the business is to take place and the proceeds of the sale are to be redistributed to the creditors. In the Slovak legal landscape, the liquidation phase should correspond to the standard insolvency proceedings as regulated by Act No 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments and Additions to Certain Acts, as amended. Under the pure pre-pack procedure, the liquidation phase will include the court's decision to authorise the sale of the business to an acquirer selected by the monitor in the preparation phase. If the sale of the business to the selected acquirer is allowed, a sale contract is concluded, the parties to which are the insolvency administrator on the one hand and the investor (the selected acquirer) on the other hand.[38] As mentioned above, in the event that the sale of the business to the highest bidder is not allowed, the insolvency proceedings continue in the standard manner.[39]

4. INSPIRATION BY STATES, WHERE PRE-PACK IS CURRENTLY APPLIED

The last part of this paper is devoted to the inspiration of the legislation of the states that have introduced the monetisation of the debtor's assets by pre-pack procedures into the application practice. We state that the outlined description of the process of pre-pack sale in selected states represents a selection of the potential inspiration that caught our attention while studying the subject matter. By no means can we say that this is a description of all the peculiarities of pre-pack sales in this-or-that country - that would require truly detailed research turned into a much more extensive output.

[38] Kapica, V.; Radwański, D., *Insolvency Pre-pack Transaction in Poland*, In: Emerging Markets restructuring Journal, year 2021, 11/2021, p. 4, https://www.clearygottlieb.com/-/media/files/emrj-materials/issue-11-spring-2021/polandarticle_insolvency_prepack_transcactions_in_poland_v3-pdf.pdf, 6 March, 2025.
[39] Dolný, J.; Cukerová, D., *op cit.* note 3, p. 137.

4.1. From the selected specifications of France

Pre-pack procedures have been gradually (in a modified form) appearing on the French legislative scene since 2010, when a pre-pack reorganisation plan was introduced by the French legislator with the creation of the so-called fast-track financial protection procedure (SFA - „*Sauvegarde financière accélérée"*).[40] It is necessary to explain at the outset that French law recognises pre-pack procedures as either (i) reorganisation procedures,[41] whereby a pre-agreed reorganisation plan is implemented subsequently in insolvency proceedings, or (ii) transactional procedures - whereby a sale of the business is implemented.[42]

In the implementation of a sale of a business through pre-pack procedures, the *mandataire ad hoc* ('conciliation') plays a relatively important role during the process. He oversees the whole process of monetisation and ensures the identification of potential buyers of the debtor's business - investors. He must also ensure the transparency of the process by giving it sufficient publicity, in particular with regard to the identification of potential purchasers,[43] which is also supervised by the court.[44] In our view, the French legislator, by means of the rules in question, ensures some of the most important prerequisites for pre-pack monetisation, namely (i) the transparency of the process (its publicity) and (ii) the competitiveness of the process, while at the same time creating the conditions for obtaining the best possible offer. The presumption of compliance with the established obligations of the mandataire ad hoc empowers the court's supervisory duty. Thus, pre-pack monetisation in the French concept does not imply the sale of the business to a bidder pre-selected by the debtor - quite the contrary. A

[40] Lauriston, H.; Gallo, B.; Remaud, CH., *Prepacks under French Insolvency Law,* In: International Corporate Rescue, year 20, 2/2023, p.107, https://www.hoche-avocats.com/en/prepacks-under-french-insolvency-law-h-de-lauriston-b-gallo-c-remaud/, 7 March, 2025; Pre-pack sales were introduced only by the reform in 2014 (Bruère-Dawson, D.; Moulette, CH., *The FRAm case and the French "Pre-Pack" solution,* In: eurofenix, year 2016, p. 16, https://www.insol-europe.org/download/documents/769, 7 March, 2025).
[41] Golshani, S.; Hojabr, A., *The Art of the Pre-Pack - Edition 3,* In: Global Restructuring Review, year 2024, https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack/edition-3/article/france?utm_source=GRR&utm_medium=pdf&utm_campaign=The+Art+of+the+Pre-Pack+-+Edition+3, 7 March, 2025.
[42] Lauriston, H.; Gallo, B.; Remaud, CH., *op cit.* note 40*,* p. 107.
[43] The advantage of addressing potential acquirers at this stage is the fact that the debtor is not yet formally in insolvency proceedings, which ensures the prevention of harmful effects of the declaration of insolvency proceedings on the assets of the company, for example, also associated with damage to the reputation of the company. (Bouté, G.; Gironde, L. *Pre-pack proceedings in France: Are they the best of two worlds?*, https://cms-lawnow.com/en/ealerts/2023/07/pre-pack-proceedings-in-france-are-they-the-best-of-two-worlds?format=pdf&v=13, 7 March, 2025.
[44] Lauriston, H.; Gallo, B.; Remaud, CH., *op cit.* note 40*,* p. 110.

competitive, rival and fair process is elevated by the French legislator above a pre-negotiated (relatively certain) sale.

4.2. From the selected specifications of Poland

The distinctive features of pre-pack procedures in Poland are described in their article entitled "Insolvency Pre-pack Transactions in Poland" by Kapica, V., Radwański, D. : (i) the rules of a specific M&A transaction; (ii) the sale relates only to the assets (shares in the insolvent company are not sold); (iii) approval of the sale by the court; (iv) the conclusion of a contract on the sale of the business between the investor (acquirer) and the insolvency trustee; (v) the acquirer is not liable for the debts of the insolvent debtor; (vi) the security instruments on the assets subject to the transfer are extinguished; (vii) all concessions, permits, licences and also concessions related to the acquired business are transferred to the acquirer together with the business.[45]

From the publication mentioned above, we have selected perhaps the most interesting (and inspiring) measures introduced by the Polish legislation on pre-pack monetisation procedures, which we present below.

It is also possible for creditors of the debtor to initiate a pre-pack monetisation of assets[46] (provided, however, that formal insolvency proceedings have not yet commenced). This is probably a more specific legal regulation of pre-pack procedures for monetisation of the debtor's assets, since the rule, as stated also by Cukerová, D., Dolný, J. in their paper entitled "O pre-pack postupoch v konkurznom práve: Ďalšia harmonizácia na obzore?" (in translation: "On pre-pack procedures in insolvency law: further harmonisation on the horizon?"), is the initiation of the process in question by the debtor. [47] The Polish legislator thus clearly establishes higher powers in favour of creditors, thus ensuring greater protection of their property interests. However, from our point of view, it is questionable whether creditors are able to carry out the entire pre-pack process of monetisation of the debtor's business without the debtor's participation or cooperation. In our view, creditors do not have sufficient access to the information that is essential for negotiating the sale of the business. This results in a situation where creditors are not even able to 'sell' the debtor's bid for the business, as they

[45] Kapica, V.; Radwański, D., *op cit.* note 38*,* p. 4.
[46] Olech, M.; Wnukowski, M., *Prepared Liquidation - Pre-Pack Sales Under Polish Bankruptcy Law,* In: Squire Patton Boggs Restructuring GlobalView, year 2023, https://www.restructuring-globalview.com/2023/12/prepared-liquidation-pre-pack-sales-under-polish-bankruptcy-law/, 7 March, 2025.
[47] Dolný, J.; Cukerová, D., *op cit.* note 3*,* p. 134.

are not able to present any details (including the benefits) of acquiring the business to a potential bidder.

Earlier in this post, we addressed the issue of meeting the condition of a sufficiently high purchase price or a purchase price corresponding to market values. It turned out that Polish practice has indeed introduced the necessity to have the value of the business assessed by an expert, by means of an expert's report, which must be submitted to the court already together with the proposal to carry out a pre-pack monetisation of the business. The court then verifies whether the proposed price for the purchase of the debtor's business is higher than the difference between (i) the theoretical price potentially representing the proceeds from the monetisation of the assets in a standard insolvency procedure and (ii) the bankruptcy costs saved, [48] which represent a kind of additional special discount on the purchase price ('pre-pack discount'), which allows the investor to acquire the business even below its full market value. [49] In our view, this rule is very beneficial, especially from the point of view of potential investors with the skills or knowledge to revive a company in difficulty - such an offer may appear economically interesting from their point of view, representing a bargain purchase. If the acquirer is to be an entity closely related to the debtor, a condition for the authorisation of the pre-pack monetisation of the business is the appointment of an additional expert - the court's own expert - whose task is to prepare an independent valuation of the assets.[50] From the point of view of protecting the rights of the debtor's creditors, this element is highly effective - in addition to the approval of the pre-pack procedure, an 'independent' expert enters the process to provide an additional expert opinion on the value of the business, thus clearly preventing the debtor and a closely related party from acting as an acquirer of the business with the intention of harming creditors and obtaining a profit for their own benefit.

4.3. From the selected specifications of England and Wales

One of the concerns raised in relation to pre-pack monetisation is the sale of the business to persons closely linked to the debtor (and the associated potential sale

[48] In this case, the court must approve the pre-pack. If the price set would be lower but would be close to the proceeds obtained by the monetisation in the insolvency proceedings, the court may authorise the sale if an overriding legitimate interest so requires or if the preservation of the debtor's business is enabled. (Olech, M.; Wnukowski, M., *op. cit.* note 46).
[49] Kapica, V.; Radwański, D., *op cit.* note 38, p. 7-10.
[50] Kapica, V.; Radwański, D., *op cit.* note 38, p. 10.

of the business at below market value) - for this reason the Graham Review[51] recommended the establishment of a panel of independent experts assessing the appropriateness of pre-pack sales, the 'Pre-pack Pool'.[52] The usefulness of their statement[53] on the forthcoming pre-pack sale was assumed to be mainly in the context of sales to related parties. Later on, this opinion became more popular, not least because it brought more credibility to the process, especially in relation to unsecured creditors[54] who do not participate in the monetisation process.[55] It can be seen here that the English environment brings into the pre-pack monetisation environment a whole group of experts who are supposed to enter into the process on the assumption that the business is to be sold off to a debtor related party. Indeed, it can be said that this is a matter of providing credibility in relation to (unsecured) creditors that the sale will be conducted in accordance with the required terms and that the debtor's *mala fides* will be avoided.

In addition to the "Pre-pack pool" statement, the Graham Review recommends that the related party provide a review of of the viability of the business in the 12 months following the sale.[56]

A further guarantee is provided by the fact that, unless the related party has a qualified report from an expert (or the consent of creditors), the trustee in bankruptcy is prohibited from transferring the assets of the company within 8 weeks of the commencement of the insolvency proceedings.[57] This again improves the position of creditors and ensures the protection of their property interests.

The above specification of the Proposal for a Directive in the context of the English perspectives on the treatment of pre-pack sales of a business represents

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[51] Graham Review into Pre-pack Administration (n 20) 59, https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration, 7 March, 2025.

[52] Adebola, B., *Transforming Perceptions: The Development of Pre-pack Regulations in England and Wales,* In: Oxford Journal of Legal Studies, year 43, 1/2023, p. 156, https://academic.oup.com/ojls/article/43/1/150/6779857, 7 March, 2025; The list of experts forming the "Pre-pack Pool" is available at the following link: https://www.prepackpool.co.uk/about-the-pool.

[53] In concluding the opinion, the experts are to make one of the following statements (alternatively): (i) there are no reasons to suggest that pre-pack sales are inappropriate, (ii) more information is necessary to verify the reasonableness of pre-pack sales, but there is no presumption that pre-pack sales are inappropriate, (iii) there is no evidence to support the assertion that pre-pack sales are appropriate for assessing the reasonableness of pre-pack sales. (*Ibid.,* p. 162).

[54] *Ibid., p*. 157.

[55] Flannery, G., *Pre-pack insolvency sales: the UK approach,* In: Lexology, year 2023, https://www.lexology.com/library/detail.aspx?g=5291e7fb-fb87-4026-bf32-56a932096e96, 7 March, 2025.

[56] Mokal, R.; Nocilla, A., *Rehabilitating the U.K. Pre-Pack: A Critical Analysis and Proposals for Reform,* In: Banking and Finance Law Review, year 40, 2/2024, p. 32, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4565561, 7 March, 2025.

[57] The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021; Adebola, B., *op. cit.* note 52, p. 167-168.

the choice of guarantees or special conditions that most appeals to us (particularly from the perspective of the protection of creditors' rights). In other respects, it is a relatively familiar process of pre-pack sales.

5. CONCLUSION

Pre-pack procedures are characterised by their speed, efficiency and the intention to monetise the debtor's business as a whole, as an economically productive unit, with the aim of achieving a higher yield from monetisation than a monetisation in a standard insolvency proceedings. The interest in a prompt sale of the debtor's business with a view to a relatively certain entry into insolvency proceedings comes not only from the debtor, but also from potential acquirers of the business who are interested in acquiring the business before its economic condition deteriorates further.[58]

In our paper we have focused on one of the two models of pre-pack procedures, the so-called "pure pre-pack". Its essence lies in the selection of the most suitable acquirer of the business in the preparation phase and the subsequent sale of the business shortly after the commencement of formal insolvency proceedings, in the liquidation phase. Negotiations on the sale of the business are thus postponed to a stage when insolvency proceedings have not yet formally started,[59] which is intended to ensure the effectiveness of the transfer of the business to the new acquirer and to prevent further deterioration of the economic situation. As we have stated in our paper, the proceedings in question raise certain doubts, in particular as to the amount of the sale price. The monitor, as the 'main actor' in the preparation phase, should be a certain guarantee. In our view, it is appropriate that the Proposal for a Directive stipulates that the monitor may, in principle, only be a person who can be appointed as an insolvency trustee in a particular State - increased requirements for expertise. The monitor performs the control function of the process, while at the same time it is within his remit to select the most suitable potential acquirer of the business. We consider that the most ideal procedure for selecting the best offer for the purchase of the debtor's business in the Slovak Republic would be a public bidding procedure (with some modification, in particular in terms of time) as a relatively quick and formally simple procedure, in which the monitor would clearly set out the conditions that the proposal for the

[58] Rodríguez Ruiz De Villa, D., *Jurisprudencia comunitaria y pre-pack: hacia un pre-pack reestructador preconcursal,* In: Revista Jurídica De Asturias, year 46, 2023, p. 225, https://reunido.uniovi.es/index.php/RJA/article/view/20281, 8 March 2025.
[59] Dolný, J.; Cukerová, D., *op cit.* note 3*,* p. 134.

purchase of the business must meet, while these conditions would be publicly available (ensuring publicity, transparency).

One part of our article was devoted to possible inspiration for the regulation of pre-pack sales by states where this process is already in use.

In our view, an interesting addition to the pre-pack sales under the Proposal for a Directive is the explicit obligation given to the monitor (*mandataire ad hoc*) in the French sense (i) to identify potential acquirers[60] of the debtor's business (i.e., active action by the monitor is required) – this undoubtedly broadens the possible range of bids submitted and increases the competitiveness of the process (which ultimately has a positive impact on the price offered for the purchase of the assets) – and (ii) to ensure the transparency of the pre-pack process by publicising it. We view positively these obligations given to the monitor - it can be inferred that the French legislator elevates a competitive and fair process above the pre-negotiated sale of the business (by the debtor) to a selectively chosen acquirer.

Poland introduces the possibility of initiating a pre-pack sale of the debtor's business by the creditors themselves. This is an interesting regulation from our point of view; we assume that the legislator probably intended to provide greater protection for creditors and improve their position by granting them this right. However, we cannot imagine a pre-pack sale without the debtor's participation, or at least without the debtor's proper cooperation, as creditors largely lack information and access to the debtor's business documents, which reduces the effectiveness of the sale. However, what we see as positive is the obligation to have the value of the business valued by an expert, already at the stage of filing a pre-pack sale proposal with the court (prevention of low buy-out sums). At the same time, we see as positive the possibility of obtaining a "pre-pack discount", which means a discount for the costs saved by monetising the business only during the insolvency proceedings - and thus in a way legalises the possibility of selling the business for less than market value. In our view, the 'pre-pack discount' is particularly attractive from the perspective of potential investors with the skills or knowledge to revive a business in difficulty - such an offer may appear economically interesting from their point of view, representing a bargain purchase. England is perhaps the most open in relation to the valuation of the value of a business by experts - it introduces a whole group of experts whose remit is to carry out a valuation of the business (and therefore in some way approve the proposed offer) that is to be the subject of a pre-pack sale - the so-called "Pre-pack Pool".

[60] What is supervised by the court (Lauriston, H.; Gallo, B.; Remaud, CH., *op cit.* note 40, p. 110).

The introduction of this pool has been shown to increase the credibility[61] in the monetisation process of pre-pack procedures. At the same time, England introduces an interesting obligation, from our perspective, in relation to the sale of a business to a person closely connected with the debtor, and that is the obligation to submit a viability review of the business within a period of 12 months of the sale taking place. This prevents the economic situation of the business (even after the pre-pack sale) from continuing to deteriorate and thus from the need to initiate insolvency proceedings also in relation to the entity acquiring the business.

We conclude our paper by stating that the Proposal for a Directive comes up with a really interesting idea of pre-pack sales, which is supposed to be an efficient way of monetisation of the debtor's business, however, in order to achieve the pursued purpose - to achieve a higher yield from the monetisation of the business by pre-pack sale than the yield achieved by the monetisation in the standard insolvency proceedings, it is necessary to fine-tune the legal regulation by the Member States, in particular with regard to the sale of the business at the relevant market value and in order to protect the creditors' property interests. It is important that the efficiency of the process is not elevated above the protection of creditors as entities harmed by the debtor's actions.

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JUDGMENTS MADE WITHOUT THE FREE WILL OF JUDGES AND BY MENTALLY ILL AND UNAUTHORIZED JUDGES (EXISTENT OR NON-EXISTENT?)

ABSTRACT

The purpose and goal of civil proceedings is to deliver correct and lawful judgments that decide on the main subject of the dispute, i.e., the validity of the claim. Various objective and subjective reasons can lead to incorrect and unlawful judgments. Such decisions can cause numerous harmful consequences for both the parties involved and society as a whole. The quality of judgments largely depends on the individual judge, who should be competent, honest, and reasonable. In exceptional cases, the correctness and legality of the proceedings, and thus the judgments, may come into question if, due to various influences, the judge no longer has free will during the trial. Furthermore, it is clear that a judge, like other people, may have certain psychological issues or be mentally ill, which can certainly affect their judgment and ability to make valid decisions. Additionally, there are theoretically possible, and in practice there have been cases where decisions are made by judges who, for various reasons, should not have judged the specific case (for example, due to exclusion of judge or because they were not appointed as judges by the competent state body). Although these cases are not common in practice, it does not mean they do not exist. Therefore, it is necessary to point them out and consider how parties can achieve legal protection against judgments made under these circumstances. This is especially important because the issue in question is not the focus of legal doctrine and the professional public. In this sense, it is first necessary to determine the legal nature of decisions made, for example, by a mentally ill judge, a judge under physical coercion, or a judge appointed by occupying authorities. The question arises whether such judgments are merely voidable or non-existent. Depending on the answer, different legal remedies are available to parties to challenge such decisions, ensuring they do not produce legal effects.

Keywords: *voidable judgment, non-existent judgment, judge's mental illness, lack of free will, unauthorized judge*

1. INTRODUCTION

In civil proceedings, a judgment is a decision by which the court, as a rule, decides on the merits of a claim concerning the main matters and secondary claims.[1] In this way, the dispute between the parties that led to the initiation of civil proceedings is resolved. Crnić rightly points out that a judge is expected to conduct the proceedings lawfully, to ensure equality of the parties in the proceedings, to issue decisions within a reasonable time, to base his legal positions on the evidence presented and its assessment, and to state reasonable and clear positions for his decision in the reasoning of the decision, based on the Constitution, laws and other acts that bind him in the trial.[2] Indeed, there should be no doubt about this, every honest and reasonable judge will strive to issue a correct and lawful judgment. However, due to various subjective and objective reasons, errors occur in the trial, which can ultimately result in an incorrect and unlawful judgment. In order to prevent such invalid judgments from producing legal effects, and thus jeopardizing the goals of the legal order (legality and fairness), modern legal systems allow litigants to review the correctness and legality of judgments through legal remedies (in one, and sometimes in several, stages of the trial).

Rosenberg, in the context of considering the incorrectness - invalidity of court decisions and the possibility of their correction, correctly notes that, in order to discuss these legal categories at all, it is necessary that a court decision as such exists, and not just that there is an appearance of a decision.[3] In this sense, he emphasizes that in law we also speak of non-existent decisions, especially non-existent judgments. Indeed, we share the understanding that there are cases when a particular act, which is formally judicial in law and which should be a judgment, cannot acquire the status of a court decision - judgment at all due to its major shortcomings, i.e. significant violations of the provisions of civil procedure regarding its origin and content. In such cases, we are dealing with the so-called non-existent judgment, as the described act is called in the section on legal doctrine and jurisprudence. When a particular violation of the provisions of civil procedure is characterized as so serious or of such great importance that its very existence leads to the non-existence of the judgment, it is a matter of legal and political evaluation of the particular violation.

It is quite exceptional that a judgment is rendered in civil proceedings by a judge who rendered it against his or her free will, for example due to duress. It is also

[1] Pravni leksikon, editor in chief: Pezo, V., Leksikografski zavod Miroslav Krleža, Zagreb, 2007, p. 1260.
[2] Crnić, I., *Ustav Republike Hrvatske u praksi*, Organizator, Zagreb, 2018., p. 847.
[3] Rosenberg, L.; Schwab, K. H.; Gottwald, P., *Zivilprozessrecht*, C.H. Beck, München 2010., p. 324.

conceivable that a judgment is rendered by a mentally ill judge or a judge with certain psychological disorders, in whom the mental illness or disorder affects his or her ability to understand the meaning of his or her actions and the consequences that arise from them, all of which can affect the correctness and legality of the judgment. In the above cases, it is justified to ask whether these judgments are existent and as such refutable, or whether they are non-existent judgments. The same question regarding the legal existence of decisions can also be raised in cases where decisions purporting to be judicial decisions were made by judges who were not authorized to judge in the cases in which they were made or were not made by judges within the framework of proceedings conducted before the court.

A special problem, in terms of the legal existence of judgments, is that judgments are, admittedly, made by a court respectively judges, but not by courts established by the sovereign state on whose territory they are located, or not by judges to whom that state has entrusted judicial duty. This problem is particularly pronounced when, on the territory of a sovereign, internationally recognized state (or on a part of it), judgments are made by courts established by hostile occupation authorities. Therefore, in the context of the existence or non-existence of a judgment, we will also consider the aforementioned situation, all the more so since the Republic of Croatia unfortunately also had experience with this problem in the nineties of the last century, when its territory was partially occupied.

Dika rightly notes that from the aspect of rebutting court decisions by legal remedies, only the so-called non-existent judgments require special attention, as other decisions are undoubtedly rebuttable under general rules allowing rebuttal by appropriate legal remedies.[4]

In this context, we must consider whether the lack of free will of the judge when making a judgment, and judgments passed by mentally ill or unauthorized judges, can result in the non-existence of a judgment rendered under such circumstances.

[4] Dika, M., *Građansko parnično pravo*, *Pravni lijekovi*, *X knjiga*, Narodne novine, Zagreb, 2019., p. 45.

A special problem in properly defining a non-existent judgment is the fact that it is not provided for by either domestic procedural law[5] or the procedural laws of the Federal Republic of Germany[6] and the Republic of Austria.[7]

The fact that these legal issues are not the special focus of the legal profession is all the more reason to write about them, to raise awareness of potential problems and offer answers regarding the existence or non-existence of judgments rendered under such circumstances, as well as the possibilities of legal protection for parties from such judgments.

2. LACK OF FREE WILL OF JUDGES WHEN MAKING JUDGMENTS

2.1. Introductory remarks

In a valuable, interesting and historically significant legal work from the seventeenth century, "Methodical instruction in judicial procedure according to the customary law of the glorious Hungarian kingdom", its author Ivan Kitonić, in response to a question about the qualities required of a judge, answers: "fifth and last, let him do nothing out of request, profit, fear, love or hatred..."[8] Indeed, a judge may encounter various difficulties and even fear during the procedure, and precisely in connection with it. However, a judge should be endowed with the virtue of courage in the sense of overcoming this fear, whatever its cause, to remain honest and impartial, and find the strength to fulfill his obligation to make a lawful and correct judgment. This despite the feeling of fear about the consequences that the judgment he makes, due to various external factors, could have on his private or professional life. However, hypothetically, situations are possible when even an honest and courageous judge renders a judgment contrary to his or her own convictions and inner will. For example, if a person (a litigant or a third party) makes it seem as if some harm will happen to the judge or someone close to him

[5] Civil Procedure Law (Zakon o parničnom postupku, Official Gazette, No. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 2/07, - Decision USRH, 84/08., 96/08. – Decision USRH, 123/08, 57/11, 148/11, 25/13, 89/14 – Decision USRH, 70/19, 80/22, 114/22 and 155/23, hereinafter: ZPP).

[6] (German) Civil procedure act (njem. Zivilprozessordnung), Bundesgesetzblatt nr. 6/72/2005 – 328/2024, https://dejure.org/gesetze/ZPO, January 15, 2025.

[7] (Austrian) Civil procedure act (njem. Zivilprozessordnung), Reich – Staats und Bundesgesetztblatt, nr. 113/1895 – 85/2024, hereinafter: A ZPO), https://www.jusline.at/gesetz/zpo, January 15, 2025.

[8] Kitonić, I., *Metodična uputa u Sudbeni postupak po običajnom pravu slavnog Ugarskog kraljevstva*, first edition, Trnava 1619., second edition, Beč, 1634., second edition translate, Jovanović, N., Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2004, p. 485.

or her if he or she does or does not render a judgment of a certain nature, thereby causing fear in the judge and thereby inducing him or her to render a judgment that he or she would not otherwise render, it is justified to raise the question of the legal existence of such a judgment. Namely, in such a case, the judgment would not be the result of the judge's free will, but rather of threats or psychological unlawful compulsion against him or her. Furthermore, situations are possible where an individual judge is forced by physical unlawful compulsion to render a judgment of a certain nature that he or she would not otherwise render if that circumstance did not exist. Here too, the question can be raised whether such a judgment can even be considered existent because the judge's free will is absent as one of the *conditio sine qua non* of every trial.[9] It seems that the prevailing understanding in legal doctrine is that judgments rendered under the aforementioned circumstances (lack of free will of the judge due to threat or unlawful compulsion) would be existent, and that they could be challenged like all other judgments, by filing regular or extraordinary legal remedies. However, there are also different views.

2.2. Croatian doctrine

A very small number of Croatian legal theorists have dealt, and mostly sporadically (with the exception of Mihajlo Dika), with the phenomenon of a non-existent judgment. However, it seems that there has been no consideration of whether the judge's lack of free will could result in the non-existence of the judgment that the judge would have made under such circumstances.

It is noteworthy that only Črnko, dealing with the problem of defining and legal consequences of a non-existent judgment in relation to objective joinder of claims, mentions that the concept of adjudication undoubtedly means the intellectual work of a specific judge or several of them. It is precisely this intellectual activity of decision-making by a judge (or judges) that represents a *conditio sine qua non* for an act to be called a decision or judgment on the merits of a matter.[10] Essentially, Črnko believes that an act can only be considered a judgment if there are several elementary things: 1) a judge, 2) a claim, 2a) a proposal of facts and evidence, 3) the plaintiff and the defendant, and 4) the mental stage of deciding on the merits. There is no doubt that a serious threat to a judge who is threatened with harm if he

[9] It is worth noting that the difference between a threat and unlawful compulsion is that a threat involves the appearance of some evil (usually a threat that force will be used), while unlawful compulsion only exists if physical force has already been used, vidi: Pravni Leksikon, *op. cit.* (note 1.), p. 1300.
[10] Črnko, J., *Nepostojeća presuda u svezi eventualne kumulacije*, Odvjetnik, Hrvatska odvjetnička komora, Zagreb, no. 7-8, year 70, 1997, p. 51 and 52.

does not render a judgment of a certain content can certainly affect his mental work, and if physical unlawful compulsion were exerted on him in connection with the decision-making, the question arises as to whether he had any possibility of deciding at all (for example, if someone guided his hand to sign the appropriate judgment).

2.3. German doctrine

In German doctrine, the concept of a non-existent judgment has been seriously considered for about a hundred years, both in terms of defining this legal phenomenon, i.e. the cause that leads to it, as well as the possibility of refuting such "decisions". However, it is interesting to note how the question of the judge's lack of free will when making a judgment was problematized in older legal theory, while it seems to be absent in modern German doctrine.

Wurzer seriously and thoroughly dealt with the non-existent judgment almost a hundred years ago in his work "The Non-existent and Nullity Judgment" (German: *Nichturteil und Nichtiges Urteil*).[11] He also considers the question of the judge's free will when passing the judgment and the possible impact on the (non)existence of the judgment, which would have been passed after the judge received a serious threat to pass a judgment with a specific content. Essentially, he believes that the judgment passed in civil proceedings would not only be nullity because of a threat to the judge, even a serious one. Namely, he maintains that it is logically and psychologically justified to conclude that, despite the threat to the judge aimed at passing a certain judgment, the free expression of the will of the affected judge is not excluded. A threat to the judge to issue a judgment of a certain content, in order to represent only an influence on his free will, but not its automatic suspension. Despite the threat to pass a certain judgment, according to Wurzer, the judge remains the master of his will, and if he submits to the threat, it is a matter of "*coactus volui*" (a declaration of will created by illegal threats and unlawful compulsion). In such a case, the judgment still exists, and legal remedies can be filed against it. Such a judgment can acquire the characteristics of formal and substantive final judgment.[12]

Ratzke in his dissertation from 1930, entitled "Non-existent Judgment and Ineffective Judgment in Civil Procedural Law" (German: *Nichturteil und Unwirksames Urteil im Zivilprozessrecht*).[13] He looks at the existence of the

[11] Wurzer. G., *Nichturteil und Nichtiges Urteil*, Verlag von M.&H. Marcus, Breslau, 1927.
[12] Ibidem, p. 125. and 126.
[13] Ratzke, B., *Nichturteil und Unwirksames Urteil im Zivilprozessrecht*, *Inaugural – Dissertation*, Druck von R. Gorschalky, Danzig, Marburg, 1930.

judge's free will to issue a certain judgment, and especially the influence of the judge's mental illness on the existence of the judgment. It can be concluded from his consideration that he considers it sufficient that a judge has the capacity of a judge, regardless of whether he is capable of performing that duty. In line with the above, Ratzke rejects those understandings that question the existence of the judgment only because the judge was in a drunken state when passing the judgment or because he was threatened, and even in cases where the judge is deaf or blind. Namely, in all the mentioned cases, there is only an influence on the free will of the judge, which, according to Ratzke, is not a reason for the non-existence of the judgment.[14]

2.4. Austrian doctrine

Fasching also links the concept of a non-existent judgment to certain volitional states of the judge who makes the judgment. In this context, he emphasizes that a judgment that a judge would make under the threat of direct or irremovable force (*vis absoluta*) represents a non-existent judgment.[15] Similarly, Rechberger believes that a non-existent judgment would be spoken of if the "decision" came from a judge who made it under the threat of direct and irremovable physical force, e.g. when a judge was threatened with a gun to make a specific decision.[16]

3. JUDGMENTS MADE BY MENTALLY ILL JUDGES

3.1. Introductory remarks

Mental illnesses (mental, psychological illnesses) are disorders of mental life that are qualitatively or by the intensity of their manifestation separated from the so-called normal. It is believed that every tenth person is affected by some mental illness or disorder during their lifetime.[17] There is no doubt that mental illnesses or various psychological disorders, in certain cases, can lead to the fact that a person affected by them cannot make rational decisions both in their private and professional lives. The possibility cannot be ruled out that certain court judgments were made by mentally ill judges, or judges with psychological disorders.

[14] Ibidem, p. 29, 30 and 31.
[15] Fasching, H. W., *Lehrbuch des österreichischen Zivilprozessrechts*, Manzsche Verlags – und Universitatsbuchandlung, Wien, 1990, p. 798.
[16] Rechberger, W.; Simotta, D.A., *Grundriss des österreichischen Zivilprozessrechts*, Erkenntnisverfahren, Manzsche Verlags und Universitätsbuchandlung, Wien, 2010, p. 521.
[17] Medicinski leksikon, editor in chief: Padovan, I., Leksikografski zavod „Miroslav Krleža", Zagreb, 1992., p. 201.

Therefore, the question of the legal fate of such judgments arises, given the possibility that judges who would judge under such circumstances (mental illness or disorder) would not be mentally capable of such intellectual activity.

It seems that the aforementioned issue has not been considered in Croatian legal doctrine, but it has not been completely neglected in German and Austrian legal theory, which have hesitated over the answer to the question of whether judgments rendered by mentally ill judges are rebuttal or non-existent.

3.2. German doctrine

Wurzer in his study of the circumstances that could lead to a non-existent judgment, he also touched on the issue of the judge's mental health and, in connection with this, the judge's ability to properly conduct the proceedings and render a judgment. In this regard, he raised the question of what impact the judge's mental illness has on the existence of a judgment as particularly significant. After examining this problem in great detail, Wurzer essentially concludes that as long as a mentally ill judge is not dismissed from office, there is no legal obstacle that would prevent him from performing his judicial duties and rendering judgments. Therefore, the judgments of a mentally ill judge (who has not been dismissed from office), according to Wurzer, are still, in terms of the issuance itself, "within the law", and cannot be considered non-existent judgements.[18]

We have already mentioned how Ratzke considered the existence of the judge's free will and, in particular, the influence of the judge's mental illness on the legal fate of the judgment. Ratzke thus believes that the judgment represents an act of the judge's free will, which can be more or less reduced in the case of mental illness. However, even in such cases there is a will that led to the actions taken. Therefore, it can be concluded that for Ratzke, even the mental illness of the judge who makes a specific judgment in such a state cannot call into question its existence.[19]

3.3. Austrian doctrine

Austrian legal theorists have been dealing with the issue of the possible influence of a judge's mental state on the existence of a judgment he would make even before the Second World War. Thus Pollak states that the mental capacity, or inability of

[18] Wurzer, *op. cit.* (note 11.), p. 121.
[19] See about that: Ratzke, *op. cit.* (note 13.), p. 29, 30 and 31.

a judge to properly express his will when making a judgment, cannot affect the existence of a judgment, but it can make it rebuttal.[20]

In modern Austrian legal doctrine, the issue of the influence of a judge's mental illness on the existence of a judgment that such a judge would make was addressed by Fasching. He states that a prerequisite for the validity of any legal expression of will is legal capacity. However, if a judgment were made by a judge who is incapacitated, e.g. due to mental illness or mental disorder, or who has been appointed a guardian due to mental illness, then such a "judgment" would in any case be non-existent. In support of these claims, Fasching points out that it would be unacceptable to set lower criteria for state bodies (e.g. judges) in relation to their legal capacity and in connection with their declarations of will (decision-making) than for persons who would make their declarations of will in private law transactions. Unless, of course, state authorities have double standards.[21]

Unlike Fasching, Rechbereger is "more lenient", because he considers the judgement of a mentally ill judge to be existent and only rebutting, equating it with the judgement of the judge who issued it, even if he should have been exempted from the trial.[22]

4. JUDGMENTS RENDERED BY UNAUTHORIZED JUDGES

4.1. Introductory remarks

As a rule, judgments in court proceedings, including civil proceedings, are rendered by judges authorized by state authorities. Thus, in the Republic of Croatia, the State Judicial Council is a body that, in accordance with the Constitution and the law, independently decides on the appointment, promotion, transfer, dismissal and disciplinary liability of judges.[23] However, it is possible that judgments are rendered by judges who, for various reasons, are not authorized to act in a specific civil proceeding. Of course, we are not referring to cases of judges who rendered judgments as judges of courts without territorial or subject-matter jurisdiction, since these omissions in the trial can be remedied by filing legal remedies against the judgments rendered in this way. However, if, for example, a judgment is rendered by a judge who is not an employee of the court

[20] Pollak, R., *System des österreichischen Zivilprozessrechtes*, Manz, Wien, 1932, p. 82.
[21] Fasching, *op. cit*. (note 15), p. 798.
[22] Rechberger, W.H., *Die Fehlerhafte Exekution*, Manz, Wien, 1978, p. 37.
[23] Article 124. paragraph 2. Constitution of the Republic of Croatia, Official Gazette, No. 85/10 and Decision of the Constitutional Court of the Republic of Croatia, Official Gazette, No. 5/14.

in which the judgment was rendered, or if the decision is rendered by a judge but not in the course of performing a judicial function, the question arises whether such decisions would be merely challenging or could they not be called judgments at all. In the following article, we will see what positions domestic and foreign legal doctrines have taken on the aforementioned issues.

4.2. Croatian doctrine

Dika, within the framework of studying the phenomenon of non-existent judgment, also considered the problem of participation in the decision-making of judges who are not authorized to do so. In this sense, he asks the following questions:
1. Can a person who is appointed as a judge, but in another court, be considered a judge, and would not be a person who would be authorized to judge in that court on some other legal basis?
2. Can the capacity of a judge in a specific case be recognized as a person who does have the capacity of a judge in a specific court, and who would in principle be authorized to make decisions in that court, but who in the specific procedure, according to the schedule of work in that court, is not authorized to judge in the dispute in question (the judge "took" the case of another judge)?

Dika offers answers to both questions.
Regarding the first question posed, Dika emphasizes that there are at least two interpretative solutions to this dilemma. According to one, a judge should be considered any person who has been appointed as a judge in the Republic of Croatia, regardless of which court they were appointed to. Therefore, according to this interpretation, there is no significant violation of the participation in the decision-making of a person who does not have the capacity of a judge, whenever a person who generally has the capacity of a judge participates as an individual judge or a member of a panel, even if they were not appointed to the court in which the decision was made or are not authorized to judge in that court on some other basis.

According to another opinion, the concept of a person who does not have the capacity of a judge would be linked to a specific court, meaning that such a person would be considered any person who was not appointed to the court in which the decision was made or who was not authorized to judge in that court on some other legal basis.

Dika believes that the second understanding should be opted for because it would be in accordance with the legal rules on when and where (in which court) a person

appointed as a judge is authorized to judge. By adopting this second position, it prevents circumvention of the rules on the election and appointment of judges, removes suspicions of possible manipulations and non-objectivity, enables the right to a legal judge, respects the regulations on subject and territorial jurisdiction, and ensures trust in the work of the courts.[24]

In further consideration of the issue of who can be considered a judge in a specific case, Dika states a possible situation and doubt: whether the capacity of a judge should be recognized to a person who admittedly has the capacity of a judge in a specific court and who would in principle be authorized to issue judgments in that court, but who in a specific dispute, according to the schedule of work in that court, would not be authorized to judge. This would be a judge who unauthorizedly took the case for which another judge was responsible. According to Dika, a judgment rendered by such a person would only be rebutting, because it would still be a person who is a judge in a specific court.[25]

It is especially worth noting, in the context of the adoption of a judgment by unauthorized persons, the problem of correctly defining participation in decision-making. According to the first, broader understanding, participation in decision-making would mean participating in the substantive preparation of the decision-making, including the presentation of evidence and enabling the parties to discuss it. According to the second, narrower understanding, which Dika opts for, participation in decision-making would mean participating in deliberations and voting during the decision-making in panels, or in other words, making a decision based on the collected procedural material.[26]

In the event that a person who has the status of a judge but who is not authorized to judge in the court in which the decision was made participated in the rendering of the judgment, Dika states different opinions regarding the legal consequences of such a decision and the possibility of its rebuttal:
1) if the position were taken that, according to the provision of Article 354, paragraph 2, item 1 of the ZPP, an absolutely essential violation of civil procedure would only exist if a person who does not have the status of a judge at all participated in the rendering of the judgment, then the circumstance that a person who does not have the status of a judge in the specific court participated in its rendering, and that this was concealed, would have no consequences,
2) if the position, which Dika pleads for, that such a violation would exist even if a judge who is not authorized to judge in that court participated in the rendering

[24] Dika, M., *op. cit*. (note 4.), p. 132.
[25] Ibidem
[26] Ibidem, p. 133.

of the judgment were accepted, the rendered judgment would certainly be rebuttable.

Dika concludes that the issue of its (in)existence should be resolved analogously to the issue of the (in)existence of the decision of the court counselor.[27]

When a court counselor issues a judgment, Dika recognizes different situations and, accordingly, different possible consequences.

If a judgment were issued by a court counsellor who was otherwise authorized to participate in the proceedings, in the sense that he signed it as his own act, such an act would certainly be contestable in the sense of the provisions of Article 354, paragraph 2, item 1 of the Civil Procedure Code, but it is doubtful whether such a judgment can even acquire the status of final judgment, or whether such a defect could be remedied by not filing legal remedies, i.e. is such a judgment possibly non-existent or existent but rebuttable? Dika offers 2 possible answers.

1) If the provision of Article 354, paragraph 2, item 1 of the Civil Procedure Code is understood literally, according to which a essential violation of the provisions of civil procedure always exists if a person who does not have the status of a judge participated in the issuance of the judgment, then there would be no basis for the position that a judgment that would not be challenged due to that significant violation could not acquire the status of final judgment. Namely, that by not challenging that violation, it would be remedied. But here too, the precise author notes two possibilities:

a) if the parties were aware of the circumstance that the decision was made by a court counselor who was not authorized to judge,

b) if the parties were not aware of the aforementioned circumstance, i.e. that the court counselor signed the judgment declaring himself to be a judge or under the name of the judge who was supposed to sign the decision. Dika believes that it is undeniable that in the case under a) the parties could challenge such a decision by means of an appeal, an appeal on points of law and request to reopen the proceedings. However, he immediately raises the question of whether, after the possibilities of such a challenge have been exhausted or have ceased (e.g. due to the expiry of the deadlines for legal remedies), a decision made by a court counselor in the circumstances specified under a), could become a valid judicial act. The answer to this question depends on the position on what would be considered a judicial decision, i.e. whether only decisions made by judges or also decisions made by persons authorized to perform certain procedural actions in court. The constitutional legal positioning of the authorities in the Republic of

[27] Ibidem, p. 134.

Croatia would speak in favor of the first position, while pragmatic, unprincipled reasons would speak in favor of the second position. Dika pleads for the acceptance of the second position, i.e. that the failure to rebut a judgment made by a court counselor should still be considered a non-existent decision, i.e. one that can never acquire the status of final judgement. Rebutting such decisions only by filing legal remedies would be only one way of removing such acts.[28]

In the second case (under b) when the parties are not aware of the fact that the court counselor issued the judgment by declaring themselves a judge or under the name of the judge who was supposed to sign the decision, for Dika the matter is clear. This is a forgery, and such an act should be treated the same as other extrajudicial forgeries. Namely, it would be a non-existent judgment, which would allow any party to file a lawsuit to establish its falsity (Art. 187, paragraphs 1 and 2 of the Civil Procedure Code). It would be a non-existent judgment, allowing any party to file a lawsuit to establish its falsity (Art. 187, paragraphs 1 and 2 of the Civil Procedure Code). It is worth noting that the 2019 Amendment to the Civil Procedure Code, in Jakovina's opinion, aimed to speed up the procedure and relieve the courts,[29] prescribed greater authority for court counselors. Namely, until then, in a certain types of first-instance proceedings, court counselors were authorized to conduct proceedings, evaluate evidence and submit a written proposal to the judge for making a decision,[30] while in second-instance proceedings and proceedings regarding extraordinary legal remedies, they were authorized to report on the state of the file and prepare draft decisions.[31] Now, after the 2019 amendment to the ZPP, in addition to the aforementioned powers, court counselors are also authorized to make some decisions independently.[32, 33]

4.3. German doctrine

In his work The Wrong Civil Judgment (German: *Das Fehlerhafte Zivilurteil*), Jauernig also paid due attention to non-existent judgments, or apparent

[28] Ibidem, p. 134. i 135.
[29] Jakovina, D., *Promjene u zakonodavnom uređenju prvostupanjskog parničnog postupka prema noveli iz 2019.*, in: Godišnjak 26, Aktualnosti hrvatskog zakonodavstva i pravne prakse, edt. Sessa, Đ., Organizator, Zagreb, 2019, p. 33.
[30] See the provision of Article 13., paragraph 1. of the ZPP.
[31] See the provision of Article 13., paragraph 4. of the ZPP.
[32] Dika, M., *op. cit.* (note. 4.), p. 136.
[33] Thus, the 2019 Amendment to the Civil Procedure Code added a new paragraph 9 to Article 164 of the Civil Procedure Code, which reads: "The court counselor is also authorized to make a decision on the request for reimbursement of costs referred to in paragraph 8 of this article."

judgments.[34] In his opinion, when the essential features of a judgment are so lacking that it does not exist in the legal sense at all, then we are talking about a non-existent judgment. The answers to the questions of what are the shortcomings that prevent the realization of the essential features of a judgment, or the creation of the judgment itself, are provided by the science of non-existent judgment. That in a positively formulated sense means that the science of non-existent judgment actually indicates the prerequisites that are necessary for the creation of a judgment. If one of these prerequisites were not met, then the judgment could not have been created. Regarding the issue of the legal nature, or the existence/non-existence of judgments rendered by judges who are not authorized to render them, Jauernig asks 2 questions, namely:

1. can only courts render judgments? and
2. under what conditions does a judgment come from a "court" and what significance do the regulations on the form of judgment have for the issuance of a judgment?[35]

Jauernig calls a judgment a decision that is issued in a certain form, during the proceedings, by a court. Therefore, a judgment differs from other state acts in the manner of issuance, i.e., it is issued in a special procedure by a court. In the context of a non-existent judgment, he specifically warns that the fact that a judgment "pronounces law" (German: "*Recht gesprochen*") does not make a difference in relation to other legal acts of government, which can also issue legal decisions. However, by issuing decisions in accordance with the law, an administrative body does not become a court, and therefore its decisions are not judgments, which can only be issued by a court, but remain administrative acts.[36]

Jauernig believes that in order to distinguish between a judgment and a non-existent judgment, it is irrelevant whether the administrative act is labeled as a "judgment" and whether it contains a decision that only a court is authorized to make (e.g., the Housing Authority "judgments" a party to pay rent). What is important to the author in the above context is that it is a decision of an administrative body, not a court, and for this reason such a decision is a non-existent judgment. He notes that a state body that is not a court is not able to make judgments, but that it may make other state acts that are not invalid simply because they are called "judgments".[37]

[34] Jauernig, O., *Das Fehlerhafte Zivilurteil*, Vittorio Klostermann, Frankfurt am Main, 1958.
[35] Ibidem, p. 6.
[36] Ibidem, p. 7.
[37] Ibidem, p. 8.

It is worth mentioning that Jauernig also considered the legal nature of decisions made within the jurisdiction of the judicial administration. They would always be non-existent judgments, which would not even need to be discussed, unless they were decisions made by "judges". However, as in the case where the "judicial authority" decides in cases of judicial administration, their decisions are also non-existent judgments.[38]

Furthermore, Jauernig states that to this part of the consideration of the non-existent judgment, the question of whether courts in noncontentious proceedings (German: *Freiwilligen Gerichtsbarkeit*) can issue judgments should be added.[39, 40] Their activity is often referred to as "court administration" (German: *gerichtliche Verwaltung*). However, according to Jauernig, it is more than doubtful whether such a characterization corresponds to the factual content of their tasks. Namely, numerous decisions issued in noncontentious proceedings represent a substantive verdict, that is, they contain an independent and binding ruling that can acquire the property of substantive final judgment, and which was issued in accordance with the law. It seems that the name "court administration" is correct, because courts in noncontentious proceedings do not issue judgments in the formal legal sense, and which are the only subject of consideration of non-judgment. Namely, in this procedure, decisions are issued in the form of resolutions and they cannot be judgments. Jauernig therefore concludes that noncontentious courts are judicial bodies that lack the "ability" (German: *Fähigkeit*) to make judgments.[41]

Jauernig also touched on the case where the court, when issuing a judgment, lacks jurisdiction in the subjective sense (German: *Gerichtsbarkeit im subjektiveben Sinne*). In this sense, the author believes that when a court of another branch of the judicial power issued a judgment (and not the one that should have), this circumstance does not make such a judgment non-existent. Specifically, if a

[38] Ibidem, p. 9.

[39] Noncontentious proceedings in the narrow sense are a type of judicial civil proceedings, and in the broader sense we define them as all judicial civil proceedings that are different from litigation proceedings. Noncontentious proceedings can (in the narrow sense) be classified into status (e.g. proceedings for the deprivation and restoration of legal capacity, for permission to marry, for the withdrawal of parental care), property law (e.g. proceedings for the dissolution of a co-ownership community, for the regulation of boundaries, inheritance proceedings, for the drawing up and preservation of a will, land registry proceedings) and registration proceedings, while in the broader sense this group of proceedings should include enforcement and bankruptcy proceedings. In noncontentious matters, there is no dispute, so they are most simply defined negatively, as a judicial civil procedure that is not litigation procedure.

[40] More about non litigation proceedings in German law (German: Freiwilligen Gerichtsbarkeit) see: Creifelds, C., *Rechtswörterbuch*, Verlag C.H. Beck, Munich 1994, p. 443 and 444.

[41] Jauernig, *op. cit*. (note 34.), p. 10. i 11.

criminal or administrative court issued a judgment in a civil law case, this fact would not make the issued judgment non-existent. This stems from the unity of the judicial power prescribed by the Basic Law of the Federal Republic of Germany (constitution), (German: *Grundgesetz fur die Bundesrepublik Deutschland*).[42]

However, Jauernig notes that some authors previously took the position that a civil judgment can only be considered a judgment if it was issued by a competent court in civil proceedings, and that it would be a non-existent judgment assuming that it was issued by a criminal or administrative court. Jauernig considers this opinion to be outdated and contrary to the constitutional arrangement of the unity of the judicial power.[43]

Rosenberg in the context of the existence of circumstances that would make a certain "judgment" non-existent, Rosenberg mentions the case when the judgment was made by a judge, but not in the performance of judicial duties (e.g. when a judge made a "judgment" during a gathering of regular guests at a table in a pub).[44,45]

Prütting, on the other hand, warns that a decision that was not made in the performance of judicial duties cannot be considered a judgment, whether it was made by a retired judge or a judge at a private meeting.[46]

4.4. Austrian doctrine

Austrian theorists have also considered the situation if a judgment was rendered by an unauthorized judge, and this by considering the legal consequences for the judgment that would be rendered under such circumstances. When considering

[42] Indeed, the provision of Article 92 of the Basic Law (Constitution) of the Federal Republic of Germany, which regulates the organization of the courts, stipulates the following: "Judicial power is vested in judges; judicial power is exercised by the Federal Court, the federal courts provided for in this Basic Law and the state courts", see: Grundgesetz fur die Bundesrepublik Deutschland, Bundeszentrale fur politische Bildung, Bonn, 2013., p. 61 and in: *Basic Law (Constitution) of the Federal Republic of Germany*, Pan Liber, Osijek, 1994, p. 58.
[43] Jauernig, *op. cit*. (note 34.), p. 13. i 14.
[44] Rosenberg, *op. cit*. (note 3.), p. 324.
[45] See similar and Kramer, W., *Die Berufung in Zivilsachen*, C.H. Beck, München, 2015, p. 16.
[46] Prütting, H.; Gehrlein, M., *Zivilprozessordnung, Kommentar*, 14. Auflage, Luchterhand Verlag, available on: https://www.haufe.de/recht/deutsches-anwalt-office-premium/pruettinggehrlein-zpo-kommentar-zpo-vorbemerkung-vor-i-schein-bzw-nichturteil_idesk_PI17574_HI15259691.html, January 15, 2025.

and defining non-existent judgments, Fasching classifies them into certain groups depending on the circumstances that lead to them, and thus, among other things, also lists decisions rendered outside civil litigation. According to this criterion, non-existent judgments, from the point of view of civil litigation, should be considered all judgments that were not rendered in such proceedings. However, he notes that decisions of some other courts (arbitral judgments and, in part, judgments rendered in criminal proceedings) are legally equal to civil judgments.[47] According to Fasching, judicial powers belong to a person (an individual judge or a panel), not to a court, and if the judgment were not rendered by a person with the capacity of a judge, such a "decision" would be a non-existent judgment.

In the context of a panel (senate) that issues judgments, it is worth noting that Fasching does not consider a judgment rendered by a panel instead of an individual judge authorized by law to be non-existent if it was otherwise properly composed. However, if the panel (which should be composed of judges) included even one person who did not have the status of a judge, the body as a whole would not be authorized to judge. In this sense, Fasching highlights the doubt as to whether in that case, when all members of the panel are not holders of judicial power (e.g. if the panel is composed of 2 professionally appointed judges and one aspiring judge), a decision rendered by such a body could be characterized as a non-existent judgment. Fasching, developing this problem, emphasizes that the A-ZPO recognizes 2 different holders of judicial power, namely an individual judge and the panel (senate). The panel as a collective, and not an individual judge as a member of the panel, has the power to decide, but always, unconditionally, all members of the panel should be judges (not necessarily all members should be professional judges). Therefore, according to Fasching, if all members of the panel do not have judicial powers (they are not appointed as judges or lay judges), then the panel as a whole cannot be the holder of decision-making authority. The judgments that such a body would issue would be non-existent.[48]

In the context of the judge's authority to issue a judgment in a certain legal matter, let us mention that Buchegger, like Fasching, considered the problem of a panel in which all members do not have judicial powers. Thus, Buchegger states that a judgment would not exist when the panel (senate) does not have the number of members - judges prescribed by law from the very beginning of the procedure. Such a panel is incapable of issuing judgments, and therefore such a body lacks judicial power (German: *Gerichtsgewalt*). Judgments issued by such a body (a

[47] Fasching, *op. cit.* (note 15), p. 796.
[48] Ibidem, p. 796-798.

panel without the required number of members) would be irrelevant, or non-existent judgments.[49]

5. JUDGMENTS MADE BY OCCUPATION AUTHORITIES

In our opinion, the consideration of the legal fate of judgments rendered by unauthorized judges would be incomplete if we did not at least briefly address the situation of judgments rendered by judges appointed by the occupying authorities to act as judges on the territory or part of the territory of an internationally recognized and sovereign state. Since the cases in question differ somewhat from situations when judgments are rendered by judges who have been entrusted with judicial duties by legal state authorities, we will present this issue in a separate chapter.

Therefore, in the context of the existence or non-existence of judgments, we will address the question of the consequences for the existence of a judgment, if it were rendered during the hostile occupation of the whole or part of the state, and what judgment would be rendered by a judge appointed by the hostile occupying authorities. This problem, albeit quite incidentally, was pointed out by Neumann even before the II. World War II as part of considering the nullity of the judgment due to the irregular composition of the court,[50] as well as Ratzke, also quite incidentally, just mentioning it.[51]

The Republic of Croatia unfortunately had experience with this problem in the 1990s when its territory was partially occupied, and on whose territory, as part of the enemy occupation, Serbian autonomous regions as well as the Republic of Serbian Krajina itself were established. Brekalo thus states that these creations, according to the positive legislation of the Socialist Republic of Croatia and the Socialist Federal Republic of Yugoslavia, ipso iure and ipso facto represented an illegitimate act of the rebel Serbs. The aforementioned qualification is identical from the point of view of the provisions of international law. Therefore, the Republic of Serbian Krajina never became an international legal entity. Also, the normative activities of the rebel Serbs, which were the basis for the process of establishing and organizing the Serbian autonomous regions and the Republic of

[49] Buchegger, W.; Roth, M., *Zivilprozessrecht, Sammlung kommentierter Fälle*, Springer-Verlag, Wien, 2011, p. 67 and 68.
[50] Neumann, G., *Komentar građanskog parničnog postupka*, preveo Gregović, S., Planeta, Beograd, 1935, p. 1283 and 1284.
[51] Ratzke, *op. cit*. (note 13.), p. 21 and 22.

Serbian Krajina on the territory of the Republic of Croatia, were sub colore iuris (under the guise of law), i.e. illegitimate.[52]

Courts were established in the occupied territory by normative acts of the occupying authorities, which exercised judicial power in the occupied territory of the Republic of Croatia, previously within the Serbian autonomous regions, and then within the framework of the Republic of Serbian Krajina.

Namely, with the merger of the Serbian Autonomous Region of Krajina, the Serbian Region of Slavonia, Baranja and Western Srem, and the Serbian Region of Western Slavonia into the Republic of Serbian Krajina on December 19, 1991, a new organization of judicial bodies that operated in the occupied territories of the Republic of Croatia was established. Courts of general jurisdiction and commercial courts were established by the Law on Courts of the Republic of Srpska Krajina.[53] Municipal courts, district courts and the Supreme Court of the Republic of Srpska Krajina were established within the courts of general jurisdiction. Commercial courts and the Higher Commercial Court were established within the commercial courts.[54, 55] The Law on Misdemeanors[56] established municipal (municipal) misdemeanor courts as bodies authorized to conduct first-instance proceedings, and the Republic Court for Misdemeanors to decide in second-instance proceedings.

After courts in the occupied territory of the Republic of Croatia conducted proceedings and rendered judgments, including in civil cases, the question of the legal existence of such decisions arose.

[52] Brekalo, M., *Povijesni prikaz i pravni karakter normativnih akata Republike Srpske Krajine*, Zbornik Pravnog fakulteta u Rijeci, 2012, br. 2, p. 551.
[53] Zakon o sudovima, Službeni glasnik Republike Srpske Krajine, No. 4/1992.
[54] For more information on the organization of the judicial power in the occupied territory of the Republic of Croatia, see: Rončević, M., *Organizacija sudbene vlasti na okupiranom području istočne Hrvatske u razdoblju od 1991. do 1997. godine*, in: Arhivi i Domovinski rat, Radovi, 49. savjetovanje hrvatskih arhivista, edt. Babić, S., Hrvatsko arhivističko društvo, Plitvice, 2016, p. 111-125.
[55] On the organization of the judicial system of the Republic of Serbian Krajina, see also: Holjevac, Tuković, A.; Rupić, M., *Arhivski fondovi srpske provenijencije pohranjeni u Hrvatskom memorijalno - dokumentacijskom centru Domovinskog rata*, in: Scrinia Slavonica, Godišnjak Podružnice za povijest Slavonije, Srijema i Baranje Hrvatskog instituta za povijest, svezak 20 (2020.), Hrvatski institut za povijest, Podružnica za povijest Slavonije, Srijema i Baranje, Slavonski Brod, 2020, p. 432.
[56] Misdemeanor Law - Zakon o prekršajima, Službeni glasnik Republike Srpske Krajine, No. 4/1992.

The Republic of Croatia responded to this question by adopting the Convalidation Act (1997),[57] and then the Regulation for the Implementation of the Convalidation Act in Cases of a Judicial Nature (1998).[58]

The provisions of the Convalidation Act and the Regulation prescribe a legal path by which an interested person can establish, through a competent court in the Republic of Croatia, that decisions in cases of a judicial nature, made on the territory of the Republic of Croatia that were under the protection or administration of the United Nations (occupied territory),[59] are in accordance with the Constitution of the Republic of Croatia, the Constitutional Act on Human Rights and Freedoms and on the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia, or the laws of the Republic of Croatia. Therefore, these are decisions made by courts of Serbian regions, or the Republic of Serbian Krajina, on the occupied territory of the Republic of Croatia. There is no doubt that such decisions could not be treated in the same way as decisions made by judges in the free, unoccupied part of the Republic of Croatia, because, among other things, they were not made by authorized judges. Namely, these judges were not appointed or appointed as judges in a certain court by a decision of the legal bodies of the state government of the Republic of Croatia. On the other hand, the reasons for the reintegration of the occupied territories into the constitutional and legal order of the Republic of Croatia, and related reasons for legal certainty, imposed the need for the judgments rendered in the occupied territory to be "strengthened" or convalidated, if they are in accordance with the Constitution and laws of the Republic of Croatia. It is for this purpose that the Croatian legislator passed the Convalidation Act and the Regulation. For example, let us state that the Municipal Court in Gospić, deciding on the proposal of the proposer for convalidation of the decision on inheritance, on 29 January 2013 passed a decision with the following dictum: "It is established that the decision on inheritance of the Municipal Court in Gračac, case no. O-14/93-3 of 29 April 1993 is in accordance with the Constitution, Constitutional laws and laws of the Republic of Croatia.[60]

[57] Law on Convalidation - Zakon o konvalidaciji (Official Gazette, No. 104/97, hereinafter: ZOK).
[58] Regulation for the implementation of the Law on Convalidation in Judicial Matters - Uredba za provođenje Zakona o konvalidaciji u predmetima sudbene naravi (Official Gazette, No. 51/98, hereinafter: Uredba za provođenje ZOK-a).
[59] On the peacekeeping operation of the United Nations in the Republic of Croatia, see: Miškulin, I., *Republika Hrvatska i mirovna operacija Ujedinjenih naroda: kada, kako i zašto je došlo dio njezine realizacije*?, Historijski zbornik, Društvo za hrvatsku povjesnicu, Zagreb, No. 1, 2012, p. 121-159.
[60] Decision of the Municipal Court in Gospić, number: 13 R1-110/2011 from January 29, 2013.

The Municipal Court in Vukovar also decided on a proposal for the convalidation of a decision - a judgment based on the ZOK and the Regulation for the Implementation of the ZOK. Thus, in its decision of June 4, 2021, it adopted the proposal of the proposer and decided: "convalidates the judgment of the Municipal Court Vukovar, Republika Srpska Krajina, No. P- 202/94 of March 6, 1995."[61]

In this context, it is worth mentioning that in the procedure initiated by a proposal for the convalidation of a certain decision, the interested party may request that the decision subject to convalidation is contrary to the Constitution of the Republic of Croatia, the Constitutional Act on Human Rights and Freedoms and on the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia, or the laws of the Republic of Croatia.[62]

Following the above, we are of the opinion that all judgments rendered in civil proceedings in the occupied territory of the Republic of Croatia in the 1990s, either in the courts of the Serbian autonomous regions, or later in the courts of the Republic of Srpska Krajina, are formally non-existent from a legal perspective. This is because they were issued by unauthorized persons, persons who were not appointed as judges in certain courts by the legal and competent institutions of the Republic of Croatia. Only by conducting noncontentious procedure for their convalidation, of course assuming that the convalidation procedure has been completed by accepting the proposal for convalidation of a specific decision, do they cease to be non-existent. Of course, everything said about the case of judgments issued by courts - occupation authorities on the territory of the Republic of Croatia during the nineties of the last century also applies at a general level.

Therefore, we are of the opinion that judgments issued by courts established by occupation authorities on the occupied territory of a sovereign state would be non-existent judgments, unless the authorities of the state on whose territory such judgments were issued decide otherwise. In this sense, it is worth noting that, unlike the Republic of Croatia, on the basis of whose regulations (the Civil Procedure Act and the Regulation for the Implementation of the Civil Procedure Act), as we have seen, a court decision made in an occupied territory can only be validated after conducting an appropriate procedure, post-war Yugoslavia (the Federal People's Republic of Yugoslavia) resolved the problem of court decisions - judgments made in a territory it considered to be under enemy occupation in a

[61] Decision of the Municipal Court in Vukovar, number: R1 - 61/2019-2 from June 4, 2021. The decision in question decided on the convalidation of the judgment of the Municipal Court in Vukovar, case number: P-202/94 of 6 March 1995, for the purpose of divorce and entrusting the custody and upbringing of a minor child.
[62] See: Decision of the Vukovar County Court, case number: Gž 968/2001 from March 12, 2002.

different, actually opposite way. Namely, Yugoslavia considered that decisions made by the occupiers, in civil - legal relations, were valid. However, the interested (injured) person was left with the possibility of initiating court proceedings with a request to discuss the disputed legal relationship and make a new decision.[63, 64]

6. OWN POSITION

After studying domestic and comparative legal doctrine, and considering the judge's ability to reason and his free will when rendering a judgment, we are of the opinion that these circumstances, under certain assumptions, may be a reason for challenging the judgment, but by no means for its non-existence. Namely, the judge's mental illness, psychological disorder, as well as a possible trial under the influence of alcohol or narcotics, do not make the judgment non-existent, just as a serious threat to the judge to render a judgment of a specific content does not make the judgment non-existent. In our understanding, these are possible reasons for filing an appropriate legal remedy against a judgment rendered under such circumstances (which otherwise has all the essential characteristics of a court decision), but we repeat, they are not reasons for its non-existence.

[63] The provision of Article 7, paragraph 1 of the Act on the Invalidity of Legal Regulations Adopted Before 6 April 1941 and During the Enemy Occupation (Official Gazette, No. 86/46, 105/46, 96/47, hereinafter: ZONPP), stipulates that decisions (judgments, rulings, conclusions, etc.) of courts in civil law relations adopted after 6 April 1941 remain in force. Paragraph 2 of the same article stipulates that if the court's decision on such a relation is based on legal regulations adopted by the occupiers and their accomplices or on regulations from Article 2 of this Act that are in conflict with existing regulations, a person who is considered to have been harmed by such a court decision may, within one year from the date of entry into force of this Act, initiate proceedings with a request that the competent court review the legal relationship and make a decision based on existing regulations.

[64] According to the mandatory interpretation of the regulations of articles 1, 2, 4, 7, 10 and 11 of the ZONPP, it is prescribed that under the decisions of the courts on civil-legal relations, which in the sense of art. 7 of the ZONPP remain in force, they include those decisions of the courts on civil-legal relations that were made after April 6, 1941. "Legal regulations adopted by the occupiers or their helpers", specified in Article 7 paragraph 2 of the same law, are understood to mean the legal regulations that were adopted for that area by the authorities of the Kingdom of Italy after April 6, 1941, as well as by the authorities of the German occupier, the republican-fascist regime and other helpers of the occupiers. Likewise, the "regulations referred to in Article 2 of this Law", referred to in Article 7, paragraph 2 of the same Law, are understood to mean the legal regulations that were in force in the annexed territory on 6 April 1941. Mandatory interpretation available at: https://www.iusinfo.hr/zakonodavstvo/zakon-o-nevaznosti-pravnih-propisa-donesenih-prije-6-travnja-1941-i-za-vrijeme-neprijateljske-okupacije/clanak-12, January 15, 2025.

Furthermore, we are of the opinion that the circumstance that the judgment was rendered by a judge who was not in charge of the proceedings in question (court file), or by a judge who was appointed to a different court than the one where he rendered the judgment, would not make the judgment non-existent, but possibly refutable. We are also of the opinion that the existence of a civil judgment would not be affected if it was rendered by a court, for example, in criminal proceedings, this is because there is unity of judicial power.

Regarding the rendering of decisions by unauthorized judges, the following should be said. Judgments in civil proceedings are rendered by judges or panels composed of several judges, and it is they who are the holders of judicial power. In cases in which a judgment is rendered by a panel, it is the holder of judicial power as a whole. Therefore, we are of the opinion that even if there were even one person in the panel that renders the judgment who is not a judge, such a panel would not be the holder of judicial power, and consequently, the acts that such a panel, as a collective body, would not be judgments.

If a judgment were rendered by a person who had lost his/her status as a judge, for example due to retirement, in that case that person would be equated with persons who were never appointed as judges by the state. Acts rendered by such a person could also be characterized as non-existent judgments. Also, if a judge, outside of the performance of his/her judicial duties, for example during a birthday celebration, were to render a "judgment" resolving a property dispute between two friends, then such an act could certainly not be considered a judgment.

It should be noted here that, in our understanding, the circumstance that the judgment were rendered by a judge who was not in charge of the proceedings in question (court file), or by a judge who was appointed to a court other than the one where he/she rendered the judgment, would not make the judgment non-existent, but possibly refutable.

We have explained our own position on the non-existence of judgments rendered by judges who were authorized by the occupying authorities to judge on the territory of a sovereign state in detail in Chapter 5 of this paper.

Although this paper primarily deals with the issue of legal assessment of judgments rendered without the free will of judges and mentally ill and unauthorized judges in terms of the existence or non-existence of such decisions, we will also focus on the possibility of challenging decisions rendered under such circumstances. In cases in which, in our opinion, the judgment rendered exists, i.e. which we consider to be existent (e.g., judgment rendered by mentally ill judges as well as those who rendered the judgment under the influence of a serious threat),

such judgments may be challenged by those legal remedies (regular and extraordinary) that are otherwise provided for by procedural law to be filed against judgments rendered in civil proceedings.

The matter seems more complicated regarding the issue of challenging non-existent judgments (in our view, e.g., "judgments" rendered by a judge who has lost his capacity as a judge due to retirement or rendered by a panel whose members would not all be judges). Namely, in such cases, one can justifiably ask whether legal remedies can be filed against such decisions at all, because there is no act of refutation (a non-existent judgment is actually a "legal nothing"). We believe that in such cases, primarily for reasons of legal certainty (because such a non-existent judgment can create the appearance of a "real" judgment), legal remedies may be allowed, in the sense that they should not be rejected as a rule. For example, if an appeal were filed against a judgment rendered by a judge who has lost that capacity, the second-instance court would not be able to decide on the merits, but it could conclude that the contested decision is not a judgment, and return the case to the first-instance court to render a judgment. The party could also request a continuation of the proceedings, because a "judgment" that does not exist (non-existent) certainly does not end the civil proceedings, not even in the first instance of the trial.[65, 66]

[65] Regarding the possibility of challenging non-existent judgments, Rosenberg points out that such a decision is not binding on the court nor does it ends the procedure before the court in which it was rendered. In this regard, he points out that the parties could re-initiate the proceedings (because such a "judgment" does not actually exist). However, for Rosenberg, the situation is somewhat different regarding a illusory judgment (as a manifestation of a non-existent judgment). Namely, considering the possible effectiveness of this "judgment" and the possibility of its refutation, he states that such a "judgment" could still be challenged by legal remedies, if it would create the impression of an effective ("real") judgment among the parties. However, that a non-existent judgment can never be the basis for a merits judgment, and therefore that the non-existent judgment should be reversal and the case returned to the court of first instance (for the purpose of rendering a judgment). He further states that the parties affected by a illusory judgment have the choice of whether to request the continuation of the proceedings in the court of first instance or to file an appeal against the illusory judgment. See Rosenberg, op. cit. (note 3.), p. 325.

[66] Fasching, in relation to the submission of legal remedies against non-existent judgments, states that the first-instance court, and if necessary also the second-instance court, should reject an appeal against such a "judgment" as inadmissible, this because the prerequisite for the admissibility of the appeal – a decision that is contestable – is missing. In the explanation of such a decision rejecting the appeal, it should be stated that the contested "decision" is a non-existent judgment and therefore cannot be contested. Fasching notes that such a determination contained in the explanation of the decision to reject cannot acquire the status of final and binding force. However, for Fasching, the situation is different if it is a fictitious judgment (a non-existent judgment that meets the external characteristics of a judgment), especially in situations in which such a "judgment" was made by non-judges, judges who are incompetent or that were made without the existence of a party's request. Namely, in the presence of such circumstances that a party's real need for legal protection against a "non-existent judgment" can be demonstrated, in such a way

7. CONCLUSION

The issue of the legal nature of judgments rendered without the free will of judges, mentally ill judges and unauthorized judges (taking into account judgments rendered by the occupation authorities) is understandably (due to its rare occurrence) not in the focus of the legal profession. However, this does not mean that these legal phenomena should not be researched and that it is not necessary to try to make a small contribution to the development of legal theory and the improvement of legal security of citizens affected by judgments rendered under "special circumstances" that we have considered in this paper. Moreover, the lack of professional and scientific literature on this topic is even more reason to research and write about this issue.

We have seen that in Croatian, German, and Austrian legal doctrine, there are partly identical, partly different, and partly opposing understandings of the legal nature of judgments rendered without the free will of judges, by mentally ill judges, and by unauthorized judges. Some of these decisions are defined by theorists as existent, while others are considered non-existent. The answer to the question of whether they exist or not also determines the method of legal protection against such decisions, as they can undoubtedly produce legal effects. We have presented our own position on these issues in Chapter 6 of this paper-.

In the end, we hope that this paper will be interesting to the reader, perhaps useful to some, and perhaps an incentive for some aspiring lawyers to further engage with this and similar issues.

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that the ineffectiveness of the non-existent judgment is established in a generally binding and final manner. In this sense, Fasching proposes that the court, at the request of the party, issue a declaratory decision stating that the judgment is to be deemed not to have been rendered. In the event that a party files an appeal against a sham judgment, which appeal would be inadmissible for that reason, Fasching holds that the appeal should be treated as a request for a declaratory decision stating that the judgment is to be deemed not to have been rendered. Fasching finds the legal basis for this treatment of an appeal filed against a non-judgment in the provision of paragraph 84, paragraph 2. A of the ZPO. See: Fasching, *op. cit*. (note 15.), p. 799-800.

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STUDENTS WITH DISABILITIES IN THE CONTEXT OF CROATIAN HIGHER EDUCATION – SOME QUESTIONS, FINDINGS AND PROBLEMS*

ABSTRACT

In the context of current debates on the right to education as a fundamental human right, the importance and benefits of education for individuals and for society as a whole, on equality, fairness and social justice, etc., particular attention is directed towards analysing the issue of persons with disabilities in the context of the higher education system. The topic is also updated with the current debates on the promotion and strengthening of "inclusive education", the social dimension of the "Bologna Process", achiving the "sustainable development goals" and implementing the contemporary "human rights model" approach to disability. Based on a review and analysis of the scientific literature, as well as the legal framework and documents, and by using a hermeneutic approach, as well as analysis and comparison of available secondary data on students with disabilities in Croatia (with a focus on the University of J. J. Strossmayer in Osijek and the University of Split), the aim of this paper is to present, analyse and highlight some questions, problems and obstacles related to the position of students with disabilities in Croatian higher education. In this context, the discrepancy between the existing legal framework and its application in practise is emphasised, as well as the need to respect the human rights of persons with disabilities and ensure them equal opportunities and access to higher education in order to build a more inclusive higher education system, achieve the Bologna goals and the sustainable development goals and build a more just, equal and inclusive society.

Keywords: *students with disabilities; higher education; human rights; inclusion; Croatian society.*

"People with physical […] disability are not only
among the most deprived human beings in the world,
they are also, frequently enough, the most neglected."

(Amartya Sen, *The Idea of Justice*)

1. INTRODUCTION

The issue of students with disabilities in the Croatian higher education and science system is very complex for several reasons. On the one hand, the problem of the lack of uniform standards and specific guidelines must be pointed out, as well as the lack of responsibility and resources to take appropriate measures for people with disabilities in practise[1], which often proves to be very problematic and even discriminatory within the higher education system itself. On the other hand, there is constant talk about the need to improve the quality of the system itself. Today, the view is almost unconditionally accepted that "the most successful education systems are those that can combine equity and quality".[2] The idea that there is no binding or optional legal framework is often the result of prejudices about the legal culture or legal non-culture in Croatia. Although there are legal and implementing regulations in Croatia, they are often applied only partially or selectively, sometimes even casually. One example of this is the accessibility of public spaces in our universities, including the newly built ones, which should be a representative indicator not only of social sensitivity, but also of fairness and quality. One of the constant complaints about our legal system is that our legal rules and principles do not follow practise. Interestingly, this is also mentioned in the "Report on the work of the Ombudsman for Persons with Disabilities" from

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[1] This expression "emphasises that it is a person in the full sense of the word, but since the relevant part of the population must be named, the addition 'with a disability' is added. This means that the person is not 'disabled', but that a part or parts of their psyche and/or body are affected by certain deficits and do not have the functions that they have in healthy people". Marinić, M., *Jesu li osobe s invaliditetom „invalidi"? Pitanje konceptualne naravi, ali i potreba izjednačavanja mogućnosti.* Društvena istraživanja*,* Vol. 17, No. 1-2 (93-94), 2008, p. 201

[2] OECD., *Equity and Quality in Education: Supporting Disadvantaged Students and Schools*, OECD Publishing, 2012, p. 3, https://www.oecd.org/en/publications/equity-and-quality-in-education_ 9789264130852-en.html, 2 February, 2025.

2023[3], and one of our best-known documents on guidelines and standards for the accessibility of higher education for students with disabilities in the Republic of Croatia[4]. The second reason why it is ungrateful to deal with this subject is numerical or statistical data. They are difficult to obtain, and even when they are collected, they are difficult or impossible to compare due to the inconsistent methodology of data collection. The third reason is perhaps the least publicly discussed. Indeed, there is almost no discussion at all about the various forms of abuse of the system by its users, which in the context of this topic includes those who believe they deserve the status of a student with a disability and other health problems that may affect the progress of their studies. Understandably, there is no statistical or explanatory data on this.

The global problem of disability is enormous. Nobel Prize-winning economist Amartya Sen reports that "more than 600 million people – about a tenth of all people – live with some form of severe disability. More than 400 million of them live in underdeveloped countries"[5]. Furthermore, Sen continues, "people with disabilities in developed countries are often among the poorest of the poor in terms of income".[6] As if one problem were not enough. And usually it isn't. In addition to the "handicap of earning", people with disabilities are also confronted with the "handicap of conversion": the difficulty of "converting income and resources into a good life precisely because of the disability".[7] Similar data are highlighted by the World Health Organisation and the European Commission. According to the World Health Organisation in 2022, "around 1.3 billion people, i.e. around 16% of the world's population, are people with disabilities"[8], while, according to the European Commission, "around 100 million people in the EU live with some

[3] The aforementioned report states that "the normative framework for the protection of the rights of persons with disabilities is largely in line with the Convention on the Rights of Persons with Disabilities and its principles, but we are lagging behind as a society in implementing the provisions and realising the rights in practise", *Izvješće o radu Pravobranitelja za osobe s invaliditetom,* 2023*,* p. 6, https://posi.hr/izvjesca-o-radu/, 11 January, 2025.

[4] According to the document *Osiguravanje minimalnih standarda pristupačnosti visokog obrazovanja za studente s invaliditetom u Republici Hrvatskoj* "the legal prerequisites for ensuring equal opportunities, i.e. accessibility of higher education for people with disabilities in the Republic of Croatia, are in place. What is lacking are concrete measures by the responsible institutions to ensure that the equal opportunities defined in the regulations are actually implemented in practise", 2013, p. 23, http://www.unizg.hr/studiji-i-studiranje/podrska-studentima/podrska-studentima-s-invaliditetom/dokumenti/, 11 January, 2025.

[5] Sen, A., *Ideja pravednosti*, Naklada Jesenski i Turk, Zagreb, 2017, p. 247.

[6] *Loc. cit.*

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[8] WHO., *Global Report on Health Equity for Persons with Disabilities*, 2022, p. 3, https://www.who.int/publications/i/item/9789240063600, 12 January, 2025.

form of disability"[9]. The educational structure and their position within the education system is best illustrated by Eurostat data from 2018, according to which "two out of five people with disabilities have only completed primary or lower secondary education"; "a larger number of people with disabilities aged 15-34 do not participate in the education, rehabilitation and employment system compared to their peers without disabilities (15% more)"; "young persons with disabilities usually leave education earlier than persons with no disabilities" etc.[10] The best illustration of their position in society and on the labour market is the European Commission's data, according to which "only half of people with disabilities in the EU are employed"; a third of people with disabilities in the EU (28.4%) are at risk of poverty and social exclusion, while "half of all people with disabilities in the EU (52%) feel discriminated against"[11]. The disadvantaged position of people with disabilities in the labour market is also highlighted in a study by the International Labour Organisation in 2024, according to which people with disabilities of working age are worse off in the labour market than other people and less likely to participate in the labour market at all, and when they do participate, they "face higher unemployment rates, are more likely to be self-employed and tend to earn less."[12]

The representation of people with disabilities in Croatia is in line with the aforementioned estimates. According to the "Report on People with Disabilities in the Republic of Croatia" of the Croatian Institute of Public Health from 2023, there are "657,791 people with disabilities in Croatia, of whom 369,242 are male (56.1%) and 288,549 are female (43.9%)", which corresponds to 17% of the total population of the Republic of Croatia[13]. In terms of age structure, 47.6% belong to the 65+ age group, 41.2% to the working age group (20 to 64 years), while 11.1% of people with disabilities belong to the group of children and young people (0 to 19 years)[14]. The above-mentioned report from 2023 does not include data on completed education and living conditions (due to the change in data collection methodology), but for the purposes of this paper we will highlight the data that is available and published as part of the "Report on People with Disabilities in the

[9] Europska komisija., *Osobe s invaliditetom*, 2024, https://ec.europa.eu/social/main.jsp?catId =1137&langId=hr, 12 January, 2025.
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[14] *Loc. cit.*

Republic of Croatia" from 2019. According to the aforementioned report, around 66% of people with disabilities in the Republic of Croatia "have not completed primary school or have only primary education", while around 25% have completed secondary school; only "3% have university or higher education", and "6% of people with disabilities have completed special education".[15] According to the "Report on the work of the Ombudsman for Persons with Disabilities" from 2019, data on differences in the educational structure between male and female persons with disabilities also stand out. According to the data on the education of males with disabilities, "63.5% have completed primary school, incomplete primary school or no primary school"; 28.5% have completed secondary school; 6% have a university or university degree and 2% have "completed education in special institutions and according to a special programme", while for females with disabilities an even higher percentage of persons with "completed primary school, incomplete primary school" or no education was recorded, namely 72.8%; 18.2% have completed secondary school; 7.2% have a university or higher education degree, and 1.8% have "completed education in special institutions and according to a special programme".[16] The stated low educational structure of people with disabilities; inadequate or non-adapted education[17]; the "limited number of professions" for which training is offered and "education for unpromising professions", i.e. the mismatch of this education with the needs of the labour market, "prejudices and stereotypes about people with disabilities", "discrimination in job search", etc. also contribute to the low proportion of people with disabilities among the workforce in Croatia[18]. The fact that people with disabilities face particular challenges in the labour market is best illustrated by the fact that in Croatia in 2018 "the employment rate of people with disabilities was 34.3%", while the average employment rate of people with disabilities in the EU is 50.8%[19]. The employment rate has increased in recent years, which means that the employment gap has narrowed compared to the total population, but this gap

[15] Benjak T., *Izvješće o osobama s invaliditetom u Republici Hrvatskoj*. Hrvatski zavod za javno zdravstvo, Zagreb, 2019, p. 6, https://www.hzjz.hr/wp-content/uploads/2019/05/Osobe_s_invaliditetom_2019.pdf, 12 February, 2025.

[16] *Izvješće o radu Pravobranitelja za osobe s invaliditetom*, 2019, p. 2, https://posi.hr/izvjesca-o-radu/, 11 January, 2025.

[17] As an illustration, we can highlight the information about the inadequate or non-adapted education for deafblind people in Croatia, the refusal and lack of sign language interpreters and accompaniment from the pre-school system onwards during education, which undoubtedly affects their poorer results in the education system and then the more frequent completion of three-year secondary school programmes. Brajdić Vuković M.; Vuković, P., *Jednakost šansi u postizanju svakodnevne kvalitete života kod gluhoslijepih osoba*. Revija za socijalnu politiku, 27 (2), 2020, pp. 206-208.

[18] Leutar Z.; Buljevac M., *op. cit.* note 10, p. 130.

[19] National Development Strategy of the Republic of Croatia until 2030, Official Gazette, No. 13/2021 (hereinafter: NDS)

is still "one of the largest in the EU".[20] All this, together with the low labour and pension income and the low financial benefits received by people with disabilities, leads to an increased risk of poverty and social exclusion, which is also evident from the conclusions of various studies on poverty, poor material situation and standard of living and social exclusion of people with disabilities in today's Croatian society.[21] The employment of persons with disabilities, their upward social mobility, the improvement of material standards and quality of life and social inclusion in general can undoubtedly be promoted through education and vocational rehabilitation as an important and indispensable, though not sufficient or the only, condition. Because even the achievement of the highest scientific degree in practise can be cancelled out by the presence of prejudices and stereotypes about people with disabilities in society and among employers, discrimination in employment, etc. In short, education of people with disabilities alone will not solve the problems associated with their employment. However, education and vocational rehabilitation are essential in this sense and should focus on "occupations that are employable and prosperous"; people with disabilities should be empowered and their acquisition of knowledge, skills and competences systematically promoted; access to all "formal and informal forms of education" must be ensured, etc.[22] In this sense the need for greater inclusion of young people with disabilities in the higher education system should be emphasised. A brief overview and analysis of the relevant legal framework, professional and scientific literature and current documents analysing the above-mentioned issues in Croatian society are the subject of the next chapter of the paper.

2. SOCIETY AND STUDENTS WITH DISABILITIES – LITERATURE REVIEW AND ANALYSIS OF LEGAL FRAMEWORK AND STRETEGIC DOCUMENTS

An overview of a broader theoretical framework explaining the importance of education for the realisation of more equitable "meritocratic" contemporary societies, often referred to in the sociological literature as "knowledge societies", i.e. societies with a high proportion of highly skilled professionals, "information societies", "post-industrial societies", etc., is beyond the scope of this

[20] *Loc. cit.*
[21] Leutar, Z.; Milić Babić, M., *Pravo na rad i osobe s invaliditetom u Hrvatskoj*. Sociologija i prostor, Vol. 46, No. 2 (180), 2008, pp. 161-186.; Leutar Z.; Buljevac M., *op. cit.* note 10; Marinić, *op. cit.* note 1, pp. 199-221.; Starc N. (ed), *Siromaštvo, nezaposlenost i socijalna isključenost*, UNDP, Zagreb, 2006; Žganec N.; Lakija, M.; Milić Babić M., *Access to social rights and persons with disabilities*. Društvena istraživanja, Vol. 21, No. 1 (115), 2012, pp. 59-78.
[22] Leutar Z.; Buljevac M., *op. cit.* note 10, p. 130.

paper.[23]Nevertheless, it is an indispensable theoretical framework and context to understand the implications of the themes of this paper, and when we talk about human rights, equality, fairness and social justice; about the importance and benefits of education for the individual (for their personal and professional development) and for society as a whole (education as a basis and tool for economic development, employment, social inclusion, social mobility, breaking out of the "vicious circle of poverty", etc.); about the philosophy of inclusion which "assumes that the position of people with disabilities and their discrimination is socially determined"; the fulfilment of the objectives of the social dimension of the Bologna Process (focusing on inclusion in higher education, especially for different disadvantaged social groups, in order to reduce social inequalities)[24]; reducing existing educational inequalities, etc.[25]

Furthermore, the inclusion of people with disabilities as an "underrepresented group in the higher education system" must be placed in a theoretical context in which, based on the above, the right to education is emphasised as a fundamental human right (while preventing the realisation of this right constitutes its violation and discrimination); "inclusive education" (inclusive and quality education that reduces the marginalisation of vulnerable groups in society within the education system); "principles of equal opportunities in education or education for all"; "adjustments to the academic environment", etc.[26] One of the first stumbling blocks in researching this topic is the lack of a "normative definition of a student with disabilities" in Croatia.[27] However, since 2013, when the aforementioned document about standards of accessibility of higher education for students with disabilities was published, the definition used is that students with disabilities are "students with visual and hearing impairments, motor disorders, chronic illnesses, specific learning difficulties (dyslexia, ADHD), mental illnesses and disorders".[28] According to the authors of the above-mentioned document, "there is no single and internationally recognised definition of students with disabilities", therefore the definition must be broad enough to "demonstrate the need to adapt the

[23] Pavić, Ž.; Vukelić, T., *Socijalno podrijetlo i obrazovne nejednakosti: istraživanje na primjeru osječkih studenata i srednjoškolaca.* Revija za sociologiju, Vol. 40(9), No. 1-2, 2009, pp. 53-55.
[24] An overview and analysis of existing public policies and the relevant international and national legal framework on the social dimension of the Bologna Process can be found in the following paper: Bošković, S.; Rinčić, I., *Visoko obrazovanje studenata s invaliditetom u Hrvatskoj*. Ljetopis socijalnog rada, 21 (3), 2014, pp. 487-492.
[25] Bošković, S.; Rinčić, I., *op. cit.* note 24, pp. 486-487.; Leutar Z.; Buljevac M., *op. cit.* note 10; Pavić, Ž.; Vukelić, T., *op. cit.* note 23, pp. 56-60.
[26] Bošković, S.; Rinčić, I., *op. cit.* note 24, p. 487.
[27] *Ibid.,* p. 495.
[28] Farnell, T. et al., i sur., *Osiguravanje minimalnih standarda pristupačnosti visokog obrazovanja za studente s invaliditetom u Republici Hrvatskoj*, 2013, p. 8

academic environment to the needs and abilities of all the groups of students mentioned".[29] In this sense, a slightly more detailed definition can be found in the document entitled "Guidelines for Improving the Support System for Students with Disabilities in Higher Education in the Republic of Croatia" from 2016, according to which students with disabilities are "all students who, due to illness, impairment or disorder, regardless of the decision on the specified percentage of physical impairment, have permanent, occasional or temporary difficulties in performing everyday academic activities (students with visual and hearing impairments, motor disorders, chronic illnesses, mental illnesses and disorders and specific learning difficulties such as dyslexia, dysgraphia and ADHD, as well as other health problems and difficulties that may affect the course of their studies)".[30] Finally, the Ombudsman for Persons with Disabilities in Croatia proposes the following definition as a suggestion for a formal definition of students with disabilities: "students with disabilities are students whose health condition, difficulties or impairments in combination with environmental factors may prevent their full and effective participation in the academic environment on an equal basis with other students and for whom they require reasonable adjustments and support."[31]

In addition to defining the term "students with disabilities", the second step in analysing the above-mentioned topic involves examining the relevant legal framework that regulates the right to equal access to higher education for persons with disabilities in Croatia and which also forms the basis for the actions of all higher education institutions in the Republic of Croatia. It is important to emphasise that the legal framework that ensures the right of persons with disabilities to equal access to education, equal opportunities and conditions during education and accessibility of higher education for all persons, including persons with disabilities, includes a whole range of Acts, international conventions and national documents, strategies and guidelines.[32] Their review and analysis goes beyond the scope of this paper, but we will highlight some of them below. Namely, the legal regulation of the right to education can be found primarily in the Constitution of the Republic of Croatia as the fundamental legal and political state

[29] *Loc. cit.*
[30] Kiš-Glavaš, L. et. al. i sur., Smjernice za unapređenje sustava potpore studentima s invaliditetom u visokom obrazovanju u Republici Hrvatskoj, 2016, p. 4-5, https://www.unizg.hr/fileadmin/rektorat/Studiji_ studiranje/ Podrska/SSI/Smjernice_LKG_2016.pdf, 11 January, 2025.
[31] *Izvješće o radu Pravobranitelja za osobe s invaliditetom, op. cit.* note 3, p. 119.
[32] In addition to these documents, it also contains the statutes of various universities and their components, and the study regulations of various higher education institutions.

document[33], than in the The Act on Higher Education and Scientific Activity[34], The anti-discrimination Act[35] etc.

In addition, we list below some of the most important international declarations, conventions and international and national strategies and guidelines that define the various rights of persons with disabilities and emphasise the need to protect and guarantee the human rights and fundamental freedoms of all persons with disabilities on an equal basis with others. In doing so, we emphasise the right to equal access to higher education and the need for special consideration of the social dimension of studying for people with disabilities. In this sense, the UN „Convention on the Rights of Persons with Disabilities" should first be emphasised, as it is the first binding international human rights instrument for persons with disabilities, which Croatia ratified in 2007.[36] The Convention refers to the guarantee of a wide range of human rights for people with disabilities (civil, economic, social, political and cultural rights), and an entire article is dedicated to the right to education "without discrimination and on the basis of equal opportunities".[37] The Convention has influenced the development of the "human

33 Article 66 states that "education in the Republic of Croatia is open to all people under equal conditions and according to their abilities", while Article 58 emphasises that the state pays special attention to "the protection of persons with disabilities and their inclusion in social life". The Constitution of the Republic of Croatia, Official Gazette, No. 56/90, 135/97, 8/89, 113/99, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

34 Article 77. rights and obligations of students states that "a student with a disability may study in accordance with the general law of the higher education institution under adapted study conditions", while Article 78. rights under the student standard states that "a student with a certain degree of disability who is studying full-time shall exercise special rights from the students standard in accordance with the general law of the higher education institution", and that "a student with a certain type and degree of disability shall exercise the right to transportation for students with disabilities". The Act on Higher Education and Scientific Activity, Official Gazette, No. 119/2022.

35 The Act prohibits unequal treatment or discrimination against persons on any of the statutory grounds, including health and disability. Article 4 states that discrimination also occurs "when persons with disabilities are not enabled to use publicly available resources, to participate in public and social life, to have access to the workplace and to appropriate working conditions, in accordance with their special needs, through the adaptation of infrastructure and space, the use of equipment and in any other way that does not impose a disproportionate burden on the person for whom this is necessary". The anti-discrimination Act, Official Gazette, No. 85/2008.

36 Croatia signed the above Convention on 30 March 2007, ratified it on 15 August 2007 and it entered into force on 3 May 2008. Babić, Z.; Leutar, Z., *Položaj osoba s invaliditetom na tržištu rada Republike Hrvatske*. Socijalna ekologija, Vol. 19, No. 2, 2010, p. 195.

37 In order to realise this right, the State must ensure "(a) that persons with disabilities are not excluded from the general education system on the basis of their disability and that children with disabilities are not excluded from free and compulsory primary or secondary education on the basis of their disability, (b) that persons with disabilities have access to inclusive, quality and free education on an equal basis with others, (c) reasonable accommodation of individual needs, (d) that persons with disabilities receive the necessary

rights model" as the latest approach to disability and forms the basis for the realisation of "all the rights and duties of persons with disabilities that it promotes and guarantees".[38] Furthermore, the European Social Charter should be mentioned[39], Declaration on the Rights of Persons with Disabilities[40], Council of Europe Strategy for Persons with Disabilities 2017-2023[41], National Plan for Improving the Social Dimension of Higher Education in the Republic of Croatia 2019-2021[42] etc.

As a welfare state, Croatia commits itself in the "National Development Strategy of the Republic of Croatia until 2030"[43] to strive for "further convergence towards the ideal of equal opportunities" and the inclusion of marginalised and particularly vulnerable population groups (which undoubtedly includes people with

support within the general education system to facilitate their effective education, (e) the provision of effective individualised support measures in an environment that is most conducive to academic and social development, consistent with the goal of full inclusion". Act on the ratification of the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention on the Rights of Persons with Disabilities, Official Gazette, No. 6/ 2007.

[38] Leutar Z.; Buljevac M., *op. cit.* note 10, p. 42.

[39] Article 15 refers to the "right of physically or mentally disabled persons to vocational training, rehabilitation and social reintegration" and the adoption of "appropriate measures for the provision of training facilities" and for employment. Act on the ratification of the European Social Charter, the Additional Protocol to the European Social Charter, the Protocol amending the European Social Charter and the Additional Protocol to the European Social Charter on a system of collective complaints, Official Gazette, No. 15/2002.

[40] With regard to education, paragraph 16 states: "In order to ensure adequate education, the Republic of Croatia will adapt its education system to the needs of persons with disabilities, insisting on adapting the existing regular education programmes and systems (pre-school, primary, secondary, higher and adult education systems) and promoting the use of new technologies, distance learning and e-education". Declaration on the Rights of Persons with Disabilities, Official Gazette, No. 47/2005.

[41] In particular, the chapter on education and training (paragraph 62) expresses "concern that, despite improvements, people with disabilities are still at high risk of becoming unemployed and that less than 30% of them have a tertiary or equivalent qualification, compared to around 40% of people without disabilities; Member States and the Commission are therefore invited to pay particular attention to the difficulties faced by young people with disabilities and/or special educational needs in the transition from secondary or higher education to the labour market". Strategija Vijeća Europe za osobe s invaliditetom 2017.-2023., https://eurlex.europa.eu/legalcontent/HR/TXT/PDF/?uri=CELEX:52017IP0474&from=GA, 15 February, 2025.

[42] It also includes measures to systematically support people with disabilities, the implementation of which will lead to better accessibility and adaptation of educational programmes to people with disabilities. Nacionalni plan za unaprjeđenje socijalne dimenzije visokog obrazovanja u Republici Hrvatskoj 2019. – 2021., https://mzo.gov.hr/UserDocsImages/dokumenti/Obrazovanje/VisokoObrazovanje/RazvojVisokogObrazovanja..pdf,15 February, 2025.

[43] NDS, Official Gazette, No. 13/2021.

disabilities, people in institutions, people at risk of poverty, people with low socio-economic status, etc.) and the realisation of social cohesion, which is "a prerequisite for social justice, democratic security and sustainable development", as well as ensuring the "protection of human rights, democracy and the rule of law".[44] As part of the above strategy, Croatia is committed to long-term, sustainable and inclusive development, the benefits of which should be shared by all members of society, and to the realisation of priorities and goals that are in line with the "2030 Agenda for Sustainable Development"[45] (for example fulfilment of the "sustainable development goals", especially reducing the level of absolute poverty; employment and decent work; reducing inequality and ensuring and promoting social, economic and political inclusion, etc.) and the "European Green Deal"[46]. Such economic and social development is sought within the framework of the following four development directions for Croatia: "sustainable economy and society" (building a "society based on the rule of law", continuous investment in knowledge and education for all members of society, "integration of all social groups into the world of work", etc.); "strengthening resilience to crises" (promoting social inclusion, combating poverty and improving the quality of life of all citizens, etc.); "green and digital transformation" (ecological, green and digital transformation of society and the economy) and "balanced regional development" (better standards and quality of life in all parts of Croatia").[47] Furthermore, with the above-mentioned strategy, Croatia has committed itself to promoting public policies, priorities and measures that prevent discrimination on any grounds, including disability, and ensure equal opportunities for the exercise of rights and the creation and promotion of "equal opportunities" for all members of society. In this sense, Croatia has also committed to implementing public policies that take into account the specificities of people with disabilities, "with particular emphasis on ensuring equal access to education, employment and all public services"[48]. Ultimately, these are obligations arising from the duty to comprehensively implement the "Convention on the Rights of Persons with Disabilities", which Croatia has committed to by signing and ratifying it.

However, despite this international legal framework and decades of implementation of the Bologna Process, according to data from the European

[44] *Loc. cit.*
[45] UN., *Transforming Our World: The 2030 Agenda for Sustainable Development*, 2015, https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20 Development%20web.pdf, 8 February, 2025.
[46] European Commission., *European Green Deal: delivering on our targets*, 2019, https://ec.europa.eu/commission/presscorner/api/files/attachment/869807/EGD_brochure_EN.pdf, 9 February, 2025.
[47] NDS, Official Gazette, No. 13/2021.
[48] *Loc. cit.*

Students' Union (ESU) taken from Eurostat statistics on disabilities among students, "only 15% of disabled people attain higher education"[49]. Furthermore, "once enrolled in a higher education institution, it is also more difficult for such a student to graduate", more precisely "only 24% of the population aged between 30 and 34, and having a disability have graduated".[50] According to the same source, the reasons for dropping out of studies are multiple: inaccessible buildings, inaccessible teaching methods, "lack of training of academic staff and other higher education staff members"; "lack of understanding of disabilities"; "stigma from other students and staff members", "lack of support programmes or the inaccessibility of such programmes"; "lack of accessible student activities" etc.[51] Therefore, in the following chapter, some questions, problems and obstacles related to the position of students with disabilities in Croatian higher education will be analysed and highlighted.

3. ABOUT THE NUMBERS AND SOME PROBLEMS WITH REGISTERING AND OTHER ISSUES REGARDING THE STUDENTS WITH DISABILITIES IN CROATIA

According to "The Act on Higher Education and Scientific Activity" the possibility of studying for students with disabilities is prescribed "in accordance with the adapted conditions for participation in studies"[52], however, the *obligation to make* a *reasonable* accommodation" is not prescribed[53]. The Ombudsman for Persons with Disabilities considers that "without reasonable accommodation and the necessary support, students with disabilities cannot be guaranteed equal study opportunities" and points out the need to harmonise the above-mentioned Act with the "Convention on the Rights of Persons with Disabilities" and with "The anti-discrimination Act"[54]. Namely, according to the aforementioned Acts, people with disabilities must have "equal access to tertiary education, with the obligation to make the necessary reasonable accommodations, and they must not be excluded because of their disability".[55] In this context, the Ombudsman proposes "to include in all general acts of higher education institutions": firstly, to define "who are students with disabilities and the right to reasonable accommodation in all areas";

[49] European students' union (ESU)., *Disabilities, students and Higher Education*, 2018, https://esu-online.org/disabilities-students-higher-education/, 6 March, 2025.
[50] *Loc. cit.*
[51] *Loc. cit.*
[52] Article 77 of The Act on Higher Education and Scientific Activity, Official Gazette, No. 119/2022.
[53] *Izvješće o radu Pravobranitelja za osobe s invaliditetom*, *op. cit.* note 3, p. 119.
[54] *Loc. cit.*
[55] *Loc. cit.*

secondly, to establish "a clear method of recording students with disabilities"; and thirdly, "to establish specific rights and support within higher education (e.g. the involvement of teaching assistants and professional communication mediators, individualised support during studies, adapted transport, adapted accommodation in a student residence, personal assistance in a student residence, etc., and the method/procedure for exercising the aforementioned rights".[56] The unique way in which students with disabilities are evidented is important for the planning and design of educational policy and the various support measures, which differ according to the type of disability.[57]Although the Office of the Ombudsman for Persons with Disabilities has been pointing out this problem and the need for systematic and standardised data collection for years, its proposals have unfortunately not been adopted and universities continue to collect data based on different collection methods. For this reason, it can be concluded that there is no clear and therefore no reliable data on the number of students with disabilities at Croatian universities. One of the reasons for this is that "the inclusion of people with disabilities in higher education" is insufficiently regulated due to the lack of a standardised definition and "in practise, this leads to a perceived inconsistency of approach" and "each institution deals in its own way with the challenges arising from the requirements for the inclusion of people with disabilities proclaimed at the priniciple level".[58] Although there has undoubtedly been positive progress in the last decade, the inclusion of people with disabilities in the higher education system and the handling of their challenges and problems is still in a "grey area", not only in our education and legal system, but also in society in general. Another reason is that "students do not want to declare their disability or cannot obtain a disability certificate, especially when it comes to mental health difficulties and specific learning difficulties."[59] For the purposes of this paper, we have been warned several times that the official figures are flawed in this regard because they do not capture everyone who is actually in the system. So there is also a fear of stigmatisation or labelling. The cause of this can be "a society that discriminates against those with disabilities", where "it can be active discrimination or a failure to provide the necessary resources and conditions to minimise the impact of disability".[60]

One source of data on the number of students with disabilities is the data of the Ministry of Science, Education and Youth which collects the above-mentioned

[56] *Loc. cit.*
[57] *Ibid.,* p. 123.
[58] Meić, B., *Položaj osoba s invaliditetom u sustavu visokog obrazovanja - perspektiva Ureda pravobraniteljice za osobe s invaliditetom*. Jahr, Vol. 5, No. 1, 2014, pp. 24-25.
[59] *Ibid.,* p. 25.
[60] Haralambos, M.; Holborn. M., *Sociologija: teme i perspektive*, Golden marketing – Tehnička knjiga, Zagreb, 2002, p. 314.

data as part of an information system that records students with disabilities with at least 60% assessed physical impairment or at least degree III impairment of functional abilities in accordance with the instructions on the expert investigation methodology and entry in the Register of persons with disabilities. Namely, recorded students can exercise the following rights during their university studies in Croatia: direct enrolment in study programmes at higher education institutions outside the regular quota, provided that they exceed the points threshold; the right to a full subsidy of study costs in the first year of study and the following year if they have earned at least 30 ECTS in the previous academic year; the direct right to subsidised housing[61]; the right to financial support to partially cover the costs of transport from the place of residence to the place of attendance at the higher education institution and for the fulfilment of other study obligations; a state scholarship for special groups of students, including full-time students "people with disabilities"; as part of the Erasmus+ international student exchange programme, students with disabilities or other special needs are entitled to additional financial support for special needs (e.g. adapted accommodation, travel assistance, travel support, medical care, additional equipment, adapted teaching materials, an accompanying person, etc.). According to the data collected by the Ministry of Science, Education and Youth, 369 students with disabilities were enrolled in the Republic of Croatia in the academic year 2023/2024; in the academic year 2022/2023, 258 students with disabilities were accommodated in student residences, and 193 students with disabilities were entitled to financial support for transport.[62]

Another source of data on the number of students with disabilities are the registers kept by universities, polytechnic universities and colleges, which in turn record the students who have contacted the Disability Officers to obtain support in the form of some academic adjustment (for adjustment during examinations, absence from classes, etc.) or support during their studies. Students are, of course, under

[61] With regard to the right to subsidised housing, there are two groups of students with disabilities. "The student with disabilities of the first group is a student with an assessed physical impairment of at least 60% or with an impairment of functional abilities of at least the third degree according to the regulation prescribing the expert investigation methodology and who is registered in the Register of persons with disabilities", and "a student with disabilities of the second group is a student with an assessed physical impairment of up to 50% or with an impairment of functional abilities of up to the second degree according to the regulation prescribing the expert investigation methodology and registered in the Register of persons with disabilities". Students in the first group acquire the right to social housing directly (in the first year of study directly, in the following years they must obtain at least 15 ECTS points during the academic year), while students in the second group obtain 400 points, which they attach to their application. Regulation on the criteria and *manner of exercising rights* of students in regular status to subsidised housing, Official Gazette, No. 68/2023.

[62] *Izvješće o radu Pravobranitelja za osobe s invaliditetom, op. cit.* note 3, p. 122.

no obligation to seek such assistance, unless they wish to claim a right to academic adjustment or support during their studies. According to this data, a total of 1,066 students with disabilities studied at universities, polytechnic universities and colleges in Croatia in the 2023/2024 academic year.[63] (Table 1).

Table 1. Number of students with disabilities in Croatia according to data from universities, polytechnic universities and colleges in the academic years 2022/2023 and 2023/2024

Universities/ polytechnic universities and colleges	**2022/2023**			**2023/2024**		
	Total number of students	**Total number of students with disabilities**	**Share in total number**	**Total number of students**	**Total number of students with disabilities**	**Share in total number**
Univerisities in total	135.099	978	0,72%	135.675	1.059	0,78%
Polytechnic universities and colleges in total	24.670	88	0.36%	13.319	93	0,69%
In total	159.769	1.066	0,67%	148.994	1.152	0,77%

Source: *Izvješće o radu Pravobranitelja za osobe s invaliditetom,* 2023, p. 123.

The inconsistency of data collection on the number of students with disabilities is also reflected in the way in which data is collected by different universities. For this reason, the authors of the paper requested data on the number of students with disabilities from the Office for Students with Disabilities at the Josip Juraj Strossmayer University in Osijek and the University of Split. The collected data can confirm the above-mentioned inconsistency in data collection (Table 2).

[63] *Ibid.,* p. 123.

Table 2. Number of registered students with disabilities at the Josip Juraj Strossmayer University of Osijek and the University of Split

Academic year	Number of registered students with disabilities at the University of Osijek		Number of registered students with disabilities at the University of Split	
	In total	Active	In total	Active
2010/2011	26	26	-	-
2011/2012	42	34	-	-
2012/2013	46	37	-	-
2013/2014	57	39	-	-
2014/2015	68	48	-	-
2015/2016	82	58	36	-
2016/2017	92	61	38	-
2017/2018	96	59	41	-
2018/2019	104	58	43	-
2019/2020	115	64	43	-
2020/2021	130	65	53	-
2021/2022	136	62	57	-
2022/2023	156	75	58	-
2023/2024	179	90	61	-
2024/2025	201*	102	98**	-

*of that number, 156 students have physical disabilities of 60% or more;
** of that number, 54 students have physical disabilities of 60% or more;
Source: prepared by the authors based on data from the Office for Students with Disabilities of the Josip Juraj Strossmayer University in Osijek and the Office for Students with Disabilities of the University of Split

In contrast to the data collected by the Office for Students with Disabilities of the University of Split, which refers only to the total number of students at all university components since the academic year 2015/2016 (when the Office for Students with Disabilities of the University of Split started its work) ,[64] the data received from the Office for Students with Disabilities at Josip Juraj Strossmayer University in Osijek includes this information, but also data on activities, i.e. progress of enrolled students, graduations, etc. The Office for Students with

[64] The Office for Students with Disabilities at the University of Split started its work on 1 May 2016 and consists of one person, namely the Head of the Office for Students with Disabilities. We would like to take this opportunity to thank the Head of the Office, Ivan Bogdanović, for his sincere help and provision of data for the needs of this paper. Studenti s invaliditetom Sveučilišta u Splitu, https://arhiva.unist.hr/studiranje-u-splitu/ured-za-studente-s-posebnim-potrebama, 10 January, 2025.

Disabilities at the J. J. Strossmayer University of Osijek was established in 2008.[65] Since then, data on the number of enrolled students with some form of disability has been monitored, and since the 2010/2011 academic year, a regular annual system of monitoring the number of students has been developed through the "Record List of the Office for Students with Disabilities". Each university component at the University of Osijek maintains its own table with data on students with disabilities. In the 2013/2014 academic year, the monitoring system was improved to remedy some of the shortcomings identified. In addition to the record sheets, all participants fill in a table with a standardised form that shows the progress of each student. Students are never removed from the spreadsheet, only data on status changes (student's year, inaction, graduation, etc.) are added. The Office for Students with Disabilities continues to maintain a standardised "Register for Students with Disabilities" (Table 3), which can also serve as an example of how data can be collected and consolidated in the Register for Students with Disabilities at the University of Split.

[65] The Office for Students with Disabilities at the Josip Juraj Strossmayer University of Osijek was established on 26 May 2008. The Office employs two people and is managed and coordinated by the Vice-Rector for Academic Affairs and Students and the Head of the Office. We would like to take this opportunity to thank the Head of the Office, Damir Španić, PhD, for his sincere help and provision of data for the needs of this paper. Studenti s invaliditetom Sveučilišta Josip Juraj Strossmayer u Osijeku, https://unios.hr/studenti/studenti-s-invaliditetom/podrska/, 10 January, 2025.

Table 3. Register of students with disabilities at the University of Osijek (2010 – 2024)

Academic year	Number of registered students with disabilities		Graduated	Withdraw	Transition
	In total	Active			
2010/2011	26	26			
2011/2012	42	34			
2012/2013	46	37	8	1	0
2013/2014	57	39	13	4	1
2014/2015	68	48	14	5	1
2015/2016	82	58	16	7	1
2016/2017	92	61	17	13	1
2017/2018	96	59	22	14	1
2018/2019	104	58	29	16	1
2019/2020	115	64	31	19	1
2020/2021	130	65	39	23	4***
2021/2022	136	62	46	25	4
2022/2023	156	75	52	26	4
2023/2024	179	90	58	28	4
2024/2025	201*	102	63**	30	4

*of that number, 156 students have physical disabilities of 60% or more;
** one student has enrolled in a specialist study and is recorded as active;
*** 2020/2021 the University of Slavonski Brod was founded;
Source: Office for Students with Disabilities of the Josip Juraj Strossmayer University in Osijek

The authors of the paper requested data on the number of enrolled students with disabilities by type of disability and impairment at the J. J. Strossmayer University in Osijek and the University of Split from the above-mentioned Offices for Students with Disabilities. The data collected also confirms the aforementioned inconsistency in data collection, not only in terms of the number of registered students with disabilities, but also in the recording of different types of disabilities and impairments. The data collected from the J. J. Strossmayer University in Osijek (Table 4) and the University of Split (Table 5) are presented below.

Table 4. Number of registered students with disabilities by type of difficulties and impairments at Josip Juraj Strossmayer University in Osijek in the academic year 2024/2025

Types of difficulties and impairments	**Number of registered students with disabilities**
Motor difficulties	63
Visual impairment	13
Hearing impairment	6
Chronic diseases	17
Impairment of language-speech-voice communication	1
Internal organs impairment	13
Specific learning disabilities	8
Attention deficit/hyperactivity disorder	0
Autism spectrum disorders	1
Mental health difficulties	1
Multiple impairments	34
Other	1
Unknown data	43
In total	**201**

Source: prepared by the authors based on data from the Office for Students with Disabilities of the Josip Juraj Strossmayer University in Osijek received during January 2025

Table 5. Number of registered students with disabilities by type and degree of difficulties and impairments at the University of Split in the academic year 2024/2025

Types and degree of difficulties and impairments	**Number of registered students with disabilities**
100% physical disability*	22
80% physical disability*	13
60% physical disability*	12
More than 60% physical disability*	1
Less than 60% physical disability*	4
At least 60% physical disability*	2
III degree of disability - impairment of functional abilities**	4
IV degree of disability - impairment of functional abilities**	2
Cronic and long-term illnesses	13
Specific learning difficulties (eg. dysgraphia, dyslexia, etc.)	10
Mental difficulties, disorders and illnesses	11
Unknown data	2
In total	**98**

* the degree of impairment based on the opinion of the competent authoritie for expert investigation and entry in the Register of Persons with Disabilities;
** according to Regulation on the expert investigation methodology, Official Gazette, No. 96/2023
Source: prepared by the authors based on data from the Office for Students with Disabilities of the University of Split received during February 2025

From the above tables it can be concluded that the University of Osijek keeps records according to the type of difficulties and impairments, while the University of Split keeps records according to the degree of impairment on the basis of an opinion of the competent authority for expert investigation and entry in the Register of Persons with Disabilities, and according to Regulation on the expert investigation methodology. It should also be noted that while the University of Osijek has a larger number of students with disabilities overall, mental health difficulties are the least represented (only one student), which may indicate the stigma that still exists in relation to the aforementioned difficulties as well as specific learning difficulties[66], while the dates of up to 43 students are unknown. Based on the University of Split records, the data are unknown for only two students, but the records do not allow conclusions to be drawn about the type of the impairments and difficulties. In short, both recording methods have advantages and disadvantages, but for this reason, and in order to collect data in a uniform

[66] Meić, *op. cit.* note 58, p. 27.

manner, the Office of the Ombudsman for Persons with Disabilities has for several years recommended the use of a "comprehensive recording questionnaire" –" a form developed by the Coordination of the Ombudsman for Persons with Disabilities for the field of higher education"[67]. The aforementioned form contains "personal data, data on the disability, the type of the disability, data on necessary adaptations and aids during education", etc.[68]The proposed form is still not applied in all higher education institutions, which is also evident from the data collected by the authors of the paper. In this regard, we can only agree with the Ombudsman's assessment that the figures we cite will continue to be "only a rough indicator and a reflection of the different rights that students with disabilities have obtained at different universities in Croatia" as long as the method of collecting data on the number of students with disabilities is not standardised and "the definition of a student with disabilities itself" is not accepted and unified.[69]

The figures collected by the Ministry of Science, Education and Youth and the figures collected by universities based on the records of all their university components can be supplemented by data collected as part of the EUROSTUDENT VII survey (the fourth EUROSTUDENT survey in which Croatia is participating) on a convenient sample of the student population in Croatia in the 2018/2019 academic year.[70] Namely, the EUROSTUDENT surveys mentioned above are conducted with the aim of creating a clearer picture of the "social profile of students in Croatian higher education institutions", and one of the ongoing objectives of these surveys is to examine "the extent to which higher education is accessible to people with physical or mental disabilities".[71] The above need to be empirically analysed in order to plan and "improve support for people with disabilities" so that "they are not excluded from the educational process due to barriers that are not visible to people without disabilities".[72] In the 2018/2019 study mentioned above, a total of 1,840 completed questionnaires were analysed, of which 71.2% of students stated that they had no difficulties; 6.5% did not answer the question, while 21.4% of students stated one or more difficulties.[73] The data from the EUROSTUDENT VI study, which was conducted in the 2015/2016 academic year on a convenient sample of 5,074 students in Croatia, is also used

[67] *Izvješće o radu Pravobranitelja za osobe s invaliditetom, op. cit.* note 3, p. 122.
[68] *Loc. cit.*
[69] *Loc. cit.*
[70] Rimac, I., *Istraživačko izvješće projekta EUROSTUDENT VII.* Ministarstvo znanosti i obrazovanja Republike Hrvatske, Zagreb, 2021, p. 9.
[71] *Ibid.,* p. 37.
[72] *Loc. cit.*
[73] *Loc. cit.*

for comparison.[74] In that survey, a total of 11.8% of students stated that they had "some form of difficulty that functionally interferes with their life or studies" (in the 2011 survey, 15% of students stated that they had difficulties, while in 2014, 14% of students stated that they had difficulties).[75] In the 2015/2016 academic year, most students (5.8%) reported having "some other long-term physical and/or health problems", which was to be expected as the list of problems (which students could select in their responses) refers to only five problems that may affect the progress of their studies. The students then stated that they had the following problems: visual and hearing impairments (4.7%), chronic illnesses (3.7%), mental difficulties (2.0%), learning disabilities (e.g. dyslexia, dysgraphia, ADHD) and difficulties with moving (0.4%).[76] The responses of the students who reported difficulties in the EUROSTUDENT VII survey for the 2018/2019 academic year are shown in Table 6.

Table 6. Students with difficulties by type of difficulty and assessment of the impact of the difficulty on studying (2018/2019)

Type of difficulty	**Number of students having difficulty (%)**	**Assessment of the difficulty as "somewhat disruptive" (%)**	**Assessment of the difficulty as "significantly disruptive" (%)**
Cronic physical illness	5	2,5	0,4
Mental difficulties	3,6	1,7	1,6
Difficulty with moving	1,0	0,4	0,1
Vision or hearing impairment	5,4	1,4	0,4
Learning disabilities (e.g. dyslexia)	1,5	1,0	0,1
Any other long-term health problems, functional limitations or impairments	8,4	3,7	3,6

Source: Rimac, I., *Istraživačko izvješće projekta EUROSTUDENT VII.* Ministarstvo znanosti i obrazovanja Republike Hrvatske, Zagreb, 2021, pp. 38-39.

Table 6 shows that in the 2018/2019 academic year, most students (8.4%) reported the presence of "another health problem, functional limitation or impairment", which is to be expected for the reasons mentioned above. For this response, most students indicated that it was a "somewhat disruptive" difficulty (3.7%) and a

[74] Rimac, I.; Bovan, K.; Ogresta J., *Socijalni i ekonomski uvjeti studentskog života u Hrvatskoj. Nacionalo izvješće istraživanja EUROSTUDENT VI. za Hrvatsku.* Ministarstvo znanosti i obrazovanja, Zagreb, 2019, p. 13
[75] *Ibid.,* p. 34.
[76] *Ibid.,* p. 35.

"significantly disruptive" difficulty for their studies (3.6%). However, of the other difficulties mentioned in the 2018/2019 academic year, visual or hearing impairments (5.4%) and mental difficulties (3.6%) were the most common. Still, when assessing the impact of individual difficulties on learning, the order changes and most students in the 2018/2019 academic year name chronic physical illnesses (2.5%) and mental difficulties (1.7%) as "somewhat disruptive" difficulties during their studies, while they name mental difficulties (1.6) as "significantly disruptive" difficulties during their studies, followed by chronic physical illnesses (0.4%) and visual or hearing impairments (0.4%). Overall, the results of the 2018/2019 survey show that, alongside long-term health problems, functional limitations or impairments, mental difficulties are cited as the second most important obstacle to studying. In addition, 2.8% of students estimate that their difficulties seriously interferes with their studies, while 8.8% of students believe that the difficulties they face interfere with their studies less, but still interfere their studies.[77] In this sense, the data collected in 2018/2019 differs from the data collected in 2015/2016. In fact, according to the 2015/2016 data, only 0.8% of the total student population believe that difficulties seriously limit them in everyday activities and studies, while 1.3% believe that they limit them somewhat less, but still considerably (1.4% in everyday activities and 1.3% in studies).[78] From this data, it can be concluded that in the 2015/2016 academic year, approximately 2.1% of students needed support from the higher education institution or university they were studying at (although we cannot say for certain that they applied for help or support), while in the 2018/2019 academic year this figure is significantly higher, i.e. it would relate to up to 11.6% of students. The EUROSTUDENT surveys mentioned above also collect data on the assessment of "support from the higher education institution in overcoming difficulties", and the surveys from the 2018/2019 academic year show that students are "mostly very critical" of the support provided by the higher education institution.[79] In the 2018/2019 academic year, as many as 19.7% of students considered the aid to be "completely inadequate" and 23.4% "inadequate", while only 6.1% of students considered the aid to be "completely adequate" and 10.9% "adequate".[80] In addition, it is interesting to highlight the fact that students with difficulties in the 2015/2016 academic year expressed lower satisfaction with the "quality of teaching and the organisation of studies and the lecture plan" than other students (who expressed medium satisfaction with these aspects of studies overall), while they are just as satisfied with the "spatial equipment as other students"[81]. From this data, it can be concluded that significant progress has been made in terms of spatial accessibility,

[77] Rimac., *op. cit.* note 70, p. 38.
[78] Rimac, I.; Bovan, K.; Ogresta J., *op. cit.* note 74, p. 35.
[79] Rimac., *op. cit.* note 70, p. 39.
[80] *Loc. cit.*
[81] Rimac, I.; Bovan, K.; Ogresta J., *op. cit.* note 74, pp. 82-83.

but that other forms of support and adaptation are also needed for students with disabilities and difficulties.

In short, the research results presented should serve as a guidelines for universities in the Republic of Croatia to implement, organise and provide better help, support and counselling for students in terms of health and learning, especially for mental health education and the creation of better psychological support for students.[82] Both universities highlighted so far in this paper (University of Split and J. J. Strossmayer University in Osijek) have established a "Psychological Counselling Centre" for students for this reason.[83] However, what the data from the last two EUROSTUDENT surveys for Croatia show is an increase in the proportion of students with difficulties who report having mental difficulties, i.e. in the 2015/2016 survey this proportion was 2.0%, while in the 2019/2019 survey it was 3.6%. It is therefore necessary to continuously invest in education and counselling and provide support and assistance to students, precisely to maintain their mental health, but also because of the existence of mental difficulties, as they seem to be the area most burdened by stigma and still the least reported, and they can significantly affect academic success and quality of life during studies.

Furthermore, it is necessary to "ensure greater psychosocial support for students with disabilities in higher education"[84]. These are the conclusions of a quantitative study conducted in 2013 on a convenient sample of students with disabilities in Croatia.[85] Study adjustment was investigated as a "significant predictor of academic performance and study effectiveness" and as a complex process involving "academic, social and emotional adjustment".[86] According to the conclusions of the above study, students with disabilities are similar to students

[82] This refers to "mental health as part of general health", not just the "absence of mental illness". For more information on student mental health and the psychosocial needs of students, see the following document: Jokić-Begić, N. (ed.), *Studenti s invaliditetom 8. Psihosocijalne potrebe studenata*, 2012, https://www.unizg.hr/ fileadmin/rektorat /Studiji_studiranje/Podrska/SSI/sihosocijalne_ potrebe.pdf., 5 March, 2025.
[83] The University of Split has established a "Psychological Counselling Centre", which "offers students help and support in solving personal difficulties, increasing the efficiency of their studies and improving their quality of life", https://arhiva.unist.hr/studentska-savjetovalista/psiholosko-savjetovaliste, 13 February, 2025. Students at J. J. Strossmayer University in Osijek have access to a "Psychological Counselling Centre", where "students can receive psychological help and support in dealing with various problems, from problems related to their studies to personal problems", https://www.unios.hr/kvaliteta/psiholosko-savjetovaliste-sveucilista-josipa-jurja-strossmayera -u-osijeku/, 13 February, 2025.
[84] Bošković, S.; Ilić-Stošović, D.; Skočić-Mihić, S., *Prilagodba na studij s obzirom na neka obilježja studenata s invaliditetom.* Revija za socijalnu politiku*, 24* (1), 2017, p. 64.
[85] The study involved 64 students with disabilities, with an average age of 25, 57 of whom were full-time students, *Ibid.*, p. 77.
[86] *Ibid.,* pp. 75-76.

without disabilities in terms of academic and social adjustment to their studies, but they show a lower level of emotional adjustment to their studies.[87] Therefore, the need for "greater psychosocial support for students with disabilities" in higher education is emphasised, as well as the importance of strengthening their "emotional capacities" due to the various "demands and limitations associated with disabilities".[88]

4. CONCLUSION

In conclusion, we can reiterate the need for a legal or normative definition of the term "students with disabilities" in Croatia and for standardised data collection on students with disabilities, as well as data collection on the types of academic adjustments that students need during their studies. All of this is necessary not only for analysing trends, but also for successfully planning the support that students with disabilities need. Namely, in order to be able to deal with people with disabilities in the Croatian higher education system in a quality manner, it is necessary to keep more systematic records, which are often the only indicators of the problems that need to be solved. Furthermore, students with disabilities in the Croatian higher education system still face many difficulties that can be eliminated by the system itself: from physical to professional difficulties, of which the one related to the education of university teachers themselves for the special needs of students with disabilities seems particularly important. Indeed, university teachers need to be trained and educated so that they themselves can successfully make various academic adjustments without compromising learning outcomes or lowering the criteria for student expectations. With the exception of teachers who have attended studies for obtaining the title of professor, the other university teachers have not acquired or had to acquire basic teaching skills during their studies, apart from relatively short training courses on didactics and learning and teaching methods during working at the Facultie or other higher education institution. Such education does not include informing or training university teachers about academic adjustments and the method of working individually with students with disabilities, nor about their abilities. In this sense, this type of teacher training should be encouraged and, of course, everything should be done so that reasonable adjustments can be implemented uniformly during the study programme, regardless of which teacher leads a course. Namely, the Office of the Ombudsman for Persons with Disabilities points to findings "that certain professors at higher education institutions regard elements of the provisions for students with disabilities as legally unfounded or even as favouritism" towards

[87] *Ibid*., p. 86.
[88] *Ibid.*, p. 87.

students.[89] Furthermore, in order to implement some academic adjustment into practise, a solution for adjustment is sought in accordance with the university's statutes and statutes of its components or its various study regulations, which prescribe some forms and methods of adjustment for students with disabilities. Although no regulation can prescribe every situation and every adjustment, a solution in this sense would be the mandatory training of university teachers and the drafting of more detailed general laws and regulations for higher education institutions that would uniformly prescribe "specific rights and support in higher education" and "specific forms and methods of adjustment" for students with disabilities at the national level[90]. Although the legal basis has been presented in the previous sections, students with disabilities are still in an unequal position in the higher education system, as the implementation of the regulations and the practise of the various academic adjustments depends on the university (or its components); moreover, the claim of an unequal position is supported by the aforementioned data on more frequent study interruptions, i.e. longer study duration, which is not always and exclusively a consequence of the students themselves, but also of an unadjusted system. Finally, future analysis should include all people with disabilities in the higher education system, including not only students but also academic, teaching and administrative/technical staff with disabilities. Indeed, while data is collected on students (inconsistent but nonetheless approximate data), we know little or almost nothing about other people with disabilities in the higher education system. In fact, we all "assume something" about their work and difficulties. For this reason, the Ombudsman's Office has repeatedly proposed in recent years that, in addition to the standardised collection of data on students with disabilities, the same data should also be collected on all employees in the higher education sector, but unfortunately the proposals are not adopted.[91] In conclusion, we can therefore once again point out the discrepancy between the existing legal framework and its application in practise, i.e. the implementation of the "Convention on Persons with Disabilities" in the Croatian higher education system, as well as the need to respect the human rights of persons with disabilities and ensure them equal opportunities and access to higher education in order to build a more inclusive higher education system, achieve the Bologna goals and the sustainable development goals and build a more just, equal and inclusive society.

In short, the issue of students with disabilities in our higher education system is extremely complex and difficult, as is achieving the stated goals. While much progress has undoubtedly been made, there is still room for improvement towards

[89] Meić, *op. cit.* note 58, p. 24.
[90] *Izvješće o radu Pravobranitelja za osobe s invaliditetom*, *op. cit.* note 3, p. 119.
[91] *Ibid.,* p. 123.

achieving the stated goals. Some of the proposals are also listed in this paper. In addition, neither as a society nor as employees in the higher education system do we often realise that a person with a disability is much more than their disability, that they are valuable and have their own dignity and that they can and should fulfil all their potential. The higher education system must be much more than just the fulfilment of declarations, strategies, quotas or all that can be summarised under the word - form - which is briefly presented in the paper. Students with disabilities do not need our pity or sympathy. They want us to recognize them as equal members of our society who can realize their full potential and they will know how to do so unless if we do not prevent them from doing so. By recognising and valuing their potential, we "fulfil" Aristotle's famous statement from the beginning of his "Metaphysics": "All people naturally strive for knowledge". This of course also applies to people with disabilities.

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Review paper

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SOME LEGAL ASPECTS OF WOMEN'S STATUS UNDER THE 1305 STATUTE OF BRAČ: REFLECTIONS ON ITS 720TH ANNIVERSARY*

ABSTRACT

This paper analyses the issues of the legal status of women in the mediaeval Statute of Brač from 1305 in comparison with the other Dalmatian statutes. It examines to what extent the provisions of statutory law correspond to the general tendencies, as well as their possible peculiarities in status, family, property, criminal and procedural law. By analysing notarial acts and archival material, the extent to which the statutory provisions were applied in everyday life is examined. It is known that the Dalmatian statutes are an example of the synthesis off different legal cultures. The provisions of the Statute of Brač shows the mutual permeation of two fundamental legal cultures: Slavic and Roman, as well as the influences of the canonical and Venetian legal systems.

***Keywords**: the Statute of Brač, 14th century, Dalmatian statutory law, legal status of women.*

1. INTRODUCTION

Among the communal societies in the eastern Adriatic, the mediaeval Brač is distinctive for its peculiarities in terms of its border location at the intersection of

political and cultural activities, as well as its peculiarities in terms of its social structure.[1] There were no urban settlements on medieval Brač, and the rural settlements were located in the interior of the island or developed along the coast towards the mainland due to the frequent attacks from the sea. In addition to these two directions in the social development of Brač, there was another direction of connection with the neighbouring island of Hvar in the Middle Ages. At the Church Council of Split in 1185, it was decided that thejurisdiction of theBishop of Hvar would comprise theterritories of Hvar, Brač, Vis, Korčula, Lastovo, Makar and the whole of Krajina.[2] As early as the beginning of the 12th century, Brač appears in documents as an independent administrative-territorial unit with its own self-government, forming an island communitytogether with Hvar and Vis,having a common duke and bishop.[3] In 1240, Brač recognised the authority of the City of Split and its *podestà* (chief magistrate) Gargan.[4] In 1278, theRepublic of Venicegained power over Brač and Hvar. Since 1423, the island has become a special commune ruled by the Venetianduke. In reality, the inhabitants of Brač lived completely independently, with all the privileges granted to them by the rulers.[5]

The Statute of Brač is one of the statutes of the Neretva region, together with the statutes of Korčula and Hvar.[6] These statutes, although written in Latin and adopting Roman law to a certain extent, are mainly based on the substrate of old

* This paper is the result of work fully supported by the Faculty of Law of the University of Split as part of the IP-PDPO project *The individual and legal dynamics from Roman law to modern times.*

[1] Raukar, T., *Srednjovjekovni Brač na razmeđu društava*, in: *Studije o Dalmaciji u srednjem vijeku,* KKS, Split, 2007, p. 357.

[2]*Codex Diplomaticus, Diplomatički zbornik Kraljevine Hrvatske, Dalmacije i Slavonije.* Vol. II, ed. Tadija Smičiklas, JAZU, Zagreb 1904, p. 193. For more details, see: Dokoza, S., Dinamika otočkog prostora, *Društvena i gospodarska povijest Korčule u razvijenom srednjem vijeku*, Književni krug Split, 2009, p. 241; Raukar, T., *O sjedištu hvarske biskupije u 12. i 13. stoljeću*, in: *Crkve i crkvice Staroga Grada* (ed. Tarbušković, V.), Stari Grad 2009, pp. 8-21.

[3]Vrsalović, D., *Povijest otoka Brača*, Brački zbornik br. 6, Štamparsko poduzeće *Franjo Kluz*, Omiš, 1969, p 92.

[4]*Codex Diplomaticus, Diplomatički zbornik Kraljevine Hrvatske, Dalmacije i Slavonije,* Vol. IV, ed. Tadija Smičiklas, JAZU, Zagreb, 1906, p. 112.

[5]Vrsalović, *Povijest otoka Brača, op. cit*., note 4, p. 96; Vrandečić, J., *Značajke društveno-gospodarskog razvoja Brača za vrijeme mletačke uprave (1420-1797)*, Historijski zbornik, 1993, pp. 67-88.

[6]Dokoza, *Dinamika otočkog prostora, op. cit.,* note 3, p. 257.; *Brački statut* (edited and translated by Cvitanić, A.), Književni krug Split, Split 2006; Karbić, D, Karbić, M, *The Laws and Customs of Medieval Croatia and Slavonia - A Guide to the Extant Sources*, London UCL School of Slavonic and East European Studies Studies in Russia and Eastern Europe, London 2013; Cerineo, A., *Nekoliko riječi o postanku, redakciji i važnosti Statuta i Reformacija otoka Brača*, *Brački zbornik*, issue No. 1., Split, 1940, pp. 90-96.; Gospodnetić, J., *Brač i njegovo pomorstvo*, Brački zbornik d. o. o., Supetar, 1995., p. 73.

Croatian law.[7]The legal provisions, privileges and customs were codified before 1277butwere destroyed in a fire during the invasion of the Omiš pirates.

The Statute of Brač from 1305, together with later amendments, i.e. Reformations, was published in 1656 under the title *Statuta municipalia, ac reformationes magnif. Communitatis Brachiae* and dedicated to the brothers Jerolim and Vinko Michaeli.[8]

It consists of a preamble (*Prohemium*), four books of statutory provisions in the narrower sense, and three books of Reformations.

The preamble and the first three books were simultaneously revised in 1305. Each book is divided into chapters *(capitulum).* The first has 29 chapters, the second 11 and the third 43. Chapter 43 of the third book was completed in 1351 and is part of the Reformations of the first three books.

The fourth book was completely revised up to and including chapter 56. It has a total of 59 chapters, so that chapters 57, 58 and 59, which were completed later, are actually Reformations but were included here by mistake. Chapter 57 was completed on March 12, 1375. Chapter 58 is divided into four parts. The first part was completed in 1383; in the second there is no date but the Vice-Duke Comuli de Petrarchis is mentioned, whose name is again linked to the year 1385 in the third part; the fourth part was completed in 1392. The last chapter 59 was completed in 1415.

After the four books that make up the Statute in the narrower sense, there are three books entitled Reformations. As the Statute in the narrower sense was revised twice, so were the Reformations. As far as the books of Reformations are concerned, the first book is considered separately from the second and third books.[9]

[7]See in details: Margetić, L., *Hrvatsko srednjovjekovno obiteljsko i nasljedno pravo*, Narodne novine, Zagreb 1996, p. 8, 169-245.; Margetić, L., *Srednjovjekovno hrvatsko pravo. Stvarna prava*, Zagreb – Rijeka – Čakovec, 1983, p. 1.

[8]The coat of arms of the Mičelović family is on the front cover of the book. Around 1650, Jerolim Michieli wrote the manual *Pratica Criminale,* which was used by Venetian chancellors in criminal proceedings. For more details, see: A. Cvitanić,*Tragom rada jednog našeg pravnika-krivičara iz XVII. stoljeća*«, *Iz dalmatinske pravne povijesti,* Split, 2002, pp. 749-758. (in particular 751); Radić, Ž., *Jerolim Mičelović – Michieli, A Penologist from the XVII Century and his Pratica Criminale,* Annals of the Faculty of Law in Belgrade, Belgrade Law Review, year LVIII, 2010, No. 3, pp. 176-185.

[9] Cvitanić, A., *Uvodna studija* in: *Brački statut*, *op. cit.*, note 7, p. 21.

The chapters of the first book of Reformations are undated, but they probably date from the pre-Venetian period. They were completed in the last years of Croatian-Hungarian rule on Brač, from 1415 to 1420. The last chapter IV of the Statute refers to the year 1415, while an extract from the decree of Doge Tomaso Mocenigo of 22 October 1420 refers to the year 1420, when the new Venetian supreme authority confirmed these communal legal regulations of Brač. This book of Reformations has 87 chapters, and the 87th is an extract from the aforementioned decree.[10]

The chapters of the second and third books of Reformations are partially dated and all date from the period of the final Venetian rule, after 1420. Since then, Brač no longer had a common duke with Hvar (and Vis), but its own duke.

The second and third books of Reformations were revised in 1655, when Duke Aluise Duodo ordered the collection and editing of scattered passages of statutory legislation. During this editorial work, however, Chancellor Petar Mattiazzi did not even ensure that all the chapters of Reformations were arranged chronologically. Thus, the second book contains chapters that often date from 1423-1615, with longer intervals, and the third book containschapters from 1435 and 1436. The second book of Reformations consists of 23 chapters. The first 8 chapters date from 1423-1434, the others from 1445-1615. These last three groups of provisions do not contain any conclusions of the Great Council of the Brač Commune.

The third book of Reformations comprises 18 chapters and contains conclusions adopted by the Great Council of Brač in 1435, which were sent to Venice for confirmation together with three new conclusions of the same Council from 1436. In the same year, Doge Francesco Foscari confirmed the chapters submitted to him with some modifications.[11]

The Statute was written in Latin, with the exception of a few provisions in Italian, which were formulated in Venice and included in the Statute of Brač. Although it was written in Latin, the Statute of Brač did not adopt Roman law to the same extent as the neighbouring Dalmatian towns. The reason for this is that the communal system of Brač has features of feudalism with the remnants of Slavic social regulations from the time of the dissolution of the clan system. It can be argued that the Statute of Brač is predominantly a collection of feudal laws with elements of recepted Roman law, and in terms of its characteristics, lies between

[10] *Ibid., op. cit.,* note 8, p. 22.
[11] The Statute of Brač*,* Ref. III, 18.; *Diversi publici decreti, terminationi, privilegi et indulti a favor della magnif. communita della Brazza*, Udine, 1656, p. 30.

the statutes of coastal towns, which adopted Roman law to a greater extent, and the legal codes from rural areas based on the old Croatian legal basis, such as the Statute of Poljica and the Vinodol Code, which were written in Croatian and also in the local script (Croatian Cyrillic script and Glagolitic script, respectively).[12]

The Statute of Brač from 1305 served the nobles of Hvar as a model for the drafting of the Statute of Hvar from 1331.The circumstances on Hvar (with Vis) were similar to those on Brač, and at that time Brač and Hvar (together with Vis) had a common duke. When the inhabitants of Hvar revised the last two books of their statute (the fourth and fifth) in 1453, they no longer used parts of the Statute of Brač as a model due to the changed circumstances.[13]Since 1420, Brač and Hvar (with Vis) had their own duke.[14]

With the exception of the town of Hvar on the south-western cape of the island, the situation on the rest of the island remained the same as it was on the neighbouring islands of Brač and Visat the beginning of the 10th century. In the Middle Ages, these three areas were part of the Principality of Neretva. The nobility was of endogenous origin, which is confirmed by the Charter of Povlja from 1184.[15]

The medieval communal legal systems, including that of Brač, retained some of the public and private law restrictions on women from the legal systems of the early Middle Ages, as we will see on following text.[16]

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[12]Cvitanić, A., *Uvod u Brački statut, op. cit.* in footnote 7, p. 24. For the Statute of Poljica, see *Poljički statut,* Split, 1988; for the Statute of Vinodol, see Margetić, L., *Iz vinodolske prošlosti.* Rijeka, 1980; cf. Cvitanić, A., *Slavenski pravni elementi u statutarnom uređenju Poljica, Brača i Splita*, Zbornik radova Pravnog fakulteta u Splitu, Split, 1963.; *Usporedba Vinodolskog zakona i dalmatinskih statuta*, Zbornik radova Pravnog fakulteta u Splitu, year 29, issue No. 1-2, Split, 1992.; Cf. Dokoza, *Dinamika otočkog prostora*, *op. cit., note 3,* p. 257.

[13] Kasandrić, I., *Uvod u Hvarski statut, Split, 1992.,* p. 9; Pezelj, V., Erent Sunko, Z., Bartulović, Ž, *Neka pitanja pravnog položaja žene prema Hvarskom statutu iz 1331. godine (povodom 690 godina),* Zbornik radova Pravnog fakulteta u Splitu, year 61, 1/2024, p. 2.

[14] See: Cvitanić, *Uvod u Brački statut*, *op. cit.,* note 7, p. 25.

[15]Rački, F., *Najstarija hrvatska ćirilicom pisana listina*, Starine JAZU, knj. XIII, Zagreb 1881, pp. 196-211.; Ostojić, I., *Benediktinska opatija u Povljima na otoku Braču*. Split: [s. n.], (Zagreb: Nadbiskupska tiskara), 1934, pp. 28-66.; Cvitanić, A., *Pravnopovijesno značenje Povaljske listine*, *Spomenica u povodu 500. obljetnice dominikanskog samostana u Bolu*, Provincijalat hrvatske dominikanske provincije, Zagreb 1976., in: Cvitanić, A., *Iz dalmatinske pravne povijesti*, Književni krug Split, Split 2002, pp. 407-429; Margetić, L., *Neka pitanja Povaljske listin*e, Archaeologia Adriatica, Vol. 2; No. 2, 2008, pp. 611-621; *Leksikon hrvatskoga srednjovjekovlja* (ed. Šanjek, F.; Grbavac, B.), Školska knjiga, Zagreb 2018, pp. 546-548.

[16]Tribal laws were uniform in terms of restricting women's legal capacity, with women being under the guardianship of their father or husband. They were excluded from all public functions, and they could not appear in court independently, but had to be represented by

2. PERSONAL STATUS AND FAMILY LAW

Like others medieval legal systems, Dalmatian statutory regulations do not postulate full age (maturity or majority) as a single category.[17] It rather was determined differently regarding to different public or private rights. However, marital maturity is usually taken as a guideline.[18] In Justinian's Roman law as well as in later canon law, that was indifferently valid in all catholic countries, such capacity was acquired in the age of twelve (for women) or fourteen (men).[19] It should be assumed that the canonical age was also relevant on the island of Brač,[20] not only for marriage but also fortestamentary capacity as well as dowry, as the Statute of neighbouring Split expressly says.[21]The Statute of Brač contains no provisions on the manner in which a marriage is concluded, as canon law applied in this respect.

With regard to secular matters, some statutes required a higher age, thus aiming to protect family assets. The Statute of Split stipulates that a child can only prevent

their husband. In the event of the death of the father or husband as the holder of authority over the woman, they were replaced by the closest male relative in the male line. A woman's rights to dispose of her property were regulated differently in certain legal laws. The general principle probably corresponded to the provisions of the Lombard law, where the property of both spouses passed into the hands of the husband who managed it (*Edictus Rothari,* par. 204).See in details: Ketch, P.; Kuhn, A., *Frauen im Mittelalter*, Band 2, Schwann, Düsseldorf 1984, p. 146; Guerra Medici, M. T., *I diritti delle donne nella societa altomedievale*, Edizioni Scientifiche Italiane, Napoli 1986, p. 116; Dubby, G.; Perrot, M., *A History of Women in the West*, Harvard University Press, Harvard 1994, p. 174; Ennen, E., *The Medieval Woman*, John Wiey & Sons, Ltd., Oxford 1989, p. 29.

[17] Beuc, I., *Statut zadarske komune iz 1305. g.*, Vjesnik Državnog arhiva u Rijeci, 2/1954, pp. 579-580; Cvitanić, A., *Statut grada Splita,* splitsko srednjovjekovno pravo, translated by A., Cvitanić, Književni krug Split, 1998*,* pp. 148-150; Besta, E., *Il diritto e le leggi civili di Venezia fino al dogado di E. Dandolo,*F. Visentini, Venezia 1900, pp. 72-73; Roberti, M., *Svolgimento storico del diritto privato in Italia*, Vol. I, CEDAM, Padova 1935, pp. 142-143; Radić, Ž., *Imovinsko pravo po Statutu grada Trogira*, doctoral thesis, Pravni fakultet Sveučilišta u Splitu, Split 2002, p. 16 and p. 290.

[18]Čepulo, D., *Hrvatska pravna povijest u europskom kontekstu*, Zagreb, 2023, p. 104.

[19]Gross, K., Schueller, H., Novak, M., *Udžbenik crkvenog prava Katoličke crkve*, Zagreb, 1930, p. 284.

[20] Cvitanić, *Uvod u Brački statut*, *op. cit.*, note 7, p. 82.

[21]The Statute of Split (III, 68) expressly emphasises this.Under the influence of neighboring Split, adulthood according to the Poljica Statute (cap. 99) acquired at the age of 18. On Hvar, the age prescribed is 25 years for reaching the age of majority. See in details: Pezelj, V., Erent Sunko, Z., Bartulović, Ž, *Neka pitanja pravnog položaja žene prema Hvarskom statutu iz 1331. godine (povodom 690 godina),* Zbornik radova Pravnog fakulteta u Splitu, year 61, 1/2024, p. 4. According to the Statute of Korčula (Chapter 50 old ed. and Ch. 54 new ed.) up to the age of 14, women were nominally treated like men. Pezelj, V., Štambuk Šunjić, M., *Pravni položaj žene prema srednjovjekovnom Korčulanskom statutu*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 55, 3/2018, p. 559.

his father from disposing of his property at the age of 18, and at the age of 25, a son can act as a representative in court or a legal guardian in the father's estate.[22]

Some of the city's statutes raised the age limit for marriage, thereby contravening canonical regulations. The Statute of Zadar set the age limitat 15 years, and the Statute of Šibenik at 14 and 16 years, respectively. *Liber viridis* of Dubrovnik stipulated with a decree from 1458 that a marriage cannot be concluded unless he groom is 20 years old and the bride 14 years old.[23]

The marriage could not be dissolved, but there could be a separation of the spouses from table and bed. If the husband banished his wife for unjustified reasons, he was obliged to pay spousal support until she returned home, otherwise he was not obliged to do so.[24]

If a child married without the parents` consent, more specifically the son without hisfather`s consent, and the daughter without her mother`s consent if the father was absent, the marriage would not be invalid, but the child could be disinherited as a result.[25]

2.1. Married women

A married woman had only limited legal capacity and could not enter into binding obligations without the will and consent of her husband.[26]The same provision

[22] The Statute of Split, III, 67-68, 70.
[23]*Statuta Jadertina – Zadarski statut sa svim reformacijama odnosno novim uredbama donesenim do godine 1563.*, Matica hrvatska Zadar, Hrvatski državni arhiv, Zadar – Zagreb 1997, III, 111.; *Knjiga statuta, zakona i reformacija grada Šibenika*, Muzej grada Šibenika, Šibenik 1982, II, 61; *Statut grada Dubrovnika 1272.*, Historijski arhiv Dubrovnik, Dubrovnik 1990, *Liber viridis* 478.
[24]The Statute of Brač II, 5; The Statute of Hvar, II, 41. For more details on the Statute of Hvar, see: Kasandrić, *Uvod... op. cit.,* note 14, p. 50; Kasandrić, I., *Stvarnopravne, bračne i obiteljske odredbe Hvarskog statuta*, Hvarski zbornik, 5/1977, pp. 149-155.
[25]The Statute of Brač, II, 3.
[26]*Ibid*, I, 29. The same solution was found in the statutes of Brač, Pag, Šibenik, Cres (II, 125) and Dubrovnik. See: Čepulo, D., *Statut Paške općine*, Matica hrvatska Pag, Pravni fakultet Sveučilišta u Zagrebu, Pag – Zagreb 2011.; *Cresko-osorski statut*, in: *Srednjovjekovni zakoni i opći akti na Kvarneru* (ed. Margetić, L.), Globus, Kvarner, Pravni fakultet Sveučilišta u Rijeci, Rijeka 2012, pp. 1151-1312.

existed in the statutes of Hvar,[27] Pag,[28] Šibenik,[29] Dubrovnik[30] and Cres.[31] A husband could, for certain reasons that were considered justified, banish his wife from the common home without granting her any kind of spousal support. However, if he banished her without justified cause, he had to pay for her maintenance.[32]

In the Dalmatian legislation, a married woman generally had only limited legal capacity.[33] In this respect, Dalmatian statutes differed significantly from Roman-Byzantine and Venetian law[34] and resembled the characteristics of Lombard law.[35]

When a woman married, she usually received a dowry from her parents, but also from her brothers.[36] The dowry was considered the wife's property which was given to the husband to cover the costs of the joint household. The dowry on Brač was between 400 and 4,000 ducats. It depended on the financial situation of the family that provided it, but also on fertile and infertile years, as the harvest was the basis for the payment of the dowry.[37] The woman was the owner of the dowry she brought into the marriage and could acquire property during the marriage, usually through inheritance from her ancestors. Her legal capacity did not cease during the marriage.

[27]The Statute of Hvar, II, 31.
[28]The Statute of Pag, IV, 7.
[29]The Statute of Šibenik, IV, 8 (identical to the Statute of Pag, IV, 7).
[30]The Statute of Dubrovnik, VIII, 32.
[31]The Statute of Cres and Osor, II, 126. See Lachner, V., *Obiteljskopravna regulacija Cresko-osorskog statuta iz 1441. godine*, Pravni vjesnik Pravnog fakulteta Sveučilišta J. J. Strossmayera u Osijeku, Vol. 39, 2/2023, pp. 31.
[32] The Statute of Brač, II, 5.
[33]Margetić, L., *Hrvatsko srednjovjekovno… op. cit.,* note 8, p. 180. This is also referenced by Italian authors, cf. Roberti, M., *Svolgimento… op. cit.,* note 18, p. 136.
[34]In this respect it is significant a provision I, 39 of the Venetian statute of 1242, passed by doge Jacopo Tiepolo, according to which a woman may alienate her paraphernalia without her husband's consent. See: Cessi, R., *Gli statuti Veneziani di Jacopo Tiepolo del 1242 e le loro glosse*, Venezia 1938, pp. 70-71. See also: Besta, E., Predelli, R. (a cura di), *Gli statuti civili di Venezia anteriori al 1242*, Venezia 1901, pp. 102-103.
[35]Margetić, L., *Hrvatsko srednjovjekovno… op. cit.,* note 8, p. 180. In Lombard law, a woman could not enter into legal transactions without the consent of her representative (*adjutor*). Margetić believes that this concept penetrated our territories from the Italian coast, and partly through the Croatian law of the old Croatian people's state, which resembled Lombard law. Margetić, L., *Bizantsko bračno imovinsko pravo u svjetlu Novele XX Lava Mudroga (s osobitim obzirom na razvoj bračnog imovinskog prava u srednjovjekovnim dalmatinskim gradskim općinama*, Zbornik radova Vizantološkog instituta, XVIII, 1978, p. 36. Cf. Kasap, J., *Osobitosti nasljedno-pravnog uređenja Cresko-osorskog statuta iz 1441. godine*, Pravni vjesnik Pravnog fakulteta Sveučilišta J. J. Strossmayera u Osijeku, Vol. 38, 3-4/2022, p. 73.
[36] Vodanović Kukec, V., *Brački testamenat*, Golden marketing, Zagreb, 2002, p. 75.
[37] For more details, see: *Ibid.*, *op. cit.*, note 37, p. 42.

The husband administered the dowry until his death, and after his death she could dispose of it again as owner if it was not spent.[38]On 19 March1344, Maroje Henrikov admitted that he had received 132 small dinars in gold and other items from Prvetin Teodozijev from Brač as part of his wife Margarita's dowry.[39]

In 1689, Bone Bersatić née Gospodnetić-Dominis, the widow of Captain Lovro, died without descendants. Her husband's sister Margarita asked the notary Zuppaneo to draw up a record of the tangible assets of the deceased widow, which she brought with her as a dowry. According to the marriage contract with the standard clause on the return of property in the event of the bride`s death without descendants, this property was to be returned to the bride's family, i.e. to her brother Jeremija in Dol. [40]

2.2. Women in convents

In the area of Brač and Hvar (i.e. within the jurisdiction of the Diocese of Hvar) there were no second-order female convents until the 17th century, and for this reason, from the15th century onwards there were a lot of *picokare* (tertiary nuns of St. Vincent) and third-order nuns.[41]

Daughters who entered the convent also received a dowry. In 1609, Mihovil Cerineoleft money in his will to three *picokare*[42]convents on Brač (in Murvica[43], Škrip and Postira), to pray for his soul. The Brač families sent their daughters who did not want to or could not marry to these convents.[44] In 1625, Cerineo left money

[38]The Statute of Brač, I, 23; The Statute of Hvar, II, 32.
[39]*Splitski spomenici*, dio I., Splitski bilježnički spisi, sv. 1., Spisi splitskog bilježnika Ivana pok. Çove iz Ankone od 1341. do 1344. (ed. Stipišić, J.; Nazor, A), MSHSM, Zagreb 2002, issue No. 534, p. 322.
[40] Vodanović Kukec, V., *Brački testamenat*, *op. cit*., note 37, pp. 23 – 33.
[41]Lonza, N., *Ana, Pavo, Grlica – rekluze i pustinjaci u pobožnom krajobrazu srednjovjekovnog Dubrovnik*a, HAZU, Zavod za povijesne znanosti u Dubrovniku, Zagreb – Dubrovnik, 2021, p. 54.
[42] The third order (*ordo tertius*) refers to the association of the laity, unlike the male order (*ordo primus*) and its female branch (*ordo secundus*). The sisters of the third order lived outside the convent. They were usually allowed to retain their property on the condition that they did not join the convent. For Split, see: Jurišić, K., *Samostan franjevačkih trećoredica picokara sv. Ciprijana u Splitu (1493-1905*.), Prilozi povijesti umjetnosti u Dalmaciji, Vol. 33, No. 1, 1992, pp. 327-361.
[43]For more details, see: Kovačić, V., *Pustinja Stipančić iznad Murvice na otoku Braču*, Klesarstvo i graditeljstvo, Vol. XXV No. 1-4, 2014, pp. 34-51.
[44] Vodanović Kukec, V., *Brački testamenat*, *op. cit.,* note 37**,** p. 72.

to the convent in Pustinja so they pray for his soul and two rings for his two nieces. He left everything else to his wife for life and, after his death, to his nephews. [45] In *testamento paterno* of 27 November 1745 in Bol, in the house of Giovanni Martinis, the father left his unmarried and ordained daughters (*monacate*), with the consent of their mother and brothers, equal shares of the inheritance in the event that they married or were ordained; to his wife he left usufruct for life, and to his sons (Ottavio, Alessandro, Antonio and Gio Pietro) the property on condition they complied with the above-mentioned conditions.[46]

The monastic way of life was not always the free choice of the unmarried girls. In fact, it often happened that a girl without a dowry was forced to choose such a lifestyle. The provisions in the statutes of Trogir, Split, Kotor and similar provisions refer to this issue. The frequency of such cases is evidenced by the prohibition of the admission of girls from other communes to certain convents due to the large number of ordained girls.[47]

Women were members of the confraternities of Brač. An example of this is the minutes of the meeting of the Confraternity of the Most Holy Body of Christ from 1 November 1509 in Bol, in the Church of St. Mary, where monks and nuns gathered.[48] The Daughters of Mary took care of the cleaning of the churches and helped the sick.[49]

2.3. Paternal authority

Paternal authority in the family often extended to those who lived with him under one roof, such as the servants (*famuli*).[50] Paternal authority was also reflected in

[45] *Ibid.*, *op. cit.,* note 37, p. 74; Tomić, R., *Oporuka Jakov Cerine*, Radovi Instituta za povijest i umjetnost, Zagreb, 1995, 19/1995, p. 114.
[46] Vodanović Kukec, V., *Brački testamenat*, *op. cit.,* note 37, p. 75.
[47] *Zlatna knjiga grada Splita*, Volume I, Latin documents were transcribed, translated and edited by Vedran Gligo and Marin Berket; Italian documents were transcribed, translated and edited by Vladimir Rismondo and Ljerka Šimunković; Književni krug, Split, 1996, p. 79: "A non-native woman and one who is not the daughter or sister of a nobleman of Split may not be admitted as a nun to any of the women's convents in the City of Split."
[48] Vrsalović, *Povijest otoka Brača*, *op. cit.,* note 4, p. 279; For more details on confraternities, see: Jutronić, A., Apostolska vizitacija otoka Brača 1579. g., Croatia sacra, No. 5, Zagreb, 1933, pp. 62-88.
[49] Vodanović – Kukec, Bračkitestamenat, *op. cit.,* note 37, pp. 133-137. For other communes, see: Pezelj, V., *Žene u bratovštinama srednjovjekovnih dalmatinskih gradova*, Zbornik radova Pravnog fakulteta u Splitu, vol. 47, No. 1, 2010, pp. 155-173.
[50] For Split, see: Pezelj, V., *Pravni položaj žene po Splitskom statutu iz 1312. godine,* in: *Splitski statut iz 1312. godine: povijest i pravo, povodom 700. obljetnice*, Zbornik radova (ed. Radić, Ž.; Trogrlić, M.; Meccarelli, M.; Steindorff, L.), Split 2015, pp. 227-253; for Zadar, see: Beuc, I., *Statut zadarske komune*, Vjesnik državnog arhiva žu Rijeci, Vol. II,

the father's power to give his children permission to marry. Even after the age of 14, children who were under paternal authority had only limited legal capacity even if they were otherwise considered to be of age and fully liable under criminal law.[51] As a rule, this limitation manifested itself in their inability to conclude contracts independently and act as a party in court. Adopted children were subject to the same regulation.[52]

3. PROPERTY LAW AND LAW OF OBLIGATIONS

Notarial records contain contracts for the sale and lease of land concluded by unmarried women or widows with children.
On 22 February 1344, Vukena, the daughter of the deceased Radoslav, the servant of Kamurcije Franjin, sold her small hut on the land of the Church of St. George "de Ponte Nigra" on Brač to Rada, the daughter of Ivan, for 8 gold ducats. [53]
On 29 October 1341, Desula, the widow of Damjan Beriša from Brač, admitted that she owed Kamurcije Franjin 8 libras for two modius of barley.[54]
On 21 August 1337, the Archdiocese of Split leased the land in the port of Postira to Buda, the widow of Mišo from Dol, and her sons Beriša and Vladinja for planting vineyards. The document is also the oldest mention of Dol.[55]
On 10 July 1345, the land in Postira was leased to Desača and her son Klonidrug.[56]
In 1454, Dobrica, the widow of the deceased Mihajlo Klabučavić from Straževnik, sold part of the Glogoviza pond to Nikola Andrijević for 14 small libras in an office on Brač.[57]

Due to the limited legal capacity of married women, they are rarely mentioned in notarial records as partiestobinding contracts.

Rijeka, 1954, p. 596; for Kotor, see: Sindik, I., *Komunalno uređenje Kotora od druge polovine XII do početka XV. stoleća*, Belgrade, 1950, pp. 131 – 133.
[51] According to the Statute of Korčula (Chapter 50 old ed. and Ch. 54 new ed.) up to the age of 14, women were nominally treated like men. Pezelj, V., Štambuk Šunjić, M., *Pravni položaj žene prema srednjovjekovnom Korčulanskom statutu*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 55, 3/2018, p. 559.
[52] The Statute of Brač III, 11.
[53]*Splitski spomenici*, *op. cit.,* note 40, issue No. 496, p. 298.
[54]*Ibid, op. cit.,* note 40, issue No. 35, p. 22.
[55]*Diplomatički zbornik Kraljevine Hrvatske, Dalmacije i Slavonije,* Vol. X, ed. Tadija Smičiklas, JAZU, 1912, doc. 262. For more details, see: Bracanović, J., *Povijest župe Dol na Braču*, Brač, 2016, p. 5 and p. 6.
[56]*Ibid*, doc. 163. For more details, see: Bracanović, J., *Povijest župe Dol na Braču*, Brač, 2016, p. 5 and p. 6.
[57] Vrsalović, *Povijest otoka Brača*, *op. cit.,* note 4, p. 228.

On 23 July 1288, Dragonja from Split, a tanner, as the authorised representative of his wife Dobra, and Peruša, the son of Desača, a shoemaker, sold the land on Brač called Rasohe, Prodole, Rapje, Vrilo, together with a fishpond to Milen Machein Nerežišća on Brač.[58]

In 1441, there was a dispute in Nerežišća about the validity of the contract for the sale of part of the Vraniha pond, between Gradac and Mošuj, in the presence of the witness archpriest Grgur, Margarita Viloničić from Hvar, residing in Trogir, sold her part of the mentioned pond to Matej Nižetić for 24 small libras with the permission of her husband.[59]

4. INHERITANCE LAW

4.1. Intestate inheritance law

According to intestate inheritance law, the estate of a person who dies intestate can be inherited by children of both genders, with the exception of houses and buildings which may not be inherited by daughters if the person had sons.[60]Margetić believes that this provision was created in Zadar as an important economic and cultural centre, only to be abandoned during the period of Venetian rule in Zadar.[61]

The statutes treat the issue of the compensation of the married and financially supported daughter in relation to the father's property differently. According to the statutes of Dubrovnik, Zadar, Trogir, Šibenik, Pag and Split, she is not considered to be settled with regard to her parents` inheritance, and therefore has the right to

[58] Vrsalović, M., *Prinos iz bračkih starina– Emprunté a quelques documents de l'ile de Brač*, Vjesnik za arheologiju i historiju dalmatinsku, Vol. L (for the years 1928 and 1929), Split 1932, p. 282, document III.
[59] Vrsalović, *Povijest otoka Brača*, *op. cit.,* note 4, p. 228.
[60]The Statute of Brač, I, 24. According to the venetian statute of J. Tiepolo from 1242 (IV, 24, 25) a person who died without a will is inherited in real estate by his sons, and they are obliged to provide the sisters with a proper dowry in movable property. Cfr. Cessi, R., *Gli statuti veneziani di J. Tiepolo del 1242. e le loro glosse*, Venezia, 1938. pp. 200-206. According to L. Margetić, In Venice, the solutions of Roman-Byzantine law (equality of sons and daughters) and Lombard law (sons have the right of inheritance, if there are none, sisters are invited) are accepted. Cfr. Margetić,L., *Hrvatsko srednjovjekovno …, op. cit.*, note 8, p. 232.
[61] Margetić, *Hrvatsko srednjovjekovno... op. cit.,* note 8, pp. 225-229; Margetić, L., *Nasljedno pravo descendenata po srednjovjekovnim statutima Šibenika, Paga, Brača i Hvara*, Zbornik Pravnog fakulteta u Zagrebu, year 22, 3/1972, pp. 215-247; Hebib, M., *Plodouživanje (ususfructus); primjena rimskog koncepta u dubrovačkom pravu*, doctoral thesis, Pravni fakultet u Sarajevu, Sarajevo 2022., pp. 282-283.

claim part of the estate after their death.[62] These concepts correspond to the provisions of Roman law.[63]

On Korčula, Lastovo and Mljet, a married daughter was considered compensated, because, according to the system of family property, a person who leaves the family community after receiving their share is considered compensated and permanently separated from the community.[64]

Among the contradictory views mentioned above, the provisions of the Brač and Hvar statutes indicate that the father could marry off his daughter if he had secured her a share of the inheritance due to her in proportion to the number of children (*cum parte*) or compensated her (*cum dote*).[65] According to the provisions of the Statute of Brač, a daughter could not inherit any of the remaining property if she had received a dowry from her parents on the occasion of her marriage,[66] which can be compared to the Roman *collatio dotis*.[67] This provision was soon derogated by the following statutory provision.[68]

The wife of a husband who dies intestate was entitled to the same share of the inheritance as the children of the deceased.[69] The widow retained the dowry, which was always her property, even though her husband administered it during his lifetime. If a woman remarried after her husband's death, she lost part of her

[62]The Statute of Dubrovnik, IV, 47; The Statute of Zadar, III, 127; The Statute of Trogir, Ref. II, 223. *Statut grada Trogira*, Splitski književni krug, Split 1987; The Statute of Šibenik, V, 25; The Statute of Pag, V, 21; The Statute of Split, III, 44.
[63]Margetić, L., *Hrvatsko srednjovjekovno … op. cit*., note 8, pp. 231-233.
[64]The Statute of Korčula, (B) 98 and 113. *Korčulanski statut*, JAZU, Pravni fakultet u Zagrebu, Pravni fakultet u Splitu, Skupština općine Korčula, GZH, Zagreb 1987; The Statute of Lastovo, 32. *Lastovski statut*, Splitski književni krug, Split 2024; The Statute of Mljet, 13. *Mljetski statut*, Književni krug Split, Zavičajni klub*Mljet*, Split – Dubrovnik 2002.
[64]The Statute of Brač, I, 23; The Statute of Hvar, II, 32.
[65]*Ibid*.
[66] The Statute of Brač, I, 23.
[67] Horvat, M., *Rimsko pravo*, Školska knjiga, Zagreb, 1973, p. 393.
[68] The Statute of Brač, I, 24. For more details, see: Cvitanić, *Uvod u Brački statut*, *op. cit.,* note 7, p. 105.
[69]The Statute of Brač, I, 23; The Statute of Hvar, II, 32.Inheritance of spouses under the provisions of the Zadar Statute was possible only if one of them died without a will, leaving no ancestors, descendants or relatives until the fourth degree of kinship (The Statute of Zadar III, 135). According to the older law of Cres, the wife inherited half of the husband's property, while the husband had no rights to the wife's estate. Newer rules have determined that up to one quarter of the property can be inherited from each other (The Statute of Cres and OsorII, 67). In Dubrovnik law, the marital relationship did not constitute the basis for invoking inheritance, and the issue of the position of the surviving spouse was resolved by applying the institute of widow's enjoyment. Cfr. Hebib, M., *Plodoužívanje*…, *op. cit*., note 62.

husband's estate, which then passed to the children of the deceased in equal shares, as after her death. The husband inherited the wife`s estate in the same amount as the children. By remarrying, he also lost the portion that passed to his children in equal shares as after his death.[70]

The estate of a childless husband who died intestate was inherited by the wife, albeit in the amount of one third. The husband had the same right of inheritance to the estate of a deceased woman without children. The remainder, i.e. two-thirds of the estate, belonged to close relatives of the deceased spouse.[71] According to the statute, the estate of a widow and a widower who died intestate and without children was inherited in full by their close relatives. The statute made no distinction in terms of the rights and the amount of the inheritance share between husband and wife**.** With the exception of the inheritance of real estate, the statutory rights of inheritance of a man and a woman were identical.

The Statute of Brač contained elements of gender equality with regard to inheritance. The widow was entitled to the same share as the children of the husband who died intestate, regardless of the dowry she had retained. However, she could not dispose of it, but only use it and exercise usufruct. However, if she remarried or died, this share was divided equally between the children of the deceased. An analogous procedure was applied when the wife died, so that the widower received the same share of her inheritance as the children, and if he remarried, this share went to the children.[72]

The estate ofa man who died intestate and without children or a wife was inherited by his closest relatives. However, if he had a wife but no children, she received one third of all tangible and intangible assets.[73]The same procedure was applied toawoman who died intestate andwithout children or a husband, as well as to a woman who had a husband but no children.[74] Here, too, women and men were treated equally as in the intestate inheritance of the widowed spouse and surviving children.[75]

The estate of a person who died intestate and without heirs and relatives would belong to the commune, with the obligation of the commune to give one third of the estate to the church for the eternal peace of the deceased person`s soul and for

[70]The Statute of Brač I, 23.
[71] The Statute of Brač, I, 25; The Statute of Hvar, II, 34 and 35.
[72]The Statute of Brač I, 23.
[73]*Ibid*, 25.
[74] *Ibid*, 26.
[75] Cvitanić, *Uvod u Brački statut*, *op. cit.,* note 7, p. 106.

the repair of the church.[76]The Brač regulation was not favourable to the intestate inheritance, which is evident from the aforementioned provision. Similar provisions can also be found in other Dalmatian and Istrian statutes.[77]

Brač inheritance law, like Roman law, advocates universal succession according to which the debts of the testator pass to the heir.[78] The heir was not obliged to accept the inheritance.[79] This did not apply to legacies, as the legatee only received certain property benefits at the expense of the heirs and only after the inheritance debts had been settled. Children as heirs were only responsible for the debts of their parents as testators up to the value of the inheritance.[80]

4.2. Testamentary inheritance law

As a rule, the testator had to entrust the drafting of the testament to the communal chancellor or a notary, but he could also make it orally in the presence of witnesses whose statements were later recorded in a special communal register. An oral testament before witnesses was called a *testamentum nuncupativum,* as in Roman law.[81] The oral testament of Bogdana, the daughter of the deceased Grubša from Brač, and her sister Petruča was recorded before witnesses on 23 February 1344with a codicil clause according to which the testament was to be considered a codicil if it was not recognised as valid. [82]

Exceptions to this rule were only allowed in cases where there was a plague and for plague sufferers. [83]Brač was struck by the plague in the 1420s and 1430s, and in 1430 the Reformation on how todraft a testament during the plague was included in the Statute of Brač. [84]People suffering from the plague patients could

[76]The Statute of Brač I, 27;The Statute of Hvar, II, 36.
[77] Beuc, I., *Osnovi statutarnog prava u Istri,*Zbornik Pravnog fakulteta u Zagrebu, XII, 3-4, 1962, p. 196.
[78]D. 50, 17, 62; Nov. 48, *preaf.* For more details, see: Cvitanić, *Uvod u Brački statut*, *op. cit.,* note 7, p. 106.
[79] The Statute of Brač, III, 11.
[80]*Ibid*, II, 4.; Cvitanić, *Uvod u Brački statut*, *op. cit*., note 7, p. 107.
[81]*Ibid*, I, 28; IV, 59; Ref. III, 16.
[82]*Splitski spomenici*, *op. cit.,* note 40, issue No. 502 p. 301.
[83]The Statute of Brač, Ref. II, 4.
Pezelj, V.; Erent Sunko, Z; Dajak, M., *Pravnopovijesni modeli suzbijanja pandemijskih ugroza kao podloga razumijevanju suvremenih zdravstvenih izazova*, Zbornik radova s međunarodnog kongresa *5. kongres KOKOZ-a i 7. Hrvatski kongres medicinskog prava s međunarodnim sudjelovanjem*, Novi Vinodolski, 19-21 April 2024, p. 18; Vrsalović, *Povijest otoka Brača*, *op. cit.,* note 4, p. 256.
[84] The Statute of Brač, Ref. II, 4 of 1430: The manner of drawing uptestaments in times of plague. For more details, see: Jutronić, A., *Prilog proučavanju zdravstva na Braču*, Anali Historijskog instituta JAZU u Dubrovniku 2 (1953), p. 277 and the references cited therein.;

make their testament orally before three credible witnesses who were obliged to appear before the administration in the presence of the chancellor and four witnesses within two months of the end of the epidemic and report on the testament by confirming their statement with an oath. The content of the testament had to be attested by at least two of the four witnesses, excluding the legatee, the heir andthe executor. The chancellor was obliged to enter the witness report in the officialregister and fulfil other necessary formalities in order for the testament to be valid.[85]

An oral testament made in the commune without a notary had to be delivered to the duke within fifteen days of the testator's death, and if made outside the commune without a notary, within two months. The witnesses to the testament were obliged to appear before the duke or his deputy and their judges, and their statement had to be entered in the communal register.[86]

The main purpose of the inheritance provisions in the Dalmatian statutes was to ensure the integrity of property. Most statutes recognise equal rights for male and female heirs (Brač, Hvar, Zadar, Šibenik, Pag,). The Statute of Dubrovnik emphasises the primacy of male heirs. Testamentary inheritance is restricted by the institution of family property, especially in the statutes from the end of the 13th and beginning of the 14th century (Brač, Hvar, Korčula, Rab). More recent statutes from the end of the 14th and beginning of the 15th century allow disposition in the event of death, not only for pious purposes, but also in favour of any person (e.g. Šibenik IV, 64 and Pag IV, 48, which allow the testator to freely dispose of half of his property).[87]

The debts of the testator passed to the heir as soon as the latter accepted the inheritance as universal heir. All debts for which the creditors proved to be true and lawful had to be paid from the inheritance without affecting the rights of dowry and commune.[88]

The statute stipulated that children as heirs were liable for the debts of their father

Jutronić, A., *Bračka naselja i podrijetlo njegovog stanovništva*, Brački zbornik 1, pp. 10, 8-17. t.

[85]The Statute of Brač, Ref. II, 4 of 1430. For more details on the special form of the testament in Roman law *testamentum pestis tempore*, see: Carbone, M., *Epidemije i pravo u antičkom svijetu: od Tukidida do Prokopija iz Cezareje*, Godišnjak Udruženja Bathinvs Acta Illyrica, p. 225. Online ISSN 2744-1318.

[86]*Ibid*, I, 28.; The Statute of Hvar, II, 37.

[87]The Statute of Šibenik, IV, 64; The Statute of Pag, IV, 48. For Pag, see: Čepulo, D., *Pravna baština i društveno okruženje Paškog statuta*, u: *Statut paške općine* (ed. Čepulo, D.), Matica hrvatska Pag, Pravni fakultet Sveučilišta u Zagrebu, Pag – Zagreb 2011, p. 73.

[88]The Statute of Brač, Ref. III, 11.

and mother up to the value of the inheritance.[89]The statutes of Brač,[90] Hvar,[91] Zadar,[92] Skradin,[93] Pag[94] and Split stipulated [95] that a child could inherit a maximum of one tenth of the value of the estate over and above the share to which they were entitled. The Statute of Šibenik increased the amount of preference from one tenth to one quarter of the entire estate, which deviates most from the principle of equality of heirs.[96]

A parent could only disinherit their child if the child maliciously beat them or entered into a marriage against the parents` will, as well as if the child acted against the father`s testamentary disposition.[97]The statutes often cite the grounds for disinheritance from Justinian's Novel 115 or Venetian law. In contrast to Justinian law, the right of parents to exclude forced heirs is relatively limited in Dalmatian statutory law. Venetian law recognised only one ground for exclusion – parental abuse, while children could also be disinherited by entering into a marriage against their parents` will, which was introduced by customary law.[98]The provisions of the Statute of Rab[99]come closest to the Venetian provisions. Brač[100] and Hvar[101]statutes contain the contradiction to the last will of the parents. The Statute of Zadar also accepts the grounds from Venetian law.[102] Trogir,[103] Pag and Šibenik[104] only mention marriage without parental consent.

The only significant restriction on freedom of testation was the provision that forbadebequeathing property to the church under the penalty of nullity of such a disposition.[105]This was later mitigated by the fact that property could be

[89]*Ibid.,* II, 4; The Statute of Hvar, II, 40.
[90]The Statute of Brač, II, 3.
[91]The Statute of Hvar, II, 30.
[92]The Statute of Zadar, III, 61.
[93]The Statute of Skradin, 10. *Statut grada Skradina*, Matica hrvatska Skradin, Zagreb – Skradin 2002.
[94]The Statute of Pag, IV, 48.
[95]The Statute of Split, III, 38.
[96]The Statute of Šibenik, IV, 64.
[97]The Statute of Brač, II, 3; The Statute of Hvar, II, 31.
[98]The *Statute of J. Tiepolo*, IV, 35.; Cfr. Cessi, R., *Gli statuti veneziani di J. Tiepolo del 1242. e le loro glosse*, Venezia, 1938., p. 213-214.Margetić believes that Venetian law recognises only one reason for disinheritance, unlike Besta, who does not agree with the above. Margetić*, Hrvatsko srednjovjekovno... op. cit.,* note 8, pp. 219-224; Besta, *Il diritto... op. cit.,* note 18, p. 165.
[99]The Statute of Rab, II, 10.
[100]The Statute of Brač, II, 3.
[101]The Statute of Hvar, II, 31.
[102]The Statute of Zadar, 90, 96-98.
[103]The Statute of Trogir, II, 15 and III, 21.
[104]The Statute of Šibenik, V, 38 and 48 and Ref. 39.
[105]The Statute of Brač, Ref. I, 75.

bequeathed to the church, but in such a way that the church sold it and used the money for the construction of church buildings, their furnishings and the like.[106]

According to the cartulary of the Charter of Povlja from 1184, masters usually freed their slaves on their deathbed and gave them part of their property on that occasion. For instance, Mrs Raška gave her slave Marija "a quarter of everything she owned" (a quarter of the entire estate).[107] The Statute of Brač does not mention slaves, unlike the Statute of Korčula, which banned the slave trade through reformations.[108]

4.2.1. Legacy (*legatum)*

Brač legislation also recognises the institution of the legacy (*legatum*) [109]by which the testator bequeaths certain property benefits to third parties to be paid from the estate of the heirs, and the legacy was mostly used to leave property to the church.

4.2.2. Executor of the testament

The institution of the executor arose from the need to ensure the validity of a testamentary disposition.[110]To ensure that the testator's last will is fulfilled, the testator appointed an executor (*commissario testamentario*)[111]in his testament. According to a document from 1342, women could also actas executors*: in Split,*

[106]*Ibid.*, Ref. III, 8.
[107] Vrsalović, *Povijest otoka Brača*, *op. cit*. in footnote. 4, p. 103, Ostojić, I., *Benediktinska opatija u Povljima na otoku Braču*. Split: [s. n.], (Zagreb: Nadbiskupska tiskara), 1934, p. 50.
[108]The Statute of Korčula, Ref. 36 of 1399; Ref. 141 of 1412. For more details, see: Pezelj, V.; Štambuk Šunjić, M., *Pravni položaj žene prema srednjovjekovnom Korčulanskom statutu*, Zbornik radova Pravnog fakulteta u Splitu, year 55, 3/2018, p. 561; Dokoza, *Dinamika otočkog prostora, op. cit*., note 3, p. 141.
[109]The Statute of Brač, Ref. I, 65; Ref. II, 4.; Ref. III, 8.
Numerous aforementioned testaments mention legacies. Legacies and fideicommissum were used in classical Roman law for the purpose of circumventing inheritance regulations. See: Aličić, S.; Miletić, T., *Izigravanje odredbi o ograničavanju nasljednog prava žena putem legata i fideikomisa u rimskom pravu*, in: Boranijašević, V. (ed.). Zbornik radova sa znanstvenog skupa P*ravni sistem i zaštita od diskriminacije*, Kosovska Mitrovica 2015, pp. 487-499; Bujuklić, Ž., *Forum romanum*, Pravni fakultet Univerziteta u Beogradu, Beograd 2009, p. 439: Hebib, M., *Primjena instituta rimskog prava u cilju materijalnog osiguravanja ženskih srodnika u zakonskom nasljeđivanju srednjovjekovnog Dubrovnika*, Godišnjak Pravnog fakulteta u Sarajevu, LX, 2017, p. 102.
[110]For more details, see: Roberti, M., *Le origini dell`esecutore testamentario*, Modena 1913.
[111]The Statute of Brač, Ref. II, 4.

Dominik Matišić and Petrula, the widow of Dragan from Brač, then the wife of Dragoslav from Hvar, who are executors of the will of the deceased Dragan, admit that they owe 13 libras to the prefect Grgur, the nephew of the deceased Archbishop Petar.[112]

On the neighbouring island of Hvar, it often occurred that fathers, brothers or others, who administered the inheritance of female family members, which they had acquired through a legacy (usually by usufruct), used this inheritance in ways other than for their benefit. In 1588,Duke Antonio Longo appointed four procurators (two from among the nobility and two from among the commoners) who were obliged to protect the interests of the female heirs and ensure that the testator`s will was completely fulfilled. These executors were appointed by the public authorities in contrast to the executor who was appointed by the testator.[113]

4.3. Forcedheirship law

On Brač, forced heirship share was introduced on 4 March 1436 together with the freedom of testation, as they are two related legal institutions.[114] The amount of the forcedheirship share is not specified, but the provisions refer to Venetian law, so it is the same as in the Statute of Split.[115]Forced heirshipshare is rarely found in Dalmatian statutes. It appears at the earliest in the Statute of Split,[116] according to which a son or a daughter is entitled to at least one third of what they would have received if their father had died intestate. The principle of family property weakens with respect to understanding the father`s right to free disposition as an individual, but it survives in the form of forcedheirship share.

[112]Splitski spomenici, dio I., Splitski bilježnički spisi, sv. 1., Spisi splitskog bilježnika Ivana pok. Çove iz Ankone od 1341. do 1344. (ed. Stipišić, J.; Nazor, A), MSHSM, Zagreb 2002. For Split, see185/105, 77/45 and 78/46.

[113] On June 27, 1588, the Duke of Hvar, Antonio Longo, appointed the nobles Antonio Fasaneo and Antonio de Barbis, as well as the commoners Marc`Antonio Ivaneo and Luca Milateo, as executors. For more details, see: Kasandrić, I., *Uvod u Hvarskistatut,* p. 65.

[114]The Statute of Brač, Ref. III, 16.

[115] Bartulović, Ž., *Povijest prava države (I. dio – Opća povijest prava i države)*, Pravni fakultet Sveučilišta u Rijeci, Rijeka 2014, p. 64; Margetić, L., *Opća povijest države i prava (Nacrt predavanja)*, 3. izdanje, Pravni fakultet Sveučilišta u Rijeci, Rijeka 1985, pp. 80-82.

[116]The Statute of Split, III, 18.

5. CRIMINAL LAW

The Statute of Brač mentions women in relation to several criminal offences: murder, poisoning, rape, insulting a person of good repute, unauthorised picking of other people's fruit and washing in other people's fenced ponds.

5.1. Murder

The offence of murder committed by a woman is seldom regulated in the statutes. As far as the offence of murder is concerned, the statutes of Brač and Hvar makea clear distinction between nobles and commoners, as well as a gender distinction between the perpetrators. The Statute of Brač provides for the punishment of hanging for commoners and burning for women, while nobles are beheaded.[117]

5.2. Criminal offence against honour (slander) – defamation

The criminal offence of defamation (slander) against a person`s honour and reputation was punishable by a fine. If a person of lower social status (*persona vilis conditionis*) insulted a noble man or woman or another reputable person (*sive alicui bonae personae*), the court may impose a more severe penalty at its discretion.[118]

When determining the punishment for insult, some statutes do not distinguish between the class affiliation of the perpetrator, e.g. the Statute of Trogir, unlike the statutes of Split, Brač, Hvar and Skradin, which take class affiliation into account.[119] The Statute of Korčula regulates the offence of defamation and brawling between women.[120]

5.3. Criminal offence of preparing a poisonous potion

With regard to the criminal offence of preparing a poisonous potion, the Statute of Brač stipulates that the duke and the judges are authorised to punish a person *who*

[117]The Statute of Brač, III, 27; The Statute of Hvar, III, 31. Cf. Cvitanić, A., *Diskriminacija pučana u Hvarskom statutu*, Radovi Instituta za hrvatsku povijest, Vol 10, 1/1977, p. 86; Splitski statut IV., 17; cf. Cvitanić, A., *Statut grada Splita,* KKS, Split, 1998, p. 264.
[118]The Statute of Brač III, 38; IV, 33; The Statute of Hvar, III, 33.
[119]The Statute of Trogir, II, 6; The Statute of Split, IV, 12; The Statute of Brač, III, 33 and 38; The Statute of Skradin, 20.
[120]The Statute of Korčula, 18.

prepares a poisonous potion (herbariam)[121]at their own discretion. The preparation of the potion itself is punishable, not just theact of poisoning. According to Vladimir Mažuranić, the preparation and administration of the potion were usually linked to certain spells and vice versa.[122]These questions attract a great deal of attention, and not only from legal experts.[123]

The Proto-Statute of Rab from 1234 stipulates that a woman who prepares poisonous herbs cannot be purified even with iron, i.e. by divine judgment ofwearing heated iron, and if the poisoned person dies, the poisoner is to be burned at the stake.[124]

The statutes differently define the offences of sorcery and witchcraft,[125] as well as the penalties for them.[126] Most statutes provide for penalties for *herbariae*, but only the statutes of Korčula[127] and Dubrovnik[128] specify their content.[129]Art. 59 of the Vinodol Code threatened the poisoner with a fine of 100 libras and burning if she was unable to pay the fine.[130] According to the provisions of the Statute of Poljica, witches or sorceresses are to be flogged for their first offence and burned if they reoffend.[131] The neighbouring Statute of Split only prescribes the

[121]The Statute of Brač III, 8; The Statute of Hvar, III, 10.
[122] Mažuranić, V., *Prinosi za hrvatski pravno-povjestni rječnik,* JAZU, Zagreb 1908-1922, Vol. I, p. 14.
[123]See, Vukelić, D., *Magija na hrvatskome povijesnom prostoru*, Školska knjiga, Zagreb 2021.
[124] Milović, Đ.; Milović Karić, G., *Tjelesne kazne u rapskom protostatutu iz 1234. godine*, *Acta medico-historica Adriatica* vol. 3, 1/2005, p. 40.
[125]For witches, see: Jutronić, A., *Uzlovi i vilenice na Braču, Hvaru i Visu u 17. veku*, Glasnik Etnografskog instituta SANU, 11-15/1962-1966, pp. 179-184.; Skrivaneli, P., *O vještacima na otoku Hvaru*, Prilozi povijesti otoka Hvara Vol. IV, 1/1974, pp. 80-90.
[126] See: Grozdanić, V.; Rittossa D., *Povijesni razvoj kaznenopravnog statusa žena*, in: *Kada žena ubije* (ed. Grozdanić, V.), Pravni fakultet Sveučilišta u Rijeci, Rijeka 2011, p.74 and onward.
[127]The Statute of Korčula, 17. Cf. Rađep, J., *Moć vradžbine (razmišljanja povodom XVII gl. Korčulanskog statuta)*, in: *Zbornik radova Znanstvenog skupa Statut grada i otoka Korčule* iz 1214. (ed. Šeparović, Z.), Jugoslavensko viktimološko društvo, Zagreb 1989, pp. 237-249.
[128]The Statute of Dubrovnik, IV, 7.
[129]The Statute of Split, IV, 87; The Statute of Trogir, II., 26; The Statute of Skradin, 76; The Statute of Rab, IV, 51; The Statute of Hvar, III, 10; The Statute of Kotor, 101.*Statuta civitatis Cathari, Statut grada Kotora*, Državni arhiv Crne Gore, Kotor 2009.
[130] The Vinodol Code, Art. 59, text and translation according to *Srednjovjekovni zakoni i opći akti na Kvarneru*, pp. 1151-1312, ed. Margetić, L., Globus, Kvarner, Pravni fakultet Sveučilišta u Rijeci, Rijeka 2012. See also Milotić, D.; Milotić, I., *Proces protiv Dilette, Motovun - 1271. U prožimanju rimskog, kanonskog, običajnog i mletačkog prava*, Državni arhiv u Pazinu, Pazin 2022, pp. 59-61; Margetić, L., *Iz starije prošlosti Raba*, in: *Istra i Kvarner*: izbor studija, Pravni fakultet Sveučilišta u Rijeci, Rijeka 1996, p. 249 in footnote 79.
[131]The Statute of Poljica, Ch. 112.

punishment of burning with complete or partial confiscation of property in favour of the commune for the perpetrator of such an offence and their accomplice. If the perpetrator had no descendants, their property would be confiscated in favour of the commune, and if they had only female descendants, they received half of the property, while the other half went to the commune.[132]

5.4. Rape

The Statute of Brač regulates the offence of rape in a short provision. The rapist was punished at the discretion of the Curia, taking into account the circumstances in which the rape took place and the person`s social status.[133]

In statutory law, punishment could often be avoided by the conclusion of a marriage between the perpetrator and the victim, which mitigated the consequences of the offence, as evident from the provisions of the Statute of Poljica.[134]

It was considered that rape interfered with the foundations of the life of the commune, which is why it was strictly sanctioned in all Dalmatian statutes.[135] The Statute of Skradin defines rape as *primum maleficium post omicidium.*[136]The Statute of Zadar contains no provisions on rape, and the Statute of Pag sanctions rape in the Penal Statute of Pag from 1462.[137] The Statute of Rab precisely illustrates the social conditions in the offence of rape. The rape of a woman *bonae qualitatis* is punished with 100 perpers (half to the commune, half to the victim)

[132]The Statute of Split, IV, 87. For more details, see: Pezelj, 2015, p. 250.
[133]The Statute of Brač III, 12; The Statute of Hvar III, 14.
[134] Cf. The Statute of Poljica, Art. 110. For more details, see: Pezelj, V., *Neka pitanja pravnog položaja žene prema Poljičkom statutu iz 1440. godine*, Godišnjak Pravnog fakulteta u Sarajevu, LXVII, 2024, p. 194; Grozdanić, Rittossa, *Povijesni razvoj… op. cit.,* note 127, p. 53. For the criminal offences of violence against women in the Middle Ages, see Bartulović, Ž.; Erent Sunko, Z.; Pezelj, V., *Spolno zlostavljanje i druga kaznena djela nasilja nad ženama u zakonicima srednjovjekovnog germanskog prava s naglaskom na Lex Salica i Lex Ribuaria, Prilog istraživanju pravnopovijesnog položaja žena i borbi protiv nasilja nad ženama*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 39, 3/2018, pp. 921-945.
[135]For the criminal offence of rape in Dalmatian statutory law, see Jaramaz Reškusić, I., *Kazneni sustav u Šibeniku od 14. do 16. st*., Gradska knjižnica Juraj Šižgorić, Šibenik 1996, p. 53; Heršak, G., *Krivično djelo silovanja u Korčulanskom statutu i komparativno*, in: *Zbornik radova Znanstvenog skupa Statut grada i otoka Korčule* iz 1214. (ed. Šeparović, Z.), Jugoslavensko viktimološko društvo, Zagreb 1989, pp. 195-200.
[136]The Statute of Skradin, 92; The Statute of Šibenik, VI, 61-66.
[137] Čepulo, *D., Pravna baština i društveno okruženje Paškog statuta*, in: *Statut paške općine* (ed. Čepulo, D.), Matica hrvatska Pag, Pravni fakultet Sveučilišta u Zagrebu, Pag – Zagreb 2011, p. 100.

and a one-year banishment, while the rape of a harlot or maid is punished with 12 perpers, and that of a harlot in a brothel with 6 perpers. If the rapist is unable to pay, in the first case both of his eyes will be gouged out, in the second case his right hand will be cut off, and in the third case he will beflogged and branded.[138]

The Vinodol Code prescribes a heavy fine of 50 libras each for the duke and the injured party for rape and attempted rape unless the duke reaches an agreement with the injured party,[139] while other Kvarner and Dalmatian communes provide for the death penalty or banishment. The Vinodol Code makes no distinction as to the social status and marital status of the raped woman. If there are no witnesses, which is the most common case, the raped woman is believed with an oath of 25 sworn witnesses who confirm her good repute or even a self-sworn oath if there are no sworn witnesses.[140]

5.5. Unauthorised picking of other people's fruit

For the unauthorised picking of other people's fruit, a noblewoman is required to pay 25 small libras (denars), and the commoner is required to pay the same amount but is also branded.[141]

In the Middle Ages, thefts were frequent on Brač, which is why the Venetian administration often intervened. In his decree of29 July 1701, Doge Aloise Mocenigo threatened harsh punishments, in particular for thieves who damaged vineyards, harvested grapes, cut down and burned forests, orchards and pastures, with a sentence of up to three years in prison in a galley and banishment and for children and women with public beating.[142]

5.6. Prohibition of washing in other people's fenced ponds

Many disputes stemmed from ponds because, like pastures, they were the common property of the islanders and they were used to water livestock and supply water to the inhabitants of the settlements in the interior of Brač. As there were hardly

[138]The Statute of Rab, IV, 66-67. Cf. Margetić, *Iz starije... op. cit.*, note 131, p. 261.
[139] The Vinodol Code, Art. 56. See Bartulović, Ž.; Radić, Ž., *Pravna ostavština Frankapana*, in: *Putovima Frankopana*, pp. 375-428 (ed. Srdoč-Konestra, I.; Potočnjak, S.), Primorsko-goranska županija, Rijeka 2018, p. 422.
[140] Učur, M. Đ.; Bartulović, Ž., *Nomotehnički aspekti Vinodolskog zakona iz 1288. godine*, Grobnički zbornik, 11/2021, p. 44.; Heka, L., *Prisega kao dokazno sredstvo u Vinodolskom zakonu*,Zbornik Pravnog fakulteta Sveučilišta u Rijeci,Vol. 41, issue No. 2, 2020, p. 549.
[141]The Statute of Brač, Ref. I, 10.
[142] Vrsalović, *Povijest otoka Brača, op. cit*., note 4, p. 238.

any sources of potable water, rainwater was collected in fenced troughs created by the natural configuration of the soil.[143]

Washing in other people's fenced ponds, which served to supply people (with water) was punished with a fine of 5 small libras (denars), and if the perpetrator was unable to pay, he was punished with flogging from the Church of St. Anthony in Nerežišća to the Church of St.Peter.[144]

6. PROCEDURAL LAW

In 1426, three seats of local judges on Brač were mentioned: in Nerežišća, in Donji Humac and in Gradac, while the judges of Brač were mentioned at the end of the document.[145]

In some statutes, it is customary for the plaintiff to take an oath on the truthfulness of his claim when filing a lawsuit.[146] The supplementary oath is mentioned in the statutes of Brač,[147] Hvar and[148] Korčula,[149]and served the plaintiff to supplement the incomplete evidence, i.e. to compensate for the lack of evidence. The oath is found in the Dalmatian statutes in a considerable number of different cases in relation to the persons who take it and the consequences it entails.[150]

The Statute of Brač makes no mention of torture in relation to women, although it is prescribed in neighbouring statutes. According to the Statute of Hvar, a woman brought before the duke for theft is interrogated and subjected to torture at the discretion of the duke and the judges.[151] Torture as evidence against women is provided for in the statutes of Korčula[152] and Split.[153]

[143] *Ibid.*, p. 228.
[144] The Statute of Brač, Ref. III, 5.
[145] Vrsalović,*Povijest otoka Brača*, *op. cit*., note 4, p. 100.
[146]The Statute of Brač, IV, 56; The Statute of Split, IV, 1; The Statute of Šibenik, Ref. 50.
[147]The Statute of Brač, IV, 51.
[148]The Statute of Hvar, III, 28.
[149]The Statute of Korčula, 7.
[150]Forthe notion of taking oaths in the Vinodol Code, see: Heka, L., *Prisega… op. cit.,* note 141*,* p. 552.
[151]The Statute of Hvar III, 39. For more details on torture, see: Fiorelli, P., *La tortura giudiziaria nel diritto comune*, Vol. I, Giuffré, Milano 1953, pp. 295-299; Pansolli, L., Voce *Tortura*, *Novissimo digesto italiano*, Vol. XIX, Turin 1973, pp. 424-425.
[152]The Statute of Korčula, 134 new ed. For more details, see: Pezelj, V.; Štambuk Šunjić, M., *Pravni položaj žene prema srednjovjekovnom Korčulanskom statutu*, Zbornik radova Pravnog fakulteta u Splitu, year 55, 3/2018, p. 571.
[153]The Statute of Split, IV., 84-85. For more details, see: Pezelj, V., *Pravni položaj žene po Splitskom statutu iz 1312. godine,* in: *Splitski statut iz 1312. godine: povijest i pravo,*

7. CONCLUSION

Although the Statute of Brač follows the basic determinants of neighbouring statutes within the Dalmatian legal region and beyond, there are some peculiarities.

With regard to the age of majority, the Statute of Brač follows other statutes, which mostly take into account the provisions of canon law, i.e. the onset of sexual maturity at the age of 12 or 14.

A married woman had limited legal capacity, could not enter into legal transactions without the will and consent of her husband and was deprived of the right to dispose of and manage the dowry. The provisions of the Statute of Brač thus differed from Roman Byzantine law, which was based on the principle of a woman's full legal capacity, and they resembled the characteristics of Lombard law. The concept of paternal authority is made clear by the provisions on the marriage of children. The father's authority ended in relation to his adult daughter if she married during her father's lifetime. The woman was the owner of the dowry she brought into the marriage, and during the marriage she could acquire property, usually by inheritance from her ancestors. Her legal capacity did not expire during the marriage. The husband administered the dowry until his death, and after his death the wife could again dispose of it as owner. Archive material indicates that women were involved in the legal transactions of buying, selling and leasing land.

According to inheritance law, the estate of the person who died intestate was inherited by his children, equally by male and female, with the exception of houses and buildings, which were not inherited by daughters if the deceased had sons. This institution spread from Zadar, where it was later abandoned due to the dominance of Venetian law.

The estate of a husband who died intestate and childless was inherited by his wife in the amount of one third. The husband had the same right of inheritance for the estate of a wife who died intestate and without children. In both cases, the remainder of the estate (two thirds) belonged to close relatives of the deceased spouse. The estate of a widower or widow who died intestate and without children was inherited in full by close relatives. The statute made no distinction between men and women in terms of rights and the amount of the inheritance. The equal treatment of men and women in inheritance law indicates a less developed economy and a backlog in gender equality from the clan-tribal system.

povodom 700. obljetnice, Zbornik radova (ed. Radić, Ž.; Trogrlić, M.; Meccarelli, M.; Steindorff, L.), Split 2015, pp. 227-253.

Testamentary inheritance was limited by the institution of family property, especially on Brač, Hvar, Korčula and Rab. The free will of the testator was restricted by the statute in such a way that a parent who had living children could not leave more to one child than to the other, with the exception of an item worth no more than one tenth of the total estate. The same provision is contained in the statutes of Hvar, Zadar, Skradin, Pag and Split. A parent could only disinherit their child if the child maliciously beat them or entered into a marriage against parental consent, as well as if they acted against what the father had decreed in his last will.

Women performed the duties of an executor, who was named by the testator as as a private indivdual in his testament.

As far as the criminal offence of murder is concerned, the statutes of Brač and Hvar are illustrative with regard to the gender difference between the perpetrators, as they provide for the punishment of hanging for commoners and burning for women, while noblemen were beheaded. Rape was punished at the discretion of the Curia, taking into account the circumstances in which the rape took place and the person`s social status. The duke and the judges were authorised to punish a person at their discretion if they prepared a poisonous potion and if a person of lower social standing insulted a nobleman, his wife or another prominent person. The differentiation according to gender and class can be seen in the offence of unauthorised picking other people's fruit, for which noblewomen were fined and commoners were branded in addition to a fine.

With respect to the legal status of women, the provisions of the Statute of Brač are the most similar to the provisions of the Statute of Hvar as far as the content of the first three books is concerned. They indicate a favourable permeation of two basic legal cultures: Slavic and Roman, as well as the influences of the canonical and Venetian legal systems. It can be argued that women on Brač were not particularly discriminated against and that the legal provisions contain many elements that indicate equal treatment of wives and husbands, which is particularly evident in inheritance law.

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RESTORING THE PRUDENT PART OF JURISPRUDENCE: ARISTOTLE VS. HOBBES

ABSTRACT

The article examines contemporary trends in jurisprudence, particularly the growing interest in the role of phronesis-prudence. Modern legal thought increasingly acknowledges the need for "practical wisdom" (phronesis) in legal practice, challenging the Hobbesian view that lawyers should be mere executors of sovereign will. Through a historical perspective and a critical comparative analysis of Aristotle's and Hobbes' theories, we argue that the Aristotelian concept of phronesis – integrating ethical and political dimensions into legal reasoning – offers a model for addressing the increasing complexity of legal and moral ambiguities in democratic societies. While Hobbes dismissed prudence as a politically hazardous form of subjective reasoning, Aristotle viewed it as a necessary supplement to legal techne, enabling legal practitioners to navigate the relationship between law, justice, and societal expectations. Furthermore, phronesis provides a valuable philosophical foundation for anchoring contemporary legal propositions. Reviving Aristotelian prudence into contemporary legal discourse encourages lawyers to engage more actively in social life, rather than hiding behind their techne or serving merely as the "mouth of the law", yet, it does not grant them additional power over others. Instead, it encourages lawyers to cultivate "human" competencies that promote informed judgment and political responsibility and enhances legal practitioners' ability to mediate between legal norms and social justice concerns. Ultimately, this Aristotelian perspective offers a dynamic response to the growing ethical uncertainties of modern pluralistic societies, ensuring that law remains not only a technical craft but also an integral part of civic life.

Keywords: *Phronesis, jurisprudence, Aristotle, Hobbes, judgment*

1. INTRODUCTION

In *Theory of Justice*, John Rawls synthesised what he termed "the Hobbes's thesis,"[1]a concept he then explored in depth in his lectures on Hobbes.[2] The sense of justice and the will to abide by existing arrangements that all men share, Rawls argued after Hobbes, is not enough to motivate each of them to trust one another, unless they live in a state where there is an effective penal machinery that "serves as men's security to one another."[3] Agreeing with this Hobbesian thesis, Robin West proposed to complement it with a second important proposition. In contemporary political culture, she argued, the law is not only expected to deter violence, but it is also expected to protect some "mess" that is necessary in order to let individuals to exercise their individual freedom.[4] For West such "modified legalist contract" explicitly guides the thinking about the function of law in U.S. legal culture,[5] but this ideal seems to be characteristic for any democratic state, in which establishing a satisfactory balance between security and freedom is of crucial importance. In Poland, too, since the collapse of the communist system, this ideal has been palpable, influencing not only debates about the law, but also the position of lawyers and their function within the political system and society as a whole. The contract in question works only as long as there is a general agreement on labelling particular actions either as a "violence" or a "mess." At times, however (and according to West, this time is now), there is a growing grey area of actions that are perceived by many members of the society as more than a mess, but less than violence. In such circumstances, it becomes increasingly difficult to make justifiable judgements about them using existing concepts and terms. Pollution caused by industry is more than a mess, but not as yet violence.[6] Industrial activity confirms the potential of human freedom and is one of the unwelcomed but also unintended results of the human creative powers that have built civilisation as we know and enjoy it. Nevertheless, its consequences are often lethal for human beings, which allows it to be seen as violence that should not be left unattended to by the state. The more acts of this kind there are, the more difficult it becomes to draw a clear line between "mess" and "violence." As a result, West continued:

"[F]amilial legal categories (…) lose their point of reference. The categories themselves then become worse than useless: they obfuscate and distort reality. Law becomes unhinged from the modified legal contract that underlies it; law

[1] Rawls, J., *A Theory of Justice*, Belknap Press, Harvard 2003, p. 211.
[2] Rawls, J., *Lectures on the History of Political Philosophy*, Belknap Press, Harvard 2008, p. 23–93.
[3] Rawls, J., *A Theory…*, note 1, p. 211.
[4] West, R., *Legal Selves*, In: Messy Self, J. Rosner (ed.), Routledge, NY 2015, p. 147.
[5] *Ibid*., p. 148.
[6] *Loc. cit.*

loses self-confidence. (…) Whenever that line (of division between violence and mess) is lost, we lose the confident inference that either the intrusion of law or the staying of law's hand is a boon to our overall well-being."[7]

It is quite likely that Hobbes would have agreed with the above diagnosis and even accepted the extension of his "thesis" so that it remained consistent with the modified legalistic contract described by West. For all his insistence on obedience, he accepted as a natural fact that citizens need a mess in order to actively pursue their own little visions of happiness. "For the use of Laws," he wrote, "is not to bind the People from all Voluntary actions; bur to direct and keep them in such a motion, as not to hurt themselves by their own impetuous desires, rashness, or indiscretion; as Hedges are set, not to stop Travellers, but to keep them in the way."[8] Hobbes would also have agreed that from time to time there grows a tension between individual perceptions of mess and violence, and then the very basis of citizens' obedience is threatened. The laws are no longer trusted to provide security, and such a lack of trust is easily generalised, endangering the life of the whole political community. The philosopher was well aware that every Leviathan is a mortal god,[9] and its mortality becomes apparent when the clear line of division discussed by West is lost. The legal "hedges" are no longer seen as sufficient protection against violence and, worse still, many citizens have the idea that they should be removed and replanted according to a different project.

Hobbes and West would perhaps also agree on another point: that the decision of where exactly to draw the line between the violence and the mess entails political judgement and "becomes very much a function of whose perspective counts as authoritative."[10] This decision is external to the law itself, but it modifies the content of many well-established legal terms and concepts ("murder," "justified homicide," "self-defence," etc.). Nevertheless, Hobbes's and West's views diverge, when it comes to answering the question of whose judgement is to be regarded as authoritative in such cases, and therefore whose opinion should be taken into account by those who deal directly with the law, namely: lawyers. Hobbes is absolutely clear about this. The only subject capable of making political judgements in the Leviathan state is the sovereign, who is the legislator to whose decisions the citizens must submit. West, on the other hand, proposes to listen to the "narrative voice"[11] of those who have first-hand experience of the grey area of actions that have not yet been recognised by the law as violence, but which impair

[7] *Ibid*., p. 149.
[8] Hobbes, T., *Leviathan*, Oxford University Press, NY 1998, p. 230.
[9] *Ibid*., p. 114.
[10] West, R., *Legal Selves*, note 4, p. 149.
[11] *Ibid.*, p. 150.

the well-being of some individuals and groups to an extent that deserves to be called injustice.

West's proposal can be seen as an example of a much broader trend in contemporary legal scholarship to enrich the image of law and lawyers in ways that demonstrate their positive and active contribution to the wider concern to promote a sense of justice in diverse societies and to facilitate political cooperation between individuals and groups. In many of these new ideas and movements in the field of law, one can observe various attempts to revive elements of the very specific practical knowledge known as prudence, with its overtly political and ethical dimensions.

As historians of political and legal thought, we will argue in this article that such attempts reflect a more general need to overcome the rather modest view of the legal profession that modernity owed to thinkers such as Hobbes. We will try to show that a return to the very origin of the concept of prudence - Aristotle's *phronesis* - offers an interesting philosophical perspective that allows certain contemporary propositions to be anchored. Moreover, by understanding both the advantages and the limitations of *phronesis*-prudence, we believe it is possible to complement West's answer to the question of whose judgements should be heard when some perceptions of violence emerge within the natural chaos of freedom. We believe that the narrative voice of lawyers should also play some role here.

The academic literature on prudence and *phronesis* is extensive, as the concept of practical wisdom has been discussed by many thinkers (from Cicero via St. Thomas Aquinas to Martin Heidegger and Martha Nussbaum), and is now attracting the attention of scholars from various disciplines. In the present text, which builds on our previous research,[12] we refer directly to the works of Aristotle.

2. HOBBES VS LAWYERS

According to Hobbes, problems in maintaining social order arise from the proliferation of beliefs and opinions, many of which would fall under the “mess” category, as discussed by West. They are the unavoidable outcomes of individual freedom, but once they enter the public sphere, their subjective and partial character makes them a threat to the common order. What they demand here is no

[12] Barwicka-Tylek, I., *Historia doktryn politycznych i prawnych: refleksja fronetyczna*, Krakowskie Studia z Historii Państwa i Prawa, 17/2024, p. 459-484; Barwicka-Tylek, I., Ceglarska, A*., Does la bouche de la loi have anything to say in democracy? An exercise in legal imagination*, Studia Iuridica Lublinensia, 31/2022, no 2, p. 85-99.

longer freedom, but power, often masked with ethical references to values such as justice or equality. Under such conditions, rebellion and civil war lurk in the dark, and the state risks dying in violence. The practical test for the Hobbesian sovereign is to be able to make the political judgments necessary to silence competing narratives and capture the minds of citizens in order to restore their confidence in laws and the state. "Capture" is a very apt word here. Since human beings are guided by passions and appetites, the sovereign's judgement should take into account the sentiments of the people, however different they may be. This means that the sovereign should not ignore the "narrative voices" (to return to West's language) that come directly from the citizens and express their sense of justice. Responding positively to them, even if it means manipulating them to reduce their diversity, makes his task easier. At the same time, his own political narrative should first and foremost be consistent with scientific knowledge of human nature. In short, eloquence and reason should come together in the sovereign to make authoritative political judgements exposed as statute law. Hobbes thinks that this is possible, although he admits that they are contradictory faculties, since eloquence is more useful when it appeals to the passions, whereas reason should be "grounded upon principles of truth".[13] Among such principles of truth which are indispensable for the sovereign to learn before making any judgements, one can find a great deal of knowledge concerning the nature of obligations and law. It is interesting to note, however, that for Hobbes it is not lawyers but political philosophers like him who are in a position to provide such scientific, theoretical knowledge.[14] As for lawyers, or more specifically: for judges, whose function in the state is the most important, Hobbes likened them to "the organs of voice,"[15] which provide the technical support that enables the sovereign to utter his laws.

Hobbes criticised the long English tradition of common law not so much on its merits,[16] but because this tradition assumed that judges possessed a special kind of wisdom that is political and contributes to the welfare of the whole community, and so should also guide the artificial reason of the legislator. The wisdom in question was called prudence and could only be acquired through "long study,

[13] Hobbes, T., *Leviathan*, note 8, p. 389.
[14] Loughlin, M., *The political jurisprudence of Thomas Hobbes*, In: Hobbes and the Law, D. Dyzenhaus, T. Poole (eds.), Cambridge University Press, Cambridge 2012, p. 5-21.
[15] Hobbes, T., *Leviathan*, note 8, p. 162.
[16] Hobbes does not deny that customary laws can indeed become law, but only if the sovereign so decides. He does not question the content of that law, but insists that only that which is pronounced by the sovereign can truly be called law. Any legal custom cannot constitute a different kind of law, but is subordinate to the statutory law and can only be binding if the sovereign confirms it or signifies its content by not objecting to it. See: Letwin, S.R., *On the History of the Idea of Law*, Cambridge University Press, NY 2005, p. 97-98.

observation and experience".[17] It required an understanding of *ius*, often equated with some pre-existing, natural and normative order. It also involved the ability to relate general norms to particular cases, so that judicial decisions would serve universal justice, even if they varied to some extent because of the different particular circumstances of the case. The reverse was even more useful: if a particular judgement was accepted as just, it acquired universality and could be applied to many other similar cases. It was prudence, which allowed one to mediate between the application of the letter of the law and the fulfilment of the requirements of justice, that made legal activity the *arsboni et equi.*[18] From this perspective, it was the statute law that served as a technical tool to make the administration of justice easier and more efficient.

It was also their presumed prudence that contributed to the high regard in which lawyers were held in public life in the Middle Ages, when the ruler was seen primarily as an *iudex* rather than a legislator[19]. For Hobbes, however, *ius* and *lex* are as different as liberty and obligation.[20] The state is an artificial edifice built on the latter, and so "it is not wisdom but authority that makes a law", he declared unequivocally, adding: "That the law hath been fined by grave and learned men, meaning the professors of the law, is manifestly untrue; for all the laws of England have been made by the kings of England, consulting with the nobility and commons in parliament, of which not one of twenty was a learned lawyer."[21] It is well known that Hobbes's criticism was directed at Edward Coke and his idea of jurisprudence.[22] But in formulating it, Hobbes undertook a much more general attack on the concept of prudence. Here his enemy was not so much Coke as Aristotle.

The last sentence may sound controversial. Prudence is a Latin term, and the first esteemed *iuris prudentes* were Roman jurists.[23] In ancient Greece there were no lawyers as we know them, and the administration of justice was a political task. Nevertheless, it was Aristotle's *phronesis* (practical wisdom) and his view of human affairs that influenced the further conceptualisation of prudence, also known as practical wisdom. Hobbes seems to have recognised this. He also

[17] Hobbes, T., *A dialogue between a philosopher and a student of the common laws of England*, University of Chicago Press, Chicago 1971, p. 55.
[18] *Digesta Iustiniani*, T. Mommsen; P. Krueger; A. Watson (eds.), D 1.1.1., https://droitromain.univ-grenoble-alpes.fr/Corpus/digest.htm, 28 February, 2025.
[19] Ribeiro, G. de Almeida, *The Decline of Private Law*, Hart Publishing, Oxford 2019, p. 124-125.
[20] Hobbes, T., *Leviathan*, note 8, p. 192.
[21] Hobbes, T., *A dialogue…*, note 17, p. 55.
[22] Lobban, M., *Thomas Hobbes and the common law*, In: Hobbes and the Law, D. Dyzenhaus, T. Poole (eds.), Cambridge University Press, Cambridge 2012, p. 59-60.
[23] Litewski, W., *Podstawowe wartości prawa rzymskiego*, WUJ, Kraków 2001, p. 27-28.

realised that *phronesis*-prudence, as Aristotle conceived it, was a wisdom directly related to the relational definition of man as *zoon politikon.*[24] The definition that had to be rejected in order to construct the impressive project of a state made up of individuals primarily interested in their own preservation (and thus incapable, though not unwilling, to engage in a wider political and ethical discourse about the common good).

3. ARISTOTLE: A HISTORICAL REMINDER

For Aristotle, although human beings are capable of living solitary lives, we are naturally social creatures. Endowed with reason and speech, but also "perception of good and bad and right and wrong and the other moral qualities", we should use all these capacities to build political communities in which it is possible to live well.[25] Every *polis* has its origin in (human) nature, but at the same time it is an artificial product of human creativity, or more precisely: of our mimetic capacity, which allows us to imitate nature and to make certain things adapted to our particular desires and needs. The art of making (Greek *poiesis*) is based on the knowledge known as *techne*, which is, roughly speaking, the knowledge characteristic for of craftsmen ("producers") of all kinds. Among these there are carpenters as well as poets. In a way, according to Aristotle, every individual is a craftsman, doing his best to produce his own personal ("private") happiness. And since productive knowledge is concerned "with crafting things and getting a theoretical grasp on how something may come to be that admits of being and of not being and whose starting point is in the producer and not in the product,"[26] the result of our struggles is diversity.

Unlike Plato, Aristotle is not hostile to diversity, as long as it is possible to ensure some unity, necessary for *polis* to survive and prosper as one political community.[27] Given natural inclinations towards diversity, such unity must be artificially crafted to a certain extent, and so every state needs a kind of political craft that encompasses all the public activities essential to the functioning of the state, including the functions which are nowadays performed by lawyers as part of the legal craft. The task of all such political craftsmen, granted with power, is to ensure that citizens would choose cooperation in spite of all the differences that set them apart. To use the vocabulary applied by West, they would neither do

[24] Barwicka-Tylek, I., *Aristotle's concept of zoon politikon: on political benefits of being not too perfect*, Horyzonty Polityki 15/2024, no 50, p. 229-242.
[25] Aristotle, *Politics*, transl. C.D.C Reeve, Hackett Publishing, Indianapolis 1998, 1.1253a.
[26] Aristotle, *Nicomachean Ethics*, transl. C.D.C. Reeve, Hackett Publishing, Indianapolis 2014, 6.4.
[27] Aristotle, *Politics*, note 25, 2.1261a.

violence, nor grow too messy, for that would increase diversity beyond the acceptable levels.

In Aristotle's works there are at least three kinds of means that help to accomplish the task. Two of them are directly related to a craft-like activities that objectivise any material they work upon (human beings included) and so need to be based on power. These are the laws of the state all the citizens must obey, and education in virtue aimed at habituating them to act in a manner publicly approved to the extent possible. In this particular context, both laws and virtues are in fact quite similar, since they serve as tools to shape the character of individual citizens (virtue) or at least to manipulate their behaviour in order to ensure that their actions are neither violent nor too messy according to the already existing standards (laws)."For man, when perfected," writes Aristotle, "is the best of animals, but, when separated from law and justice, he is the worst of all".[28] Both craft-like means of producing unity reduce individual freedom and creativity, but improving our cooperative actions they actually stimulate personal development, making us better *zoapolitika*. They force citizens who pursue their particular goals to rely on trained and repeatable rules. Unconditional respect for these rules gives a sense of stability to the common order. But Aristotle does not stop there. He mentions a third way of fostering cooperation that has nothing to do with *techne*, since it concerns actions taken in areas where there is no craft.[29] Here the philosopher introduces a specific kind of "practical wisdom" he calls *phronesis*.

As has already been said, *phronesis* is an ambiguous concept and it can be interpreted in different ways. It is a virtue, because it requires an experience that fosters a particular disposition (a habit of acting *phronetically*). At the same time, it is action itself, since it is the practical result of deliberation.[30] *Phronesis* emerges under conditions of uncertainty, when there is no algorithm that would allow the course of action to be fully controlled in a craft-like (*poietic*) manner so as to guarantee its ultimate success. As Aristotle explains, some people are called prudent, since they possess a faculty of discerning "what is good for themselves and for human beings".[31] And this means that *phronesis* is related directly to our political nature (the universally human sense of justice), and not to the artificial order we introduce to make the best of that nature under particular material conditions. As such, it can be judged by others on the same natural basis. An

[28] *Ibid.*, 1.1253a.
[29] Aristotle, *Nicomachean Ethics*, note 26, 6.5.
[30] The first understanding has been particularly emphasised by the Christian tradition, especially by Thomas Aquinas. The second was underlined by Aristotle himself. See: Aquinas, T., *Summa Theologiae*, Aquinas Institute 2020, II-II, p. 47-56; Aristotle, *Nicomachean Ethics*, note 26, 6.5.
[31] *Loc. cit.*

interesting aspect of *phronesis*, which distinguishes it from any other type of wisdom, is its relational character. In the case of theoretical knowledge or technical knowledge, it is I who has it or not, and I who performs it or not. But for the action to deserve the name *phronetic*, it must be received by others as a credible reflection of human political nature, oriented towards cooperation and justice, which makes it worth being supported or followed. Only then – after such a collective political judgement has been made –would I deserve the name *phronimos* (a practically wise person). Otherwise my action and I would simply pass unnoticed as merely a private act of a private person; an element of diversity and not a public attempt to contribute to the work of unity, using the competences I have as a human being capable of seeking ways of cooperation rather than conflict.

4. *PHRONESIS* AND LEGAL CRAFT: ARISTOTLE VS. HOBBES

Phronesis as a concept may be difficult to define, but the reasons why Aristotle mentions it are relatively clear. In short, the message is that there are crafts in which not only *techne* but also *phronesis* matter. These are the crafts in which the material they work on involve human beings and their relationships with each other. There is an important difference between a skilled craftsman and a good craftsman, just as there is a difference between many Athenian politicians and Pericles, who is the example of *phronimos.*[32] No doubt Pericles was a skilled craftsman, which in democratic Athens meant acquiring the *techne* of a dexterous rhetorician. But somehow he was also trusted as a democratic leader, who inspired the citizens to exercise their share of *phronesis* (judgement).[33] As a result, in his times Athenian democracy functioned relatively well.

The concept of *phronesis* is also relevant to the field of law. Unlike a carpenter, who is not expected to create chairs with moral considerations for their future use, legal professionals cannot separate their craft from ethical and political concerns. This does not mean that the chairs cannot be used politically, or that such use cannot be judged ethically as good or bad. In ancient Rome, *curule* seats (*sellaecurules*) symbolized the authority of magistrates. At times, when people believed that this authority had been abused, they called for the destruction of these

[32] *Loc. cit.*
[33] This is not the same thing as saying that Pericles was always just or always in the right. In fact, Aristotle questions some of his political decisions. See: Aristotle, *Politics*, note 25, 2.1274aand also: Barwicka-Tylek, I., *Intricacies of Practical Wisdom: Or Why Would Aristotle Vote for Pericles Rather Than Lenin?,*Krakowskie Studia z Historii Państwai Prawa, 11/2018, p. 321-341.

chairs[34]. However, no matter how the chairs were used in practice, the carpenter who made them could not be held responsible for any wrongdoing. Lawyers, on the other hand, are in a different position. Their work is inherently connected to everyday life. Their particular actions are not only judged by the largely (though not entirely) artificial rules of legal craft and the theoretical concepts on which that craft is based. These are internal criteria, many of which are known only to lawyers themselves, because they justify our professional autonomy on the basis of legal expertise. Non-lawyers judge our actions on the basis of a somewhat ambiguous but nonetheless real "sense of justice". For them, the actions of individual lawyers and opinions about them, serve as a litmus paper for judging the whole legal system, and even the whole political order, as facilitators or impediments to living together and living well. As long as there is a large dose of consistency between the rationally designed (crafted) public order and the general sense of justice in the society, *phronesis* is at best a nice human supplement to craft-like activity. Its presence in the public sphere, i.e. the striking observation that phronetic actions are allowed within the artificially designed political system, serves as perceptible proof that this is a system in which natural human impulses, particularistic and yet quite universal, are welcomed. In fact, we expect all those who work in professions of public trust (be they lawyers, civil servants, teachers or doctors) to show some *phronesis* in the exercise of their political skills and in the fulfilment of their duties, especially when we come into personal contact with them. We want them to treat us not as objects to be acted upon, but as free individuals like themselves. When we give examples of good teachers, we tend to focus on their ethical and political (in Aristotle's cooperative sense) qualities. When I go to the doctor, I do not want to be treated merely as a medical case to be treated. The more uncertain the outcome of the therapy, the more important the doctor's *phronesis* becomes - only his empathy, reliable information, commitment, etc. can convince me to cooperate in the continuation of the therapy instead of giving up. In the case of the administration of justice, *phronesis* was given special treatment by Aristotle, who introduced the concept of *epieikeia* (equity), which reveals the spirit rather than the letter of the law.[35]

For all the advantages of *phronesis*, it also has many shortcomings. It requires flexibility and creativity in adapting one's approach to the circumstances. To persuade a patient to cooperate with a certain therapy, even though there is no guarantee that his illness can be cured, different means have to be used for different patients. Only *a posteriori* is it possible to verify which of them worked (perhaps, if the number of similar cases grows, referring to them should become a standard)

[34] Dio Cassius, *Roman History*, Volume III: Books 36-40, transl. E. Cary; H.B. Foster, Harvard University Press, Cambridge 1914, p. 69.
[35] Aristotle, *Nicomachean Ethics*, note 26, 5.10.

and which did not. And so the use of *phronesis* to support a craft requires the acceptance of a rather uncomfortable outcome - allowing diversity among craftsmen so that they can better relate to those they serve. There is a danger, however, that if we move away from the standardised bonds of *techne* and the routines it prescribes, we will only make things worse. More diversity is more diversity, and the hope that some of this diversity will work for the common good, guided by a natural sense of what is advantageous or just and reminding everyone of the sociability inherent in our nature, is a vague and risky hypothesis. The hypothesis Hobbes strongly opposes.

In a long paragraph in the *Leviathan* Hobbes discredits Aristotle's concept of *zoon politikon,*[36] arguing that there is nothing in human nature that would prompt individuals to choose actions that would not only serve their private interests but also respect some common human criteria of the good life in general. Other social animals (bees or ants) are luckier, Hobbes argues, because in their case there is no difference between the private and the common. By individually pursuing the former (which is characteristic of every living thing), they automatically contribute to the latter. But man understands only too well that there is a discrepancy here, and it never works to the advantage of the common. Natural reason, subjected to the animal part of human nature (appetites and aversions), tends to take shortcuts whenever possible, and that is what makes it dangerous. The private always comes first, for there is nothing like common sense to serve as a point of departure for phronetic deliberation, action and judgement.

Hobbes does not deny that prudence – he uses the Latin term – exists and is useful in one's practical activity, whatever it may be. Prudence (and lack of it) also distinguishes between skilled craftsmen who stick to procedures and well-trained routines (which sometimes requires a large dose of creativity), and those professionals who, with long experience, are sometimes encouraged to give priority to the complicated nature of reality and to go beyond the rules of their craft when faced with a new problem to solve. What Hobbes strongly rejects, however, is the suggestion that *phronesis* – prudence – can be called upon to serve the common good. For him, it is strictly private wisdom, politically dangerous. Political judgement applies not natural, but artificial reason, and here relying on anybody's experience is hazardous. "Where men build on false grounds, the more they build, the greater is the ruine;" he writes, and adds: "therefore it is not that jurisprudentia, or wisdom of subordinate judges; but the reason of this our artificial man the commonwealth, and his command, that make the law (…) the subordinate judge, ought to have regard to the reason, which moved his sovereign to make such law, that his sentence may be according thereunto; which then is his sovereign's

[36] Hobbes, T., *Leviathan*, note 8, p. 111-114.

sentence; otherwise it is his own, and an unjust one."[37] Again, Hobbes refers here to the common law tradition, but in fact his critique is much broader. He portrays lawyers as craftsmen who have no right to engage in a wider political and ethical discourse. If they attempt to do so, they should be judged as seeking power, not justice.

Even when the idea of a great monster-state was replaced by the liberal idea of a republican and a democratic political order, the perception of the legal professions as crafts, and judges as "organs of voice" (Montesquieu's "mouth of law") persisted. Or even grew stronger: as professionals, we were expected to shed our humanity and merge with the law so that it could rule in a fully rational and impartial manner. The replacement of the *iurisprudentes* by craftsmen was important for the production of a new legal reality, adapted to new social and political ideals. This production was particularly successful in the nineteenth century (Ribeiro: see note 19), all the more so as the modest "theoretical grasp" needed by any craftsman developed over time into a full-fledged, rational and objective legal "science".

5. CONCLUSION

According to Hobbes, law is the only effective means of achieving the political unity that is essential for mutual cooperation in pluralistic societies. When increasing diversity (especially diversity of ethical and political judgements, beliefs and opinions) cannot be adequately managed within existing legal frameworks, it is the responsibility of the legislator to step in and make decisions that all citizens and legal practitioners must abide by. And sometimes, as Hobbes vividly states, there is no other way "to mend an ill game, as by causing a new shuffle."[38] This suggests that, during periods of significant ethical and political disagreement, legal professionals should keep quiet to reduce the risk of becoming "the organ of voice" used (or rather: abused) to increase political conflicts. The law is expected to serve political unity, and so the task of lawyers is to remain united and faithful to law as it is. They should not try to judge diverse proposals, but wait until an authoritative political judgment - whatever its origin or content - dominates the public sphere and acquires sufficient legitimate power to offer a substantially revised version of the legal contract to which West refers. Once such a shift has occurred, the expertise of lawyers is called upon to facilitate and consolidate the change. The spread of modern liberal trends in the West would not have been as steady as it has been without the contributions of generations of

[37] *Ibid.*, p. 179.
[38] *Ibid.*, p. 66.

lawyers who have dedicated themselves to their roles and constantly improved the technical means of fulfilling them (whether in promoting the rule of law or in developing the field of private law).

Equating lawyers with carpenters captures the imagination and has important practical advantages. Law is largely a craft, working on and with the existing legal order. There is good reason to believe that as long as this order is binding, it is useful to society, which is roughly equivalent to saying that it is also just to a reasonable (producible) extent. Nowadays, such a rigidly positivist view of the legal profession has lost its appeal, all the more so as it has been negatively tested by history. And so, in analogy to Gustav Radbruch, contemporary jurisprudence admits that separating the legal profession from a broader discourse on justice is an all too simplistic, and sometimes simply bad, choice.

What is more, contemporary legal science (or sciences) proved wrong Hobbes's assumption that the practical wisdom of lawyers is somehow inferior to the scientific knowledge that any legislator needs to rationally govern society in order to fulfil the modern legal contract West discusses. Today's legal scholars are as much interested in the society as the representatives of other social sciences, with whom they gladly cooperate in order to scientifically describe and explain, as far as possible, the nature of human affairs. The social sciences themselves have undergone a significant paradigmatic change, moving more and more in the practical direction suggested by Aristotle.[39] The credibility and usefulness of a particular social science lies less in its explanatory potential (which is crucial in the case of the natural sciences), but increasingly in its ability to carefully examine and advise on possible ways of ensuring artificial political unity in societies so diverse that their constant dynamism cannot be captured in a fully rational matrix of well-defined concepts. The task is all the more difficult because there seems to be no authoritative political judgement available. It is not even possible to point to some ideals - analogous to those born within the modern social imaginary, which over time have favoured the construction of liberal democracies - that would have the potential (either natural or artificially crafted; directly political) to win in the competition to become authoritative in any way other than by direct recourse to force.

Diversity is the new normal, one might say, and if so, also lawyers will confront more and more "hard cases", in which ethical and political disagreements that stem from our naturally messy lives come to the fore and demand being taken care of.

[39] See: Salkever, S.G., *Aristotle's Social Science*, Political Theory, 9/1981, vol. 4, p. 479-508.; Sayer, A., *Why Things Matter to People*, Cambridge University Press, Cambridge 2011.

It may be more and more difficult to deal with them in a strictly craft like manner. Legal philosophy admits that, and there is a growing number of proposals which try to make the situation cognitively easier for lawyers. These proposals vary in their specific recommendations, yet many of them emphasise the importance of various aspects and elements of *phronesis*-prudence. The concept of "practical reasoning" and the value of dialogue are emphasised. Also, the role of empathy and a desire for justice are identified as crucial components of the professional competencies of good lawyers. This aligns with the Aristotelian ideal of professionals who can perform their public function while maintaining their *zoapolitika* humanity. The list of particular proposals or movements in jurisprudence which resonate well with *phronesis* is extensive and open-ended, and it is subject to constant review and refinement, as evidenced by the evolution of the Critical Legal Studies and Law and Literature movements, the latter of which has paved the way for Law and Humanities.[40]

In the context of this much-needed rejuvenation of jurisprudence, a key concern pertains to its theoretical orientation, which appears to predominate over a truly phronetic approach. Instead of fostering (in this case intellectual) cooperation between legal scholars, it sets new divisions among them, as every new trend does its best to expose its innovative character. Furthermore, various new proposals do not seem to pay enough attention to discuss their relation to traditionally conceived (and practiced) legal craft. It is "practically wise" to broaden the cognitive framework to encompass the law and legal activity as integral components of our collective existence (politics) and well-being (ethics). However, Aristotle advises caution against equating phronetic knowledge with "theoretical grasps" that a craft relies on. As with any craft, the legal one is also founded on cumulative experience, leading to a conservative and sceptical stance towards speculative proposals that lack, at least for now, empirical testing and integration with existing practice. Lawyers are professionals in law, and the foundation of legal craft is legal dogmatics. Its methods, as underlined by Jerzy Leszczyński,[41] are fundamentally positivist in nature as their primary focus is on legal texts rather than the dynamic realm of human affairs. *Phronesis* seems to be a kind of wisdom tailored for challenging times that can never be fully integrated with the craft it serves to supplement. Rather than reducing the challenges or controlling them, the aim of *phronesis* is to reduce the risk that ignoring them would worsen the situation.

Returning to Aristotle's concept of *phronesis* and recovering the prudent part of jurisprudence may be one of the answers to the lack of clear criteria for

[40] Stern, S., *Law, Literature, and The Legal Imagination*, Yale Journal of Law & the Humanities, 35/2024, no. 2, p. 211-224.
[41] Leszczyński, J., *O niezmienności uprawiania dogmatyki prawa*, Studia Prawno-Ekonomiczne, 81/2010, p. 115-129.

distinguishing between the aforementioned violence and mess. Rather than keeping lawyers separate from it, safely hidden behind the walls of their craft, it encourages them to step into this mess to try to minimise certain harms that are being done, even if such harms are not legally defined as violence (or perhaps not just yet). It also encourages them, as they engage with the mess, not only to serve as "organs of voice" for different individuals and groups seeking justice, but also to speak for themselves. Like other citizens, lawyers have a voice, and they should use it to contribute to actively choosing the future of our common "human affairs." At the same time, in using that voice, they should remember that they have just left the safe ground of their strictly legal competence, based on solid "theoretical grasps" integrated with their craft. *Phronesis*-prudence does not make legal knowledge better in the sense that it allows *phronimos* to solve problems that "craft lawyers" could not solve. It does not turn anyone into a judge-Hercules from Dworkin's theory, a half-god of the law for whom no hard case is really hard. On the contrary, the desire to remain such a demigod, capable of solving every case, tends to isolate him from the human world, requiring an even greater concentration on the craft-part of his profession. The Judge-Hercules must be able to, if necessary, put aside, his own views as well as possible social expectations or consequences, in order to focus above all on the coherence of the legal system, and therefore to accept an interpretation that tends to strengthen and maintain this artificial order, protecting it from any possibility of "mess".[42] Nor does the turn to *phronesis* justify a possible "juristocracy" that would protect democratic society from itself. Our (legal) narrative voices inspired by our sense of justice are no more powerful than other narrative voices. What can make them more audible is action, because lawyers are entitled to act in ways that other citizens cannot. It should not be just any action, not even a successful one, but first of all a *phronetic* action – human enough to evoke a positive response of those who see and judge it."Human" in the cooperative sense of Aristotle, not Hobbes.

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ADVANCE TAX RULINGS IN THE TAX LAW OF THE REPUBLIC OF CROATIA*

ABSTRACT

Advance tax rulings are part of modern tax systems that aim the protect taxpayers' rights and achieve the predictability of tax authorities' actions. Advance tax rulings are fundamental in providing business certainty regarding the tax treatment of particular transactions. Advance tax rulings are particularly useful when: a) the law is unclear and there is more than one possible interpretation, b) new legislation applies to the transaction, c) the transaction is novel, sensitive, or controversial, d) significant issues arise or may have a wide impact and e) the arrangement is a complex financing transaction. The tax authority in the Republic of Croatia is authorized to provide, upon written request from the taxpayer, an advance tax ruling on the tax treatment of future and intended transactions, i.e. business events and activities of the taxpayer. The very legal nature of the advance tax ruling is questionable. Therefore, the authors of this paper have provided answers to complex legal questions: a) is an advance tax ruling an administrative act or not?, b) is the adopted advance tax ruling effective erga omnes or only inter partes? and c) does the adopted advance tax ruling have a unilateral or bilateral binding legal effect? The authors also analyzed the liability of the Republic of Croatia for damage caused by the issuance of an illegal advance tax ruling by the competent tax authority, based on which the taxpayer acted because he was in good faith.

***Keywords**: tax ruling, advance tax ruling, good faith, tax authority, taxpayer*

1. INTRODUCTION

With the development of society, with the acceptance of new organizational forms of social communities, and with the change in the relationship between the individual and the state government, there is a need for new legal regulation in many legal areas. This need is particularly pronounced in the tax procedure, as one of the most sensitive procedures in the legal system of every country, because every citizen is involved in it, without their will, and even against it. Therefore, legal science and judicial practice must follow these changes and react to them with appropriate legal postulates and legal institutes.[1]

One of the principles of the rule of law, which is also respected in public law, and therefore in tax law, is the principle of acting in good faith (Latin: *bona fide*). In the context of the concept of good faith, it is customary to distinguish between good faith in the objective sense and good faith in the subjective sense. Good faith in an objective sense assumes that all participants act in accordance with honesty and trust, while in a subjective sense, it represents a certain state of a person that refers to the case when a person, in exercising their right, is unaware of the violation of the interests of another person; or is unaware that they are violating someone else's rights.[2]

The principle of good faith and fair dealing was for the first time introduced in Croatian Tax Law in 2001. The contemporary legal framework of the introduced institute of good faith in revenue procedure did not contain provisions that would more precisely define the content of the notion or criteria to assess such acting. Subsidiary sources of law were equally modest.[3]

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[2] See more: Contrino, A.; Corasaniti, G.; della Valle, E.; Marcheselli, A.; Marello, E.; Marini, G.; Messina, S. M.; Trivellin, M., *Fondamenti di diritto tributario*, Terza edizione, Wolters Kluwer, CEDAM, 2024, pp. 393-396.

[3] Žunić-Kovačević, N., *Primjena načela dobre vjere u poreznom postupku – neuspjeli pokušaj uvođenja instituta obvezujuće informacije u hrvatsko porezno pravo*, Zbornik radova Pravnog fakulteta u Rijeci, Supplement, Vol. 31, 1/2010, p. 149.

The principle of acting in good faith in the tax law of the Republic of Croatia is regulated by Article 9, paragraphs 1 and 2 of the General Tax Act[4] which states: "Participants in tax-legal relations are obliged to act in good faith. Acting in good faith means acting conscientiously and honestly in accordance with the law".[5] In other words, there should be a mutual relationship of trust and fair dealing between the taxpayer, other participants, and the tax authority when conducting a tax procedure in which the provisions of substantive tax law are enforced. Acting in good faith in a broader sense means acting conscientiously, honestly, and in accordance with the law, i.e. in resolving legal relationships (obligatory relationships, tax-legal and tax-debt relationships) one should, whenever possible, start from the assumption that the participants in the tax procedure acted conscientiously and without dishonest intent, i.e. strive for trust, mutual understanding, and respect.[6]

The principle of good faith is regulated similarly in other Member States of the European Union. For example, in the Republic of Italy, the principle of good faith is regulated in Article 10 of the Taxpayers' Statute (Italian: Statuto del contribuente) under the title "Protection of trust and good faith. Taxpayer errors", according to which the relations between the taxpayer and the tax authorities are based on the principle of cooperation and good faith.[7] In the Federal Republic of Germany, the principle of good faith is generally not regulated in tax law. Nevertheless, the principle of good faith regulated in Articles 242 and 157 of the German Civil Code[8] also applies to tax law, both for the taxpayer and the tax authority. Also, the principle of acting in good faith is reflected in other regulations, for example in Article 174 German Fiscal Code.[9] The principle of good faith in tax law assumes the existence of a specific tax-legal relationship between the taxpayer and the tax authority, on which the trust is based, which is decisive for the application of the principle of acting in good faith. Only those involved in this relationship, i.e. the individual taxpayer and the relevant tax

[4] General Tax Act, Official Gazette, No. 115/16, 106/18, 121/19, 32/20, 42/20, 114/22, 152/24 (hereinafter: OPZ).
[5] The Minister of Finance shall lay down the manner of acting in good faith in an ordinance (Article 9, paragraph 3 of the OPZ).
[6] Matković, B., *Komentar Općeg poreznog zakona*, RRIF, Zagreb, 2009, p. 8.
[7] Statuto del contribuente (Legge 27 luglio 2000, *Gazzetta Ufficiale,* n. 212.) aggiornato con le modifiche apportate, da ultimo, dal D. L. 9 agosto 2024, *Gazzetta Ufficiale,* n. 113., convertito, con modificazioni, dalla L. 7 ottobre 2024, *Gazzetta Ufficiale,* n. 143.
[8] German Civil Code - Bürgerliches Gesetzbuch (hereinafter: BGB), Ausfertigungsdatum: 18. 08. 1896, „Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002. (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 14 des Gesetzes vom 23. Oktober 2024. (BGBl. 2024 I Nr. 323) geändert worden ist".
[9] German Fiscal Code – Abgabenordnung (hereinafter: AO), Ausfertigungsdatum: 16. 03. 1976, „Abgabenordnung in der Fassung der Bekanntmachung vom 23. Januar 2025. (BGBl. 2025 I Nr. 24)".

authority, are bound by the principles of good faith. Within a specific tax-legal relationship, each participant is required to take into account the legitimate interests of the other participant and to gain the trust of the other participant through their consistent actions, i.e. not to contradict their own previous actions. The institution of advance tax rulings is one of the ways of applying and realizing the principle of acting in good faith.[10]

Therefore, in the remainder of this paper, more will be said about the concept and types of advance tax rulings, the legal nature of advance tax rulings, and the liability of the Republic of Croatia for damage caused by the issuance of an illegal advance tax ruling by the competent tax authority, based on which the taxpayer acted because he was in good faith.

2. THE CONCEPT (DEFINITION) OF ADVANCE TAX RULINGS

Given the special nature of tax law norms, often sub-special, predictability of the application of tax regulations is not easy to ensure. One of the instruments that contributes to this is the Institute of advance tax rulings. The legal literature related to advance tax rulings presents, analyzes, and defines different approaches of individual jurisdictions and their attempts to contribute to legal certainty through advance tax rulings. From other aspects and areas of observation, in addition to the fundamental, legal standpoint, advance tax rulings can be given other functions, which is why the economic role of advance tax rulings is often emphasized.[11] Therefore, the broader role of advance tax rulings is often seen not only as an instrument for achieving and increasing tax and legal certainty[12] that contributes to the consistent application of tax regulations, but also as an instrument that contributes to reducing tax disputes, strengthening cooperative relations between tax authorities and taxpayers, and harmonized and non-contradictory actions and decisions of tax authorities in similar matters.[13]
There are similar definitions of advance tax rulings in doctrine and practice. Advance tax rulings are official administrative explanations of a particular issue

[10] Žunić-Kovačević, N., *Prethodna obvezujuća porezna mišljenja – novi institut hrvatskog poreznog postupka*, Zbornik radova Pravnog fakulteta u Rijeci, Vol. 37, 1/2016, p. 287.
[11] *Ibid*., pp. 267-268.
[12] *Gadžo, S., Tax Procedure Law in Transition: Croatian Experience, Eds: B. Milisavljević et al., Law and Transition: Collection of Papers, Pravni fakultet Univerziteta u Beogradu, Beograd, 2017, p. 186.*
[13] Žunić-Kovačević, *op. cit.* note 10, p. 268.

in the context of tax law. They support taxpayers in the proper interpretation and application of tax law provisions.[14]

Advance tax rulings have been a topic of discussion for at least the last few decades. Two IFA studies adopted the same definition in 1992 and 1999. These studies defined advance rulings as "a more or less binding statement by a tax authority, at the voluntary request of a private individual, concerning the conduct and consequences of one or a series of planned future actions or transactions". A similar definition was also adopted in The International Guide to Advance Rulings as "…a statement issued, upon request, to a (potential) taxpayer, stating the tax authority's view on the tax treatment of a particular set of facts and circumstances that are under consideration, in the process of being finalized or have been finalized but not yet evaluated".[15] Combining these definitions, an advance tax ruling can be broadly defined as any advice, information, or statement that a tax authority gives to a particular taxpayer or group of taxpayers regarding their tax situation concerning future transactions and on which they are (to some extent) entitled to rely. Advance tax rulings are opinions issued by a tax administration or, in some countries, other independent bodies. A request for an advance tax ruling comes from a taxpayer and is made on a specific set of facts. The taxpayer seeks certainty about how tax provisions will be applied in a certain way to become aware of the fiscal consequences of his transactions. To this end, the taxpayer submitting a request for an advance tax ruling must fully disclose all relevant facts in his request for a ruling and will receive the tax administration's official position on these facts. The effects of these decisions on tax authorities, taxpayers, or tax courts vary from country to country. According to the above definitions, advance tax rulings qualify only as statements by tax authorities that have some binding effect on the tax administration.[16]

Taxpayers are usually not bound by the issued ruling, but in some jurisdictions, penalties may be imposed when a taxpayer fails to comply with the terms of the advance tax ruling. Due to the application of the doctrine of separation of powers in most legal systems, the statement of the executive branch, in our case the tax administration, does not have to be binding on the other two sovereign branches, the legislative and judicial branches. Therefore, advance tax rulings usually do not have a binding effect on parliaments or courts.[17]

[14] What are tax rulings?, https://cgofinance.com/tax-r ulings/, February 18, 2025.
[15] According to: Romano, C., *Advance Tax Rulings and Principles of Law –Towards a European a Tax Ruling System*, IBFD, Amsterdam, 2002, pp. 118-119.
[16] Romano, *op. cit.* note 15, pp. 119-120.
[17] *Ibid*., p. 120.

However, in the opinion of Žunić-Kovačević, Gadžo and Klemenčić the biggest challenge in the times ahead lies not so much in further transformation of the legal framework, but rather in the commitment of tax authorities and other stakeholders to fully make use of existing instruments (e.g. conferment of special status to certain taxpayers, tax settlements, advance rulings) in accordance with best practices.[18]

3. LEGAL NATURE AND TYPES OF ADVANCE TAX RULINGS

Regarding the legal nature of advance tax rulings, they can be considered as 1. private law agreements (or contracts); 2. public law agreements; or 3. unilateral acts of public administration.[19]

The characterization of advance tax rulings as private law contracts cannot be accepted. This does not depend on the public nature of the entity issuing the tax rulings (i.e. usually the tax administration). In most, if not all, jurisdictions, a public administration can also act as a private person using private law instruments (i.e. iure privatorum). The choice between adopting a private rather than a public law instrument depends on the objectives that the public administration wishes to pursue. The distinction between private and public law instruments is very important since the principle of legality and the reservation of a legal rule can only exist about public powers. These principles are indeed limitations on public power and guarantees for citizens that would have no significance when the public administration acts as a private person on an equal footing with other private persons. The reason against characterizing advance tax rulings as private law contracts is that in tax law fundamental public interests are at stake, and this is usually an area whose discipline is reserved for statutory laws (ie enacted by parliaments). Therefore, in principle, only the use of public law instruments should be justified. In principle, the public administration can use all instruments of private law by the limitations arising from the legal order. However, certain areas should not be regulated by private law because the public interests involved are essential to the life of the state. This is a typical situation of tax law, through which the state collects the revenues necessary to achieve its goals. This fundamental function of tax law also includes the fact that the tax liability cannot be freely disposed of. Tax law protects the fundamental interest of the state in collecting

[18] *Žunić-Kovačević, N.; Gadžo, S.; Klemenčić, I., Flexible Multi-Tier Dispute Resolution: The Croatian Experience, Eds: P. Pistone et al., Flexible Multi-Tier* Dispute *Resolution in International Tax Disputes, IBFD, Amsterdam, 2020, p. 21.*
[19] Romano, *op. cit.* note 15, p. 120.

revenues, which is the collective interest of every citizen. This public interest could, in principle, be realized through instruments of administrative law or private law. In situations, such as the work performed by the tax administration in tax law, the tax administration has a superior position about taxpayers and acts to achieve the collective interest of every citizen. Therefore, the basic guarantees for citizens under procedural administrative law, such as those stemming from the legality, impartiality, and transparency of administrative activities, should be applied instead of the weak guarantees provided for in civil law. As an example of a different system of checks and guarantees, one could mention that an administrative act is generally invalid if it is adopted for purposes not foreseen by the enabling provision, while a private law contract is valid regardless of its ability to achieve public objectives. However, there must also be recognition of the greater flexibility of private law instruments compared to administrative law instruments which could lead to optimization of the efficiency of public (and tax) activities.[20]

One of the most important classifications of advance tax rulings, although there are others, is the one that distinguishes advance tax rulings as individual or individual and general or public advance tax rulings. Most often, the term advance tax ruling has the meaning of individual or individual advance tax ruling. In this sense, primarily due to the distinction between the above-mentioned basic types or forms of ruling, general or public tax rulings could also be terminologically designated as, simply, tax opinions. Advance tax ruling can be defined as an interpretation of tax law provisions by tax authorities, whereby the interpretation is binding on the tax authority, assuming that the facts and circumstances on which the opinion is based have not changed. The reason for issuing an advance tax ruling is always a formal request from a taxpayer that concerns the application of tax rules to a planned, future tax-relevant transaction or activity.[21] Therefore, an advance tax ruling only applies to future planned or intended transactions and never applies to initiated tax procedures.

The characterization of an advance tax ruling as an administrative act rather than a (public or private) contract would seem fundamental in terms of the protection of the taxpayer, which may be more effective within the system of guarantees provided by administrative law. The consequences of considering advance tax rulings as administrative acts are also relevant in terms of the legal effects of advance tax rulings. Advance tax rulings (also called advance, private, or letters) are legal instruments under which taxpayers (or their tax advisors) can obtain a more or less binding statement from the tax authorities regarding the treatment of

[20] *Ibid*., pp. 120-122.
[21] Žunić-Kovačević, *op. cit.* note 10, p. 270.

a transaction or a series of contemplated future (and sometimes past) actions or transactions. Advance tax rulings are issued to specific taxpayers upon request and explain how the tax administration will apply the law to a specific taxpayer or group of taxpayers with a transaction or series of specified facts or transactions. They are commonly referred to as "advance rulings" because they are usually issued before the taxpayers enter into a transaction or arrangement or (in certain jurisdictions) after the event but before the taxpayer files a tax return. Such solutions are tailored to the taxpayer in question because they take into account the factual situation of the taxpayer and are therefore not directly applicable to other taxpayers. They may also decide whether and how the general ruling applies to the facts and circumstances of a particular taxpayer.[22]

Another form or type of ruling is a general or public (binding) ruling. The obligation of tax authorities to issue general (binding) rulings, known in tax practice as or simply as rulings, is reduced to rulings addressed to all taxpayers, which do not relate to the specific elements and facts of a tax case or particular or individual taxpayers. Therefore, general rulings or just rulings are a kind of "public" notices or public advance rulings (Public advance ruling system).[23] It can be said that this obligation of tax authorities to issue general opinions is broader in scope since all taxpayers are addressed. Such rulings and their publication aim to contribute to the information of taxpayers about the taxation system and the manner of application of individual provisions, to create trust among participants in tax-legal relations, and to achieve the principles of acting in good faith. Such so-called public advance rulings, in Croatian tax law, known as opinions, are generally issued after a large number of individual requests for advance tax rulings have been received from taxpayers. The publication of a public ruling eliminates the need to issue individual advance tax ruling, as it can be assumed that there is no basis for requesting it.[24]

From an international comparative perspective, an institution similar to the rulings of the Ministry of Finance of the Republic of Croatia is not unknown in theory and practice. It is the institution of advance tax ruling. Namely, taxpayers planning a certain transaction can consult the tax authorities in some countries to gain insight into all the tax consequences related to that transaction. In tax systems where there is an institute of advance tax rulings, their application is limited to the prior regulation of "extremely important and special cases with certain characteristics". The United States of America (hereinafter: USA) Tax Administration (Internal

[22] Romano, *op. cit.* note 15, pp. 77-78.
[23] Žunić-Kovačević, *op. cit.* note 10, p. 270.
[24] *Žunić Kovačević, op. cit.* note 3, *p. 140.*

Revenue Service - IRS) issues written instructions (so-called letter rulings)[25] that respond to taxpayers' inquiries regarding the tax treatment of some of their planned transactions. Although written letter rulings are published and delivered to lawyers and accountants, they do not have the significance of a precedent and cannot be cited as such. The similarity of the written instructions with the practice of formulating and publishing the ruling of the Ministry of Finance is striking. But there are also significant differences. Written letter rulings have a precisely defined status and role in the USA tax system, and there can be no doubt about their significance; in particular, it can be said with certainty that it is not an autonomous source of law. These are some indications of the actions of the tax administration of the USA, which do not bind either the court or the tax administration itself for future cases.[26]

In the Netherlands, advance tax rulings began to develop immediately after the end of World War II. It is known worldwide that the Netherlands has a long-established practice of issuing rulings, which has historically contributed to the Netherlands' position as a favorable location for investments by multinational corporations.[27] Several definitions of advance tax rulings can be found in Dutch literature, case law, and the practice of the Ministry of Finance. As a preliminary remark, it should be noted that over the years there has been a general trend to consider advance tax rulings as unilateral positions, which was the prevailing view until the second half of the 1980s. Since then, the prevailing opinion has been that they should be considered contracts governed by the Civil Code.[28] The characterization of advance tax rulings as public law contracts should also be rejected. A public law contract includes private law and public law elements. Therefore, the actual goal to be pursued, the type of contract, and its basic elements are generally prescribed by administrative law, while the contract as such is governed by private law. However, the taxpayer's consent is missing in the advance rulings procedure, which is one of the fundamental aspects of a private law contract. An issued tax ruling can produce effects regardless of the taxpayer's will. The taxpayer's participation in the ruling process is mainly limited to presenting a request for the ruling, which is certainly a necessary condition for an administrative act containing the tax administration's interpretation to be considered an advance on a tax ruling. An issued tax ruling can produce effects regardless of the taxpayer's will. The taxpayer's participation in the ruling process is mainly limited to presenting a request for the ruling, which is certainly a

[25] About the letter rulings see: Portney, G. G., *Letter Rulings: An endangered species?*, The Tax Lawyer, Spring, Vol. 36, 3/1983, pp. 751-758.
[26] Arbutina, H., *Ustavna i nadnacionalna ograničenja ovlaštenja na oporezivanje*, Zbornik radova Pravnog fakulteta u Zagrebu, Vol. 62, 5-6/2012, p. 1307.
[27] Romano, *op. cit.* note 15, p. 96.
[28] *Ibid*., p. 96.

necessary condition for an administrative act containing the tax administration's interpretation to be considered an advance on a tax ruling. This participation in the issuing of the ruling is limited to the initial phase of the ruling procedure. The interests of the private individual (taxpayer) and the tax administration are not merged into a common interest arising from the contract but remain legally independent. Taxpayers should be free to take a position that deviates from the advance tax ruling issued and to file their tax returns accordingly.[29]

It could be argued that, in settled jurisdictions where advance tax rulings are to some extent also binding on taxpayers, those opinions should be considered unilateral administrative acts with double effect. However, the prevailing opinion is that advance tax rulings are considered unilateral acts of public administration. It is considered that the tax administration does not, as a rule, enter into a contractual relationship with the taxpayer by issuing a ruling. As stated above, the advance tax decision is valid even without the consent of the taxpayer who submitted it. The binding effects of advance tax rulings arise either directly from a specific legal provision or, in the absence of such a legal provision, from unwritten general principles of proper administration.[30] Some scholars distinguish between formal advance tax rulings based on specific rules (statutes, regulations, etc.) and informal rulings that are not based on any specific rule. According to them, formal advance tax rulings should be considered as unilateral administrative acts, and informal rulings as agreements. In the Netherlands, there has been a long-standing debate about whether an advance tax ruling is an agreement subject to civil law or an administrative act subject to administrative law. This means that the agreed tax treatment will be determined by a written agreement between the taxpayer and the tax authorities. According to some scholars, under the new system of rules, it appears that the taxpayer is also bound by the agreement, whereas this was not stated in the old solution policy. Since the 2001 amendments to Dutch tax legislation, an advance tax ruling has been defined as an agreement between the taxpayer and the tax authorities, which agreement is also binding on the taxpayer himself.[31]

The situation in the Republic of Italy is interesting because there are 5 types of advance tax rulings (Italian: Interpello). The interpello procedure gives a taxpayer the possibility of obtaining an advance-written opinion from the Italian Tax Agency on a particular question or tax-related issue. Both resident and non-resident taxpayers (directly or by means of their elective representatives in Italy) are entitled to forward a query to the Italian Revenue Agency. The Italian Revenue

[29] *Ibid*., pp. 122-123.
[30] *Ibid*., pp. 123-124.
[31] *Ibid*., p. 124.

Agency can accept a request for an advance tax ruling only when taxpayers require clarifications about a tax provision: whose interpretation is objectively uncertain, relating to state (and not local) taxes, and applicable to a real (not hypothetical) and personal case. The request must be submitted before the relevant tax provision is applied (for example, before submitting the tax return, before applying a withholding tax, before issuing an invoice, etc.). The opinion expressed by the Revenue Agency in the advance tax ruling is not binding on the taxpayer, however, it is binding on the Revenue Agency, which cannot issue assessments or impose fines or penalties that would be in contrast with the opinion expressed in the advance tax ruling. The Revenue Agency has 90 days to reply to the query and another 60 days if, in the meantime, asks for further clarification or documents from taxpayers to form its opinion. If the Revenue Agency doesn't answer within the time limits, the taxpayer's interpretation is deemed to be accepted based on tacit consent. There are the following types of advance tax rulings: a) Ordinary ruling: All taxpayers, including non-residents, may submit a query to obtain an opinion about the correct interpretation of an objectively uncertain tax provision or in case the objective uncertainty is related to the legal and fiscal analysis of a specific case. The interpretation of a tax provision is „objectively uncertain" when there is no official interpretation available (circular letters, resolutions, etc.) that applies to the taxpayer's specific case or when such official interpretation is too generic, b) Probatory ruling: taxpayers can request an opinion about the fulfilment of the conditions and the assessment of the elements of proof required for the adoption of specific tax regimes, in cases expressly provided by law, c) Anti-abuse ruling: taxpayers can ask an opinion about the application of the „abuse of law" principle to a specific case, aiming at verifying if a transaction may be considered as abusive, d) Anti-avoidance ruling: a ruling in order to fight tax avoidance aimed at the disapplication of tax provisions limiting deductions, tax benefits, tax credits or other subjective positions of the taxpayer and e) the ruling on new investments allows investors, whether Italian or foreign, to seek an opinion on the tax treatment applicable to major investments (worth not less than 20 million euros and with significant and lasting employment effects) made in the territory of the State. For applications submitted from 1 January 2023, even if they relate to investments before that date, the minimum amount of investments must not be less than 15 million euros.[32]

[32] Ministero dell'Economia e delle finanze, Agenzia Entrate https://www.agenziaentrate.gov.it/portale/schede/istanze/scheda-interpello/tipologie-di-interpello_/interpello--ordinario, March 5, 2025, Gian Marco, IL SECONDO BOLLETTINO DELL'AGENZIA DELLE ENTRATE SUL „RULING" INTERNAZIONALE, https://www.acptax.it/wp-content/uploads/2015/03/22-IL-SECONDO-BOLLETTINO-DELLAGENZIA-DELLE-ENTRATE-SUL-%C2%ABRULING%C2%BB INTERNAZIONALE.pdf, March 5, 2025.

In Germany, taxpayers have the right to request a ruling from the tax authorities provided the ruling is intended to receive clearance with regard to a legal question. Nonetheless, the issuance of a ruling is up to the tax authority's discretion. The right to request a ruling is granted under the provision of the tax law (i.e. Article 89 AO). The AO differs generally between rulings considering the tax procedure provisions and rulings considering the substantive tax provisions. The issuance is – for both matters – generally not limited to certain topics but the taxpayer has to claim a special interest in obtaining the ruling (e.g. relevant future tax effects on a business activity) as far as rulings on substantive tax provisions are concerned. The request for a ruling is charged with a fee irrespective of whether the tax authorities finally issue the ruling. Tax rulings can be revoked by tax authorities under certain circumstances whereby the AO does especially differ between the revocation of a lawful and an unlawful ruling. No tax court authorization is required for a revocation. As mentioned before AO does differ between the revocation of a lawful or an unlawful ruling. While lawful rulings which can in general be revoked under much stricter provisions than unlawful rulings can be revoked only with future effect, unlawful rulings can also be revoked with retroactive effect. Nevertheless, the retroactive revocation of an unlawful ruling does not lead to a retroactive liability (i.e. no interest liability for the past) unless the ruling was obtained in an attempt of tax evasion.[33]

The advantages of advance tax rulings and the arguments for their implementation are: 1) promoting clarity and consistency in the application of tax law for both taxpayers and the tax authority; 2) enhancement of certainty of tax treatment of transactions and dealings, thereby also increasing taxpayer/investor confidence in the tax system; 3) encouraging compliance with tax law to ensure the proper functioning of the self-assessment system; 4) strengthening the relationship of trust between taxpayers and the tax authority; 5) and reducing conflicts.[34] However, there are also arguments against implementing advance tax rulings due to certain shortcomings, namely: 1) the risk of reducing the tax base if a advance tax ruling is issued incorrectly or inappropriately; 2) the system can lead to 'privatization' of the tax law. This is particularly the case where the ruling regime is used as a means of attracting tax base from other jurisdictions. This is also of concern where there is a substantial cost associated with applying for an advance tax ruling (e.g. because of very detailed application and supporting information requirements), and/or private rulings are not; 3) the system can be costly to administer, as compared to where no such system exists; 4) and the process can

[33] Tax Rulings A Global Practice Guide prepared by the Lex Mundi Tax Group, https://www.acc.com/sites/default/files/resources/vl/membersonly/Article/1449528_1.pdf, pp. 43-44, March 5, 2025.
[34] Waerzrggers, C.; Hiller, C., *Introducing an Advance Tax Ruling (ATR) Regime*, Tax Law IMF Tehnical Note, Vol. 1, 2/2016, p. 3.

take too long for a advance tax ruling to be issued or published, particularly in complex and/or significant matters made public.[35]

4. ADVANCE TAX RULINGS IN THE TAX LEGISLATION OF THE REPUBLIC OF CROATIA

This chapter will present the institute of advance tax rulings in the Republic of Croatia. Attempts to introduce advance tax rulings into the Croatian tax system can be discussed in the context of regulating the principle of good faith (which was already discussed in the introduction to the paper).

The principle of good faith was first introduced into Croatian tax law in 2001 with the first enactment of the General Tax Act. This Act did not contain provisions that would more precisely define the content of the concept or the criteria for assessing such conduct - bona fide, while at the same time, the subsidiary legal sources that would provide answers to such open questions were equally modest. The new General Tax Act from 2008 hinted at a change in the approach to regulating conduct in good faith by prescribing the adoption of implementing regulations on the manner of applying the legally prescribed principle of tax procedure. This was the main reason for the expectations of the profession regarding the introduction of advance tax rulings, then terminologically defined in the literature as the institute of binding information in taxation. However, an analysis of the subordinate legislation adopted to implement the principle of acting in good faith did not lead to the conclusion that advance tax rulings should be applied in taxation procedures. It could only be determined that it was a failed attempt to regulate the institute of advance tax rulings.[36] The use of advance tax rulings as a means with a purpose other than that assigned to them by the system poses a threat to the realization of the principle of legality and thus jeopardizes legal certainty in the area of taxation. The institution of advance tax rulings or written instructions is a good tool for clarifying the application of regulations in individual cases. Its application avoids possible conflict situations between the tax administration and taxpayers. However, the legal significance of such acts must be clearly defined in the system that applies them, as is the case, for example, in the USA. In this sense, the introduction of a similar, legally precisely defined, institute into the taxation system of the Republic of Croatia was certainly beneficial because such an institute makes the procedures of the tax administration and the tax position of

[35] *Ibid*., p. 4.
[36] Žunić-Kovačević, *op. cit.* note 10, p. 280. For more information on the history of introducing the institute of advance tax rulings into the Croatian tax system, see: Žunić-Kovačević, *op. cit.* note 10, pp. 280-283.

taxpayers transparent. According to the previous solution, which existed in the Republic of Croatia until the adoption of the Ordinance on Advance Tax Rulings, Correction of Declarations, Statistical Reports and Tax Settlements in 2015 (author's note), the lack of definition of the legal significance of the opinions of the Ministry of Finance caused important questions - for example, can these opinions be successfully used as an argument in administrative proceedings or court proceedings? It was assumed that subjects of tax-legal relations would increasingly seek answers to questions arising from the then status of the institute of rulings. Since, over time, the rulings of the Ministry (public rulings) have become established as an (informal) source of law, based on the fact that taxpayers must take them into account when planning and implementing their private and business activities, the question arose - is there a possibility of challenging them using some legal remedy? The answer is negative. This remedy is not a proposal for a constitutional review, as it can only be raised if the applicant considers that a regulation of a general nature is contrary to the Constitution.[37]

Arbutina argued that *de lege ferenda* should be changed. He thought that "given the importance that rulings have acquired, they can potentially significantly affect the tax situation of a natural or legal person, thus making the overall legal position of such a person uncertain, so that a way of effective legal control of these opinions should be found or they should be defined as advance tax rulings, with a clear legal status".[38]

Arbutina also states that, regardless of future developments, an analysis of the then-current place and role of rulings (in 2012, author's note) in the tax system leads to the conclusion that they negatively affect the realization of the principle of the rule of law (i.e. the principle of legality), differently from case to case, but potentially even very significantly. As far as he knew, such opinions issued for individual cases were binding on Tax Administration officials, regardless of possible different interpretations of higher-level regulations that they might give, so it could be concluded that for them they had the significance of binding instructions for resolving such cases. Therefore, they truly acquired the status of a source of sui generis law that even lives its own separate "legal life", creating a de facto legal "recess" (niche) in which, due to the lack of regulation in the field, one opinion, referring to individual cases, often contradicts others referring to similar cases. Such a situation necessarily raises doubts among Tax Administration officials regarding which of the conflicting opinions to apply to a specific case. Of course, such doubts also arise among taxpayers - such an effect of legal uncertainty in a situation where very significant amounts of money may be involved in

[37] Arbutina, *op. cit.* note 26, p. 1308.
[38] *Ibid*., p. 1308.

fulfilling a tax obligation calls into question the legality and constitutionality of the operation of the entire tax system.[39]

Advance tax rulings in the Republic of Croatia have been regulated, since 2016, by the OPZ and the Ordinance on the Implementation of the General Tax Act.[40] Before that, from July 2015 until April 2017, i.e. until the entry into force of the Ordinance on the Implementation of the General Tax Act of 2017,[41] they were regulated in Articles 2-13 of the Ordinance on Advance Tax Rulings, Correction of Declarations, Statistical Reports and Tax Settlements.[42]

In accordance with Article 10 of the OPZ,[43] the tax authority is authorized to issue an advance tax ruling upon a written request from a taxpayer. A request for issuing an advance tax ruling (hereinafter: the request) may be submitted by a resident or non-resident taxpayer, or by his or her authorized representative or tax advisor. A request may also be submitted by a natural or legal person who has not yet acquired the status of a taxpayer or has not yet registered for the performance of an activity under special regulations, or by his or her authorized representative or tax advisor.[44] The Tax Administration, Central Office, is responsible for issuing advance tax rulings. Under Article 8 of the Tax Administration Act[45] the Director of the Tax Administration appoints an Advisory Board for advance tax rulings, which consists of Tax Administration officials. An external associate court expert from the list of permanent court experts from a particular area may also be appointed to the Advisory Body. The advance tax ruling is signed by the Director of the Tax Administration.[46]

[39] *Ibid*., p. 1309.
[40] Ordinance on the Implementation of the General Tax Act, Official Gazete, No. *45/19, 35/20, 43/20, 50/20, 70/20, 74/20, 103/20, 114/20, 144/20, 2/21, 26/21, 43/21, 106/21,144/21,156/22, 16/25 (hereinafter: Ordinance).*
[41] See articles 6-16 of the Ordinance on the Implementation of the General Tax Act of 2017, Official Gazette, No. 30/17.
[42] Ordinance on Advance Tax Rulings, Correction of Declarations, Statistical Reports and Tax Settlements, Official Gazette, No. 78/15, 16/16.
[43] The tax authority is authorised to provide, upon written request from the taxpayer, a binding opinion on the tax treatment of future and intended transactions, i.e. business events and activities of the taxpayer. The costs of issuing binding opinions are to be borne by the taxpayer in their entirety. The Minister of Finance shall determine the application, deadlines and costs for issuing binding opinions in an ordinance. - Translation of Article 10, paragraphs 1-3, taken from the website of the Tax Administration of the Republic of Croatia, https://www.porezna-uprava.hr/en_propisi/_layouts/15/in2.vuk2019.sp.propisi.intranet/propisi.aspx#id=pro136, March 8, 2025.
[44] Article 6 of the Ordinance.
[45] Tax Administration Act, Official Gazette, No. 115/16, 98/19, 155/23, 152/24.
[46] Article 7 of the Ordinance.

The request referred to in Article 6 of the Ordinance shall in particular contain: 1. the name and surname/title of the applicant, personal identification number (hereinafter: OIB) or tax number, passport number if the applicant has not been assigned an OIB by a special law, the VAT ID number of the taxpayer if he/she has one; 2. details of the authorized representative or tax advisor who is involved in the procedure for issuing a advance tax ruling by the taxpayer, OIB and number of the tax advisor's work permit; 3. a detailed description of the planned (intended) business transactions and the business and financial consequences of the transaction, business event or activity; 4. specific questions and proposed answers regarding relevant legal provisions; 5. a statement by the applicant as to whether a decision-making procedure regarding legal remedies or a court proceeding related to the request for an advance tax ruling in which the applicant participates as a party is in progress; 6. documents or documentation relating to the request for an advance tax ruling or to which the applicant refers; 7. all advance tax rulings from the competent tax authorities of other countries on the same issue or whether a request for an advance tax ruling has been made on the same issue before the tax authorities of another country with related persons. The Tax Administration may also request other documentation from the applicant necessary for the issuance of an advance tax ruling.[47]

The Tax Administration may invite the applicant or his/her authorized representative or tax advisor to hold a preliminary interview.[48] An advance tax ruling must be marked as such. An advance tax ruling must contain the questions asked, the answer, the facts, and the analysis of the presented case or transaction, business event, or activity.[49] Following Article 14 of the Ordinance, an advance tax ruling has a binding effect on the Tax Administration.

An advance tax ruling is valid from the date of delivery to the applicant. An advance tax ruling ceases to be valid if: 1. it is based on provisions of regulations that have been amended or have ceased to be valid, based on which the opinion was issued; 2. there have been changes in circumstances that have a significant impact on the advance tax ruling; 3. it is determined that the advance tax ruling is based on false or incomplete information.[50]

[47] Article 8 of the Ordinance.
[48] Article 10, paragraph 1 of the Ordinance.
[49] Article 13, paragraphs 4 and 5 of the Ordinance.
[50] Article 15 of the Ordinance.

5. DOES AN ADVANCE TAX RULING HAVE THE CHARACTERISTICS OF AN ADMINISTRATIVE ACT IN THE TAX LEGISLATION OF THE REPUBLIC OF CROATIA?

Since an administrative act is the most important act of administration, and mandatory opinions in some legal systems have the character of an administrative act, this chapter will briefly present its characteristics.

When defining the concept of an administrative act, different approaches to interpreting its essential properties have led to the emergence of many different definitions in theory. All these different understandings of the substantive and formal qualities of an administrative act carry within them some characteristics that appear as common features more or less in all definitions. The term "administrative act" (French: acte administratif) originated in France at the beginning of the nineteenth century. Its emergence should be seen as a product of the time marked by the process of bringing administration under the law and establishing the principle of legality of administration. As a product of a certain time in the development of modern administration, the administrative act becomes its fundamental instrument by which the administration now, in its basic activity, applies a legal rule to a specific case. The administrative act still arouses the interest of theory, especially the theory of administrative law, today. This interest is particularly pronounced in Germany and Austria, which are countries with exceptionally developed administrative law. French administrative law theory is also of great interest, although its approach to the general problem of administrative acts is somewhat narrower than that which exists in Germany and Austria. However, this is a consequence of certain circumstances characteristic of the organization and development of administrative law in France. The fact that the French theory of administrative law in the domain of the administrative act is too burdened by the fact that the administrative act is the object of an administrative court lawsuit is particularly significant, so the analysis of its characteristics is primarily based on that aspect, which puts its other properties in the background.[51]

The essential characteristics of an administrative act in contrast to other legal acts and activities are the following: its concreteness; its authoritativeness; its direct legal consequences (the concreteness of the administrative act); and its author.[52]

[51] Borković, I., *Upravno pravo*, Narodne novine, Zagreb, 2002, pp. 357-358.
[52] Ivančević, V., *Institucije upravnog prava, knjiga I.,* Pravni fakultet u Zagrebu, Zagreb, 1983, p. 234.

The authoritativeness of an administrative act is understood to mean that it is the unilaterally expressed will of its author sanctioned by the use of coercion in the event of the involuntary execution of the act by the addressee. It is a commanding, prohibiting, and substantively similar form of executing the will of the author of the administrative act who stands in an administrative-legal relationship with the addressee, but the addressee is subordinate to it.[53] The authoritativeness of an administrative act is connected to its unilaterality. An administrative act is always unilateral. The unilaterality of an administrative act is manifested in the circumstance that the administrative act itself, its content, as well as its legal effect arise as a consequence of the expressed will of one subject, namely the unilateral author.[54] Furthermore, a characteristic of an administrative act is that it must produce direct (concrete) legal effects.[55] This immediacy (concreteness) of an administrative act goes in two directions. According to the subject matter being decided, i.e. the specific administrative matter, and according to the subjects whose rights and obligations are being decided by the administrative act (the specific addressees of the act). It is characteristic of an administrative act that it has a legal effect, i.e. that it produces a direct legal effect. This is the most essential feature of an administrative act because an administrative act is passed to achieve a certain legal effect. Therefore, an authoritative statement in the form of an administrative act leads to the fact that a legal relationship is: a) established, changed, or terminated, or b) established. In both cases, we are talking about the legal effect caused by the administrative act. The difference is that in the first case, the legal effect of the administrative act is constitutive, while in the second case, it is declaratory.[56] The legal effect of an administrative act is directed primarily towards its addressee, i.e. the party whose rights and obligations are decided by the administrative act itself. However, an administrative act also acts toward its issuer, and here, as with the act's effect on the party, we speak of its direct effect.[57] In the legislation of the Republic of Croatia, the Administrative Disputes Act[58] in Article 3, paragraph 1, item 1 states that, among other things, the subject of an administrative dispute is: the assessment of the legality of an individual decision by which a public body[59] has decided on the right, obligation or legal interest of a party in an administrative matter (administrative act) against which it is not permitted to file a regular legal remedy. In the same way, the 2010 Administrative

[53] *Ibid*., p. 237.
[54] Borković, *op. cit.* note 51, p. 361.
[55] Ivančević, *op. cit.* note 52, p. 246.
[56] Borković, *op. cit.* note 51, p. 361.
[57] *Ibid*., p. 362.
[58] Administrative Disputes Act, Official Gazette, No. 36/24 (hereinafter: ZUS).
[59] Under Article 1 of the General Administrative Procedure Act (Official Gazette, No. 47/09, 110/21, hereinafter: ZUP), public law bodies are: state administration bodies and other state bodies, bodies of local and regional self-government units, and legal entities with public authority.

Disputes Act indirectly defined an administrative act, following the logic of the characteristics of an administrative act, which is defined as an authoritative decision to cause a direct legal effect in the rights and duties of natural and collective persons for a specific case in the field of administrative activity.[60] Therefore, an administrative act is a decision by which a public law body decides on the right, obligation, or legal interest of a party in a specific administrative matter.[61]

From the above characteristics of an administrative act, it is evident that advance tax rulings do not have the character of an administrative act. Namely, advance tax rulings do not decide on taxpayers' rights and obligations, nor do taxpayers have the possibility of filing a legal remedy or other means of legal protection against them.

6. LIABILITY OF THE REPUBLIC OF CROATIA FOR DAMAGES CAUSED BY ISSUING AN ILLEGAL ADVANCE TAX RULING

The bases of non-contractual liability for damage are generally set out in the Civil Obligations Act.[62] However, the ZOO does not list general assumptions of liability for damage but rather states that liability for damage is based on the principle of presumed fault, that ordinary negligence is presumed, and that liability for damage caused by a dangerous object or activity and in other cases provided for by law is imposed regardless of fault. In legal theory, there is no dispute that the scope and assumptions of liability for damage are the harmful action of the harmdoer, damage, causal link, illegality, and the existence of subjects of the contractual relationship of liability for damage, namely the injured party, the harmdoer, and the responsible person. If it is a matter of liability based on fault, the existence of fault is required, which is divided into intent and negligence.[63] Article 14 of the

[60] Britvić-Vetma, B.; Pičuljan, Z., *Pravno uređenje i glavna obilježja upravnog postupka u Republici Hrvatskoj,* Elektronički zbornik radova Veleučilišta u Šibeniku, Vol. 10, 3-4/2016, p. 39.
[61] According to Article 2 of the ZUP, an administrative matter is any matter in which a public law body decides in administrative proceedings on the rights, obligations, or legal interests of a natural or legal person or other parties by directly applying laws, other regulations and general acts governing the relevant administrative area. Any matter that is defined by law as an administrative matter is also considered an administrative matter.
[62] Civil obligations Act, Official Gazette, No. 35/01, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23 (hereinafter: ZOO).
[63] Jug, J.; Vezmar-Barlek, I., *Naknada štete u upravnom sporu*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 50, 2/2013, p. 443.

State Administration System Act[64] stipulates that the Republic of Croatia shall compensate for any damage incurred by a natural or legal person due to the unlawful or improper performance of state administration duties. Article 118, paragraph 1 of the ZUS states that the court shall decide on compensation for damage and the return of property within the scope of the claim.

For the liability of a public legal body to exist, all general and special prerequisites for that special type of liability for damage must be met. Special assumptions would be that the harmful action was committed in a specific administrative case, that the injured party was a party in that procedure and the claimant in the administrative dispute, and that it must be irregular or illegal work. Since ZUS does not prescribe whether it is an objective or subjective liability, the question arises as to what type of liability is involved in the case of compensation for damages. In the previous judicial practice that considered the issue of illegal and irregular work, the position was taken that in the case of unlawful and irregular work, there must also be a will or consent to damage the rights or interests of the party by such action. Such case law refers to the work of public law bodies and courts or judges. Given this position, which essentially amounted to the interpretation that a certain omission or action contrary to the law, other regulation, or general act, and a certain act or omission contrary to the usual or prescribed manner of performing an activity, constitutes illegal or irregular work only if, in addition to the above, there is a will or consent to cause damage to another, it can be concluded that the principle of liability based on fault was accepted. The will and consent of the harm-doer to cause damage was one of the assumptions that were interpreted depending on all the specific circumstances of the case. This would mean that in the past period, the subjective attitude of the harmdoer towards causing damage, whether it was intentional or careless, was one of the assumptions of illegal and improper work, i.e. that the principle of subjective liability based on fault was accepted.[65]

However, the Constitutional Court issued a decision stating that "...the ZSDU establishes a system of objective liability of the Republic of Croatia for damage due to the unlawful or improper operation of state and public administration bodies, which is based on the principle of causation (causa), and not on the principle of fault (culpa). The primary and direct liability of the state for damage due to the unlawful or improper operation of state and public administration bodies is a special expression of the principle of the rule of law, one of the highest values

[64] State Administration System Act, Official Gazette, No. 66/19, 155/23 (hereinafter: ZSDU).
[65] Jug, Vezmar-Barlek, *op. cit.* note 63, p. 445.

of the constitutional order of the Republic of Croatia, established in Article 3 of the Constitution."[66,67]

Regarding illegal work in the event of erroneous legal positions, legal opinions, or decisions of the state and public administration, Jug and Vezmar-Barlek essentially point out that the state and public administration act according to the principles of vertical supremacy, in a system in which lower administrative bodies are obliged to act by the mandatory instructions of a higher body, and within one administrative body, officials act according to the principle of subordination concerning the head of the body. They further state that "... State bodies act from a public law perspective, i.e. as *iure imperii*, even when it is not a bilateral legal relationship and it would be unacceptable for the party opposing the state body to bear any potential damage if it were an incorrect legal position and if a certain decision were to be later annulled. Therefore, the aforementioned decision of the Constitutional Court of the Republic of Croatia, which also relates to the work of state bodies, is also applicable to any illegal work of state administration bodies that would relate to both the incorrect application of law and an incorrect legal position".[68]

The Supreme Court of the Republic of Croatia stated in its decision that for the existence of state liability, three prerequisites must be cumulatively met: 1. unlawful or improper operation of a state administration body, 2. existence of damage that has occurred to the claimant, 3. causal link between the unlawful or improper operation of a state administration body and the damage incurred, whereby the damage incurred must be a direct consequence of the unlawful or improper operation of a state administration body, i.e. that the damage would not have occurred if such operation had not occurred.[69] In the same decision, it also points out that for state liability, it is not decisive at which level of the state administration body the harmful act occurred, as the Constitutional Court of the Republic of Croatia also points out in its decision.[70]

In France, about the issue of fault as a prerequisite for state liability for damage, the general position is that for state liability it is sufficient that the damage was

[66] Decision of the Constitutional Court of the Republic of Croatia, case no. U-III-2314/05 of 21 February 2007.
[67] See also: Bukovac-Puvača, M.; Žunić-Kovačević, N., *Problem temelja odgovornosti države za štetu prouzročenu nezakonitim i nepravilnim radom njenih tijela*, Zbornik radova Pravnog fakulteta u Rijeci, Vol. 32, 1/2011, pp. 271-272.
[68] Jug, Vezmar-Barlek, *op. cit.* note 63, p. 449.
[69] Decision of the Supreme Court of the Republic of Croatia, case no. Rev-1726/12 of 11 January 2017.
[70] See Decision of the Constitutional Court of the Republic of Croatia, case no. U-IIIB-1373/2009 of 7 July 2009.

caused by a breach of official duty. What is considered a breach of official duty depends on the nature of the duty and the circumstances of the specific case, and in any case, it is an inappropriate, imperfect performance of duty. A specific official doesn't need to be at fault, but rather the service is generally at fault. Case law on fault generally accepts the principles of civil law. Therefore, simple negligence is generally sufficient for liability. Gross negligence (faute lourde) is required as a presumption of liability in cases where the performance of official duties involves great difficulties or dangers (police, tax authorities, supervisory and regulatory authorities), and when the authorities have discretionary powers in performing them. The state may also be held liable based on objective liability, which in French administrative law is based on risk and the principle of equality in the bearing of public burdens. It is based on the idea that the state acts in the interest of the entire community, and if this action causes disproportionate damage to some citizens, it must be compensated so that they do not have to bear a greater burden.[71]

In Germany, an official who intentionally or negligently violates his official duty is obliged to compensate third parties for any damage caused by such violation. If the violation was caused by the official's negligence, he will only be liable if the injured party cannot obtain compensation from the other party. This provision, although it prescribes the liability of officials, is applied to determine the liability of the state, and case law considers the state to be primarily liable instead of the official who cannot be directly liable to a third party, but owes the state the amount paid only if the damage was caused intentionally or through gross negligence. The state replaces the official with the injured party, and its liability is assessed according to the assumptions prescribed for his liability: if the damage was committed in the performance of official duties (Amtspflichten), the violated interest falls within the circle of interests protected by the violated legal norm, the official acted negligently, i.e. intentionally or negligently, the injured party cannot obtain compensation from the other party and has failed to use other legal means for his protection. The liability of the state for damage is decided by civil courts. It is pointed out that fault as a prerequisite for state liability is that, since the burden of liability has been transferred from the official to the state, it has much less justification than it had at the time of the adoption of the BGB. Case law has long shown a tendency towards a strict interpretation of the standard of due care so that sometimes this liability becomes almost identical to objective liability. In Germany, too, the state can be held liable based on objective responsibility, based on the customary rule on the so-called special victim (Sonderopfer), according to

[71] Bukovac-Puvača, Žunić-Kovačević, *op. cit.* note 67, pp. 273-274.

which an individual who bears a special burden for the benefit of the general interest has the right to fair compensation.[72]

The Republic of Croatia is liable for damage incurred by a taxpayer who acts (or fails to act) by the advance tax ruling opinion issued. This is because, if a taxpayer acts by the ruling issued, he may encounter a situation where the first-instance and second-instance tax authorities do not act following the ruling of the Central Office of the Tax Administration, even though it binds the Tax Administration. This was also evident in one tax procedure when the tax authorities did not act following the advance tax ruling of the Central Office.[73] In another situation, when the taxpayer would not act by the issued ruling because he believes it is unfavorable for him[74] and illegal, but in the way he considers it is legal. However, in this situation, the first-instance and second-instance tax authorities act following the ruling of the Central Office and issue a decision that becomes final in the tax procedure and is unfavorable for the taxpayer. The taxpayer must pay the tax liability after the final decision becomes enforceable. If the tax decision (administrative act) is unlawful, the taxpayer incurs damage.

If the courts, when controlling the tax administration in response to a taxpayer's lawsuit, determine the illegality of an administrative act (tax ruling), they are obliged to award the taxpayer compensation for damages under Article 118, paragraph 1 of the ZUS, because the state administration acted following the advance tax ruling of a higher body that incorrectly presented a legal position and accordingly incorrectly applied the law.

The administrative court will decide on compensation for damages in an administrative dispute at the request of the taxpayer (claimant) when the claimant requests compensation for damages in addition to the main claim. If the claimant requests compensation for damages in addition to the main claim for annulment of an unlawful tax decision (administrative act), the court in the administrative dispute must also consider the request for compensation for damages and decide on that request in a judgment.[75] This is because the judge in an administrative dispute with full jurisdiction, which is implemented in Croatian law, has extended powers that allow him not only to cancel the act but also to make other decisions about the administration. In a full jurisdiction dispute, the judge has wider powers

[72] *Ibid*., pp. 274-275.
[73] Arbutina, H., *Croatia: The residence of individuals; the income from dependant personal services; director's fee*, Eds: E. Kemmeren et al., Tax Treaty Case Law around the Globe 2022, IBFD, Amsterdam/Linde, 2023, pp. 265-274.
[74] It is illogical that he should submit legal remedies favorable to him.
[75] Đerđa, D.; Šikić, M., *Komentar Zakona o upravnim sporovima*, Novi informator, Zagreb, 2012, p. 258.

than in a legality dispute, and a full jurisdiction dispute manifests itself as a civil dispute. A judge with full jurisdiction, such as a judge in a legality dispute, can, for example, set aside the decision and declare the contract illegal. He can also, and only he has these powers, award damages and a monetary amount.[76]

7. CONCLUSION

An advance tax ruling is a formal decision provided by a tax authority, clarifying how specific tax laws and regulations apply to an individual taxpayer or a corporate entity in particular circumstances. Often sought before a significant financial transaction or investment, advance tax rulings offer legal certainty by outlining the tax implications and obligations in advance. Such rulings are pivotal for multinational corporations, tax professionals, revenue authorities, and consultants, helping to ensure compliance and to manage potential tax risks proactively. [77]

Advance tax rulings are particularly useful when: a) the law is unclear and there is more than one possible interpretation, b) new legislation applies to the transaction, c) the transaction is novel, sensitive, or controversial, d) significant issues arise or may have a wide impact and e) the arrangement is a complex financing transaction. [78]

The tax authority in the Republic of Croatia is authorized to provide, upon written request from the taxpayer, an advance tax ruling on the tax treatment of future and intended transactions, i.e. business events and activities of the taxpayer.

Since an advance tax ruling does not have the character of an administrative act in the Republic of Croatia, and the authors believe that it should not have, given its content and legal nature, an administrative dispute cannot be initiated against it before the Administrative Courts. Consequently, to avoid illegality, the ZUS should introduce the possibility that the tax authority deciding in the first-instance tax procedure and the taxpayer may request the judicial authority to review the legality of the advance tax ruling within 30 days from its issuance if they believe that the advance tax ruling of the Central Tax Administration Office is illegal. This would raise the legal certainty of the taxpayer to a higher level, and the obligation

[76] Britvić-Vetma, B., *Spor pune jurisdikcije prema Zakonu o upravnim sporovima iz 2010.*, Zbornik radova Pravnog fakulteta u Rijeci, Vol. 32, 1/2011, pp. 390-391.
[77] Tax Ruling - Academy of Tax Law, https://academyoftaxlaw.com/glossary/tax-ruling/, March 10, 2025.
[78] What is a binding ruling?, https://www.taxtechnical.ird.govt.nz/apply-for/apply-for-a-ruling/what-is-a-binding-ruling, March 10, 2025.

to compensate for damage by the Republic of Croatia would be reduced. This type of administrative dispute should be prescribed as an urgent procedure. Consequently, all terms should be shorter, and the second-instance court should issue a decision on the appeal within four months from the date of initiation of the administrative dispute.

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CUSTOMS REFORM - ANOTHER STEP TOWARDS CENTRALIZATION OF CUSTOMS?*

ABSTRACT

In May 2023, the European Commission published a proposal for EU customs reform. In terms of its content, it is expected to be the most far-reaching customs reform since 1968. The proposed reform brings a number of innovations, the essence of which lies in the further convergence of the customs authorities of the individual EU Member States. Among other things, the published proposal also aims to create a new institution - the 'EU Customs Authority'. Of particular interest are the functions and powers of the newly created body. The published proposal shows that the EU Customs Authority should, among other things, have the power to order customs controls. These would then have to be carried out by the customs authorities of the Member States concerned. This suggests that the published reform could be a significant step towards the institutional and functional centralisation of EU customs. For this reason, the present paper will be devoted to an analysis of the impact of the proposed customs reform on the relationship of the newly emerging EU Customs Authority with the authorities of the Member States, with a focus on exploring the potential emergence of a vertical institutional and functional hierarchy. The aim of the analysis will be to identify the specific centralising elements of the proposed customs reform in the context of, or in contrast to, the very purpose of the creation and existence of the EU Customs Union, the foundations of which were laid down in the Treaty establishing the European Economic Community.

Keywords (up to five keywords): *Customs reform, Customs union, centralisation*

1. INTRODUCTION

The last decades have been characterized by a massive development of e-commerce. This is essentially a consequence of economic globalization, and the technological revolution brought about by the emergence of the Internet. Many challenges have arisen for society as a result of this development, and the legal field is no exception. Legislators have had to respond with reforms in several legal sectors, such as consumer law, tax law and, finally, customs law. Equally important is the fact that there is an international element to e-commerce in many cases. For this reason, it is not entirely possible to take a unilateral approach to the issue. The European Union ("EU") responded to the social and technical developments described above by adopting a new Union Customs Code ("UCC").[1] The new Code replaced the older 'Community Customs Code'[2] from 2016 onwards, with the purpose of simplifying and digitizing customs procedures; increasing security and compliance with EU Member States' legislation; and promoting the EU's international trade objectives. However, there has been a significant increase in customs clearance in recent years, primarily due to the increased use of e-commerce by citizens and businesses based in EU Member States. While the 2017[3] reform removed the exemption from value added tax for imported goods based on e-commerce, it did not remove the exemption from customs duty for consignments of up to €150 in value. In addition, from 2022, the obligation to lodge an electronic customs declaration was introduced for this type of consignments, which led to an additional billion customs declarations lodged year-on-year. This brings the total number of declarations lodged in 2021 to 1.691 billion.[4] In 2023, there were already a total of 2.6 billion import declarations, of which 2.1 billion were for consignments of up to EUR 150.[5] At the same time, according to available studies, it is estimated that up to 65% of e-commerce shipments imported using postal

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[1] See Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

[2] The Community Customs Code was introduced in 1992. See Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code.

[3] The 2017 reform was introduced by the adoption of the Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods.

[4] 691.5 million were so-called "standard" declarations.

[5] It is also interesting to note that these 2.1 billion import tariff declarations accounted for only 0.6% of the total price of imported goods. See https://taxation-customs.ec.europa.eu/customs-4/eu-customs-union-facts-and-figures/eu-customs-union-major-trading-partner_en, 28 February, 2025.

services are undervalued[6] and 66% do not meet EU security requirements.[7] The European Commission has responded to these developments by publishing on 17 May 2023 a Customs Reform proposal with the working title "Customs Reform: taking the Customs Union to the next level." In particular, the Commission hopes to create a more cost-effective and efficient framework governing the EU Customs Union, based on "a new partnership between EU customs authorities and between customs and business."[8] However, the way in which the Commission intends to achieve the articulated objectives seems interesting. A key element of the announced reform is to be the creation of a new institution, the EU Customs Authority, which will acquire its own powers and competences. In addition, an EU Customs Data Centre is to be created, the purpose of which will be to centralize Member States' customs IT systems. For this reason, the present paper will be devoted to an analysis of the impact of the proposed customs reform on the relationship of the newly emerging EU Customs Authority with the Member States' authorities, with a focus on exploring the potential emergence of a vertical institutional and functional hierarchy. The aim of the analysis will be to identify the specific centralizing elements of the proposed customs reform in the context of, or in contrast to, the very purpose of the creation and existence of the EU Customs Union, the foundations of which were laid down in the Treaty establishing the European Economic Community.[9]

The paper could thus enrich the growing pool of legal research outputs dealing with the published proposal to reform the EU Customs Union. In general, the topic of the EU Customs Union has been dealt with, for example, by Fabio (2020).[10] In addition, selected issues of the EU Customs Union have been addressed by e.g.

[6] Basalico, B.; Wahl, J.; Okholm, H., *E-commerce imports into Europe: VAT and Customs treatment*, Copenhagen Economics, 2016, p. 1, https://copenhageneconomics.com/wp-content/uploads/2021/12/e-commerce-imports-into-europe_vat-and-customs-treatment.pdf, 28 February, 2025.
[7] The European Consumer Organisation, n.d., *Is it Safe to Shop on Online Marketplaces?*, 2021. p. 3, https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-004_is_it_safe_to_shop_on_online_marketplaces.pdf, 28 February, 2025.
[8] European Commission, *Communication From The Commission To The European Parliament, The Council And The European Economic And Social Committee Customs reform: Taking the Customs Union to the next level (COM 257 final)*, Brussels, 2023, p. 5, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023DC0257, 28 February, 2025.
[9] Treaty establishing the European Economic Community of 25 March 1957.
[10] Fabio, M., *Customs Law of the European Union*, Alphen aan den Rijn: Kluwer Law International B.V. 2020, p. 768, ISBN 9789041161253.

Drwiłło (1991)[11], Viner (2014)[12], Poniewierka (2015),[13] Gwardzińska et. al. (2017),[14] Lyons (2018)[15] and also Oktaba (2019).[16] Among domestic (Slovak and Czech) authors, we can mention Brodesser et. (1982),[17] Slovinský et. al. (1985),[18] Balko (2007),[19] Cakoci (2008),[20] Šimonová (2010),[21] Šramková (2011)[22] and others. We can also mention several authors of recent papers, including e.g. Bérešová (2017),[23] Prosman and Vysocký (2018),[24] Stojáková and Popovič (2018)[25] and the most recent also Daudrikh and Szakács (2022.)[26] The issue of the

[11] Drwiłło, A., *Zarys prawa dewizowego i celnego* [The basics of exchange and customs duty law], Gdańsk: Wydawn, Uczelniane WSM, 1991, p. 341.
[12] Viner, J., *The Customs Union Issue*, New York: Oxford University Press, 2014 p. 198. ISBN 978-0-19-975612-4.
[13] Poniewierka, W., *Prawo celne komentarz*, Varšava: Wolters Kluwer, 2015, p. 330, ISBN 978-83-2648-013-3.
[14] Gwardzińska, E. et. al., *Prawo celne*, Varšava: Wolters Kluwer Polska, 2017, p. 624, ISBN 978-83-810-7427-8.
[15] Lyons, T., *EU Customs Law*, USA: Oxford University Press, 2018, p. 599, ISBN 978-0-19-878-402-9.
[16] Oktaba, R., *Prawo celne*, Varšava: C. H. Beck, 2019, p. 202, ISBN 978-83-8158-993-2.
[17] Brodesser, S., *Celnictví v Československu: minulost a přítomnost* [Customs in Czechoslovakia: past and present], Praha: Naše vojsko, 1982. 358.
[18] Slovinský, A. and col., *Československé finančné právo* [Czechoslovak financial law], Bratislava: Obzor, 1985, 338 p. 65-064-85.
[19] Balko, L., *História genézy cla v medzinárodnom obchode* [History of the genesis of customs duties in international trade], In: Medzinárodné vzťahy. Vedecký časopis pre medzinárodné, politické, ekonomické, kultúrne a právne vzťahy Fakulty medzinárodných vzťahov Ekonomickej university v Bratislave, ISSN 1336-1562, 2007, roč. V., č. 2, p. 125-146.
[20] Cakoci, K., *Colné právo* [Customs law], Žilina: Knižné centrum, 2008, 148 p. ISBN 9788080643195.
[21] Šimonová, J., *Právna úprava cla v európskej únii – jej špecifiká, perspektívy a negatíva* [Customs legislation in the European Union - its specifics, perspectives and negatives], In: DÁVID, R., SEHNÁLEK, D., VALDHANS, J. (ed.). DNY PRÁVA – 2010-DAYS OF LAW, Zborník príspevkov zo. 4 ročníka medzinárodnej konferencie usporiadanou Právnickou fakultou Masarykovej university, Brno: Masarykova Univerzita, 2010. ISBN 978-80-210-5305-2, p. 792-805.
[22] Šramková, D., *Celní právo v prostředi globalizace* [Customs law in the environment of globalisation], Brno: Masarykova univerzita, 2011. 108 p. ISBN 978-80-210-5699-2.
[23] Bérešová, G, *Global Strategy of the European Union*, In: Globalization And Its Socio-Economic Consequences: 17th International Scientific Conference: Proceedings (Part I.), Žilina, 2017, p. 131-138. ISBN 978-80-8154-212-1.
[24] Prosman, M.; Vysocký, E., *Colné právo: Nový Colný kódex Únie* [Customs law: the new Union Customs Code], Bratislava: Wolters Kluwer SR s.r.o., 2018. 330 p., ISBN 978-80-8168-814-0.
[25] Stojáková, M.; Popovič, A., *Clo ako tradičný vlastný zdroj rozpočtu EÚ a právne aspekty jeho úpravy* [Customs duty as a traditional own resource of the EU budget and legal aspects of its adjustment], In: Bratislavské právnické forum 2018: ústavnoprávne východiska finančného práva, Bratislava: Právnicka fakulta, 2018, ISBN 978-80-7160-475-4, p. 110-119.
[26] Daudrikh, Y.; Szakács, A., *Colné právo a menové právo* [Customs and monetary law], 1. vydanie, Bratislava: Wolters Kluwer SR s.r.o., 2022, 148p.

new customs reform has so far been addressed, e.g., by Schippers (2023);[27] Pickett and Wolffgang (2023);[28] Antonini and Ioachimescu-Voinea (2023);[29] Lux (2024);[30] [31] Lyons (2024);[32] Fabry (2024);[33] Grave (2024);[34] [35] van Doornik and Groenewoud (2024);[36] and Arendsen (2024).[37] All of the outputs mentioned in the

[27] Schippers, M.L., *Proposals to Reform the EU Customs Union, EC Tax Review*, 2023, 32, Issue 6, p. 253-262, https://kluwerlawonline.com/journalarticle/EC+Tax+Review/32.3/ECTA2023031, 28 February, 2025.

[28] Pickett, E.; Wolffgang, H.-M., *The European Commission's Proposal for a Modernised Union Customs Code: A Brief Introduction*, World Customs Journal, 2023, 17(2), p. 132–147, https://doi.org/10.55596/001c.90961, 28 February, 2025.

[29] Antonini, R.; Ioachimescu-Voinea, M., *EU Customs Reform: A Bridge Over Troubled Waters and Towards Sanctions Harmonization?*, Global Trade and Customs Journal, 2023, 18, Issue 11, p. 437-443, https://kluwerlawonline.com/JournalArticle/Global+Trade+and+Customs+Journal/18.11/GTCJ2023060, 28 February, 2025.

[30] Lux, M., *Import and the Responsible Person(s): What Would Change under the EU Commission's Reform Proposal?*, Global Trade and Customs Journal, 2024, 19, Issue 5, p. 348-359, https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/19.5/GTCJ2024046, 28 February, 2025.

[31] Lux, M., *Export and the Responsible Person(s): What Would Change under the EU Commission's Reform Proposal?*, Global Trade and Customs Journal, 2024, 19, Issue 6, p. 413-419, https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/19.6/GTCJ2024039, 28 February, 2025.

[32] Lyons, T., *The Proposed EU Customs Authority: A New Agency in a new System,* Global Trade and Customs Journal, 2024, 19, Issue 6, p. 362-370, https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/19.6/GTCJ2024049.

[33] Fabry, V., *Customs Undervaluation Through the Prism of the Proposed Reform of the EU Customs Code*, Global Trade and Customs Journal, 2024, 19, Issue 6, p. 371-375, https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/19.6/GTCJ2024048.

[34] Grave, J.M., *The Impact of the European Union Customs Reform on the Exchange of Data With Third Countries for the Purpose of International Customs Cooperation*, Global Trade and Customs Journal, 2024, 19, Issue 6, p. 420-435, https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/19.6/GTCJ2024051.

[35] Grave, J.M., *The Impact of the European Union Customs Reform on the Origin and the Customs Value of Goods*, Global Trade and Customs Journal, 2024, 19, Issue 6, p. 376-390, https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/19.6/GTCJ2024050.

[36] Van Doornik, E; Groenewoud, G., *EU Customs Data Hub: Data-Driven Approach to Customs in an Ever-Growing Digitalised Custom Landscape*, Global Trade and Customs Journal, 2024, 19, Issue 6, p. 396-402, https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/19.6/GTCJ2024052, 28 February, 2025.

[37] Arendsen, R., *Towards Digital Transformation of EU-Customs?*, Global Trade and Customs Journal, 2024, 19, Issue 6, p. 403-412,

previous sentence focus on the legal aspects of the proposed reform, and as can be observed, there are not many of them at this moment. However, given that this is a current issue, it is likely that publications in this area will increase.

2. METHODOLOGY

As stated in the introduction, the present paper will focus on the identification of specific centralising elements of the proposed customs reform in the context of, or in contrast to, the very purpose of the creation and existence of the EU Customs Union, the foundations of which were laid down in the Treaty establishing the European Economic Community. Hence, for the purpose of this research, it is necessary to define the concept of centralisation in its basic features so that the identified centralising elements can be included in its scope. For this reason, we will apply insights from the field of management science. The use of the vertical element of the power sharing parameter, the essence of which lies in the distribution of management powers within the organisational structure along the vertical line, seems to be appropriate.[38] Thus, in principle, centralisation occurs when competences are moved upwards along the organisational structure along a vertical line, or when new management competences are created at the top of the organisational structure in general.

In order to achieve the set objectives, scientific research methods will be used. In particular, the historical method will be used to examine the Customs Union arrangements contained in the Treaty establishing the European Economic Community in order to clarify the origins of the Customs Union, its causes and objectives. In the next part, the proposal for an EU customs reform will be analysed to identify the centralising elements, using the methods of grammatical-semantic and systematic interpretation. Finally, the objectives and principles of the creation and existence of the Customs Union will be compared with the elements identified in the second part using a comparative method. The research will result in an assessment of the evolutionary trend of the Customs Union, i.e. whether the centralisation processes are in line with the objectives and principles on which the Customs Union was originally created.

https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/19.6/GTCJ2024047, 28 February, 2025.

[38] Blažek, L., *Management: Organizování, rozhodování, ovlivňování. 2., rozšířené vydání* [Management: Organizing, Deciding, Influencing. 2nd, expanded edition], Praha: Grada Publishing, a.s., 2015, p. 5.

3. ESTABLISHMENT OF THE EU CUSTOMS UNION IN THE CONTEXT OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY

The EU customs union can be characterised as a Community customs territory with the abolition of customs duties at the internal borders of the Member States, a common external customs policy and tariff, common rules of origin for non-EU goods and a common definition of customs value.[39] However, the Customs Union has had to go through a gradual evolution to get to its current form, and it is clear, even in the light of the published Customs Reform, that its evolution is not yet completed.

The emergence and development of the EU Customs Union must be seen in the context of the events following the end of the World War II and in the context of the efforts of European countries to create integration associations in the field of trade, primarily to increase economic interconnectivity between the individual states. This economic integration was ultimately intended to increase the likelihood of maintaining peace. Cooperative efforts led to the signing of the Treaty establishing the European Coal and Steel Community (the 'Treaty of Paris')[40] in 1951, which subsequently led to the creation of the European Coal and Steel Community (ECSC) in 1952. The founding countries were France, West Germany, Italy, Belgium, Luxembourg and the Netherlands. The aim was to create a common market in the trade of steel, coal, coke, iron ore and scrap. Subsequently, in 1957, the so-called Treaties of Rome were signed. These were the Treaty establishing the European Economic Community (EEC Treaty) and the Treaty establishing the European Atomic Energy Community (EAEC Treaty)[41]. The first of these treaties must be regarded as the initial legal act on the basis of which the customs union was gradually built up, evolving into the current form of the EU Customs Union.

As mentioned above, the Treaty establishing the European Economic Community (hereinafter referred to as "EEC") is one of the so-called Treaties of Rome, signed in 1957 to deepen cooperation between European states and to create common institutional structures. The EEC Treaty itself must be considered as a comprehensive source of international law (or, from the perspective of today's legal theory, European law). Already in its Part I it discusses principles. According

[39] Šramková, D., *Celní právo ve světle 40. výročí celní unie* [The customs law and the 40th anniversary of the Customs Unio], In: Dny práva - 2008 [Days of Law 2008], Brno: Masarykova univerzita, 2008, p. 349.
[40] Treaty establishing the European Coal and Steel Community of 18 April 1951.
[41] Treaty establishing the European Atomic Energy Community of 25 March 1957.

to Article 2, the mission of the Community (EEC) is to promote, through the establishment of a common market and the gradual approximation of the economic policies of the Member States, the harmonious development of economic activities throughout the Community, continued and balanced growth, increased stability, an accelerated rise in the standard of living and closer relations between the Member States. Furthermore, Article 3 names the specific Community activities which were intended to achieve the objectives defined in Article 2. Among other things, Article 3 lists the following actions:

- "the elimination of customs duties and quantitative restrictions on imports and exports of goods between Member States, as well as any other measures having equivalent effect,"
- "the introduction of the Common Customs Tariff and the Common Commercial Policy in relation to third countries,"
- "the approximation of the laws of the Member States to the extent required for the proper functioning of the common market."

It follows from the above that the establishment of the Customs Union was one of the integral parts of the newly emerging Community. At the same time, the attributes of the Customs Union were already clearly defined in the EEC Treaty itself, i.e. the actions and activities that the Member States were to undertake in order to ensure the establishment and functioning of the Customs Union itself, i.e. the elimination of tariffs and restrictions on the import and export of goods between the Member States and the introduction of the Common Customs Tariff and trade policy towards third countries. In addition to the above activities, this also includes the general activity of approximating the law of the Member States to ensure the proper functioning of the common market, which also includes the proper functioning of the customs union. Under Article 7 of the EEC Treaty, the common market was to be established within twelve years of the signing of the Treaty, a period divided into three relatively distinct phases, each of which was to last four years. The process of establishing the Customs Union also reflected the division into these stages. In terms of content, however, the process of the establishment of the Customs Union can be divided into two categories.

The first category is characterised by the process of regulating customs relations between Member States. This involved refraining from introducing any new export and import tariffs or duties with equivalent effect between themselves, as well as increasing those already applied in mutual trade. At the same time, the Member States undertook to abolish customs duties and all charges having equivalent effect which existed between them up to that time. The process of abolition of customs duties and charges having equivalent effect was to be gradual, the details of which were laid down in a directive issued by the Commission.

The second category included the regulation of the customs relations of the EEC Member States with third countries. To this end, the Member States agreed, within the meaning of Section 1 of Chapter 1 of the EEC Treaty, to create and implement a Common Customs Tariff. However, this was preceded, in accordance with Article 23 of the EEC Treaty, by a gradual adjustment of customs tariffs in relation to third countries, which led in stages to their final unification.

The institutional aspect of the formation of the EEC and its Customs Union cannot be overlooked in the analysis carried out. As it is generally known, four basic bodies with their own competences were created within the EEC. These were the Assembly, the Council, the Commission and the Court of Justice. Their status and competences are mainly dealt with in Part Five of the EEC Treaty. The Assembly was set up as a collective body made up of representatives of the individual Member States, with mainly advisory and supervisory powers. The most important of these was the ability to vote of no-confidence in the Commission. In the area of customs, the Assembly had only an advisory role, which is defined in Article 14(7) of the EEC Treaty. Under that provision, the Council, acting unanimously on a proposal from the Commission and after consulting the Assembly, may amend the other provisions of that Article dealing with the process of progressive tariff reduction between Member States.

The second of the fundamental institutions was the Council. It was a body made up of representatives of the governments of the Member States. The Council was set up to ensure the coordination of the general economic policies of the Member States, with the power to take decisions. In the area of the Customs Union, the Council was granted significant approval powers in the EEC Treaty. In particular, the approval of directives within the meaning of Article 14(2)(c) of the WEEA, the purpose of which was to schedule tariff reductions between Member States under the third stage. In addition, the Council could subsequently approve directives proposed by the Commission in order to address ad hoc problems that may have arisen in the process of reducing reciprocal tariffs. At the same time, the EEC Treaty, in the aforementioned provision of Article 14(7), granted the Council the right to amend the provisions of this Article unanimously, on a proposal from the Commission after consultation of the Assembly. The Council thus has de facto the right to amend a specific part of Community primary law. Furthermore, in the context of the implementation of the Common Customs Tariff, the Council had the right to resolve technical difficulties in the process of setting the common customs tariffs, on a proposal from the Commission. The use of this power was time-limited to two years after the entry into force of the EEC Treaty. Under Article 25(1) of the EEC Treaty, the Council could decide, on a proposal from the Commission, to reduce customs duties on specific types of goods in cases where the production of those goods in a Member State was insufficient to supply it and where that supply

was heavily dependent on imports from third countries. Lastly, the Council could decide, under Article 28, on any autonomous modification or suspension of customs duties under the Common Customs Tariff. It is clear from all the above-mentioned powers in the field of the Customs Union or Customs that the Council's main decision-making functions consisted in the adoption of common legislation - directives. At the same time, the Council adopted the legislation and decisions referred to above, but the Commission was the initiator or submitter of the legislation and decisions. The Council thus had no executive powers and did not act in an institutionally superior capacity vis-à-vis any authority of a Member State.

The third newly created institution was the Commission. It was a collective body with a total of nine members. In principle, it was the central body of the executive power of the European Economic Community. From the powers of the Council and the Assembly described above is clear that one of the most important powers of the Commission was that of legislative initiative. Under Article 155 EEC Treaty, the Commission ensured the application of the EEC Treaty itself; gave recommendations or opinions where the EEC Treaty so provided or where the Commission considered it necessary; took decisions and participated in the formulation of measures adopted by the Council and the Assemblies; and exercised the powers delegated to it by the Council. Of the institutions of the European Economic Community discussed so far, the Commission has had the most significant role in the field of customs. In addition to the drafting powers already mentioned, as provided for in Article 14(7), Article 25(1) of the EEC Treaty, the Commission had the following powers:

- Art. 14(6) - power to make recommendations to Member States if they fail to reduce their mutual duties in accordance with an agreed timetable;
- Art. 15(2) - power to make recommendations to Member States that have voluntarily opted for faster reductions in reciprocal tariffs;
- Art. 17(4) - power to allow a Member State to maintain a fiscal duty in force for a maximum period of 6 years from the entry into force of the EEC Treaty, if its abolition causes serious difficulties;
- Art. 20, 21, 22, 25, 26, 27 and 28 - powers to decide, coordinate and make recommendations in relation to the implementation of the Common Customs Tariff. All these powers are directed to the Member States as a whole.

This gave the Commission significant decision-making and coordination powers, including in the field of customs. However, like the previous institutions of the European Economic Community, the Commission had no direct or managerial powers over the customs authorities of the Member States. As one of the EEC

bodies, the Commission participated in the process of adopting secondary EEC legislation and issued decisions which were binding on individual Member States but not on their national authorities.

The Court of Justice is the last of the EEC's fundamental institutions. Under Article 164 of the EEC Treaty, the purpose of the Court of Justice was to ensure compliance with the law in the interpretation and application of the Treaty itself. The Court of Justice's role was to rule on infringements of the EEC Treaty by individual Member States or by the EEC institutions themselves, at the instance of a Member State or the Commission. Under Article 173 of the EEC Treaty, the Court of Justice examined the legality of legal acts adopted by the Council and the Commission (except for opinions and recommendations). To this end, the Court has ruled on actions for lack of jurisdiction, infringement of essential procedural requirements, infringement of the EEC Treaty or misuse of powers. These actions could be brought by Member States, the Council or the Commission and, in certain circumstances, by private individuals and legal persons. It is essential that the judgments of the Court of Justice were enforceable under the procedural law of the State in which the decision was to be enforced. However, apart from these general decision-making powers, the Court had no specific powers in the customs field. That is to say, it was not in a position of functional superiority to the customs authorities of the Member States.

In general, it can be concluded that, although the Member States gave up some competences under the EEC Treaty in order to establish a common customs union, it cannot be said that there was a centralised customs administration at that time. The Common Customs Union at that time was based on the coordination of customs policies between individual Member States among themselves and the EEC as a whole with third countries. To this end, the Common Customs Tariff was created and adopted. However, the exercise of customs administration depended solely on the individual Member States and their customs authorities, without the possibility of direct intervention by the EEC authorities.

4. EU CUSTOMS REFORM UNVEILED IN 2023

In the era referred to as the industrial "digital" revolution 4.0, there is a massive implementation of technological advances in everyday life to simplify or streamline routine activities. There is also a certain reflection on the emerging e-commerce. E-commerce has revolutionised the interaction between consumers and businesses, which is of great benefit to the EU economy as a whole. This

explosive growth in e-commerce[42] has also multiplied the challenges associated with it. Such challenges include the risk of harm to consumers' health and safety due to non-compliant products, the risk of environmental damage, the negative carbon footprint, as well as many others that are not the subject of this paper. The realisation that customs authorities need to respond more flexibly to these challenges, to contribute more significantly to improving the economic environment, and in particular by ensuring the smooth flow of trade while carrying out the required level of controls to protect the health and safety of all EU citizens, led the EU Commission in May 2023 to propose an ambitious package of customs reforms[43] aimed at changing the structure of customs authorities and thereby fundamentally improving and strengthening their position. The role of customs authorities is primarily to supervise the movement of goods entering the customs union and to control their security. Very often, these are dangerous products that pose a serious safety and health risk to consumers, have an unsustainable impact on the environment and promote unfair competition, which has a significant impact on the EU's competitiveness in various sectors. It is becoming increasingly clear that current customs procedures and instruments are no longer fit for purpose, in particular they are unable to handle efficiently the huge volume of consignments generated by e-commerce in particular. E-commerce already accounts for more than 97% of all customs import declarations.[44] In line with the above, the number of speculative practices that have sought to exploit or outright abuse the imperfections of the current customs union arrangements have also increased. First of all, it is important to recognise that customs authorities have a fundamental and important position by virtue of the fact that they are essentially 'on the front line', providing protection at the border against the importation of non-compliant and potentially dangerous products. Although the European Commission, in an attempt to respond comprehensively and effectively and thus avoid the negative phenomena associated with e-commerce, has begun to promote wider and more intensive cooperation between customs authorities. In our view, this is a legitimate process, in an effort to ensure that customs authorities act as one and thus ensure

[42] Digitalisation is also manifesting itself in the fact that national central banks are developing their own digital currencies along the lines of crypto-assets, which may trigger further changes in the field of research in the future. For more details see: e.g. Nieborak, T., *Central Bank Digital Currency as a New Form of Money*, In: Bialystok Legal Studies, vol. 29, no. 1, p. 189-203, https://bsp.uwb.edu.pl/wp-content/uploads/2024/05/189_Book-BSP-2024-29-1.pdf, 28 February, 2025.

[43] The reform consists of a number of draft legislative acts amending and supplementing existing ones in both the customs and tax areas.

[44] European Parliament, REPORT A9-0065/2024 on the proposal for a regulation of the European Parliament and of the Council establishing the Union Customs Code and the European Union Customs Authority, and repealing Regulation (EU) No 952/2013 (COM (2023) 0258 – C9-0175/2023 – 2023/0156(COD)), https://www.europarl.europa.eu/doceo/document/A-9-2024-0065_EN.pdf, 28 February, 2025.

that the fundamental priorities in the customs area are met. Above all, cooperation between customs authorities must be improved and the EU must act as one in customs matters at international level. To achieve this ambition, the European Commission is proposing to establish two key instruments in the framework of the customs reform.

The EU Customs Data Centre, designed as a central element of the Customs Union, which is essential for strengthening supervision and simplifying customs procedures. It should gradually replace the existing customs IT infrastructure. It should bring annual savings of up to €2 billion to the EU and its Member States in the development and maintenance of IT systems.[45] The EU Customs Data Centre should also perform risk analysis at EU level to achieve more effective protection of its external borders. In this sense, it should improve the efficiency and coordination of customs operations through better management and exchange of data between Member States and other stakeholders. It also acts as a new tool that processes, links and stores information and carries out risk analysis at EU level. All of this should give customs authorities a better understanding of the supply chain when assessing risks and allow customs action to be more targeted and strategic. In addition, it should apply the rules on data protection, access to information, IT security and confidentiality in a horizontal, coordinated and consistent manner. The EU Customs Data Centre will be developed progressively, starting with a new approach to e-commerce. Across the trade chain, businesses would be able to start using the EU Customs Data Centre from January 2032, with mandatory use from 2037, when it should be fully operational.

The EU Customs Data Centre should keep personal data for a maximum of ten years. This period is justified in view of the possibility for customs authorities to notify a customs debt up to ten years after the necessary information on a shipment has been obtained, as well as to ensure that the EU Commission, OLAF and customs and other authorities can cross-check the information in the EU Customs Data Centre with information stored in other systems and information exchanged with other systems. In addition, this period should be aligned with the retention period required by other legislation applied by the customs authorities, where such legislation is relevant for customs controls.

As the objective of the paper already shows, it is possible to see a centralising element at this point, precisely through the introduction of the Customs Data Centre, which is, in our opinion, essential, since the European Commission will have to coordinate customs procedures and customs controls, prioritising products from third countries with a security and non-compliance risk, which are purchased

[45] *Ibid.*

through online markets and sent directly to consumers in the EU. In fact, if we look at the issue of "centralisation" from a broader perspective, its aim is to address the lack of compliance and to ensure that non-compliant and unsafe products do not reach the market, and subsequently the consumer, precisely by control from above by a single authority.

However, crucial to our analysis is the creation of an EU Customs Authority,[46] whose main function should be to pool the expertise and competences that are currently scattered across the EU in order to guide, coordinate and support national customs authorities in the EU. In order to ensure the efficient functioning of the EU, the EU Customs Authority should play an important role in simplifying customs rules and procedures. The EU Customs Authority is also designed as a central operational capability to enable coordinated management of the Customs Union in specific areas. This centralised management increases the efficiency and uniformity of customs operations across Member States, which is essential to ensure consistency and predictability in customs procedures. One of the main benefits of the EU Customs Authority is its ability to take into account and manage the growing number and complexity of non-financial risks, which relate to various aspects such as safety, security, sustainability, human, animal and plant health and life, the environment and the protection of human rights.

The EU customs reform itself is materialized in the Proposal for a Regulation Of The European Parliament And Of The Council establishing the Union Customs Code and the European Union Customs Authority, and repealing Regulation (EU) No 952/2013 (hereinafter referred to as the "EU Customs Reform Proposal"). The EU Customs Reform Proposal is divided into 15 chapters. The creation of the EU Customs Authority and its legal status is regulated in Title XII. This is a broad description of the objectives, mission and tasks that the EU Customs Authority will be required to carry out. In terms of its competences, risk management in accordance with Title IV, Chapter 3 of the EU Customs Reform Proposal is relevant to our analysis.[47] Under Article 51(5)(e), the EU Customs Authority shall develop and carry out a joint risk analysis to generate risk indicators, risk analysis results and, where appropriate, issue control recommendations and other appropriate mitigating measures to customs authorities, including for the purposes of applying the common priority control areas and common risk criteria and standards established by the Commission and for dealing with crisis situations.

On the other hand, under Article 51(6)(g), the (Member States') customs authorities are obliged to implement the risk indicators, the results of the risk

[46] *Ibid.*
[47] Regulated by Article 208(1) of the EU Customs Reform Proposal.

analysis and the control recommendations generated by the EU Customs Authority. In addition, under Article 52(6)(h), the customs authorities of the Member States are required to provide justification to the EU Customs Authority in case a control recommendation has not been implemented. Thus, it follows from the above provisions that the EU Customs Authority has some competence over the customs authorities of the Member States in the area of risk management. However, this is an indirectly formulated competence, since the European Commission used the expression 'making recommendations' in its creation, which corresponds to the obligation of the customs authorities of the Member States to 'implement' those recommendations. However, the EU Customs Reform proposal implicitly accepts that the Member State's customs authority will not ultimately be required to implement the recommended control. In such a case, the customs authority concerned will have to provide the EU customs authority with a justification for not carrying out the recommended control. This is a very vague rule, as it is not clear from the proposal who will assess the sufficiency of the justification for not carrying out the recommended check and on what basis. In addition, it should be noted that the European Commission should have the power under Article 51(1) to establish common priority control areas and common risk criteria and standards for any type of risk, including, but not limited to, risks related to financial interests. This means that the European Commission should have a kind of strategic competence that should be translated into the concrete activities of the EU Customs Authority and, consequently, into the activities of the customs authorities of the Member States, including in the framework of controls. The European Commission will thus have indirect executive powers vis-à-vis the customs authorities of the Member States.

5. CONCLUSION

The analysis contained in the present paper focused on the issue of the EU Customs Union - specifically on the impact of the customs reform introduced on 17 May 2023 on the institutional and functional hierarchy of the EU Customs Union. In the first part of the paper, the Treaty establishing the European Economic Community was analysed with a narrower focus on the issue of the establishment and formation of the EU Customs Union. Within the analysis, the provisions concerning the competences of the different organs of the European Community were discussed. The analysis showed that the common Customs Union at that time was based on the coordination of customs policies between the individual Member States among themselves and the EEC as a whole with third countries. To this end, the Common Customs Tariff was created and adopted. However, the exercise of customs administration depended solely on the individual Member States and their

customs authorities, without the possibility of direct intervention by the EEC authorities.

Subsequently, in the second part of the present paper, the customs reform of 2023 has been discussed. From the perspective of the analysis of the competence changes, the creation of the EU Customs Authority appears to be key. The powers that should be assigned to it on the basis of the published proposal are essential. The analysis shows that the EU Customs Authority will have the power to issue recommendations for the implementation of controls, while the customs authorities of the Member States will be obliged to implement or execute these recommendations. On the other hand, the draft customs reform allows the customs authorities not to implement such a recommendation, but in such case, they are obliged to duly justify their refusal. However, the practical assessment of the sufficiency of such justification is questionable. Furthermore, the reform would give the European Commission executive powers at a strategic level to prioritise controls. In such case, the European Commission would have indirect functional competence vis-à-vis the customs authorities of the Member States. In conclusion, the eventual approval of the customs reforms as published would increase the degree of centralisation of customs in the EU.

We do not consider the centralising elements of the published reform to be a priori negative. In our view, although customs authorities play a key role in ensuring balance and supporting legitimate trade through supply chain control, their role has changed significantly over the last decade, also due to digitisation and the e-commerce boom. Customs authorities themselves face new challenges such as increasing the competitiveness of EU operators, improving the economic environment, in particular by ensuring a smooth flow of trade while carrying out the required level of controls to protect the health and safety of all EU citizens. These challenges are also in response to the growing trend of imports of illegal, dangerous and harmful goods passing through the customs territory, to which they need to react flexibly.

It is for these reasons that the European Commission has proposed a series of structural changes and measures to the regulatory framework, with a particular focus on reforming the customs system to empower customs authorities, with a high priority on taking coordinated enforcement action against the surge in dangerous, counterfeit or otherwise substandard products being sold online and imported into the EU. To be effective, targeted and efficient, change must be coordinated centrally. It must be based on uniform rules. It is for this reason that we see the centralisation element as rational and positive, all things considered, on the part of the European Commission. Customs procedures, customs controls and methods should and must be mutually harmonised and coordinated. However,

flexibility on the part of legislators who are not sufficiently dynamic in reacting to these changes, which may ultimately affect the EU's financial interests, also seems to us to be very problematic.

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CUSTOMS CONTROL IN THE E-COMMERCE ERA*

ABSTRACT

In The form of consumer habits and the business activities that reflect them have changed fundamentally in the last decade. The catalyst for the gradual change in their form was and is mainly two factors, namely the shift away from the perception of state borders as obstacles and the shift from shopping in "brick" stores to the online space. Therefore, it is not surprising that goods originating from outside the European Union are very popular. However, when implementing these transactions, their customs and legal dimension must also be perceived. The rise of e-commerce has also fundamentally influenced the form of traditional customs institutes, which undoubtedly include customs control. Today's digital phenomena and artificial intelligence are also externalities that can affect customs control as we perceive it today. The aim of this article is to evaluate the institute of customs control, its essence and importance in the era of e-commerce, identify legal-application problems while simultaneously pointing out other trends in the given area. Analysis, synthesis, comparison and historical method were used in the treatment of the above-mentioned issues.

Keywords: *customs union, customs control, e-commerce*

1. INTRODUCTION

Mankind has gone through several societal crises in the past period that are unprecedented in modern history. The first global societal crisis of the 21st century is associated with the emergence of a dangerous contagious human disease,

COVID-19, which initial emergence dates back to December 2019.[1] The enormous increase in the number of people falling ill led the World Health Organization (WHO) to declare, on 30 January, a global emergency, and later on 11 March 2020, the spread of this virus was already being referred to as a 'pandemic'. The world did not have time to rehabilitate after the pandemic and immediately faced another crisis in the form of the war in Ukraine or the ongoing war in the Far East between Palestine and Israel. These societal crises have affected the EU Member States to varying degrees and intensities and have had (among other things) significant economic spillovers. The budgets of the EU Member States, but also of the EU itself, have been severely depleted, and they have had to find ways of recovering from the economic consequences of recent events. For this reason, countries have taken and are continuing to take various measures to deal with these secondary effects of societal crises. During this period, countries have also had to deal with other associated phenomena such as high inflation rates, enormous (even rampant) increases in the price of goods and services, etc. These societal phenomena, which have been enumerated demonstratively, in particular the pandemic of the dangerous contagious disease COVID-19, have also had an impact on consumer behaviour, which has changed fundamentally. Individuals have also been forced by various restrictive government measures to make purchases in the online space, which has caused a huge boom in the e-commerce sphere. A number of businesses have used these crises as an opportunity and have come to dominate the market as they have been able to adapt and very quickly implement e-commerce solutions. In the online space, national borders are losing their real meaning on a global scale. This is leading to an increase in the importance of customs law in the 21st century, as products from third countries have never been more accessible than they are now.[2] It is thus very important to address the issue of traditional customs institutes and their place in customs law in the era of rapid development of e-commerce and in the era of dominance of giants from outside the EU (AliExpress, Temu and others).[3] Among such traditional customs-law institutes is undoubtedly customs control, which will be the focus of our attention in this paper. This traditional institute of customs law is an essential and indispensable link of customs supervision, by which customs authorities ensure compliance with customs rules by the addressees of these norms.

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[1] The first case of this respiratory disease is associated with the Chinese city of Wu-chan, located in the province of Hubei (China).

[2] Customs duties remain a very important own resource of the EU budget. In numerical terms, customs duties on goods imported into the EU account for around 14% of the EU budget (see: The EU customs union in action, https://european-union.europa.eu/priorities-and-actions/actions-topic/customs_sk, 16 February 2025).

[3] Electric cars coming from China are also a hot topic and can be ordered online.

The literary background in customs law and duties is at a very high level. As far as the customs control is concerned, special mention can be made of the domestic (Slovak) authors Babčák et al. (2017), Duračinská et al. (2014), Szakács and Daudrikh (2022), Cakoci (2022) and others. Among foreign authors, it is possible to mention, for example, the authors Erkorek and Blas (2023), Lyons (2018), Harmash (2019) etc. At the same time, however, it should be noted that many of the publications mentioned above are already of an older date, which means that they do not reflect the new society-wide phenomena/ events that we have outlined in the introduction. What form does customs control take in the era of e-commerce? We did not get an answer to this question, so we will try to find it in the following text. On the basis of the above, the aim of this paper is to evaluate the customs control as the customs law institute, its essence and importance in the era of electronic commerce, to identify the legal and application problems and to point out other trends in the field. We applied several scientific research methods in our research. We used general-theoretical methods, especially analysis, synthesis, comparative method, historical method and mathematical-statistical methods. The analytical method was used to examine the form of customs control in the era of e-commerce in the context of the Union legislation. Consequently, using the comparative and historical methods, we were able to assess and compare changes in customs control over the course of historical development, which is currently heavily influenced by rapid technological advances. By applying mathematical and statistical methods, we have outlined on concrete data the expansion of the e-commerce sphere. The methodological instrumentation has been applied in interrelationships to achieve a synergistic effect with respect to the above defined objective of the paper.

2. THE RISE OF E-COMMERCE AS A MATERIAL SOURCE OF LAW

Online shopping, as already mentioned, has been very popular even after the effects of the COVID-19 pandemic.[4] Of course, shopping in bricks-and-mortar stores will, probably, never be completely replaced, but the ratio between online and bricks-and-mortar shopping has changed very significantly over time. Physical shopping continues to dominate, as shown in Table 1 mapping the share of online retail sales globally, but individuals are making greater use of the online shopping option. We are even seeing greater demand for products from non-member countries, particularly from China.

[4] Closer: Impact of COVID Pandemic on eCommerce, https://www.trade.gov/impact-covid-pandemic-ecommerce, 16 February 2025.

Table 1: Share of online retail sales 2021-2025

Year	Share of online trade
2021	18,8%
2022	18,70%
2023	19,40%
2024	20,10%
2025	21%

Source: own elaboration based on Statista data

Table 1 above shows the proportion of retail sales between 2021 and 2025. From the statistical data available to us, the share of online retail sales has been steadily progressive and is expected to continue in the current year 2025 (projected to be 21%). According to Statista, this trend will continue in the following years, namely in 2026 the share of e-commerce sales should be at 21.8% and in 2027 again at 22.6%.[5]

Table 2: E-commerce sales volume in USD 2021-2025

Year	E-commerce sales volume in USD
2021	USD 4.98 trillion
2022	USD 5.29 trillion
2023	USD 5.82 trillion
2024	USD 6.33 trillion
2025	USD 6.86 trillion

Source: own elaboration based on Emarketer data

It is evident from the absolute numbers (Table 2) that e-commerce is growing globally in this respect as well. This can also be demonstrated by the year-on-year growth between 2024 and 2025, which amounts to around USD 0.53 trillion, an increase of 8.37% compared to the period in 2024. This is indeed a high increase in the volume of online sales in terms of value as well. Statistical data suggests that this growth is expected to continue in the coming years and this trend should not subside at least in 2026 and 2027.[6]

These facts could not have been left without an adequate response by the legislative bodies of the individual EU Member States. The growth of e-commerce

[5] E-commerce as percentage of total retail sales worldwide from 2021 to 2027, February 2024, https://www.statista.com/statistics/534123/e-commerce-share-of-retail-sales-worldwide/, 16 February 2025.

[6] Worldwide Retail Ecommerce Forecast 2024, February 2024, https://www.emarketer.com/content/worldwide-retail-ecommerce-forecast-2024, accessed 16 February 2025.

has led to the adoption of a number of legal measures in various sectors of the law. This is also the case of customs law, which, as we will point out below, is currently under enormous pressure. This is precisely due to the blurring of national borders and the accessibility of products from outside the European area. We therefore refer to e-commerce and other related phenomena as a material source of law that influences both national and European legal framework.

A change of approach in the implementation of customs supervision, including customs control, as an immanent part of it, is becoming a very topical issue. As has already been pointed out in several places of this paper, the physical presence of business operators is no longer necessary to carry out business activities, which is a fundamental point that cannot be overlooked. As the data shows, the e-commerce sphere should continue to develop, thus it is necessary to pay attention to this issue. Adequate solutions must be sought at supranational level but also within the EU Member States forming the EU customs union, which is also a consequence of EU primary law, which enshrines the fundamental basis of this issue.

3. CUSTOMS CONTROL IN E-COMMERCE

Customs supervision is a traditional and essential component of the legislation contained in customs law. It is a term which is very closely related to customs control, but they are not synonymous. In terms of content, customs supervision is a broader term than customs control, as it includes, in addition to the performance of customs control, the performance of customs formalities and other procedures of the customs authority under the relevant customs legislation. Despite the fact that these are traditional customs law concepts, the general public does not perceive any major differences between them, which, in view of the above, is not correct.

The basic legal framework for customs supervision, including customs controls, across EU Member States is contained in Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (hereinafter also referred to as the *"Union Customs Code"*). The basic role of the customs authorities of the EU Member States is defined in Article 3, first sentence, of the Union Customs Code, according to which: *"Customs authorities shall be primarily responsible for the supervision of the Union's international trade, thereby contributing to fair and open trade, to the implementation of the external aspects of the internal market, the common commercial policy and other common Union policies having an impact on trade,*

as well as to the overall security of the supply chain." EU Member States' customs authorities play a very substantial role in surveillance activities.

Customs supervision is, according to, Article 5(27) of the Union Customs Code *"(...) an action carried out in general by the customs authorities to ensure compliance with the customs rules and, where appropriate, with other provisions applicable to the goods subject to such action".* The specifics of customs supervision are contained in Article 134 of the Union Customs Code, while the customs controls which are part of customs supervision are framed in Article 46 of the Union Customs Code.

Before proceeding to an analysis of the concept and current content of customs control, it should be recalled that customs law is a branch of law that falls within the exclusive competence of the European Union. Therefore, European legislation and regulations play a key role in customs law. The Union Customs Code, as mentioned above, in its Article 46, regulates and frames customs control. At the outset, the aforementioned Article of the Union Customs Code grants customs authorities of the Member States a broad margin of discretion, stating that they are authorized to carry out any customs controls they deem necessary. The degree of the customs authority´s discretion appears, from the grammatical point of view, unrestricted. However, it may be noted that the limits of the customs authority's discretion are determined by the other points of already mentioned Article 46. Thus, the measure of discretion of the customs authority can be understood both in the context of what will be the subject to a customs control and when a particular customs control will be carried out.

As for the first categorisation of customs controls - what will be subject to customs control - it can be stated that this categorisation can be subdivided internally into (i) controls dealing with customs documents, records and (ii) physical controls of goods. As far as documentary controls are concerned, the customs authority verifies the correctness, completeness, authenticity or validity not only of the documents presented, but also, for example, of accounting records and other documents and records relating to the imported goods. On the other hand, as for the physical controls, these may be understood as controls carried out, for example, by physical examination of luggage and other goods carried by natural persons, sampling or, more generally, by inspection of the goods.[7] Although the above subcategories of the concept of customs control can be separated in a theoretical sense, in practice it is necessary to view customs control as a whole,

[7] European Court of Auditors, E-commerce: many of the challenges of collecting VAT and customs duties remain to be resolved, Special Report no.: 12/2019, https://op.europa.eu/webpub/eca/special-reports/e-commerce-12-2019/sk

due to both the physical and 'documentary' subcategories of customs control have a common objective, namely to ascertain and verify that the physical goods are supported by the documents presented. In other words, physical and documentary customs controls examine the consistency of the declared and actual situation.

If we talk about the second component of the discretion of the customs authority - when the authority carries out a customs control - the customs authority is entitled to carry out a customs control before and after the release of the goods under one of the customs regimes. It is easy to imagine a control of goods before they are placed under one of the customs regimes. During this control, in principle, both the physical and the documentary part of the customs control can be carried out and thus the conformity between the actual and the declared situation can be verified relatively simply. However, it can also be noted that physical controls will inevitably be more time-consuming, which, in the context of customs controls carried out on goods before it is placed under one of the regimes means, that they will inevitably interfere also with the flow of trade, or, in the case of controls on goods ordered via e-commerce platforms, they will have the potential to increase the delivery time of the goods ordered and thus, in a sense, to deprive the goods so imported of one of their greatest assets, which is rapid delivery. However, even if the customs control is carried out before the goods are placed under one of the customs regimes, a subsequent customs control is not ruled out. In that connection, it needs to be pointed out that neither the Union Customs Code nor national legislation provides for a mandatory customs control at the moment of the importation of goods. In other words the mandatory customs control prior to the release of goods under one of the customs regimes is not required by the legal norms. This is one of the reasons why the possibility for the customs authority to control the imported goods ex post, after the imported goods has been placed under one of the customs regimes, is necessary.

In the case of customs control of imported goods ex post, i.e. after they have been placed under one of the customs regimes, it will, in principle, only be possible for the customs authorities to carry out the documentary part of the customs control, since the imported goods will mostly have already been distributed further in the trade chains or will be in hands of the final consumer. Of course, the possibility of a simultaneous documentary and physical control is not ruled out in the subsequent control, but this will be rather exceptional for pragmatic reasons. Therefore, during the ex-post control, the customs authority will generally examine the authenticity, accuracy and completeness of the documents submitted, their consistency with the declarant's accounting documents, but also with other records relating to the transaction in question. When carrying out subsequent customs controls, it is necessary to take into account the fact that the Union Customs Code lays down only its basic framework, and therefore, for example in the conditions of the

Slovak Republic, it is possible to carry out a subsequent control of the goods not only with the declarant, but also with the declarant's business partners, or with any other person who was directly or indirectly commercially involved in the transaction. From the nature of subsequent customs controls it can be abstracted, that this form of customs control is more acceptable from a business point of view because it interferes considerably less with the flow of trade and is therefore not liable to harm importers of goods solely for reasons of prevention. In the context of e-commerce and the creation of a pro-business environment within the European Union, we believe that the role of this form of customs control will grow significantly in the coming years.

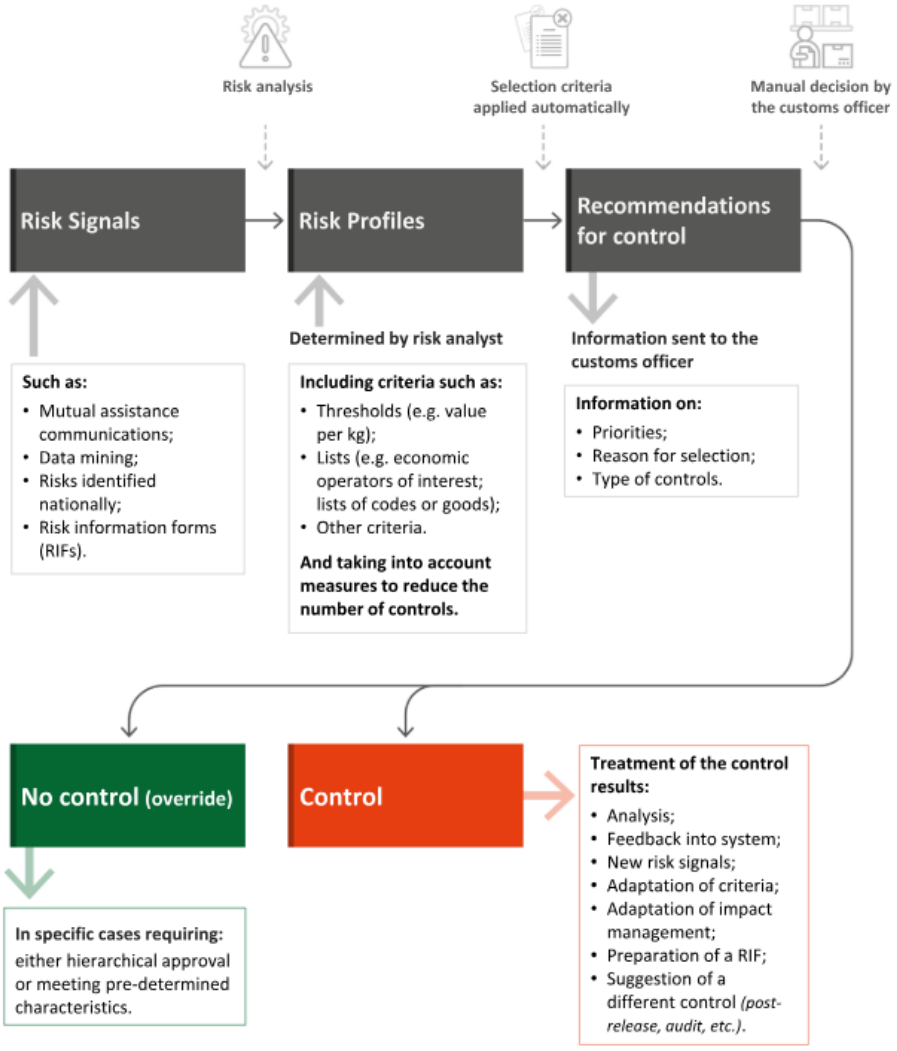
Similarly, Article 46 of the Union Customs Code categorises customs controls into, so called, random customs controls and risk – based customs controls. The very name of the "random customs controls" seems to refer to the basis on which they are carried out, i.e. they are random customs controls without a more detailed analytical basis. The opposite of random customs controls are controls carried out on the basis of risk analysis. According to Article 5(7) of the Union Customs Code, the risk is defined as the likelihood of adversely affecting the financial interests of the Union or the Member States, endangering the safety and security of the Union and its citizens, including human, animal, plant and environmental health, as well as the likelihood of preventing the correct application of Union or national rules.

Based on a special report of the European Court of Auditors, there should be an exchange of information between the European Union Member States' customs authorities on (customs) risks, but it can be noted that the existing platform, in the opinion of the Member States and the auditors, is not well adapted for the exchange of information between Member States, and thus it is very natural for Member States to have information on risks only on the basis of their own analytical work.[8] The practical impact of that is that if one Member State starts to check a risky importer frequently or more frequently, the importer simply changes its country of entry into the European Union and escapes, at least temporarily, from more frequent customs controls.

Taking into account abovementioned, it can be concluded that the risk management process and the identification of risks will vary across Member States. Nevertheless, in general terms the risk management, and therefore the implementation of customs control based on risk analysis, can be depicted as follows:

[8] European Court of Auditors, Customs controls: lack of harmonisation hinders the enforcement of EU financial interests.

Figure 1: Risk management practices in EU Member States



Source: European Court of Auditors, Customs controls: lack of harmonisation hampers enforcement of EU financial interests

In short, it can also be pointed out that only a basic framework for understanding of the risks and the lack of a functioning system for exchanging information on customs risks has resulted in EU Member States taking different approaches to the performance of customs controls. In the EU, on average, Member states carry out documentary controls on 9.5% of imported goods and physical controls only on

4.5% of imported goods. However, within the European customs area, there is a country that has carried out a documentary customs control on 58.1% of imported goods, while at the same time only on 4.0% of the imported goods have been physically controlled, and conversely, a country that has carried out a physical control on 24.3% of imported goods, while at the same time only 4.7% of imported goods have been physically controlled.[9] For the sake of completeness, it can be noted that there are countries which do not control even 1% of the total volume of imported goods either physically nor by documentary control.[10] In summary, it can be stated that there are huge differences in the approach to the exercise of customs controls between EU Member States, nota bene, all of which are at the same time gateways to the single European market.

From the above, it can be quite clearly concluded that there is a lack of greater harmonisation in risk management. In this context, it should be pointed out that, although there is a Union Customs Code, national legislation in particular plays an important role in the case of customs controls. In the Slovak Republic, this is Act No 199/2004 Coll. on the Customs Act and on amendments and additions to certain acts, as amended (hereinafter also referred to as *'Customs Act'*). The performance of customs control is regulated in several places within the provisions of the Customs Act, for example, subsequent customs control is procedurally regulated in § 12.[11]

When summarizing and transferring the above-mentioned basic knowledge about customs control on the issue of e-commerce it is necessary to view the e-commerce as the material sources of customs law, as we mentioned in the previous subchapter, especially in the sense that the current customs system was introduced in a historical context where large volumes of goods passed through customs/ customs controls, but these were usually from one supplier to one business customer (B2B relationships), however, nowadays incomparably larger volume of goods cross the border of the European Union and these goods move to a large extent from the supplier/ trader to the consumer (B2C relationships), and therefore the traditional means of the customs law will continue to have their place in this branch of law, but their implementation must be reasonably modified and adapted to current requirements. We believe that the logical conclusion is that it is impossible to physically control an exponentially increased quantity of B2C goods for pragmatic and economic reasons, moreover in a situation where these goods

[9] European Court of Auditors, Customs controls: lack of harmonisation hinders the enforcement of EU financial interests.
[10] Ibid. We add that the European Court of Auditors has anonymised its findings on the implementation of customs controls by EU Member States.
[11] Prosman – Pavlovič, Customs Law: Subsequent customs control, February 2018, https://www.prosman-pavlovic.sk/2-colne-pravo-kontrola-po-prepusteni-tovaru/,

are generally of very low value. Equally, in our view, one cannot expect mechanical, human documentary control of a significant number of declarations and documents relating to imported goods.

From the described understanding of customs control, its components and the available data, it can be abstracted that the current customs control framework does not reflect the needs of e-commerce well. This is, we believe, due to the fact that, while customs authorities continue to exercise their scope and competence, the way they work, and the interconnectedness of the global marketplace is not well reflected by the legal standards. As we have already pointed out, there is a great deal of disparity between EU Member States, which can undoubtedly be seen as problematic, to say the least. Leaving the legal framework in place as it stands today could result in some countries having almost no control over shipments, not excluding those originating from e-commerce, and, on the other hand, there would be countries that would be able to control in some way almost every second shipment. This clear difference in approach between countries, despite the common legal framework, is, in our opinion, incompatible with the growth of e-commerce and, in the same way, the above-mentioned disparity in the common European market creates an unwieldy system that is undoubtedly susceptible to abuse. It is therefore welcome that the European Union has announced its intention to undertake the biggest reform of customs law since the creation of the Customs Union, which, from the information published so far, is likely to change the way customs control is exercised in the future. The reform of the Customs Union is thus warranted to eliminate the disparities already named, which are the result not only of the lack of harmonisation of the legislation governing customs institutes, but also of the approach of the EU Member States to their (customs) obligations as such. Given that the area of customs law falls within the exclusive competence of the EU, reform cannot come about in any other way than by the EU itself creating or revising the existing framework of customs law to reflect the experience, the identified weaknesses of the system and the changes in society that have taken place over the last decades.

4. EU CUSTOMS UNION REFORM, AI IMPLEMENTATION AND OTHER TRENDS IN CUSTOMS SUPERVISION

The EU Customs Union is a project that is more than 56 years old. The EU Customs Union dates back to 1968. This form of international economic integration makes it easier for EU individuals to conduct businesses, harmonises tariffs on goods coming from outside the EU, helps to protect against unauthorised trade of animals, etc. From the above, it is clear that the mission of the EU Customs

Union is relatively broad, and this corresponds to the position and roles of customs authorities that we have described in the above section of the paper. However, the variety of approaches taken by EU Member States in carrying out customs controls as part of customs supervision may reduce effectiveness and thus render these activities ineffective. As we have already mentioned, the Customs Union was created in a specific historical context. It is therefore facing a number of challenges in the current period, which were not and could not have been taken into account when its legal framework was developed. Current challenges of the Customs Union include, for example, low-value shipments of goods - up to €150 - which are exempt from customs duties (these account for a significant proportion of the total number of shipments entering the EU), or the undervaluation of shipments by importers so that they are exempt from customs duties.[12] Another major problem is, as it has been mentioned, the different approaches taken by the customs authorities of the Member States and, last but not least, the lack of harmonisation of European standard-setting. The challenges for the ahead appear to be maintaining or improving health and consumer rights, improving international cooperation and, no doubt, the implementation of new technologies/systems – e.g. AI.

The European Union is also aware of these challenges, as it has pointed out these challenges when presenting the reform of the Customs Union. At the same time, EU has pointed out the possible solutions.[13] For example, the problems of undervaluation of goods and efforts to avoid duties are probably best addressed by removing this exemption, which will make the whole system more transparent, and it also should eliminate the incentive for unfair practices by importers. Also, the European Union has announced the creation of a new 'common' customs authority, which should be a kind of coordinator of procedures, and which should therefore be able to eliminate the divergence in the approach and procedures of customs authorities across Member States.[14]

Last but not least, we can point to the intended creation of a central data system, the ambition of which is to unify the procedures and results of customs authorities in the analysis of risks as well as to ensure the smooth flow of necessary information between Member States. The new datacentre and the 'common'

[12] Tackling challenges with e-commerce imports, February 2025, https://commission.europa.eu/news/tackling-challenges-e-commerce-imports-2025-02-05_sk,
[13] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, May 2023, https://data.consilium.europa.eu/doc/document/ST-9622-2023-INIT/sk/pdf
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customs authority are also reportedly intended to use artificial intelligence, which can be beneficial in a number of areas, such as risk analysis, automation of customs procedures or documentary control of goods, etc..[15] All of this must be reflected in high-quality legislation, which should be preceded by a broad debate, perhaps even within a broader framework than the European one. However, it should not be forgotten that the timeframe for taking adequate measures is also an essential factor to be taken into account. The late adoption of the envisaged instruments may have a negative impact on the EU Customs Union, which has so far emerged as one of the most successful projects in the EU, currently undergoing major tests of resilience and responsiveness.

5. CONCLUSION

Obviously, it can be stated that the world in the era of globalization, is changing very rapidly. We believe that change can be seen both in the approach of traders to business and in the approach of consumers to shopping. We feel that the trend of behavioural change in both groups has been accelerated and compounded by the pandemic of the dangerous contagious human disease COVID-19, which began in 2019, and in which the physical world has shut down and, conversely, the online one has flourished. Given the significant presence of third-country players in the online space, the pressure for change in the importation of goods was and is even more palpable considering just mentioned. E-commerce is simply a phenomenon of today's times, which must already be taken into account in terms of the substantive, material source of law. It is clear that e-commerce is growing and that it is highly unlikely to come off this trend, and therefore it is necessary to reflect these changes in the legal sphere as well. It can be noted that such a classic institute of customs law as customs control (in the broader and general sense of customs supervision) has adapted very little to these new trends during the period of change in the behaviour and habits of the whole society. Customs control continues to be accompanied by different country approaches, which, in the context of the common open European market, creates significant systemic weaknesses that make it possible to evade the rules set or abuse the current system. Equally problematic is the poor exchange of information between Member States, which facilitates the collusion of rogue importers.

[15] Taking the EU Customs Union to the next level: innovative ideas for a modern and efficient Customs Union presented by Wise Persons Group, March 2022, https://ec.europa.eu/commission/presscorner/detail/sk/ip_22_2181, respectively AI: The Future of EU Customs Clearance, https://eclear.com/ai-for-automated-customs-clearance-in-cross-border-commerce

In particular, a major problem we have identified in our research is the variation in the approaches taken by national customs authorities in carrying out customs controls. Too much passivity and, on the contrary, too much activity of customs authorities in carrying out customs controls can lead to negative phenomena such as, on the one hand, the flourishing of speculative practices or, on the other hand, the bullying exercise of public authority. This fundamental problem is very closely linked to another one, which is the lack of harmonisation of customs controls within the EU Member States. The rules on customs supervision and customs control specifically contained in the Union Customs Code are of a framework nature and national legislation plays a crucial role. Regarding the current initiatives underway at EU level, it can be stated that this international integration grouping of states is aware of the above-mentioned pitfalls of the current legal framework of the Customs Union and is therefore interested in proceeding with its most comprehensive and largest reform in its existence, bearing in mind the existence and boom of the e-commerce. This reform should be capable of eliminating or at least minimising the weaknesses currently identified at the level of the divergence of approaches between the customs authorities of the Member States, at the level of the poor exchange of information between Member States, and at the same time it should be capable of creating a framework that is prepared both to cope with the increasing amount of bureaucracy and to identify potential risks in the increasing amount of imported goods and importers, all without hampering the growth of e-commerce. The implementation of AI solutions should also play a role here, with the aim of streamlining the assessment of risks and the subsequent necessity to carry out customs controls in a specific case. All this should be backed up by quality legislation that will create a strong basis for customs authorities in fulfilling the mission of the EU Customs Union.

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Review paper

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GO DIGITAL OR DIE? DIGITIZATION OF TAXES IN EU AND IN POLAND

ABSTRACT

To describe the transformation of law in the 21st century, three terms are commonly used: digitization, digitalization and electronization. The article does not definitively determine which of these terms is most appropriate; rather it posits that discussions of these concepts should consider both the extent of computer system implementation and the volume of processes conducted via the Internet (i.e. online). The third element is growing use of artificial intelligence. The objective of the article is to briefly illustrate how electronization was initiated and how it has evolved. The article outlines the legal foundations of the electronization of tax proceedings within the framework of European Union law, followed by an examination of Polish law. The European Union has issued a series of documents and undertaken many initiatives aimed at digital development, cybersecurity, artificial intelligence development and the creation of a single digital market. Of course, due to Poland's membership in the EU, Polish legislation should largely implement EU law. The main identified risks were highlighted in the article regarding the processes described. The methods applied include description and critical analysis of Polish and EU legal sources, drawing on selected literature. It should be emphasized that, due to space constraints and the complexity of the subject matter, the article does not claim to be comprehensive. Nevertheless, it undoubtedly provides arguments supporting the relevance of the maxim "go digital or die" in the current economic context of the e-economy.

Keywords: *digitization, digitalisation, electronisation, tax law, artificial intelligence*

1. INTRODUCTION

At the beginning, it should be noted that at first glance, the terms "digitization" and "digitalization" seem to be identical, and their interchangeable use appears acceptable. However, in the context of public law, which includes tax law, there is a tendency to use the term "digitization" to refer to the process of converting analog data (e.g. paper documents) into digital form. On the other hand,

"digitalization" refers to the broader application of digital technologies, including the automation and optimization of processes.[1] Some sources also suggest that the term "digitization" is widely used by economists, while the term "digitalization" is used less frequently.[2]When examining this issue in 2025, it seems that this distinction is somewhat artificial, and attempting to categorize each tool introduced by the legislator according to this division may pose difficulties and carry the risk of error. Additionally, it seems that the term "electronization"[3] could also be an appropriate word. This article should be considered as an introduction to further research on this important contemporary issue, and the author does not make a definitive statement on which word is the most accurate. Furthermore, in the author's opinion, it seems reasonable to acknowledge that three terms are used to describe the transformation of law in the 21st century: digitization, digitalization and electronization. Continuing further, it should be noted that digital transformation is impacting not only many aspects of everyday life but also, at the macro level, the way the economy is organized and functions. This is also true when considering the implications of digital transformation on tax matters.[4]Of course, this goes beyond the scope of this paper, but it is worth highlighting two issues which, in the author's opinion, together or separately, create a state referred to as the digitization, digitalization and electronization of Polish tax law. These components are computerization (informatization) and the use of the Internet, i.e.

[1] OECD, *Going digital in a multilateral world. Meeting of the Council at Ministerial Level*, C/MIN(2018)6, 30-31 May 2018, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://one.oecd.org/document/C/MIN(2018)6/en/pdf, p. 11.

[2] Novak J. and others, *Polska jako Cyfrowy Challenger. Cyfryzacja nowym motorem wzrostu dla kraju i regionu*, Digital McKinsey 2018, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.mckinsey.com/pl/~/media/McKinsey/Locations/Europe%20and%20Middle%20East/Polska/Raporty/Polska%20jako%20cyfrowy%20challenger/Raport-McKinsey_Polska-jako-Cyfrowy-Challenger.pdf, p. 8. English version of the report: Novak J. and others, *The rise of Digital Challengers How digitization can become the next growth engine for Central and Eastern Europe Perspective on Poland*, Digital McKinsey 2018, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.mckinsey.com/pl/~/media/McKinsey/Locations/Europe%20and%20Middle%20East/Polska/Raporty/Polska%20jako%20cyfrowy%20challenger/Poland%20as%20a%20Digital%20Challenger%20-%20report%20in%20English.pdf.

[3] Although the aforementioned dictionary does not contain such a term: https://dictionary.cambridge.org/spellcheck/english-polish/?q=electronization.

[4] OECD, *Going digital…, op. cit.,* p. 25. See also: https://dictionary.cambridge.org/us/dictionary/english/digitization (to digitize means to put information into digital form [=into the form of a series of the numbers 0 and 1) so that it can be used by computers and other electronic equipment) and: https://dictionary.cambridge.org/us/dictionary/english/digitalization – to digitilize means to change something such as a document to a digital form (=a form that can be stored and read by computers), but also it means to start to use digital technology such as computers and the internet to do something.

enabling tasks to be carried out on-line. Literature points to the date of 23 December 1948 as the beginning of the Polish computer science. On that day, several scientists met at the University of Warsaw, in the Institut of Physics at 69 Hoża Street, and decided to begin work on the development of an electronic calculating machine. Such machines had already been created earlier in the USA.[5] The Internet, on the other hand, had its origins in military applications and was also born in the USA as a response to the military threat posed by Russia during the Cold War. The idea behind the Internet was to allow communication even in the event of a nuclear attack on central devices.[6] The Internet quickly gained an ubiquitous presence in both the economy and culture of developed societies,[7] including Poland. The Department of Physics, the successor of the previously mentioned Institute at 69 Hoża Street, is considered the birthplace of the Polish Internet. It was here, on 17 August 1991, that the first fully functional Internet connection in Poland was established, involving the sending of an email from the University of Warsaw to the University of Copenhagen. Two years later, the first Polish web server was launched at the Department of Physics.[8]

The third element that should be given careful attention is the use of artificial intelligence (AI). However, this topic will not be extensively addressed in this article. It is enough to mention that the year 1997 can be identified as a moment that demonstrated that the belief that humans will always dominate machines is or may be misguided. Specifically, in that year, the IBM Deep Blue artificial intelligence[9] defeated the world chess champion, Garry Kasparov. It should be noted that the development of artificial intelligence provides opportunities for data analysis on a scale previously unattainable for humanity.[10] It is currently predicted

[5] Noga M., Nowak J. S., (eds.), *Polska informatyka: wizje i trudne początki*, Warszawa 2017, p. 7. See also: Czubkowska S., *Historia informatyzacji w Polsce: system PESEL największym osiągnięciem*, 3.02.2012, available on: https://forsal.pl/artykuly/590823,historia-informatyzacji-w-polsce-system-pesel-najwiekszym-osiagnieciem.html.

[6] https://www.usg.edu/galileo/skills/unit07/internet07_02.phtml and https://pl.wikipedia.org/wiki/ARPANET (describes what ARPANET is: It was created as an initiative of the U.S. Department of Defense (Pentagon). In 1958, after the shock caused by the Soviet Union's launch of Sputnik into space, the government agency ARPA was established with the task of observing and supporting initiatives with defense significance emerging at universities). See also: Birth of the Internet, https://www.pbs.org/transistor/background1/events/arpanet.html.

[7] Burczyński T., *Załatwianie spraw administracyjnych przez Internet*, Kontrola Państwowa 2002, no 3, p. 80.

[8] https://www.uw.edu.pl/100-lat-fizyki-na-hozej/.

[9] https://pl.wikipedia.org/wiki/Deep_Blue.

[10] Tax Booster™: AI dla doradców podatkowych, *Od „Blade Runnera" do Tax Boostera - jak AI stało się naszą rzeczywistością*, LinkedIn, 14.03.2025, https://www.linkedin.com/pulse/od-blade-runnera-do-tax-boostera-jak-ai-sta%25C5%2582o-si%25C4%2599-nasz%25C4%2585-

that robots, such as those in stores, are no longer *a science fiction* scenario,[11] like in the *Star Wars* movie (where two friendly robots, R2-D2 and C-3PO, appear). As the author is from Kraków, it is worth mentioning - as preparation to fulfill this prediction - that a robot resembling a dog has been undergoing tests since 2024 at the AGH (University of Science and Technology in Kraków), and its purpose includes, among others, exploring hard-to-reach areas.[12] It is also possible to already purchase industrial robots.[13]

As for legal solutions, as T. Burczyński points out, in Poland, it was precisely within the framework of administrative and tax law (the Code of Administrative Procedure[14] and the Tax Ordinance[15]) that regulations enabling the use of the Internet in the relationship between the government and citizens first appeared.[16] This was certainly, at least partly, inspired by legislative actions in the EU. The legislator's recognition of technological trends and adaptation to the new reality is certainly a pragmatic approach and can contribute to enhancing the efficiency of the legal system and individual EU member states. Efficiency in a state, or more specifically in the creation and implementation of tax law, can and should manifest itself in the speed and flexible response to changes occurring in the world.[17]

In 2018 Poland was classified among the group of ten countries (which also includes Bulgaria, Croatia, the Czech Republic, Lithuania, Latvia, Romania, Slovakia, Slovenia, and Hungary) referred to as "Digital Challengers", meaning markets with significant potential for digital economy growth. For comparison, the group of digitally advanced countries, known as "Digital Leaders", includes Belgium, Denmark, Estonia, Finland, the Netherlands, Ireland, Luxembourg, Norway and Sweden.[18] "When comparing Poland and Sweden, as a representative of the aforementioned Digital Leaders, it can be observed that the greatest gap in terms of digitization is found in public utility services, industry, government

rzeczywisto%25C5%259Bci%25C4%2585-2h3ef/?trackingId=69iBTUn%2BTl65FBuEvPfCPA%3D%3D.

[11] Białkowski K., *Czas Nowych Liderów*, Gość Niedzielny 2024, no 37, p. 41.

[12] Motak D., https://lifeinkrakow.pl/w-miescie/8454,nowy-robot-na-krakowskiej-agh-zachowuje-sie-jak-pies-wykorzystuje-sztuczna-inteligencje, 17.08.2024. The author saw this robot dog once during a walk (author's walk).

[13] https://www.robotorium.pl/dystrybucja-robot%C3%B3w or https://www.fanuc.eu/pl/pl/roboty/robot-strona-filtrowania.

[14] Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego (t. j. Dz. U. z 2024 r., poz. 572).

[15] Ustawa z dnia 29 sierpnia 1997 r. Ordynacja podatkowa (t. j. Dz. U. z 2025 r., poz. 111 ze zm.).

[16] Burczyński T., *Załatwianie…, op. cit.,* p. 80.

[17] Sokołowska J., Sprawność i etyka w sektorze finansów publicznych (in:) Nowak-Far A. (red.), *Finanse publiczne i prawo finansowe*, Warszawa 2011, pp. 461-465.

[18] Novak J. and others, *Polska jako Cyfrowy…, op. cit.*, p. 3.

administration, specialized services and business services".[19] Data from 2021 shows that Poland has the largest digital economy in the region, valued at 44 billion euros, and has seen significant acceleration in digital growth in the years 2020-2021.[20] As indicated in the literature, the 21st century is the age in which digitization is becoming ubiquitous and many entities, including public administration and taxpayers, recognize the accuracy of the maxim *go digital or die*.[21] Therefore, it is essential to conduct research on how modern governments are adapting to these observed changes. How to leverage new digital opportunities to rethink how the public sector functions, including the governance and the regulatory environment concerning these new (potentially disruptive) areas, and how to interact with the public is the main issue novadays.[22]

The next two chapters will outline selected legal foundations of the electronization of tax proceedings in the context of EU law, followed by Polish law. It should be pointed out that, especially in EU law, official documents can be divided into two categories: policy documents and legal documents. The main identified risks regarding the described processes will be highlighted in the conclusions.

2. EU LAW BASE FOR DIGITIZATION OF MEMBERS STATES TAX LAW

2.1. Policy documents

It seems that in the initial stage, the documents in the EU (which was established on 1 November 1993 by the Maastricht Treaty), that should be considered when searching for the framework for the electronization of tax matters in the EU, are documents of a programmatic and political nature. These will be presented below.

[19] *Ibidem*, p. 11.
[20] McKinsey Company, *Polska jako Cyfrowy Challenger. Podsumowanie wyników raportu dla Polski*, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.mckinsey.com/pl/~/media/mckinsey/locations/europe%20and%20middle%20east/polska/raporty/digital%20challengers%203/polska%20jako%20cyfrowy%20challenger_digital%20challengers.pdf, September 2022, p. 11.
[21] Poniatowska-Jaksch M., Sobiecki R., Wprowadzenie (w:) Poniatowska-Jaksch M., Sobiecki R. (red.), *Cyfryzacja a przedsiębiorstwo*, Warszawa 2019, pp. 7 and 10. See also, as an example, the latest proposals from the European Commission regarding the creation of a unified digital notification portal, which companies in the EU could use when sending posted workers: Topolska A., *Będzie unijny portal do delegowania*, https://www.gazetaprawna.pl/praca/artykuly/9756978,e-deklaracja-bedzie-unijny-portal-do-delegowania-pracownikow.html, 13.03.2025.
[22] OECD, *Going digital…, op. cit*., p. 41.

The first horizontal program for building a modern electronic economy was the *eEurope initiative,*[23] announced by the European Commission in December 1999. Its goal was to create a society utilizing the opportunities of the new economy, particularly in the sectors of education, transportation, healthcare and employment activation,[24] with the objective to bring Europe on-line.[25]

Substantively, this coincided with the European Council meeting on 23-24 March 2000, in Lisbon, where a new political and economic strategy for the EU was initiated, known as the *Lisbon Strategy*. The goal of this strategy was to make the European Union the most dynamic, competitive and knowledge-based economy in the world.[26]

To achieve the objectives outlined above, the next document presented the so-called action plan, which included goals such as: „a cheaper, faster and secure Internet", „stimulate the use of the Internet" and „government on line: electronic access to public services". [27] The implementation of these goals was to include, among others, ensuring that by 2002, „essential public data online including legal, administrative, cultural, environmental and traffic information" would be available, as well as „simplified online administrative procedures for business e.g. fast track procedures to set up a company".[28]

The next program was the Action Plan of 2002 titled *eEurope 2005 – An Information Society for All*[29] It set the following objectives: „to modernise public services, and to give everyone the opportunity to participate in the global information society. eEurope 2005 therefore aims to stimulate secure services, applications and content based on a widely available broadband infrastructure".[30]

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[23] European Commission, *eEurope 2002. An Information Society For All. Draft Action Plan prepared by the European Commission for the European Council in Feira 19-20 June 2000*, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0330:FIN:EN:PDF, Brussels, 24.5.2000, COM (2000) 330 final, p. 2.

[24] Posłajko R., *Rozwój europejskiej polityki cyfrowej*, Poliarchia 2014, nr 2, https://www.uj.edu.pl/documents/123362602/8eb25809-3f8e-414f-b33b-fca2e46cc079, p. 41.

[25] European Commission, *eEurope 2002…, op. cit*., p. 2.

[26] Posłajko R., *Rozwój…, op. cit.*, p. 42.

[27] European Commission, *eEurope 2002…, op. cit*., p. 3.

[28] *Ibidem*, pp. 22-23.

[29] Commission of the European Communities, *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, eEurope 2005: An information society for all An Action Plan to be presented in view of the Sevilla European Council*, 21/22.06.2002, Brussels, 28.5.2002 COM(2002) 263 final and R. Posłajko, *Rozwój…, op. cit*., p. 43.

[30] *Ibidem* (Commission), p. 2.

It is stated in this document that by 2005, Europe should have i.a.: modern online public services, e-government, as well as a dynamic e-business environment.[31] Interactive public services should be accomplish by end 2004 through the following steps: „Member States should have ensured that basic public services are interactive, where relevant, accessible for all, and exploit both the potential of broadband networks and of multi-platform access. This will require back-office reorganisation which will be addressed in the good practice exercise. It also implies addressing access for people with special needs, such as persons with disabilities or the elderly".[32]

In March 2005, at the European Council summit, a document known as the *Renewed Lisbon Strategy* was adopted. This new strategy led to the approval in June 2005 of *the i2010 initiative – European Information Society for Growth and Employment.*[33] The Community recognized knowledge and innovation as the drivers of sustainable growth and emphasized that "it is necessary to build a fully inclusive information society based on information and communication technologies (ICT) widely applied in public services, small and medium-sized enterprises, and households".[34] Regarding public services, it was emphasized that they are a crucial element of the European economy. It was identified that the contemporary challenge is to make these services "better, more accessible and less costly". At the same time, an example of success in implementing ICT-based public services was highlighted in the form of online tax declarations, which save millions of hours annually.[35]

The next step was the adoption of the eGovernment Action Plan in 2006 – i2010 eGovernment Action Plan.[36].As stated, this document is „designed to make public services more efficient and more modern and to target the needs of the general population more precisely. To do this, it proposes a series of priorities and a roadmap to accelerate the deployment of eGovernment in Europe". This document, aside from issues related to the electronization of public procurement,

[31] *Ibidem*, p. 3.
[32] *Ibidem*, p. 11.
[33] Posłajko R., *Rozwój…, op. cit*., pp. 45 i 47.
[34] Commission of the European Communities, *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions "i2010 – A European Information Society for Growth and Employment" [„i2010 – Europejskie społeczeństwo informacyjne na rzecz wzrostu i zatrudnienia"]*„ Brussels, 1.6.2005 COM(2005) 229 final, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0229:FIN:PL:PDF, p. 2.
[35] *Ibidem*, p. 11.
[36] Communication from the Commission, *i2010 eGovernment Action Plan - Accelerating eGovernment in Europe for the Benefit of All [COM(2006) 173 final*, 25.04.2006, https://eur-lex.europa.eu/EN/legal-content/summary/i2010-egovernment-action-plan.html.

is characterized by a great deal of generality. However, it introduces an interesting definition: „eGovernment seeks to use information and communication technologies to improve the quality and accessibility of public services. It can reduce costs for businesses and administrations alike, and facilitate transactions between administrations and citizens. It also helps to make the public sector more open and transparent and governments more accountable and understandable to citizens".[37]

In response to the economic crisis in 2008, the EU adopted *the Europe 2020 strategy* and commissioned the report *A New Strategy for the Single Market,*[38] where the creation of a Digital Single Market in the EU was highlighted as an important element.[39]

All of the above-mentioned documents led to the adoption of *the Digital Agenda for Europe* in 2010.[40] As stated, "the overall goal of the Digital Agenda is to achieve sustainable economic and social benefits from a Digital Single Market based on fast and very fast internet and interoperable applications".[41] It also highlighted issues that are obvious in 2025, such as: "an increasing number of everyday tasks are being carried out online, ranging from applying for jobs to paying taxes".[42]

In 2015 *the Digital Single Market Strategy for Europe* was issued.[43] It stated that the objective is, among other things, to create the appropriate conditions for the development of digital networks and services, as well as to maximize economic

[37] *Ibidem*.
[38] Monti M., *Nowa strategia na rzecz jednolitego rynku. W służbie gospodarki i społeczeństwa Europy. Sprawozdanie dla przewodniczącego Komisji Europejskiej J.M. Barrosso*, 9.05.2010 r., https://ec.europa.eu/docsroom/documents/15501/attachments/1/translations/pl/renditions/native, p. 8.
[39] Posłajko R., *Rozwój…, op. cit*., p. 48-49.
[40] European Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions Digital Agenda for Europe [Europejska agenda cyfrowa]*, *KOM(2010)245 final version*, 19.05.2010, Brussels, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:pl:PDF.
[41] *Ibidem*, p. 3.
[42] *Ibidem*, p. 28.
[43] Commission of the European Communities, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe [Strategia jednolitego rynku cyfrowego dla Europy]*, Brussels, 6.5.2015 COM(2015) 192 final. See also https://cyberpolicy.nask.pl/strategia-jednolitego-rynku-cyfrowego-dla-europy-strategia-dsm/.

growth generated by the European digital economy. Achieving these goals requires "ultra-fast, secure, and reliable infrastructure and services related to content, as well as appropriate legal conditions for innovation, investment, fair competition, and equal playing fields" as well as "investments in ICT infrastructure and technologies such as cloud computing and big data, as well as research and innovation that will enhance industrial competitiveness, improve public services, expand the number of people using the digital economy and improve their skills.[44] The document also indicated that "more can be done to modernize public administration, achieve cross-border interoperability, and facilitate interactions with citizens". It emphasized that electronic public services increase cost-effectiveness and improve service quality for citizens and businesses. It was stated that, for this purpose, the European Commission will launch a pilot project applying the "once only" principle in administration-petitioner relations and will analyze the possibility of introducing a secure EU-wide electronic solution (a secure online document repository). This is intended to ensure that services do not ask petitioners for information that is already in their possession.[45]

In 2016 the European Commission issued a *Communication on e-Government.*[46] This document referred to the 2014 OECD Recommendation on Digital Government Strategy.[47] The Communication recommends that "by 2020, public administrations and public institutions in the European Union should be open, effective, and universal, providing all citizens and businesses across the EU with borderless, personalized, user-friendly, end-to-end digital public services. In order to design and provide better services that meet the needs and expectations of citizens and businesses, innovative solutions will be applied. Public administrations will take advantage of the opportunities offered by the new digital environment to facilitate interactions with interested parties and between each other.[48] Author can fully agree with the following assessment presented in the discussed communication: "[e]lectronic government supports administrative processes, improves service quality, and increases internal efficiency within the public sector. Digital public services reduce the administrative burden on businesses and citizens, as contact with public administrations becomes faster, more efficient, more convenient, more transparent, and cheaper. Furthermore,

[44] *Ibidem*, p. 4.
[45] *Ibidem*, p. 18.
[46] Commission of the European Communities, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. EU eGovernment Action Plan 2016–2020: Accelerating the Digital Transformation of Government [Plan działania UE na rzecz administracji elektronicznej na lata 2016–2020. Przyspieszenie transformacji cyfrowej w administracji]*, Brussels, 19.4.2016 COM(2016) 179 final.
[47] *Ibidem*, p. 2.
[48] *Ibidem*, p. 3.

integrating digital technologies into the administration modernization strategy can bring additional economic and social benefits to society as a whole. Digital transformation in administration is one of the key conditions for successfully building a Single Market".[49]

In July 2024 the second annual report on the State of the Digital Decade takes stock of the EU's progress towards a successful digital transformation, as set out in the Digital Decade Policy Programme 2030. The 2024 State of the Digital Decade evaluates the progress - at both the EU and national levels - towards realising the objectives and targets set by the Digital Decade Policy Programme (DDPP). It explores the key drivers and challenges to achieve the EU's digital transformation, including a new geopolitical paradigm, fostering competitiveness in a complex economic context, entering a new age shaped by generative AI, and keeping people and societies engaged in an increasingly hybrid context. The report also highlights the EU's establishment as a global policy innovator and discusses the strengthening of the EU's digital industrial basis.[50]

2.2. Legal documents

It appears that the first act to which attention should be drawn is Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market[51]. This directive established general provisions facilitating the exercise of the freedom of establishment by service providers and the free movement of services;[52] however, it did not directly address taxation.[53] According to the directive, "Member States shall ensure that all procedures and formalities related to the establishment and operation of service activities are easy to complete remotely and electronically, via an appropriate single contact point and competent authorities".[54] This provision therefore imposes on EU Member States not only the requirement for the electronic processing of procedures but also their standardization. As correctly noted in the literature, "the exchange of information between different IT systems is possible only after agreeing on the

[49] *Ibidem*, p. 2.
[50] Information fully copied from the provided page: *Report on the state of the Digital Decade 2024,* 2.07.2024, https://digital-strategy.ec.europa.eu/pl/library/report-state-digital-decade-2024 and "24-Annex 3 Poland Executive Summary".
[51] OJ L 376, 27.12.2006, p. 36–68.
[52] Art. 1 paragraph 1 of the mentioned directive.
[53] Art. 2 paragraph 3 of the mentioned directive.
[54] Art. 8 paragraph 1 of the mentioned directive.

appropriate standards, both in terms of formats and the content of document templates".[55]

It should be noted next Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.[56] It states that "[i]n times of globalization, the need for mutual assistance between Member States in the field of taxation is becoming increasingly important. Due to the significant increase in taxpayer mobility, the number of cross-border transactions, and the internationalization of financial instruments, it is difficult for Member States to correctly determine the amount of taxes owed. These growing difficulties affect the functioning of tax systems and lead to double taxation, which in turn encourages tax fraud and evasion, while control powers remain at the national level. This jeopardizes the functioning of the internal market".[57] According to Article 21, the exchange of information should, where possible, take place electronically using the common CCN network. The exchange of information may concern matters specified in Article 2 of this directive.

Another act worth mentioning was Directive 2014/55/EU of the European Parliament and the Council of 16 April 2014 on electronic invoicing in public procurement.[58] Its aim was to remove barriers to cross-border trade arising from the coexistence of various legal requirements and technical standards for electronic invoicing.[59] One of the proposed requirements in this document is that the European standard for e-invoicing should be technologically neutral (to avoid potential disruptions to competition) and compatible with international standards (to avoid obstacles when issuing invoices to buyers in third countries).[60] The scope of the information included in e-invoices is specified in Articles 6 and 9 of the aforementioned directive.

The European Parliament and Council Regulation (EU) No 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC[61] was adopted. Compliance with this regulation in tax matters appears to be required due to its Recital 12 of the Preamble, which states: "The aim of this Regulation is not to

[55] The requirement for standardization is rightly pointed out by Kraska M., Matuszewska-Maroń M., *Nowy wymiar standaryzacji dokumentów w e-administracji*, Przegląd Prawa Publicznego 2013, no 4, pp. 67-75, from which the citation originates (I used the online version, hence I indicate that the citation comes from point 2).
[56] OJ L 64, 11.3.2011, p. 1–12.
[57] *Ibidem*, pkt 1 of the Preamble.
[58] OJ L 133, 6.5.2014, p. 1–11.
[59] *Ibidem*, pkt 5 of the Preamble.
[60] *Ibidem*, pkt 20 of the Preamble.
[61] CELEX number:32014R0910, known as "eIDAS".

interfere with the electronic identity management systems and the related infrastructures established in the Member States. Its objective is to ensure secure electronic identification and authentication for the purpose of accessing cross-border online services offered by the Member States".

Since 2019, a number of VAT provisions concerning distance selling have been introduced. First, Directive 112 on VAT was amended by adding Articles 369 and subsequent articles,[62] which introduced the so-called VAT MOSS (Mini One Stop Shop), a facilitation for entrepreneurs in the form of a single VAT registration requirement within the EU for the sale of electronic, broadcasting, and telecommunications services to private individuals from other EU countries. Subsequently, VAT MOSS was replaced on 1 July 2021 by the so-called OSS procedure (One Stop Shop) – the facilitation was extended to cover distance sales of goods. As a result, entrepreneurs no longer need to register for VAT in each individual country where their buyers are located, even after exceeding the threshold for distance sales of goods.[63] Importantly, according to Article 369c of Directive 112 VAT, the taxpayer must notify the relevant authorities of both the start and the end of using the aforementioned procedure electronically.

In the context of digitalization, it is also important to mention that on 11 March 2025, the Council of the European Union approved the VAT in Digital Age (ViDA) package, which means, among other things, that by 1 January 2035, Member States with national mandatory real-time digital transaction reporting should align their systems with EU standards.[64]

In conclusion, it should be also noted that on 13 March 2024 the European Parliament adopted the world's first regulation on artificial intelligence.[65]

[62] The change came into effect on 22 December 2019 under Council Directive (EU) 2019/1995 of 21 November 2019 amending Directive 2006/112/EC with regard to provisions on distance selling of goods and certain domestic supplies of goods (OJ L 310, 2.12.2019, p. 1–5), art. 1.

[63] https://www.pit.pl/aktualnosci-sponsorowane/one-stop-shop-oss-w-praktyce-1006203.

[64] https://crido.pl/blog-taxes/pakiet-vida-oficjalnie-przyjety-przez-rade-ue-reforma-vat-staje-sie-faktem/.

[65] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance), PE/24/2024/REV/1, OJ L, 2024/1689, 12.7.2024, ELI: http://data.europa.eu/eli/reg/2024/1689/oj.

3. DIGITIZATION IN POLISH TAX LAW SYSTEM

Digitization of tax processes in Poland began at the beginning of the 21-st century, when the possibility of submitting tax declarations in electronic form was introduced. This took place on 1 January 2004.[66] At that time, article 3a of the Tax Ordinance was introduced, stipulating that, unless otherwise required by separate laws, declarations could be submitted electronically. It was specified that declarations submitted electronically should include data specified in the form (template) and must be signed with a secure electronic signature. It should therefore be noted that the digitization of the Polish tax system began 21 years ago, shortly before Poland's accession to the EU. The first element was the introduction of electronic declarations.

After approximately two and a half years, the possibility of electronic communication with the tax administration and electronic delivery was introduced. On 16 August 2006, a provision entered into force,[67] stating that the delivery of documents, except for certificates, may take place *via* electronic communication means, as defined by the regulations on the provision of electronic services, to the email address of the party, its representative, or attorney, provided that a request has been made to the tax authority for the electronic delivery of documents. In matters concerning the preparation of document structures in electronic form and the organizational and technical conditions, the provisions of the Administrative Procedure Code and the executive regulations issued thereunder shall apply accordingly.

Subsequently, on 17 June 2010, the Polish tax legislator introduced the definition of an electronic document, which was done through the adoption of article 3, point 13 of the Tax Ordinance.[68] According to this definition, an electronic document is a collection of data, organized in a specific internal structure, that forms a separate

[66] Pursuant to the art. 1 ustawy z dnia 12.09.2002 r. o zmianie ustawy – Ordynacja podatkowa oraz o zmianie niektórych innych ustaw (Dz. U. nr 169, poz. 1387). In this context – for the sake of order – it is worth pointing out that another date (earlier – 2002) is indicated by M. Niezgódka-Medek in commentary to art. 3a o.p. (in:) Babiarz S., Dauter B., Hauser R., Kabat A., Niezgódka-Medek M., Rudowski J., *Ordynacja podatkowa. Komentarz*, Warszawa 2019, p. 82. However, the author does not indicate the legal basis and therefore her assertion does not seem justified.

[67] Ustawa z dnia 30 czerwca 2005 r. o zmianie ustawy - Ordynacja podatkowa oraz o zmianie niektórych innych ustaw (Dz.U. nr 143, poz.1199), art. 1.

[68] Niezgódka-Medek M., komentarz do art. 3 o.p. (in:) Babiarz S., Dauter B., Hauser R., Kabat A., Niezgódka-Medek M., Rudowski J., *Ordynacja podatkowa. Komentarz*, Warszawa 2019, p. 79, Bogucka-Felczak M., Dzwonkowski H., Kondratowska J., komentarz do art. 3 o.p. (w:) Dzwonkowski H. (red.), *Ordynacja podatkowa. Komentarz*, Warszawa 2016, p. 43.

meaningful whole and is recorded on an electronic data carrier. An electronic data carrier is understood as a material or device used for recording, storing, and reading data in digital form.[69] Such a carrier may include, for example, computer memory, storage drives (hard drives [HDD] and solid-state drives [SSD]), USB memory devices (flash drives), CD-ROM and DVD discs, cards with printed barcodes, floppy disks or external drives.[70]

On a side note - it is noted in the literature that the aforementioned definition of an electronic document is not fully consistent with the EU model, as it does not specify the type of carrier on which the document should be transferred.[71] The EU model is contained in article 3, point 35 of the eIDAS regulation,[72] which defines an electronic document as 'any content stored in electronic form, particularly text, or an audio, visual or audiovisual recording. In light of the above, it seems that, for example, a link to a recording on a YouTube portal should also be considered an electronic document. It is also worth noting that the regulation stipulates that the legal effect of an electronic document and its admissibility as evidence in court proceedings are not questioned solely because the document is in electronic form.[73] As emphasized, "electronic documents are crucial for the further development of cross-border electronic transactions in the internal market. This regulation should establish the principle that the legal effect of an electronic document should not be questioned solely because the document is in electronic form, so as to ensure that an electronic transaction is not rejected solely because the document is in electronic form".[74]

On 11 May 2014 the Polish legislator introduced the definition of the tax portal through the adoption of article 3, point 14 of the Tax Ordinance.[75] The introduction of this tool took place through an amendment to the Act on the Computerization

[69] Art. 3 pkt 1 i 2 ustawy z dnia 17 lutego 2005 r. o informatyzacji działalności podmiotów realizujących zadania publiczne (t. j. Dz. U. z 2024 r., poz. 1557 ze zm.).
[70] https://epdokumenty.pl/rodzaje-nosnikow-danych-przechowywanie-informacji-dawniej-i-dzis/ and https://www.archiwizacjadokumentow.com.pl/glossary/nosnik-informatyczny/.
[71] Zob. Popławski M., komentarz do art. 3 [w:] Etel L. (red.), *Ordynacja podatkowa. Tom I. Zobowiązania podatkowe. Art. 1-119zzk. Komentarz aktualizowany*, LEX/el. 2024 along with the literature provided there.
[72] The regulation described in section 2.2 of this article.
[73] Art. 46 of the regulation described.
[74] Pkt (63) of the Preamble of the regulation described.
[75] On a side note, it should be noted that as of 1 September 2022, the discussed article 3, point 14 of the Tax Ordinance was repealed. As indicated (in the justification for the draft act eliminating the aforementioned provision), this was due to the comprehensive regulation of this matter in Article 35a of the Act of 16 November 2016 on the National Tax Administration (Popławski M., komentarz…, *op. cit.*)

of Entities Performing Public Tasks.[76] The tax portal was defined as the information and communication technology system of the tax administration used for communication between tax authorities and taxpayers, payers, and collectors, as well as their legal successors and third parties, particularly for submitting applications, filing declarations, and delivering documents from tax authorities via electronic communication means. The current internet address of this portal is www.podatki.gov.pl.[77] The introduction of the aforementioned portal was a result of implementing Directive 2006/123/EC of the European Parliament and Council of 12 December 2006 on services in the internal market.[78]

On 11 May 2014,[79] a series of changes were introduced that impacted the digitalisation of Polish tax law. These included, among others:

a) the acceptance of electronic power of attorney,
b) the possibility for the tax authority to request the taxpayer, payer, or collector to consent to receiving documents in electronic form for all tax matters handled by that authority,
c) the provision that tax matters are to be handled either in writing or in the form of an electronic document, unless specific regulations provide otherwise,
d) the option for an individual interpretation to be issued in the form of an electronic document.

It should be noted that there are currently many mandatory electronic solutions in operation in Poland concerning taxation.[80]

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[76] Ustawa z dnia 10 stycznia 2014 r. o zmianie ustawy o informatyzacji działalności podmiotów realizujących zadania publiczne oraz niektórych innych ustaw (Dz. U poz. 183 ze zm.).

[77] https://www.gov.pl/web/gov/portal-podatkowy. It should also be noted that as of 20 February 2019, the website of the Ministry of Finance's Public Information Bulletin [Biuletyn Informacji Publicznej] is available at the website www.gov.pl/finanse. The archived Public Information Bulletin of the Ministry of Finance is available at the following address: https://mf-arch2.mf.gov.pl/web/bip/ministerstwo-finansow.

[78] The regulation described in section 2.2 of this article. Niezgódka-Medek M., komentarz do art. 3 o.p. (in:) Babiarz S., Dauter B., Hauser R., Kabat A., Niezgódka-Medek M., Rudowski J., *Ordynacja podatkowa. Komentarz*, Warszawa 2019, p. 79.

[79] Above mentioned ustawa z dnia 10 stycznia 2014 r. o zmianie ustawy o informatyzacji (…). See as well: Martysz Cz., Komentarz do ustawy z dnia 10 stycznia 2014 r. o zmianie ustawy o informatyzacji działalności podmiotów realizujących zadania publiczne oraz niektórych innych ustaw, [in:] *Ustawa o informatyzacji działalności podmiotów realizujących zadania publiczne. Komentarz*, wyd. II, LEX 2015 and Byrski J., *Nowelizacja ustawy o informatyzacji działalności podmiotów realizujących zadania publiczne z dnia 12 lutego 2010 r.*, CASUS. Krajowa Reprezentacja Samorządowych Kolegiów Odwoławczych 2010, no 56, pp. 33-36.

[80] In more detail: Majka P., Informatyzacja systemu podatkowego (in:) Brzeziński B., Franczak A., Olesińska A., *Polskie prawo podatkowe*, Warszawa 2024 and Majka P., Gromadzenie i przepływ informacji na potrzeby systemu podatkowego (in:) Brzeziński B., Franczak A., Olesińska A., *Polskie prawo podatkowe*, Warszawa 2024.

The most significant of these is the so-called JPK (Standard Audit File for Tax [Jednolity Plik Kontrolny]), which has been in effect since 1 July 2016. In general, this obligation requires taxpayers maintaining tax books using computer programs to send accounting data in the JPK format to the tax authorities. The obligation was introduced through the addition of Article 193a of the Tax Ordinance, which states: "§1. In the case of maintaining tax books using computer programs, the tax authority may request the transmission of all or part of these books and accounting documents via electronic communication means or on electronic data carriers, in an electronic form corresponding to the logical structure referred to in §2, specifying the type of tax books and the period to which they relate. §2. The logical structure of the electronic form of tax books and accounting documents, taking into account the possibility of generating it from computer programs commonly used by entrepreneurs and the automatic data analysis, is available in the Public Information Bulletin on the website of the office servicing the minister responsible for public finance matters. §3. The minister responsible for public finance matters shall, by way of regulation, specify the method of transmitting tax books, parts of these books, and accounting documents in electronic form via electronic communication means, as well as the technical requirements for the electronic data carriers on which the books, parts of these books, and accounting documents may be stored and transmitted, taking into account the need to ensure the security, reliability, and undeniability of the data contained in the books and the need to protect them from unauthorized access".

In the JPK format, VAT declarations and VAT records are also transmitted (see: article 99(11c) and article 109(11i) of the VAT Act), which is why the term JPK VAT is commonly used. Since VAT declarations are filed for monthly or quarterly periods, there are two variants of the JPK_VAT files. These are the JPK_V7M variant (intended for taxpayers who settle VAT on a monthly basis, i.e., those who file VAT declarations for monthly periods) and the JPK_V7K variant (intended for taxpayers who settle VAT quarterly, i.e., those who file VAT declarations for quarterly periods).[81]

Starting from settlements for the year 2025, the JPK CIT has been introduced, which is the declaration for corporate income tax. This JPK consists of JPK_KR_PD (Standard Audit File for Accounting Books – Corporate Income Tax) and JPK_ST_KR (Standard Audit File for Fixed Assets). The first reporting

[81] Gumola M., Krywan T., *Sankcje za nieprzestrzeganie obowiązku przekazywania organom podatkowym danych w formacie JPK*, ABC, Lex/el. (the legal status as of 30 December 2024).

period for which the report must be submitted will be the tax year beginning after 31 December 2024.[82]

The implementation of the National e-Invoice System (KSeF) is planned for 2026. It will become mandatory in two phases: a) from 1 February 2026 for entities whose sales value in the previous tax year exceeded PLN 200 million; b) from 1 April 2026 for all entrepreneurs. This is a new method for storing invoices, issuing invoices, as well as the circulation of invoices both within and outside the entity. It is a state platform for issuing and receiving invoices electronically.[83]

In October 2024, the Ministry of Digital Affairs presented the draft of the Poland Digitalisation Strategy for 2035.[84] At present, it is available in the form of slides and sentence equivalents, from which one can infer key objectives, such as the creation of an e-State by 2035, where paper documents will be used only in exceptional circumstances. Other goals include the implementation of the principle of providing data by citizens only once, automation of case handling and the use of AI tools to "create transparent law" with "100% of entities performing public tasks working with digital documents", "100% of cases handled by these entities being processed electronically" and "80% of offices utilizing AI".[85] It is therefore expected that these objectives will also be applied in the area of taxation, raising legitimate concerns about the protection of taxpayers' rights (e.g. the automation of processes and case handling, as well as lawmaking by AI). The Ministry informs that, in response to feedback received during public consultations, a new draft of the State Digitalisation Strategy is being developed, incorporating changes based on the suggestions submitted so far.[86] As a result, one can anticipate that any changes stemming from this strategy will significantly impact the further digitalisation of taxation in Poland.

4. CONCLUSION

The development of the digital market seems inevitable, which is why further research into its functioning, as well as the desire to understand the impact of

[82] Malinowski D. M., Cyfryzacja *ksiąg rachunkowych, czyli JPK CIT dogoni nas w roku 2025*, Przegląd Podatkowy 2024, no 12, pp. 3-4.
[83] Brzostowska M., *Wpływ* KSeF *na wewnętrzne procesy w biurze rachunkowym i w przedsiębiorstwie*, LEX/el. 2023, https://ksef.podatki.gov.pl/.
[84] https://www.gov.pl/web/cyfryzacja/strategia-cyfryzacji-panstwa---20-czerwca-br-na-pge-narodowym.
[85] https://www.gov.pl/attachment/963099d7-93a7-43e9-a610-99e15c20a3ab, Strategia_Cyfryzacji_Polski_28_10_2024_prezentacja.pdf, pp. 6, 50, 66, 67 and 73.
[86] https://www.gov.pl/web/cyfryzacja/strategia-cyfryzacji-panstwa---20-czerwca-br-na-pge-narodowym.

technology on the economy and taxpayers' behavior, are essential and fully justified for the creation of sound laws and best practices in this complex field. It is necessary to conduct research and, in the context of inevitable digitization, establish certain standards of conduct and regularities – as both EU and Polish legislators are attempting to do. Certainly, e-government contributes to the improvement of services for petents, increases internal efficiency in the public sector, and reduces the administrative burden on businesses and individuals. Contact with public administration, including tax authorities, should be quick, efficient, convenient, transparent and affordable.[87] However, the transition from paper-based to electronic systems, including the use of AI, raises legitimate concerns, the most significant of which are the uncertainty of the tax law/ tax obligations and the potential disregard for taxpayers' rights.

Below are the main identified risks:
1. privacy and data protection issues – the risk that information (which is very fragile, such as personal wealth data) may be exposed to unauthorized access, theft or misuse
2. lack of access to technology – not all taxpayers may have or wish to have access to the necessary technology or skills required to use electronic systems, which may lead to the marginalization of certain groups, particularly the elderly or less affluent individuals.
3. automation and system errors – the risk that automated tax systems may incorrectly calculate tax amounts or misclassify events, potentially resulting in improper tax liabilities; additionally, errors may occur during the migration of data from paper-based systems to electronic ones.
4. cyberattack risks – electronic systems are inherently vulnerable to cyberattacks, which may threaten the integrity of tax data and the security of information (e.g. the risk of data loss, alteration or misuse).
5. lack of understanding regarding the complexity of a taxpayer's situation and improper interpretation of regulations. The transition to e-government may result in the loss of personal contact with tax administration personnel, which, in the case of problems or uncertainties in tax matters, may hinder the resolution of cases in a way that is tailored to the individual situation.
6. negative psychological effects – the lack of personal contact may have negative psychological effects on taxpayers.
7. reliance on deepfake technology – electronic systems may struggle to distinguish between real facts and electronically created content, such as artificial intelligence-generated deepfakes.

[87] European Commission, *Komunikat (...) Plan działania UE na rzecz administracji elektronicznej…*, *op. cit*, p. 2.

8. excessive complexity of systems – the complexity of new electronic systems may make it difficult for taxpayers to understand and navigate new regulations and procedures, which could lead to unintended errors or difficulties in fulfilling obligations.
9. increased control and monitoring – digitization may result in more advanced tools for tracking and controlling taxpayers' actions, which may raise concerns about excessive State intrusion into citizens' privacy.
10. dependence on technology – in the event of system failures or inaccessibility, taxpayers may encounter difficulties in fulfilling their tax obligations or obtaining assistance.[88]

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[88] Pogroszewska M., *Cyfryzacja i prawo międzynarodowe kluczowe dla zmian w podatkach*, 16 October 2024 r., prawo.pl via Lex/el. (and phrase: „New technologies are also changing the area of risks in taxation. Until now, this area has been characterised by incorrect interpretation of regulations; in the future, it will involve system failures, said Dr. Andrzej Pałys").

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Review paper

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GROUP INSURANCE – VALUE FOR MONEY? COMPARATIVE AND EU LAW REFLECTION*

ABSTRACT

This article discusses the latest trends regarding the legal construction of group insurance through the prism of its efficiency and in the spirit of the CJEU judgments C-26/13, C-633/20, C-208/21. The subject of consideration is the role of the group organizer /insurer/ in the process of insurance distribution. Another issue is the information and advisory obligation towards the insured group members and the group organizer's responsibility for its performance. Correct performance of the information obligation and matching the insurance contract to the requirements and needs of the insured group members prevents misselling.

Keywords: *group insurance, IDD, disclosure obligation, insured person*

1. INTRODUCTION

The intense development of group insurance should encourage an in-depth reflection on the legal nature of solutions in which the insurance protection model goes beyond the classic formula of individual insurance. Group insurance contracts differ from individual insurance contracts, because of:
- their economic purpose,
- the insurance interest (i.e. of the party interested in insurance protection), which may be very diverse and, therefore, include the interest of the policyholder, the insured person or both,
- the fact that sometimes the only reason for concluding group insurance contracts is organizational convenience,
- the type of benefit for the person covered by insurance,
- the method of risk calculation, depending on whether the individual characteristics of a specific person or the characteristics of an abstract group member are taken into account.

Both in the IDD Directive[1] and in many Member States there are no legal regulations that, taking into account the specificity of group insurance, would provide a legal framework adapted to the needs of the market, and that would counteract the threats resulting from the specific structure of persons involved in group insurance (insurance company - policyholder /group organizer/ - the insured party). As a result, the level of the protection of persons insured as a group does not keep up with the dynamic changes in the legal structures used to offer insurance protection. In this paper, legal regulations of group insurance, both at the EU and Member State level, will be analysed in the context of law and economics, the information obligation, and the pursuit of claims under the group insurance contract. Achieving the goal of protecting the weaker party of group insurance is only possible if the assertion of claims is effective from an economic point of view, i.e. it leads to a reduction in social costs. Next, various legal solutions will be presented that properly or improperly implement the basic principles of law and economics. Another issue that will be analysed is the legal nature of the group insurance contract.

2. DUALISTIC CONCEPTION OF GROUP INSURANCE

In German literature the heterogeneous nature of the concept of group insurance is emphasized. Authors point to two contractual constructions that account for the system of affording protection to a group of insured parties. So called improper group insurance (*unechte Gruppenversicherung*) is based on a framework agreement. The contract from which insurance protection is directly derived is concluded between a group member and the insurer. The group member takes the role of both the policyholder and the insured party.[2]On the other hand, proper group insurance (*echte Gruppenversicherung*)[3] is a construction in which the group organizer is at the same time the policyholder, and the insured parties within the group are not parties to the agreement concluded with the insurer. However, proper group insurance contracts do not form a uniform category. One can distinguish between their two forms.

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[1] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution.

[2] Herdter, F., *Der Gruppenversicherungsvertrag: Grundlagen und ausgewählte Problemfelder*, Karlsruhe 2010, p. 14.

[3] This terminology was coined by Millauer, H., *Rechtsgrundsätzeder Gruppenvericherung*, Karlsruhe 1966, p. 107 et seq.

The first one is automatic group insurance of a variable circle of persons (*automatische Gruppenversicherungeineswechselnden Personenkreises*). In principle, all members of one group at a given time will be covered by insurance protection against a specific risk without the need to take any independent action. Under this construction, the group is insured in its constantly variable composition.[4]Therefore, persons who accede to the group specified in the agreement, automatically and without the need to take any action, obtain insurance protection, which they automatically forfeit upon leaving the group. The members covered by a group insurance contract who accede to the contract at a later date are automatically covered by the insurance protection as of the time when they become a part of the group (join the group).[5]The discussed formula of group insurance is compared in German literature to the construction of so-called current insurance (*laufende Versicherungen*) governed by the provision of § 53 VVG. The essence of such insurance boils down to the fact that on the date of conclusion of the agreement, the insurance interest is specified only generally, and the specific risk is covered by the protection only upon its emergence.[6]

The other form of group insurance distinguished in German literature is group insurance of a variable circle of persons making declarations of accession (*GruppenversicherungeineswechselndenPersonenkreisesmitrechtsbegründendeAnmeldung*). The substance of this insurance type boils down to the fact that after the conclusion of the insurance contract it is possible for a new group member to make a declaration of accession. The person interested in being afforded insurance protection submits a declaration of accession to the insurer. This act enables the insurance coverage to emerge. The group enjoying such coverage is not closed as on the date of concluding the insurance contract but it is possible to accede to and leave the group in case of respectively: acquiring or losing the properties determining the range of persons belonging to the group of insured parties.[7]

Having regard to the two forms of proper group insurance, as discussed above, one should bear in mind that there are far-reaching differences between this construction and the French model of insurance with compulsory accession, as far as proper group insurance with automatic accession is concerned. In the context

[4] Millauer, H., *Rechtsgrundsätze der Gruppenvericherung*, Karlsruhe 1966, p. 19.
[5] Herdter, F., *Der Gruppenversicherungsvertrag...*, *op. cit.* note 2, p. 23.
[6] This type of insurance contract is characteristic of transport insurance and such types of business activities in which both the number and value of goods are subject to constant fluctuation. More in Weigel H., *Niemiecka ustawa o umowie ubezpieczenia – Versicherungsvertragsgesetz (VVG) – nowe rozwiązania*, Rozprawy Ubezpieczeniowe 2008, No. 2, p. 110.
[7] More in Herdter, F., *Der Gruppenversicherungsvertrag...*, *op. cit.* note 2, p. 24–25.

of the discussed constructions, H. Millauer, as the first author in the German doctrine, formulated a definition of group insurance according to which it is a uniform insurance contract covering a group of people to which, in any case, an individual group member belongs either automatically or by accession, but only jointly with the group to which he belongs; under this agreement, the entire group or a single insured party enjoy the same protection against the same risk concerning all the group members subject to the condition that the insurance benefit is paid separately to each insured person within the group.[8]

A special manifestation of the tendency for the unification of international contract law are the model rules on the insurance contract, better known as the Principles of European Insurance Contract Law (PEICL), prepared by the members of the Project Group on a Restatement of European Insurance Contract Law.[9] As a part of the project, which initially was a typically academic undertaking, an effort was made to create uniform rules on the insurance contract which would make a set of solutions positively evaluated by the representatives of legal science and market participants. It was intended to accomplish that goal taking into account the conclusions following from comparative law analysis. Because of the supranational character of the prepared rules, priority in their interpretation was afforded to the conception of autonomous construction.[10] In 2016, the full text of the PEICL was published, including a commentary.[11] The original version of the PEICL did not contain provisions on group insurance.[12] As the works progressed, the authors of the PEICL eventually decided to introduce a definition of the group insurance contract which – beside the definition of "insurance contract," "damage insurance" and "fixed-sum insurance" – was covered by the provision of Art. 1:201, under paragraph (7) of that provision. It was concluded that group insurance contracts are based on the agreement between the insurer and the group organizer concluded for the benefit of the insured parties who have a common connection with the organizer and meet the requirements set forth in such agreement. So

[8] So writes Millauer, H., *Rechtsgrundsatze…, op. cit*. note 3, p. 13.
[9] Lakhan, M.; Heiss H., *An Optional Instrument for European Insurance Contract Law*, Utrecht Journal of International and European Law 2010, vol. 71, part 27, p. 1–11.
[10] Fuchs, D., *Insurance Restatement jako europejski instrument opcjonalny służący regulacji umów ubezpieczenia*, RU 2010, No. 9, p. 132; *Status ubezpieczonego według rozporządzenia Rady (WE) nr 44/2001 – wnioski de lege ferenda dla prawodawcy polskiego*, EPS 2012, No. 5, p. 27.
[11] Basedow, J.; Birds, J.; Clarke, M.; Cousy, H.; Heiss, H.; Loacker, L., *Principles of European Insurance Contract Law (PEICL), 2nd Expanded ed Edition*, Köln 2016. The text was published on the website: https://www.uibk.ac.at/zivilrecht/restatement/sprachfassungen/peicl-en.pdf.
[12] Armbruester, C., *PEICL – The Project of a European Insurance Contract Law*, Connecticut Insurance Law Journal 2013, vol. 20, p. 150.

determined circle of the insured parties is referred to as "group." At the same time, the definition expressly mentions the possibility of obtaining protection by members of the insured party's family under the group insurance contract.

Researchers from the Restatement Group opted as well for sanctioning the distinction between insurance with compulsory accession (*accessory group insurance*) and insurance with voluntary accession (*elective group insurance*). The first of these concepts is defined as group insurance in which the existence of insurance protection is a consequence of belonging to a given group. The insured party may not withdraw from the insurance coverage. The second category, on the other hand, refers to situations in which accession to a group insurance is a consequence of submitting to the insurer a notice of intention to join the circle of insured parties or the lack of refusal to accede to the insurance.[13]

In the provision of Art. 1:201 PEICL, containing a dictionary of terms used in the PEICL, the authors additionally introduced definitions of the group insurance contract (Art. 1:201 item 7), group insurance with compulsory accession (*accessory group insurance*) (Art. 1:201 item 8) and group insurance with voluntary accession (*elective group insurance*) (Art. 1:201 item 9).

At the same time, the authors of the PEICL decided to refer to the person entering into the group insurance contract with the insurer as "group organizer." This term applies regardless of the compulsory or voluntary nature of accession to the group insurance contract. However, the authors did not decide to define that concept under Art. 1:202, which specifies the meaning of such terms as "insured" (Art. 1:202 item 1) or "insurance agent" (Art. 1:202 item 5). It must be noted that the authors of the instrument use the term "group organizer" inconsistently. As a part of the provisions on group insurance contracts, they also make references to the "policyholder" (Art. 18:204 item 2). It seems, however, that the distinction is unintentional and the terms "group organizer" and "policyholder" can be used interchangeably for the purposes of the discussed rules.

There are essential structural differences between insurance contracts to which accession is compulsory and insurance contracts to which accession is voluntary. The insurance contract with compulsory accession (*accessory group insurance*) is an insurance contract *sensu stricto.* It is on its basis that individual insured parties obtain insurance protection. However, direct application of the PEICL could result in numerous doubts in the light of the special character of group insurance. The authors of the PEICL seem to share such fears. Under the rule expressed in Art.

[13] More on the considered conceptions of the group insurance contract in Fras, M., *Umowa ubezpieczenia grupowego. Aspekty prawne,* Warszawa 2015, p. 400-402.

18:201 PEICL, the provisions of the PEICL apply only appropriately to insurance contracts with compulsory accession (*accessory group insurance*).

3. LEGAL POSITION OF THE POLICYHOLDER AND ORGANIZER OF THE GROUP

Article 2(3) and (5) of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, as amended by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014, and Article 2(1)(1), (3) and (8) of Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016, on the distribution of insurance, as amended by Directive (EU) 2018/411 of the European Parliament and of the Council of 14 March 2018, must be interpreted as meaning that the concept of 'insurance intermediary' and, therefore, that of 'insurance distributor', within the meaning of those provisions, covers a legal person whose activity consists in offering its customers membership on a voluntary basis, in return for payment the legal person receives from them, of a group insurance policy to which the legal person has subscribed previously with an insurance company, where that membership entitles those customers to insurance benefits in the event, in particular, of sickness or accident abroad.

Group organizer is a distributor by terms of IDD. This is the main idea of Judgement of the Court (First Chamber) of 29 September 2022 in case C-633/20,[14] Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v. TC Medical Air Ambulance Agency GmbH.[15]

In the justification of this judgment, the CJEU draws attention to the fact that the positive answer to the referred preliminary question is a consequence of interpretation of Directive 2002/92 and Directive 2016/97, taking into account not only the text of the provisions but also their context and purposes of the legislative instruments. In this regard, the CJEU shared the view that consumers should enjoy insurance coverage at the same level regardless of differences between the

[14] ECLI:EU::C:2022:733.
[15] Fras, M.; Zgonina, O., *ECJ – Group organizer* as a distributor by terms of IDD. Commentary Judgement of the Court (First Chamber) of 29 September 2022 in case C-633/20, Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v. TC Medical Air Ambulance Agency GmbH, Wiadomości Ubezpieczeniowe 1/2023, https://piu.org.pl/wp-content/uploads/2023/05/WU-2023-01_06_Fras.pdf 26 February, 2025

channels of insurance distribution. However, the qualification of the policyholder in the group insurance contract as insurance intermediary raises legitimate doubts of academic authors and may have major significance in the insurance practice.

An analysis of the commented judgment leads to the conclusion that the CJEU offered broad interpretation of the terms "insurance distribution" and "insurance intermediary," including the prerequisite "for consideration." In effect, the CJEU explained in very general terms in what situations and under what conditions a policyholder in a group insurance contract can qualify as insurance intermediary. In the first place, by giving expression to a broad understanding of the term "consideration," used by the EU legislator in Recital 11 of Directive 2002/92 and in Art. 2(1) item 9 of Directive 2016/97, the CJEU admits that "the condition relating to the existence of remuneration must be regarded as satisfied where every membership of a customer of the legal person which subscribed to the group insurance policy with the insurance company and which pays, on that basis, the insurance premiums to that company, gives rise to a payment to that legal person." One can only agree with the opinion of the CJEU that the defendant in the main proceedings actually acted in the defendant's own economic interest and, as a consequence, the benefits obtained by the defendant fell within the scope of the term "consideration." However, it is still dubious to put an equation mark between the activities of a group's organiser, who is a party to the insurance contract, and remunerated activities of an insurance intermediary or insurance distributor.[16] A further part of the justification of the commented judgment reveals that, in the opinion of the CJEU, it is irrelevant that a legal person conducting such activities as examined in the main proceedings is in itself a party to the group insurance contract in respect of which the legal person intends to encourage its customers to make a declaration of accession (46). One should approach with criticism the lack of in-depth considerations in this respect.

In the same way, the CJEU points to two prerequisites permitting qualification of a policyholder in a group insurance contract as insurance intermediary. First of all, this is voluntary accession to the group insurance scheme, that is the possibility to make an individual decision, and the economic interest of the policyholder as organizer of the group. However, in the commented judgment, the Court did not address the difference between acquisition of membership in a particular group and the accession to the group insurance contract as such. It seems that the decisive factor in the assessment of the prerequisite of voluntariness, as invoked by the CJEU, should be intention and purpose for which potential members of the group

[16] Armbrüster, C., EuGH, 29.09.2022 - C-633/20: Niederlassungsfreiheit: Erlaubnis zur Versicherungsvermittlung für Versicherungsnehmer einer Gruppenversicherung, Europäische Zeitschrift für Wirtschaftsrecht 20/2022, p. 954.

join the scheme. Therefore, it should be sufficient to resolve if, when joining a particular group, its members have a real possibility to withdraw from the insurance coverage offered within the framework of the group insurance contract.[17] One should accept the opinion that the judgment of the CJEU should not be interpreted so that the policyholder in the group insurance contract must always be treated as insurance intermediary if the policyholder encourages to become members of the group organized by the policyholder, which involves the need to pay a membership fee, as a part of which members of the group obtain at the same time insurance cover under the group insurance contract concluded by the group organizer.[18] As an example, M. Wandt points so a sports club whose members pay a fixed membership fee, in consideration of which they obtain insurance coverage under the group insurance contract concluded by the sports club.

In the case-law of the CJEU, a tendency can be noticed to treat a policyholder in a group insurance contract as insurance intermediary. In the commented judgment, the CJEU refers to an earlier judgment of 24 February 2022,[19] in which the Court held that an entrepreneur being a policyholder in a group insurance contract has a disclosure obligation to the insured party. It was explained in the cited judgment that the status of insurance distributor is not incompatible in that context with the status of a policyholder. This view was consequently upheld also in the latest judgment of the CJEU of 2 February 2023.[20] In this judgement CJEU had already ruled that the accession of a consumer to a group contract between an assurance undertaking and a policyholder gives rise to an individual assurance contract between that assurance undertaking and that consumer. The policyholder should be considered to be carrying out an assurance mediation activity.[21]

[17] Fischer, A., Lübcke, T., *Ende oder Neuanfang im Gruppenversicherungsmarkt? Zugleich Anmerkungzum Urteil des EuGH v. 29.9.2022 - C-633/20*, Versicherungsrecht (VersR) Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht 23/2022, p. 1480.
[18]Wandt, M., Versicherungsnehmer einer Gruppenversicherung als Versicherungsvermittler. Grund und Grenzen der Entscheidung des EuGH v. 29.9.2022 - C-633/20, Versicherungsrecht (VersR) Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht23/2022, p. 1481 et seq.
[19] Judgment of the CJEU of 24.02.2022 r., C-143/20, (EU:C:2022:118)
[20] Judgment of the CJEU of 2.02.2023 r., C-208/21, (EU:C:2023:64)
[21] ECJ 24 Feb. 2022, A ('*Unit-linked' assurance contracts*), § 81, 87 and 88, with reference to ECJ 31 May 2018, Case C-542/16, *Länsförsäkringar Sak Försäkringsaktiebolag*, ECLI: EU: C:2018:369, § 47–54.

4. PRE-CONTRACTUAL OBLIGATIONS IN GROUP INSURANCE

In the judgment of 20 April 2023,[22] the CJEU held that under Art. 5, first sentence, of Directive 93/13[23], the terms of consumer agreements concluded in the written form must always be drawn up in plain and intelligible language. The Court explained that this requirement has the same scope as the requirement laid down under Art. 4(2) of the above-mentioned Directive, which makes the exception provided for in the latter provision from a judicial review mechanism by a national court of the unfair status of the terms in question, in particular terms on the main subject matter of the contract, dependent on whether the terms have been formulated in plain and intelligible language.[24] The Court explained that the requirement of transparency of contractual terms must be interpreted extensively, and that it cannot be limited only to the intelligibility of those terms in a formal and grammatical sense. This requirement means that an average consumer, who is reasonably well-informed and reasonably observant and circumspect, is able to understand the specific operation of such term and to accordingly assess, based on clear and intelligible criteria, the potentially significant economic consequences of the term to the consumer's obligations.[25] As for the moment when the information should be provided to the consumer, provision of information about the contract terms and about the consequences of concluding the agreement prior to its conclusion is of fundamental importance to the consumer, because specifically on the basis of that information the consumer will decide if he or she wishes to be bound by the terms formulated in advance by an entrepreneur,[26] also when the consumer accedes to a group insurance agreement when entering into a loan contract. Essential importance, from the consumer's point of view, attaches to information provided before concluding the contract so that the consumer is in a

[22] Judgment of the CJEU of 20 April 2023, *Ocidental – Companhia Portugesa de Seguros de Vida SA versus LP1.,* C-263/22 (EU:C:2023:311).
[23] Dir. 93/13/EEC of 5 Apr. 1993 on unfair terms in consumer contracts, http://data.europa.eu/eli/ dir/1993/13/oj (hereafter: UCTD).
[24] See the judgments of the CJEU of 30 April 2014, *Kásler i Káslerné Rábai,* C-26/13) EU:C:2014:282) and of 3 March 2020 r., *Gómez del Moral Guasch,* C-125/18 (EU:C:2020:138).
[25] See the judgments of the CJEU of 10 June 2021, BNP Paribas Personal Finance, C-609/19 (EU:C:2021:469) and of 10 June 2021 r., BNP Paribas Personal Finance, od C-776/19 to C-782/19 (EU:C:2021:470). In foreign literature, with regard to pre-contractual obligations of insurers and the related question of transparency, see in particular: Loacker L. D., *Informed Insurance Choice? The Insurer's Pre-Contractual Information Duties in General Consumer Insurance,* Edward Elgar Publishing, Cheltenham 2015, p. 78 et seq.
[26] See the judgments of the CJEU: of 21 December 2016, Gutiérrez Naranjo et al., C-154/15, C-307/15 C-308/15, (EU:C:2016:980) and of 12 January 2023, D.V., C-395/21 (EU:C:2023:14).

position to assess the contract's economic consequences to him- or herself on the basis of clear and intelligible criteria. In fact, such information is necessary so that the scope of a given provision can be understood by the consumer of whom, when concluding a linked contract, the same level of vigilance cannot be expected as when concluding separately the insurance agreement and the loan agreement.[27]

The requirement of transparency of contractual terms gives rise to a requirement to provide to the consumer, prior to the conclusion of contract, all information necessary to enable the consumer to understand the economic consequences of the terms in question and to make a fully informed decision about entering into the contract. This requirement entails a necessary assumption that the consumer is in a position to become familiar with all the terms of the contract before entering into the agreement. In this context, the question if the discussed terms relate to the main subject matter of the agreement is irrelevant. As a matter of fact, if a consumer is to make an informed decision, in accordance with the objective pursued by the above-mentioned transparency requirement, whether or not he or she wishes to be bound by the provisions of the agreement formulated in advance by an entrepreneur, the consumer must be in a position to become familiar in advance with the entire agreement, because all of its provisions will specify, in particular, the rights and obligations of the consumer. The transparency requirement will apply also when a given term relates to the main subject matter of the agreement.[28] Moreover, such a requirement of prior familiarisation with all contractual terms was clearly emphasised in Recital 20 of Directive 93/13. For another thing, the requirement of transparency of contractual terms, laid down under Directive 93/13, cannot be excluded based on the existence of a special legal system applicable to a particular type of contracts. This is the case as, according to well-established case-law, under a reference to the transactors' status, Directive 93/13 defines contracts to which it applies[29] Therefore, at the end of the day, Art. 4(2) and Art. 5 of Directive 93/13, in the light of Recital 20 of the same Directive, must be interpreted so that the consumer should always be in a position to become familiar with all contractual terms before entering into the contract.

Going further, according to well-established case-law, the jurisdiction of the Court to examine possibly unfair nature of a contractual clause, in the understanding of Art. 3(1) of Directive 93/13, relates to the interpretation of the criteria a national court may or should adopt when examining the contractual clause in the light of the Directive's provisions. In the same way, the national court's task is to

[27] Judgment of the CJEU of 23 April 2015, Van Hove, C-96/14, (EU:C:2015:262).
[28] Judgment of the CJEU of 3 March 2020, *Gómez del Moral Guasch,* C-125/18 (EU:C:2020:138).
[29] Judgment of the CJEU of 21 March 2019, *Pouvin i Dijoux,* C-590/17 (EU:C:2019:232).

specifically qualify a given contractual term on the basis of the prescribed criteria and in the light of the circumstances of the examined case. In this regard, it must be reminded that, in the context of Art. 5 of Directive 93/13, transparency of a contractual term is one of the criteria the national court should take into account when making the assessment, as prescribed by the law, of unfair nature of the term in question under Art. 3(1) of the discussed Directive.[30] Inasmuch as the lack of transparency of a contractual term following from its unclarity or unintelligibility can constitute an element to be taken into account when assessing the unfair nature of the examined term, the lack of transparency following from the fact that the consumer was not in a position to become familiar with the term before concluding the given agreement can, even more so, constitute such an element. This thread involves an assessment of possible non-compliance with the requirement of good faith and, then, an assessment of a possible significant imbalance to the detriment of the consumer. According to Art. 4(1) of the discussed Directive, the national court should make such assessment taking into account, in the first place, the time of concluding the contract and any circumstances surrounding the contract's conclusion. As a part of assessing good faith, the national court should, in particular, take into consideration the strength of the parties' bargaining positions and whether the consumer was invited to give his or her consent to a given term.

When it comes to the question if, contrary to the requirement of good faith, a contractual term leads to significant imbalance between the parties' rights and obligations under the contract to the detriment of the consumer, according to well-established case-law, the national court should verify if an entrepreneur treating the consumer fairly and equitably could reasonably expect the consumer to accept the clause in question in the course of individual negotiations.[31]

In the light of the above, for the purpose of assessing if contractual terms lead to such imbalance to the detriment of the customer, one should take into consideration all circumstances that the entrepreneur could be aware of at the time of concluding the contract and that could have an impact on the subsequent performance of the contract. It must be determined if the consumer received all information that might have an influence on the scope of the consumer's obligations under the contract and that allowed the consumer to assess, in particular, the consequences of the contract. In this context, the circumstance that the consumer could not become familiar with a contractual term before concluding the contract constitutes an essential element of the assessment of possible unfair

[30] Judgment of the CJEU of 12 January 2023, *D.V.,* C-395/21 (EU:C:2023:14).
[31] See the judgments of the CJEU of 3 September 2020, *Profi Credit Polska,* C-84/19, C-222/19 and C-252/19 (EU:C:2020:631), of 10 June 2021, *BNP Paribas Personal Finance,* from C-776/19 to C-782/19, (EU:C:2021:470).

nature of the contractual term in question because that circumstance could incline the consumer to incur obligations that he or she would not otherwise have accepted and, as a consequence, this could lead to a significant imbalance between the mutual obligations of both parties to a given agreement.

Giving effect to clauses excluding or limiting insurance protection in relation to the risk covered by the insurance leads to a situation in which the consumer no longer takes advantage of the protection in case of the materialisation of risk and in which the consumer, in principle, as of the date of ascertaining permanent inability to work caused by a health problem existing in advance about which the consumer was not in a position to notify the insurer, should independently pay the remaining loan instalments. In the given case, the consumer would be obliged to pay at least a part of those instalments if, under an applicable provision of national law, such as taken into account in the examined case in the main proceedings, the bank incurred liability for a damage caused by an omission to notify the contractual terms to the consumer, that is for not placing the consumer in a situation in which the consumer would have been if he or she had taken advantage of the above-mentioned insurance coverage. As a consequence, the consumer can be placed in a situation in which, because of the loss of incomes following from his or her permanent inability to work, the repayment of the instalments is difficult, or even impossible, to the consumer, even though this was precisely the risk the consumer wanted to be insured against by acceding to the insurance agreement such as the contract examined in the main proceedings.

In the same way, by an omission to allow a given consumer to become familiar, prior to concluding the agreement, with an information about the contractual terms and all the consequences of the agreement to be concluded, an entrepreneur imposes on the consumer, in whole or in part, a risk relating to possible permanent inability to work. At the end of the day, in the examined case, it was impossible to invoke, against the claimant, a term excluding or limiting insurance protection with regard to the insured risk.

The above considerations in general indicate that Art. 3(1) and Art. 4-6 of Directive 93/13 should be interpreted so that in a situation in which a term of the insurance agreement excluding or limiting insurance coverage with regard to the insured risk that the consumer was not in a position to read before concluding the agreement is found unfair by the national court, the court will be obliged not to give effect to that term so that the term does not have a binding force vis-a-vis the consumer.

Both the considerations made in the judgment of the CJEU and the resolution based on those considerations deserve full approval. At the same time, they are a

perfect starting point for an attempt to evaluate national legal provisions on the widely understood pre-contractual obligations to persons insured under group insurance agreements, and – in a wider context – under insurance agreements for the account of a third party. This follows from clear conclusion of the CJEU that an insured person who is not a party to the insurance agreement (either under Portuguese or Polish law) is a consumer and, in consequence, should have an actual possibility to become familiar with all the terms of the agreement.[32] For example, in Polish judicial practice, the courts very often offer extensive interpretation, extending the scope of consumer protection to persons that are not a party to the insurance agreement. In the decision of 15 May 2014,[33] The Supreme Court held that the rationale behind Art. 808 § 5 of the Civil Code consists in extending consumer protection to a (non-entrepreneur) insured person under a contract concluded by the policyholder for his or her account. The consequence of such extension is that the person insured as a part of group insurance acquires the consumer status in the understanding of the provisions of the Civil Code, which, in turn, enables the application of the Act of 23 August 2007 on combatting unfair market practices.[34] In the opinion of the Supreme Court, it would be unreasonable and unfair to limit consumer protection only to the protection against the use in group insurance agreements of so called unfair contract terms. In the judgment of 16 April 2015,[35] the Supreme Court concluded (this time in the context of the Act of 16 February 2007 on the protection of competition and consumers[36]) that for the acquisition of the consumer status in an insurance agreement for the account of a third party it is sufficient to make a unilateral legal act, that is a declaration of intention referred to in Art. 829 § 2 of the Civil Code. In the justification of the judgment of the Court of Appeal in Warsaw of 8 January 2015,[37] we can read that it would be difficult to find axiological reasons to substantiate forfeiture by a consumer incurring the entire financial burden of the agreement concluded with the insurer of the protection under Art. 384 of the Civil Code for the sole reason that the offer of group insurance was made to him through the employer.

[32] Mantrov, V., *Consumer Being a Party to the Group Insurance Contract is Not Just a Silent Observer: The CJEU's Clarification in Ocidental*, European Journal of Risk Regulation, no. 15, 2024, p. 1062–1068. https://doi.org/ 10.1017/err.2024.50.
[33] Judgment of the Supreme Court of 15 May 2014, III SK 75/13 (LEX No. 1511062).
[34] Act of 23 April 1964 – Civil Code. Dziennik Ustaw 1964, No.16, item 93.
[35] Judgment of the Supreme Court of 16 April 2015, II SK 42/14 (LEX No. 1710374).
[36] Act of 16 February 2007 on the protection of competition and consumers. Dziennik Ustaw 2007, No. 50 item 331.
[37] Judgment of the Court of Appeal in Warsaw of 8 January 2015, I ACa 762/14 (Legalis 1186645).

5. REGIME OF LIABILITY

The CJEU ruled that the furnishing of the information obligations related to the unit-linked group contracts forms a commercial practice in the sense of the UCPD.[38] Moreover, these information obligations are to be deemed essential (or 'material') information obligations in the sense of Article 7 UCPD.[39] By consequence, failure to provide that information, concealment of that information or providing it in an unclear, incomprehensible, ambiguous or late manner may cause the consumer to take a transactional decision that he would not have taken otherwise and are therefore a misleading omission in the sense of Article 7 UCPD.[40] The disregard of transparency requirements under one set of legislation (insurance law directives), will lead to the violation of the transparency requirement that flow from Article 7 UCPD.[41] The CJEU first confirmed that both the assurance undertaking and the policyholder fall within the definition of 'trader' of the UCPD.[42] The Court thereby applied on the present facts its ruling of the RLvS judgment where it determined that the UCPD may apply in a situation where an operator's commercial practices are put to use by another undertaking, acting in the name or on behalf of that operator, with the result that the provisions of that directive could, in certain situations, be relied on as against both that operator and the undertaking, if they satisfy the definition of 'trader'.[43] Their legal qualification as a trader in case C-208/21 leads to the result that both traders (bank and insurer) are individually responsible for the proper performance of the pre-contractual information obligations mentioned above for the benefit of the consumer who accedes to the unit-linked group contract, for the part of that obligation which they are required to fulfil.[44] A good example in this respect, to illustrate effective

[38] Judgement of the CJEU of 24 February 2022, A v O and G.W. and E.S. v A. Towarzystwo Ubezpieczeń Życie S.A., Joined Cases C-143/20 and C-213/20 (EU:C:2022:118), § 130. Dir. 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/ 2004 of the European Parliament and of the Council, http://data.europa.eu/eli/dir/2005/29/oj (hereafter: UCPD).
[39] Judgement of the CJEU C-143/20 and C-213/20 (EU:C:2022:118), § 134–135.
[40] Judgement of the CJEU 2 February 2023, K.D. v. Towarzystwo Ubezpieczeń Ż S.A., Case C-208/21, (EU:C:2023:64)
[41] Vereecken J. *Consumer Protection by the ECJ in Unit-Linked Group Contracts: On Transparency, Liability and Nullity under the UCPD, E*uropean Review of Private Law, Kluwer Law International BV, The Netherlands, no. 5, 2023, p. 933–954.
[42] Judgement of the CJEU C-208/21, (EU:C:2023:64), § 68.
[43] Judgement of the CJEU 17 October 2013, R.L. v. S., Case C-391/12, (EU:C:2013:669), § 38.
[44] Judgement of the CJEU C-208/21, (EU:C:2023:64),§ 69; Vereecken J. *Consumer Protection by the ECJ in Unit-Linked Group Contracts: On Transparency, Liability and Nullity under the UCPD, E*uropean Review of Private Law, Kluwer Law International BV, The Netherlands, no. 5, 2023, p. 943.

interpretation of IDD, is provided by French case-law. In the judgment of 25 November 2020,[45] the French Cassation Court (Cour de Cassation) held that the omission to inform the injured party – a person insured under the group insurance formula against accidents – about the benefits of taking out an insurance covering personal injuries to which the insured person might be exposed in the context of paragliding meant that the insured person lost a possibility to take out an insurance offering a wider coverage and was in a position to seek from the group organiser, i.e. sports club, damages for the loss of a chance to be insured on more favourable terms.

6. CONCLUSION

A well-informed customer and adjustment of the proposed insurance agreement to the customer's demands and needs are the principal objectives of IDD, irrespective of the legal form of the insurance contract. The Union legislator, under Art. 20 IDD imposes on insurance distributors an obligatory requirement to determine the demands and needs of the customer, and the demands and needs test is to be based on the information obtained from the customer.[46] In the Directive itself, there is no information on how the analysis of the customer's demands and needs should proceed. IDD does not specify its form, mechanisms or the scope of information an insurance distributor should obtain from the customer.[47] Therefore, the insurance distributor should take all possible measures allowing to fulfil the purpose of the Directive and to adjust the proposed insurance contract to the customer's demands and needs.[48] It can be inferred from the discussed CJEU judgments that the group organiser is a party obliged to provide information and to perform the demands and needs test for customers insured under the group formula. When the information is not given to the consumer in a manner that is compliant with the ECJ's requirements, a simultaneous determination of an infringement under both the UCPD and UCTD will arise. It follows that the

[45] Bigot, R., *L'obligation d'information et de conseil du club sporting*, (á propos de Cass. 1 civ., 25. Nov. 2020, nr 19-17195, F-D), *bjda.fr* 2021, No. 74.
[46] According to IDD, Recital (44): "In order to avoid cases of mis-selling, the sale of insurance products should always be accompanied by a demands-and-needs test on the basis of information obtained from the customer. Any insurance product proposed to the customer should always be consistent with the customer's demands and needs and be presented in a comprehensible form to allow that customer to make an informed decision."
[47] Tarasiuk, A.; Wojno, B., *Analiza wymagań i potrzeb klienta w procesie dystrybucji ubezpieczeń*, Prawo Asekuracyjne, no. 3., 2018 (96), p. 5.
[48] Czajkowska, A., *Analiza wymagań i potrzeb klienta w świetle ustawy o dystrybucji ubezpieczeń – zarys procesu*, Wiadomości Ubezpieczeniowe, no. 4, 2018, p. 20-22.

violation of a transparency requirement in the UCPD will most likely lead to the violation of the transparency requirement enshrined in the UCTD.

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Preliminary communication

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MODERN ECONOMY AND ANCIENT THOUGHT – POSSIBLE ANSWERS FOR MODERN CHALLENGES?

ABSTRACT

One of the most widely used terms to describe today's economy is the Knowledge-Based Economy, which emphasises the importance of knowledge as an invaluable resource. In our paper, we aim to explore the origins and evolution of the concept of the knowledge-based economy, as well as the challenges and opportunities that lie ahead. As new theories continue to emerge, we are no longer at a crossroads, but are faced with a multitude of paths that are difficult to evaluate. In order to meet this challenge, it is proposed that we shift our focus from the contemporary concepts involved in this debate to the fundamental principles of the European heritage, namely Greek thought, which unites politics, economics and philosophy. Therefore, drawing mainly on Aristotle, but also on the ancient concept of myth, understood as a fable with an educational purpose, we would like to argue that what the contemporary world needs is a skill that is not limited to the analysis of facts, but that includes the ability to discuss possibilities, to evaluate probable but not certain outcomes, and to dare to take the risk of acting. This ability, already recognised in antiquity, was what enabled the critical approach to both data and knowledge gained, and thus the effective shaping of the field of practice. We believe that, in an era of rapid economic development, we can still benefit from these ancient concepts, which refer both to universal values as well as individual needs, and emphasize the need for preserving the "human factor", that unites us and seems essential for future development.

Keywords: *knowledge, the Knowledge-Based Economy, Aristotle, myth, philosophy*

1. INTRODUCTION

For centuries, knowledge has been recognised as a catalyst for socio-economic growth and development. However, it was not until the 20th century, when the concept of the Knowledge-Based Economy (further on referred to as KBE) became pervasive, that the substantial role of knowledge in our lives became a widely acknowledged phenomenon, in both theory and practice. The concept of "knowledge" is not universally defined. It is analysed in many disciplines and fields, and the multiplicity of research perspectives on the problem of defining the concept of "knowledge" can testify to its relevance and importance in both individual and social dimensions. The question of the definition of "knowledge" can be and is explored through the lenses of many social sciences, especially philosophy, economics, psychology or sociology, as well as is recognised in the broadly understood humanities. A review of the scientific literature reveals that the absence of a universally accepted definition of "knowledge" can be attributed, as P. Samuelson states, to the tendency to utilise the same term for different concepts and to employ different terms for the same concept.[1] This results in a plethora of definitions and various attempts to characterise this concept. However, it can be posited that no single, overarching definition of knowledge exists, neither in economics nor in other disciplines. Despite the heterogeneity of these positions, it is possible to identify shared elements that facilitate a systematic discussion on the concept and role of knowledge in the contemporary world. "Knowledge" *sensu largo* is defined as a set of information, opinions, views and beliefs that possess cognitive or practical value. *Sensu stricto*, "knowledge" is the totality of information and skills that are employed in problem-solving.[2]

The recognition of this "human factor"[3] has been a focal point within modern social sciences, with an increasing emphasis on this aspects of human personality that are beyond rationality, including emotions, beliefs, values, volition, and so forth. These components, which collectively form the basis of what we might call the "human nature", influence our behaviour, marking it with elements of irrationality and emotionality.[4] We truly believe that these components must also

[1] Quote after: Boettke, P.J., *Information and Knowledge: Austrian Economics in Search of its Uniqueness*, The Review of Austrian Economics, 15/2002, no. 4, p. 272.
[2] Probst, S., Raub, K., Romhardt, K., *Zarządzanie wiedzą w organizacji*, Oficyna Ekonomiczna, Kraków 2002, p. 35.
[3] This phenomenon is particularly evident in the plethora of publications, magazines, popular science articles, even dedicated departments or faculties that focus on this subject, and the literature on the subject in various domains of science, both theoretical and practical, is substantial.
[4] These phenomena have been the subject of philosophical discussion for centuries. For instance, they have been perceived as threatening to the established order (Plato, Hobbes), as an inevitable part of human life (Aristotle), as something positive (Hume), or not

be considered in any deliberation regarding the social sphere, including the economic one. Many contemporary theorists have adopted this approach, which has resulted in the formulation of diverse models, and fields like behavioural economics, institutional economics, purpose economy or economic sociology among others, all explore these issues of human factor in application. However those very human elements have gained their recognition also earlier on. In economic literature regarding KBE, the eminent classical philosophers Socrates, Plato and Aristotle are occasionally designated as first of those who endeavoured to formulate a definition of "knowledge" in antiquity.[5] For them, both what is currently referred to as "scientific knowledge" (and in Greek was called *episteme*) and wisdom (*sofia*) constituted the fundamental objectives of a true philosopher, a goal that both Socrates and Plato sought to attain. However, Aristotle's conception of human beings as "social animals"[6] led him to seek a unification of the objectives of philosophy and human life, incorporating elements such as human will, emotional sphere, and the desire for recognition – precisely the thing modern social sciences aim to accomplish.

The objective of this study is to ascertain whether references to ancient thought, particularly in the context of KBE, including its challenges and problems, can offer suggestions for change or solutions, and whether we can speak of the relevance of ancient thought also to contemporary dilemmas. To achieve this goal, first, various understandings of "knowledge" in economic literature will be presented, as they constitute the basis for understanding the concept of KBE. A literature review is an essential component of any scientific investigation, as a comprehensive understanding of the existing research is indispensable for grasping the core of the issue under consideration. Subsequently, the possibility of referring to antiquity in the economic context will be analysed, taking into account the specificity of the ancient and modern eras as well as timeless threads referring to human nature. Then we will then proceed to discuss the challenges associated with KBE, including the accumulation and utilisation of knowledge to induce change and

completely contrary to reason (Nietzsche). See, for example: Hatzimoysis, A.(ed.), *Philosophy and the Emotions*, Cambridge University Press, New York 2003; Tappolet, Ch., *Philosophy of Emotion*, Routledge, New York-London 2023; Kurth, Ch., *Emotion*, Routledge, New York-London 2022;Rick, S., Loewenstein, G., *The Role of Emotion in Economic Behavior*, [in:] *Handbook of Emotions*, eds. M. Lewis, J.M. Haviland-Jones, L. Feldman Barrett, The Guilford Press, New York 2008, p. 138-156;Loewenstein, G., *Emotions in Economic Theory and Economic Behavior*, The American Economic Review 90/2000, no. 2, p. 426-432.

[5] Fazlagić, J., *Innowacyjne zarządzanie wiedzą*, Difin, Warszawa 2014, p. 28; Nonaka, I., Toyama, R., Hirata, T., *Managing Flow. A Process Theory of the Knowledge-Based Firm*, Palgrave Macmillan, New York 2008, p. 3.

[6] Aristotle considered humans to be *zoon politikon*, which was subsequently transferred into Latin by Cicero, who also recognized humans' social nature.

development, and the risks associated with these processes. These challenges will be examined through the lens of antiquity, drawing upon the myth of Prometheus as a case study due to its connections with technology and its continued relevance to the subject matter. Consequently, the text will employ a multifaceted approach encompassing philosophical analysis, analogy, the comparative method, and references to cultural texts.

2. THE NOTION OF "KNOWLEDGE" IN MODERN ECONOMICS

Given the above, it can be stated that the concept of "knowledge" is intricate and multi-faceted, and as a result, numerous definitions have been proposed within the economic literature. These definitions vary depending on factors such as the time and place of use, the purpose, or the method of interpretation.[7] One interpretation of the concept of "knowledge" found in the economic literature is the hierarchy of cognitive concepts. It is not uncommon, as a result of deliberate (conscious) or unintentional (unconscious) efforts, to erroneously equate the concept "knowledge" with other concepts such as "data", "information" or "wisdom". However, it should be emphasised that, although these concepts are not synonymous, the relationship between them is reflected in their juxtaposition. This relationship is vividly illustrated by the so-called "pyramid" or "hierarchy of knowledge" (DIKW). This concept has been explored by numerous researchers, including B. Lloyd, "Wisdom can be considered to be a useful truth (or knowledge) with a long shelf-life. And Knowledge is useful information with a shorter shelf-life than wisdom, with information being data but with a longer shelf-life"[8] The comprehensive DIKW pyramid/hierarchy was initially presented and described by M. Zelezny[9] and M. Cooley[10] in the mid-1980s. Subsequently, an expanded form of it was proposed by R.L. Ackoff.[11] Nevertheless, as the undertaken literature analysis suggests, it did not garner significant traction among researchers.[12]

[7] Sikorski, J., *Wiedza jako fundament skutecznego konkurowania w gospodarce rynkowej*, NE 28/2018, p. 44.
[8] Lloyd, B., *Knowledge management: what has wisdom got to do with it?*,[in:] *Knowledge Management: Social, Cultural and Theoretical Perspectives*, ed. R. Rikowski, Chandos Publishing, Oxford 2007, p. 7.
[9] Zelezny, M., *Management Support Systems: Towards Integrated Knowledge Management*, Human Systems Management 7(1)/1987, p. 59-70.
[10] Cooley, M., *Architecture or Bee?*, The Hogarth Press, London 1987.
[11] Ackoff, R.L., *From Data to Wisdom*, Journal of Applies Systems Analysis, 16/1989, p. 3-9.
[12] Grabowski, M., Zając, A., *Dane, informacja, wiedza – próba definicji*, Zeszyty Naukowe UEK 798/2009, p. 103.

Therefore, the prevailing hierarchy of cognitive concepts is comprised of four distinct levels: 1) data, 2) information, 3) knowledge, and 4) wisdom. According to K.C. Laudon and J.P. Laudon, data are defined as raw facts that can be shaped and moulded to form information. Information, in contrast, is data that has been shaped or moulded by humans into a meaningful and useful form[13]. T.H. Davenport and L. Prusak posit that knowledge, in contrast to data and information, arises, develops and perpetuates in the human mind as a result of the accumulation of experience and learning, and is, so to speak, a "product" of human mind, which can be categorised into two distinct types: conscious, which is acquired systematically and intentionally during the educational process, and unconscious, which is acquired in an unsystematic, unplanned and unintentional manner.[14]

In the economic literature, knowledge is often interpreted as the result of the application of information in the thinking process. In this view, "knowledge" can be considered a "resource" accumulated and fixed in the human mind, a derivative of the learning and experience process. For example, R. Maier, T. Hädrich, and R. Peinldefine knowledge "as the capacity to interpret and act."[15]

The third interpretation of the concept of "knowledge" found in the economic literature is somewhat similar to the previous one, as it emphasises the essence and importance of knowledge and skills that are used by individuals to solve problems.[16] And so, T.D. Wilson defines "knowledge" as "the mental processes of comprehension, understanding and learning that go on in the mind and only in the mind, however much they involve interaction with the world outside the mind, and interaction with others",[17] while M.C. Weggemann treats it as "a personal capacity that should be seen as the product of the information, the experience, the skills and the attitude which someone has at a certain point in time."[18]

The concept of "knowledge" as a reflection of the actual state of affairs in the human mind is espoused by E. Skrzypek or J. Rokita, among others. According to the former, knowledge consists of the whole possessed reliable information about

[13] Laudon, K.C., Laudon, J.P., *Business Information Systems: a problem solving approach*, Dryden Press, Chicago 1991, p. 14.
[14] Davenport, T.H., Prusak, L., *Working Knowledge – How Organizations Manage What They Know*, Harvard Business School Press, Boston 1998, p. 5.
[15] Maier, R., Hädrich, T., Peinl, R., *Enterprise Knowledge Infrastructure*, Springer, Berlin Heidelberg 2009, p. 20.
[16] Probst, G., Raub, S., Romhardt, K., *locus. cit.,* note 2.
[17] Wilson, T.D., *The nonsense of Knowledge Management*, Information Research, 8/2002, no. 1, p. 144.
[18] Quote after: Beijerse, R.P., *Questions in Knowledge Management: Defining and Conceptualising a Phenomenon*, Journal of Knowledge Management 2/1999, p. 99.

reality but also with the ability to use it[19]. In contrast, J. Rokita's interpretation posits that knowledge is a reflection of the perceived reality, which contains different events, processes and objects, that is formed in human consciousness, as well as the understanding of the characteristics and relations occurring between those elements of reality.[20]

Table 1. Examples of knowledge definitions[21]

Author(s)	Definition
S. Elliott	It is an information that has a value.
B. Gupta, L.S. Iyer, J.E. Aronson	It is a dynamic combination (mixture) of formed experience, value, contextual information, and specialised intuition that provides a substructure for evaluating and incorporating new experience and information.
B. Lloyd	It is information that is used, which in turn leads to the acquisition of further information, which is then transformed into even more grounded knowledge.
T. Davenport, L. Prusak	A fluid composition of concentrated experience, values, relevant information and expert insight that provides a basis for evaluating and assimilating new experience and information. providing a foundation for evaluating and assimilating novel experiences and information. Knowledge is conceptualised and formulated in the minds of individuals. Within organisations, it is frequently documented in documents and databases, as well as in customs, norms and procedures
R. McAdam, R. Reid	It can be defined as a standardised set of facts and rational principles.
W. R. Wiig	It consists of truths and beliefs, perspectives and concepts, judgments, and explicit methods and expertise.

[19] Skrzypek, E., *Nowe podejście do wiedzy w organizacji*, [in:] *Organizacyjne uczenie się w rozwoju kompetencji przedsiębiorstw*, ed. A. Sitko-Lutek, E. Skrzypek, C.H. Beck, Warszawa 2009, p. 59.

[20] Rokita, J., *Dynamika zarządzania organizacjami*, Wydawnictwo Akademii Ekonomicznej w Katowicach, Katowice 2009, p. 109.

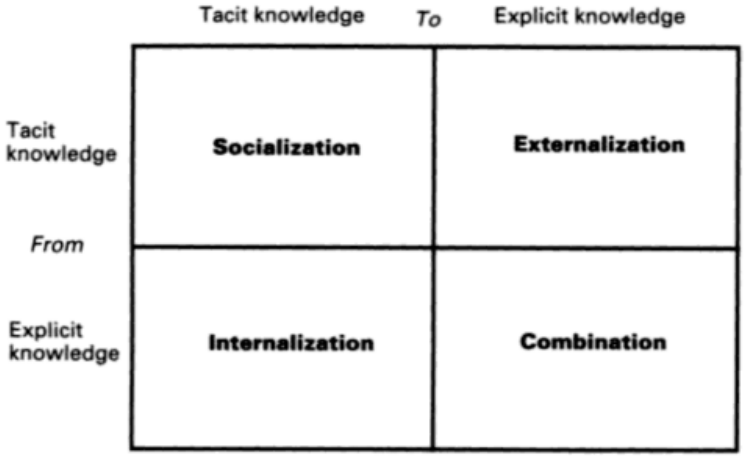
[21] Source: Authors' own presentation based on: Lloyd, B., *op. cit.* note 8, p. 8; Evans, Ch., *Zarządzanie wiedzą*, Wydawnictwo PWE, Warszawa 2005, p. 30; Kisielnicki, J., *Zarządzanie wiedzą we współczesnych organizacjach*, [in:] *Zarządzanie wiedzą w systemach informatycznych*, ed. W. Abramowicz, A. Nowicki, M. Owoc,Wydawnictwo Akademii Ekonomicznej we Wrocławiu, Wrocław 2004, p. 29-30; Szaban, J., *Zarządzanie wiedzą*, [in:] *Miękkie zarządzanie: ze współczesnych problemów zarządzania ludźmi*, ed. J. Szaban, WydawnictwoWyższejSzkołyPrzedsiębiorczościiZarządzaniaim. Leona Koźmińskiego w Warszawie, Warszawa 2003, p. 44; Mikuła, B., *Organizacjeopartenawiedzy*, Wydawnictwo Akademi I Ekonomicznej w Krakowie, Kraków 2006, p. 108-109; McAdam, R., Reid, R., *SME and Large Organisation Perceptions of Knowledge Management: Comparisons and Contrasts*, Journal of Knowledge Management 3/2001, p. 233; Elliott, S., *APQC Conference Attendees Discover the Value and Enablers of a Successful KM Program*, Knowledge Management in Practice, 5/1996, p. 1-8; Gupta, B., Iyer, L.S., Aronson J.E., *Knowledge Management: Practices and Challenges*, Industrial Management & Data Systems, 1/2000, p. 17-21; Nonaka, I., Takeuchi, H., *The Knowledge-Creating Company: How Japanese Companies Create the Dynamics of Innovation*, Oxford University Press, New York-Oxford 1995, p. 58.

J. Kisielnicki	It is an intangible resource of an organisation, related to human activity, the application of which can be the basis of an organisation's competitive advantage. It is related to the resources held: data, information, procedures, as well as experience and training.
J. Szaban	We deal with knowledge when there is a model, a pattern. This archetype is characterised by its repeatability and predictability, and it is through the realisation of its existence and implications that knowledge is achieved. The essence of knowledge lies not in its collection, but in its application.
Mikuła	Knowledge is a flexible and dynamic intangible substance that is the result of the mental processing of information sets possessed and obtained by humans.
I. Nonaka, H.Takeuchi	Knowledge is a confirmed belief.

In summary, the general overview of the definitions of "knowledge" reveals that it is the ability to interpret data and information in the process of making meaning of them. It seems important to note the research of I. Nonaka and H. Takeuchi[22], who, in addition to attempting to define knowledge, also explained the process of its creation and evolution. They argue that "knowledge" is created through the interaction between "tacit knowledge" and "explicit knowledge". This process, termed "knowledge transformation", occurs in four distinct ways (see Figure 1.):

1. From tacit knowledge to tacit knowledge – socialisation
2. From tacit knowledge to explicit knowledge – externalisation
3. From explicit knowledge to explicit knowledge – combination
4. From explicit knowledge to tacit knowledge – internalisation

Figure 1. The knowledge spiral – ways of transformation[23]



[22] Nonaka, I., Takeuchi, H., *op. cit.* note 5, p. 62.
[23] Source: Nonaka, I., Takeuchi, H., *op. cit.* note 5, p. 62.

The knowledge conversion process outlined above is a contributing factor to an increase in the overall stock of knowledge and provides the impetus for innovative activity, which is the main source of growth and development in the modern era. As previously indicated, the primary source of knowledge is humankind, as knowledge is created as a result of mental activities performed by people. Therefore, efforts must be made to make it productive and useful by managing it efficiently and transforming it into innovations that satisfy ever newer conscious and unconscious human needs. This conclusion is of particular significance in the context of the efficiency of innovation creation, which, in the Knowledge Economy, is the primary catalyst for socio-economic growth and, consequently, for the development of society and the economy. Therefore, it seems reasonable to conclude that the majority of definitions of the KBE are based on an attempt to identify its defining characteristics. In examining the extant literature on the subject, the "new economy" can be ascribed the following characteristics:[24]

- The creation and development of intangible capital as the most important factor of production;
- The utilisation of research results in the economy;
- The investment of the state and economic actors in research and development;
- The institutionalisation of innovation in the research and development departments of large corporations;
- The emergence of new economic sectors, designated as high-tech industries, driven by scientific research and the increasing availability of scientific knowledge;
- The advancement and extensive utilisation of telecommunications and information technologies;
- A notable shift in the educational landscape, characterised by the decline of elitism and the proliferation of higher education.

In light of the aforementioned considerations, the following factors have been identified as instrumental in the advancement of KBE:[25]

- The evolution of contemporary educational systems;
- The establishment of scientific and research institutions;
- The expansion of the know-how base;
- Investments in cutting-edge technologies and innovations;

[24] Marcinkowski, A., *Era gospodarki opartej na wiedzy*, [in:] *Wiedza współczesnych organizacji. Wybrane problemy zarządzania*, ed. P. Jedynak, Wyd. UJ, Kraków 2010, p. 20.
[25] Kleer, J., *Gospodarka oparta na wiedzy a globalizacja: związki czasowe i przyczynowe*, [in:] *GOW – wyzwanie dla Polski*, ed. J. Kotowicz-Jawor, PTE, Warszawa 2009, p. 71-73.

- The implementation of modern solutions for optimising the flow of information and the entire information infrastructure;
- An increase in investment in research and development;
- An open economy and society that actively engages in the exchange of goods, services and ideas through the utilisation of IT techniques;
- Modifications to the functions of the public sector;
- A transition from a welfare state to a mixed economic model.

As has been demonstrated, the KBE is a type of economy that is formed and developed under the dominant influence of science or scientific knowledge. Consequently, academic and research centres play a pivotal role in this process. They establish an environment conducive to learning and, consequently, to the generation of new knowledge, its transfer through educational and training activities, its dissemination through information technologies and its utilisation in the form of adaptation to modern industrial solutions.

The trajectory of KBE's evolution is contingent on numerous factors. While the 21st century unquestionably offers significant opportunities, it is important to acknowledge the challenges and problems that it presents. It would be impossible to address all these issues within the boundaries of a single text, particularly as they pertain to the interests of many different social sciences and their respective research methodologies. However, one of the more frequently discussed themes is that of the development of AI, which, on the one hand, facilitates the rapid accumulation and acquisition of knowledge and may automate tedious, repetitive tasks, streamline procedures or minimise the risks of error and the hazards associated with dangerous tasks. As AI systems evolve, they are capable of performing duties of both highly skilled professionals as well as entry-level workers. This shift has the potential to diminish the value attributed to human knowledge, innovation, and creativity, leading to the:

- the emergence and intensification of socio-economic inequalities (e.g. the "digital divide");
- challenges to the existing legal framework, as there is often a lack of appropriate regulations that can ensure the safe and fair use of modern technologies;
- difficulties in managing knowledge and innovation so that they can be efficiently created, processed, stored and used in practice;
- lack of sustainable development policies, leading to the deepening of socio-economic inequalities or environmental degradation due to a lack of sustainable development;

- data security and privacy risks (e.g. abuse, theft, unauthorised access, cyber-attacks), which can lead to serious risks for individuals and societies as a whole;
- volatility and unpredictability of the labour market (e.g. automation, robotisation, digitisation, artificial intelligence), which may lead to changes in the labour market in the form of increasing or decreasing employment levels in various sectors or exclusion from the labour market of workers lacking abilities to adapt to a rapidly changing work environment.

Furthermore, it can result in the instrumentalisation of knowledge, leading to its reduction to basic data sets, that are collected and stored by AI, rather than being utilised as a means of knowledge and be acted upon. Consequently, the "human factor" previously mentioned is lost. Attention is directed towards this element not only in scientific research, but also in popular science texts.[26] However, what needs to be stressed here and possibly can be seen as a way to overcome this challenge, is the fact that in the various divisions and definitions of elements related to knowledge, there is one element that is both obvious and yet the most difficult to grasp. This element is not about knowledge in itself, but about its use in a way that influences development and improves living conditions. This is particularly emphasised in the works of I. Nonaka et. al. where, however, much more emphasis is placed on elements of altruistic behaviour. The assumption is that the utilisation of knowledge is primarily driven by a sense of altruism, with the aim of achieving collective goals, often involving a disregard for personal interests in favour of broader objectives.[27] This raises the issue of integrating individual interests with collective goals. Following the previous individualist shift observed in libertarian thought or the earlier Benthamite atomism, it seems that now we are moving towards the other extreme, that of exclusively altruistic actions for the sake of the community action. Still, regardless of the theoretical framework adopted, it is evident that the human being remains at the centre of these theories, as only humans have the capacity to act and utilise the resources at their disposal – including knowledge.

[26] *Konsekwencje AI – czy gospodarka oparta na wiedzy jest na wylocie?*, Filary Biznesu 2025,https://filarybiznesu.pl/innowacje/nowe-technologie/konsekwencje-ai-czy-gospodarka-oparta-na-wiedzy-jest-na-wylocie/a26743, 1 March, 2025
[27] Nonaka, I., Toyama, R., Hirata, T., *op. cit.* note 5, p. 53.

3. THE NOTION OF "KNOWLEDGE" IN ANCIENT TIMES

This constatement, vital for KBE, is, in fact, is not a novel concept. Already in antiquity, one of the greatest ancient philosophers, Aristotle, highlighted this crucial aspect: regardless of the number of knowledge types that are delineated, defined and valued, they possess no inherent ability to alter the future; human action is indispensable for this purpose. That element found its way to the modern definitions of knowledge as well, for example it is present in the one made by Maier et. al., quoted above, emphasizing the element of "action". However, there is one more thing that ancient philosopher already understood – at times, this human action may not be entirely knowledge-based or rational. It is often accompanied by considerable risks, is susceptible to errors, and its evaluation as beneficial or detrimental only becomes possible over time, often exhibiting a combination of both positive and negative outcomes. Consequently, as Aristotle also implies, such action cannot be undertaken by any arbitrary individual, but rather by one who possesses the capacity to contemplate the possibilities and assume the risks associated with it.[28] Aristotle's insights offer a perspective that transcends time, emphasising the necessity for economic and technological advancements to be guided by deliberate and ethical decision-making.

It may appear to be an excessive undertaking to delve so deeply into the past in this context. While it is true that we predominantly refer to ancient thought, when considering culture, literature, philosophy, even law (although there it is mostly Roman, not Greek thought that is referred to), the question arises as to whether it is possible to translate ancient ideas into contemporary economic dilemmas or to search for solutions so deep into the past. It seems insufficient to assert that the term "economics" itself is of Greek origin, or that Xenophon and Aristotle authored treatises bearing such titles, given that these works primarily addressed domestic management. The predominant perspective asserts that it is only in the wake of a technological revolution that the subject of economics can be meaningfully addressed. Rightfully so, if we restrict ourselves only to the modern thought, however, certain phenomena manifested in history and human life prior to the establishment of appropriate nomenclature and academic disciplines and it is not the existence of the latter that determines the possibility of their analysis; rather, it is the presence of specific mechanisms in human life that does so. Therefore, references to antiquity, which also contain elements of knowledge (a prerequisite for philosophy), and human actions (including those of an economic nature), may prove useful. Furthermore, we cannot concur with the notion that the

[28] Aristotle, *Nicomachean Ethics*, [in:] *Aristotle in 23 Volumes*, vol. 19, transl. H. Rackham, Harvard University Press - William Heinemann Ltd., London - Cambridge, MA 1934, VI,5; VI,7.

evolution of economics can be traced back no earlier than the feudalism,[29] since the earliest known examples of economic thinking can be traced back to the cities of ancient Mesopotamia and Egypt,[30] and the ancient Greeks demonstrated a solid grasp of fundamental economic principles. Aristotle, in employing the term *oeconomica*, was able to differentiate between activities pertaining to the state and public matters, and the art of household management, taxation, loans, banks, and state income.[31] Additionally, for the Greeks, the issue of knowledge was of the utmost importance, not only as a "scholarly" activity, but in practice as well. Philosophers, those who "loved wisdom", taught and advised rulers, proposed potential solutions to practical problems, engaged in politics and even played an active part in economic life: for instance, Thales of Miletus and an anonymous man from Sicily were among the first individual citizens to introduce a monopoly.[32] However, beyond formal treatises, the Greeks also conveyed profound insights into human progress, action and decision-making through the exceptional medium of education – myths and their various forms of expression, including, but not limited to poetry, tragedy, fable or narrative. Unlike abstract theories, myths offered a dynamic mean to explore the consequences of human action, and the classical Greek *mythos* was a well-developed, logical and reasonable plot intended to show probable effects and consequences[33]. In light of the prevailing concern regarding the significance of knowledge, its acquisition, and its utilisation, the myth of Prometheus emerges as a particularly pertinent exemplar. This myth not only explores the themes of innovation and technological advancement, but also underscores the responsibilities and risks associated with knowledge.

The myth of Prometheus is evident in a variety of forms throughout ancient thought, with notable representations found in the works of Hesiod, Aeschylus, and Plato[34]. These accounts vary slightly in their depictions of the specific actions

[29] Piech, K., *Gospodarka oparta na wiedzy jako etap przemian społeczno-gospodarczych krajów transformacji systemowej*, [in:] *Gospodarka, przedsiębiorstwo i konsument a wyzwania europejskie,* eds. J. Nowakowski, A. Skowronek-Mielczarek, SGH, Warszawa 2004, p. 181.
[30] Atanelishvili, T., Silagadze, A., *Formation of Economic Views in the Ancient Era*, Bulletin of the Georgian National Academy of Sciences, 12/2018, no.2, p. 191-196.
[31] Aristotle, *Oeconomica,* transl. E.S. Forster, Clarendon Press, Oxford1920, 1345b-1346a.
[32] Aristotle, *Politics*, [in:] *Aristotle in 23 Volumes*, vol. 21, transl. H. Rackham, Harvard University Press - William Heinemann Ltd., London - Cambridge, MA 1944, 1259a.
[33] Aristotle, *Poetics*, [in:] Aristotle in 23 Volumes, vol. 23, transl. W.H. Fyfe, Harvard University Press - William Heinemann Ltd., London - Cambridge, MA 1932, 1452a.
[34] Hesiod, *Works and Days* 42-105 and *Theogony* 520-616, [in:] *Hesiod. The Homeric Hymns and Homerica*, transl. H.G. Evelyn-White, Harvard University Press - William Heinemann Ltd., London - Cambridge, MA 1914; Aeschylus, *Prometheus Bound*, transl. H.W. Smyth, Harvard University Press, Cambridge, MA 1926; Plato, *Protagoras*, transl.

attributed to Prometheus and the moral evaluation of these actions. However, a consistent core theme can be identified within these variations. Prometheus, a Titan, played a pivotal role in the great war between the Titans and the Olympian gods, led by Zeus. By supporting the latter, Prometheus evaded the fate of being sent to Tartarus. However, following the creation of humankind, Prometheus developed a fondness for these new beings and sought to assist them in not only in surviving in the unfriendly world, but also in leading a fulfilling, good life (as Plato recounts, this desire was influenced by the actions of his less intelligent brother, Epimetheus, who, given the chance to distribute all of the beneficial traits, gave them all to animals).[35] Prometheus, being a highly intelligent individual, recognized the immense potential of fire to enhance the quality of human life. However, Zeus was averse to the idea of bestowing fire upon humankind. Therefore Prometheus has stolen the godly Olympic fire and gave it to people. In reprisal, he was chained to the Caucasus mountain, with an eagle incessantly devouring his liver. Furthermore, humanity was subjected to afflictions such as sickness, old age, woe, and toil, brought by Pandora. Notwithstanding, the gift of fire enabled humanity to illuminate the dark, to maintain warmth, and to prepare their meals. It seems unquestionable that taming of fire can be called the first great technological revolution in the history of humanity, and as such, may fit might even fit the widely recognized Schumpeter's theory of innovation waves, as the very first one that facilitated the development of civilisation, in a manner similar to the impact of the Industrial Revolution on modern times. Consequently, it is unsurprising that the Prometheus myth is predominantly associated with the development and perils of technology.[36]

Whilst these interpretations have some merit, it is our view that they are excessively preoccupied with customisation to align with contemporary needs, and to a certain extent, diverge from the original message. This standpoint is in alignment with the principles articulated by Aristotle and the contemporary challenges confronting KBE – what should and can we do with knowledge, meaning how can we act. Prometheus embodies not only the act of decision-making and the acceptance of consequences, but also the "human factor" previously referenced. Therefore, the presented interpretation refers to that essential, but mostly overlooked aspect of the Prometheus myth, namely the role of applying knowledge through human action, as well as deliberating upon that

W.R.M. Lamb. Harvard University Press - William Heinemann Ltd., London - Cambridge, MA 1967, 320d-322a.

[35] Plato, *op. cit.* note 34, 321c.

[36] Mokyr, J., Vickers, Ch., Ziebarth, N.L., *The History of Technological Anxiety and the Future of Economic Growth: Is This Time Different?*, Journal of Economic Perspectives, 29/2015, no. 3, p. 3; Francis, D., *Technology, Mythology and the Search for Meaning*, Cambridge Scholars Publishing, Cambridge 2024, p. 4, 10.

action, weighing risks and evaluating possible consequences. As explicitly stated by L. Vinsel,[37] the myth is not required to understand technological development; indeed, it may suggest that this development is beyond human control. The Greeks, with their profound engagement in philosophy, mathematics, and astronomy, among other fields, were likely among the last to whom we may attribute a conscious conviction that development hinged on divine whim. The primary leitmotif of the myth, therefore, aligns closely with the objectives of KBE: the risks associated with the application of possessed knowledge, encompassing the decision itself and its potential outcomes.

Prometheus, whose name in Greek means "forethought", is distinguished by his ability to first think, then act, in contrast to his brother Epimetheus ("afterthought"). Prometheus is regarded as one of the most intelligent Titans, having significantly contributed to Zeus's triumph in the Titanomachy. Aeschylus also suggests that the gift of fire enabled humans to master other crafts (*techne),*[38] such as writing, mathematics, astronomy and agriculture, which are fundamental to human civilisation.[39] The etymology and meaning of Greek *techne* clearly lead to modern technology, hence the connection with Prometheus. However, his gift can be problematic. Not only did he himself suffer retribution, but humankind also suffered, as they received new toils and troubles in place of the previous ones. Therefore, the question arises as to whether he can truly be regarded as the hero of humankind.[40] While his gift is often perceived as a symbol of human progress, the myth also conveys a more profound message about the risks inherent in using knowledge to reshape the world. The actions of Prometheus led to significant consequences, both for himself and for humankind. This prompts further inquiry, both pertinent to the narrative of Prometheus and the future of KBE: how can the advantages of novel knowledge be balanced against the potential hazards?

Prometheus's remarkable ability was to look further than others. Not to foresee the future, but to reason and predict, provided he had the premises. He was well-equipped with knowledge, having learnt from his elders, and establishes as a quick thinker, as well as a good and prudent advisor. Yet there were many things he could have done with the possessed knowledge – including doing nothing. The world would not change, humanity would not evolve, everything would be stable. Despite this, Prometheus discerned the potential repercussions and chose to take

[37] Vinsel, L., *Why the Myth of Prometheus Haunts Talk of Technology?*, The Montréal Review 2024, https://www.themontrealreview.com/Articles/Prometheus_Why_the_Myth_of_Prometheus_Haunts_Talk_of_Technology.php, 25 February, 2025
[38] Aeschylus, *op. cit.* note 34, p. 256.
[39] *Ibid., p.* 455-470.
[40] Vinsel, L., *op. cit.* note 37.

action. While he may not have been certain of the divine retribution that would befall humankind, armed with his profound understanding of the gods, he calculated that the advantages would outweigh the costs. He also took a substantial gamble, one that would have significant personal costs. Yet, as depicted in Aeschylus's play, he takes pride in his actions and because of them is widely recognised as the foremost benefactor of humanity.[41] Therefore, the fire-stealing cannot be considered entirely selfless, as Prometheus himself gained fame and renown. From a contemporary perspective, his deed can be regarded as beneficial, as it contributed to the evolution of humanity. However, the initially unanticipated consequences of the act, include also negative ones: wars, environmental degradation, diseases and toil. Prometheus, just like the modern inventors may not have anticipated the dual capacity of their technological contributions (like the dynamite, steam engines, computers, AI and so forth) to be both beneficial and harmful. The utilisation of knowledge for transformative purposes invariably entails a certain degree of risk, stemming from the uncertainty surrounding the consequences of such actions. This risk is further compounded when we discern a potential trade-off between the enhancement of one domain and the deterioration of another: technology vs environment, AI vs human contact. Nevertheless, the reluctance to act, stemming from a fear of the unknown, can result in the mere accumulation of knowledge, a state that is ultimately stagnant. It is evident that the myth reflects not only the acquisition of knowledge, but also its application. This is evidenced by the significance of Prometheus' actions. He not only had or passed knowledge, but also taught people how to act upon it.

This finding is in alignment with the differentiation between the types of knowledge posited by J. Mokyr,[42] who, while discussing the origins of the knowledge economy, introduced the concept of propositional (theoretical) and prescriptive (practical) knowledge. These can be easily connected with the ancient Greek categories of *episteme* – philosophical, full knowledge regarding the world as it is – and *techne*, the knowledge of how to do things, how to craft them. For a considerable period, the first one was regarded as the most significant, as it was believed to facilitate access to the ultimate truth about the world. However, this form of knowledge, as articulated by Hannah Arendt, results in a state of *vita contemplative,*[43] a life of contemplation, where the philosopher becomes detached from the material world and merely observes it, seeking universal truths. In this realm of observation no possibility for transformation exists. Aristotle's philosophical perspective places greater emphasis on individuals who engage in

[41] Aeschylus, *op. cit.* note 34, 101, p. 236-240.
[42] Mokyr, J., *The Gifts of Athena: Historical Origins of the Knowledge Economy*, Princeton University Press, Princeton 2011, p. 4.
[43] Arendt, H., *The Human Condition*, University of Chicago Press, Chicago-London 1998, p. 14, 20.

deliberation and action.[44] He employs the Athenian statesman Pericles as a case study, and we draw parallels with Prometheus, highlighting the common threads between these two figures. Both Pericles and Prometheus find themselves confronted with challenging circumstances: the former with the Peloponnesian War, while the latter faces the threat of humankind's downfall. They both meticulously assess the situation and select the course of action they deem most rational, carefully balancing the pros and cons. However, their actions extend beyond mere presentation of possibilities or recommendations; they actively act, and not merely as craftsmans or demagogues who influence and manipulate others to gain support, but as conscious individuals, aware of the risks and able to draw on both the propositional and prescriptive "knowledges" Mokyr writes about, to achieve change and some effect. Yet, there is more to that. The knowledge they possess is applied in a social situation, in relation to other humans. They interact with others, hoping that their actions will be recognised and lead to something good, both for themselves and others, even if the personal gain is something immaterial, like fame and renown. The value of myth lies in its ability to form yet another relationship: between the heroes of the story and the audience. It provides a means to grapple with challenging dilemmas or moral issues without direct involvement, yet it engages all human emotions in the process. This formed the foundation of Greek education and was known as catharsis in theatre. Consequently, Greek myth retold offers insights into knowledge and its application, as well as the elusive "human factor".[45]

4. CONCLUSION

When considered within its original context, the myth of Prometheus offers an important lesson for the KBE. The ancient Greeks already recognised that knowledge alone is insufficient, stressing the importance of its practical application. This element is also getting emphasized in modern definitions: that knowledge requires action and interaction with others to play a role in society and economy.[46] However, this application, to be successful, also requires knowledge of more elusive elements, that cannot be kept within the labels of "data" and "information", such as the ability to deliberate upon possible effects and undertake a considerable risk with no guarantee of success. These human elements also constitute a form of knowledge – not necessarily tacit, as they might be realised

[44] Aristotle, *Nicomachean Ethics*, *op. cit.* note 28, VI, 5.
[45] For more on the modern educational aspects of the Greek myths, see: Ceglarska, A., *The relation between classical and legal education: the role of myth in educating lawyers*, Miscellanea Historico-Iuridica, 23/2024, no. 2, p. 277-300.
[46] E.g. Maier, R., et al, *op. cit.* note 15; Wilson, T.D., *op. cit.* note 17.

by the doer, but far less certain, as they refer to the emotions, opinions and individual will. Aristotle's philosophy and the myth of Prometheus' gift of fire both serve to highlight the fact that every technological advancement and economic decision is accompanied by a certain degree of risk and the possibility of unintended consequences. However, it is equally important to recognise that stagnation, caused by fear, is not a viable solution. The true challenge lies not only in the acquisition of knowledge but also in its transformation into meaningful action. In this regard, Prometheus is not only the one possessing knowledge – the philosopher, leading the *vita contemplativa* – but he is also the one who possesses what Aristotle calls the "practical knowledge", that requires deliberation, action and courage – to take the risks and to wait for evaluation from others. That practical knowledge should be the very type of knowledge that KBE seeks and needs as it relates to both the accumulation and the application of said knowledge, and would enable further development. As was the case with Prometheus and as is now, action depends on the individuals. L. Vinsel states "feeling that the aggregate effects of technology use is beyond our control as individuals is perfectly understandable".[47] Nevertheless, he adds that there are a multitude of things that are beyond human control. Inaction, or impulsive action, is not a viable solution, nor is it sufficient to merely conform to established practices or frameworks. At times, unconventional and potentially risky actions are necessary to address complex issues, as ultimately, development is not about any quantifiable indicators that we use to describe it,[48] but rather about enhancing human life, a concept that is inherently subjective and influenced by individual preferences, values, and opinions. That element of uncertainty, of acting without the full knowledge and risking the judgement of others, the Aristotelian "practical knowledge", still seems most difficult to grasp.

The appeal of AI appears to lie in its capacity to avoid such element of uncertainty by amassing precise and comprehensive data. However, as K. Różanowski rightfully observed,[49] contemporary artificial intelligence, at its present (and likely for a considerable time more) developmental stage, exhibits a deficiency in strictly human competencies, notably consciousness, emotion, awareness or social intelligence. What was already understood by the ancients, should also guide the future for the KBE now, and all results of human innovative mind should be used in a conscious and responsible way, keeping in mind that these are means to an end, not goals themselves and there is always a need for a conscious person behind them, both willing to take the risk of using them and deliberate or asses

[47] Vinsel, L., *op. cit.* note 37.
[48] Such as, for example: GDP per capita, Gini coefficient, Global Innovation Index, Global Sustainability Index, Human Development Index, etc.
[49] Różanowski, K., *Sztuczna inteligencja: rozwój, szanse i zagrożenia*, Zeszyty Naukowe Warszawskiej Wyższej Szkoły Informatyki, 2/2007, p. 109-135.

consequences. A discernible shift away from the positivist paradigm of thinking resultedin a growing acknowledgement of this element across various research trends and new models. K. Raworth also gives a striking example for the need to change our paradigms of thinking further, an example she deemed important for her need to create a new economic theory. She relates the stories of students of economics in Paris and Harvard who decided to take action, in order to change and improve their current educational situation, despite the inherent risks involved.[50] In Paris they have sent a critical letter to their lecturer, while at Harvard, they have left a lecture given by a distinguished scientist to protest against outdated forms of teaching economics. The risk faced by the students was twofold: firstly, that their demands would remain unfulfilled, and secondly, that they would face some form of consequence. However, they were conscious of the pressing need for change. For Raworth, it resulted in forming the very imagination-appealing doughnut economy model. And so, contemporary trends in the development of economics clearly suggest that taking into account this human factor is crucial for the economy itself and for its understanding by society.

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[50] Raworth, K., *Doughnut Economics*, Chelsea Green Publishing, White River Junction, VT 2017, p. 9.

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SALE OF CRYPTO-ASSETS AS AN ALTERNATIVE FORM OF FINANCING BUSINESS COMPANIES*

ABSTRACT

The transformation of the economy into a digital economy is a highly topical issue, bringing new challenges such as the need for legal regulation of digital assets. Among the most prominent digital assets are crypto-assets, which are currently regulated at the EU level by the MiCA regulation. In the presented article, the authors explore the issue of issuing crypto-assets as a source of alternative financing for business companies. Crypto-assets, such as cryptocurrencies or tokens issued through Initial Coin Offerings (ICO) or Security Token Offerings (STO), provide businesses with innovative options for raising capital, independent of traditional financial institutions. The introductory part of the article provides a general definition of traditional and alternative sources of capital acquisition for business companies. In the subsequent section, the authors also briefly address the process of Initial Coin Offerings. Their aim is to highlight the advantages, disadvantages, and other associated risks linked to this form of capital acquisition. Finally, the authors focus in more detail on defining crypto-assets and their specific classification. Special attention is given to tokens and coins, that are not subject to legal regulation. In this context, the article seeks to answer whether, under the current regulatory framework, a business company can offer crypto-assets freely, that is, outside the regulatory scope of the MiCA regulation or other legal provisions, if such tokens serve as a means of rising capital.

Keywords: *crypto-assets, tokens, cryptocurrencies, initial coin offerings, utility token*

1. INTRODUCTION

The modern world requires modern solutions for modern problems. The development of digital technologies brings with it a significantly challenging task

the creation of balanced legal regulations that, on one hand, provide sufficient protection and, on the other hand, do not hinder the advancement of new technologies. One such example is the emergence of cryptocurrencies and crypto-assets, which have enjoyed considerable popularity for more than a decade. Gradually, processes have been developed that allow various projects to be financed through the creation and sale of crypto-assets. From the perspective of traditional notions of business financing, this type of financing (along with a range of other new and innovative methods) is considered to be so-called alternative form of financing. However, it is important to point out that although alternative forms of financing may be seen positively as they usually leverage the possibilities of modern technologies their legal regulation is often lacking, or legislators attempt to subject these new methods to existing legal frameworks. Nevertheless, these legal frameworks are frequently insufficient. In this article, the authors provide a closer analysis of the relatively new legal regulation concerning crypto-assets and their public offering, as set out in Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on Markets in Crypto-Assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937.[1] The authors focus on explaining the ICO process, the categorization of tokens under MiCA, and the regulatory obligations that MiCA imposes on issuers within the ICO framework.

2. TRADITIONAL FORMS OF FINANCING BUSINESS COMPANIES

The realization of business activities inevitably brings the need to allocate a certain amount of capital. There are multiple ways to acquire this capital and they can be categorized according to various criteria. At first glance, one might assume that the necessary funds primarily come from the entrepreneur themselves, meaning from their own resources. However, the realities of implementing business plans, as well as conducting business activities, often disprove this assumption. Although there are some exceptions, in many cases self-allocated funds are insufficient and

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[1] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on Markets in Crypto-Assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, OJ L 150, 09/06/2023 (hereinafter: MiCA).

this method of financing also carries a significant risk of loss due to potential failure.[2]

The financing of business companies represents a complex structure of relationships that goes beyond the scope of corporate law.[3] The choice of a specific method, or a combination of methods, also depends on other aspects (e.g., tax-related considerations) that an entrepreneur should consider. In academic literature, business financing sources are traditionally divided into so-called equity (own) and debt (external) financing sources. Equity financing sources include, for example, share capital and partners' contributions, their additional payments and deposits, reserve funds and other funds, retained earnings after taxation, and so on.[4] Debt financing sources, on the other hand, include loans, credits, and non-repayable financial aid provided from the state budget, and others.[5] Alternative financing methods for business companies (hereinafter: AFM) are increasingly coming to the forefront. These include, for example, venture capital, factoring and forfaiting, mezzanine capital, crowdfunding, project financing, and others. In academic literature, AFM is typically considered a newer, more innovative form of financing, which is less familiar to entrepreneurs compared to traditional financing methods, such as bank loans.[6] AFM is characterized by lower rigidity, greater flexibility, and in today's business environment, it plays a significant role in the development of business companies and the support of innovations. In the presented article, we focus on a specific type of AFM, namely the sale of crypto-assets.

3. INITIAL COIN OFFERINGS – A BRIEF SUMMARY

Initial Coin Offerings (hereinafter: ICO) represent one of the new methods of raising capital by business companies (particularly for projects in the field of cryptocurrencies or within the blockchain sector) and are primarily used in the early stages of their existence (startups). In academic literature, several definitions of ICOs can be identified.[7] However, from these definitions, it is possible to

[2] Ovečková, O.; Csach, K.; Žitňanská, L, *Obchodné právo 2. Obchodné spoločnosti a družstvo*, Wolters Kluwer SR, Bratislava 2020, p. 361.
[3] *Ibid.,* p. 355.
[4] Dolný, J., Financovanie obchodnej spoločnosti a družstva, In: Patakyová, M.; Ďurica, M.; Husár, J., Aplikované parvo obchodných spoločností a družstva – ťažiskové inštitúty. 1. Vydanie, Wolters Kluwer SR, Bratislava 2021, p. 474.
[5] *Ibid., p.* 474-475.
[6] *Ibid., p.* 505.
[7] Jiasun, L.; Mann, W., Initial Coin Offering and Platform Building, January 31, 2018, p. 2, https://finance-conference.wpcarey.asu.edu/sites/default/files/imported/initial-coin-offering.pdf , 21 February, 2025.

abstract a few fundamental characteristics that describe ICOs more closely. In general, an ICO is understood as a process of raising capital by an entrepreneur, which consists of creating so-called coins or tokens, which are subsequently sold to the public investors typically in exchange for other cryptocurrencies (quite often Ethereum or Bitcoin), or for fiat currencies. According to some sources, tokens can also be exchanged for the right to use a product or service that the entrepreneur conducting the ICO is developing.[8] This means that these tokens may later be used either to access the entrepreneur's future services or they may be traded on cryptocurrency exchanges (some investors expect a rapid increase in the value of these tokens with the prospect of selling them later at a profit).

One of the most significant projects that utilized an ICO is Ethereum. It is important to note that while Ethereum is commonly perceived as one of the best-known cryptocurrencies, it is often overlooked that the essence of Ethereum also lies in the creation of a platform that has applications in decentralized finance, enables the creation of smart contracts and the development of decentralized applications (aka dApps), and more.[9] The Ethereum project raised approximately 17 million dollars in 2014 through an ICO in exchange for Bitcoin.[10]

As mentioned earlier, ICOs are predominantly used in the blockchain environment. Naturally, this raises the question of what the term blockchain means. It is important to point out that crypto-assets are transferred and stored through Distributed Ledger Technologies (DLT), with blockchain representing just one type of DLT.[11] Simply put, blockchain is a digital transaction database distributed across a network of computers. New transactions are called "blocks" and are organized into a chronological chain — a blockchain.[12] For completeness, it should be noted that DLT is also defined by MiCA in Art. 3 sec. 1 num. 1 as:

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or see National Bank of Slovakia, Crypto-Assets and Initial Coin Offerings (ICOs) - https://nbs.sk/en/financial-market-supervision1/fintech/crypto-assets-and-initial-coin-offerings-icos/, 21 February, 2025.

[8] Jiasun, L.; Mann, W., Initial Coin Offering and Platform Building, January 31, 2018, p. 2, https://finance-conference.wpcarey.asu.edu/sites/default/files/imported/initial-coin-offering.pdf , 21 February, 2025.

[9] See Ethereum, https://ethereum.org/en/what-is-ethereum/, 21 February, 2025.

[10] See Ethereum and the ICO Boom - https://www.gemini.com/cryptopedia/initial-coin-offering-explained-ethereum-ico#section-ethereums-role-in-the-ico-boom, 21 February, 2025.

[11] Putera, M., *Kryptoaktíva, ich zdaňovanie a exekúcia. 1. vydanie*., C. H. Beck, Bratislava 2024, p. 29.

[12] Hayes, A., Blockchain Facts: What Is It, How It Works, and How It Can Be Used, 16 September, 2024, https://www.investopedia.com/terms/b/blockchain.asp, 21 February, 2025.

"distributed ledger technology or DLT means a technology that enables the operation and use of distributed ledgers".[13]

Based on the basic principle of ICOs described above, ICOs are often compared to Initial Public Offerings (IPOs), in which business companies enter the stock market and sell shares.[14] However, even though these processes may seem similar, there are certain differences. ICOs are primarily used in the early stages of a business company's existence, while IPOs can also be used for the expansion of an already established business company. From the investor's perspective, the difference also lies in the fact that while in an IPO the investor acquires shares, often with voting rights or ownership participation in the business company, in an ICO the investor acquires tokens/cryptocurrencies, which may have various uses they may be associated with rights to access services or products of the business company, or they may be sold later, but they usually do not grant ownership rights in the business company. Another important difference is legal regulation. ICOs have long been unregulated, and even today, regulation is only in its early stages. In contrast, IPOs are subject to strict legal regulations. This also relates to another key aspect associated risks. It can be stated that, in comparison (also due to long-term legal regulation), ICOs are a much riskier investment than IPOs, with a significantly more uncertain outcome.

4. REGULATION OF THE ICO IN THE EU

The method of raising capital through ICOs has been in use for over a decade. However, with the arrival of this innovative form of financing, several risks emerged. The first and natural risk was that ICOs were initially not subject to any regulatory frameworks. The seriousness of this absence of legal regulation must also be viewed in the context of the period when ICOs began to emerge. It is important to recall that with the arrival of the cryptocurrency phenomenon and promises of extreme returns, people began investing money in various projects without fully understanding the entire process. The success and rapid value increase of certain cryptocurrencies (such as Bitcoin) may have created the false impression that the launch of every new cryptocurrency would automatically lead to a significant appreciation of the initial investment. This perception often led to the belief that one must invest as soon as possible, while the price is still low.

[13] Art. 1 sec. 1 num. 1 MiCA. See also Putera, M., *Kryptoaktíva, ich zdaňovanie a exekúcia. 1. vydanie*., C. H. Beck, Bratislava 2024, p. 29.
[14] Delivorias, A., Understanding initial coin offerings. A new means of raising funds based on blockchain, July 2021, p. 3, https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696167/EPRS_BRI(2021)696167_EN.pdf, 21 February, 2025.

These circumstances created wide space for various types of fraud, including ICO scams without a real business objective or concrete vision. A natural consequence of these risks was the gradual erosion of investor trust.

Over time, however, various regulatory approaches to ICOs have been developed, including the creation of regulatory sandboxes or, in some countries, the complete prohibition of ICOs.[15] A significant milestone in this field at the EU level was the adoption of the MiCA Regulation, which aims to mitigate the mentioned risks and harmonize the legal framework across EU Member States. The importance of this regulation is reflected in Art. 1 sec. 1 of MiCA, which states: "This Regulation lays down uniform requirements for the offer to the public and admission to trading on a trading platform of crypto-assets other than asset-referenced tokens and e-money tokens, of asset-referenced tokens and of e-money tokens, as well as requirements for crypto-asset service providers."[16] MiCA also establishes rules for the issuance, offering, and trading of crypto-assets.[17]

But what does MiCA regulation mean for ICOs? Probably the most significant contribution of MiCA in the field of ICOs is investor protection, which is ensured through the imposition of multiple obligations. The level of protection, or rather the extent of these obligations, depends on the type of tokens involved. The following tokens fall under the scope of MiCA:

- ART Tokens (Asset-Referenced Tokens)
- E-Money Tokens (EMTs)
- Tokens other than ART or EMTs

The classification of individual crypto-assets and the related obligations that increase the level of investor protection are examined in more detail in the following sections.

5. CLASSIFICATION OF CRYPTO-ASSETS

First, it is important to say that not every kind of digital coins or tokens fall within the scope of MiCA. From the perspective of digital coins and tokens, MiCA's scope is limited to crypto-assets that matches its definitions. If we consider digital tokens or coins as an alternative form of financing for a business company - as a source of capital, then we need to work with presumption that such business company acts as an issuer. For this reason, such tokens would not be automatically excluded from MiCA solely on the basis that they are provided in a completely

[15] *Ibid.,* p. 5.
[16] Art. 1sec. 1 MiCA.
[17] Art. 1 sec. 2 MiCA.

decentralized manner. Even partial centralization of processes means that the MiCA regulation should apply.[18]

In accordance with baseline definition of crypto-assets in Art. 3, sec. 5 of MiCA, crypto-assets is defined as a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology. This definition is crucial for assessing intangible digital token as crypto-asset governed by MiCA. From a functional perspective, a crypto-asset must be capable of being transferred from one owner to another and must be storable on distributed ledger technology or similar technology. For this reason, assessing a token as a crypto-asset is inherently linked to the technology that enables its operation. From that point of view, it is important to emphasize that MiCA rules are primarily designed to protect investors and consumers, ensure market integrity and financial stability and the operation of payment systems.[19] These regulatory goals are essential for interpreting why some types of crypto-assets should be regulated and to what extent. Respecting these various regulatory goals, there are different rules for different types of crypto-assets. This approach is clearly stated in Recital 18 of MiCA: *"MICA Regulation classifies crypto-assets into three types, which should be distinguished from one another and subject to different requirements depending on the risks they entail. The classification is based on whether the crypto-assets seek to stabilise their value by reference to other assets."* From this perspective, it is clear that one of the MiCA´s regulatory approaches is based on assumption that tokens can have different functions, which are inevitably connected to specific risks.

Classification of crypto-assets is therefor based on three main groups. *"The first type consists of crypto-assets that aim to stabilise their value by referencing only one official currency. The function of such crypto-assets is very similar to the function of electronic money as defined in Directive 2009/110/EC. Like electronic money, such crypto-assets are electronic surrogates for coins and banknotes and are likely to be used for making payments."* These are so called E-money tokens (hereinafter as EMTs). MiCA approach to this category of token emphasizes, that they must be treated the same as electronic money and may only be issued by electronic money institution and credit institutions. MiCA´s regulatory requirements just supplement existing regulation of electronic money and crypto-asset rules do not affect existing e-money regulation. To prevent regulatory circumvention, MiCA provides a broad definition of e-money tokens in order to capture all type of crypto-assets referencing to single fiat currency.[20] If a crypto-

[18] MiCA, recital 22.
[19] See MiCA recitals 4, 12, 27.
[20] MiCA, recital 19.

assets value is referenced on more than single fiat currency, it is treated differently.*"The second type of crypto-assets concerns 'asset-referenced tokens', which aim to stabilise their value by referencing another value or right, or combination thereof, including one or several official currencies. That second type covers all other crypto-assets, other than e-money tokens, whose value is backed by assets, to avoid circumvention and to make this regulation future-proof."* These are so called Asset-referenced tokens (hereinafter as "ART Tokens"). As is evident from the definition of these tokens, their value is tied to the value of another asset (tangible or intangible), including multiple fiat currencies. Such tokens resemble commodity derivative contracts, and due to the risk of adoption by its holders as means of exchange, issuers of such crypto-assets are subject to stricter requirements than issuers of other crypto-assets.[21]
"Finally, the third type consists of crypto-assets other than asset-referenced tokens and e-money tokens, and covers a wide variety of crypto-assets, including utility tokens." This kind of tokens are so called other than Asset-referenced tokens (hereinafter as Other than ART Tokens). But it is rather a residual category for crypto-assets, then homogenous designation of tokens with special characteristics like at the case of EMTs and ART Tokens.

The functional approach is legislatively materialized in follow-up definition in Art. 3, sec. 6, 7 of MiCA. MiCA in sec. 9 defines so called "utility tokens" intended to provide access to goods or services supplied by its issuer, which are completely exempted from Title II od MiCA, provided that these goods or services already exists. If they do not yet exist, the duration of the offer to the public as described in the crypto-asset white paper shall not exceed 12 months from the date of the publication of the crypto-asset white paper.

The basic concept of crypto-asset classification is further elaborated in ESMA Guidelines.[22] The principle that "one size does not fit all" is also emphasized in the ESMA report in several answers to the questions. The prevailing principle for assessing nature of tokens is "substance over form".[23] Such approach must be considered not only when assessing nature of token as ART Token, EMTs, or other, but also when evaluating whether crypto-assets meet the characteristics of other financial instruments. his is particularly important in the context of recognizing financial instruments. The regulatory goal is to avoid regulatory overlap between MiCA and dedicated regulation of capital and financial market that already exists.

[21] MiCA, recital 40.
[22] Final Report. Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments. 17 December 2024. ESMA75453128700-1323.See ESMA Guidelines sec. 61. to 64.
[23] ESMA Guidelines, sec. 31 – 34.

Basic differences between various obligations from the point of issuer at the point of the token issuance, should be illustrated by following table:

Tokens / Obligation	**ART Tokens (Asset-Referenced Tokens)**	**E-Money Tokens (EMTs)**	**Tokens Other Than ART (e.g., Utility Tokens)**
Authorization for Issuance	Yes, the issuer must obtain authorization from the regulator or be a credit institution. (Article 16 MiCA)	Yes, the issuer must be authorized as a credit institution or an e-money institution (Article 48 MiCA)	No (e.g. Article 4 sec. 3 MiCA), but registration may be required in certain cases.
Whitepaper	Mandatory, Scope of information according to Article 51 MiCA.	Mandatory, Scope of information according to Article 19 MiCA. Disclaimer that white paper was not approved	Mandatory with exemptions. Scope of information according to Article 8 and 9 MiCA. Is not part of authorization. Disclaimer that white paper was not approved. (Exemptions e.g. Article 4 sec. 3 MiCA),
Capital Requirements	Yes, minimum own funds (either €350,000, 2% of reserves, or another set amount) (Article 35 MiCA)	Yes, follows the same rules as e-money institutions	No, but some requirements apply to platform operators in case of "person seeking admission to trading"
Regulatory Supervision	Issuer is supervised by regulatory body	Issuer is supervised by regulatory body for e-money institutions	Regulation mainly focuses on platform operators (not issuers)
Use for Payments	Possible, but not the primary purpose	Primarily intended as a means of payment	Not primarily intended for payments. Payments only for issuers gods and services (not third parties) are permitted under certain circumstances.

According to MiCA art. 4, sec. 2, offers of crypto-assets Other than ART are not subject of duties of drawn of crypto-assets whitepaper, notified it to national

authority, publish white paper and marketing communication in accordance with MiCA art. 9. Such exemptions are very similar to exemptions from Prospectus regulation on public offer of securities[24], providing fact that (i) such offer is dedicated for maximum 149 persons in each member state, (ii) the total consideration of an offer to the public of a crypto-asset in the Union does not exceed EUR 1 000 000, (iii) offer is limited solely to qualified investors within the meaning of MIFID II.

6. MICA EXMPTED TOKENS

6.1. Exemptions due to other regulation

Another issue is exemption of tokens or coins that should fall under specific regulation of financial and capital market, mainly as financial instruments regulated under MIFID II[25]. ESMA has prepared specific guidelines to assist with the correct classification of tokens. This task is especially challenging when assessing nature of ART Tokens and financial instruments. ESMA has developed the following updated guidelines. (5) Guidelines on the classification of crypto-assets as financial instruments, in the form of general guidelines (Guideline 1) and in particular in relation to classification of crypto-assets as transferable securities (5.1 - Guideline 2) Classification as other types of financial instruments (5.2), which include money-market instruments (Guideline 3), units in collective investments (Guideline 4), derivative contracts (Guideline 5), emission allowances (Guideline 6). According to these guidelines, if crypto-assets match the definition of any of the financial instruments regulated under capital market law, they should be treated under this regulation.[26] Guidelines 1 to 6 aim to explain the key differences between crypto-assets and recognized financial instruments and clarify the extent of which MiFID II concepts apply to the assessment of crypto-assets.

Problems arise in case of so called "hybrid nature" of some crypto-assets. According to ESMA, it is necessary to consider whether a hybrid token has

[24] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, OJ L 168, 30/06/2017.
[25] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12/06/2014. For other relevant capital and financial market regulation see ESMA Guideline, p. 6.

features of financial instrument, in which case such a nature should take precedence in its classification. According to Guideline 9, only when criteria of financial instruments are not met, tokens should be classified as utility token.[27] The crucial factor is the inherent characteristics of crypto-assets, rather than the labels given to them by issuers.[28] In this light, if a token has the prevailing features of a financial instrument, the specific regulation of financial and capital markets applies, including rules on issuance (e.g. Prospectus regulation).

6.2. Purely decentralized tokens and other crypto-assets

As stated earlier, MiCA does not cover tokens or coins that are provided in a completely decentralized manner; however, partial centralization is sufficient for classifying a coin or token as crypto-assets.[29] Such partial centralization should consist of the connection of a specific right or value to a certain market participant (e.g. voting right or right to profit). The absence of an issuer does not prevent from assessing the factual behaviour of persons involved as regulated service providers or platform operator. However, interpretation of decentralized crypto-assets is outside of the scope of ESMA Guidelines.

The connection of a specific right to token or coin (including right to profit) is not sufficient on its own to classify such token under MIFID II. What is crucial is whether the ownership of such a token or coin is transferable to third parties. The mere fact that such token is accepted by the issuer or offeror does not lead to the fact, that this token falls under MiCA. If the purpose of token or coin is to raise capital for crypto project, and if investors, in return, receive a share in profit of that projects, and as long as crypto projects have general industrial or non-financial purpose, such tokens should fall under MiCA rather than collective investments regulation.[30] If the reward for coin-owner is non-financial (e.g. right to pre-order final products of crypto project) such tokens could be considered as utility token and fall outside of MiCA. From this perspective it is also important to follow ESMA Guidelines on key concepts of AIFMID[31] to avoid classification under collective investment regulation. If the purpose of a utility token is to finance cash flow in exchange of ownership of products or services that do not yet exist (at the time of its white paper publication), the public offer of such tokens must not exceed 12 months. According to art. 6, sec. 5, let. d) MiCA, it is acceptable that

[27] ESMA Guidelines, sec. 74.
[28] ESMA Guidelines, sec.75.
[29] MiCA, recital 22.
[30] ESMA Guideline, sec. 43.
[31] Guidelines on key concepts of the AIFMD, 13 August 2013, ESMA/2013/611.

such tokens may not be exchangeable in the case of a failed crypto-project. However, such information must be clearly stated in its white paper.

Moreover, Title II of MiCA is not applicable if tokens Other Than ART and e-money are offered for free (MiCA, art. 4, sec. 3, let. a), or if tokens are created automatically as a reward for operating distributed ledger technology or validating transactions (MiCA, art. 4, sec. 3, let. b), tokens are providing access to existing good and services (MiCA, art. 4, sec. 3, let. c), use of tokens is limited only in specific network of merchants with contractual arrangements with the offeror (MiCA, art. 4, sec. 3, let. d).

6.3. Non-fungible and unique tokens

Non-fungible tokens (commonly known as NFTs) represent a specific category of tokens that typically serve as a crypto alternative to traditional art collections, such as paintings or other artworks. From the MiCA perspective, such tokens may be exempt from regulation if they meet the criteria of non-fungibility and uniqueness. According to ESMA Guideline 8, the concept of non-fungible and unique assets should be interpreted regardless of its pure technical uniqueness (e. g. unique identifier or the use of specific technical standards or features).[32] Concept of non-fungibility and uniqueness must be based on the assessment of (i) intrinsic value and rarity (in comparison with other crypto-assets), (ii) utility and functionality and (iii) ownership of assets and associated rights. This assessment is not dependent on the asset´s transferability on secondary market, which is acceptable. Fractional NFT (e.g. one unique picture is divided into a lot of smaller parts) should be partially considered as failing to meet the criteria of uniqueness and non-fungibility, even though original picture may be unique.[33]

7. CONCLUSION

In the presented article, we have addressed the issue of categorizing crypto-assets under the MiCA Regulation and its impact on the financing process of business companies through ICOs. The findings indicate that ICOs may represent a highly innovative way of raising capital for entrepreneurial projects. On the other hand, the long-standing absence of adequate legal regulation of this process has resulted in fraud and a partial loss of investor confidence. For these reasons, the adoption of the MiCA Regulation can be considered a positive step. However, it remains questionable whether the regulation contained in MiCA will be able to eliminate

[32] ESMA Guidelines, sec. 68.
[33] ESMA Guidelines, sec. 70.

the associated risks, whether it will not create an unnecessary obstacle to the development of this process, and whether it will actually lead to the growth of ICO-based financing.

Based on a deeper analysis of MiCA's provisions, we have concluded that not every ICO necessary fall under the scope of MiCA regulation - it depends on the nature of the particular token. MiCA applies only if the token meets the definition and criteria of a crypto-asset. Even though MiCA has already entered into force, it will still be possible to issue tokens or coins that qualify as crypto-assets but fall outside MiCA's regulatory regime. However, they cannot be used as a means of raising capital other than through selling of already existing goods and services. Utility tokens for non-existing goods and services may only be offered for a maximum period of 12 months from the date of whitepaper publication. Furthermore, MiCA provides certain exemptions from specific obligations, which simplify the ICO process for crypto-assets other than Asset-Referenced Tokens (ARTs) or e-money tokens. These exemptions apply if: (i) the offer is addressed to a maximum of 149 persons per Member State, (ii) the total consideration of the public offer of a crypto-asset in the Union does not exceed EUR 1,000,000, (iii) the offer is made solely to qualified investors within the meaning of MiFID II. Finally, if a token has the prevailing characteristics of a financial instrument, it should be regulated under the specific financial and capital markets regulatory framework.

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Review paper

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SELF-PREFERENCING PRACTICES OF ONLINE PLATFORMS*

ABSTRACT

This paper deals with the so-called self-preferencing practices of online platforms. Some specific practices can be perceived negatively from a competition law perspective. As the previous decision-making practice of national competition authorities and the European Commission shows, anti-competitive self-preferencing practices of online platforms have been sanctioned by standard competition law instruments. The currently applicable Digital Markets Act defines new obligations for online platforms that are in the position of gatekeepers. At the application level, the DMA aims to complement the enforcement of competition law without prejudice to Articles 101 and 102 TFEU. The aim of the paper is to compare the assessment of self-preferencing practices by standard competition law instruments and the assessment of these practices under the Digital Markets Act. In this contribution we intend to test the scientific hypothesis that the Digital Markets Act targets self-preferencing practices more effectively and will assist in eliminating those that are detrimental to the well-functioning of digital markets.

Keywords: *competition law, Digital Markets Act, online platforms, self-preferencing practices, abuse of dominant position*

1. INTRODUCTION

Digital platforms increasingly surround us in every area of the online world**.** From information search through internet search engines and browsers (e.g., Google, Bing), communication via social networks (e.g., Facebook, Instagram, LinkedIn), purchasing goods and services (e.g., Vinted, Facebook Market), to selecting and purchasing apps for our mobile devices (e.g., AppStore, Google Play). Ordinary users of these platforms rarely realize that the goods and services offered by other merchants through these platforms are often in a mutually competing position. The promoting platforms have a strategic position in relation to the placement of

products or advertisements for these products, which can significantly favour their competitive position in the online platforms without additional costs or greater effort. Data, primarily generated by the users of these platforms, play a key role. Naturally, each platform has its own terms of use and internal processes for handling personal data, or data that does not qualify as personal data under legal definitions, but from a business perspective, represents significant value.

The subject of this contribution is the fundamental definition and characterization of what we mean by self-preferencing practices of online platforms, how they manifest in practical application, and why and when they can be considered harmful phenomena from the perspective of competition law. Furthermore, the basic regulatory framework will be presented, both from the perspective of standard competition law tools and from the perspective of the Digital Markets Act, which is currently fully effective. From a practical point of view, selected case studies related to self-preferencing practices of platforms that have meaningly resonated within the professional community and have had a major impact on shaping the decision-making practice in the defined area will be analysed.

Methodologically, the analysis will primarily use the legal text analysis method (relevant legislation and related decisions of administrative and judicial bodies), the comparison method (approaches to sanctioning self-preferencing practices with "standard" competition law tools compared to the Digital Markets Act), the deduction method (with regard to drawing general conclusions applicable not only to specific case studies but also to other similar cases in the future), and finally, summarization (of key findings arising from previous application practice). With respect to the defined area, the scientific hypothesis will be tested that the Digital Markets Act can respond more effectively to the self-preferencing practices of online platforms, which may have a negative impact on competition in the relevant (digital) markets. The main goal of the contribution is to compare the regulation of self-preferencing practices from the perspective of competition law and from the perspective of the Digital Markets Act, focusing on selecting key aspects that confirm or refuse the effectiveness of the new regulation.

2. WHAT ARE SELF-PREFENRECING PRACTICES?

2.1. Self-preferencing in general

Self-preferencing can be characterized as an effect in which a particular entity prioritizes its own goods or services over those of another entity. Self-preferencing could generally be considered a natural occurrence in society, both in the commercial and non-commercial spheres. In general, we consider self-

preferencing to be acceptable, taking into account the rationale of human and business thinking. Considering the fact that business activities are primarily carried out with the aim of making a profit, entrepreneurs will seek to maximize profits with the lowest possible expenses. Therefore, self-preferencing is not only an issue of commercial or competition law, but its implications can be seen across multiple branches of law. For completeness, it is important to note that the limits of self-preferencing practices are not only regulated by competition law but can also be observed in several branches of private law, such as consumer protection, anti-discrimination laws, and in public law reflecting basic rights enshrined in the Constitution, as well as selected criminal law aspects.

2.2. Self- preferencing in the environment of online platforms

If we focus on the core of this contribution, it is essential to observe the self-preferencing practices of online platforms and their practical manifestations. For the purposes of this contribution, we will unify the term "online platforms" or "digital platforms," referring to entities providing a broad portfolio of information society services. We speak of self-preferencing practices of online platforms when large tech companies prioritize their own products or services over those of their competitors, or entities with which they are in a competitive position as competitors in the same relevant market. According to Hutchinson and Treščáková self-preferencing refers to a conduct of a large provider of core platform services which consists in favouring one´s own products and services over those offered by competitors on the same platform.[1] From an economic perspective, the literature suggests that self-preferencing practices of online platforms are not always harmful to consumers or sellers.[2] Similarly, it is noted that self-preferencing can be discussed when these companies act as both platform operators and sellers on the platform, whereas they are in the position of a 'dual-role platform,' 'hybrid platform,' and 'vertically-integrated platform.'[3] According to Bejček, self-preferencing also has a pro-competitive effect, because it is part of competitive pressure and the motivation of rivals to promote themselves (*survival of the*

* This contribution was processed as partial output of the projects APVV-23-0331 Capital Market Union Integration: Reshaping Corporate Finance and Rescuing Companies in Distress and APVV-21-0336 Analysis of Judicial Decisions using Artificial Intelligence.

[1] Hutchinson, C. S.; Treščáková, D., *Tackling gatekeepers' self-preferencing practices*, European competition journal, Volume 18, Issue 3, 2022, p. 567.

[2] Kittaka, Y; Sato, S.; Zennyo, Y., *Self-preferencing by platforms: A literature review*, Japan and the World Economy, Volume 66, 101191., 2023, p. 1 and other there cited sources.

[3] Ibid.

fittest).[4] Heinz emphasizes that there are also critical voices, pointing out that self-preferencing practices by vertically integrated digital companies are not *per se* harmful, but could often lead to efficiencies, possibly also in ranking.[5] In the professional literature, we also encounter the creation of toolkits used to identify self-preferential practices.[6] Such conduct can be carried out in various ways, and a dual-role platform can arise from multiple factual situations. While self-preferencing concerns have recently increased in prominence, they can be seen as similar to traditional leveraging theories of harm in which firms leverage market power in one market (e.g. the intermediation platform) to foreclose competitors in a related market (e.g. a downstream retail market).[7] Through this contribution, we will attempt to highlight those practices that we are most likely to encounter in the online environment. However, the outlined list of practices should not be viewed as exhaustive. It will rather be an exemplary enumeration of practices that resonate in application practice.

2.2.1. Displaying rankings in internet search engines and browsers

As the first example, we could consider the order in which individual products or services are promoted on online platforms. This can be most noticeably perceived by users, especially on internet search engines (which are used to search for specific information)[8] or browsers that are designed to display specific content on websites.[9] A common manifestation of self-preferencing is the display of a preferred product or service at the top of search results. Displaying search results at the top when searching, has a significant impact on the selection of a specific product or service by the consumer. Users may even perceive such product placement positively, as the platform often bases its display on their user data, which takes into account their usual choices and preferences. Ranking may or may not include a situation where the platform itself is also the seller.

This area is specifically addressed by Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and

[4] Bejček, J., *Má DMA regulatorní a/nebo soutěžní „DNA "?*, *Časopis pro právní vědu a praxi*, Vol. XXXII, No. 3, 2024, p. 474.
[5] Heinz, S. in: Podszun, R., *Digital Markets Act: article-by-article commentary*, Verlag, C.H. Beck, 2024, p. 170, citation referring to footnote 7.
[6] Jürgensmeier, L.; Skiera, B., *Measuring self-preferencing on digital platforms*, available at: https://arxiv.org/abs/2303.14947, March 7, 2025.
[7] OECD, Competition Policy in Digital Markets, Paris: OECD Publishing, 2023, available at: https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/10/competition-policy-in-digital-markets_554eb7d5/80552a33-en.pdf, p. 8, April 11, 2025.
[8] We include here, for example, Google, Bing or Yahoo.
[9] Internet browsers include Google Chrome, Mozilla Firefox, Apple Safari and others.

transparency for business users of online intermediation services.[10] This regulation is referred to as the P2B regulation (Platform to Business) and, according to Article 1(2), applies to online intermediation services and internet search engines that are provided or offered to business users and users of corporate websites whose registered office or place of residence is located in the Union, and which, through such online intermediation services or internet search engines, offer goods or services to consumers in the Union, regardless of the place of establishment or residence of the providers of such services and irrespective of the applicable law. From the formulation of the purpose and objectives of the legal regulation, considering the formulation of individual obligations of online intermediation services, it is clear that this regulation primarily relates to the area of contractual law, specifically partial contract law, since the core part of the regulation is dedicated to attributes relating to the terms and conditions of the platforms. Busch and Mak state that Regulation 2019/1150 served as a significant model for the Digital Services Act.[11]

The regulation defines online intermediary service providers in Article 2(3) as any natural or legal person who provides or offers to provide online intermediary services to commercial users. In Article 3, obligations are imposed on entities acting as online intermediary service providers concerning the terms and conditions of their services. In addition to the clarity, easy accessibility, and transparency of platform terms and conditions, this regulation also sets requirements regarding the order in which goods or services are advertised. Article 5 establishes obligations for online intermediary service providers, specifying that they must define the main parameters determining the ranking order and the reasons for the relative importance of these main parameters compared to other parameters. Entities acting as internet search engine providers must establish the main parameters that are individually or jointly most significant in determining the ranking order, as well as the relative importance of these main parameters. The terms and conditions must also be easily accessible to the public and drafted in clear and understandable language on the internet search engines of the respective providers. The possibility of influencing the ranking for direct or indirect compensation paid by commercial users or users of business websites is linked to the obligation of such an entity to specify the effect this compensation will have on the ranking in the published search results. In the legal conditions of the Slovak

[10] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57-79 (hereinafter: Regulation 2019/1150).
[11] Bush, C.; Mak, V., *Putting the Digital Services Act into Context: Bridging the Gap between EU Consumer Law and Platform Regulation*, Journal of European Consumer and Market Law (EuCML), Issue 3/2021, p. 109.

Republic, the authority authorized to receive complaints regarding the application of this P2B regulation is the Council for Media Services.[12]

2.2.2. When the platform itself also acts as a seller

It is not uncommon in the online environment for a platform providing the promotion and sale of third-party products to be in a competitive position with those products. Let's illustrate a situation where a platform itself sells a certain type of goods while also providing third parties, on a commercial basis, the opportunity to present products that are on the same relevant market. This platform is in a strategically advantageous position because it collects data about users not only in relation to its own customers but also in relation to customers who are interested in the products of competing entities promoting their goods through this platform. An example from practical application could be the case of Meta[13], which was fined €797.72 million for imposing unfair trading conditions on other online classified ads service providers.[14] Based on the investigation by the Commission, it was found that Meta holds a dominant position in the social media market, as well as in national markets for online display advertising on social media.

According to available information, Meta has violated Article 102 TFEU, which applies within the markets for personal social networks, within the territory of the European Economic Area, as well as in the national markets for online display advertising on social media. The conduct it engaged in, in violation of competition law, was primarily based on two aspects – tying its online classified ads service Facebook Marketplace to its personal social network Facebook. According to this, Facebook users automatically have access to and are regularly exposed to Facebook Marketplace, whether they want it or not. The Commission found that competitors of Facebook Marketplace may be foreclosed, as the tie gives Facebook Marketplace a substantial distribution advantage that competitors cannot match. The second anti-competitive behaviour involved imposing unfair trading conditions on other online classified ads service providers who advertise on Meta's platforms, particularly on its very popular social networks Facebook

[12] Council for media services, available at: https://rpms.sk/podanie-podnetu-na-preverenie-tykajuceho-sa-sprostredkovatelskej-sluzby-podla-p2b, March 5, 2025.
[13] You can find information about February 25, 2025.
[14] Ibid.

and Instagram. This allows Meta to use ads-related data generated by other advertisers for the sole benefit of Facebook Marketplace.[15]

3. INITIAL LEGAL FRAMEWORK

3.1. Competition law

Competition law could be described as a universal tool for addressing unfair practices in the online space. Due to the more general formulation of the abuse clauses related to participation in competition, this area of law is capable of covering a wide range of actions that distort markets, whether to the detriment of competing entities, consumers, or end users of these platforms. Competition law is therefore significantly shaped by decisions made by competition authorities and also by judicial authorities, which provide contours to the generally formulated clauses. The structure of competition law is based on a three-pillar system consisting of the prohibition of agreements restricting competition, the prohibition of the abuse of a dominant position, and the control of concentrations. The first two mentioned institutions – agreements restricting competition and the abuse of a dominant position – are regulated at the EU law level in the primary law of the EU (Articles 101 and 102 TFEU). The control of concentrations is regulated by Council Regulation (EC) No 139/2004 of January 20, 2004, on the control of concentrations between undertakings.[16]

In relation to the various forms of unlawful restriction of competition, the most frequently used form was likely the abuse of a dominant position. However, as stated in the preamble of Article 5 of the Digital Markets Act, an online platform does not necessarily have a dominant position in every case from the perspective of competition law, but its actions can significantly distort the market in which it operates. Agreements restricting competition cannot be overlooked either. Concentrations in the context of digital markets also appear to be specific. In this regard, it is important to emphasize that regulation in the form of prohibiting the abuse of a dominant position and prohibiting agreements that restrict competition is based on the so-called *ex-post* principle, meaning that actions are penalized or sanctioned only after they have occurred. The control of concentrations, on the other hand, is based on the *ex-ante* principle, meaning that if a business transaction meets the parameters outlined in the regulation on the control of concentrations,

[15] Commission fines Meta €797.72 million over abusive practices benefitting Facebook Marketplace, Press Release, November 14, 2024, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_5801, March 5, 2025.
[16] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22.

the involved parties are required to notify the relevant competition authority (whether it is a national competition authority in the case of domestic mergers or the European Commission) of their intention to initiate such a transaction.

The significant impact of digital technologies has not spared the field of competition law. The emergence of entirely new digital relevant markets has fundamentally transformed the traditional approach to market definition. This shift is evidenced, for example, by the necessity to revise the European Commission's Notice on the definition of the relevant market from 1997[17] prompted by the growing influence of digitalisation.[18] The updated Commission Notice devotes specific sections to the definition of markets in the context of multi-sided platforms, aftermarket products, product bundling, and digital ecosystems. As stated in the Notice, the presence of indirect network effects in practice may complicate the assessment of demand-side substitutability particularly the application of the SSNIP test more so than in scenarios where such interdependence between user groups is absent. Furthermore, the Commission emphasizes that the fact a product is offered at zero monetary price does not imply that there is no relevant market for such a product. Where appropriate, network effects may also be taken into account in the assessment and delineation of the relevant market.[19]

Investigating practices that restrict competition is time-consuming. This is primarily evidenced by the length of individual proceedings. However, this fact is objectively determined by the need to verify a wide range of information that is crucial for initiating proceedings, as well as for clarifying the case. As an example, we could mention the definition of the relevant market in which the concerned entity holds a dominant position. Often, various economic approaches are also used, necessary for correctly determining the space in which competition takes place.

3.2. Digital Markets Act

The Digital Markets Act (specifically, the proposal for a regulation) was introduced in December 2020, alongside the proposal for the Digital Services Act regulation. Currently, this legal act in the form of a regulation is fully valid and in

[17] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–13.
[18] Whish, R.; Bailey, D., *Competition law*, Oxford University Press, 2021, p. 22-24.
[19] Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law, C/2023/6789, OJ C, C/2024/1645, 22.2.2024, ELI: http://data.europa.eu/eli/C/2024/1645/oj.

effect, and therefore fully applicable. The regulatory approach applied in the Digital Markets Act differs in several ways from competition law. The Digital Markets Act defines, based on qualitative and quantitative criteria, the category of so-called gatekeepers, imposing specific and detailed obligations on them, which contrasts with the general clauses typical of competition law. Competition law addresses anti-competitive practices only *ex post*, meaning after the affected party has caused a distortion in the conditions of a relevant market. The Digital Markets Act is an *ex ante* regulation with a predefined catalog of obligations (mainly Articles 5, 6, 7, and 8, which specify the conditions for compliance with these obligations).

3.2.1. Article 6 (5) of Digital Markets Act - Prohibition of self-preferential practices

The practices of self-preferencing are specifically addressed in Article 6(5) of the Digital Markets Act. It explicitly states that "the gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair, and non-discriminatory conditions to such ranking." This provision essentially reflects three types of conduct where self-preferencing may occur, namely a) ranking, b) related indexing, and c) crawling. The interpretation and representation of this provision can be assisted by recital 51, which establishes that gatekeepers are often vertically integrated and offer certain products or services to end users through their own core platform services or through commercial users, over which they have control, leading to a conflict of interest. In terms of ranking and related indexing and search indexing, such gatekeepers may ensure better positioning for their own offerings than for the products or services of third parties also operating on the same core platform service.[20]

Ranking can be characterized as an act by which a specific online platform arranges content, products, or services, or when it prefers its own content, products, or services in search results or displays to users of the platform. The goal of such conduct is to increase the visibility of the given product or service, which occurs essentially at the expense of products and services that are substitutable from a competition perspective with the presented services. This practice can take place either during the process of searching for a generic product or service or may also be present when displaying ads for products or services. According to Derakshan, ranking products in decreasing order of their preference weights does

[20] Preamble 51 of Digital Markets Act.

not necessarily maximize market share or consumer welfare. Such a ranking may shorten the consumer's consideration set due to the externality effect of high-positioned products on low-positioned ones, leading to insufficient screening.[21]

When we speak of the term related indexing, it primarily refers to the indexing (which can be understood as a form of categorization or sorting) of content, products, or services reflected in securing a better position in search results or recommendations within the online platform interface. In this way, online platforms favour their own content, services, or products.

The process of crawling could be described as a situation where an online platform automatically scans and indexes content from the internet (or content within its own ecosystem) so that it can subsequently be made available to users in various forms—most commonly in search results, recommendations, or other lists. In the case of search engines, this may manifest as the prioritization of its own content or websites over those of third-party external entities. In summary, we could state that the various practices described in the establishment of a ban on self-preferencing aim toward a single objective, which is better visibility and the preferential treatment of one's own content, products, or services over those provided by third parties, which, from the perspective of competition law, can be considered substitutable.

3.3. Differentiation between standard competition regulation and the Digital Markets Act

If we were to characterize the key differentiating determinants or highlight the common denominators between competition law and the Digital Markets Act, we would begin by describing the nature of the aforementioned regulations. While competition law (i.e., the prohibition of agreements restricting competition and the prohibition of abuse of a dominant position) is based on *ex post* enforcement (since merger control also takes place *ex ante*), the Digital Markets Act operates *ex ante*. The practical effects of regulation are reflected in the fact that online platforms are sanctioned only after a violation of competition law, though similarly, the DMA also provides for sanctions that may occur after the breach of an obligation. However, in the case of the DMA, competition authorities will be in a more favourable position in terms of evidence, as they will not need to extensively investigate the platform's conduct, given that the regulation includes a catalogue of specific prohibited behaviours. A comparison of the form of *ex ante* and *ex post*

[21] Derakhsan, M. et al., *Product ranking on online platforms*, Management Science, Vol. 68, No. 6, 2022, p. 4024-4041.

regulation is addressed in an OECD report within the jurisdiction of the G7 countries, which states that for other concerns, related for example to self-preferencing and tying practices, there is less certainty about the design and implementation of potential remedies, as a number of major investigations remain open. In these cases, traditional antitrust frameworks are likely to remain relevant, alongside *ex ante* regulation, in determining the ultimate outcomes in digital markets. [22]

This brings us to the second aspect of the regulatory distinction, namely that the Digital Markets Act establishes specific and detailed obligations, whereas competition regulation is based on the principle of broadly formulated general clauses that are capable of encompassing a wide range of online platform behaviours. Both regulatory approaches naturally entail certain advantages as well as disadvantages. The broadly formulated general clauses of competition law are further refined through the decision-making practice of administrative and competition authorities, which play an exceptionally important role in this area of law. Conversely, specifically tailored obligations may function as a "catalogue" of prohibited conduct, providing obligated entities with clear guidance as to which behaviours will be regarded as unlawful.

The third factor is that competition law applies to all entities capable of fulfilling the definition of an undertaking, whereas the Digital Markets Act targets a specific category of gatekeepers, whose thresholds are contained in Article 3, paragraphs 1 (qualitative criteria) and 2 (quantitative criteria).

Ex post sanctioning of harmful self-preferencing practices through the standard instruments of competition law, primarily concerning the prohibition of abuse of a dominant position, has proven effective, though it is more time-consuming from a procedural perspective. When deciding on competition law violations, it is necessary to define the relevant markets and assess the harmful effects on specific markets, which often requires considerable time from competition authorities and the European Commission. In contrast, the Digital Markets Act formulates an *ex ante* prohibition of such conduct with respect to the three forms of self-preferencing (indexing, etc.).

Lastly, we highlight the difference in which body is competent to enforce the rules of the Digital Markets Act. Competition law, in general, can be divided into national and European aspects. In the application of national competition rules, the competition authorities of individual Member States are competent, and

[22] OECD, Competition Policy in Digital Markets, *op. cit*., p. 5.

according to Article 3(1) of Regulation 1/2003[23], national competition authorities, as well as national courts, are authorized to apply Articles 101 and 102 TFEU, provided that the agreements or abuse of a dominant position affects trade between Member States. In contrast, enforcement of the Digital Markets Act is exclusively the responsibility of the European Commission (primarily with reference to Articles 17 and 18 of the Digital Markets Act).

The European Commission began applying the Digital Markets Act on May 2, 2023. On September 6, 2023, the Commission designated six entities as gatekeepers for 22 core platform services, including Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft[24]. These entities are required to inform the Commission of their status and provide all relevant information within two months of reaching the specified thresholds. As of the time of drafting this article, publicly available information does not indicate any specific proceedings that the Commission has initiated based on this act. Within the scope of the Digital Markets Act (DMA), the Commission has addressed preliminary findings to Alphabet regarding self-preferencing practices in connection with Google Search and Google Play. At present, no additional official documents or decisions have been made publicly available.[25] According to publicly available information, Alphabet is alleged to be favouring its own services in ranking, placing them more advantageously than similar services offered by third parties. Under the Digital Markets Act (DMA), such ranking must be conducted in a transparent, fair, and non-discriminatory manner.[26] However, in relation to the Digital Services Act, a legal case involving Zalando against the European Commission (T-348/23) is currently pending before the EU Court of Justice. In this case, the plaintiff requests the General Court to annul the Commission's decision of April 25, 2023, arguing that Zalando was incorrectly classified as a so-called very large online platform and that the Digital Services Act does not apply to it, as it allegedly is not an intermediary service, nor a hosting service, nor an online platform under the Digital Services Act.[27]

[23] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.
[24] European Commission, Digital Markets Act: Commission designates six gatekeepers, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328, March 10, 2025.
[25] European Commission, Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers, Mar 19, 2025, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_811, April, 12, 2025.
[26] *Ibid.*
[27] Currently, only information on the lawsuit filed by the company is publicly available. Cast T-348/23 Zalando against the European Commission, OJ C 314, 4.9.2023, p. 9-11.

4. CASE STUDIES

4.1. Google Shopping

The Google Shopping case significantly resonated with both the general public and legal professionals. In 2017, the European Commission initiated proceedings against Google on suspicion of breaching competition law.[28] The practices in question concerned Google Shopping, a service that allows users to search for products online and compare prices of different products from various online stores. Within the framework of competition law's core institutes, Google was alleged to have abused its dominant position in the search engine market by favouring its own price comparison service (Google Shopping) over competitors in search results. As a result of this anti-competitive conduct by Google, competitors had more difficult access to users, and their products were less visible. The public's interest in this case was likely heightened by the fact that the Commission imposed a fine of €2.42 billion on Google. Since Google disagreed with the Commission's findings, it decided to appeal to the General Court of the EU. Google argued that its search algorithms did not target illegal favouritism of its own services but aimed to provide the best results for users. In 2021, the General Court of the EU dismissed Google's appeal, confirming that Google had abused its dominant market position. The General Court ruled that Google favoured its own products by prioritizing them in advertisements and search results, thus harming competitors such as independent price comparison services. The court also upheld the imposed fine of €2.42 billion. Even after this ruling, Google appealed the decision of the General Court to the Court of Justice of the EU (C-48/22 P).[29]

In 2023, the Court of Justice of the EU made its final decision, once again confirming the General Court's ruling, thereby upholding the fine imposed on Google for abusing its dominant position in the price comparison market. This case had a wide impact on digital markets and the way in which large technology companies (such as Google) can operate within the relevant markets in which they hold a dominant position.

[28] Documents concerning the proceeding before the European Commission are available here (AT.39740) https://competition-cases.ec.europa.eu/cases/AT.39740, March 10, 2025.
[29] Genesis of the proceeding of case Google Shopping available at https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&for=&jge=&dates=&language=sk&pro=&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=&td=%3BALL&avg=&parties=google%2Bshopping&lg=&page=1&cid=4578138, March 10, 2025.

The Google Shopping case is an example of how specific practices of digital giants evolve and highlights the important role of competition law in regulating digital giants. In the digital age, traditional competition models may not always adequately reflect the specific business practices of online giants. In response to these regulations, Google had to adapt and modify the way it displays its own products in search results. Google also had to change its business practices within Google Shopping to ensure that competing services would have the same opportunities for visibility of their content or products. For the sake of completeness, it should be noted that similar proceedings were also conducted against Google by the US Federal Trade Commission, but in the absence of arguments determining the abuse of Google's dominant position, it was discontinued.[30]

4.2. Amazon

In 2019, the European Commission formally initiated an antitrust investigation to assess whether Amazon was using sensitive data obtained from independent retailers in a manner that violated competition rules. In November 2020, the European Commission preliminarily concluded that Amazon holds a dominant position in the French and German markets for online marketplace services in relation to third-party sellers. On the same day, the Commission opened a second investigation, in which it was to assess whether the criteria set by Amazon for the selection of the Buy Box winner and the ability for sellers to offer products within their own Prime Programme led to preferential treatment for merchants selling through Amazon and those utilizing Amazon's logistics and delivery services.

In the second investigation, the Commission concluded that Amazon had abused its dominant position in the relevant French, German, and Spanish markets with respect to providing online marketplace services to third-party sellers. Amazon voluntarily proposed commitments to cease using non-public data, ensure equal treatment for all sellers, and took further measures. Due to the cooperation provided and the findings regarding compliance with these commitments, the Commission did not impose any fines. However, if Amazon breach its commitments, the Commission is authorized to impose a penalty of up to 10% of Amazon's total annual turnover, or alternatively, impose a periodic penalty of 5% of daily turnover for each day of non-compliance.[31]

[30] Kostecka-Jurczyk, D., *Abuse of dominant position on digital market: is the European Commission going back to the old paradigm?*, European Research Studies Journal, Volume XXVI, Special Issue 1, 2021, p. 122.
[31] Investigation proceedings agains Amazon were registered under numbers AT.40462 and AT.40703.

5. CONCLUSION

Self-preferencing practices do not necessarily always have a negative competitive effect. The *ex post* enforcement of harmful self-preferencing practices through standard competition law instruments, particularly with regard to the prohibition of abuse of a dominant position, has proven to be effective; however, it tends to be more time-consuming. When determining whether there has been an abuse of a dominant position, the competition authority must conduct investigations concerning the relevant market and verify whether the particular competitor actually holds a dominant position in the competition law sense. If this essential condition is not met, the platform cannot be penalized. In cases involving the violation of competition rules, both the definition of the relevant markets and the assessment of harmful effects in those markets require a careful evaluation of significant economic and law aspects, which often necessitates more time from the competition authorities or the European Commission. In contrast, the Digital Markets Act formulates an *ex ante* ban on such practices in relation to three forms of self-preferencing (indexing, related indexing, crawling), which may have a deterrent effect on platforms, especially considering the fact that identifying such practices *ex post* is more circuitous. For the reasons mentioned above, it is necessary to conclude that the new regulation under the Digital Markets Act targets the specific practices of digital giants more effectively, as these practices have a significant impact on the markets in which they operate. However, competition law remains an vitally relevant legal instrument for the area of digital markets.

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Review paper

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SOME FEATURES OF AN ADMINISTRATIVE ACT

ABSTRACT

The purpose of this paper is to analyze some features of an administrative act. We have deliberately chosen the term "administrative act,", and not some other term, in order to preserve the connection of the term in question exclusively to unilateral (individual) administrative acts. Within the context of Croatian administrative law, individual elements of an administrative act are analyzed. The paper further explores how administrative acts are understood in the legal systems of various European countries and identifies common characteristics across Europe. Finally, the paper addresses the issue of differing jurisdictions, noting that some acts may fall under distinct litigation frameworks.

Keywords: *administrative law, administrative act, judicial control*

1. INTRODUCTION

It is sometimes strange to what extent certain concepts take an important place in the general theory of administrative law, and which, at first glance seem clear, yet remain unclear and surrounded by ambiguities. This is also the case with the concept of an administrative act, a concept that is imprecise even though it is considered fundamental, with which theory has been dealing for a long time, failing to offer an unambiguous solution. In fact, although the answer may seem simple at first, if basic criteria are applied, it has very quickly proved complex through the evolution of public administration and the role of the judge who can be in charge of judicial review of an administrative act.

On the basis of normative and judicial duality, the attempt to shape the concept of an administrative act has always carried significant controversial implications. Legal texts often offer little clarity, leaving administrative judges to distinguish administrative acts from other types of acts, including those of a private law nature.

In Croatian administrative procedural law, the very concept of an administrative act is determined by Art. 2 of the General Administrative Procedure Act.[1] It defines the concept of an administrative matter and states that an administrative matter is considered to be any matter in which a public body in administrative proceedings decides on the rights, obligations or legal interests of a natural or legal person or other parties by directly applying laws, other regulations and general acts governing the relevant administrative area.[2] This provision is crucial for applying the General Administrative Procedure Act. In the present case, this presupposes that the competent public law Competent public authority as decided on an individual application by deciding on an administrative matter. The legal understanding of an administrative matter presupposes a decision on the right, obligation or legal interest of a party.[3] It means that an administrative act can only

[1] General Administrative Procedure Act, Official Gazette, No. 47/09, 110/21.

[2] Only those bodies whose competence is at all stages of the administrative procedure may act in an administrative matter, primarily by complying with the rules of general administrative procedure contained in the General Administrative Procedure Act, as well as the rules of special administrative procedure. Public law bodies deal directly with administrative matters, applying substantive legal regulations to individual cases, and are obliged to perform each action during the procedure according to the given rules. Taking certain actions contrary to the rules of procedure would mean violating the fundamental principles of administrative procedure. In this way, the realization of substantive and legal regulations on the basis of which a specific administrative act was adopted would also be called into question. In order to avoid some of these negative consequences, which could create uncertainty in the legal order, legal rules are created that proceed according to certain, common principles concisely formulated within the framework of individual articles, without losing sight of their exceptional importance. This gives the administrative function a unique upgrade. Britvić Vetma. B.; Malenica, I., *The Principle of Legality in Croatian and Comparative Administrative Law*, Proceedings of the Faculty of Law of the University of Rijeka 44, No. 1, 2023, p. 91.

[3] Although the law is below the Constitution in terms of legal force, it is still the most important source of law – which also applies to administrative procedural law. Law is the form in which, as a rule, the state expresses its will, creates general and specific rules and regulates social relations on its territory. In the broadest sense, the principle of legality in administrative proceedings boils down to the fact that state administration bodies, other state bodies, bodies of local and regional self-government units and legal persons with public authority, when directly resolving administrative matters, are guided in their activities by the law and other regulation based on the law. In doing so, they must ensure the objective and correct application of substantive regulations to a specific case, regardless of the administrative area of the substantive regulation in question.
"... There are special rules that prescribe the principle of legality, either for the activities of certain state administration bodies, or for the actions of the state administration in certain areas." Borković, I., *Administrative Law*, 7th ed., Zagreb, Official Gazette, 2002, pp. 232-233.

be adopted in administrative matters.[4] However, the administrative matter is also defined by the General Administrative Procedure Act[5] in a broader sense, and includes not only individual situations that the competent public law body resolves by adopting an administrative act, but also specific situations that are determined by a particular law as an administrative matter.[6]

In addition, it is important to mention the Administrative Disputes Act, which in Art. 3(1) prescribes that the subject matter of an administrative dispute is the assessment of the legality of an individual decision by which a body governed by public law has decided on the right, obligation or legal interest of a party in an administrative matter (administrative act) against which it is not permissible to declare a regular legal remedy.[7] This is in accordance with the settings of administrative law that establish an administrative matter as a fundamental prerequisite of an administrative act. In the Republic of Croatia, administrative court practice always assesses ewhether a case qualifies as an administrative matter or not. Case law encounters great difficulties in determining whether an act

[4] However, it seems that the legislator himself is aware of the imperfection of defining the concept of an administrative matter by a general definition, which, taking into account the diverse areas of activity of the administration, prescribed in the General Administrative Procedure Act that any matter that is defined by law as an administrative matter is considered an administrative matter. By doing so, he not only opened up the possibility, but in a way set himself the obligation to prescribe certain things in administrative matters by special laws in certain administrative areas, which would significantly specify the taxpayers and the decision-making process on the rights, obligations and legal interests of parties in special administrative areas. Đerđa, D., *General Administrative Procedure in the Republic of Croatia*, Zagreb, Inženjerski biro, 2010, p. 42.

[5] The General Administrative Procedure Act, for the first time in the Republic of Croatia, normatively defines administrative matters, and this is indisputably one of the most important issues in the application of this Act. Until the adoption of the new General Administrative Procedure Act, no law in the Republic of Croatia contained this definition, but administrative and administrative jurisprudence remained, in each specific case, to successfully or less successfully decide whether it is an administrative matter or not. In the broadest sense, an administrative matter can be equated with a comprehensive administrative action, i.e. an individual situation of public interest in which the competent public law body, through the direct application of regulations from the relevant administrative area, influences the position of the party. On this Staničić, F.; Britvić Vetma, B.; Horvat, B., *Commentary on the Law on Administrative Disputes*, Zagreb, Narodne novine, 2017, p. 37.

[6] In relation to the breadth of application of the General Administrative Procedure Act in administrative matters, we can determine the division into general administrative procedure (which is applied in all administrative matters) and special administrative procedure (which is applied in certain matters that are in turn determined as administrative by a special law).

[7] Administrative Disputes Act, Official Gazette, No. 36/24.

has resolved an administrative matter and, in this regard, whether it can be subject to an administrative dispute. In their decisions, administrative courts usually give only brief explanation as to whether the act challenged by the lawsuit is an administrative act.[8]

Regarding the question of the legal nature of an act, it is essential to note that the name 'act' does not affect its legal nature. Neither the form in which an act was adopted nor the name it has is decisive for its essential nature. Therefore, the nature of an act ill not be determined by its form or name, but by its content. , Regardless of the fact that the term "administrative act" has traditionally existed in the theory of Croatian administrative law, the term "administrative act" is not used for its legislative determination. The General Administrative Procedure Act prescribes that an administrative matter is resolved by a decision and that, in accordance with the law, an act resolving such a matter may bear a different name.

An administrative act stems from the development of an administrative dispute.[9] Indeed, depending on whether the administrative judge has jurisdiction to review a particular decision, the depth and breadth of its limits are delineated.[10]More precisely, the concept of an administrative act has undoubtedly been influenced by the concept of a court judgment, and in this sense we can conclude that an administrative act represents a special legal institute, which separates itself from its bearer and lives its own life.[11]

[8] Staničić, F.; Britvić Vetma, B.; Horvat, B., *op. cit*., pp37-38.

[9] An administrative act is a legal institute that was established at the beginning of the 19th century in France, following the model of a judicial act, and following the development of an administrative dispute.

[10]In this regard, it is certainly important to refer to the Rule of Law Checklist adopted by the Venice Commission, i.e. paragraphs no. 44, 45 and 46: "The State shall act in accordance with the law which shall authorize it to do so. The need to carry out administrative judicial control of acts and decisions of the executive power and other bodies providing a public service is universally recognized... One of the fundamental requirements of the rule of law is that the powers of public authorities are provided for by law. Where the rule of legality relates to the actions of civil servants, it requires them to be authorised to act, to act within the limits of the powers conferred on them and to comply with both procedural and substantive law. … The term "law" here refers not only to the constitution, international law, legislation and regulations, but also, if necessary, to case law. Every law should be accessible and predictable." *The Rule of Law Checklist, Venice Commission of the Council of Europe*, https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf, 2 April, 2025.

[11] See about this in Medvedović, D., ed., *Chrestomathija administracyjnnog pravo*, Zagreb, Contemporary Public Administration, 2003.

Far from being a subject of theoretical study separate from practical consideration, on the contrary, this term traditionally encompasses a pragmatic approach that views it, almost systematically, as an act that is controlled in the Croatian legal system by an administrative judge and which therefore has precisely defined characteristics.

2. INDIVIDUAL CHARACTERISTICS OF AN ADMINISTRATIVE ACT IN CROATIAN ADMINISTRATIVE LAW

The concept of an administrative act is defined by a set of characteristics that distinguish it from other legal instruments. In connection with the concept of 'administrative act' in national administrative law, the following elements are most commonly emphasized: concreteness, authoritativeness and one-sidedness, legal action and legal binding.[12]

The administrative act is concrete. The concreteness of an administrative act presupposes that it determines a certain, concrete situation. A specific situation refers to a specific individual (an administrative act has the characteristics of individuality) or a specific group of persons (these are general administrative acts that do not refer to a specific person by name, but to a group of persons who can be identified on the basis of certain characteristics).[13] An administrative act does not set legal rules, which have a subsidiary effect on legal relations, but directly and specifically regulates these relationships.[14] The concreteness of an

[12] Professor Ivančević distinguished the essential from non-essential characteristics of an administrative act. He considered the following to be essential characteristics: (1) concreteness, (2) authoritativeness, (3) direct legal action and (4) the author of an administrative act. While he considered the irrelevant characteristics to be those that help in the identification of an administrative act, namely: 1. what is the significance of the presence of the will of its adopter in an administrative act, 2. what does its enforceability mean, and 3) whether it is accompanied by finality and to what extent does it have a specific meaning for the administrative act in a positive case. See Ivančević, V., *Institutions of Administrative Law*,Zagreb, Faculty of Law, Zagreb, 1983, pp. 234.

[13] This means that concreteness goes in two directions. According to the case being decided (a specific administrative matter) and according to the entities whose rights and obligations are decided by administrative matters (specific addressees of the act). Borković, I., *Administrative Law*, 7th ed., Zagreb, Official Gazett, 2002, p. 36.

[14] Medvedović, D., *op. cit*., p. 6.

administrative act highlights its distinction from a legal norm, which is an abstract rule of conduct." [15]

The authoritativeness and unilaterality of an administrative act implies that with its help, as an unilateral act of a body with the authority of public authority, "rules of conduct" are "imposed" on the addressed subjects. An administrative act is an 'act of authority'[16] and its obligation is unambiguous as long as it is not amended. Authoritativeness is often defined as the superiority of one subject over another subject.[17] According to this understanding, the inequality between the parties in an administrative legal relationship is seen as a consequence of the need to protect the public interest. Unilaterality is understood as a characteristic by which a public body in an administrative law relationship independently adopts an administrative act and defines the rights and obligations of the other party in an administrative law elationship. However, it is certainly necessary to point out that authoritarianism and one-sidedness are not synonymous because there are also unilateral administrative acts that are not authoritative[18] (subjects are in an equal relationship).[19]

Legal action as a characteristic of an administrative act is reflected in the possibility of concrete changes in specific legal relations. An administrative act produces direct legal action, it introduces changes in legal relations, i.e. changes, abolishes or establishes the rights and obligations of specific persons in specific legal situations. The legal effect of an administrative act is reflected in its obligation that arises when the administrative act begins to act. Administrative acts

[15] More on this in Ivančević, V., *op. cit.,* pp. 234-237.

[16] Professor Ivančević says that it is an act of authority (in French *acte d'autorité* or *acte de puissance publique* , in German most often *hoheitlicher*), understanding the unilaterally expressed will of its issuer sanctioned by the use of coercion in the event of involuntary execution of the addressee of the act. Ivančević, V., *op. cit.,* p. 237 .

[17] Authoritativeness is evident when it comes to acts that impose a certain obligation on a party.

[18] The authoritativeness of an administrative act should not be extended to cases in which there is no authoritative decision-making.

[19] The emphasis on the stronger will of the author of the administrative act sharply distinguishes it from civil legal transactions, in which the legal consequences are the result of the consent of the will of the subjects. In view of this, it is necessary to distinguish between administrative acts in which their adopter acts authoritatively and those by which administrative bodies conclude a civil law transaction with other entities. In the latter case, the coordination of subjects is imminent, because they are unanimous in their manifestation of will to act in equal positions, i.e. On an equal footing, unlike the situation that arises with an administrative act when the stronger will of its adopter comes to the fore. Borković, I., *op. cit.,* pp. 360-361.

have legal effect towards all parties in administrative proceedings. In connection with the commencement of legal action, an administrative act generally produces legal effects for the future, and in general retroactive (retroactive) action is not permitted. The termination of the legal effect of an administrative act marks the moment in time when the obligation of the administrative act ceases.

The legal binding nature of an administrative act presupposes the adoption of an administrative act on the basis of the law. Namely, an administrative act is adopted on the basis of the law, has a content and form determined by law, the procedure for adoption is prescribed by law and is subject to administrative court control.[20] Which presupposes one of the fundamental expressions of the principle of legality. Specifically, the principle of legality is a basic principle not only in administrative procedure, but it is also one of the fundamental constitutional principles that finds its expression in numerous legal provisions.[21] Its role is to guarantee the "rule of

[20] The norms of substantive law determine the rights and obligations, while the norms of procedural law regulate the rules of conduct that are important in the process of applying substantive law.
Procedural and substantive law form a functional unity, because substantive law can be lawfully applied only in an appropriate legally regulated procedure. Đerđa, D*., op. cit*., p. 13.
Substantive legal norms determine the basic rights and obligations of legal subjects, procedural legal norms determine the manner of their exercise, i.e. the rules of procedures for the application, exercise and protection of substantive legal norms. Substantive law, as a rule, is found in substantive laws that determine the rights and obligations of a party in an administrative area. Procedural law is found in procedural laws that regulate the manner and procedure of exercising and protecting certain rights determined by substantive laws. The relationship between substantive and procedural law is often compared to the relationship between content and form. At the same time, this does not mean that the rules of procedural law are less important, that they represent formalism, since the exercise and protection of substantive law is often impossible without a change in procedural law. When it comes to administrative law, the norms of administrative law can be divided into substantive and procedural norms. While the norms of substantive administrative law determine the rights and obligations in administrative matters, the norms of procedural law determine the manner and procedure of their exercise and their protection. Britvić Vetma, B.; Malenica, I., *op. cit*., p.89.

[21] "The need for the principle of legality is justified in theory by the following reasons: (1) political, because in this way the executive power is subordinated to the representative, legislative organs of state power which exist to express the will of the people; 2. technical, as this ensures the proper functioning of the entire executive apparatus, which could not be implemented without certain legal regulations; 3. psychological, because this ensures the legal security of citizens from the executive power, which would act according to its own will, and not according to pre-made regulations with which citizens can become familiar." Bačić, A, *Commentary on the Constitution of the Republic of Croatia*, Split, Faculty of Law in Split, 2002, p.40.

law" as a fundamental prerequisite for legal certainty and stability of the legal system, the process of democratization of social relations and the realization of the idea of equality of the rules of general administrative procedure. The constitutional and legal realization of the principle of legality in the Republic of Croatia is in Art. 5 (2) of the Constitution of the Republic of Croatia[22], which states: Everyone is obliged to abide by the Constitution and the law and respect the legal order of the Republic of Croatia. The provision in question guarantees the possibility of exercising judicial protection against all acts that decide on rights and obligations, which is most often an administrative act adopted in administrative matters.[23]

Concerning legal binding, a distinction should certainly be drawn between acts adopted on the basis of free (discretionary) assessment and those in which there is no such assessment. It should be noted that the principle of legality must also apply when an act is adopted on the basis of a discretionary assessment. Thus, public law bodies act in the same way with regard to the principle of legality, regardless of whether they apply a categorical or an alternative rule of law. The difference, however, arises in the dimension in which the breadth of legal binding is compared (acts adopted according to a free assessment and acts in which there is no such assessment). In the first case, only some parts of the acts are legally binding, while the method of deciding on the right and obligation is a matter of discretion. Since discretionary assessment is not carried out in the sphere of legality, but in the sphere of purposefulness, the part of the administrative act in which free assessment is contained escapes the control of legality, but remains in the domain of the control of opportunity, i.e. purposefulness. In the second case, all parts of the administrative act are legally binding, and are therefore subject to legality control. Generally, it can be said that the control of an act containing a discretionary assessment is more broadly possible through the institute of an appeal in administrative proceedings, where the second-instance body may also enter into the question of free assessment. On the other hand, the review of legality by means of an administrative dispute is limited solely to the question of legality. Accordingly, the solution according to free assessment should not be understood as a possibility for arbitrary and arbitrary resolution of an individual body. On the contrary, it represents just one aspect of the legal framework in which the principle of legality must be upheld—both in the application of procedural rules and in the application of substantive regulations authorizing such a decision, as well as in alignment with the purpose for which the authorization was granted When

[22] Constitution of the Republic of Croatia, Official Gazette, No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.
[23] Britvić Vetma, B.;Malenica, I., *op. cit*., p. 90.

deciding on an administrative matter at its discretion, the competent authority is obliged to provide the necessary information in the explanation.[24]

In addition to previously mentioned characteristics of an administrative act, it is important to emphasize additional elements of an administrative act that arise from the General Administrative Procedure Act and the Administrative Disputes Act. The authoritativeness of an administrative act arises from the obligation of an administrative act. The parties are obliged to act in accordance with the administrative (content) act that imposes a certain obligation. Otherwise, public authorities have at their disposal coercive means of enforcement. However, when it comes to an act that recognizes a right to the parties, then the party independently decides whether to use a particular right or not. An administrative act is also binding on its adopter (a body governed by public law). The obligation of an administrative act is not only a consequence of authoritativeness, but also of the legal norm on the basis of which the administrative act was adopted.[25]

Two particularly important elements of an administrative act are finality and enforceability. These are properties that usually occur at different points in time and that presuppose different legal effects.

Finality is a characteristic of an administrative act that implies that it cannot be challenged by ordinary legal remedies. The finality of an administrative act presupposes that an administrative act, as a rule, cannot be changed by the will of a party or a public law body. The basic purpose of res judicata is to achieve legal certainty. Positive administrative acts, i.e. acts by which a party has acquired a certain right or imposed a certain obligation, become final. Importantly, only the operative part of the administrative act becomes final. The General Administrative Procedure Act recognizes the concept of finality as a fundamental principle, which, at least explicitly, was not preserved by the earlier laws governing the general administrative procedure. Finality, in accordance with the General Administrative Procedure Act, is fundamentally an institute that prevents decision-making on a matter that has been finally decided in ordinary proceedings (*ne bis*

[24] This principle is extremely important for a party to the proceedings, as it appears at all stages of the administrative procedure. However, the possibility of its realization depends not only on itself, but also on the body conducting the procedure, as well as on the possibility of harmonizing their mutual interests. A party actively participates in administrative proceedings, acting in a certain way as an associate of public law bodies, thereby contributing to the protection of legality in general. In this interaction, the careless behavior of public law bodies in the procedure may be primarily to the detriment of the party, but also to the detriment of the procedure itself. Britvić Vetma, B.;Malenica, I., *op. cit*., p. 91-92.

[25] Borković, *op. cit*., p.382.

in idem) and that primarily protects parties who have acquired certain rights by administrative acts from amendments. In the Republic of Croatia, an administrative decision against which no appeal may be lodged and no administrative dispute may be initiated is considered final.[26]

The enforceability of an administrative act presupposes that the content established, altered or determined by an administrative act is capable of being carried out in practice,[27] which is the result of the fact that in administrative matters there is often a public interest in ensuring that what has been legally determined is also effectively implemented. The Act on General Administrative Procedure in its fifth part addresses the issue of enforcement, beginning with the determination of the moment when the decision becomes enforceable[28] and determines the person of the enforcer.[29] Furthermore, it prescribes that enforcement is carried out both ex officio and at the proposal of a party,[30] after determining how enforcement is carried out for the purpose of realization of monetary or non-monetary obligations,[31] it regulates in more detail the execution of monetary[32] and non-monetary obligations.[33] The General Administrative Procedure Act prescribes that in a situation where the executor fails to act according to the enforcement decision, a decision shall be issued in writing and the content of the decision in question and the possibility of appeal against it shall be determined in more detail.[34] The General Administrative Procedure Act also allows the possibility for postponing enforcement,[35] timing of execution[36] and the forced execution of non-pecuniary obligations using a fine,[37] the execution of non-pecuniary obligations through third parties[38] and the execution of non-pecuniary obligations by direct coercion.[39] It prescribes in detail the principle of proportionality in the protection of the rights

[26] Šikić, M., *Finality, Finality and Enforceability in Administrative Procedure*, Proceedings of the Faculty of Law of the University of Rijeka 33, No. 1,1991, pp.208-209.
[27] The basic intention of the administrative act is that its decision be realized and implemented in life. See on this in Medvedović, D., *op.cit*., p., 11.
[28] Art. 133 of the General Administrative Procedure Act, Official Gazette, No. 47/09, 110/21 (hereinafter referred to as the ZUP).
[29] Art. 134. ZUP.
[30] Art. 135. ZUP.
[31] Art. 136 of the ZUP.
[32] Art. 137. ZUP.
[33] Art. 138. ZUP.
[34] Art. 139. ZUP.
[35] Art. 140. ZUP.
[36] Art. 141. ZUP.
[37] Art. 142. ZUP.
[38] Art. 143 of the ZUP.
[39] Art. 144. ZUP.

of the parties and the public interest,[40] stipulates how enforcement must be carried out in ae manner and by the means that are most lenient for the executor, and lead to the goal of enforcement (proportionality in enforcement). Finally, the General Administrative Procedure Act regulates the suspension of enforcement,[41] the elimination of the consequences following the annulment or modification of the executed decision,[42] enforcement for the purpose of securing claims[43] and urgent enforcement[44].[45]

However, we may ask ourselves how the concept of an administrative act is viewed in other European countries and whether it leads to a similar definition. What do we mean by the term „administrative act" and do we employ the same methods to determine its framework?

3. UNDERSTANDING OF AN ADMINISTRATIVE ACT OUTSIDE THE NATIONAL FRAMEWORK

Examining administrative justice across Europe leads to a broader analysis of this concept, which represents the very core of its operation, trying to define an administrative act beyond the national understanding and aiming to approach its comprehensive definition.Firstly, we should provide certain clarifications related to the terminological framework of the research.

We must point out that we have adopted the term "administrative act", and not some other targeted terms such as administrative or individual decision,[46] in order to preserve e generality of the term regardless of the specific terminologies used in some countries,[47] and, of course, the terminology used in Croatian legal frameworks.[48]

[40] Art. 145. ZUP.
[41] Art. 146. ZUP.
[42] Art. 147. ZUP.
[43] Art. 148. ZUP.
[44] Art. 149. ZUP.
[45] Šikić, M, *op. cit*., p. 214.
[46] Looking at it comparatively, it seems that this term can be more directly reduced to the "individual administrative act" itself.
[47] A special approach from the proceedings retained in Germany, known *as infra,* also states that Section 35 of the Code of Civil Procedure. Article 10 of the Administrative Procedure Act defines an administrative act as any order, decision or other measure of public authority issued by the administrative authority and relating to the special situation of an individual.
[48] Various authors distinguish between an administrative act in the broad sense and an administrative act in the narrow sense. Professor Krbek also distinguishes between an

Administrative justice is understood here not only as a prerequisite in which administrative courts participate, but also, in a broader sense, as an entire judicial activity that includes resolving dispute between a private person and public administration, allowing to include regular general judges, who may or may not be specialized in resolving administrative matters.

Following the preceding discussion, we now turn to the methods that have enabled us to determine the meaning of the term administrative act.

At the European level, some doubt may be cast on the pertinence of the controversial definition of acts used in France. Moreover, in French administrative law, generally the term 'administrative act' actually contains multiple meanings because it encompasses unilateral administrative acts, general acts and administrative contracts. However, contracts concluded by the administration contain specific problems in Europe that are not known to unilateral administrative acts. In order to achieve coherence and in accordance with the classical approach, this paper takes into account unilateral (concrete) administrative acts under the term "administrative act".

The systematic link that exists between an administrative act and the special dispute settlement regime seems to be valid only in the 'French' schematised context, where the concept of an administrative act has the effect of applying administrative law,[49] which in turn implies the jurisdiction of the administrative

administrative act in the narrow sense and an administrative act in the broad sense. Thus, under the term administrative act in a broader sense, he considers different types of administrative acts, with the main common characteristic, that they are adopted by a body governed by public law. She believes that this comprehensive concept is easily misleading because it extends legal phenomena, which are only related to a certain type of such acts, to other acts adopted by a public body, or obscures the issues of certain types of such acts. The term administrative act is useful and usable only if it encompasses only certain characteristic phenomena that form a unity, and thus we arrive at a specific legal category. In this sense, a part of legal theory tries to come up with a specific concept of an administrative act – that would be the concept of an administrative act in a narrower, legal or technical sense. Medvedović, D., *op. cit*., p.5.

[49] Treaty disputes have long been exclusively civil in nature throughout Europe, with the exception of France. A contract was considered a kind of act of private law: by concluding a contract, the management was placed on the same level as the partner. In France, the administrative dispute over treaties would also have been of a civil nature if it had not been for Napoleon's texts, according to which disputes over contracts were brought under the jurisdiction of the Council of State. Truth be told, this rule has been in force since the time of Louis XIV, who considered that companies, entrusted by his administration with material work such as the construction of roads or canals, should not have access to civil judges because he feared their independence. More on this: Bigot, Grégoire In: Britvić Vetma, B.,

court. However, many European countries are not subject to such an organization, i.e. they do not have a specific law that applies exclusively to acts issued by public law bodies, or there are no special administrative courts that have jurisdiction over them.[50]

In reality, there is hardly any specific treatment applied to certain acts which does not indicate that they are administrative in nature. We will not list the specifics related to the administrative tradition and history of each country, but almost all European countries today recognize mechanisms of administrative dispute, in a manner that they establish separate administrative courts, that some judges within common law bodies specialize or that they establish a special procedure for disputes. Even in Denmark, a country where there are no specialised courts, although there is a specific dispute concerning certain administrative acts, by the *High Court* having direct jurisdiction to assess their legality. The different degrees of susceptibility of these acts to different rules than those applicable to legal persons are now generalized in such a way that we can determine its diversity.[51]
A comparative examination of administrative justice in Europe offers the opportunity to observe the strong connection between the concept of an administrative act and its dispute regime and to derive certain insights into its components across different countries. However, it can always be argued at the theoretical level that it is controversial to define a concept depending on the regime of the dispute, and not vice versa, so that this regime is only a logical consequence of the operation of that concept.

Disputes related to acts and actions of the administration in the exercise of the public authority prerogatives have their own peculiarities. They fall underthe jurisdiction of either specialised bodies, specialised administrative courts within bodies of general jurisdiction,or courts at a special level of jurisdiction. In countries that have an independent administrative judiciary, such disputes fall within its jurisdiction(e.g. Germany, France, Greece, Italy). Outside these countries, disputes over the legality of administrative acts fall within the jurisdiction of the Supreme Court (e.g. in Denmark and Ireland). The same applies

Organization and Jurisdiction of Administrative Courts, *Zbornik Pravnog fakulteta Sveučilište u Rijeka* 33, No. 1, 2012, p.403

[50] Basically, we distinguish between two systems for resolving administrative disputes: Anglo-Saxon and French. We have the Anglo-Saxon system in: the United Kingdom, Ireland, Malta, Cyprus, etc. The system at the centre of which is the Council of State (French system) is: France, the Netherlands, Belgium, Italy and Greece. Administrative courts in the strict sense of the word, and this system includes, among others: Germany, Austria, Switzerland, the Republic of Croatia, Spain, Portugal, etc.

[51] Auby, J.B., ed., *A propos de la notion d'exorbitance du droit administratif, in L'exorbitance du droit administratif en question(s)*, Paris, LGDJ, 2004, p.10.

to Cyprus, where the Supreme Court resolves all disputes about legality. However, the existence of specialised administrative courts does not preclude the possibility for courts of general jurisdiction to take over the resolution of disputes on the legality of administrative acts (jurisdiction of the criminal judge in France or of the specialised courts in Belgium). Portuguese law excludes from the jurisdiction of the administrative court acts which arise in the exercise of political and legislative tasks. In Belgium, the theory of state acts is not accepted. In Latvia, it has been defined that political decisions by the parliament, the president, the government and local councillors are not administrative acts and do not fall under the jurisdiction of the administrative courts in case of dispute. Denmark and Estonia do not recognize any exceptions to the admissibility of administrative actions. Dutch administrative law does not know the theory of State acts, which does not preclude some restrictions when it comes to a court action (e.g. against acts containing general binding regulations or a circular letter). In Germany, all acts, including those of a political nature, are subject to judicial review as soon as they are of such a nature as to undermine fundamental or subjective rights.[52] For example, in the Czech Republic, acts of administrative authorities that do not constitute decisions, acts that precede a decision, acts that alter the course of proceedings before administrative authorities, acts whose adoption depends solely on an assessment of the state of health of persons or technical conditions, acts which do not confer or deprive a natural person of any qualification are exempt from judicial review. However, if the act endangers state or business secrets, the judge may decide on the act, but at a hearing excluded from the public. In Ireland, as a general rule, no administrative act is exempt from judicial review, but the legislator requires the courts to apply stricter conditions of admissibility when it comes to challenging the validity of decisions of authorities competent to deal with asylum applications and decisions on town planning matters. Austria has some peculiarities: jurisdiction to review the legality of administrative regulations is shared between the Administrative Court and the Constitutional Court. However, some political decisions of the administration cannot be challenged (e.g. administrative decisions on government draft laws). In some countries, the same judge is not competent for individual and general legislative acts (Greece). Court proceedings are initiated by filing an action against an administrative act, either express or implied, for failure to issue an act (Greece) or by submitting a request for the adoption of an act (Estonia). The examples mentioned illustrate the diversity of specialised bodies. Additionally, differences were found in the structure of the bodies responsible for conducting court proceedings against the

[52] Berthier, L.,, *Regards européens sur l'idée qualité des décisions de la justice administratife*, Paris, RFDA, 2008.

administration.[53] However, this is not the only method of determination suitable for conducting a comparative analysis of an administrative act in Europe.

In the first place, an administrative act sometimes has a textual comprehensive definition. The example of Malta is convenient because it is one of the few countries that do not have specialization in dispute proceedings, and the administrative act is defined in Section 469A of the Organization and Civil Procedure Act,[54] which refers to judicial reviews which states that the term "administrative act" includes "any order, authorization, permission, order, decision or rejection of any application submitted by the applicant" but does not cover measures 'adopted for the organisation of the internal administration of that authority'.

Some guidance on the general definition of an administrative act can also be found in countries where there is a special dispute resolution regime, so the Netherlands sees a solution as "."[55]

Furthermore, a number of legislative or constitutional texts which lay down the organisation of administrative courts, judicial proceedings or the organisation of public administration may indirectly contain elements that contribute to the definition of a concept, by containing, for example, a classification of administrative acts covering that concept.

However, these textual definitions are sometimes incomplete, abbreviated or simply non-existent, making it necessary to explore the dominant criteria for definition in judicial proceedings intended for an administrative act. It is understood that these two research methods of the components of the concept of an administrative act – the textual basis or the approach through dispute – certainly do not aim to exclude one another, but on the contrary, to complement each other.

In various European countries, we regularly find features characteristic of an administrative act, which together form a relatively homogeneous definition of the term. However, at the same time, the fate of a specific dispute for some of those acts remain uncertain, in the sense that responding to the general definition given

[53] More on this in Britvić Vetma, B., *op. cit*., pp.397-406.
[54] Code of Organization and Civil Procedure,https://legislation.mt/eli/cap/12/eng/pdf, 31 March, 2025.
[55] See Art. 1.3. General Administrative Law Act., https://www.acm.nl/sites/default/files/old_publication/publicaties/15446_dutch-general-administrative-law-act.pdf, 04 April, 2025.

earlier, it is established that they are in fact excluded from the specific mechanisms related to administrative justice. Such an assertion could lead us to think that an administrative act knows its wider or narrower limits depending on the judicial system that regulates it, but then we would privilege an approach to the concept that results from excessive systematization.

3.1. Common elements of an administrative act in Europe

By relyin on textual and disputed indicators, structural elements common to all European countries can be identified and reveal a general unity in the understanding of the administrative act.d.

3.1.1. The importance and lack of a core benchmark

It is not surprising that the categorisation of an administrative act is determined primarily in accordance with the basic definition. An administrative act is, firstly, an act issued by a body governed by public law, which in most European countries has largely similar definition, but which in many respects is too ambiguous and therefore insufficient to confirm the administrative nature of the act, although being one of the decisive indicators.

In its most obvious meaning, the concept of a body governed by public law refers to public bodies that have administrative powers. Executive authorities, decentralized local governments and public institutions certainly fall under the realm of administrative authorities, although this description does not apply to legislative or judicial bodies. With regard to this question, the Austrian Federal Constitutional Law places particular emphasis on implementation of the formal separation between the administration and the courts,[56] and the bodies with jurisdiction may benefit from guarantees of independence and permanence. On the other hand, a body governed by public law is composed of bodies subject to instructions from several persons hierarchically appointed, which is the criterion providing an answer. At the same time, this framework leaves open certain questions related to the increasingly frequent actions of independent administrative bodies (regulatory agencies).

[56] See Art. 20 1 and 94. Federal Constitutional Law, https://constitutionnet.org/sites/default/files/Austria%20_FULL_%20Constitution.pdf,28 March, 2025.

Concerning the participation of "private institutions" in the exercise of public service, this phenomenon has been observed in almost all European countries, clearly indicating a growing relaxation of the basic benchmark. Administrative power is understood as something encompassing both private persons and institutions that exercise the privileges of public authority in order to serve general interest. In this sense, the interference of private persons in activities that logically fall within the domain of bodies governed by public law, in all European countries, remains tied to the requirement of dependence on the administration. Moreover, the indirect attribution of an administrative act to a body governed by public law remains one of its essential definitional elements. However, this possibility thatadministrative acts may be issued by a body governed by public law emphasizes widely recognized importance of combining both the basic criterion and the substantive definition in identifying such acts.

3.1.2. Homogeneous material approach

If, in defining the concept of an administrative act, we begin with the assumption that a legal person performing public service tasks, in the material sense, falls under administrative authorities, then it is possible for public law bodies to issue certain acts on behalf og of "private management" and without exercising privileges arising from public authority.

Under this assumption, the principle that such acts cannot be regarded as administrative acts is upheld in most European countries. In these cases, the body governed by public law operates as a private person and is therefore treated as such, meaning that the acts that it issues cannot use specific dispute resolution mechanisms. The administrative act is then characterised by features that allow us to distinguish it from other unilateral acts issued by the administration.

The second material element, in fact, must accompany the original one. It is very often found in court decisions, and yet it is very well-established principle – an administrative act is an act that affects the legal regulation and that refers to the rights and obligations of citizens and creates a certain legal effect in relation to them.[57]

Between administrative acts and administrative acts, it is precisely the situation with the effects that the act can create on the legal situation of the parties.[58] Likewise, for example, Italy clearly points out that a distinction must be made

[57] Devolvé, P., *L'acte administratif*, Paris, Sirey, 1983, p.20.
[58] *Ibidem*, p.11.

between 'declarative' acts, which merely confirm *de facto* and *de jure* situations, and constituent acts which have legal consequences effects vis-à-vis third parties and thus avoid a dispute which is subject to ordinary courts.[59] In the same vein, a number of classifications of administrative acts propose to distinguish between 'internal acts' and 'external acts', and the administrative act should refer to the latter category. The term "internal act" designates, primarily, measures that serve to prepare an administrative act, but also[60] refer to the internal organization of the administration,[61] that do not have any legal effect on citizens.

At the core of the administrative activity, the administrative act when defined in this way calls for the application of dispute resolution mechanisms characteristic of administrative justice.

However, this is where the equivalence ends and some particularities are revealed, i.e. measures that correspond to these general characteristics do not recognize special court proceedings. In practice, different European countries have adopted, different solutions to disputes, sometimes intended for general acts and so-called "governmental" acts, however it is not necessary to draw excessive conclusions from these differentiations with regarding the concept of an administrative act.

3.2. Unity of the concept compared to the variety of solutions in the dispute

Some acts are sometimes covered by a special approach to litigation, the impact of which should not, however, lead to a challenge to the one-size-fits-all assessment of the concept presented so far.

3.2.1.Different jurisdictions

Differential treatment of general acts in some European countries requires little attention and should not be overemphasized. In Europe, a general act is an impersonal measure of general scope issued by executive bodies[62] and certainly

[59] Giovannnini Colombini, C. et al., *Le contrôle des decisions administratives en Italie*, Actualité Juridique Droit Administratif, No. 9, 1999, p 671.

[60] If we accept that almost half of these preparatory measures can be directly covered by the request to initiate proceedings, Hungary seems to be an exception here.

[61] The concept of circular also exists in the Netherlands, V. art. 1.3. General Administrative Law Act. Art. Article 8.2 of the same law states that this type of act is not sensitive to legal remedies.

[62] We will not consider here exceptional assumptions in which the regulatory power is empowered to independently enforce or amend existing laws on the basis of legislative

falls into the general definition of an administrative act, i.e. an administrative act in Croatian administrative law, and as such it seems that *a priori* it is subject to the same dispute resolution regime as other administrative acts, in particular, the one applicable to individual decisions. Also, it is necessary to recall that general legal acts, i.e. general legal norms, are abstract and general norms, and in theory they are considered law in the material sense. It is a legal regulation with the characteristics of an abstract and general setting of rules of conduct. An abstract rule of conduct implies vagueness and uncertainty, while generality means that such a legal regulation applies to everyone, both natural and legal persons.[63]

Although in many European countries[64] these two types of acts are subject to the jurisdiction of administrative justice, this view is not shared by all countries. Namely, in Germany, Austria, the Netherlands, Poland, Slovenia and Sweden, countries with specialised administrative courts, they the control of a general act is not entrusted to an administrative judge, and thus they cannot be challengedbefore him. We cannot in any way draw the conclusion that these are indeed the aforementioned acts solely on the basis of the indirect attribution of an administrative act or a general act to a body governed by public law, although it is an essential element in their definition. However, the possibility of administrative acts and general acts to be issued by a body governed by public law emphasizes the importance of combining the basic criterion and the substantive definition, which is unanimously recognized today. In this sense, it is quite possible that public law bodies issue certain acts and then do not show the exercise of any privilege of public authority.

This distinction, referring to a general act, finds an explanation in the general scope and impersonality that this act has. Such a peculiarity actually distances it from an

powers limited in time and scope. The general act here is primarily taken as an executive legal norm.

[63] Ivančević, V., *op. cit*., p. 31. By analyzing the practice of the High Administrative Court of the Republic of Croatia through rejected applications (for the assessment of the legality of general acts), one comes to the criteria that an act must meet in order to be a general act. These are: the author of the act, the lack of jurisdiction of the Constitutional Court of the Republic of Croatia for the assessment of legality, the content of the act, its entry into force and public announcement. Therefore, a general act is an act enacted by an authorized issuer, which has the content prescribed by law and independently regulates the matter, has been publicly published and has entered into force, and is not within the jurisdiction of the Constitutional Court of the Republic of Croatia. The absence of any of these characteristics leads to the lack of jurisdiction of the High Administrative Court of the Republic of Croatia and, consequently, its rejection of the request for review of the legality of the act.

[64] Such as France, Belgium, Italy or Great Britain.

individual administrative act and, due to its influence, brings it closer to the law,[65] which entails certain consequences in the system of administrative disputes where the basic subjectivization of administrative legal protection has been established.[66] The presumption can be found in Germany, a country where court proceedings before the administrative court are modeled on civil proceedings and are aimed at initiating proceedings between two parties.[67] Firstly, the situation where the citizens are opposite the administration should be defended. In this sense, in order to be in an equal position, the claimant needs to point out the violation of subjective public law in order to initiate a dispute before an administrative judge, which brings us back to the prohibition of challenging a general (administrative) act.

A discrepancy has been identified between the States that defend the relatively narrow concept of the procedure, in which the claimant must obligatorily demonstrate an interest that protects one of his subjective rights for his claim to be admissible. Some other countries, France or Belgium, have an objective and therefore broader definition of the procedure by which it is easy to assess the interest that motivates the applicant to act. Depending on the case, the administrative judiciary will thus be able to have jurisdiction directly over general acts or this supervision will "slip away" in favor of the Constitutional Court.[68]

Regarding other States, they do not provide any specific approach with regard to those acts. That is the situation in Ireland, the Netherlands, the Czech Republic, Slovenia, Sweden, Germany,[69] Belgium[70] and, finally, Spain, a country in which

[65] In France, this position was defended by Léon Duguit, who is committed to the substantive classification of legal acts and who proposed to distinguish between "acts-rules", acts that aim to create general and impersonal legal situations, and subjective acts that in turn have the purpose of creating, modifying or annulling relationships or individual and subjective legal situations. Such a distinction enabled that author to approximate laws and general acts under the name of "acts-rules", and in this way he deprived the general act of the nature of an administrative act and in the material sense equated it with the law. See Duguit, L., *Treaty on Constitutional Law*, 3rd ed.,Paris, Boccard, 1921, p.327.

[66] Rainer, A., *Le contrôle juridictionnel des décisions administratives en Allemagne*, *Actualité Juridique Droit Administratif,* No. 9, 1999, p. 658 .

[67] Fromont, M., *Droit administratif des États européens*, Paris, PUF, 2006, p.177.

[68] Fromont, M., *op. cit*., p.157.

[69] Art. 20th century 3 of the Basic German Law actually subjects to the law and the Constitution everything that the executive power enacts, i.e. no act can escape judicial control. See Basic Law for the Federal Republic of Germanyhttps://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html, 28 March, 2025,.

[70] The Belgian Council of State has accepted jurisdiction over disputes concerning the annulment of an act brought against the royal decision appointing the provincial governor. Council of State of Belgium, *Vender oren c/ Etat Belge*, No 107561 of 10 June 2002

immunity from jurisdiction for certain acts was in force for a long time, before that specificity was abolished under the influence of the Law of 13 July 1998 defining the jurisdiction of an administrative judge when it comes to reviewing a number of elements relating to government acts.

Determining the gap maintained by such a theory about respect for the rule of law remains a recurring issue today, given that the compatibility of such a limitation of judicial review is often questioned with Art. 13 of the European Convention for the Protection of Human Rights,[71] which stipulates that everyone whose rights and freedoms are recognized in this Convention has the right to effective legal remedies before domestic state authorities, even when the violation was committed by persons acting in an official capacity.[72]

From this perspective, the categorization of these measures raises certain questions, i.e. it is permissible to ask whether these are administrative acts even when the administrative judiciary is not competent for them. In the context of that presumption, that title is often denied to them, while, on the other hand, that title does not give rise to any difficulties in States that do not have any distinction in that regard. However, such an approach betrays an overly mathematical view of the connection that unites the concept of an administrative act and administrative justice. Admittedly, the fact that an administrative act is generally subject to specific dispute resolution mechanisms makes it easier to determine it. However, controversial considerations surrounding it fail to preserve its own purpose, which can distort the concept.[73]

4. CONCLUSION

It is recommended not to exaggerate the consequences arising from the disputed distinction between general and individual acts that we have observed in some countries. It is indisputable that even in countries where the classification of an administrative act is not contested, a general (administrative) act, due to its general scope, receives special treatment, particularly with respect to its form of

[71] The Act on the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol No. 1, 4, 6, 7, and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette – International Treaties, No. 18/97 ('the ECHR').

[72] Flauss, J.F., *Le droit à un recours effectif – L'article 13 de la Convention européenne des droits de l'homme*, *RUDH,* Vol. 3, No. 7-9, 1991, p. 331.

[73] Devolvé, P., *op. cit*., p.20.

publication theprocedure of its withdrawal and repeal, its interpretation, and the assessment of its legality.

Although these two views cannot be entirely separated, the considerations relating to the legal regime of a general act, stems from its specific scope and not to its nature as an administrative act, the same observation could be made with regard to the dispute settlement regime of those acts. The refusal of a direct remedy against general acts can be understood depending on a specific conception aimed at the individual protection of the rights of citizens, and not at the objective control of the administration.

In this sense, the impact of an individual administrative act looks like it is being assessed in relation to legal acts issued by private individuals,[74] because the effect of an individual act on the rights and obligations of an individual is considered a priority. Such an approach requires the applicant to demonstrate an infringement of one of his or her subjective rights for the appeal to be upheld, which seems difficult to demonstrate in the case of an act having *erga omnes scope*. In that regard, it may be considered that it is not only the direct challenge of a general act that compels the administrative judge to decline jurisdiction to adjudicate on the matter, but that the presumption lacks a sufficient interest of the applicant to act. The solution is, of course, linked to the act, but only in terms of its general scope, which is subject to restrictive conditions relating accessing a court. It may be considered that the disputed justification seeking the exclusion of a general act from the jurisdiction of administrative justice focuses primarily on the question of the interest which prompts the applicant to act, and not on the nature of the act itself.

Furthermore, the comparative approach allows us to establish the profound unity of the concept of an administrative act and to ask ourselves about the scope of the numerous controversial specificities that it can permeate and that can practice real limits. This "shift" between the concept and the case law may seem unusual to the general public, which is inclined to believe that the administrative judge has long since defined the boundaries of an administrative act. However, the mainvalue of the comparative approach lies in the fact that, by questioning other legal systems,

[74] As Bertrand Seiller points out, private law does not entirely preclude proceedings under a unilateral act which often operates within private law groups (such as wills, recognition of an illegitimate child, revocation of a power of attorney, denunciation of a tenant, etc.). Melleray, B., ed., *L'exorbitance du droit administratif en question(s)*, Paris, LGDJ, 1999, p.107.

we reassess our own legal certainties and move beyond purely experiential conception of the administrative act.

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18. Šikić, M., *Finality, Finality and Enforceability in Administrative Procedure*, Proceedings of the Faculty of Law of the University of Rijeka, 33, No. 1, 1991, pp. 205-220.

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6. General Administrative Procedure Act, Official Gazette, No. 47/09, 110/21.
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AUSTRALIA-TUVALU "FALEPILI UNION" TREATY: INTERNATIONAL LAW IMPLICATIONS FOR THE STATEHOOD OF TUVALU

ABSTRACT

On 28 August 2024, the so-called "Falepili Union" Treaty between Australia and Tuvalu, signed by the two state parties on 9 November 2023, has entered into force. This treaty is significant in that it is the first international legally binding agreement related to the problem of small Pacific island states facing the loss of territory and other existential problems due to the climate change and (natural) disasters. The "Falepili Union" Treaty regulates climate cooperation between the two state parties, enabling human mobility with dignity for citizens of Tuvalu to Australia and cooperation between two states in security matters. The Treaty contains several important implications for international law of which the impact of this Treaty on international law on statehood stands out. With its provision on preserving the sovereignty and statehood of Tuvalu, this Treaty marks the possible beginning of a change in state practice regarding possessing territory as one of the necessary elements of statehood and, related to that, changing of the relevant norm of general customary international law. However, there is a justified fear for the survival of the ethnic and cultural identity of the Tuvaluans if their displacement from native territory occurs.

Keywords: *"Falepili Union" Treaty, international law, climate change, statehood, displacement*

1. INTRODUCTION

> „*When you relocate a whole country, cross border into another country, their distinctiveness and their identity will be lost. You know, they will become second, third or even fourth class citizens and assimilate into a totally different culture which is not theirs. And that's a reality. Tuvalu as a nation, as a people, will disappear.*" *(Reverend Tafue Lusama, 2018[1])*

The incentive for writing this article entry into force of „the world's first climate resettlement treaty",[2] the „Falepili Union" Treaty between Australia and Tuvalu on the 28 August 2024.[3] This Treaty is already marked as international legal instrument that „sets a groundbreaking precedent"[4] and which represents „a profound step forward for Small Island States threatened by rising sealevels"[5] not only in the context of climate resettlement issues, but also in the context of their state continuity. The aim of this paper is to consider the possible implications of this Treaty on the statehood and sovereignty of Tuvalu in the context of the impact of climate change and (natural) disasters on the territory of Tuvalu as a small Pacific island state and the existing rules of international law on statehood. The question arises as to what will happen to the people of this small oceanic state when further life and survival on the island becomes impossible, and this will happen even before the entire island disappears beneath the surface of the ocean.

[1] Stewart, I., *Importance of Indigenous Views on Climate Change Stressed*, 2 October, 2018, Radio New Zealand, https://www.rnz.co.nz/international/programmes/datelinepacific/audio/2018665052/importance-of-indigenous-views-on-climate-change-stressed, 10 March, 2025.

[2] Guilfoyle, D.; Green, A., T*he Australia-Tuvalu Falepili Union Treaty: Security in the face of climate change … and China?*, EJIL Talk!: Blog of the European Journal of international Law, November 28, 2023, para. 1., https://www.ejiltalk.org/the-australia-tuvalu-falepili-union-treaty-security-in-the-face-of-climate-change-and-china/, 1 March, 2024.

[3] Australia-Tuvalu Falepili Union of 9 November 2023. The text is available at the official pages of the Australian Government - Department of Foreign Affairs and Trade, https://www.dfat.gov.au/sites/default/files/australia-tuvalu-falepili-union-treaty.pdf, 20 February, 2025.

[4] Green, A.; Guilfoyle, D., *The Australia-Tuvalu Falepili Union Treaty: Statehood and Security in the Face of Anthropogenic Climate Change*, American Journal of International Law, year 118, 4/2024, p. 684.

[5] Kucharski, Sz., *Limited Success: Reflections on the Falepili Union Treaty*, 21 November 2023, para. 1, Verfassungsblog, https://verfassungsblog.de/limited-success/, 14 March 2025.

Therefore, if climate change and environmental degradation continue at this pace and intensity, Tuvalu will be the first nation to lose its territory, and then statehood in modern times, the first state to disappear due to climate change. This paper will contribute to the discussion of what will happen to the independence, sovereignty and, in general, statehood of Tuvalu when a large part of the population moves out due to the impossibility of living on the island.

What can generally be said in the context of international law is that in the context of the above challenges, legal norms are insufficient, and existing international and regional institutions are insufficiently prepared, as are states. The solutions are mostly not planned but improvised. The relevance of this topic is evidenced, among other things, by the current procedure for giving advisory opinion of The International Court of Justice on the Obligations of states in respect of climate change. which, among other, includes the question, of the legal consequences for states who have „caused significant harm to the climate system and other parts of the environment, with respect to […] small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change".[6] Due to the limitations of its scope, this paper cannot address all international legal aspects of climate change, but only issues of maintaining the statehood of states whose territory is threatened by climate change and (natural) disasters, such as Tuvalu. This particular topic is very challenging given that it impinges on the most sacred concepts of international law: the state and statehood.

After the introduction (1), chapter 2 will review the impact of climate change and (natural) disasters on migration/displacement of people in order to gain insight into the broader context of the circumstances in which Tuvalu and its population find themselves**.** In chapter 3, the facts about Tuvalu as a small Pacific island State on the verge of disappearing will be presented in order to understand the specific challenges that the country is facing. This is necessary to understand the reasons for the conclusion of the "Falepili Union" Treaty and what it brings or could bring to Tuvalu in the future. Chapter 4 is dedicated to the most prominent provisions of that Treaty. Chapter 5 will analyse the issue of the fate of Tuvalu's statehood and sovereignty after the conclusion of the "Falepili Union" Treaty due to the possible loss of that state's territory.

[6] Request for Advisory Opinion, International Court of Justice, Obligations of States in respect of Climate Change, transmitted to the Court pursuant to General Assembly resolution 77/276 of 29 March 2023, 14 April 2023, p. 8. Available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf, 14 March, 2025.

2. THE IMPACT OF CLIMATE CHANGE AND (NATURAL) DISASTERS ON MIGRATION/DISPLACEMENT OF PEOPLE

It is a well-known fact today that changes in temperature, predominantly, but not solely, as a result of the extremely high increase in greenhouse gases on Earth, have led to a number of harmful consequences for the survival of humans and other living beings, as well as the preservation of nature and the environment in general. Climate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric, and coastal and open ocean ecosystems.[7] In this regard, there are also extremely complex problems such as melting of polar ice, rising tide levels, dying ocean currents, acid rains, deforestation and forest destruction, water salinization, famines, fearsome and destructive winds and storms, accumulation of waste, to list only the most alarming, but not the only, problems that humanity faces today. Coral reefs are being massively destroyed, plant and animal species are dying out and biodiversity is decreasing, and extremes have become everyday life in various parts of the world (e.g. from expanding deserts to massive floods).[8] These are all examples of the consequences of catastrophic climate change and man's careless treatment of the nature around us.[9]

Climate change and natural disasters are intertwined and connected, affecting each other and cannot be viewed separately. Climate change is causing increased and significantly more dramatic natural disasters, just as long-lasting natural disasters can permanently alter the environment and cause climate change. According to Borges, the mentioned problems are "interconnected, cross-disciplinary, and cross-boundary". Some are the result of natural causes (storms, tornados, volcanic eruptions, earthquakes), while others are human-induced (environmental pollution, the construction of river dams, the logging of tropical forests, chemical warfare).[10] In this regard, it is possible that it is more adequate to use the term „disaster" rather than „natural disaster" to acknowledge that risk is influenced by

[7] IPCC, Summary for Policymakers, in: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, IPCC, Geneva, p. 5.
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[9] *Loc. cit.*
[10] Borges, I.M., *Environmental Change, Forced Displacement and International Law From Legal Protection Gaps to Protection Solutions*, Routledge, Oxon, New York, 2019, pp. 19-20.

both a) geophysical hazards as well as b) social, economic, and political vulnerability.[11] Additionally, not only does climate change contribute to making hazard events more frequent and intense, but it also contributes in (in)direct ways toward increasing exposure and vulnerability of people and systematic and irreversible environmental degradation.[12]

The impact of climate change on human rights is particularly pronounced.[13] Such changes threaten people's health and lives; destroy their private property, especially homes and habitats. In this regard, they make private and family life impossible by separating families, that is, they make it impossible to achieve an adequate standard of living. Climate change often irreversibly destroys nature itself, as well as cultural and other material goods, as well as existing natural resources. Local communities and peoples are left without food and water, the movement of people is prevented, and potentially their return to their homes. Due to the dramatic and often irreversible changes that climate change brings, not only local communities but also entire nations and states are threatened with the inability to live in peace, security and dignity.

Because of all of the above, climate change and natural disasters lead to human migration. Migrations of people have occurred before throughout history, both due to sudden-onset climate events (e.g. extreme storms and floods) and more gradual conditions of change (e.g. protracted droughts).[14] Migrations due to climate change are often connected with humanitarian, political, social or economic reasons.[15] There is often "a combination of a number of threats - floods, droughts, rising sea levels, destructive winds and the like, global warming in general, difficult economic conditions, and possibly armed conflict, violence, and instability".[16] Because of this multiple triggers which may prompt a decision to

[11] Van Geelen, T.; Wewerinke-Singh, M., *Vanuatu Protecting the Rights of Vulnerable Groups during Evacuation: A Case Study of Cyclone Pam and Mataso Island in Vanuatu*, in: Scott, M.; Salamanca, A. (eds.), Climate Change, Disasters, and Internal Displacement in Asia and the Pacific, A Human Rights-Based Approach, Routledge, Oxon, New York, 2021, p. 106.
[12] Scott, M.; Salamancas, A., *Internal Displacement in the Context of Disasters and Climate Change in Asia and the Pacific: Introduction to the Volume*, in: Scott, M.; Salamanca, A. (eds.), Climate Change, Disasters, and Internal Displacement in Asia and the Pacific, A Human Rights-Based Approach, Routledge, Oxon, New York, 2021, p. 3.
[13] See generally on connection of climate change and human rights: Savaresi, A., *Environment and Human Rights*, December 2023, Max Planck Encyclopedias of International Law, Oxford University Press, paras. 22-27, https://opil.ouplaw.com/home/mpil, accessed with subscription 7 March, 2025.
[14] McLeman, R., *Climate Change Migration, Refugee Protection, and Adaptive Capacity-Building*, McGill International Journal of Sustainable Development Law and Policy, year 4, 1/2008, p. 7.
[15] Lulić, Muhvić, Rešetar Čulo, *op. cit.* note 8, p. 8.
[16] *Ibidem*, p. 5.

move, it is often difficult to distinguish between "forced displacement" and "voluntary mobility".[17] In addition to forced and voluntary, migrations can be temporary and permanent; they can include displacement within the home state or migration abroad. All this is connected with enormous and complex economic and financial costs and losses, but also destabilization of society and the state, which can lead to instability, as well as violence and even armed conflict.[18]

International law in its current form does not provide adequate and sufficient legal solutions to this problem. Treaties related to climate change, such as the 1992 Framework Convention on Climate Change,[19] the 1997 Kyoto Protocol[20] and the 2015 Paris Agreement,[21] „are mostly concerned with mitigating and adapting to climate change and are focused on reducing greenhouse gas emissions, rather than protecting people or nations already affected by climate change."[22] On the other hand, the 1951 Convention relating to the Status of Refugees[23] with its 1967 Protocol[24] protects people fleeing their state for political reasons only (political refugees).[25] According to its definition of the refugee (Art. 1, A of the Convention, Art. I of the Protocol), "fleeing from natural disasters [...] or economic crisis do not fall within the scope of the Refugee Convention".[26] There are some regional treaties[27] and international soft law documents[28] which, in contrast to the Refugee Convention, offer protection to „persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of […] „natural or human-made disasters", but this protection extends exclusively to displacements within a certain state (thus the term „internally displaced persons").

[17] Price, S., *Introduction*, in: Price, S.; Singer, J., Global Implications of Development, Disasters and Climate Change Responses to Displacement from Asia Pacific, Routledge, Oxon, New York, 2016, p. 6.
[18] Lulić, Muhvić, Rešetar Čulo, *op. cit.* note 8, p. 5.
[19] United Nations Treaty Series, Vol. 1771, p. 107.
[20] United Nations Treaty Series, Vol. 2303, p. 162.
[21] United Nations Treaty Series, Vol. 3156, p. 79.
[22] Lulić, Muhvić, Rešetar Čulo, *op. cit.* note 8, p. 11.
[23] United Nations Treaty Series, Vol. 189, p. 137.
[24] United Nations Treaty Series, Vol. 606, p. 267.
[25] Andrassy, J.; Bakotić, B.; Seršić, M.; Vukas, B., *Međunarodno pravo 1*, 2nd edition, Školska knjiga, Zagreb, 2010, p. 367.
[26] Kugelmann, D., *Refugees*, March 2010, Max Planck Encyclopedias of International Law, Oxford University Press, para. 4, https://opil.ouplaw.com/home/mpil, accessed with subscription 5 March, 2025.
[27] The 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), available at the official web pages of the African Union https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa, 6 March, 2025.
[28] The 1998 UN Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2.

There is not, despite numerous proposals, even a single clearly accepted term or definition for this category of people. There is an abundance of the terms used in the literature, including „climate(-change) refugees", „environmental (eco-) refugees", „(forced) climate migrants", „environmental migrants", „survival migrants" and „environmentally displaced persons".[29] This kind of human mobility obviously "blurs the traditional distinctions between refugees, internally displaced people, and international immigrants."[30] Terms such as „climate refugees" or „environmental refugees" are clearly not in line with positive international law and official (international) legal terminology" and terms such as „climate migrants", „environmental migrants" or „survival migrants" are „imprecise and misleading".[31] Namely, although the term "migrant" in this context, unlike the term "refugee", is not incorrect, it is too broad since „includes equally reasons of persecution and various natural or man-made threats, economic necessities, but also purely voluntary and unforced reasons."[32] More importantly, the term is not formally defined by international law[33] and no specific international legal rights derive from it, in addition to the general rules on human rights and alien protection.[34] Given that the term "displaced persons" is already used in international documents in the context of persons who are *forced to move*,[35] the most adequate term, which is increasingly used also under the auspices of the United Nations,[36] is the term "environmentally displaced persons". However, it should be emphasized that the term "environmentally displaced persons", at least for now, does not confer on such persons any additional specific rights under international law.[37]

The aforementioned absence of adequate legal regulation, and even consensus on the relevant terminology, creates a "legal hole" in which people wo are forced to move across borders due to climate change are denied legal remedies for legally

[29] For an overview of relevant literature in which certain terms are used, see: Lulić, Muhvić, Rešetar Čulo, *op. cit.* note 8, pp. 12-15.
[30] Borges, *op. cit.* note 10, p. 17.
[31] Lulić, Muhvić, Rešetar Čulo, *op. cit.* note 8, p. 27.
[32] Lulić, Muhvić, Rešetar Čulo, *op. cit.* note 8, p. 23.
[33] With the exception of the term „migrant worker" from the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Art. 2(1)), United Nations Treaty Series, Vol. 2220, p. 3.
[34] See Kugelmann, D., *Migration*, March, 2009, Max Planck Encyclopedias of International Law, Oxford University Press, paras. 21-23, https://opil.ouplaw.com/home/mpil, accessed with subscription 5 March, 2025.
[35] See Francis, A.R., *Migrants Can Make International Law*, Harvard Environmental Law Review, year. 45, 1/2021, p. 107.
[36] Compton, B., *The Rising Tide of Environmental Migrants: Our National Responsibilities*, Colorado Natural Resources, Energy & Environmental Law Review, year 25, 2/2014, p. 365.
[37] *Loc. cit.*

entering another state and the corresponding legal status in such a state.[38] Further problems include disappearing of the entire nations' territory under water, losing claim to self-determination and the ability to maintain their culture.[39] The international community has so far mostly only detected the problem of dramatic climate changes causing displacement of people. There is still no specialized multilateral treaty for this area and in general too little has been done to protect the rights of people displaced by climate change. For now, the only area of international law that provides specific legal mechanisms for these individuals to protect their rights is international human rights law with its individual complaints mechanisms.[40] The question arises to what extent these endangered categories of population and nations can find their protection within the existing network of international human rights law regulations, i.e. to what extent and at what speed the existing norms can be adapted to new threats to human rights.

3. TUVALU – SMALL PACIFIC ISLAND STATE ON THE VERGE OF DISAPPEARING

One of the most critical areas in the world affected by climate change and ecosystem degradation are the archipelagic ocean states in the Pacific region. This region has suffered and is still suffering dramatic negative consequences of climate change, especially low-lying atolls and coral islands due to rising sea levels.[41] The list of the most endangered small Pacific island states includes the very fragile Tuvalu and Kiribati, because both of these states have a very low average elevation of just 1.5 metres, and rising sea levels could threaten not only the very existence of territories but also of its people.[42] Namely, it is not only those residents who live along the coast that are affected, the entire population of those islands and archipelagos, or rather an entire nation, is affected. In addition to Tuvalu and Kiribati, the Marshall Islands, but also Fiji, Tonga, Samoa, Vanuatu, the Solomon Islands, Nauru and Palau suffer exceptional damage in that part of the Pacific Ocean. These are also economically poor states, which cannot fight alone against

[38] Kent, A.; Behrman, S., *Facilitating the Resettlement and Rights of Climate Refugees An Argument for Developing Existing Principles and Practices*, Routledge, Oxon, New York, 2018, p. 7.
[39] *Loc. cit.*
[40] See *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020.
[41] Gemenne, F.; Blocher, J.; de Longueville, F.; Perrin, N.; Vigil, S., Zickgraf, C.; Ozer, P., *How Climate Extremes are Affecting the Movement of Populations in the Asia Pacific Region*, in: Price, S.; Singer, J., Global Implications of Development, Disasters and Climate Change Responses to Displacement from Asia Pacific, Routledge, Oxon, New York, 2016, p. 34.
[42] *Loc. cit.*

the more harmful consequences of climate change and natural disasters, but try to maintain themselves with international help, especially from the United Nations and other states in the region and beyond.[43]

As a small oceanic island nation located in the Pacific Ocean, Tuvalu is the fourth smallest state in the world by territory.[44] The area of Tuvalu is only 26 km^2, but it has, compared to its mainland, an enormously large exclusive economic zone of approximately one million km^2.[45] Tuvalu consists of nine small coral islands, five of which are atolls, formed in a chain from northwest to southeast over a distance of more than 670 km.[46] It is located approximately halfway between Australia and Hawaii, and its neighbours are Kiribati to the north and Fiji to the south. The capital, Funafuti, is located on the largest atoll, where half of Tuvalu's population lives.

The official languages are Tuvaluan (a Polynesian language group) and English. The latter is not surprising, given that Tuvalu is a former British colonial possession that gained independence from the United Kingdom in 1978 in the process of decolonization. However, the ties with the former colonial power remained, Tuvalu is a parliamentary monarchy, and the British king is the head of state. It is a member of the Commonwealth.[47] The Government is a parliamentary democracy with a unicameral legislature, and there are no political parties.[48] Interestingly, Tuvalu only has 16 members of parliament.[49] Tuvalu became a

[43] See e.g. investments of the World Bank in Tuvalu to support Tuvalu's financial management of and resilience to climate-related disasters, New World Bank Grant to Enhance Tuvalu's Climate Financing, Disaster Response, and Resilience, World Bank, Press Release, March 3, 2025, na https://www.worldbank.org/en/news/press-release/2025/03/03/new-world-bank-grant-to-enhance-tuvalu-s-climate-financing-disaster-response-and-resilience/, 14 March, 2025.

[44] List of the World's Largest Countries and Dependencies by Area, Britannica, https://www.britannica.com/topic/list-of-the-total-areas-of-the-worlds-countries-dependencies-and-territories-2130540, 14 March, 2025.

[45] The United Nations in Tuvalu, The United Nations country team website of Fiji, Solomon Islands, Tonga, Tuvalu and Vanuatu, https://pacific.un.org/en/about/tuvalu#_ftn1/, 14 March, 2025.

[46] Tuvalu is comprised of atolls and reefs islands. The atolls - Nanumea, Nui, Nukufetau, Funafuti and Nukulaelae - have islets encircling a shallow lagoon; the reef islands - Nanumanga, Niutao, Vaitupu and Niulakita - are compact with a fringing reef. Macdonald, B.K., Tuvalu, Britannica, February 2025, https://www.britannica.com/place/Tuvalu/, 14 March, 2025.

[47] Member Countries, The Commonwealth, https://thecommonwealth.org/our-member-countries, 14 March, 2025.

[48] The Constitution of Tuvalu Act 2023, Revised Edition. CAP. 1.02., available at: https://tuvalu-legislation.tv/cms/images/LEGISLATION/PRINCIPAL/1986/1986-0001/1986-0001_2.pdf, 14 March, 2025.

[49] Tuvalu, IPU Parline, Global Data on National Parliaments, https://data.ipu.org/parliament/TV/TV-LC01/election/TV-LC01-E20240126/, 14 March,

member of the United Nations in September 2000 as the 189th member state, and is very active in that international organization on issues related to climate change and sustainable development.[50]

In terms of population, the people of Tuvalu are predominantly Polynesian (96%) and a minority of them are Micronesians (4%). The majority of the population belongs to the Christian Church of Tuvalu (97%).[51] The Tuvaluan language is closely related to Samoan.[52] Around 67% are urban population.[53] As much as a third of Tuvalu's population is under 15 years old (32%), which tells us about the high birth rate, while only 12% of the population is over 60 years old.[54] For comparison, about 100 years ago, Tuvalu had only 3,457 inhabitants, the highest number was in 2012 (10,782), and in recent years the population has been steadily declining.[55] Unfortunately, in 2025, the total population had dropped significantly and, according to the Tuvalu Central Statistics Division, there were an estimated just over 9,800 people living in Tuvalu.[56]

Since Tuvalu does not have its own army, Australia and New Zealand are responsible for its security.[57] As Tuvalu does not have its own central bank, it does not have its own currency, but instead uses Australian dollars as its official currency.[58] In addition to the transfer of defence and financial matters to Australian authorities, Australia and New Zealand also assist Tuvalu in maintaining

2025 and Tuvalu, Inter-Parliamentary Union, https://www.ipu.org/parliament/TV/, 14 March, 2025.

[50] Secretary-General Welcomes Tuvalu as New Member of United Nations Family, United Nations Press Release SG/SM/7530, https://www.un.int/tuvalu/fr/activities/press-release-sgsm7530-secretary-general-welcomes-tuvalu-new-member-united-nations-family, 14 March, 2025.

[51] Tuvalu Population and Housing Mini-census 2017, Preliminary Report, Ministry of Finance, Economic Planning and Industries, Funafuti, Tuvalu, 2017, p. 3, https://finance.gov.tv/wp-content/uploads/2022/05/Mini-Census-2017-Preliminary-Report.pdf?utm_source=chatgpt.com, 14 March, 2025.

[52] Macdonald, *loc. cit.* note 46.

[53] *Loc. cit.*

[54] Tuvalu Population and Housing Mini-census 2017, *op. cit.* note 51, p. 3.

[55] *Ibidem*, p. 6.

[56] Tuvalu Central Statistics Division, at https://stats.gov.tv/, 14 March, 2025.

[57] For more information on Tuvalu-New Zealand relations, see the official website of New Zealand Foreign Affairs and Trade, New Zealand Government, https://www.mfat.govt.nz/en/countries-and-regions/australia-and-pacific/tuvalu#bookmark2/, 14 March, 2025. For more information on Australia-Tuvalu relations, see the official website of the Department of Foreign Affairs and Trade, Australian Government, https://www.dfat.gov.au/geo/tuvalu/, 14 March, 2025. See also The United Nations in Tuvalu, *loc. cit.* note 45.

[58] Macdonald, *loc. cit.* note 45, also Tuvalu, the official website of the Department of Foreign Affairs and Trade, Australian Government, *loc. cit.* note 57. See also The United Nations in Tuvalu, *loc. cit.* note 45.

diplomatic relations, as Tuvalu has a limited number of embassies abroad.[59] Since it has such a small population, it has no university or colleges, so students go either to neighbouring islands (e.g. Fiji) or to Australia and New Zealand, especially if they receive scholarships. Finally, Tuvalu is also limited in terms of healthcare. It has only one hospital located in Funafuti, but there are not enough medical staff so residents are forced to go to other, neighbouring states or, again, Australia or New Zealand.[60]

Tuvalu, like other small oceanic states in the Pacific, is not economically developed and self-sufficient, in fact, it depends on imports and aid from other states and international organizations. Because it has very limited natural resources and is so small in area, any natural disaster results in dramatic consequences for their economy. Tuvalu has ongoing problems with drinking water, for example, in 2011 a state of emergency was declared due to lack of potable drinking water.[61] The soils are porous, agriculture is very limited and the islands are depended on imported food,[62] which has been linked to serious health problems, including diabetes.[63] However, interestingly, Tuvalu is generating serious revenue from the internet domain *.tv, which is of great interest to foreigners.[64]

As the highest point on Tuvalu is currently only 4.6 m above sea level, it is clear how devastating even the lowest sea level rise or some natural disaster, such as strong storms, tsunamis and cyclones that lead to coastal erosion, landslides, floods and strong salinization of drinking water, can be. All of this not only destroys coastal areas, but also generally destroys plant life and infrastructure. Rising sea levels threaten drinking water sources on the islands, as seawater mixes with salt water, which additionally affects plant life that cannot grow in a salty environment. Due to increased soil salinity, combined with ocean acidification, the natural coral ecosystem is threatened. Tuvalu is therefore at the same time exposed

[59] Tuvalu, official website of the Department of Foreign Affairs and Trade, Australian Government, loc. cit. note 57. See also The United Nations in Tuvalu, *loc. cit.* note 45.
[60] Tuvalu, World Health Organization, Country Cooperation Strategy at a glance, 2018, https://www.who.int/publications/i/item/WHO-CCU-18.02-Tuvalu, 14 March, 2025.
[61] Tuvalu declares emergency over water shortage, 3 October, 2011, BBC News, https://www.bbc.com/news/world-asia-pacific-15147043, 14 March, 2025.
[62] Macdonald, loc. cit. note 46.
[63] Shen, S.; Gemenne, F., *Contrasted Views on Environmental Change and Migration: the Case of Tuvaluan Migration to New Zealand*, (2011) 49(S1) International Migration, year 49, S1/2011, p. 226, citation according to Ross, N.J., *Low-lying States, Climate Change-induced Relocation, and the Collective Right to Self-Determination*, A thesis submitted to the Victoria University of Wellington in fulfilment of the requirements for the degree of Doctor of Philosophy in Law, 2019, p. 9.
[64] See Tuvalu is a tiny island nation of 11,000 people. It's cashing in thanks to Twitch, The Washington Post, https://www.washingtonpost.com/video-games/2019/12/23/tuvalu-is-tiny-island-nation-people-its-cashing-thanks-twitch/, 14 March, 2025.

to severe droughts and extreme heat due to extreme climate change.[65] There are no rivers, rain catchment and wells provide the only fresh water.[66] Tuvaluans therefore depend heavily on rainwater, and droughts further threaten water supplies.

The inhabitants and the government of Tuvalu resist the idea of resettlement and do not want to leave Tuvalu, because it is clear to them that their "humane resettlement" may also represent the end of their separate ethnic identity. They are active on the international scene on the topic of climate change. They seek help from states and international organizations, and try to sensitize the regional and international public to the problems they face. They are extremely active at conferences and world forums in demanding stricter sanctions for those states that do not reduce CO_2 emissions.[67]

To preserve the territory, the Government of Tuvalu is working actively on a series of activities that would enable and extend the stay and stay of the population in Tuvalu. First and foremost, given that the option of retreating to higher ground is not possible, it is creating 7.3 hectares of new and raised land. This artificial elevation of the territory and the relocation of the population to the new, raised land could prolong their stay on the islands for decades to come and help to withstand large storms under higher sea levels.[68] Secondly, they are working to build concrete walls as solid barriers to protect against waves, coastal erosion and flooding, thus ensuring the safety and future of their citizens.[69] Third, the Government of Tuvalu is thinking innovatively about building artificial islands, as well as specific floating structures that would replace artificial islands, all in order to gain more living space. Such ideas are already being worked on extensively in other parts of the world.[70] However, in addition to the need to take into account

[65] The United Nations in Tuvalu, *loc. cit.* note 45.
[66] Macdonald, *loc. cit.* note 46.
[67] See e.g. Sinking nation Tuvalu calls for treaty ending fossil fuel use at COP27, November 11, 2022, Climate Action, the World Economic Forum, https://www.weforum.org/stories/2022/11/tuvalu-calls-for-treaty-ending-fossil-fuel-use-cop27/, 14 March, 2025.
[68] Notes from Tuvalu: Leading the way in adapting to sea-level rise, July 19, 2023, UNDP, https://www.undp.org/blog/notes-tuvalu-leading-way-adapting-sea-level-rise, 14 March, 2025.
[69] With US$36 million in financing from the Green Climate Fund; US$2.9 million in co-financing from the Government of Tuvalu, and $1.34 million in co-financing from Australia's Department of Foreign Affairs and Trade, the 8.5-year Tuvalu Coastal Adaptation Project is focused on strengthening the resilience of one of the world's most vulnerable countries to climate change and sea-level rise. Tuvalu Coastal Adaptation Project (TCAP), https://tcap.tv/, 14 March, 2025 and Tuvalu Coastal Adaptation Project, Climate Change Adaptation, UNDP, https://www.adaptation-undp.org/projects/tuvalu-coastal-adaptation-project/, 14 March, 2025.
[70] See e.g. Maldives Floating City, a benchmark for vibrant communities, Waterstudio.NL,

how such construction would affect the existing environment, such realizations are particularly technologically and constructionally challenging, as well as financially demanding. Finally, coral reef restoration and natural protection are also important for saving the territory of Tuvalu.[71]

However, Tuvalu is also preparing for evacuation and migration. As stated by the Government of Tuvalu, „Tuvalu has no choice but to start planning for this worst-case scenario".[72] Also, at COP27 (2022), Tuvaluan Minister Simon Kofe announced that Tuvalu will become the First Digital Nation: „that it would digitally recreate its land, archive its rich history and culture, and move all governmental functions into a digital space".[73] The aim of this digitalization is, *inter alia*, to preserve its history and heritage, but also its statehood and territory by creating a virtual replica of Tuvalu.

4. "FALEPILI UNION" TREATY: THE FIRST CLIMATE-RESETTLEMENT TREATY

The Australia-Tuvalu Falepili Union Treaty (further in the text: Treaty)[74] was signed on 9 November 2023 and entered into force on 28 August 2024.[75] On 8 May 2024 the two state parties also concluded an Explanatory Memorandum[76] along with the Treaty in which they, although it is not a legally binding text, „commit to implement the Falepili Union in line with this document, including

https://www.waterstudio.nl/projects/maldives-floating-city-a-benchmark-for-vibrant-communities-beyond-the-waterfront/, 14 March, 2025; Dutch Docklands, https://www.dutchdocklands.com/, 14 March, 2025; The Seasteading Institute, https://www.seasteading.org/, 14 March, 2025. See also Navigating urban futures: The Floating Cities, UN-Habitat, 2024, https://unhabitat.org/news/15-may-2024/navigating-urban-futures-the-floating-cities, 14 March, 2025.

[71] See e.g. Coral Restoration Foundation, an organization that deals with the restoration of coral reefs, which is extremely important for the protection and survival of the archipelago, Coral Restoration, https://coralrestoration.org/, 14 March, 2025 and Reef Resilience, coral reef conservation and restoration program, Reef Resilience, https://reefresilience.org/, 14 March, 2025.

[72] Tuvalu, the First Digital Nation, https://www.tuvalu.tv/about/, 14 March, 2025.

[73] *Loc. cit.*

[74] See supra note 3.

[75] Australia-Tuvalu Falepili Union treaty, the official pages of the Australian Government - Department of Foreign Affairs and Trade, https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty, 20 February, 2025.

[76] Explanatory Memorandum – Falepili Union between Tuvalu and Australia, the official pages of the Australian Government - Department of Foreign Affairs and Trade, https://www.dfat.gov.au/sites/default/files/explanatory-memorandum-falepili-union-between-tuvalu-australia.pdf, 20 February, 2025.

where relevant in interpretation of the Treaty".[77] The text of the Treaty is short; it consists of preamble and only eight articles. Already in the preamble of the Treaty, "the special and unique circumstances faced by Tuvalu and that climate change is Tuvalu's greatest national security concern" were recognized. The name of the Treaty comes from „the concept of Falepili which connotes the traditional values of good neighbourliness, duty of care and mutual respect" (preamble of the Treaty). Despite the term "Union" in the title of the Treaty, it is not about establishing a union between two states in the true sense of the word – the Treaty is „limited to matters of climate change, human mobility, and security".[78] After the indication of the Purpose of the Treaty (Art. 1), separate articles are devoted respectively to: Climate cooperation (Art. 2), Human mobility with dignity (Art. 3), Cooperation for security and stability (Art. 4), Consultation and responses (Art. 5), Settlement of disputes (Art. 6), Amendment (Art. 7) and Entry into force, duration and termination (Art. 8).

The purpose of the Treaty is defined in Art. 1 in three elements. The first element of the purpose of the Treaty is to „establish a Falepili Union based on values of good neighbourliness, care and mutual respect and elevate the Parties' relationship to one which is advanced, integrated and comprehensive" (a). The second element is providing „the citizens of Tuvalu with a special human mobility pathway to access Australia underpinned by a shared understanding and commitment to ensuring human mobility with dignity" (b). And finally, the third element is to „protect and promote each Party's and the Parties' collective security and sovereignty" (c).

In Art. 2 on „climate cooperation" the state parties „commit to work together in the face of the existential threat posed by climate change" (para. 1). Two very important things are highlighted in this article. The first one is „the desire of Tuvalu's people to continue to live in their territory where possible and Tuvalu's deep, ancestral connections to land and sea" (para 2(a)). This provision is a reflection of, as noted in the literature, „a continued lack of appetite on the part of States affected by sea level rise for 'solutions' to sea-level rise that envision accession or merger with larger entities".[79] In the context of this expressed priority of continuing to live in their own territory, the state parties committed themselves

[77] The aforementioned Memorandum should be viewed as part of the context of the Treaty "for the purpose of the interpretation of a treaty" because it is an „instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" according to the Art. 31(2)(b) of the 1969 Vienna Convention on the Law of Treaties (United Nations Treaty Series, vol. 1155, p. 331).
[78] Green, Guilfoyle, *op. cit.* note 4, p. 692.
[79] Guilfoyle, Green, *op. cit.* note 2, para 6.

to cooperation in terms of helping the citizens of Tuvalu „to stay in their homes with safety and dignity" (para. 3) and have taken into account „more recent technological developments" which could „provide additional adaptation opportunities" (para. 2(c)). This could include, for example, Australia's assistance to Tuvalu in „combatting sea-level rise including by way of land reclamation and artificial island building within its existing maritime zones".[80] Already at the time of signing the Treaty, Australia announced the investment of 16.9 Australian dollars to support the innovative Tuvalu Coastal Adaptation project (TCAP).[81] The second important element of this article is that „the statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise" (para 2(b). This is „the first publicly binding rejection by any State of the traditional view that inhabitable land is necessary for State continuity".[82] This provision has the potential to contribute to state practice that deviates from the established rule of customary law on territory as a necessary element of statehood.[83] This solution, in combination with the guarantee of a "human mobility pathway", also represents a kind of response to the arguments of sceptics who expressed views that the recognition of statehood despite the loss of territory of island states would result in the refusal to accept environmentally displaced persons by states in a similar position as Australia.[84]

In the provision of Art. 3 on „human mobility with dignity" Australia commits itself to the establishment of the so-called "special human mobility pathway" which will enable citizens of Tuvalu to "live, study and work in Australia" (para. 1(a)) and „access Australian education, health, and key income and family support on arrival" (para 1(b)). In this context, Tuvalu, with the support of Australia (para. 3), undertakes to ensure "that its immigration, passport, citizenship and border controls are robust and meet international standards for integrity and security and are compatible with and accessible to Australia". (para. 2). In the Explanatory memorandum is specified in more detail which exactly Australian supports would „genuine Tuvaluan citizens" which apply for mobility pathway enjoy. It is also specified that the annual allocation will be introduced at the beginning of up to

[80] Hobbs, H.; Rothwell, D., *Towards a Legal Era of Islands: the International and Constitutional Legal status of Island Territories*, International and Comparative Law Quarterly, year 73, 3/2024, p. 637.
[81] Barnett, J.; Farbotko, C.; Kitara, T.; Aselu, B., *Migration as Adaptation? The Falepili Union between Australia and Tuvalu*, Wiley Interdisciplinary Reviews: Climate Change, year 16, e924, 2025, p. 3.
[82] Green, Guilfoyle, *op. cit.* note 4, p. 694. See also Schofield, C.; Anggadi, F., *The Australia-Tuvalu Falepili Union Treaty: Opportunities and Controversies*, Asia-Pacific Journal of Ocean Law and Policy, year 9, 1/2024, p. 88-89.
[83] Kucharski, op. cit. note 5, para. 10.
[84] Guilfoyle, Green, *op. cit.* note 2, para. 7.

280 visas that could be mutually adjusted each program year. Despite the fact that this is a pioneering international treaty regarding climate resettlement, there are already similar, even broader regional programs, such as the one of New Zealand that enables 2,400 people from Pacific islands to move to its territory annually.[85] Despite the positive humanitarian aspects of the climate resettlement according to this model, certain concerns/criticisms have been expressed, such as that of creating „stigma for those who do choose to migrate" and that this solution is „a sign that the Tuvaluan government is giving up its fight on climate change".[86] Concerns have also been expressed that the annual visa quota is too high, which will negatively affect the priority previously expressed in the Treaty of insisting on the continuation of Tuvaluan life on their own territory.[87] The question also arises „whether the new human mobility scheme will limit the possibility of Tuvaluans to apply for international protection" from other states that could use this mechanism as an excuse that the Tuvaluans already have an adequate opportunity to settle in another territory.[88] What can certainly be said is that this Treaty introduces „a new category of migrants eligible for residence permits" and fills a „legal lacuna concerning climate migrants in the Pacific context".[89]

Art. 4 related to „cooperation for security and stability", also brings different obligations of the State parties. Thus, at the request of Tuvalu, Australia is obliged, in accordance with its international law obligations and domestic processes, to „provide assistance to Tuvalu in response to: (a) a major natural disaster; (b) a public health emergency of international concern; (c) military aggression against Tuvalu" (para. 1). On the other hand, Tuvalu undertakes to "mutually agree with Australia" regarding "any partnership, arrangement or engagement with any other State or entity on security and defense-related matters", e.g. on defence, policing, border protection, cyber security and critical infrastructure (para. 4). Tuvalu also commits, „provided that advance notice is given by Australia", to „provide Australia rights to access, presence within, and overflight of Tuvalu's territory, if the activities are necessary for the provision of assistance requested by Tuvalu under this agreement" (para 3.). The issue of the possible negative impact of Art. 4, para. 4 on Tuvalu's independence has already been noticed in the literature, given Australia's *de facto* veto power over various aspects of Tuvalu's conduct of foreign policy.[90] This solution is the result of balancing the interests of Tuvalu and

[85] Schofield, Anggadi, *op. cit.* note 82, p. 89.
[86] Barnett, J. *et al.*, *op. cit.* note 81, p. 3.
[87] See *ibidem*, p. 3-4.
[88] Similarly, Kucharski, *op. cit.* note 5, para. 15.
[89] Kucharski, *op. cit.* note 5, para. 5.
[90] See Green, Guilfoyle, *op. cit.* note 4, pp. 696-702, Schofield, Anggadi, *op. cit.* note 82, p. 90-91, Hobbs, Rothwell, *op. cit.* note 80, p. 638 and Barnett, J. *et al.*, *op. cit.* note 81, p. 3.

Australia during the negotiations regarding the conclusion of this Treaty, where Australia also had to get something in return, primarily in terms of security related to the growing influence and presence of China in the Pacific region.[91]

Among other provisions of the Treaty, it is worth highlighting the one on the establishment of a Joint Committee that will meet periodically (at least every 12 months) and as needed in order to discuss matters arising under Treaty (Art. 5). Also important is the one on the settlement of disputes according to which every dispute related to the interpretation and application of the Treaty „shall be settled by consultation or negotiation between the Parties, and shall not be referred to any national or international tribunal or court or any other third party for resolution" (Art. 6, para. 1). The rest of the Treaty contains provisions of the technical character on amendment (Art. 7), entry into force, duration and termination (Art. 8) of the Treaty.

From this brief review of the provisions of the Treaty, it can be concluded that, along with the establishment of a special human mobility pathway, the most important contribution to international law is the insistence on the priority of providing assistance to the Tuvaluans so that they can remain living on their territory where possible, but also the recognition of statehood and sovereignty of the Tuvalu regardless of the fate of its territory. We will address the issues of the fate of Tuvalu's statehood and sovereignty in more detail in the next chapter.

5. TUVALU'S STATEHOOD AND SOVEREIGNTY AFTER "FALEPILI UNION" TREATY

The provision of the "Falepili Union" Treaty that „the statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise" creates legal consequences exclusively in bilateral relations between Tuvalu and Australia. Such entity which is „recognized by just one or several states" Nicholson calls „state-in-context" – an entity which is not a state properly so called, but still „category of state-like entities […] that have personality in international law".[92] The question arises, however, what will happen if Tuvalu is left without territory in the context of general international law.

[91] Green, Guilfoyle, *op. cit.* note 4, p. 684.
[92] Nicholson, R., *Statehood and the State-like in International Law*, Oxford University Press, Oxford, 2019, pp. 5, 92.

The possibility of the collapse of the Tuvalu territory due to the previously described climate change related circumstances is very real and we already have a number of examples of the collapse of the territory that, admittedly, do not necessarily represent the territory of the entire state. Nauru has been a nearly ruined territory due to massive phosphate mining since the beginning of the 20th century, which has destroyed the island's entire ecosystem.[93] They have no agricultural land, must import most of their food and water, and are dependent on foreign aid. Over half of the island of Montserrat, a British overseas possession with the status of a UN non-self-governing territory,[94] was destroyed by a volcanic eruption (1995-1997). The southern two-thirds of the island with its infrastructure, including the capital, disappeared under ash and lava, leading to displacement of population.[95] Montserrat is the most illustrative example of the disappearance of (part of) territory due to natural disasters with the consequent loss of population.

According to the Art. 1. of the 1933 Montevideo Convention on Rights and Duties of States,[96] in order for an entity to be a state, as it is well known, four conditions must be met cumulatively: that it has a permanent population, defined territory, government and capacity to enter into relations with the other States. Although the provision of the Montevideo Convention on the elements of statehood is "often cited"[97] and is considered „the seminal definition of statehood",[98] it is „not definitive"[99] and is „no more than a basis for further investigation".[100] In this regard, an interesting opinion has been expressed according to which element of territory „operates less as an empirical observation as to the existence of an accepted factual condition, than again as a metaphorical assertion: the State must exist 'as if' it possessed territory with determinate boundaries".[101] However, there is still a consensus in theory regarding the element of territory that, although there is no rule on the required minimum area of the territory (as shown by examples of

[93] Gowdy, J.M.; McDaniel, C.N., *The Physical Destruction of Nauru: An Example of Weak Sustainability*, Land Economics, year 75, 2/1999, p. 333.
[94] Non-Self-Governing Territories, United Nations, https://www.un.org/dppa/decolonization/en/nsgt, 14 March, 2025.
[95] Pattullo, P., Montserrat, Britannica, https://www.britannica.com/place/Montserrat-island-West-Indies, 13 March 2025.
[96] League of Nations Treaty Series, Vol. 165, p. 19.
[97] Crawford, J., *Brownlie's Principles of Public International Law*, 8th edition, Oxford University Press, Oxford, 2012, p. 128.
[98] Craven, M.; Parfitt, R., *Statehood, Self-determination, and Recognition*, in Evans, M. D., International Law, 5th edition, Oxford University Press, Oxford, 2018, p. 192.
[99] *Ibidem*, p. 194.
[100] Crawford, *Brownlie's Principles…*, *op. cit.* note 97, p. 128.
[101] Craven; Parfitt, *op. cit.* note 98, p. 198.

micro-states such as Tuvalu and Nauru as members of the United Nations),[102] there must be an exclusive control over *a certain* territory.[103] There is also an argument of the importance of recognition in international law according to which „the more overwhelming the scale of international recognition is in any given situation, the less may be demanded in terms of the objective demonstration of adherence to the criteria".[104] The above considerations show that there is a certain measure of fluidity in the aforementioned rule, but it should also be emphasized that there is no obstacle to its change by, for example, changing of state practice and *opinio iuris*.

If the territory of Tuvalu disappears beneath the sea surface in the near future or life there is no longer possible due to rising sea levels, could Tuvalu be considered a state solely based on population, an independent but dislocated government, and the retention of old diplomatic relations with states from before the landmass disappeared? Could Tuvalu be considered a state-without-territory? Could it be a state-within-a-state (e.g. Australia)? For example, would the United Nations and other states in the international community continue to consider Tuvalu a legitimate and equal member? Would it remain a member of the United Nations and other international organizations? Would it transfer the entire management of foreign affairs to the host state? With the disappearance of the territory and the territorial sea, would it also be left without its, in relation to the surface of the territory, immense exclusive economic zone? These are extremely serious legal and political, as well as economic and humanitarian issues, and they represent a major challenge for the international community.

According to the existing rules of general international law on statehood, Tuvalu would lose its state status with the disappearance of its territory. However, the situation in which Tuvalu finds itself is unprecedented. Throughout history, states and empires have arisen and disappeared, lost population (migrations, wars, diseases, assimilation), new governments have emerged, existing ones have collapsed, organized governments have changed, but the disappearance of the entire territory of an existing state due to natural disasters is truly exceptional and specific. If, as a result of the disappearance of the territory, Tuvaluans move to Australia, Tuvalu could, in accordance with the provisions of the "Falepili Union" Treaty, become the "first state in exile", and not just a nation that has completely

[102] See Craword, J., *The Creation of States in International Law*, 2nd edition, Oxford University Press, Oxford, 2006, pp. 46-47, Crawford, *Brownlie's Principles…*, *op. cit.* note 97, p. 129, Craven; Parfitt, *op. cit.* note 98, p. 195.
[103] See Craword, *The Creation of...*, *op. cit.* note 102, p. 46, Crawford, Brownlie's Principles…, *op. cit.* note 97, p. 128 and Shaw, M.N., *International Law*, 7th edition, Cambridge University Press, Cambridge, 2014, p. 145.
[104] Shaw, *op. cit.* note 103, p. 150-151.

moved to another territory. It would not be the first time that, according to general international law, certain entities do not have all the elements and characteristics of statehood, but still have a certain international legal status. For example, the Vatican City State, closely linked to the Holy See (which itself enjoys international legal status), has a very small territory, a specific government, and no permanent, classical population (residents are diplomats, monks and priests). Despite this, it enjoys international legal status.[105] The Sovereign Order of Malta has also established relations with more than 100 states and enjoys an observer status at the United Nations, but has no territory other than its headquarters in Rome.[106] Palestine has its own government but its territory is partially disputed and under Israeli occupation. They also have permanent populations in the Gaza Strip and the West Bank and claim to be recognized by more than 140 states. However, it does not have full control over the entire territory and cannot exercise all functions of government.[107] At the United Nations, it only enjoys observer status. Somalia did not have an organized government for a long period from 1991-2012, but there was still no doubt that Somalia was a state.[108]

With the "Falepili Union" Treaty as the first international treaty that, at least in a bilateral relationship between two states, guarantees the survival of statehood and sovereignty of a state faced with the disappearance of its territory, the aforementioned idea also found its way into certain declarations at the international level. Thus, the 2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise of the Pacific Islands Forum, which brings together 18 Pacific states including Australia and New Zealand, expressed the similar position. According to it „the statehood and sovereignty of Members of the Pacific Islands Forum will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise".[109] The aforementioned initiative of the Pacific states was also recognized by the past president of The United States of America, Joe Biden, who stated: „We hear your calls for reassurance that you

[105] See Westdickenberg, G., *Holy See*, June 2006, Max Planck Encyclopedias of International Law, https://opil.ouplaw.com/home/mpil, accessed with subscription 13 March 2025.
[106] See Gazzoni, F., *Malta, Order of*, January 2009, Max Planck Encyclopedias of International Law, https://opil.ouplaw.com/home/mpil, accessed with subscription 13 March 2025.
[107] See Robinson, K., Who Governs the Palestinians?, Council on Foreign Relations, https://www.cfr.org/backgrounder/who-governs-palestinians, 13 March 2025.
[108] See Schmidt, J.A., *Somalia*, Conflict, June 2017, Max Planck Encyclopedias of International Law, https://opil.ouplaw.com/home/mpil, accessed with subscription 13 March 2025.
[109] Available at: https://forumsec.org/sites/default/files/2024-05/2023%20Declaration%20on%20the%20Continuity%20of%20Statehood%20and%20the%20Protection%20of%20Persons.pdf, 9 March 2025.

never, never, never will lose your statehood, or membership of the U.N. as a result of a climate crisis. Today, the United States is making it clear that this is our position as well.".[110] In the event that such positions are expanded and supported by other states and international organizations, it is also possible that the current rule of customary international law on the elements of statehood will change.[111] In theory, certain models already exist. Some authors, for example, write about „ex-situ nationhood" as „a status continued existence of a sovereign state" which would „protect the peoples forced from their original place of being by serving as a political entity that remains constant even as its citizens establish residence in other states".[112] How realistic that is is another matter.

In practice, the relocation of Tuvaluans would initiate the right to self-determination in the territory of the host state in the sense of cultural autonomy, something that is today associated with, for example, minority rights. In the territory of another state, for example Australia, Tuvaluans could thus gain some kind of cultural and possibly political autonomy. Although states categorically resist granting the right to self-determination to minorities out of fear of possible secession of the territory, Australia would probably not consider itself threatened by granting the resettled people of Tuvalu a high level of political autonomy, when the number of a few thousand people certainly would not threaten the territorial survival of Australia as a state. Realistically, integration and assimilation would probably take their toll. Whether there will be the political will to ignore the facts (lack of territory), and perhaps even change the customary law rule on the elements of statehood, and leave Tuvalu with some kind of symbolic statehood, remains to be seen. However, since they are extremely small in number, we believe that, unfortunately, the loss of their cultural identity through collective relocation would be irreversible.

6. CONCLUSION

At this level of society and civilization, we can hardly expect that harmful climate change will be stopped in the near future, nor that the intensity of (natural) disasters related to climate change will be reduced and/or mitigated. Low-lying states, especially those consisting only of islands, are directly affected, exposed to numerous and increasingly complex challenges, unprecedented in this modern era.

[110] US recognises Cook Islands, Niue as Biden hosts Pacific Island leaders, AlJazeera, https://www.aljazeera.com/news/2023/9/25/us-recognises-cook-islands-niue-as-biden-hosts-pacific-island-leaders, 9 March 2025.
[111] See Kucharski, *op. cit.* note 5, para. 10 and Guilfoyle, Green, *op. cit.* note 2, para. 8.
[112] Burkett, M., *The Nation* Ex-Situ*: On Climate Change, Deterritorialized Nationhood and the Post-climate Era*, Climate Law, year 2, 3/2011, p. 346.

Additionally, these are geographically isolated and economically less developed states, with weak(er) natural resources and underdeveloped infrastructure, which are largely dependent on the oceans and seas that surround them. These states do not have sufficient economic strength to independently prepare for the dramatic changes that have already begun, nor do they have the capacity to solve such complex and demanding problems on their own. Without the help of international and regional organizations, as well as the engagement and solidarity of states in the region and beyond, without awareness of how urgent it is to act to achieve sustainable development, it will be difficult for these states to achieve the necessary network of measures and policies to reduce the harmful consequences of climate change and (natural) disasters. Without prompt measures and actions, there is a danger that entire nations and even states will disappear. It is not enough to just (try to) stop climate change; financial and other assistance is necessary to repair the damage that has already occurred. These states are not responsible for all the changes that climate change is bringing to us, and they have become the biggest victims. Unfortunately, international justice, as well as empathy for these small nations, is lacking.

As sea levels rise, coasts erode, territory shrinks and disappears, and extreme weather events additionally destroy infrastructure and cause enormous damage to people and local communities, a series of states are threatened with the disappearance of their territory, and then the disappearance of their population (through resettlement and migration). In this way, the state actually loses two of the four criteria to survive as such under international law. The losses for that state are numerous and complex, and multiply over time. In addition to the complex political and legal issues that arise with the loss of territory and population displacement, there are also complex problems of cultural rights and the preservation of the identity of these peoples as groups, especially since most of these peoples are small in number. The question arises as to how to ensure sustainable development strategies, as well as the preservation of habitat biodiversity, but also the use of renewable energy sources in states that are sinking and rapidly disappearing below sea level.

Tuvalu, like other small archipelagic states, we fear, has passed the point of no return. It is likely that the Tuvaluans, about 10 thousand of them, will survive on their territory for only another decade or so, and after that they will no longer be able to live on their islands. Not only is the geographical position and structure of the archipelago not suitable for them, but migration from the island, especially of young people, is a process that is unstoppable and, unfortunately, leads to the disappearance of a nation. The future will show what the chances are for the survival of the Tuvaluan as a people (who have the right to self-determination and survival) and Tuvalu as a state to survive dislocated. However, practice to date has

shown that international law is flexible and tolerant (even) in some extreme situations and examples, so it will possibly adapt to the fact that a nation loses its territory, but has the ambition to continue to maintain its independence and sovereignty - just dislocated. The provisions of the "Falepili Union" Treaty are precisely on that track. In addition to recognizing the permanence of Tuvalu's statehood despite facing the loss of territory in relation to Australia, it also aims to influence the adaptation of the relevant rules of general international law.

Tuvalu will likely go down in history as the first state to become - a victim of climate change. The international community is late in reacting to the problems and challenges faced by these nations. Tuvalu as well as other states in a similar position, thus become a symbol of the failed fight and resistance to climate change, victims of extreme injustice and violations of collective human rights. Those states that have contributed the most to this climate crisis are especially responsible, and they bear the greatest responsibility to help at least these small states and nations to survive.

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THE ROLE OF ASSOCIATIONS IN LITIGATION BEFORE THE EU COURTS FOR THE PROTECTION OF GENERAL INTERESTS

ABSTRACT

This contribution aims to analyze the fundamental right of access to justice in environmental matters, when the object of supranational litigation is a general interests defended by associations that represent supra-individual rights. The environment, a common heritage, has historically been the subject of dedicated European legislation to establish a common general framework of obligations for public authorities. However, the topic will be analyzed as a first sector that can be replicate and expanded in other field, as for example the one of digital rights in the EU. In the environmental sector, the question of access to justice it is particularly relevant considering that the interest to be protected is evidently not an individual interest, but rather a general and collective interest. While recognizing the potentially crucial role attributable to mechanisms for the protection of collective interests, the EU procedural system has not stimulated the involvement of third parties in litigation through class action mechanisms, however the proposed contribution aims to investigate the issue of the role of associations with particular reference to the role recognized to them in the procedural field by European jurisprudence to formulate hypotheses regarding the development of the EU judicial protection system. In conclusion, the considerations developed for the environmental field will be analyzed for their application in other sector of the EU policies.

***Keywords**: European Law, Access to Justice, Fundamental rights, General interest, Active legitimation*

1. INTRODUCTION

Legitimation to act is, together with the interest to promote action, one of the procedural preliminary condition to promote the action, prodromal and necessary to assert the right of access to justice, guaranteed at Union level by art. 47 of the Charter of Fundamental Rights (the Charter). Indeed, European Union law recognizes the fundamental right of any individual to an effective remedy before a court in order to enforce the subjective rights conferred upon them by EU law. This principle, enshrined in the Charter, ensures that individuals have access to judicial protection and that national courts uphold the direct and effective application of EU law.[1] The right to an effective remedy has been one of the cornerstone arguments underpinning the legal order of the European Union, which is fundamentally based on the rule of law. The Court of Justice of the European Union (CJEU) has consistently reaffirmed this principle as essential to ensuring the uniform and effective application of EU law. In *Les Verts v. European Parliament* (Case 294/83), the Court explicitly recognized the EU as a "community based on the rule of law", where neither Member States nor institutions can escape the judicial review of the Cour of Justice. Similarly, in *Unibet v. Justitiekanslern* (Case C-432/05), the CJEU emphasized that national procedural autonomy cannot undermine the right to an effective remedy under EU law. These rulings, among others, illustrate the central role of judicial protection in maintaining the EU legal order.[2] Although the argument concerning the

[1] Anrò, I., *Il difficile accesso alla giustizia ambientale per le ONG e la riforma del Regolamento di Aarhus: nuove vie verso la Corte di giustizia dell'Unione europea?*, in *Federalismi*, 6 April 2022; Cantillo, C., *L'accesso alla giustizia in materia ambientale nell'ordinamento dell'Unione a seguito dell'entrata in vigore del trattato di Lisbona: problematiche attuali e prospettive* de jure condendo, in Rossi, L. S., *La protezione dei diritti fondamentali*, Napoli, 2010, p. 271-298; Montini, M., *Verso una giustizia climatica basata sulla tutela dei diritti umani*, in *Ordine internazionale e diritti umani*, 2020, p. 506-537; Avino, G. D'., *Il diritto alla tutela giurisdizionale effettiva nell'art. 47 par. 1 della Carta dei diritti fondamentali dell'UE*, in Di Stasi, A. (Eds.), *Tutela dei diritti fondamentali e spazio europeo di giustizia. L'applicazione giurisprudenziale della Carta*, Napoli, 2019, p. 151-177.

[2] CGEU, 6 October 2015, C-362/14, *Schrems*, ECLI:EU:C:2015:650, par. 95 *"… Likewise, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. The first paragraph of Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law (see, to this effect, judgments in Les Verts v Parliament, 294/83, EU:C:1986:166, paragraph 23; Johnston, 222/84, EU:C:1986:206, paragraphs 18 and 19; Heylens and Others, 222/86, EU:C:1987:442, paragraph 14; and UGT-Rioja and Others, C-428/06 to C-434/06, EU:C:2008:488,*

deprivation of the right to judicial protection is central, it has not, to date, led the CJEU to adopt a less rigid interpretation of the standing requirements under Article 263(4) TFEU for private applicants. The Court has consistently upheld the strict criteria established in *Plaumann v. Commission* (Case 25/62), requiring that a private applicant must be "individually concerned" by the contested act in a manner that differentiates them from all other persons. Despite criticisms regarding the restrictive nature of this test and its implications for access to justice, the CJEU has maintained its narrow approach, emphasizing the complementary role of national courts and the preliminary ruling procedure under Article 267 TFEU in ensuring effective judicial protection.[3] This contribution aims to offer some reflections on the fundamental right of access to justice in cases where the subject of litigation concerns diffuse interests—by their very nature supra-individual and where these interests are defended by non-governmental organizations or other associations representing collective concerns. Those reflections will be developed in particular starting from the environmental domain. The analysis will focus on the legal standing of such organizations within the EU judicial system and the extent to which procedural mechanisms allow them to effectively advocate for the protection of diffuse interests.

The environmental sector, being regarded as a common heritage, has historically been the subject of dedicated European legislation aimed at establishing a common framework of obligations for public authorities as well as rights for the public. This regulatory framework reflects the EU's commitment to ensuring high environmental protection standards and fostering public participation in environmental decision-making, in line with both primary and secondary EU law, as well as international commitments such as the Aarhus Convention.[4] In 2017,

paragraph 80)". Moreover see Salvatore, V., *Lo Stato di diritto, una prospettiva di diritto comparato*. *Unione europea*, Comparative Law Section, Library service, Research service of the European Parliament (EPRS), July 2023, ref. PE 745.685, pp. 29-55.

[3] CJEU 1 February 2001, C-300/99 e 388/99 P, *Area Cova e a.*, ECLI:EU:C:2001:71; General Court, 15 September 1998, T-109/97, *Molkerei Großbraunshain e Bene/Commissione*, ECLI:EU:T:1998:209; 23 November 1999, T-173/98, *UPA*; 27 June 2000, T-172/98, *Salamander/Parlamento e Consiglio*, ECLI:EU:T:1999:296. See in doctrine Kronenberger, V., Dejmek, P., *Locus Standi of Individuals before Community Courts Under Article 230 (4) EC: Illusions and Disillusions after the Jégo-Quéré (T-177/01) and Union de Pequenos Agricultores (C-50/00) Judgments*, in *The European legal forum: Forum iuris communis Europae*, Vol. 5, 2002, pp. 257-272; Ward, A., *Judicial Architecture at the Cross-Roads: Private Parties and Challenge to EC Measures* Post – *Jégo – Quéré*, in *The Cambridge Year Book of European Legal Studies*, Vol. 4, 2001, p. 424-431; Arnull, A., *The Action for Annulment: A case of Double Standards?*, in O'Keeffe, D.; Bavasso, A. (eds.), *Judicial review in the European Union*, Kluwer 2000, p. 177-185.

[4] De Sadeleer, N., *EU Environmental Law and the Internal Market*, Oxford, 2014; Godt, C., *Enforcement and Environmental Law by Individuals and Interests Groups: Reconceptualizing Standing*, in *Journal of Consumer Policy*, Vol. 23, 2000, pp. 79-105; Tonner, K., *Consumer Protection and Environmental Protection, Contradictions and*

the European Commission issued a Communication specifically aimed at safeguarding access to justice in environmental matters, affirming that such a right must necessarily reflect the public interests at stake.[5] The Communication 2017, reiterated and reinforced in 2020, sought to clarify and reinforce the obligations of Member States in ensuring effective judicial protection in environmental cases, in line with EU law and international commitments such as the Aarhus Convention.[6] It highlighted the need for procedural mechanisms that enable individuals and organizations to challenge environmental decisions that may contravene EU environmental law. The ability of associations advocating for the protection of diffuse interests to bring actions before the EU judiciary can serve as a form of private enforcement, exerting pressure to ensure compliance with EU law and contributing to the achievement of the objectives set by European environmental legislation. As stated by the European Commission in point 5 of the aforementioned Communication, "*ensuring that individuals and NGOs have access to justice under the Aarhus Convention is not only a matter of complying with an international commitment, but also an important means of improving Member States' implementation of EU environmental law*" without requiring the Commission to resort to infringement proceedings in every instance.[7] In the environmental sector, the issue of access to justice presents a wealth of legal and theoretical considerations, as the interest at stake is not an individual interest, but rather a diffuse and collective one. This characteristic raises significant questions regarding the legal standing of individuals and organizations, the procedural mechanisms available to safeguard environmental rights, and the broader implications for judicial protection within the EU legal order.[8] Some Member States, such as Belgium and Ireland, allow associations to bring legal actions in environmental matters even in cases where no specific victim can be identified,

Suggested Step Towards Integration, in *Journal of Consumer Policy*, Vol. 23, 2000, pp. 63-78; Hedemann Robinson, M., EC Law, *The Environment and Consumers: Addressing the Challenge of Incorporating an Environmental Dimension to Consumer Protection at Community Level*, in *Journal of Consumer Policy*, Vol. 20, 1997, pp. 1-43.

[5] Commission Communication on Access to Justice in Environmental Matters, 18 August 2017, 2017/C 275/01. This commitment was further reaffirmed in the 2020 Communication Improving Access to Justice in Environmental Matters in the EU and its Member States (14 October 2020, COM(2020) 643 final), which sought to enhance compliance with access to justice requirements by addressing existing barriers and promoting more effective national implementation.

[6] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UNECE, 25 June 1998, Aarhus.

[7] Jendroska, J., *Accès à la justice: remarques sur le statut juridique et le champ des obligations de la convention d'Aarhus dans le contexte de l'Union européenne*, in *Rev. jur. de l'environnement*, special issue, 2009, pp. 31-49.

[8] Warin, C., *Individual rights and collective interests in EU law: three approaches to a still volatile relationship*, in *Common Market Law Review*, n. 2, 2019, pp. 463-487; Villani, S., *L'accesso alla giustizia ambientale da parte delle ong nel quadro giuridico dell'Unione europea alla luce della prassi recente*, in *Eurojus*, n. 1, 2023, pp. 149-172.

making use of collective action mechanisms. This approach broadens access to justice by recognizing the collective nature of environmental interests and ensuring that legal remedies are available for the protection of the environment as a common good, irrespective of individual harm. Case law has recognized the legal standing of non-profit associations, legally established under the national law of the Member States, to bring actions that would typically be reserved for the direct victim or their legal representative. This represents a significant expansion compared to the procedural rules before the EU judiciary, which impose considerably stricter standing requirements—often deemed excessively rigid. By adopting a more flexible interpretation of the criteria governing legal standing, judicial practice seeks to uphold the fundamental right of access to justice, particularly in cases involving the protection of diffuse and collective interests.[9]

2. THE ROLE OF ASSOCIATIONS IN THE PROTECITON OF COLLECTIVE INTERESTS

Associations play a crucial role in the protection of collective interests, particularly in legal systems where access to justice is traditionally reserved for individuals who can demonstrate direct and personal harm. In areas such as environmental law and digital rights, where the interests at stake are diffuse and supra-individual, associations serve as key actors in ensuring judicial protection. They bridge the gap between public authorities and individual claimants, enabling effective enforcement of legal provisions that might otherwise remain unchallenged. In the EU legal order, the recognition of associations' legal standing varies across Member States, with some jurisdictions allowing them to bring claims even in the absence of a directly identifiable victim. The case law of the CJEU has progressively shaped the scope of their standing, balancing the restrictive criteria under Article 263(4) TFEU with the broader objectives of fundamental rights protection and effective judicial review. By advocating for collective interests, associations contribute to the dynamic evolution of legal frameworks, promoting compliance with EU law and reinforcing the rule of law. Their role is particularly relevant in environmental litigation, where access to justice mechanisms, as reinforced by instruments such as the Aarhus Convention and European Commission Communications, seek to enhance accountability and prevent regulatory gaps. As discussions on collective redress mechanisms evolve, the role of associations may expand further, strengthening the enforcement of rights across

[9] Biernat, E., *The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community*, Jean Monnet Working Paper n. 12, 2003, NYU School of Law, New York.

different legal sectors within the EU.[10] The analysis of the *locus standi* of associations, although primarily a procedural matter, inherently raises considerations related to judicial policy. As emphasized by authoritative legal scholarship, the introduction of uniform provisions on collective actions would enhance the efficiency of the internal market by ensuring greater legal certainty and consistency in enforcement mechanisms. A more harmonized approach to collective redress would not only facilitate access to justice for diffuse interests but also contribute to the effective implementation of EU law, reducing disparities among Member States and preventing regulatory fragmentation.

While acknowledging the potentially crucial role of mechanisms for the protection of collective interests, the EU legal system has not actively fostered the involvement of third parties in litigation, as is the case in the United States through the class action mechanism. Unlike the U.S. legal framework, where class actions serve as a key tool for collective redress, the EU procedural system remains more restrictive, limiting direct access to judicial review for associations and other representatives of diffuse interests. The absence of a harmonized collective redress system at the EU level reflects a cautious approach, balancing procedural efficiency with concerns over potential litigation abuse. However, recent developments, including the Representative Actions Directive (Directive (EU)

[10] Burlinova, N.V., *The Role of NGOs in International Relations and Public Diplomacy*, in *Journal of International Analytics*, Vol. 13, Issue 1, 2022, pp. 110-123; Leonelli, G., *Access to the EU Courts in Environmental and Public Health Cases and the Reform of the Aarhus Regulation: Systemic Vision, Pragmatism, and a Happy Ending*, in *Yearbook of European Law*, 2021, pp. 230-264; Drelich-Skulska, B.; Domiter, M., *The European Union as a Platform for the European NGOs' Operations: Market Versus Democracy*, in *Eurasian Economic Perspectives*, 2020, pp. 155-167; Eliantonio, M., *Collective Redress in Environmental Matters in the EU: A Role Model or a 'Problem Child'?*, in *Legal Issues of Economic Integration*, 2014, pp. 257-273; Fasoli, E., *Legal Standing of NGOs in Environmental Disputes in Europe*, in Bochiero, N.; Scovazzi, T.; Ragni, P. C., *International Courts and the Development of International Law (Essays in Honor of Tullio Treves)*, The Hague, 2013, pp. 337-347; Jans, J.; Marseille, A., *The Role of NGOs in Environmental Litigation against Public Authorities: Some Observations on Judicial Review and Access to Court in the Netherlands*, in *Journal of Environmental Law*, Vol. 22, Issue 3, 2010, pp. 373-390; Butler, J., *Non-governmental Organization Participation in the EU Law-making Process: The Example of Social Non-governmental Organizations at the Commission, Parliament and Council*, in *European Law Journal*, 2008, pp. 558-582; Armstrong, K., *Rediscovering Civil Society: The European Union and the White Paper on Governance*, in *European Law Journal*, Vol. 8, 2002, pp. 102-132; Bouwen, P., *Corporate Lobbying in the European Union: the Logic of Access*, in *Journal of European Public Policy*, Col. 9, 2002, pp. 365-390; Godt, C., *op. cit*., pp. 79-105; Bennett, R., *Business Routes of Influence in Brussels: Exploring the Choice of Direct Representation*, in *Political Studies*, Vol. 47, 1999, pp. 240-257.

2020/1828),[11] signal a gradual shift towards a more structured role for collective litigation in certain areas of EU law.

In the EU system of judicial protection, as highlighted in legal scholarship, NGOs can actively participate in proceedings before the Court of Justice in a limited capacity. They may intervene as third parties under Article 40 of the Statute of the Court of Justice of the European Union, provided they can demonstrate a direct and concrete interest in the resolution of the pending case. Additionally, in more restricted circumstances, NGOs may act as applicants, although their legal standing remains subject to the strict criteria established under Article 263(4) TFEU, as interpreted by the Court. For an application to intervene to be admissible, it must include, in its conclusions, either partial or full support for the claims of one of the parties, without introducing autonomous legal arguments. Intervening parties are therefore limited to reinforcing the legal reasoning of the party they support, rather than raising independent grounds for challenge or defense. This procedural constraint reflects the ancillary nature of interventions under Article 40 of the Statute of the CJEU, ensuring that the intervention does not alter the scope of the main proceedings. The nature of third-party intervention in proceedings is inherently *ad adiuvandum*, meaning that it must support the position of one of the parties to the case. A mere general interest in the outcome of the dispute is not sufficient to justify intervention. Instead, the intervening party must demonstrate a direct and specific interest in the resolution of the case, aligning with the procedural limitations set out under Article 40 of the Statute of the Court of Justice of the European Union. This requirement ensures that interventions do not introduce new legal arguments but rather reinforce the claims of an existing party.[12]

CJEU's case law, through a rather restrictive interpretation, has further clarified that the interest of a representative association seeking to intervene must be specific to a particular geographical area or thematic sector. A general commitment to the protection of the seas, flora, or water resources is not deemed sufficient to establish the requisite legal interest.[13] The CJEU has consistently

[11] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1–27.
[12] General Court, 27 November 2013, T-462/12 R, *Pilkinton Group/Commissione*, ECLI:EU:T:2013:119, par. 16.
[13] CJEU, 6 October 1982, 307/81, *Alusuisse/Consiglio e Comm.*, ECLI:EU:C:1982:337, par. 8; General Court, 8 September 2005, T-295/04, *ASAJA/Consiglio*, ECLI:EU:T:2005:305, par. 31; 10 luglio 2000, T-54/00 R, *Federciòn de Cofradìas de Pescadores de Guipùzcoa/Consiglio*, ECLI:EU:T:2000:183, par. 15; 7 luglio 2004, causa T-37/04 R*, Regiao autonoma dos Acores/Consiglio*, ECLI:EU:T:2008:236, par. 33.

maintained that an association must demonstrate a sufficiently direct and individualized concern in relation to the subject matter of the dispute in order to justify its standing, thereby limiting the scope of interventions based on broadly defined environmental or public interest objectives.

Legal doctrine has widely emphasized the reluctance of the EU judicial system to admit private actions for the annulment of institutional acts under Article 263(4) TFEU. The CJEU has traditionally maintained a restrictive interpretation of the standing requirements, particularly through the *Plaumann test*, which limits admissibility to applicants who are directly and individually concerned by the contested act. This stringent approach has been criticized for creating significant barriers to access to justice, particularly for individuals and associations seeking to challenge EU measures affecting diffuse or collective interests.[14]

In the Greenpeace case, the General Court refused to apply the *Plaumann test* differently in the environmental sector, maintaining the requirement that applicants must be individually concerned. The Court of Justice subsequently upheld this restrictive approach, confirming that even local environmental associations from the Canary Islands had to demonstrate that they were individually affected by the decision of the Spanish authorities.[15]

Although the expansion of standing has been achieved through case law, as seen in *Inuit Tapiriit Kanatami v. Parliament and Council* (Case C-583/11 P) and *Telefónica v. Commission* (Case C-274/12 P), the Court of Justice has yet to develop a sufficiently consistent and coherent approach to standing that would ensure full and effective judicial protection for non-privileged applicants. While these rulings have introduced clarifications regarding the interpretation of regulatory acts under Article 263(4) TFEU, they have not fundamentally altered the restrictive approach derived from the *Plaumann test*. As a result, access to direct judicial review remains significantly constrained for individuals and

[14] Mastroianni, R.; Pezza, A., *Access of individuals to the European Court of justice of the European Union under the new text of article 263, para. 4, TFEU*, in *Rivista italiana diritto pubblico comparto*, 2014, pp. 923-948; Jaeger, M., *L'acces des personnes physiques ou morales à la justice: les premieres interpretations par le Tribunal des nouvelles dispositions de l'article 263, quatrième alinea, TFUE*, in *L'Europe des droits fondamentaux (Melanges en hommage à Albert Weitzel)*, Paris, 2013, pp. 121-125; Lenaerts, K., *The legal protection of private parties under the EC Treaty: a coherent and complete system of judicial review?*, in *Scritti in onore di Giuseppe Federico Mancini*, 1998, pp. 591-623; Poli, S., *The Legal Standing of Private Parties in the Area of State Aids after the Appeal in Commission v. Kronoply/Kronotex*, in *Legal Issues of Economic Integration*, Vol. 39, Issue n. 1, 2012, pp. 357-379.

[15] General Court, Case T-585/93, *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission*, ECLI:EU:T:1995:147 and CJEU 2 April 1998, C-321/95 P, *Greenpeace/Commissione*, ECLI:EU:C:1998:153.

associations seeking to challenge EU acts, thereby raising concerns about compliance with the principle of effective judicial protection under Article 47 of the Charter. In the absence of a broader and more systematic judicial evolution, non-privileged applicants continue to face substantial procedural hurdles in securing judicial review before the EU Courts.

3. APPLICATIONS OF LEGAL STANDING IN ENVIRONMENTAL LITIGATION

As already mentioned, the issue of legal standing in environmental litigation is of particular relevance within the EU legal order, as environmental protection inherently involves diffuse and collective interests. Access to justice in environmental matters is shaped by a combination of EU law, national procedural frameworks, and international commitments, most notably the Aarhus Convention. However, despite the recognition of environmental protection as a fundamental objective of the EU, procedural barriers continue to limit the ability of individuals and organizations to challenge environmental decisions before the EU Courts.

In the *Trianel* case an environmental NGO brought an action before the German administrative court seeking the annulment of the authorization to construct and operate a coal-fired power plant in Lünen. The German court, applying national law transposing the relevant EU directive, held that an NGO could not challenge the authorization on the grounds of an alleged violation of environmental law, as it lacked the required standing to claim an infringement of its own rights. The referring court asked the CJEU whether a national provision that denies standing to environmental organizations on the basis that they do not assert a violation of individual rights is compatible with EU law. In its ruling, the CJEU aligned EU legal provisions with the Aarhus Convention, holding that a Member State cannot make the legal standing of environmental organizations conditional upon the concept of individual rights as defined by national law, where such national legislation derives directly from EU law that clearly establishes obligations in the relevant sector. The Court reaffirmed that, while "*it is for the legal order of each Member State to determine the competent courts and procedural rules governing actions intended to safeguard rights which individuals derive from EU law, such rules must not be less favorable than those governing similar domestic actions (principle of equivalence) and must not render the exercise of rights conferred by the EU legal order practically impossible or excessively difficult (principle of*

effectiveness)".[16] This ruling represents a significant step in strengthening access to justice in environmental matters within the EU. It confirms that national procedural rules cannot impose barriers that undermine the effective enforcement of EU environmental law, particularly where collective interests are at stake. The case also reinforces the binding nature of Aarhus Convention principles in shaping EU law on access to justice, ensuring that environmental organizations can play a meaningful role in judicial proceedings concerning environmental protection.

A significant turning point came also with *Slovak Bears* case in which the CJEU ruled that national courts must interpret domestic procedural rules in light of the Aarhus Convention, emphasizing that NGOs should not be denied access to justice where it would undermine the Convention's objectives.[17] While this case did not directly alter EU standing rules, it reinforced the obligation of Member States to facilitate judicial review in environmental matters. The Court of Justice adopted the same approach in October 2009, where, following the Opinion of AG Sharpston, it ruled that a Member State cannot restrict the legal standing of environmental associations solely to those with a minimum number of registered members. Such a requirement was found to be incompatible with the principles enshrined in the Aarhus Convention and EU law, as it could create an unjustified barrier to access to justice in environmental matters. The Court reaffirmed that Member States must ensure that procedural rules governing legal standing do not undermine the effectiveness of environmental protection measures under EU law.[18] This ruling further strengthened the role of environmental NGOs by preventing Member States from imposing arbitrary or excessive formal requirements that could hinder their ability to challenge environmental decisions. By aligning its interpretation with the Aarhus Convention, the Court emphasized that national rules on standing must comply with the principles of effectiveness and equivalence, ensuring that environmental organizations can fulfill their essential role in environmental litigation without facing disproportionate procedural constraints.

4. THE REPRESENTATIVE ACTIONS DIRECTIVE

The adoption of Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers marks a significant shift in the

[16] CJEU, 12 May 2011, Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland eV (BUND) v. Bundesrepublik Deutschland*, par. 43.
[17] CJEU,8 Marzo 2011, Case C-240/09, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*.
[18] CJEU, 15 October 2009, C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening*, ECLI:EU:C:2009:631.

EU's approach to collective redress. While the directive primarily targets consumer protection, its framework lays the groundwork for broader applications, including in environmental litigation and other areas where collective interests are at stake. The directive establishes a harmonized system of representative actions across EU Member States, enabling qualified entities—typically consumer organizations or public bodies—to bring actions on behalf of groups of affected individuals. It aims to ensure that consumers have effective legal remedies against violations of EU law, particularly in cases involving widespread harm. The directive mandates that Member States provide mechanisms allowing representative actions before national courts, ensuring access to justice for consumers. By enabling collective enforcement, the directive strengthens compliance with EU regulations, reducing reliance on public enforcement mechanisms such as infringement proceedings. To prevent litigation abuse, the directive introduces safeguards, such as limiting standing to qualified entities and discouraging frivolous claims through procedural checks. Although the directive is designed for consumer protection, its adoption signals a broader shift in EU judicial policy, which could influence other areas of collective interest litigation, such as environmental law. The directive could serve as a model for expanding collective redress in environmental litigation, where diffuse interests require adequate judicial protection. The Aarhus Convention already establishes principles on access to justice in environmental matters, but the EU procedural framework remains fragmented. Moreover, the directive could impact the digital rights area. With the increasing impact of digital platforms on fundamental rights, there is a growing discussion on the need for collective redress mechanisms in areas such as data protection (GDPR enforcement) and algorithmic transparency. Finally, in competition law and financial services domaine. The directive complements existing initiatives allowing collective claims in antitrust and financial regulation cases, ensuring fair market conditions.

The introduction of a structured mechanism for representative actions in consumer law contrasts with the restrictive approach to *locus standi* under Article 263(4) TFEU, where private applicants face strict standing requirements of the so called *Plaumann test*. While the directive offers a procedural avenue for consumer-related collective claims at the national level, it does not directly alter the standing requirements before the CJEU. However, it highlights the increasing recognition of collective enforcement as a necessary component of effective judicial protection under EU law.

The Representative Actions Directive represents an important milestone in the evolution of collective redress within the EU legal system. While currently limited to consumer protection, its impact could extend to other areas where collective interests require effective judicial protection. As discussions continue on

expanding collective action mechanisms, the directive may serve as a precursor to a more comprehensive EU-wide framework for collective litigation, reinforcing access to justice and the rule of law across multiple legal domains.

5. CONCLUSION

The European case law on the criteria applicable to the recognition of legal standing allows for some general reflections. First, it is noteworthy that the environmental sector, where the role of associations representing collective interests is particularly significant, has historically been the area in which the European judiciary has been most willing to adopt an expansive interpretation of access to justice criteria. Indeed**,** this development has been strongly influenced by the EU's accession to the Aarhus Convention**,** which provided a clear legal basis for reinforcing procedural rights in environmental matters. By aligning its jurisprudence with the principles of the Convention, the CJEU has gradually recognized the importance of ensuring effective access to justice for environmental organizations. This sector has thus played a pivotal role in shaping the broader discussion on legal standing in EU law**,** demonstrating how the protection of diffuse interests can lead to a more dynamic interpretation of procedural rules.

Where national courts, in formulating preliminary ruling requests, have raised doubts regarding the legal standing of environmental protection associations, the CJEU has consistently clarified that recognized environmental organizations must be able to challenge, through judicial review, administrative measures that are potentially non-compliant with EU law and assert the negative environmental effects arising from such measures. In these cases, the direct effect of legal standing provisions has been derived from the Aarhus Convention, as interpreted by EU case law. Moreover, the Court has taken the opportunity to reaffirm that, within the EU legal order, the term "environmental law" must be understood in a broad and extensive manner, encompassing all legal provisions contributing to the achievement of the Union's environmental objectives, regardless of their formal legal source. By relying on conventional norms that establish direct effect for standing in environmental matters, the CJEU has extended the scope of effective judicial protection, ensuring that the entire field of environmental law benefits from the principle of effectiveness in judicial review and the fundamental right to an effective remedy under Article 47 of the Charter. This expansive interpretation reinforces access to justice for environmental organizations, aligning national procedural rules with EU obligations in a manner that ensures robust enforcement of environmental law.

In my humble opinion, this expansive interpretation of legal standing for associations will also be applied in the field of digital rights. Just as environmental organizations have played a crucial role in enforcing compliance with EU environmental law, civil society organizations advocating for digital rights may similarly seek to challenge measures affecting fundamental rights in the digital sphere, such as data protection, algorithmic transparency, and online content moderation. Recent legislative developments, such as the General Data Protection Regulation (GDPR) and the Digital Services Act (DSA), emphasize the importance of collective enforcement mechanisms to safeguard fundamental rights in the digital environment. While legal standing for digital rights organizations just started to be used extensively – *Meta Platforms* – there is a growing recognition of the need for effective access to justice to address large-scale and systemic violations of digital rights[19]. The interpretation provided by the Court in the Meta Platforms ruling represents a significant development in the EU procedural framework regarding legal standing. By recognizing that representative entities—such as consumer associations—play a crucial and tangible role in safeguarding the interests of the broader public, the judgment strengthens the collective enforcement of fundamental rights and enhances access to justice for diffuse interests. This ruling aligns with the broader trend in EU law towards expanding the role of collective redress mechanisms, as seen in Directive (EU) 2020/1828 on representative actions for consumer protection. By affirming the ability of consumer organizations to challenge potential infringements of EU law, the Court reinforces the principle that legal standing should not be unduly restrictive when fundamental collective interests are at stake.

The Meta Platforms decision thus marks an important milestone in the evolution of procedural rights within the EU, potentially paving the way for similar developments in other areas of collective interest litigation, such as digital rights and environmental protection. Given the EU's commitment to the principle of effective judicial protection under Article 47 of the Charter, and the increasing role of representative actions in consumer and data protection law, it is conceivable that the CJEU may extend its more flexible approach to standing to organizations advocating for digital rights. This would align with the broader trend of enhancing judicial review mechanisms to ensure compliance with EU law, particularly in areas where the impact on individuals is diffuse and where collective representation is essential to ensuring effective enforcement.

[19] CJEU, 28 April 2022, C-319/20, *Meta Platforms*, ECLI:EU:C:2022:322.

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SOCIAL JUSTICE AND CHALLENGES OF MODERN SOCIETIES: THE IMPACT OF INTERNATIONAL ORGANIZATIONS

ABSTRACT

The challenges that modern society faces create or change the direction of its development with direct implications for the entire population. Social justice, as a synonym for equality of resources and opportunities for all people, is often the topic of various discussions and the starting point for the development of strategic documents. Each country, individually, is characterized by a specific and inherent level of development and (in)stability, conditioned by social, economic and political factors. The degree of success in this sense is difficult to measure, but it must be monitored. The idea of social justice is the basis of national development programs, as well as dialogue and cooperation between countries at the regional and international levels. The role of international organizations in advocating for social justice is crucial. Their approach, resources and influence around the world can significantly influence policies, raising awareness and promoting social justice in general. Examples of the work of international organizations can be viewed from different perspectives. From the aspect of promoting social justice, United Nations organizations, as well as many others, play an important role in establishing international frameworks and providing concrete support to the governmental and non-governmental sectors. The concept of social justice pervades Agenda 2030 and the goals of sustainable development, respecting the principle of universality, inclusion and improvement of social, economic and environmental aspects on a global level. The protection of human rights is the basis and prerequisite for reducing inequality, poverty and health protection. The following period brings new challenges in the field of achieving and striving for social justice, as well as the values that are summarized in it.

***Keywords**: social justice, challenges, international organizations, sustainable development, human rights.*

1. INTRODUCTION

The flow of time, as well as numerous internal and external factors, influence society and direct its development. Despite changes, the needs of every human being are constant and specific, and depend on how they live, in what circumstances and in what place. The idea of social justice is present in the concepts according to which states plan their activities and is closely linked to the values that are respected and promoted in society. The achievement of social justice is closely linked to the resources at the disposal of the state, as well as to its level of development. In practical terms, the degree of aspiration towards social justice is most tangible at the local and state levels, while in theoretical terms it is best reflected at the international level. The international community, through its specifically focused institutions, strives to influence the reduction of poverty in the world, equality of opportunity, improvement of the overall health of the population, promotion of peace, protection of human rights and numerous other aspects of social life and action. When it comes to human rights, they belong to everyone equally regardless of gender, age, ability, race, ethnicity, nationality or any other affiliation. They are basic and inalienable rights that every human being possesses and constitute a set of moral principles that are questioned and confirmed in the field of moral philosophy. Human rights are also the legal protection of human dignity, they legally confirm and protect the human dignity of each individual. It is about the rights that belong to every individual in relation to the state and government. Referring to them, the individual makes requests to institutions and authorities at the local and national level that they act in a certain way or to prevent actions that call into question his human dignity.[1]

The purpose of this Paper is to examine the impact of international organizations in the context of the challenges faced by modern societies. In accordance with the topic and the use of content and document analysis methods, as well as comparative analysis of practices, the focus is placed on United Nations organizations, taking into account their universal character, global operations, but also the resources they have at their disposal for the purpose of protecting human rights, striving for social justice and the role they play in the international community. The 2030 Agenda and the Sustainable Development Goals are a call

[1] Spajić-Vrkaš, V., Stričević, I., Maleš, D., Matijević, M., *Teaching rights and freedoms - A manual for primary school teachers with exercises for classroom teaching*, Faculty of Philosophy, Zagreb 2004, p.15.

to action for positive social change in countries around the world. Also, as an international organization, the Council of Europe is also extremely important when it comes to protecting human rights and promoting democracy.

2. SOCIAL JUSTICE AND SHAPING OF A JUST SOCIETY

Social justice as a term appears in literature, but also in practice through the aspiration of societies to provide the population with equal access to resources and opportunities, through respect for diversity. Social justice is a moral imperative that originated in ancient literature. Today, there are differences of opinion about the precise definition of the phrase social justice. But the general concept is that individuals and groups should receive fair treatment and an impartial share of the benefits of society.[2]Social justice requires the notion of a society made up of interdependent parts, with an institutional structure that affects the prospects of each individual member, and that is capable of deliberate reform by an agency such as the state in the name of fairness.[3] The concept of social justice can be defined from different perspectives. Some authors emphasize that social justice may represent a state of affairs (whether actual or ideal) in which (a) benefits and burdens in society are dispersed in accordance with some justifiable allocation principle (or set of principles).[4] Social justice is both a goal and a process. The goal of social justice is full and equitable participation of people from all social identity groups in a society that is mutually shaped to meet their needs. The process for attaining the goal of social justice should also be democratic and participatory, respectful of human diversity and group differences, and inclusive and affirming of human agency and capacity for working collaboratively with others to create change.[5] The above definitions indicate the importance of diversity, respect, sharing and inclusion of all in the process of positive change.

Numerous authors believe that social justice encompasses economic justice. Social justice is the virtue which guides us in creating those organized human interactions we call institutions. In turn, social institutions, when justly organized, provide with access to what is good for the person, both individually and in our associations with others. Social justice also imposes a personal responsibility to collaborate with others, to design and continually perfect our institutions as tools for personal

[2] Hemphill, B., *Social Justice as a Moral Imperative,* The Open Journal of Occupational Therapy: Vol. 3: Iss. 2, Article 9, 2015, p. 1 Available at: *http://dx.doi.org/10.15453/2168-6408.1150.*
[3] Miller, D., *Principles of Social Justice*, Harvard University press, London 1999, p. 4.
[4] Jost, J. T., *A Theory of System Justification*, Harvard University Press, 2020, p. 13.
[5] Adams, M., Bell, L. A., Griffin, P. (Eds.). *Teaching for diversity and social justice* (3rd ed.), Routledge, 2016, p. 26.

and social development.[6] Social justice is also closely related to, or rather, implies and strives for, truth. Some authors point out that, being the first virtues of human activities, truth and justice are uncompromising. A well-ordered society is not designed only to advance the good of its members but to be also effectively regulated by a public conception of justice. That is, it is a society in which everyone accepts and knows that the others accept the same principles of justice, and the basic social institutions generally satisfy and are generally known to satisfy these principles.[7]

From the above-mentioned notions of social justice, it is clear that despite the different definitions, the essence of the concept is the same. The term social justice permeates numerous strategic documents and is based on the aspiration of society that all its members be equal, but it also implies the responsibility of every citizen. In the context of human rights and social justice, it is important to emphasize that the exercise of rights is not justified if it violates the rights of others, and in this sense additional caution is needed. Social justice implies:[8]

- a belief in human equality is a belief that all men are equal in intrinsic worth and are entitled to have access to the rights and privileges of their society, implying that suppression of distinction between individuals and groups are as inherently unjust;
- a social philosophy advocating levelling of social, political and economic inequalities;
- fellow-feeling and compassion;
- intelligent cooperation of people in producing an organically uniform united community so that every member has an equal and real opportunity to grow and learn to live the best of his native abilities;
- the balance of adjustments of the various interests concerned in the social and economic structure of the state in order to promote harmony upon an ethical and economic basis.

Social justice is also defined as a fundamental social value and norm concerning the way in which resources should be distributed among individuals and social groups. The main criteria for achieving social justice are right, merit and need. Perceptions of social justice can vary significantly between societies or within a

[6] See: https://www.cesj.org/learn/definitions/defining-economic-justice-and-social-justice/, 15 January, 2025.
[7] Rawls, J., *Revised edition of A Theory of Justice*, published in 1971 by Harvard University Press, 1999, p. 4.
[8] Dikshit, C. J., *Social justice*, Institute of Judicial Training & Research Uttar Pradesh, 2019, p. 16.

society.[9] The scope and meaning of social justice underwent a dramatic change in the context of globalization. Globalization is a process where national boundaries have become permeable in such a way that people's lives are affected increasingly by the working of global market changes, on which nation states have little control. Therefore, contemporary theorists of social justice argue that in the context of globalization, the scope of social justice can no longer be limited to the state as a politically bounded community but needs to be extended beyond to the level of global justice across humanity.[10]

Fair access to goods and services is a fundamental principle of social justice. Based on the belief that all human beings are equal before God and the law, the notion of fairness as related to access is often linked with the notion of equality to imply that all people, regardless of their gender, race, age, class, language, religion and occupation, are entitled to benefit from public goods and resources. The principle of equity derives from the recognition that the concept of fairness as equal or uniform distribution is not always possible or implementable, particularly in view of existing injustices that have prevented or reduced the ability of certain individuals or groups to gain equal access to public goods, resources and opportunities in the first place. Rights as a key principle of social justice can be divided into the following two sub-groups: (a) legal rights, which include inherited rights, and other lawful rights such as the right to receive payment for one's jobs according to agreed terms and (b) moral rights, which include people's basic human rights, liberties. Participation in the context of social justice means involving people in decisions that govern their lives. This includes not only engaging them in deciding on the kind of public services needed in their areas but also ensuring their full participation in political and cultural life.[11]

Social justice makes societies and economies function more cohesively and productively, by reducing poverty and hunger, inequalities and social tensions. Given its central importance to inclusive and sustainable socio-economic development, social justice should be seen as one of the cornerstones of the renewed multilateralism that is required to overcome current challenges – a rallying point as well as an organizing principle for a more efficient and coherent

[9] Glossary of social security, see: https://www.coe.int/t/dg3/sscssr/source/glosscro.pdf, 15 Febraury, 2025.
[10] Prasad, B. D., *The SAGE Encyclopedia of Action Research,* SAGE Publications, London 2014, p. 6.
[11] Khechen, M., *Social Justice: Concepts, Principles, Tools and Challenges, Economic and social commission for Western Asia (ESCWA),* United Nations, New York 2013, p. 5.

multilateral system that supports national efforts across a range of policy areas and interventions.[12]

In order to maintain the essential idea of social justice, it is necessary, from a systemic and individual perspective, to ensure that equality and fairness are respected at all times and in all situations.

3. INTERNATIONAL ORGANIZATIONS AS SOCIAL JUSTICE INSTRUMENTS

Britannica defines international organization, institution drawing membership from at least three states, having activities in several states, and whose members are held together by a formal agreement. The Union of International Associations, a coordinating body, differentiates between the more than 250 international governmental organizations, which have been established by intergovernmental agreements and whose members are states, and the approximately 6,000 nongovernmental organizations (NGOs), whose members are associations or individuals.[13]

The emergence and development of international organizations is an excellent indicator of how international law is transformed and changed, even its essence, in accordance with the needs and changing circumstances in international relations.[14] The number of international organizations is growing day by day, and their powers and the number of members are constantly increasing. The world would not be what it is today without international organizations. They represent a continuous process of regional and international action (association), constantly limited by new fields of interest. Although their decisions do not have an absolutely binding character, their opinion is of great importance, because they can certainly contribute to the development of a better, more orderly, more advanced and more modern world.[15]

[12] International Labour Organization 347th Session, Geneva, 13-23 March 2023, Governing Body, Update on the Global Coalition for Social Justice, p.3.
[13] See https://www.britannica.com/topic/international-organization, 9 February, 2025.
[14] Novaković, M., *The role of international organizations in international relations – the example of the United Nations. Non-state actors in international law*, Faculty of Philology, University of Belgrade, 2020, p. 176.
[15] Danilović, N., *International organizations and their role as subjects of international public law*, Megatrend review, Faculty of Law Megatrend University, Vol. 16, № 2, 2019, p. 111.

States have tended to establish trade / economic unity in order to keep the national-international economy alive in the growing and globalizing world especially after World War II. The main purpose of international organizations should be to provide fair solutions to problems that exceed the power and ability of states and to serve common interests.[16]International organizations are created and function to solve problems that go beyond the borders of one state. They play a crucial role in ensuring world order and global security. Today, issues of international and national security are among the priorities and are essential for the actions of every state. They are also the subject of study, scientific research, and the attention of civil society and interior political struggle.[17]

Policy makers and regulators worldwide coordinate their efforts and share experiences as part of their engagement in different global and regional organizations. Each of these organizations, and the spaces they convene and their out puts, provide an opportunity for bringing the voice of community networks and introduce in their recommendations favorable wording that can then be used by champions at the national level to change local policy and regulations.[18] It is widely believed that International Organizations execute an important role in peace-making, economic stability, health and in various other pivotal matters with a mandate to act in the interest of the international community. There is a large number of intergovernmental organizations around the world today dealing with a significant amount of international and inter-state challenges.[19]

International organizations have become an essential arena for shaping public policy, and choices made in the design and reform of these organizations are critical to constructing a just international order. In order to contribute to such an order, international organizations should be efficient, legitimate, democratic, and conducive to distributive justice.[20]

[16]See https://businessdiplomacy.net/why-do-international-organizations-exist/, 12 February, 2025.
[17] Pasternak, I., Krap, A., Yastrubetska, L., Grytsyshen, D., Sergiienko, L., *The role and influence of international organizations in shaping and maintaining international legal order and global general and financial security*, Journal of law and sustainable development, Miami, v. 11, n. 12, 2023, p. 3.
[18] See https://policy.communitynetworks.group/international-organisations/start, 12 February, 2025.
[19] Fayyaz, S., *An analysis of international organizations' independent role in contemporary world politics,* ISSRA Papers Volume-XII, Institute for strategic studies research and analyses, 2020, p.89.
[20] Barnett, M., Duvall, R., *Justice, Power and International Organizations*. University of Rochester, 2005, p. 11.

3.1. United Nations

The United Nations is an organization of sovereign states, which voluntarily join together to create a forum. The UN was founded after World War II with the aspiration to avoid future wars through diplomacy and dialogue among nations. Member States join the United Nations because it provides them the mechanism to solve problems and disputes and to act on matters of concern to humanity. The UN is the forum where countries meet to discuss important issues such as human rights, social and economic development, and the fight against terrorism, among others. It plays a central role in reducing international tensions, preventing conflicts and putting an end to fighting already under way. The United Nations provides the means to help maintain international peace and security, to help those most in need to lead better lives, and to formulate policies on matters affecting all of humanity.[21]

The United Nations represents the pinnacle of the development of international organizations, and their rapid development was influenced by their predecessor - the League of Nations, which represents the first organization of a global character aimed at maintaining peace, or preventing war. In organizational, structural, historical and political terms, the United Nations represents the most significant organization and the pinnacle of the development of international organizations. In some elements, they have reached the level of states - in their importance, in their influence on relations, and in relation to other international organizations, they are an exception.[22]

The United Nations coordinates its work with the funds, programmes, specialized agencies and other organizations of the UN System. The United Nations itself is one part of the UN System. Cooperation between the UN and the other entities of the UN system is essential in order to achieve the purposes of the Organization laid out in the UN Charter. The Charter of the United Nations is the founding document of the United Nations. It was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. The work of the United Nations covers five main areas: maintain International Peace and Security, protect Human Rights, deliver Humanitarian Aid, support Sustainable Development and Climate Action, uphold International Law.[23]Due to its unique international character, and the powers vested in its founding Charter, the UN can take action on a wide range of issues. It also provides a forum for its member states to express their views through

[21] See https://www.un.org/sites/un2.un.org/files/22-00087a_visitorcentre_booklet_e_web.pdf, 12 February, 2025.
[22] Novaković, M., *op. cit.* note 14, p. 182, 188.
[23] See https://www.un.org/en/our-work, 12 February, 2025.

the General Assembly, the Security Council, the Economic and Social Council, and other bodies and committees.[24]

The Universal Periodic Review (UPR) is a unique procedure that involves reviewing the human rights situation in all UN member states, regardless of whether they have ratified a particular convention or not. The UPR is a process under the auspices of the Human Rights Council and provides an opportunity for each UN member state to demonstrate what it has done to improve the protection and promotion of human rights and to fulfil its obligations. It is designed to ensure equal treatment of each UN member state in the context of assessing the state of protection and promotion of human rights. The ultimate goal of the mechanism is to improve the human rights situation in all member states and to address violations of rights wherever they occur. There is currently no other universal mechanism of its kind.[25]

3.1.1. Global goals of sustainable development

On 25 September 2015, the 193 member states of the UN approved the 2030 Agenda for Sustainable Development, an ambitious plan that sets out to achieve prosperity that is respectful of the planet and its inhabitants. This Agenda is made up of 17 Sustainable Development Goals (SDGs), further broken down into 169 targets, to be met by 2030 with the intention of "leaving no-one behind". The 2030 Agenda is a continuation of the UN Millennium Development Goals (2000-2015) which were in their day the first international consensus on facing global problems such as the eradication of extreme poverty and hunger, and to promote improvements in access to education. Although the targets were not fully achieved, they nevertheless provided the basis for significant progress which, in 2015, was extended through the 2030 Agenda and its respective SDGs.[26] All 17 Sustainable Development Goals, are an urgent call for action by all countries - developed and developing - in a global partnership. They recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests.[27] The 17

[24] Steffek, J., Hahn, K., *The Impact of NGOs on International Organizations: Contested Influence in Global Governance*. Brooklyn Law School, 2010, p. 823.
[25] Kesonja, D., Vlašić, T., *Integration and Human Rights, Handbook for Educators*, Office for Human Rights and Rights of National Minorities of the Government of the Republic of Croatia, 2021, p.10.
[26] See https://www.iberdrola.com/sustainability/committed-sustainable-development-goals/what-is-agenda-2030, 13 February, 2025.
[27] See https://www.un.org/en/desa, 13 February, 2025.

Sustainable Development Goals, to be implemented by 2030, cover all the major challenges facing the planet: climate, biodiversity, energy, water, poverty, gender equality, economic prosperity, peace, agriculture, education and so on. Interdependent, they only make sense if they are jointly respected, and must be pursued both locally and internationally. Each country is responsible for implementing them, while ensuring that the proposed indicators and targets are met on time.[28]

Every year, the UN Secretary General presents an annual SDG Progress report, which is developed in cooperation with the UN System, and based on the global indicator framework and data produced by national statistical systems and information collected at the regional level. According to the latest report on Progress towards the Sustainable Development Goals:[29]

- Global efforts to eradicate extreme poverty have faced significant setbacks by the COVID-19 pandemic and a series of major shocks during 2020-22. The pandemic caused extreme poverty to increase in 2020 for the first time in decades, reversing global progress by three years;
- Achieving global health goals faces significant challenges, with progress slowing since 2015 in areas like maternal mortality, premature deaths from major noncommunicable diseases, and access to essential healthcare;
- Unfortunately, global progress in education has not been fast enough. Only 58% of students worldwide achieved at least the minimum proficiency level in reading at the end of primary schooling in 2019;
- Many women still lack control over their sexual and reproductive health, and violence against women persists. Urgent action is needed to challenge biased social norms, eliminate harmful practices, and change discriminatory laws. Increasing women's leadership roles and investments in gender equality are crucial at national, regional, and global levels;
- As of 2022, 2.2 billion people were without access to safely managed drinking water and 3.5 billion lacked access to safely managed sanitation;
- While labour markets have shown resilience, uneven pandemic recovery, the declining protection of labour rights and emerging vulnerabilities erode social justice prospects. The report foresees a worsening labour market outlook, with higher unemployment and sluggish growth in 2024,

[28] See https://focus2030.org/Focus-on-the-SDGs, 14 February, 2025.
[29] United Nations, Economic and Social Council Seventy-ninth session 2024, May, see https://unstats.un.org/sdgs/files/report/2024/SG-SDG-Progress-Report-2024-advanced-unedited-version.pdf.

exacerbating income inequality and jeopardizing equitable pay for women and decent work for young people;
- Over the past five years, the gap in per capita income growth between the poorest and richest countries has widened. In addition, discrimination based on age, gender, religion, race, or belief affects one in six people globally;
- Persistent threats to human security across the globe underscore the breakdown of peaceful and inclusive societies, crucial for sustainable development and the need to restore trust and strengthen and renew global peace and security frameworks.

The progress assessment carried out in 2024 reveals that the world is severely off track to realize the 2030 Agenda. Of the 169 targets, 135 can be assessed using available global trend data from the 2015 baseline to the most recent year, along with custodian agency analyses; 34 targets lack sufficient trend data or additional analysis. Among the assessable targets, only 17 per cent display progress sufficient for achievement by 2030. Nearly half (48 per cent) exhibit moderate to severe deviations from the desired trajectory, with 30 per cent showing marginal progress and 18 per cent moderate progress. Alarmingly, 18 per cent indicate stagnation and 17 per cent regression below the 2015 baseline levels. This comprehensive assessment underscores the urgent need for intensified efforts to put the SDGs on course.[30]

From the above data, the following can be concluded:
- societies are increasingly facing crisis situations (pandemics, floods, etc.) and it is necessary to invest in strengthening national frameworks in order to adequately respond to crisis situations and their consequences;
- protecting the overall health (physical and mental) of the population is imperative for preserving the well-being of society and a prerequisite for its social development;
- it is necessary to more intensively implement programs for protection against violence and discrimination, as well as improving the education system, the labour market and strengthening competencies in order to reduce various forms of vulnerability;
- ecological sustainability directly affects the sustainability of social justice;
- preserving peace, stability and guaranteeing security as a priority for the coming period.

[30] United Nations, The Sustainable Development Goals Report 2024, See https://unstats.un.org/sdgs/report/2024/The-Sustainable-Development-Goals-Report-2024.pdf, 16 February, 2025.

The 2030 Agenda also puts the principles of equality and non-discrimination at its heart, with a commitment to leave no one behind and reach those furthest behind first, special attention to marginalized groups, and two dedicated goals on combating discrimination and inequalities (SDG 5 on gender equality and SDG 10 on inequalities within and between countries), as well as a cross-cutting commitment to data disaggregation, inclusive participatory approaches (all of society and all of Government approaches), and accountability for the 2030 Agenda follow-up and review indicate that the entire Agenda was developed using a human rights-based approach, which is also crucial for its effective implementation.[31]

SDG 17 explicitly focuses on 'strengthening the means of implementation and revitalizing the global partnership for sustainable development. It highlights effective public, public-private and civil society partnerships. The 2030 Agenda and the SDGs serve as a global reference point for the transition to sustainable development. They call for the transformation of existing institutional structures in every country and require a concerted effort of governments at multiple levels, civil society, business, and academia.[32]

To deliver on the 2030 Agenda, the UN system needs to be innovative, agile, inclusive, and results-oriented. The UN system's ability to redefine how it engages with partners and works with other stakeholders towards shared sustainable development outcomes is crucial for the SDGs.[33]

3.2. Council of Europe

The Council of Europe is the continent's leading human rights organisation. Since its foundation in 1949, the organisation has created a common legal space, centred on the European Convention on Human Rights (ECHR), across its 46 member states. The Council of Europe's Committee of Ministers has overseen the implementation of 25,000 judgments and decisions from the Court, benefitting millions of people across the continent in many different ways. Alongside the

[31] See https://www.ohchr.org/en/sdgs/about-2030-agenda-sustainable-development, 16 February, 2025.
[32] Weiland, S., Hickmann, T., Lederer, M., Marquardt, J., Schwindenhammer, S., The 2030 Agenda for Sustainable Development: Transformative Change through Sustainable Development Goals? Politics and Governance, Vol 9, No 1, 2021, p. 91.
[33]The United Nations Environment Programme and the 2030 Agenda Global Action for People and the Planet, see https://www.icsspe.org/system/files/UN%20-%20Environment%20Programme% 20and%20the%202030%20Agenda %20Global%20Action%20for%20People%20and%20the%20Planet.pdf, 15 February, 2025.

ECHR, the Council of Europe has developed more than 200 legally binding international treaties to help protect people from various threats including torture, violence and sexual abuse. The European Union and the Council of Europe have developed a strong political and strategic partnership including joint cooperation programmes in a large number of countries, inside and outside the European Union, worth more than €230 million.[34] The Council of Europe protects and promotes three core values: human rights, democracy and the rule of law. It is, therefore, often called Europe's human rights watchdog.[35]

The Council of Europe has adopted a large number of documents aimed at protecting human rights, some of the most significant being, among others, the European Convention on Human Rights and the European Social Charter.

The European Convention on Human Rights (ECHR) is an international treaty for the protection of human rights and fundamental freedoms in Europe, and was signed by the Council of Europe in 1950. All 46 states from the Council of Europe are parties to the Convention, and 27 of them are members of the EU. The Convention established the European Court of Human Rights, whose purpose is to protect people from human rights violations. Any person whose rights have been violated by the state, based on the Convention, can submit a case to this court. This was a new feature that gave individuals rights in the international arena. Judgments establishing a violation are binding on states. The Committee of Ministers of the Council of Europe supervises the execution of judgments.[36]

The European Social Charter is a Council of Europe treaty that guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights, which refers to civil and political rights. It guarantees a broad range of everyday human rights related to employment, housing, health, education, social protection and welfare. The Charter lays specific emphasis on the protection of vulnerable persons such as elderly people, children, people with disabilities and migrants. It requires that enjoyment of the abovementioned rights be guaranteed without discrimination.[37] It was open for signature on 18 October 1961 in Turin, Italy. In these years, the Charter has been revised and new rights have been included to take into account the challenges facing modern societies, but the Charter has remained at the heart of the Council

[34]See https://www.coe.int/en/web/portal/the-council-of-europe-key-facts, 15 February, 2025.
[35] See https://www.europewatchdog.info/en/council-of-europe/, 15 February, 2025.
[36] See https://eur-lex.europa.eu/HR/legal-content/glossary/european-convention-on-human-rights-echr.html, 15 February, 2025.
[37] See https://www.coe.int/en/web/european-social-charter, 20 February, 2025.

of Europe's statutory goals: human rights, rule of law and democracy, which cannot be realised without the respect for social rights.[38]

4. CHALLENGES OF THE MODERN AGE

Nowadays, economic inequality is strengthened by numerous social problems such as the demographic aging of the population, low fertility rates, high youth unemployment, high pension and health costs and environmental pollution. Therefore, one of the important challenges of political and economic stability of today's society and social capital is the improvement of human development and the strengthening of social rights.[39] The key element of the fight for justice, i.e. fairness, is the adoption of good laws and the establishment of fair institutions. In order to achieve justice, as the first and most important value of a democratic society, citizens should be united, responsible and tolerant. Those values are a necessary condition for the existence and maintenance of democracy, especially social democracy.[40]

Starting from the principles of solidarity and the common good, it is possible to speak of justice in society and the state. Both concepts arise from the understanding of man and his social nature, have their own history and their own current issues.[41]Solidarity or the principle of solidarity is a fundamental and distinguishing determinant of all social security systems. Social solidarity, an intrinsic value and principle of the social security system, is first and foremost a national matter. It is based on a mutual feeling of interdependence and reliance on fellow citizens.[42] If individuals are prevented from exercising their rights, human rights, social security and social justice inevitably collapse. This leads to the social exclusion of individuals and families, which has incalculable consequences, especially for vulnerable categories of society.

[38]See https://www.coe.int/en/web/european-social-charter/60-anniversary, 20 February, 2025.
[39] Pavlišić, P., *Society on the road to conflict: a historical overview and the need for the development of a fairer new economy.* Economic thought and practice, Vol. 25 No. 1, 2016, p. 230.
[40] Čupić, Č., *Universal values and democracy, The importance and role of universal values for the establishment of social democracy*, Collection of papers Social democracy in Europe and the concept of a "good society", Belgrade, 2016, p.10.
[41]Valković, M, *Solidarity and justice as the foundation of the social state*, Social Policy Review, Vol. 111, no. 3-4, Zagreb 1996, p. 218.
[42] Martinović, A., *Solidarity as Key Determinant of Social Security Systems in EU*, Review for Social Policy, year 22, no. 3, Zagreb, 2015. p. 347.

Social exclusion is the process by which certain individuals are pushed to the margins of society and prevented from participating fully simply because of their poverty, lack of basic skills and opportunities for lifelong learning or as a result of discrimination. In this way, they are excluded from work opportunities, income-generating opportunities and education, as well as from networks of social and community activities. The socially excluded do not have access to power and decision-making processes, and therefore often feel helpless and unable to take control of their decisions that affect their daily lives. The European approach to the definition of poverty and social exclusion is based on the understanding that poverty and social exclusion are not primarily the result of human weaknesses or failures of individuals, but are the result of structural problems in society.[43]

The work of international organizations contributes not only to the strengthening of social justice and societies, but also to their promotion, with the ultimate goal of achieving the best interests of people and communities. Examples of programs of international organizations that have contributed to the strengthening of social justice:

1. The Global Fund to Fight AIDS, Tuberculosis and Malaria (The Global Fund): This organization invests more than 5 billion US dollars annually in the fight against HIV, tuberculosis and malaria, ensuring a healthier, safer and more equitable future for all;[44]
2. UNESCO's Education for All Program: This global movement, led by UNESCO, is dedicated to ensuring quality primary education for all children, youth, and adults. The program provides free, quality education for all children, especially in underdeveloped countries. The program has led to significant increases in literacy rates, reduced gender gaps in education, and improved life chances for millions of children around the world;[45]
3. The World Bank provides low-interest loans, zero to low-interest credits, and grants to developing countries. These support a wide array of investments in such areas as education, health, public administration, infrastructure, financial and private sector development, agriculture, and environmental and natural resource management;[46]
4. UNICEF funds cash transfer programs to poor families around the world to provide children with basic needs, including education, nutrition and

[43] Barbarić, Đ., *Poverty - a stain on the conscience of humanity, a presentation of the framework and possibilities of poverty reduction in the Republic of Croatia*. MoSt Association, Split, 2021, p.7.
[44]See https://www.theglobalfund.org/en/, 22 February, 2025.
[45] See https://uis.unesco.org/en/glossary, 22 February, 2025.
[46] See https://projects.worldbank.org/en/projects-operations/projects-home, 22 February, 2025.

healthcare. This program has helped millions of children in Africa, Asia, and Latin America escape poverty;[47]

5. Through the Decent Work Programme, the International Labour Organization (ILO) funds projects that improve working conditions, reduce worker exploitation and provide social security for vulnerable groups. The programme has successfully improved working conditions in developing countries and reduced child labour;[48]
6. The World Health Organization (WHO) through its Universal Health Coverage program funds projects aimed at universal health care, ensuring access to health services for poor and vulnerable populations. The programs have improved the availability of vaccines, medicines and medical services in underdeveloped countries;[49]
7. The United Nations Fund for Women (UN Women), through its Women's Economic Empowerment Programme, funds projects that help women gain economic opportunities, such as training, entrepreneurship grants and employment support. These programmes have reduced gender gaps in the economic sector and advanced women's rights.[50]

The above examples are proof that despite the uncertainty that is present on the global scene, there are initiatives that are changing people's lives for the better all over the world.

5. CONCLUSION

It can be concluded that the role of international organizations in advocating for social justice is certainly crucial and is reflected primarily in the efforts that are invested financially, materially and in terms of policy changes, in improving people's lives and protecting their rights. Numerous documents, programs and practices are indicators of society's intention to follow the direction of development, togetherness and equality. The limitations of this paper are reflected in the inability to delve deeper into the individual roles of international organizations and their specific programs, which provides opportunities for further research and focus on some of the aspects of the complex relationships within societies, the perception of social justice, as well as the correlation of the activities

[47] See https://www.unicef.org/topics/cash-transfers, 22 February, 2025.
[48] See https://www.ilo.org/topics/decent-work, 22 February, 2025.
[49] See https://www.who.int/health-topics/universal-health-coverage#tab=tab_1, 22 February, 2025.
[50] See https://www.unwomen.org/en/what-we-do/economic-empowerment, 22 February, 2025

of international organizations and government programs in the context of strengthening social justice.

Modern society is characterized by various everyday challenges, both at the national and international levels. States, individually, regardless of their level of development and economic power, often do not have the capacity to respond to growing needs in all areas of social activity. Therefore, international cooperation in jointly solving the same and similar problems plays a very important role, which is most clearly seen through the activities of international organizations. A large number of financial resources are allocated annually to support projects and programs of international organizations, with the aim of improving and protecting human rights and preserving social security. An additional value of this type of support is the fact that in many cases the percentage of funds received from the international community is higher than the national budgets of countries for certain areas. In order for funds to reach those in need, it is necessary to monitor and evaluate, especially in the context of identifying new needs, better informing and advocating for the continuation of current programs, as well as creating new ones. In this sense, it is important to mention the importance of conducting analyses, projections and using social innovations, which can certainly be the topic of some future papers and discussions.

Social justice is a concept that is inseparable from human rights. National and international policies are based on the principles of equality, inclusion and universality. Numerous international bodies have been established and various strategic documents have been adopted, all with the aim of protecting the human rights of citizens, regardless of where they live and what their specificities are. The period ahead brings uncertainty, and requires readiness, resources and strengthening of protective mechanisms of the system of protection of human rights and social justice, at the national, regional and international levels.

Various data available to the public indicate that social problems are becoming more complex and that more investments (financial and material) will be needed in the field of human rights protection. At the same time, certain changes are occurring on the international scene and the budget and scope of operations of certain international organizations are being reduced, which brings new challenges in the future and obstacles that must be overcome.

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RESPONSIBILITY AND PUBLIC INTEGRITY OF PUBLIC OFFICIALS IN MODERN PUBLIC ADMINISTRATION

ABSTRACT

Given that the concept of public administration includes functions that ensure the performance of tasks of public interest, public officials have responsibility for the lawful and efficient performance of public duties. Effective implementation of the responsibility principle will underpin the professional, transparent, and impartial operation of public administration. New European Union administrative principles are highlighting issues ranging from the rule of law, integrity, responsibility, fight against corruption, human rights, and public administration reform in general. The purpose of the paper is to elaborate both the theoretical concept of responsibility and public integrity and its practical application, with respect to the Serbian strategic, institutional, and legal administrative framework. Responsibility has been viewed as a comprehensive concept in a political, legal, and social sense that refers to both institutional and individual responsibility. The legal status of public officials and the scope of public authorities they perform determine the type of responsibility. While the functionaries can be seen mainly as subjects of political responsibility, civil servants are bound only by the rules of legal responsibility - disciplinary, criminal, material, etc. The paper will also elaborate essential elements of the public integrity concept - adhering to rules for combating conflict of interest to prevent negative effects, such as corruption in the public sector. In the Introduction, the author emphasizes the importance of responsibility and public integrity from the perspective of national administrative concepts, actual reform trends, and European Union public administration principles. The first part analyzes conceptual issues of responsibility and public integrity. The second part reveals essential elements of these principles from the perspective of international and European standards. The third part contains an analysis of the strategic, legal and institutional framework in Serbia, regarding the practical application of responsibility and public integrity. The paper concludes with the symbiosis of public administration principles and analysis of contemporary reform tendencies. Dominant scientific research methods include dogmatic, comparative, content analysis, statistical analysis.

Key words: *Public administration, Public interest, Responsiblity, Public Integrity,*

European administrative principles

1. INTRODUCTION

The purpose of public administration operation is to advocate for the legitimate public interest of society, individuals, or the majority of individuals, encompassing the protection of human rights, the provision of public services and the professional operation of public administration. Public accountability implies the rendering of account for matters of public interest, i.e. an accounting that is performed with a view to the public interest or to public responsibilities.[1] The public interest cannot be understood abstractly, but exclusively as a real historical moment, a moment of the functioning of the state and society.[2] It represents the interest of the entire social community or of individual parts, which the law must take into account. The principles of responsibility and accountability, essential in contemporary societies, are the founding principles of good governance. The basic social goal of administration control is to limit its power and direct its activities according to the needs of society.

Accountability is a comprehensive political, legal, and social concept. It implies the accountability of public administration bodies and organizations for the (non)achievement of strategic work goals and the responsibility of appointed, and employed persons for personal actions. In a broader sense, responsibility for the work of administrative bodies and organizations implies determining the effective, efficient performance of work and compliance with the rules of procedure, as well as the use of authority in accordance with the law by other administrative, legislative, judicial and other state bodies or independent institutions. While responsibility in a broader sense refers to giving an explanation for some action, accountability to other authorities, responsibility in a narrower sense implies an obligation to do or not do something.

Personal responsibility as a basis of institutional responsibility implies a special attitude of a public official towards actions and procedures, as well as a certain legal regime and sanctions. As the essence of institutional accountability, it promotes the legal, professional, efficient, and moral performance of work of public importance, with respect and a relationship of trust towards the users of public services. Public sector employees bear a crucial responsibility for maintaining public trust in state institutions, since individual responsibility is both

[1] Bovens, M.; Shillemans, T; Goodin, A.E., *The Oxford Handbook of Public Accountability,* Oxford University Press, 2014, p.7.
[2] Dimitrijević, P.; Vučetić, D., *Sistem lokalne samouprave*, Službeni glasnik, Pravni fakultet u Nišu, 2011, p.71.

a starting and an end point on the integrity route in public service.[3] The concept of individual integrity encompasses the relevant education and skills of public officials as well as their ethical, morally responsive conduct to the public. This concept also implies that they are not subjected to corruption, violation of official duties and other misuse of powers.

Both political and legal responsibility of public officials have been a *conditio sine qua non* of the modern state and the rule of law. While the functionaries can be seen mainly as subjects of political responsibility, civil servants only follow the rules of legal responsibility - disciplinary, criminal, material, etc. The concept of management responsibility implies the obligation of managers at all levels of users of public funds to perform all work legally, respecting the principles of economy, effectiveness, efficiency and publicity, as well as to answer for their decisions, actions and results to the one who appointed them or transferred responsibility to them.[4] This is a concept that aims for managers to be successful public managers and take personal legal and moral responsibility for their decisions, policies, adopted acts, undertaken actions and in general, be responsible for legal, legitimate, effective administrative action. The rules on political and legal forms of responsibility have been a crucial part of effective control mechanisms over the performance of public duties.

The concept of public integrity has also been defined in broader terms as the consistent alignment of, and adherence to, shared ethical values, principles, and norms for upholding and prioritizing the public interest over private interests in the public sector.[5] Preserving the integrity of public servants and officials, in the sense of honorable performance of work and adherence to the rules of professional ethics, is essential for the proper performance of their duties. Institutional integrity assumes the operation of public institutions and their employees that should strengthen independent, impartial, transparent, and fair performance and trust of the public.[6]

[3] Lewis, C.W.; Gilman, C.S., *The Ethics Challenge in Public Service: A Problem-Solving Guide,* 2nd Edition, Jossey-Bass, 2005.
[4] Vukašinović, Z.; Vučetić, D., *Profesionalizacija javne uprave u Srbiji,* Kriminalističko-policijski univerzitet, Beograd, 2021, p. 11.
[5] OECD, OECD Recommendations of the Council of Public Integrity, Public Integrity – A Strategy Against Corruption, 2017, https://www.oecd.org/gov/ethics/OECD-Recommendation-Public-Integrity.pdf, 16 March, 2024.
[6] Vukašinović Radojičić, Z.; Čvorović D.; Voštinić M., *Serbian approach to an effective public integrity system and combating corruption,* International Scientific Conference "Towards a Better Future: Human Rights, Organized Crime and Digital Society" Conference Proceedings, Volume I, Faculty of Law - Kicevo, University "St. Kliment Ohridski", Bitola, October, 2020, p. 117-130.

International and European Union institutions have always been strongly promoting lawfulness, the stability of democratic institutions, human rights protection and social and economic progress. International and European standards highlight the importance of legal and professional operation of public institutions through suppression of politicization, corruption, conflict of interest, violations of official duties or ethical standards and other means of abuse of public powers for private interests. By adopting common standards, the states modify and improve administrative systems and harmonize the most significant segments of public administration. At the same time, there is an emerging convergence between national legislation and practice, at both the European and international level. The concept od modern administrative reform contains the changes in the organisational culture, discipline and mentality, level of professionalism, transparency of operations and application of the new public management methods with the increase in managerial initiative and individual responsibility.[7] The aim of the paper is to point out the relevance of a systemic approach towards public administration reform, ensuring legal, professional and responsive public administration through individual and institutional mechanisms for combating negative effects in the public sector. Legal rules and ethical standards for public service should be clear - public servants need to know the basic principles and standards they are expected to apply to their work and ethical standards should be reflected in the legal framework, laws and regulations could state the fundamental values of public service providing the framework for guidance, investigation, disciplinary action and prosecution.[8]

2.INTERNATIONAL AND EUROPEAN PUBLIC ADMINISTRATION PRINCIPLES: TOWARDS RESPONSIVENESS AND INTEGRITY

2.1. The United Nations acts

International and regional public administration guidelines focus on efficient implementation of legality and legitimate expectations, professionalism, transparency, accountability, responsibility, integrity and ethical conduct and application of integrated and connected elements of the human resources management system. One essential international act concerning the strengthening of measures and the development of international cooperation for the efficient

[7] Kavran, D., *Javna uprava, Reforma, Trening, Efikasnost*, knjiga 5, Savet za državnu upravu RS, Udruženje za javnu upravu, FON, Univerzitet u Beogradu, UNDP, 2003, p. 307.
[8] Pope, J., *Confronting Corruption: The Elements of a National Integrity System,* Transparency International, Source Book, 2000, p. 178-181.

prevention and suppression of corruption is the United Nations Convention against Corruption[9], which promotes integrity, accountability, and legality in performing affairs of public importance and managing public property, while seeing corruption as a negative phenomenon undermining professionalism, the rule of law, and human rights. Because of the importance of combating corruption and conflict of interest in public administration, the notion of a "public official" has been expanded to any person holding a legislative, executive, administrative or judicial function and any other person who performs a public function, including for a public agency or public enterprise.[10] This scope should be adopted by national legal systems in order to apply rules to these officials performing public functions.

Bearing in mind that professional public administration shall underpin capacities to combat corruption and politicization, the principle of meritocracy in recruitment, retention, and promotion, includes adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions.[11] In order for public affairs to be performed professionally and efficiently, the salary system must be stimulating, according to the economic development of the signatory countries. To ensure responsibility in the work of the officials, it is proposed to adopt and implement the code of conduct for employees in the public sector, for the violation of which the officials are to be liable in disciplinary and other legal proceedings. Also, national regulations must provide for the obligation to declare the assets of persons performing public functions and the possible existence of conflicts of interest. The convention emphasizes the importance of establishing mechanisms for effective control of public finances (external and internal audit) and informing the public (availability of information of public importance, periodic reporting, simplification of administrative procedures, publication of information). An institutional framework - an independent anti-corruption body shall carry out its functions effectively and free from any undue influence.

2.2. Council of Europe's conventions and guidelines

Along with the UN Convention against Corruption, the Council of Europe's Criminal Law Convention is reflecting the Council of Europe's comprehensive

[9] United Nations, Office on Drugs and Crime, United Nations Convention against Corruption, New York, 2004, https://www.unodc.org/pdf/corruption/publications_unodc_convention-e.pdf, 20 February, 2025.
[10] Art. 2. of the UN Convention.
[11] Art. 7. of the UN Convention.

approach to combating corruption as a threat to democratic values, the rule of law, human rights and social and economic progress.[12] The specificity of the Council of Europe's role lies in its multidisciplinary approach to this issue, which includes combating corruption from a criminal, civil and administrative perspective. The broader meaning of the term public official is used, which, due to the importance of combating corruption and conflicts of interest in public administration, also refers to officials at central and local levels of government and holders of judicial functions (judges and public prosecutors). This definition has both theoretical and practical importance when anticorruption and competent authorities address or intervene in anticorruption matters. The Convention aims to develop general standards about certain criminal offenses of corruption. Corruption includes bribery, trading in influence, and any other form of conduct involving persons entrusted with public or private authority that violates the obligations arising from their status. States parties are obliged to establish as a criminal offense bribery, i.e. the acceptance of an undue advantage by a person exercising public authority, as well as bribery of foreign public officials, which may be prosecuted by all States parties, not only the country of origin of the corrupt official.

The provisions of the Civil Law Convention on Corruption[13] guarantee the signatory states effective means for the protection of the rights and interests of persons who have suffered damage from corruption, including the right to compensation for damage. Any person who has suffered damage as a result of an act or conduct of corruption has the right to initiate appropriate legal proceedings in order to obtain compensation for material and non-material damage. Article 5 of the Convention establishes State responsibility for damage caused by acts of corruption in the exercise of public functions. In appropriate legal proceedings, it is necessary to establish that an act of corruption has been committed or that appropriate measures have not been taken to prevent it, that the person has suffered damage and that there is a causal link between the act of corruption and the damage caused.

The Code of Conduct for Public Officials defines standards of conduct that play a significant role in preventing corruption, educating officials and changing the ethical climate in administrative bodies and organizations.[14] The provisions of the Code regulate in more detail issues related to conflict of interest, participation in

[12] Criminal Law Convention on Corruption, Council of Europe, ETS, no 173, Strasbourg, 1999.
[13] Civil Law Convention on Corruption, Council of Europe, ETS, No 174, Strasbourg, 1999.
[14] Council of Europe, Committee of Ministers, Explanatory memorandum to Recommendation Rec(2000)10 on Codes of conduct for public officials, adopted by the Committee of Ministers on 11 May 2000, at the 106th session.

political activities, protection of privacy, acceptance of gifts, abuse of official position, use of public funds, liability of managers, termination of employment and monitoring of compliance with the rules of the Code. The principle of equal access to jobs is promoted, which supports the principle of non-discrimination and employment based on merit (merit principle), while ensuring a fair procedure for conducting public competitions. Article 13 of the Code defines personal (private) interest as any benefit for an official, a member of his family, a close relative, a friend or a person with whom he has business or political relations. Also, as a provision of a preventive nature, periodic reporting of personal or private interest is envisaged. A special prohibition applies to the performance of duties or activities incompatible with the performance of public duties. Political activities must not affect the impartial and professional performance of duties and the trust of citizens and employers.

For the Council of Europe, corruption represents a major threat to the rule of law, democracy, human rights, fairness and social justice, hinders economic development, and endangers the stability of democratic institutions and the moral foundations of society.[15] GRECO standards are rather aspirational than legally binding on national public organizations, considering different approaches across the countries and legal systems to be supported by various legal systems. Similarly, GRECO determines the scope of "public official" as any person elected, appointed, or nominated to a public authority, appointed civil servants, advisers and special advisers to ministers, directors and members of the supervisory or executive boards nominated in public authorities.[16]

GRECO principles emphasizing integrity and impartiality as acting in accordance with the moral values, norms and rules, valid within the context in which one operates. It also refers to honesty and trustworthiness in the discharge of official duties, serving as an antithesis to corruption or the abuse of office for private gain. Public institutions should operate transparently in order to ensure public confidence in their independence, fairness and effectiveness and to maintain a balance between the need for transparency and the need to ensure confidentiality of sources, tactics and methodology, in order to effectively discharge their duties, especially in conducting investigations, as well as to protect the legitimate rights of others. Recruitment, career, and training to attract highly qualified individuals exhibiting the necessary skills, experience and behavior. The recruitment of personnel must be based on the principles of efficiency, transparency and fairness and upon known and objective criteria such as merit, equity and aptitude, focusing

[15] Council of Europe, GRECO (99) 1 Agreement Establishing the Group of States Against Corruption, Document prepared by the Directorate of Legal Affairs Strasbourg, May 1999.
[16] *Ibid.*

on a proven record of the individual's integrity, skills, education and training, experience and professionalism only. [17]

2.3. European Union Public administration principles

European Union institutions have always been strongly engaged in promoting lawfulness and human rights protection. The need for legal certainty does not mean that decision-makers must not be granted discretionary power, provided that legal remedies and procedures are in place for the prevention of its abuse. Public authorities act in accordance with the law, not taking arbitrary measures, even when exercising discretion. The concept of "abuse of power" involves the courts looking beyond the ways in which a particular decision was reached, and examining what the decision actually ought to be. [18] They shall exercise their powers only if the established facts and the applicable law entitle them to do so and solely for the purpose for which they have been conferred.[19]

Similar to other international and regional organizations, European Union Principles of Public Administration, the fundamentals address interlinked issues ranging from the rule of law, integrity and accountability, fight against corruption, human rights, and public administration reform in general.[20] The new structure follows six thematic areas. The key areas for which the working principles are defined include: 1) Strategy; 2) Policy development and co-ordination; 3) Public service and human resources management; 4) Organization, accountability and oversight; 5) Service delivery and digitalization; and 6) Public financial management.[21] The efforts of European institutions are aimed at supporting the states in establishing a clear and consistent legal framework and enforcing the rule of law, legal certainty, legitimate expectations, professionalism, transparency, efficiency, effectiveness, equality, accountability, ethical conduct, and the set-up

[17] European Partners Against Corruption, European contact-point network against corruption, ANTI-CORRUPTION AUTHORITY (ACA) STANDARDS hrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.epac-eacn.org/fileadmin/Documents/Recommendations/Anti-Corruption_Authority_Standards.pdf, November 2011, 20 January 2024.
[18] Stelkens, U., *General Principles of Administrative Law, Legality of Administration,* https://www.uni-speyer.de/fileadmin/Lehrstuehle/Stelkens/Lehrveranstaltungen/General_Principles_of_Administrative_Law/4_AdministrativeLaw_legality.pdf, 20 February, 2024.
[19] Council of Europe, Recommendation CM/Rec (2007)7 of the Committee of Ministers to member states on good administration, https://rm.coe.int/16807096b9, 20 February, 2025.
[20] SIGMA/OECD, The Principles of Public Administration, 2023 edition, Paris, 2023, https://www.sigmaweb.org/publications/principles-public-administration.htm, 19 January 2024.
[21] *Ibid.*

and application of integrated and connected elements of the human resources management system.[22] The newly redefined principle of organization, accountability and oversight reflects a need for an efficient organization of public administration across all levels of government, operating legally and applying clearly defined internal and external accountability mechanisms, such as: strong oversight bodies protect the rights of citizens and the public interest, principles of stability and flexibility ensuring accountability of public servants and protecting them against undue influence and wrongful dismissal, the obligation to act professionally and neutrally and the right to reject unlawful instructions, with protection against undue political and other interference in their professional judgment, public servants are subject to accountability, ethical and disciplinary frameworks and can be held liable in cases where misconduct is proven in due process.

Regarding the responsibility of public officials, key measures refer to effective and adequate legal provisions and institutional arrangements for suppression of corruption, disciplinary or criminal public officials' responsibility, rules on conflicts of interests (restriction of secondary employment, post-employment restrictions, guidelines for gifts and benefits, asset declarations and mechanisms for investigating and sanctioning discrepancies between personal assets and declared incomes. etc.), codes of ethics and conduct, integrity policies and action plans, and having the corrupt behavior of public servants criminalized in the penal code.[23] When it comes to the category of anti-corruption criminal offenses (bribery, fraud in the public service, abuse of public position, tax evasion, influence trading, money laundering), these offenses also need to be in the function of integrity building. While in some countries, conflict of interest is considered a crime (or misdemeanor), other countries have foreseen various sanctions for breaching the laws on conflict of interest (disciplinary sanctions).[24] Accordingly, legislation should define a comprehensive set of corrupt acts and integrity violations as criminal, civil and/or administrative offenses, including proportional sanctions.

[22] Vukašinović, Z. *et.al., op.cit*. note 4, p. 54-56.
[23] SIGMA,OECD, The Principles of Public Administration, 2017 edition. https://www.sigmaweb.org/publications/Principles-of-Public-Administration-2017-edition-ENG.pdf, 20 June 2023.
[24] OECD/SIGMA, Conflict of interest Policies and Practices in Nine EU member states: a comparative review, 2007, https://www.oecd.org/content/dam/oecd/en/publications/reports/2005/01/conflict-of-interest-policies-and-practices-in-nine-eu, 20 January, 2024.

Managerial accountability refers to the answerability of managers for the work and results of their organisation.[25] Two main forms of accountability are most often mentioned in academic studies on the subject: political, and administrative, although others are also discussed (professional, public, democratic, legal, social, moral/ethical).[26] In order to underpin managerial accountability, European Union standards for civil service development include: recruitment based on merit and equal treatment of candidates during the selection process, prevention of direct/indirect political influence on managerial positions, fair and transparent remuneration system, efficient professional development system, fair and effective performance appraisal system, promotion/mobility based on objective and transparent criteria and merit, working discipline. The setting up of an efficient civil service system assumes the existence of measures for promoting integrity, preventing corruption, and ensuring working discipline.

One of the essential prerequisites for an effective anti-corruption authority is to provide a proper institutional and legal framework and its full application. The independence of an anti-corruption institution includes political, functional and operational, as well as financial independence. Its mission is to investigate and/or prosecute allegations effectively and efficiently and without undue influence or undue reporting obligations. There must be adequate procedures in place to ensure compliance with personal and professional standards and to respond to complaints and allegations of inappropriate, unethical behavior or other misconduct. These procedures should also provide mechanisms to deal with malicious and unjustified accusations and enable credible and swift exoneration in such cases. These protective mechanisms should not inhibit proper judicial review.

3. CHALLENGES AND PERSPECTIVES OF SERBIAN PUBLIC ADMISTRATION

Although the Public Administration Reform Strategy in the Republic of Serbia for 2021-2030 and its accompanying Action Plan 2021-2025[27], as well as the Serbian legal framework provide for clear competences of state administration authorities in integrity building and in establishing a more efficient ethical infrastructure in

[25] OECD/SIGMA, Managerial Accountability in the Western Balkans, A comparative analysis of the barriers and opportunities faced by senior managers in delivering policy objectives, SIGMA Paper No. 58, Authorized for publication by Karen Hill, 2018, p. 9.
[26] *Ibid.,* p.10.
[27] Government of the Republic of Serbia, The Public Administration Reform Strategy in the Republic of Serbia for 2021-2030 and the Action Plan 2021-2025 for the Implementation of the Public Administration Reform Strategy in the Republic of Serbia 2021-2030, Official Gazette, No. 42/2021, 9/2022-Decision.

public administration, reducing the intensity of the risk of illegal behaviour, conflict of interest, corruption or unethical conduct to the minimum, effective implementation is often lacking. The European Commission has recognized limited progress in the field of Serbian public administration.[28] It has been emphasized that politicization remains one of the crucial problems in the Serbian public sector.[29] Political appointments of managers are hindering individual responsibility for legal and efficient operation. Although the legislation provides a basis for merit-based recruitment and dismissal procedures, it leaves too much discretion to the heads of institutions,[30] threatening the legality principle and legal certainty. In addition, individual and managerial responsibility remains weak.[31] Due to a large number of public administration organizations, the lines of accountability between agencies and their parent institutions are blurred, contributing to overlapping functions, fragmentation, and unclear reporting lines. Recent reports of Serbian Human Resource Management Service point to significant outflows of civil servants in some job areas (inspection, international cooperation and EU funds management), the area of management.[32] The reasons are numerous - the largest number of employees is dissatisfied with the salary, the lack of colleagues to share duties with, the lack of other resources, recognition and rewards, inadequate means and working conditions, and reduced opportunities for development and advancement.[33] Another problem is that civil service often uses temporary employment to fill positions instead of filling vacancies through competitive processes. This practice could result in inequities in career advancement opportunities and hinder the system's ability to attract and retain competent officials. A further major weakness of the Serbian civil service system is the ineffective performance appraisal system - the distribution of the results of evaluation of work performance shows a continuous inflation of high ratings of employees, so since most civil servants are appraised with the highest performance appraisal marks, it leaves a lot of discretion to a manager to decide who to promote to a higher rank.[34] Strengthening public administration's integrity requires developing the concept of managerial accountability. It involves achieving the

[28] European Commission, SWD(2023) 695 final Commission staff working document, *Report Serbia 2023,* November 2023, https://op.europa.eu/en/publication-detail/-/publication/92407d24-7eee-11ee-99ba-01aa75ed71a1/language-en), 20 February, 2024.
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] HRMS, Report on the outflow of civil servants and proposed measures for retaining and preventing the influence of the outflow in civil service bodies (period from April 2022 to April 2023), 2023 https://www.suk.gov.rs/tekst/75/korisna-dokumenta-.php, 10 March, 2023.
[33] *Ibid.*
[34] HRMS, Unified Report on the evaluation of work performance of civil servants in state administration for the period from January to December 2022, 2023, https://www.suk.gov.rs/tekst/75/korisna-dokumenta-.php, 10 February, 2023.

administration's primary goals - to protect public interest and values and to effectively implement public policies. On the other hand, it contributes to suppressing negative phenomena, such as corruption, conflict of interest, nepotism, politicization, and improper application of discretionary assessment, among other issues. Some authors perceive, similarly, in other countries like Bosnia and Herzegovina, no progress has been made in the domain of changing the approach to management and leadership in public administration - the traditional management model based on the decisive will of one person, is in place. [35]

Accountability as a comprehensive political, legal, and social concept, implies accountability of all public administration bodies and organizations for the (non)achievement of strategic work goals and the responsibility of appointed or employed persons for personal actions. According to the Serbian Civil Servants Act, a civil servant is responsible for the legality, professionalism, and effectiveness of their work and no one may influence a civil servant to do or not do something contrary to regulations.[36] Except for general reasons stipulated for dismissal, a senior civil servant shall be dismissed from their position if they have not met most of the expectations in an annual or extraordinary performance evaluation, or if their employment relationship terminated due to: a sentence of imprisonment of at least six months, or a suspended sentence of imprisonment of at least six months, for a criminal offense, or a final decision imposing a disciplinary penalty of termination of employment.[37] A civil servant shall also be dismissed from their position if the authority or body responsible for their appointment accepts the public recommendation of the Ombudsman for their dismissal, or if it accepts the initiative for dismissal based on the measure of public publication of the recommendation for dismissal issued by the Anti-Corruption Agency. A civil servant who heads a state body shall also be dismissed from their position if the appointing authority or body determines that, during their tenure, there was a serious disruption in the work of the state body they head, due to responsibility for their failure to achieve work plans and strategic goals. If applied consistently, this provision would certainly enhance individual and managerial responsibility. However, in practice, in accordance with official reports, terminations of employment for this reason have not been realized within the Serbian administration.

[35] Vranješ, N., Djurić, V., *Izazovi uspostavljanja menadžerske odgovornosti u javnoj upravi u Bosni I Hercegovini,* Pravna riječ, Časopis za pravnu teoriju i praksu,Udruženje pravnika Republike Srpske, 67/2023, Banja Luka, 2023, p.101-120.
[36] Art. 6. of the Civil Servants Act, Official Gazette of RS, No. 79/2005-13, 81/2005-11 (correction), 83/2005-21 (correction), 64/2007-3, 67/2007-26 (correction), 116/2008-76, 104/2009-27, 99/2014-7, 94/2017-5, 95/2018-366, 157/2020-3, 142/2022-3, 13/2025.
[37] Art. 78. of the Civil Servants Act.

Responsibility and integrity are stipulated through strategic and legal acts: Anti-corruption Act,[38] Civil Servants Act,[39] Criminal Code[40], and the code of ethics at central and local levels. While the Anti-corruption Act establishes the Serbian Anti-corruption Agency, governing the powers of public authorities regarding the adoption and implementation of integrity plans, solving conflicts of interest, and implementing training in corruption prevention and integrity building, the Civil Servants Act defines the legal status of civil servants, principles of work, rules on conflict of interest, featuring significant provisions concerning the obligations of public officials and responsibility for disciplinary and criminal offenses. The Serbian Anti-corruption Agency initiates and conducts the procedure to determine the existence of violations of the Law and imposes the prescribed measures, resolves conflicts of interest, files criminal charges, requests to initiate misdemeanor proceedings and initiatives to initiate disciplinary proceedings, maintains and publishes the Register of Assets, verifies assets and income reports submitted by public officials, acts on petitions submitted by natural and legal persons, investigates the state of corruption, analyzes risks from corruption and prepares reports with recommendations to eliminate the risks, and performs other tasks. In accordance with International and European standards, a public official has been perceived as any elected, appointed, or nominated person in a public authority, except for persons who are representatives of private capital in the management body of a company that is a public authority. According to the Civil Service Act and anti-corruption legislation, a public official must not be dependent on persons who could influence his impartiality, nor use public office for obtaining any benefit or convenience for himself or a related person.[41] Regarding the provisions of this Act, it has to be emphasized it contains rules on the concept of conflict of interest - prohibition of acceptance of gifts, additional work, prohibition of establishing companies and public services or engaging in entrepreneurial activities, restriction of membership in bodies of legal entities, reporting any interests related to the authority's decision and managing the conflict of interest.[42] Violation of rules concerning the prevention of conflict of interest of civil servants constitutes a gross violation of duty.[43] The Civil Servants Code of Conduct[44] spells out these rules.

[38] The Anti-Corruption Act, Official Gazette, No. 35/2019, 88/2019, 21/2021 – authentic interpretation, 94/2021, 14/2022.
[39] The Civil Servants Act.
[40] Criminal Code, Official Gazette of the RS, No. 85/2005, 88/2005, 107/ 2005,72 /2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019, 94/2024.
[41] Art. 41. of The Anti-Corruption Act.
[42] Art. 25-31 of the Civil Servants Act.
[43] Art. 107 - 120 of The Civil Servants Act.
[44] The Code of Conduct for Civil Servants, Official Gazette, No 29/2009, 30/2015, 20/2018, 42/2018, 80/2019, 32/2020.

Harmonizing with European public administration standards, the rules on conflict of interest have been stipulated through the Civil Service Act and anti-corruption legislation. These rules imply that in performing their duties, persons exercising public authority must not allow their private interests to come into conflict with the public interest. A public official can exercise only one public function unless obliged by the Constitution, law, or other regulations to exercise several public functions and he/she cannot perform other work or business activity while discharging a public office that requires permanent or full-time work or be engaged in entrepreneurship, even for two years after the termination of the public service. Besides, a public official may not advise legal entities and natural persons on issues related to the public office he holds unless obliged to do so. Nevertheless, a public official can perform a function in a political party or political entity and participate in their activities if it does not jeopardize the performance of the public function and if the law does not prohibit it. This indicates that public resources cannot be used for the promotion of political parties or political entities. Additionally, a public official and their family members may not receive gifts in connection with the discharge of public office, except for protocol gifts and special gifts.

Certain shortcomings in resolving the issues related to the conflict of interest and as such remain one of the major challenges in countering corruption in Serbia. In 2023, a total of 107 measures were imposed due to breaches of the Law – measures of caution, public disclosure of the decision on the violation of the Law on the Agency, measures of public announcement of the recommendation for dismissal from public office. [45] On the basis of current trends, the European Commission recommended that the Serbian Government should ensure consistent implementation of the administrative legislation, in order to ensure a depoliticized public administration and a stronger merit-based human resource management and revision of anti-corruption legislation, especially rules governing the conflict of interest. Conflict of interest is still perceived as an abstract category, the consequences of which are not fully comprehended.[46]

In addition, the obligation to declare assets and income is also an integral component of the rules on preventing conflicts of interest. A public official, within 30 days from the day of election, appointment, or nomination, submits to the Agency a report on his assets and income, the assets and income of his spouse or common-law partner, as well as minor children if they live in the same family household, according to the situation on the day of election, appointment, or

[45] Serbian Anti-corruption Agency, Annual Report for 2023, 2024, https://www.acas.rs/storage/page_files/Annual_Report_2023%20(003).pdf, 28 February 2024.
[46] European Commission, *Report Serbia 2023,… op.cit.* note 28.

nomination. Asset declarations are to prevent corruption and illegal use of public resources.

In 2023, the Agency imposed measures for the existence of grounds for suspicion that officials had not reported assets or had provided false information to the Agency, with the intent of concealing information about assets, 178 measures of caution, and eight measures of public disclosure of the decision on the violation of the Law on the Agency.[47] Measures of caution were imposed due to: not reported or not accurate assets (85), not reported upon termination of public office (38), not reported changes in assets and incomes (23), accumulation of functions (22) not reported on new appointment (10). The Agency filed nine criminal charges and two reports for non-reported assets and false data. In this period, 157 misdemeanor procedures were initiated due to the existence of grounds for conflict of interest.[48] In 2023, one conviction was passed and evidentiary proceedings are ongoing, while five applications were rejected. Two reports were submitted to the Serbian authority for money laundering. Most of the petitions were in the fields of local self-government, education, judiciary system, health system, construction (189), especially in public procurement. This implies to proactive role of the Agency in initiating relevant procedures and imposing measures.

Regarding the recommendations by the Group of States against Corruption (GRECO), in 2017, Serbia took steps to meet the remaining recommendations of the fourth evaluation round on the prevention of corruption in respect of Members of Parliament, judges and prosecutors, and reported on it to GRECO in March 2023.[49] In 2024, GRECO addressed a number of recommendations to Serbia in its Evaluation Report.[50] To get a comprehensive and multidisciplinary approach, there are some to be pointed out. First, national systems should lay down rules requiring that integrity checks take place prior to the appointment of ministers in order to identify and manage possible risks of conflicts of interest before joining government. GRECO concluded that this recommendation has not been implemented in Serbia.[51] In addition, in Serbia, integrity checks are still not carried out in respect of chiefs of cabinets and advisers, nor do there appear to be any

[47] *Ibid.*
[48] In 2023, misdemeanour courts imposed 9 penal sanctions and 6 measures of caution.
[49] Council of Europe, GRECO, Preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies, Evaluation report, Serbia, 2017**,** https://www.coe.int/en/web/greco/evaluations/serbia, 20 January, 2024.
[50] GRECO, Council of Europe, Public GrecoRC5(2024)921, Fifth Evaluation Round, Preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies, 2024, Compliance Report Serbia, https://rm.coe.int/fifth-evaluation-round-preventing-corruption-and-promoting-integrity-i/1680b0cd80, 20 February, 2024.
[51] *Ibid.*

reflection in this regard. However, the majority of measures recommended by GRECO (i.e. integrity checks of chiefs of cabinet and advisers, making the names and competence areas of Government advisers public) have not been addressed. The role of the Agency has to be strengthened by making public its recommendations and fostering integrity (personal, institutional, social), identifying and assessing corruption risks in the performance of the highest managerial positions. GRECO also calls upon the Serbian authorities to take resolute action so as to improve access to public information in the executive, as recommended.[52]

GRECO recommendation on post-employment restrictions rules, setting out the two-year ban on public officials to engage in employment in the private sector which had a business relationship with the public authority where the official concerned was performing his/her functions, does not apply to all persons with top executive functions, including the President, the Prime Minister's and Deputy Prime Ministers' chiefs of cabinets, as well as special and government advisers. This represents one of the key challenges. In addition, asset and income declarations of persons with top executive functions need to be subject to regular substantive control by relevant authorities.

Regarding measures within Ministry of Interior, proposed activities include amending legislation for the selection, appointment, and re-appointment of senior managers, compulsory training, security checks relating to the integrity of police officers carried out at regular intervals throughout their career, setting up of a risk register at workplaces with high risk of corruption, adopting rules on the deployment/relocation of police officers at the proposal of the managers - the Corruption Risk Analysis should be a part of preventive activities.[53] The Code of Police Ethics has to be updated to cover in detail all relevant integrity matters (such as conflict of interest, gifts, contacts with third parties, outside activities, confidential information). Importantly, the Law on Internal Affairs is expected to introduce new rules on the selection and appointment of the Chief of Police and all civil servants in the police through a more open and transparent competition process.

In this regard, GRECO refers to the European Commission Progress Report for 2023 for Serbia which takes the view that the legal framework is still insufficient to guarantee the operational autonomy of the police from the Ministry of the Interior during the pre-investigation and investigation phases. GRECO recommended that an institutional system of rotation of police staff be put in place,

[52] *Ibid.*
[53] *Ibid.*

which could be applied, as appropriate, in areas considered particularly exposed to corruption risks. However, the authorities indicate that these proposals have not been approved yet. GRECO further recommended that awareness of and training on whistleblower protection be strengthened in the police. In light of the foregoing, GRECO concludes that Serbia has implemented satisfactorily only one of the twenty-four recommendations set out in the Fifth Round Evaluation Report. Of the outstanding twenty-three recommendations, ten have been partly implemented and thirteen have not been implemented.

Considering responsibility of public officials, the most frequent violations of official duties refer to inappropriate and violent behavior towards parties and colleagues, failure to fulfill work obligations, negligent and untimely execution of tasks and orders of a superior, as well as being late for work three or more times, and leaving work early, for which a fine was imposed - 20% of the basic salary for the month in which the injury was committed.[54] Analyzing the judgments of the Administrative Court, it can be seen that civil servants initiate court proceedings most often in situations where a more serious disciplinary violation has been confirmed by the contested decision.[55] This is understandable considering the prescribed sanctions for serious disciplinary violations, which implies that the civil servant is motivated to invest legal means and thus prove in the administrative procedure, and later in the court, that he served in compliance with the regulations. In general, disciplinary responsibility does not entail responsibility in the criminal sense. We are talking about separate forms of responsibility of officials, for which special legal regimes are provided - competent authorities for conducting the procedure, legal procedure for determining responsibility and legal sanctions.

The most frequent violation of official duty refers to inappropriate and violent behavior toward parties and associates, which can be related to insufficient knowledge of the rules of the Code of Conduct and ethical norms, which would contribute to reducing such behaviors to a minimum. In general, there are a small number of initiated disciplinary procedures and a mild penal policy.[56] Also, disciplinary proceedings last quite a long time, and the epilogue is usually reached before the expiry of the period provided for the statute of limitations of the

[54] Vukašinović Radojičić, Z., Čogurić V., *Disciplinska odgovornost državnih službenika u teoriji i praksi,* „Zbornik radova 35. Susreta Kopaoničke škole prirodnog prava – Slobodan Perović", Sudski postupak – pravda i pravičnost, 13-17 decembar, Tom I, Volume I, Beograd, 2022, p. 653-667.
[55] *Ibid.*
[56] Anđelković J., Vučetić D., Vukašinović Radojičić, Z., *Conceptual issues of public officials accountability: Research conducted in Local Self-Government units in the Republic of Serbia,* TEME, Časopis za društvene nauke, Pravni fakultet Univerziteta u Nišu, Vol. XLVIII, No 3, July − September 2024, Niš, 2024, p. 777−795.

proceedings.[57] In addition to professional ones, civil servants also have moral (ethical) characteristics and personal qualifications that affect professional, politically impartial, transparent, and efficient work performance.

Since the official relationship implies moral duty and obligation of civil servants, it is related to ethics, which can be defined as "a set of social rules that he adopts as his personal criterion of behavior in view of his capacity as a public servant."[58] The code of conduct for civil servants regulates the rules of ethical conduct of civil servants and the way of monitoring its application.[59] The goal is to determine the standards of integrity and rules of conduct of civil servants from state administration bodies and to inform the public about the behavior they have the right to expect from civil servants. Although the legal framework of the Republic of Serbia provides a basis for strengthening responsibility and integrity, the level of application of these norms in practice is inadequate. Current data indicate that integrity-building mechanisms have been implemented mainly at the level of fulfilling legal obligations, and that additional efforts are necessary to further promote and develop the elements that would be conducive to their better functioning and integration aimed at strengthening ethical infrastructure. One of the ways to reduce the existing gap between the norms and their application is to pay even greater attention to the expertise and ethics of public officials.

4. CONCLUSION

Public institutions should be responsive to public interest, protecting common values. The efforts of the international and European institutions are aimed at supporting national systems in establishing a clear and consistent legal framework and enforcing the rule of law, accountability and responsibility, professionalism, integrity and transparency of public administration. International and European standards are rather aspirational than legally binding on national public organizations, considering different approaches across the countries to be supported by various legal systems. The convergence of public administration principles means fundamental public values that have been adopted and implemented in national systems, bearing in mind differences between European continental and Anglo-Saxon doctrines and administrative practices.

[57] *Ibid.*
[58] Pusić, E., *Nauka o upravi, Knjiga 1, Uvodna pitanja, Uprava u društvu, uprava kao ljudska delatnost,* Narodne novine, Zagreb, 1989, p. 240.
[59] The Code of Conduct for Civil Servants.

Clearly, public sector employees bear a crucial responsibility for maintaining public trust in state institutions, since individual responsibility is both a starting and an end point on the integrity route in public service. A systemic, multidisciplinary, approach encompasses adequate strategic and legal framework and institutional arrangement for suppression of corruption, disciplinary or criminal public officials' responsibility, rules on conflicts of interests (restriction of secondary employment, post-employment restrictions, guidelines for gifts and benefits, asset declarations and mechanisms for investigating and sanctioning discrepancies between personal assets and declared incomes. etc.), codes of ethics and conduct, integrity policies and action plans.

Anti-corruption bodies and other independent institutions have a major role in imposing measures for illegal or non-ethical behavior of public officials and they have to be strengthened. Nevertheless, a proactive role of all public institutions should be in place. Effective application of rules on conflicts of interest is viewed as a powerful tool in establishing and maintaining citizens' trust in public institutions. In addition, the recruitment of personnel must be based on the principles of efficiency, transparency, and fairness and upon known and objective criteria such as merit, equity, and aptitude focusing on a proven record of the individual's integrity, skills, education and training, experience and professionalism only. The rules on civil service appointments, especially senior civil service and their career opportunities are fostering individual responsibility and integrity, underpinning prevention of abuse of powers, corruption, politicization, and violation of duties. Disciplinary, criminal, misdemeanor, and material responsibility are enshrined in all international acts.

The rules of Serbian administrative legislation guarantee legality, fairness, efficiency, equal treatment, the proper exercise of discretionary judgment, transparency, impartiality, objectivity, and legal protection. While the institutional and legal framework of the Republic of Serbia guarantees the implementation of responsibility and integrity, the level of application of these norms in practice is inadequate. According to monitoring and progress reports of international and European institutions, the Serbian environment should exceed the gaps between rules and practice. Measures of independent institutions should be effectively implemented in practice. Some indicators as to the effectiveness of conflict of interest relate to national law setting out clear principles, meritocracy, clear policies widely understood by public servants, established mechanisms for the resolution of these conflicts in ways that serve the public interest. Information regarding chiefs of cabinet and advisers of the Prime Minister, Deputy Prime Minister and ministers, as well as their respective areas of competence, is still not publicly available. In addition, integrity checks prior to the appointment of ministers, chiefs of cabinets and advisers are yet to be introduced. The

recommendation on post-employment restrictions rules does not apply to all persons with top executive functions, which constitutes one of the key challenges in preventing conflict of interest and corruption. Moreover, asset and income declarations of persons with top executive functions need to be subject to regular substantive control by relevant authorities.

Measures to foster responsibility and integrity also include amending legislation governing the selection, appointment, and re-appointment of senior managers in public administration, compulsory training on ethics and integrity, security checks relating to "risk" working positions, setting up of risk registers at workplaces with a high risk of corruption, adopting rules on the deployment - relocation of public servants. These preventive activities for combating corruption and conflict of interest are ones that would make the Serbian administration more responsive. There should be introduced an institutional system of rotation of civil servants, possibly to be applied, as appropriate, in areas considered particularly exposed to corruption risks. The expertise and ethics of public officials need to be addressed with greater attention.

The official documents and guidelines of International and European organizations promote the development of public administration in the context of achieving the rule of law, responsiveness and professionalism. Strengthening the public integrity, public awareness, ethical conduct of public officials should be a permanent tendency in modern public administration. With a view to developing a common European administrative identity, it is crucial to assess whether the law is applicable in practice before adopting it, as well as to further evaluate whether it can be applied effectively. European standards or guidelines can be approached critically and analytically, with respect to specific traditions of the national legal systems – administrative tradition, political support for reform implementation, economic conditions, and organizational culture of public administrative bodies and organizations. The essential prerequisites for accountable and responsive administration are political support, a solid strategic framework, a normative framework ensuring rules to suppress abuse of official duty, conflict of interest, criminal and disciplinary responsibility, relevant sanctions and full application of public policies.

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DIGITAL TRANSFORMATION AS A MEANS TO EFFICIENT CIVIL JUSTICE IN POLISH LAW

ABSTRACT

This study discusses the significance of digital transformation for Polish civil procedure. The Author points out that it is important to maintain a proper balance between the legislator's legitimate desire to accelerate and simplify court proceedings and the protection of everyone's right to a fair trial. In the Author's opinion, new procedural regulations related to the development of digitalization should implement the basic principles of civil procedure, especially the principle of the equal rights of parties, principle of direct examination of evidence by the judge and principle of open proceedings. The study provides the genesis and legal analysis of the applicable procedural regulations that use digitalization techniques, in particular the service of court documents to attorneys via the Information Portal, remote hearings, electronic transcripts of hearings, electronic confirmation of receipt of court services, and the electronic random case assignment system for judges.

Keywords: *civil procedure, digitalization of justice, serving, transcripts of hearings, remote hearing*

1. INTRODUCTION

Each court proceeding is in its essence a legally organized human activity. Polish scholarship presents various definitions of civil proceedings, with the overwhelming majority referring to human activity as a set of actions, activities of procedural bodies and participants.[1] Considering the nature of court proceedings, it is not surprising that their protractedness is natural, although undesirable. In this way, there is a contradiction between the very essence of civil proceedings and the

[1] Overview of the definition of the concept of civil procedure see Cieślak, S., *Formalism of civil procedure*, C. H. Beck, Warsaw 2008, p. 2 – 4.

fundamental right of every citizen to a fair trial, including, above all, to have their case heard within a reasonable time. In the sphere of international law, this requirement results directly from Article 6, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2] and Article 14, paragraph 1 of the International Covenant on Civil and Political Rights[3]. In turn, in Polish law, Article 45, paragraph 1 of the Constitution of the Republic of Poland[4] states that everyone has the right to a fair and public hearing without undue delay by a competent, independent, impartial and impartial court.

European legislators, striving to implement the right to have a case heard within a reasonable time and implementing the judgments of the European Court of Human Rights, have introduced into national legal systems remedies against excessive length of court proceedings. An example is the Polish Act of 17 June 2004[5]. The impetus for introducing this legal remedy in Poland was the judgment of the European Court of Human Rights of 26 October 2000 in the case of Kudła v. Poland,[6] in which it was indicated that the right to have a case heard within a reasonable time is ineffective if there is no possibility of filing a complaint against excessive length of proceedings with a national state authority. The Polish Act of 17 June 2004 was based on the basic assumptions of the Italian Act of 24 March 2001.[7] Excessive length of proceedings has been defined as a case where the proceedings aimed at issuing a decision ending the proceedings in a case last longer than necessary to clarify the essential factual and legal circumstances or longer than necessary to resolve an enforcement case or another case concerning the enforcement of a court decision.[8]

Since the 1990s, new social factors have begun to appear in organized civil society, forcing new legal solutions. Numerous crises in contemporary societies show the urgent need to revise paradigms, as well as to develop new legal models capable

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette - International Conventions, No. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010, 13 /2017 (hereinafter: ECHR).
[3] International Covenant on Civil and Political Rights, No. 1966.12.19.
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of meeting the increasingly greater and more urgent demand for ensuring judicial protection.[9]

The contemporary development of digital technology provides a great opportunity to improve the efficiency and reliability of the justice system, especially in civil and commercial cases, the number of which is the highest in Polish courts. The digital transformation in civil proceedings has accelerated as a result of the COVID-19 pandemic. This study discusses the changes in Polish civil procedure introduced in recent years, which concern the computerization of the random assignment of cases to judges for consideration, electronic service of documents, consideration of the case by the court during a remote hearing using a videoconferencing system and the preparation of an electronic record of the trial.

2. PROTECTING THE PRINCIPLES OF CIVIL PROCEDURE IN DIGITAL TRANSFORMATION

The digitalization of civil proceedings is changing classical procedural institutions to such a significant extent that it is necessary to consider what are the boundaries that no legislator should cross. In my opinion, the boundaries of computerization of the justice system are determined by the basic (primary) principles of civil procedure. Therefore, it seems that it is not permissible to transform court proceedings solely into a series of electronic algorithms, without the participation of a human factor in the person of a judge or another entity acting as a legal protection authority. This issue is part of the practice of using artificial intelligence in resolving court cases. It can be noted that in 2024, the EU legislator adopted the first legal act on a global scale that introduces a legal framework for the creation and functioning of artificial intelligence systems with absolute respect for human rights and freedoms.[10]

[9] Ribeiro, D. G., *Civil Law Enforcement: Experiences from Brazilian Law* [in:] Cachón Cadenas, M.; Picó i Junoy, J., *Civil Enforcement: Current Issues*, Atelier, Barcelona 2008, p. 371.

[10] Regulation (EU) 2024/1689 of The European Parliament and of The Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJ L, 2024/1689, 12.7.2024.

2.1. The concept and types of the Principles of Civil Procedure in Polish science

2.1.1. The concept

In the Polish science of civil procedure law, the issue of procedural principles has been taken up by many authors, but it should be remembered that this issue is an important general theoretical problem. In general, it can be stated that procedural principles are certain standards of functioning of the justice system and individual procedures. Isolation of a specific principle will occur only when the elements and features that make it up are dominant.[11] The principles of civil procedure should be assigned a guarantee function, which is expressed in ensuring the correctness of court decisions and their effectiveness, as well as an interpretative function, because they are used as interpretative directives.

In Polish legal literature, various concepts of the principles of civil procedure are presented. In order to understand their essence, it is enough to recall three representative definitions. According to the first definition, the principles of civil procedure are directives for the efficiency of the proceedings, ensuring the fulfillment of its function by properly handling the cases to which the proceedings relate.[12] According to another concept, the principles of civil procedure can be defined as the guiding ideas of the civil procedural law system, according to which the content and form of individual procedural institutions are shaped and their connection into a system by means of legal and procedural relations, in order to ensure the fullest possible implementation of the functions of civil procedurę.[13] According to the third definition, the rules of civil procedure are the central ideas of the procedural law system, which are closely related to the principles according to which the justice system is organised in a given country.[14]

2.1.2. Types

Just as the doctrine presents various definitions of the principles of civil procedure, there are also significant differences in the formulation of their catalogue.[15] A

[11] Piasecki, K., *Litigious examination proceedings*, C. H. Beck, Warsaw 2004, p. 43.
[12] Broniewicz, W., *Civil Procedure in outline*, LexisNexis, Warsaw 2008, p. 55.
[13] Berutowicz, W., *Civil Procedure in outline*, State Scientific Publishing House, Warsaw 1974, p. 227 – 228.
[14] Siedlecki, W.; Świeboda, Z., *Civil Procedure. Lecture Outline*, PWN Law Publishers, Warsaw 1998, p. 53 – 54.
[15] A compilation of various catalogues of civil procedure rules, *vide* Piasecki, *op. cit.* note 11, p. 47 - 48.

detailed discussion of this issue goes beyond the scope of this study. However, for the considerations concerning the digitalization of civil procedure, it is enough to mention first of all: the principle of equal rights of parties, which manifests itself in the fact that the court cannot issue a judgment without giving the opposing party the opportunity to express its opinion (*audiatur et altera pars*) and that each party should be entitled to the same procedural means (*non debet actori licere, quod reo non permittitur*);[16] the principle of direct examination of evidence by the judge, which means that the adjudicating court (i.e. the court that issues a decision in the case) should familiarize itself directly with the parties' demands and claims as well as with the evidence;[17] the principle of oral proceedings, according to which statements made by the parties, witness testimonies and court procedural actions (e.g. announcement of court decisions) should be made orally during the hearing;[18] the principle of open proceedings, which introduces the primacy of public examination of the case in the form of public court sessions, public announcement of judgments, the possibility of access to case files and the possibility of participating in certain court activities.[19]

When introducing new legal regulations based on digital techniques into court proceedings, the legislator should examine in each case whether the procedural simplifications are not taking place to such an extent that the fundamental principles of civil procedure are being annihilated. In my opinion, diagnosing abuses, informing the legislator and participants in legal transactions about them, and formulating conclusions as to the limits of permissible digital transformation are important tasks of the modern science of civil procedure.

3. THE COMPUTERIZATION OF THE RANDOM ASSIGNMENT OF CASES TO JUDGES

The implementation of the fundamental right of a citizen to a fair trial should take place immediately after the initiation of civil proceedings. It should be emphasized that, in accordance with Recommendation No. R(94)12 of the Committee of Ministers to Member States on the independence, efficiency and role of judges, adopted on 13 October 1994,[20] in order to respect, protect and strengthen the independence of judges, steps must be taken to ensure that the allocation of cases

[16] Dolecki, H., *Civil Procedure. Lecture Outline*, LexisNexis, Warsaw 2011, p. 59.
[17] Berutowicz, *op. cit.* note 13, p. 246.
[18] Piasecki, *op. cit.* note 11, p. 89.
[19] Broniewicz, *op. cit.* note 12, p. 68 – 70.
[20] Jasiński, J., *Legal Standards of the Council of Europe. Recommendations. Volume IV. Judiciary. Organization-Proceedings-Adjudication*, Scientific Office, Warsaw 1998, p. 27, p. 36.

is not influenced by the wishes of any party or any person with an interest in the decision of the case. Cases may be allocated, for example, by drawing lots, automatically distributing them in alphabetical order or in some other similar manner (paragraph 2e of Principle I).

The Electronic Random Case Allocation System was introduced into Polish law only on 1 January 2018.[21] Before that date, there was no uniform court practice regarding the method of assigning cases to judges, and in fact it was decided by the judge who held the position of the head of a given court division. This system was not transparent and led to abuses, because it remained beyond any control.

As already indicated, the Random Case Allocation System has been in force since 1 January 2018. In accordance with Article 47a § 1 of the AALO, cases are assigned to judges randomly, within individual case categories, unless the case is subject to assignment to a judge on duty. It is rightly emphasized in the academic literature that since that date, for the first time in Poland, the random assignment of cases to judges has been recognized as a constitutional principle. Its purpose is to ensure an equal and fair workload for the adjudicating staff of courts and to guarantee impartiality to the parties to court proceedings, including civil proceedings. The Random Case Allocation System has excluded the possibility of human interference in the course of drawing cases and has adapted the Polish justice system to EU recommendations. It is worth noting that the Supreme Court in its judgment of 6 August 2019[22] stated that Article 47a of the AALO is a provision of a typically organizational nature, not a procedural one, which is intended to evenly and randomly burden judges with official duties. In turn, its violation does not mean that the composition of the court is contrary to the provisions of the law, but at most a violation of the principles of the organization of the court's work. Such a violation does not result in the invalidity of the proceedings, as provided for in Article 379, point 4 of the Code of Civil Procedure.

Detailed rules for the functioning of the Random Case Allocation System are included in a legal act of a sub-statutory nature - the Rules of Procedure of Common Courts.[23] In § 2 point 16 of the EROCC, the Random Case Allocation System is defined as an IT system used for random allocation of cases and court tasks, operating on the basis of a random number generator. This system is an IT tool - a network application available from computers logged into internal IT networks in courts. The central computer, which uses the random number

[21] Act of 12 July 2017 amending the Act – Law on the Organization of Common Courts and certain other acts, Official Gazette, No. 1452/2017 (hereinafter: AALO).
[22] Supreme Court Judgement, No. II PK 42/18.
[23] Executory order of The Secretary of Justice of 18 June 2019 Regulations of the Office of Common Courts, Official Gazette, No. 1141/2019, 867/2024 (hereinafter: EROCC).

generator, after court hours deals with each division of each common court in Poland in turn and randomly assigns a reporting judge in each case entered into the System on a given day. A characteristic feature of the System is the daily sending to the central office via the IT network of a list of cases that have been filed with the court. After registration, these cases are assigned special codes, and then a drawing of judges is carried out, and the results of the drawings are sent back at night.[24]

4. ELECTRONIC SERVING OF DOCUMENTS

4.1. Serving in general

The basic legal regulation concerning the institution of service of documents in Polish civil proceedings can be found in the Code of Civil Procedure (Articles 131 – 147)[25] and in a legal act of a sub-statutory nature – the regulation of the Secretary of Justice on the detailed procedure and method of serving court documents in civil proceedings.[26]

At the beginning of the considerations in this part of the study, it should be explained that the subject of service in civil proceedings are court documents, procedural documents, orders of the presiding judge and court decisions in the form of judgments, decisions and payment orders. For the sake of clarity, it should be indicated that court documents are documents drawn up by the court or executive authority, addressed to the parties and other participants in the proceedings (e.g. notification of the date of the hearing)[27]. In turn, according to art. 125 § 1 ACCP, procedural documents are documents submitted outside the hearing by the parties and other participants in the proceedings (e.g. a witness, an expert) to the court or executive authorities, which contain various motions and statements (e.g. a lawsuit, an appeal). Orders are exclusively decision-making actions of a judge who acts as the presiding judge (i.e. the presiding judge of the hearing, the reporting judge in a given case), and not as a court (procedural authority).

[24] Pytlewska, M., *The Random Case Allocation System as a guarantee of the impartial right to a court in the context of the European Union recommendations*, Law in Action, 40/2019, p. 273.
[25] Act of 17 November 1964 – Code of Civil Procedure, Official Gazette, 1964.43.296, No. 1568/2024 (hereinafter: ACCP).
[26] Executory order of The Secretary of Justice of 6 May 2020 on the detailed procedure and manner of serving court documents in civil proceedings, Official Gazette, No. 819/2020, 19/2024 (hereinafter: Executory order of The Secretary of Justice of 6 May 2020).
[27] Bladowski, B., *Methodology of work of a civil judge*, Zakamycze, Kraków 2005, p. 90.

Currently, Polish civil procedure regulates various methods of service, i.e. electronic service, service by placing the content of the court document in the Information Portal, service to the address for electronic service, direct service between attorneys, substitute service to an adult household member of the addressee, service by submitting a double notification, service of procedural documents by an executive authorities, service to a guardian appointed for a party whose place of residence is unknown, service by posting the document in the court building.

Attention can also be drawn to the general regulation contained in Article 149[1] of the ACCP. The provision provides for the possibility of summoning parties, witnesses, experts or other persons in a manner that the court deems most expedient, bypassing the previously mentioned methods of service, if it deems it necessary to expedite the examination of the case. A summons made in this way produces the effects provided for in the ACCP, if it is beyond doubt that it has reached the addressee. The provision allows for the summons to be made, for example, by e-mail, telephone, or electronic communicator.

Further considerations will be limited exclusively to cases of service made using electronic systems.

4.2. Electronic service

It should be noted that electronic communication in civil proceedings may be bilateral, and therefore not only in the case where the addressee is a procedural body, but also a party or another participant in the proceedings. In addition to using the global computer network to send a procedural document to the court, there is a possibility of using these services analogously by the court. This method of delivery may apply to both copies of procedural documents filed by the parties and court documents. It is correctly emphasized in science that the basic advantage of using IT systems for the purposes of delivery in civil proceedings is economic considerations. Each court proceeding involves the need to incur certain expenses by the State, and these are largely related to covering the costs of delivering procedural documents to the opponents of the proceedings and court documents. Therefore, replacing traditional - expensive and time-consuming - deliveries involving post offices with electronic services simplifies and speeds up communication and reduces its costs.[28]

[28] Kościółek, A., *Electronic procedural activities in civil court proceedings*, Wolters Kluwer, Warsaw 2012, p. 273.

The Polish legislator introduced a general regulation on electronic service to the ACCP in Article 131[1] in 2009. Over the following years, this provision was subject to subsequent amendments. According to the current content of Article 131[1] § 1 of the ACCP, the court shall deliver documents via an electronic information system (electronic service) if the addressee has submitted the document via an electronic information system or has chosen to submit documents via an electronic information system. It should be emphasized that this regulation applies only if the party has chosen to submit documents via an electronic information system, although, as a rule, the addressee may waive electronic service.

The addressee who is obliged to submit documents via the IT system under the provisions of law cannot waive electronic service, e.g. in electronic summary proceedings – the plaintiff submits documents exclusively via the IT system (Art. 505[31] § 1 of the ACCP), in the proceedings for entry in land and mortgage registers – the notary and the enforcement authority submit the application exclusively via the IT system (Art. 626[4] § 1 of the ACCP), in bankruptcy proceedings, procedural documents and documents are submitted exclusively via the IT system supporting court proceedings using the forms provided in this system (Art. 216a sec. 1 of the Bankruptcy Law Act[29]).

In the case of electronic service, the letter is deemed to have been delivered at the time indicated in the electronic confirmation of receipt of the correspondence, and if there is no such confirmation, electronic service is deemed to be effective after 14 days from the date of placing the letter in the IT system. For the speed of electronic services, apart from the fast transfer of data, it is also important that there are no restrictions on deliveries on non-working days (e.g. Sundays) and at night (i.e. from 9 p.m. to 7 a.m.).

It is worth noting that the detailed procedure and method of making electronic services are regulated in the implementing regulation of the Secretary of Justice of 20 October 2015.[30] This legal act states that a document is delivered via the IT system that supports court proceedings, in such a way that it is placed in the account from which the addressee submitted the first document in the case. After the document is received, the account in which the document was placed displays the date of receipt, and in the event that the document is not collected within 14 days from the date of placing the document in the account - the date

[29] Act of 28 February 2003 - Bankruptcy Law, Official Gazette, 2003.60.535, No. 794/2024, 1222/2024.
[30] Executory order of The Secretary of Justice of 20 October 2015 on the procedure and method of making electronic service, Official Gazette, No. 1776/2015, 452/2023 (hereinafter: Executory order of The Secretary of Justice of 20 October 2015).

on which the 14-day period expired. Electronic confirmation of receipt of correspondence is sent to the court automatically, via the IT system. Electronic confirmation of receipt of correspondence contains: the designation of the delivered document, information on the time of its receipt, the name of the account user to whom the document was delivered, or - if the document is not received - information that the document was deemed to have been delivered, information on the time of placing the document in the IT system together with the designation of the delivered document, and in the case of registration proceedings - information that the document was delivered to the account indicated by the user, other than the account from which the document was submitted.[31]

In addition to the previously mentioned legal regulations regarding electronic services, it is also necessary to refer to the Act of 18 November 2020 on electronic services.[32] This Act regulates the issue of electronic service for parties to proceedings and the principles of exchanging correspondence with public entities (e.g. public finance sector entities, enforcement authorities, non-public universities) in relations with other public entities and non-public entities, including natural persons. The Act specifies the principles of electronic harassment using the registered electronic service and the qualified registered electronic delivery service and the hybrid form of delivery. It should be emphasized that the AES provides that ultimately all correspondence of public entities will be sent in electronic form. In terms of procedural law, it is important that the AES has introduced an obligation for attorneys and other professional legal representatives to establish an address for electronic service, but the AES provisions will be applied to such services made in common courts only from 1 October 2029. This means that establishing an address for service, according to the principles specified in the AES, will not result in receiving correspondence from common courts in civil and criminal cases at this address.

According to the regulation contained in the AES, the provision of the public service of registered electronic service in contacts with public entities has been entrusted to a designated operator. Trusted providers (public and qualified) will issue proof of sending and receiving the document, providing certainty to the sender and addressee and the time of delivery. It has been emphasized in science that electronic service is a service provided to third parties, and the provider of this service is an independent entity. In particular, this independence can be ensured by using technical or organizational mechanisms. Hence, the provider of the

[31] Gołaczyński, J., *Computerization of civil procedure. From separateness to the basic model*, Gdansk Law Studies, 5/2022, p. 158.
[32] Act of 18 November 2020 on electronic service, Official Gazette, No. 2320/2020, 1045/2024 (hereinafter: AES).

electronic delivery service will be an „impartial witness" who provides evidence of the entire delivery process (evidence of sending, making the document available for collection and receipt). This evidence is made available to the sender and addressee.

In addition, an advanced electronic signature or an advanced electronic seal is used to secure both sent and received data, which is intended to exclude the possibility of undetectable data change.[33]

Under the AES, a new Article 131[2] on deliveries to an address for electronic service was also introduced to the ACCP. This provision introduced an alternative method of electronic services to Article 131[1] of the ACCP. If the conditions are met, delivery to an e-mail address under Article 131[2] of the ACCP takes precedence over electronic service under Article 131[1] of the ACCP. Electronic service under Article 131[1] of the ACCP may therefore retain its significance only outside the scope of application of delivery to an e-mail address.[34] It should also be emphasized that Article 131[2] of the ACCP applies only when the technical and organizational conditions of the court allow such service. Service may be effected on a party that is a natural person only if it has submitted a document from an address for electronic service or has indicated this address as an address for delivery. This does not apply to deliveries to entrepreneurs entered in the Central Register and Information on Economic Activity. In its substantive scope, this regulation covers court deliveries of court documents and procedural documents to parties to the proceedings.

4.3. Service via the Information Portal

The legal regulations on electronic deliveries discussed earlier are not generally applicable in Polish civil proceedings, as a universal IT system for their handling has not yet been created. Currently, such a system operates only in certain types of civil proceedings, in particular in electronic summary proceedings (Article 505[28] – 505[39] ACCP), in bankruptcy proceedings.

[33] Gołaczyński, J., *Electronic services in civil and criminal cases*, Palestra, 5/2024, p.17–18.
[34] Weitz, K., *Service in civil proceedings. Commentary to Articles 131-147 of the Code of Civil Procedure*, Wolters Kluwer, Warsaw 2024, p. 32.

4.3.1. The Information Portal

In Polish court proceedings, one of the online means of communication between courts and citizens is the Information Portal, defined as a system enabling access by authorized or authorised entities to information on cases pending before courts via the Internet, to which the State Treasury is the holder of the copyright and related rights.[35] The first Information Portal was launched in 2006, in the economic cases of one district court. Later, the system was gradually introduced in courts throughout the country. Currently, all courts dealing with civil and criminal cases have an Information Portal.

It should be emphasized that the initial purpose of introducing the Information Portal was solely to provide persons participating in the proceedings and their representatives with access to data concerning their court cases (i.e. the content of minutes of hearings, court documents and procedural documents) via publicly available computer networks.

By introducing the Information Portal, the Polish legislator primarily wanted to relieve court secretariats, as the obligation to provide information to the parties was very time-consuming, e.g. photocopying individual cards of the case files. Moreover, it involved the necessity of the party or its representative to come to the court in person, to order files for the reading room in advance, and to incur additional costs related to receiving photocopies of the case files.[36] It should also be noted that the use of the Information Portal has been free of charge since its inception, allows the parties to access the court case from a computer, and saves time and money.

4.3.2. Introduction of services via the Information Portal during the COVID-19 pandemic

After the outbreak of the COVID-19 pandemic, the Polish legislator, as part of extraordinary legal actions related to the epidemic situation due to COVID-19, by the Act of March 2, 2020 on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by tchem,[37] introduced the possibility of serving court

[35] Mikołajczuk, E., *Analysis of the functioning of the Information Portals of Common Courts*, Justice System Analyses. Justice System Institute, Warsaw 2020, p. 15.
[36] *Ibid.*, p. 16.
[37] Act of 2 March 2020 on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by tchem, Official Gazette, No. 568/2020 (hereinafter: COVID-19 Act).

documents via the Information Portal. Pursuant to art. 15zzs[9] of the COVID-19 Act, during the period of the state of epidemic threat or the state of epidemic declared due to COVID-19 and within one year of the revocation of the last of them, in the absence of the possibility of using the IT system supporting court proceedings, the court served the attorney and other professional legal representatives with court documents by placing their content in the IT system used to make these documents available (Information Portal). This regulation did not apply to documents that were to be served together with copies of the parties' procedural documents or other documents not originating from the court.

The date of service of the document was the date on which the recipient read the document placed on the Information Portal. In the event of failure to read it, it was assumed that the document was served after 14 days from the date of placing the document on the Information Portal. It should be emphasized that the delivery of a document via the Information Portal produced the procedural effects specified in the ACCP appropriate for the delivery of a court document. The judge could refrain from delivering a document via the Information Portal if delivery was impossible due to the nature of the document.

The described regulation was in force until March 14, 2024, i.e. until the legislator transferred the provision on delivery via the Information Portal to the ACCP.

4.3.3. Current legal solution for services via the Information Portal in ACCP

Considering that Article 15zzs[9] of the COVID-19 Act was a temporary provision and did not comprehensively regulate delivery through the Information Portal, the Act of 7 July 2023,[38] which is in force from 14 March 2024, a new Article 131[1a] was introduced in the ACCP. The provision states that if delivery via the electronic system is impossible, the court shall deliver court documents to the attorney and other professional legal representatives, exclusively by placing their content on the Information Portal in a manner enabling the recipient to obtain a document confirming delivery. This does not apply to documents that are to be delivered together with copies of the parties' procedural documents or other documents not originating from the court, unless the court has a copy of them recorded in electronic form. It should be emphasized that currently delivery via the

[38] Act of 7 July 2023 amending the Act - Code of Civil Procedure, the Act - Law on the Organization of Common Courts, the Act - Code of Criminal Procedure and certain other acts, Official Gazette, No. 1860/2023 (hereinafter: Act of 7 July 2023 amending the Act - Code of Civil Procedure).

Information Portal for professional representatives is, in principle, mandatory and exclusive.

In the case of delivery via the Information Portal, the document is deemed to have been delivered at the time indicated in the document confirming delivery. If there is no document confirming delivery because the attorney did not read the content of the delivered document, delivery is deemed to be effective after 14 days from the date of placing the content of the document on the Information Portal. The judge shall refrain from delivering the document via the Information Portal if it is impossible to deliver it in this way due to the nature of the document, in particular if there is a need to issue a certified copy of the judgment or enforcement title to the party.

The Secretary of Justice has issued an implementing regulation in which he regulated the detailed procedure and manner of delivering court documents via the Information Portal, as well as the electronic form in which these documents are delivered.[39]

It should be emphasized that attorneys and other professional legal representatives are required to set up individual accounts on the Information Portal.[40]

4.4. Electronic form for acknowledging receipt of a court parcel

From the point of view of improving the speed and efficiency of Polish civil proceedings, the electronic form of acknowledgment of receipt of a court document, which has been in operation since 2013 (§ 14 – 16 Executory order of The Secretary of Justice of 20 October 2015), is of great importance. Courts that decide cases in civil proceedings commonly use this solution. The essence of the electronic form of acknowledgment of receipt is that it has only electronic form and is transmitted using the sending court's IT system used to handle the electronic form of acknowledgment of receipt. The sending court obtains information about delivery only via the IT system, because there is no acknowledgment of receipt in paper form. The addressee of the parcel confirms its receipt and the date of receipt of the parcel in the electronic form of acknowledgment of receipt using a device that allows for the reproduction of a handwritten letter, placing a legible signature containing the first and last name. It should be emphasized that the software supporting the device enabling the reproduction of handwritten letters

[39] Executory order of The Secretary of Justice of 12 March 2024 on the delivery of court documents via the information portal in civil proceedings, Official Gazette, No. 368/2024.
[40] Gołaczyński, *Electronic services*…, *op. cit.* note 33, p. 14 – 15.

and the IT system used to support the electronic form of acknowledgment of receipt ensure the integrity of the data contained in the electronic form of acknowledgment of receipt with the handwritten signature affixed by the person receiving the shipment, in such a way that any changes to these data made after the signature are recognized. The completed electronic form of acknowledgment of receipt is provided by the operator's employee with an electronic signature and is transferred to the IT system of the sending court no later than the next business day.

The electronic form of acknowledgment of receipt of a court document has eliminated the waiting time for the court to receive written proof of service to the parties and other participants in the proceedings. Electronic forms of acknowledgment of receipt are continuously disclosed in the teleinformatic system of the court hearing the case, thanks to which the court can independently and quickly determine whether the court document (e.g. summons to a hearing) was properly served, on what date and who received it. The described solution is not complicated in its design, but it greatly streamlines court proceedings.

5. REMOTE HEARING

5.1. Taking evidence by videoconference

As part of the computerization of Polish civil procedure and thus its streamlining, one of the first actions of the legislator was to adopt a provision that allowed evidence to be taken remotely. By virtue of the Act of 5 December 2008[41] added new paragraphs 2 and 3 in Article 235 of the ACCP.[42] In Polish science, even before 2008, a *de lege ferenda* postulate was put forward to introduce into the ACCP the possibility of questioning a witness using technical devices for direct remote communication, i.e. by transmitting image and sound.[43] Article 235 of the ACCP is still in force, although in a slightly modified wording. Currently, if the nature of the evidence does not prevent it, the adjudicating court may decide that it will be conducted remotely as part of a remote hearing. It can be indicated that this solution is particularly useful in cases involving foreign entities. It is

[41] Act of 5 December 2008 amending the Act - Code of Civil Procedure and certain other acts, Official Gazette, 2008.234.1571. The regulation entered into force on 1 July 2009.
[42] It should be noted that this provision was introduced in order to adjust Polish law to Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, p. 1–22.
[43] Muliński, M.; Krakowiak, M., *Hearing a witness in civil proceedings using modern technology – a postulate de lege ferenda*, Judicial Review 3/2005, p. 64 – 65.

worth adding that in 2023[44] Article 235[1] of the ACCP, which concerns the content of a party's request to take evidence, has been supplemented in such a way that the request may expressly indicate whether the party requests that evidence be taken in a remote session.

5.2. The original regulation of the remote hearing in ACCP

In Polish civil procedure, the first legal regulation regarding remote hearings was introduced by the Act of 10 July 2015.[45] The legislator added a new paragraph 2 to Article 151 of the ACCP, according to which the judge could order the hearing to be held using technical devices enabling it to be held remotely. It was important that in such a case the parties could participate in the hearing when they were in the building of another court and performed procedural acts there, and the course of procedural acts was transmitted from the courtroom of the court conducting the proceedings to the place of residence of the parties and from the place of residence of the parties to the courtroom of the court conducting the proceedings. The purpose of introducing a remote hearing was primarily to reduce the costs of the parties' and other participants' appearance at the hearing by allowing them to be held via videoconferencing. It should be emphasized that the original content of Article 151 § 2 of the ACCP indicated that in the event of a remote hearing, the parties could participate in it only when they were in the building of another court, and not in any other place and perform procedural acts there.[46] The restriction on the place where the party was to be present during the remote hearing was the main reason for the non-use of the analyzed regulation in court practice. The remote hearing in the legal form resulting from Article 151 § 2 of the ACCP was a completely dead institution. Another reason for this situation were mental issues, which concerned the change in the approach to remote hearings by judges and lawyers, intellectual acceptance of tchem.[47]

[44] Act of 7 July 2023 on amending the Act - Code of Civil Procedure, the Act - Law on the Organization of Common Courts, the Act - Code of Criminal Procedure and certain other acts, Official Gazette, No. 1860/2023.
[45] Act of 10 July 2015 amending the Civil Code Act, the Code of Civil Procedure Act and certain other acts, Official Gazette, No. 1311/2015. The act has been in force since 8 September 2016.
[46] Krakowiak, M., *Electronic hearing in Polish civil proceedings*, [in:] Białecki, M.; Kotas-Turoboyska S.; Manikowski, F.; Słyk, J.; Szczepanowska, E., *Resolving Civil Cases: Current Challenges and Perspectives*, Wolters Kluwer, Warsaw 2022, p. 218 – 219.
[47] Fruk, A.; May, J., *Remote hearing in civil proceedings – origins, standards and perspectives (part I – general issues)*, Folia Iuridica Universitatis Wratislaviensis, 12(2)/2023, p. 139.

5.3. Introduction of remote hearing during the COVID-19 pandemic

The previously presented regulation of remote hearings under Article 151 § 2 of the ACCP in the wording introduced in 2015 became the prototype for solutions adopted by the Polish legislator during the COVID-19 pandemic. Namely, as part of extraordinary legal actions related to the epidemic situation due to COVID-19, by virtue of the Act of 14 May 2020[48] a new Article 15zzs[1] was introduced in the COVID-19 Act. The aforementioned provision provided for a public hearing and trial conducted using technical devices enabling them to be conducted remotely. It should be emphasized that Article 15zzs[1] of the COVID-19 Act concerned only cases examined in accordance with the provisions of the ACCP, although it was irrelevant whether these were examination proceedings, enforcement proceedings, in particular judicial enforcement proceedings, or other proceedings to which the provisions of the ACCP applied.

The fundamental difference between the previously described Article 151 § 2 of the ACCP and the remote hearing under Article 15zzs[1] of the COVID-19 Act was that, in the light of the latter provision, the entities participating in it did not have to be in the court building, but could be anywhere. The solution adopted in the COVID-19 Act was fully justified by the epidemic situation and the legislator's desire to minimize interpersonal contacts in the court building and avoid large gatherings of people.[49] From that moment on, remote hearings began to be widely used in court practice, especially since they were the rule under Article 15zzs[1] of the COVID-19 Act.

It should be explained that Article 15zzs[1] of the COVID-19 Act was a temporary provision, as it was applicable only during the period of the state of epidemic threat or the state of epidemic declared due to COVID-19 and within one year of the revocation of the last of them. Moreover, the COVID-19 Act did not contain any indications as to the technical conditions that should be met when conducting a remote hearing. There was also no universal software certified by the Secretary of Justice for conducting remote hearings. In practice, the Microsoft Teams program was widely used. The lack of detailed regulation of the remote hearing in the form adopted in the COVID-19 Act raised doubts as to the full preservation of the citizen's right to a court and the principles of civil procedure such as the principle of open proceedings, adversarial nature, oral proceedings, equality of the parties and directness.

[48] Act of 14 May 2020 amending certain acts on protective measures in connection with the spread of the SARS-CoV-2 virus, Official Gazette, No. 875/2020.
[49] Krakowiak, *Electronic hearing*…, *op. cit.* note 46, p. 221.

The regulation of a residual and temporary nature violated the authority of the court and caused difficulties as to the correct identification of persons participating in the hearing, the security of data transmission, the protection of personal data and the technical preparation and conduct of the hearing.[50] Moreover, it should be emphasised that during the COVID-19 pandemic, two contradictory forms of remote hearing were in force in parallel, i.e. the one contained in Article 151 § 2 of the ACCP and Article 15zzs[1] of the COVID-19 Act.

5.4. Current legal solution for remote hearing in ACCP

Significant changes to the content of the previously cited art. 151 of the ACCP were introduced by the Act of 7 July 2023 amending the Act - Code of Civil Procedure, which are in force until 14 March 2024. The legislator decided to transfer the solutions regarding remote hearings from the COVID-19 Act to the ACCP. The purpose of the amendment was to permanently regulate in the ACCP the solutions consisting in enabling remote hearings to be conducted using IT means enabling remote communication.

The current Article 151 of the ACCP contains a detailed solution regarding the method and conditions for conducting a remote hearing, with the assumption that the court conducts the hearing in a courtroom, to which free access is guaranteed for all parties and persons summoned, while some may come outside the court building, if they express such a wish (so-called hybrid hearing). In contrast to the solutions introduced in Article 15zzs[1] of the COVID-19 Act, the current rule is that a party may always appear in the courtroom, and remote participation in the hearing is its privilege. The party is informed of such a structure of the institution of the hearing in the notification of the date of the hearing. Moreover, Article 151 § 4 of the ACCP explicitly states that the judge may order that a person deprived of liberty participate in procedural activities only as part of a remote session. In such a case, a representative of the prison or detention center administration, a proxy, if appointed, shall participate in the remote session at the place of stay of that person. This provision shall apply accordingly to persons covered by therapeutic proceedings.

A person participating in a remote hearing who is outside the court building is required to inform the court of their location and make every effort to ensure that the conditions at their place of stay are consistent with the dignity of the court and do not constitute an obstacle to carrying out procedural activities involving them. In the event of a refusal to provide the indicated information or if the behavior of

[50] *Ibid.*, p. 226.

this person raises reasonable doubts as to the proper course of activities conducted remotely involving them, the court may summon this person to appear in person in the courtroom.

The Secretary of Justice has specified detailed technical standards for software and hardware requirements necessary to participate in a remote meeting.[51]

It should be emphasized that currently remote hearings in civil proceedings – in the hybrid form described earlier – are a real alternative to traditional hearings. Court practice commonly applies the applicable Article 151 ACCP in proceedings before the court of first instance, as well as in appellate proceedings.

6. ELECTRONIC RECORD OF THE TRIAL

Another element of the digitalization of Polish civil procedure concerns the recording of the hearing using devices recording sound or image and sound (electronic protocol; e-protocol). It should be emphasized that the recording is recorded using devices and technical means using digital technology, allowing for the recording of this record to be recorded on an electronic data carrier. The courts have been equipped with the appropriate IT infrastructure.

The legal regulation on the electronic protocol was introduced to the ACCP in 2010.[52] According to art. 157 § 1 and § 1[1] of the ACCP, the minutes are prepared by recording the course of the hearing using a sound or image and sound recording device and in writing, under the direction of the presiding judge. If for technical reasons it is not possible to record the course of the hearing using a recording device, the minutes are prepared exclusively in writing. It should be emphasized that at the same time as the electronic recording, an abbreviated written minutes are prepared by a court clerk. It is interesting that the original content of art. 158 § 1 of the ACCP indicated that the abbreviated written minutes contained only data identifying the court, judges, parties, attorneys, case designation and listed orders and rulings issued at the hearing, actions of the parties affecting the court's decision (e.g. settlement, change of claim). After several years of applying this provision in court practice, a problem related to the content of the abbreviated written minutes was revealed. Namely, in order to streamline their work, judges, in addition to the electronic record of the hearing, prepared a shortened written

[51] Announcement of The Secretary of Justice of 5 March 2024 on the technical standards of software and hardware requirements necessary to participate in a remote meeting, Official Journal of The Secretary of Justice, No. 82/2024.
[52] Act of 29 April 2010 on amending the Act - Code of Civil Procedure, Official Gazette, 2010.108.684.

record, which contained the full course of the hearing, in particular the content of the testimonies of witnesses, parties and oral opinions of experts. However, there was no legal basis for preparing a record of such content. Court practice has shown that judges familiarize themselves more quickly with the written record of the hearing in a given case than by listening to CDs with recordings of the hearing, especially if several hearing dates were held in one proceeding. As a result, the legislator changed the content of Article 158 of the ACCP in such a way that the content of the written protocol drawn up together with the electronic record was expanded and it was allowed to include in this protocol the motions and statements of the parties and the results of the evidentiary proceedings and other circumstances important for the course of the hearing. Currently, the shortened protocol may include the same content as the traditional written protocol. Thanks to this change, familiarization with the course of the hearing by judges, parties and attorneys takes much less time than familiarization with the electronic record.[53]

The court official signs the minutes prepared using a sound or image and sound recording device with an electronic signature that guarantees the identification of the person and the recognition of any subsequent changes to the minutes. The possibility for the judge to request a transcription of the relevant part of the electronic minutes is also important for practice, if this is necessary to ensure the correct adjudication of the case. Transcription is a textual expression of the audio statements recorded on the audio-video recording, and is also a procedural institution, because it is expressly provided for in the ACCP. At the same time, it is an institution that the parties to the proceedings have no influence on, and at the same time it can be a really important source of information for the court adjudicating the case.[54] The transcript is an annex to the minutes.

The legislator in the implementing regulation[55] regulated in detail the issues concerning the types of devices and technical means used to record sound or images and sound; the method of making electronic records; the method of identifying persons making electronic records; the method of making electronic records available and storing them. It is also worth noting that the parties and other participants in civil proceedings may, without the court's permission, independently record the course of the hearing and other court activities at which they are present, using a sound recording device. The court must only be warned of the intention to record the course of the hearing in such a way. The court

[53] Pietrzkowski, H., *Methodology of work of a judge in civil cases*, LexisNexis, Warsaw 2014, p. 473 – 474.
[54] Goździaszek, Ł., *IT standards in civil procedure law*, Judicial Review, 2/2017, p. 49.
[55] Executory order of The Secretary of Justice of 2 March 2015 on the recording of sound or image and sound from the course of a public hearing in civil proceedings, Official Gazette, No. 359/2015, 309/2023.

prohibits the recording of the course of the hearing or other court activity using a sound recording device if the hearing or part thereof is held behind closed doors or if the proper conduct of the proceedings is against it (Article 9[1] ACCP). This regulation implements the principle of public civil proceedings. It should be emphasized that the preparation of an electronic protocol not only speeds up the course of the hearing, but also provides a guarantee for the parties and other participants in civil proceedings that the content of their motions and procedural statements, as well as the testimonies of witnesses, parties and oral opinions of experts will not be distorted by the judge or court official as part of the written protocol. Moreover, the electronic protocol allows the higher court to precisely analyze the procedural actions taken in the case, and allows the disciplinary authority to assess the conduct of the judge, including compliance with the principles of dignity of office.

7. CONCLUSION

The use of modern, digital technologies in court proceedings is a great opportunity to reduce their length. This is of great importance, especially in civil and commercial cases, the number of which has been steadily increasing in Polish courts for several years.

The scope of application of IT systems, or broadly understood artificial intelligence, in courts can be analyzed in two aspects: information, which involves providing information to the parties, their legal representatives and other participants in the proceedings, and procedural, which enables the performance of procedural activities, in particular the initiation of proceedings, filing of procedural documents, taking evidence, making court deliveries, recording the course of the hearing through the use of ICT tools.

When introducing the digitalization of civil proceedings, it should be noted that the adopted legal solutions should first and foremost implement the right to a court and the traditional, basic principles of procedure. It should also be noted that with the development of new technologies in civil proceedings, the legal nature of procedural provisions is changing. Namely, legal acts are increasingly becoming a set of IT standards, including in the form of numerous implementing regulations.

The process of digitalization of Polish civil procedure began at the beginning of the 21st century and is still ongoing. It should be noted that these are not comprehensive changes implemented in accordance with the previously developed concept. The digital transformation of civil procedure can be called a point transformation, as it concerns individual procedural institutions selected from time

to time. Despite such a rather chaotic approach of the legislator to the analyzed issue, it is necessary to appreciate the changes already introduced and very well accepted in court practice, in particular with regard to the delivery of court documents to attorneys via the Information Portal, remote hearings, which currently operate as hybrid hearings (remote and stationary), electronic transcript of the hearing, electronic confirmation of receipt of court correspondence, electronic system of random assignment of cases to judges.

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RECOGNITION OF A PERSONAL NAME ACQUIRED ABROAD, BETWEEN NATIONAL AND EUROPEAN EXPECTATIONS*

ABSTRACT

In the intertwined world in which we live today question of personal identity becomes more important than ever. One of the emergent aspects of personal identity is the personal name. In legal transactions, the name is one of the fundamental „keys" to the identification of an individual and an indicator of the connection between the individual and their family and/or society. Therefore, the expectation that someone's personal name will be recognized in other States, especially in the State of their nationality, is not surprising. However, it is not always the case. Recognition of a personal name depends on private international law rules of the requested State which, often, are not perfect. Sometimes may even lead to the non-recognition of a name of their own nationals. Croatian law is one of them. Despite being enacted in 2017 with the intention to grasp all of the European values, in some cases it seems to restrict the use of rights and freedoms granted to the individuals in other Member States. Such is the case with personal names. This article aims to establish whether it is acceptable and how (if needed) it can be mended.

Keywords: *personal name, recognition, European law, Croatian PIL Act.*

1. INTRODUCTION

Personal name is one of the identifiers of a natural person. It is atributed at birth but it can be changed, either because of some personal reasons or because of the change of status (ie. adoption, marriage, change of geneder, etc.). Thus, attribution or change of personal name is(in most cases) connected to significant moments in one's life, moments that are inextricably related to someone's status as well as to someone's identity.

As one of the manifest aspects of personal identity, the name is „a means of individualization and an atribute of a person's personality",[1] „a personality that is unique and not found anywhere else".[2] As a consequence, the right to one's name is considered a personality right.[3][4]

In legal transactions, a name serves as an important symbolic representation of personal identity and reflects the individual in a family and social context.[5]Therefore, it is no surprise that legal protection of personal name falls within the legitimate expectations of the party (bearer of a name), in domestic and in cross-border setting.

While, in domestic cases it is easier to know what to expect since national legal framework as well as the case law are well known from the beginning, in cross-border cases legitimate expectations of the parties are often challenged, either due to multiplicity of legal sources, or different legal setting, or public policy, etc.

As a result, parties are faced with the so-called limping legal relationships, ie. situations in which a name validly acquired abroad is not recognized as a valid in another State. Negative outcome often comes with many inconveniences for the party, such as doubts about the identity of a person, difficulties when crossing borders, loss of family name affiliation, jeopardised professional recognition, etc. Following the above and having in mind the rights guaranteed by the human rights law, as well as the EU law, the parties often seek judicial protection even beyond the respective national judiciary, either from the European Court of Human Rights (ECtHR) or the Court of Justice of the European Union (CJEU).
In the following text we are going to take a closer look into the different recognition techniques used to recognise a name acquired abroad. Than we will

* This paper is a product of work that has been fully supported by the Faculty of Law, University of Split, under the project nr. 18 - "*The impact of migration on status issues (UMSP)*".
[1] Matijević, B., *Prava osobnosti – pravo na identitet i ime*, Hrvatska pravna revija, 2006, p. 15.
[2] Radolović, A., *Pravo ličnosti kao kategorija građanskog prava*, Doctoral thesis, Zagreb, 1985, p. 264.
[3] Rosolillo, G., *Personal identity at a crossroad between private international law, international protection of human rights and EU law,* Yearbook of Private International Law, Vol. 11, 2009, p. 143.
[4] See also: art. 19 of the Croatian Obligation Act, Official Gazette, No. 35/05, 41/08, 78/15, 29/18, 126/21,114/22, 156/22, 155/23: „(1) Every natural and legal person has the right to protection of his or her personality rights under the conditions regulated by law. (2) Personality rights in the sense of this Act are understood to mean the rights to life, physical and mental health, reputation, honor, dignity, name, privacy or personal and family life, freedom, etc."
[5] Rosolillo, G., *Identità personale e diritto internazionale privato*, CEDAM, 2009, pp. 8-13.

examine the existing case law of the ECtHR and the CJEU regarding a name recognition. Following that, we are going to present a current state of play in Croatia, with the aim of establishing whether it can remain the same or it needs an upgrade. Finally, we are going to present our main conclusions.

2. CROSS-BORDER PORTABILITY OF A NAME – AVAILABLE METHODS

It is well known in private international law that cross-border portability of a status acquired abroad depends on recognition of that status in another State. Recognition of a name is considereda recognition of an element of a status,[6] thus the recognition of a name is subjected to the same recognition methods. In general, there are two main paths to recognition of a status acquired abroad – procedural recognition and recognition *via* private international law (PIL) rules.

Procedural recognition as a rule, implies recognition of a status acquired abroad if it satisfies recognition requirements of the State of recognition. In the strict sense, it applies only if the status was established by the judgment.[7] However, nowadays it is often extended or remodelled in order to encompas recognition of a status established by other public authorities or other public acts.[8] The difference between the two is that extended procedural recognition includes not only judicial decisions but also any other decision delivered by public authority, which is equated with a court decision in the state of origin; while remodelled procedural recognition also includes other public acts but they are subject to additional recognition criteria. Both are present in the law of European Member States although comparative research shows that national laws in European countries are generally moving towards abolishing or decreasing impact of procedural recognition.[9] Thus, separate exequatur proceedings are only required if the validity of the judgment has been challenged or if it is needed for some other purpose. While some are of the opinon that procedural recognition can be substituted through unified conflict rules, the case law shows that it may not be so desirable,

[6] „Status is a broad notion including the name and gender of a person, legal capacity and family relations such as parentage (filiation, adoption, surrogacy), marriage, divorce, conclusion and dissolution of formalised partnership." See: Gössl, S.; Melcher, S., *Recognition of a status acquired abroad in the EU – A challenge for national laws from evolving traditional methods to new forms of acceptance and bypassing alternatives*, Cuadernos de Derecho Transnacional, Vol. 14, no. 1, pp. 1014-1015.
[7] *Ibid.*, p. 1016.
[8] *Loc. cit.*
[9] Gössl, Melcher, *op. cit.,* note 6, pp. 1017-1018.

especially if the recognition of personal status would be contrary to the public policy of the forum.[10]

Recognition by PIL rules includes „use of the connecting factors of the *lex fori* to determine the law applicable to the review of the establishment of the status".[11] It means that the recognition will only follow if the *lex fori* refers to the same applicable law as is used in the State of origin or if the content of the applicable laws overlaps. Otherwise, foreign status is not recognised, resulting in a „limping relationship".[12]In the newer conflict-of-law rules this has been mitigated in different ways – through the use of connecting factors which promote *de facto* recognition or by allowing some party autonomy or by introducing a „favour-principle".[13]

Recently, in order to comply with the requirements set in the EU law and in the human rights law, more and more European legislators also envisage an acceptance method.[14] It is based on rules that simply accept a status established abroad without any additional (recognition) requirements. It requires a publicly documented status, which is scrutinised only in relation to the public policy of the forum. This particular method is most often used regarding the names that have been acquired abroad.

However, despite the general tendency in favour of recognition of a name acquired abroad, different recognition techniques may lead to different, more or less acceptable results. Consequently, many of the cases end up either before the ECtHR or the CJEU.

3. PORTABILITY OF A NAME IN THE ECtHR JURISPRUDENCE

Although seemingly divergent, the jurisprudence of both European Courts aimes at balancing the interests of the nation-State with the interests of the individual.[15]

[10] Kunda, I., *Utjecaj međunarodnopravnih rješenja Europske unije na status migranata*, u: Barbić, J. (ed.), Položaj migranata u međunarodnom i europskom pravu, HAZU; Zagreb, 2020, pp. 84-91.
[11]Gössl, Melcher, *op. cit.,* note 6, p. 1019.
[12]*Loc. cit.*
[13]Gössl, Melcher, *op. cit.,* note 6, pp. 1020-1024.
[14] *Ibid.,* 1024.
[15] Medić, I., *Identitet i ime u prekograničnom pravnom prometu*, in: Barbić, J.; Župan, M. (eds.): Identitet u prekograničnim privatnopravnim odnosima, HAZU, Zagreb, 2021, p. 134.

In the case law of the ECtHR, the right to a name, as an element of personal identity, is protected in the context of the right to private and family life (Article 8 of the ECHR).[16]Right to private and family life is a qualified right and as such can be limited provided that: the restriction is lawful, aimed at a specific aim, necessary in a democratic society and proportionate.[17] In cases concerning personal names, such restrictions are relatively common, aiming to protect collective interests, such as language, tradition, national history, ensuring equality of all citizens, etc.[18]

The spatial continuity of a name, i e. its existence beyond the borders of the country of origin, has a dual role. On the one hand, it allows an individual to have the same name in any country they enter, and on the other hand, it allows the state apparatus to reliably identify the individual.[19] Bearing this in mind, the ECtHR strengthened the right to a single name, the continuity of which must be protected even in cross-border cases, using all available legal means, including the non-application of national conflict of law provisions and provisions on the recognition of foreign judicial and administrative decisions.[20]

The decisions of the ECtHR concerning cross-border continuity and stability of a personal name can be divided into two groups. The first consists of those decisions in which the continuity of a personal name is sought through the recognition of a new personal name acquired in another country. Thus, in the *Burghartz*[21] case protection of a personal name was ensured by referenceto Art. 8 (right to private life), but also to Art. 14 (prohibition of discrimination) of the ECHR. The ECtHR considered that a personal name, which had already become known in professional circles, formed an integral part of the private life of that person, and also a means of his identification in society and in the professional environment: "As a means of personal identification and of linking to a family, a person's name none theless concerns his or her private and family life. The fact that society and the State have an interest in regulating the use of a personal name does not exclude this, since

[16]Al Tamimi, Y., *Human Rights and the Excess of Identity: A Legal and Theoretical Inquiry into the Notion of Identity in Strasbourg Case Law*, Social & Legal Studies, Vol. 3, 2018, p. 288.
[17] Marshall, J., *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights,* Martinus Nijhoff Publishers, Leiden, 2009, p. 4.
[18] Župan, M., *Identity of a child in cross-border legal transit (Naming law at focus),* Human Rights Protection Yearbook, Protection of the rights of the child „30years after the adoption of the Convention on the rights of the child", 2020, p. 288.
[19] Rosolillo, G., *op. cit.,* note 3, p. 147.
[20] Marino, S., *The cross-border continuity of personal identity in the European Union*, London: UACES 46th Annual Conference, 2016, p. 3.
[21]Application no. 16213/90 *Burghartz v. Switzerland*, 22. 4. 1994.

these public-law aspects are compatible with private life concieved in such a wat that, to a certain degree, it includes the right to establish and develop relationships with other human beings, in professional or business contexts as in all others.".[22]In the *Mentzen*[23] case, ECtHR found no violation of the ECHR despite the fact that Latvia did not accept the German surname in its original form. Instead, ECtHR stated that the margin of appreciation which the States authorities enjoy in this sphere is particularly wide and that phonetic transcription is allowed if the language in the State of recognition is one of the fundamental constitutional values; except in cases when the original form of the surname is written in the same alphabet as that in which the document is to be drawn up. Also, if a document contains phonetic transcription as well as original version of a name, "which enables officials to make a visual comparison of both written forms of the surname and to satisfy themselves of their equivalence" than there is no violation of art. 8 of the ECHR. In the same vein, ECtHR dismissed the application in *Kuharec* case.[24] Circumstances of the case were the same as in *Mentzen*, meaning that the Latvian authorities adjusted the foreign (in this case Ukrainian) surname according to Latvian grammar which, according to the ECtHR did not cause any problems for the applicant since there is an option to have also the original name inscribed in the passport (not on the same page though).

The second group consists of the decisions that seek to ensure the continuity of a personal name through the right to retain the same personal name, as a means of personal identification, in another state. Although, due to the specific factual context, the decision in the *Burghartz* case partly fits into this category, the decision in the *Kismoun*[25] case is based exclusively on Article 8 of the ECHR. In the aforementioned case, the plaintiff requested from an EU Member State to retain the personal name (first and last name) under which he was registered in a non-member state and which he used for most of his life, and which he therefore perceived as part of his personal identity.[26] The ECtHR concluded that the right to

[22] *Ibid.,* para 24. Also, in number of other cases ECtHR subsequently confirmed that the personal name is integral part of identity and a means of identification. See: Application no. 18131/91 *Stjerna v. Finland*, 25. 11. 1994.; Application no. 31178/96 *Petersen v. Germany*, 6. 12. 2001.; Application no. 36797/97 *G.M.B. and K.M. v. Switzerland*, 27. 9. 2001.; Application no. 41843/98 *Szokoloczy-Syllaba and Palffy de Erdoed Szokoloczy-Syllaba v. Switzerland*, 29. 6. 1999.; Application no. 42973/98 *Bijleveld v. the Netherlands*, 27. 4. 2000.; Application no. 50614/99 *Taieb known as Halimi v. France*, 20. 3. 2001.; Application no. 59727/00 *Šiškina nad Šiškins v. Latvia*, 8. 11. 2001.; Application no. 11369/05 *Golemanova v. Bulgaria*, 17. 2. 2011.; Application no. 56759/08 *Negrepontis-Gianninis v. Greece*, 3. 5. 2011., etc.

[23] Application no. 71074/01 *Mentzen alias Mencena v. Latvia*, 7. 12. 2004.

[24] Application no. 71557/01 *Kuharec alias Kuhareca v. Latvia*, 7. 12. 2004.

[25] Application no. 32265/10 *Henry Kismoun v. France*, 5. 3. 2014.

[26] See also: Application no. 71074/01 *Mentzen alias Mencena v. Latvia*, 7. 12. 2004.; Application no. 29865/96 *Ünal Tekely v. Turkey*, 16. 2. 2005.; Application no. 44378/05

a name serves the function of personal identification in the private sphere. Consequently, all contracting states to the ECHR have a positive obligation to balance the interest of the individual in having a personal name with the interests of the state related to the identification of its citizens. The ECtHR confirmed that, given the presence of a public interest in this case the state has a wide discretionary assessment,however, by disregarding the individual's right to a personal name it applied that discretionary assessment incorrectly.

Existing case law clearly shows that art. 8 of the ECHR does not guarantee an unconditional right to change one's name and that in this area of law the Contracting States have wide margin of appreciation.[27]In order to succeed with their application the applicant must prove that there has been interference with the guaranteed rights which was not justified, meaning: it was not in accordance with the law, it did not pursue a legitimate aim and it was not necessary in a democratic society. Also, an applicant must prove to the ECtHR "that the difficulties are serious enough to amount to disproportionate interference with private or family life".[28]

4. PORTABILITY OF A NAME IN THE CJEU JURISPRUDENCE

The protection of personal names, in cross-border cases has also been addressed by the CJEU on several occasions. However, its approach to the issue of personal names is significantly different than that of the ECtHR. The reasoning of the CJEU operates entirely within the concepts of EU law.[29] It is based on the right to free movementthus, it applies only to persons who actually made use of that right. As a consequence, in cases in which person did not exercise their right of free movement only ECHR applies.

Daróczy v. Hungary, 1. 6. 2008. In all this cases ECtHR underlined that „while it is true that States enjoy a wide margin of appreciation concerning the regulation of names, they cannot disregard its importance in the lives of private individuals: names are central elements of self-identification and self determination." (para 32 of *Daróczy*) Therefore, forcing the applicant to alter a name whish they used for most of their life is unacceptably rigid and completely disregard their interests.

[27] For cases not mentioned in this Article see: Retea, O.-N., *Infringement in one's right to name, intrusion in private life or family life? The European Court of Human Rights perspective*, Perspectives of Bussines Law Journal, Vol. 5, Issue 1, 2016., pp. 133-141.

[28] Application no. 71074/01 *Mentzen alias Mencena v. Latvia*, 7. 12. 2004.

[29] Kohler, C., *Towards the Recognition of Civil Status in the European Union*, Yearbook of Private International Law, Vol. 15, 2013/2014, p. 20.

However, after the adoption of the EU Charter of Fundamental Rights in 2000[30] the CJEU also was formally bound to take into account human rights.[31]Not only that. In accordance with the Article 52(3) of the Charter, the level of protection of fundamental human rights established by the ECHR represents a minimum standard, which can be expanded.[32]

Unlike earlier cases related to the issue of cross-border stability of personal names in which the issue of human rights was hardly mentioned, starting with the *Sayn-Wittgenstein* case, the CJEU began to include (albeit incidentally) a reference to the right to personal identity/name as a fundamental human right in its decisions.[33] However, as already mentioned, cross-border stability of personal identity, and thus of personal name, has been recognized as one of the conditions for the exercise of fundamental rights and freedoms guaranteed to every citizen of the Union.[34] It is precisely on this platform, and not on the recognition of personal name as a fundamental human right, that the CJEU bases most of its decisions related to personal names. Fundamental human rights are evidently of a subsidiary nature and in the function of fundamental freedoms.

Thus, in the *Konstantinidis*[35] case, the CJEU ensured the protection of personal names in the context of the protection of the rights to freedom of establishment and freedom to provide services, ie. protection of fundamental economic freedoms. In view of the CJEU,both the incorrect transcription and correct transliteration equally altered the phonetic characteristics of the name, which CJEU interpreted as a potential obstacle to the exercise of fundamental economic freedoms.

[30] OJ EC C 364/1, 18. 12. 2000.
[31] Craig, P.; De Burca, G.: EU Law: Text, Cases and Materials, Oxford University Press, 2015, pp. 383-384.
[32] See: C-4/23 *Mirin*, ECLI:EU:C:2024:845, para. 63 – „In that regard, as is apparent from the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), in accordance with Art. 52(3) of the Charter, the rights guaranteed in Art. 7 thereof have the same meaning and the same scope as those guaranteed in Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), … the latter provision constituting a minimum treshold of protection (see, by analogy, Judgment of 29 July 2024, *Alchaster*, C-202/24, EU:C:2024:649, para 92 and the case law cited)."
[33]C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, para 52; C-391/09 *Runevič-Vardyn and Wardyn*, ECLI:EU:C:2011:291, para 66; C-438/14 *Bogendorff von Woffersdorff*, ECLI:EU:C:2016:401, para 35.
[34] See: Ćapeta, T.; Rodin, S., *Osnove prava Europske unije*, Zagreb: Narodne novine, 2011, pp. 91-114.; Ehlers, Dirk (ed.), *European Fundamental Rights and Freedoms*, Berlin, Boston: De Gruyter, 2007.
[35]C-168/91 *Christos Konstantinidis v. Stadt Altensteig*, ECLI:EU:C:1993:115.

In all other cases, the CJEU based its decision on citizenship of the Union, the principle of non-discrimination and the right to freedom of movement.

The *Garcia Avello*[36]was the first case in which the CJEU explicitly highlighted the right to freedom of movement and the need to protect the stability of a personal name.[37] It stated that the principle of non-discrimination requires that similar situations must be treated equally and unequal situations differently, unless the treatment is justified by objective reasons unrelated to the nationality of the person concerned and proportionate to the legitimate aim pursued. It concluded that dual nationals are in a different situation from nationals who hold the nationality of only one State, since under the laws of both States of which they are national they may have different personal names.

He pointed out that a possible discrepancy in surnames, as in the present case, could cause serious inconvenience, both in professional and private life; and in relation to the use and legal effect of diplomas and personal documents issued in one state of which they are citizens in another state of which they are also citizens.[38] Therefore, "the administrative authorities of one State, in circumstances such as those in the present case, are not permitted to refuse a request to change the surname of minor children who are nationals of several Member States of the EU, if the request is intended to ensure that the children bear the surname which they would otherwise bear on the basis of the law and tradition of another State whose nationals they are".[39] In short, in the circumstances as in this case, the decisions concerning the name registered in another Member State must be accepted as "*faits accomplis*".
The *Grunkin Paul*[40]case is also interesting in many ways. It is the first case in which the CJEU has "forced" a Member State to recognize a surname acquired in another State where its national was born and lives. In doing so, it has indirectly limited the exclusive competence of a Member State to determine the name of its own nationals who do not hold another nationality. It has also strengthened the

[36]C-148/02 *Garcia Avello*, ECLI:EU:C:2003:539. See also: Ballarino, T.; Ubertazzi, B., *On Avello and other judgements: A new point of departure in the conflict of laws?*, Yearbook of Private International Law, Vol. 6, 2004, pp. 85-128.
[37]Winkler, S., *Pravo na osobno ime u praksi europskih sudova*, in: Europsko obiteljsko pravo (Bodiroga-Vukobrat, N.; Hlača, N.; Hrabar, D.; Jakovac-Lozić, D.; Korać Graovac, A.; Lapaš, D.; Majstorović, I.; Medić Musa, I.; Novak, B.; Sikirić, H.; Smokvina, V.; Winkler, S.; Žnidaršič Skubic, V.; Župan, M.), Zagreb: Narodne novine, Zagreb, 2013, p. 137.
[38] Para 36 of the Garcia Avello Judgment.
[39] Para 45 of the Garcia Avello Judgment. See also: Winkler, S., *Praksa Europskog suda o korištenju više prezimena*, in: Zbirka presuda Europskog suda (Izbor recentne prakse) (Bodiroga-Vukobrat, N.; Đerđa, D.; Poščić, A. (eds.)), Zagreb: Inženjerski biro, 2011, p. 146.
[40]C-353/06 *Grunkin Paul*, ECLI:EU:C:2008:559.

autonomy of parents, allowing them to choose between the name given in the State of birth and the name given in the State of which the child is a national. It has also shown determination to put an end to the limping legal relations. However, it has opened up some other "fronts", primarily the question of possible different (systemic) solutions to this issue.[41]

In this case, the CJEU reminded that a national regulation that puts some of its own citizens in a disadvantageous position, just because they exercised freedom of movement and residence in another Member State, represents a restriction of fundamental freedoms.[42] He reiterated that serious inconveniences can equally arise in the situation of dual citizenship of the persons in question and in the situation when in the State of birth and residence the determination of the surname is linked to the residence, while in the State whose nationality those persons have that determination is linked to nationality.[43] According to the CJEU, none of the reasons stated in support of the fact that the determination of a person's surname is linked to the nationality of that person, regardless of how legitimate these reasons are in themselves, is so important that it would justify, in circumstances such as those in the main proceedings, the refusal of the competent authorities of a Member State to recognize the child's surname as already determined and registered in anotherMember State in which the child was born and in which he has resided since birth and who, like his parents, only has the nationality of the first Member State.[44]

The *Sayn-Wittgenstein*[45] case is the first case in which the CJEU explicitly stated the obligation to respect personal identity as a fundamental human right, in support of which it also referred to the relevant case-law of the ECtHR.[46]The CJEU found that the decision of the national court on the impossibility of changing the personal name constituted a serious inconvenience for the applicant,[47] and also an obstacle to the freedom of movement within the territory of the EU. However, it supported the position of the Austrian Government that the aforementioned restriction

[41] See: Lehman, M., *What's in a Name? Grunkin-Paul and beyond*, Yearbook of Private International Law, Vol. 10, 2008, pp. 149-163.
[42] Para 21 of the *Grunkin Paul* Judgment.
[43] *Ibid.,* para. 24.
[44] *Ibid.,* paras 31 and 39.
[45] C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806.
[46] *Ibid.,* para. 52.
[47] *Ibid.,* paras 63-71.

protected national identity[48] and the equality of all citizens before the law.[49] In other words, the restriction provided for by the national legislation was justified by the protection of public order.

In the *Runevič-Vardyn*[50] case, the CJEU gave priority to the protection of the national language of Lithuania as a part of its national identity, ie. national public order. The CJEU acknowledged the need to protect the rich European heritage,[51] but reiterated that such efforts should not disproportionately affect fundamental rights of citizens of the EU. In relation the absence of a diacritical marks, the CJEU concluded that this does not represent a violation of the right to freedom of movement, given that such marks are often omitted due to various technical limitations.[52]

In the *Bogendorff von Wolffersdorff*[53] case, the CJEU reiterated that although the rules governing the entry of a person's surname and first name in the register of civil status are within the jurisdiction of the Member States, they must, when exercising that jurisdiction, respect the law of the Union and especially the provisions of the Treaty relating to the freedom granted to every citizen of the Union to move and reside on the territory of the Member States.[54] According to the CJEU, there are onlyfour reasons that could justify the refusal to recognize and register the name and surname acquired in another Member State. These reasons relate to the principles of specificity and continuity of names, the fact that the change of name in another Member State was a deliberate choice independent of and unrelated to a change in personal status, the length and complexity of the chosen name, and reasons related to the German constitutional choice and the abolition of titles of nobility.[55]According to the CJEU, the principle of equality of German nationals before the law[56] as well as constitutional choice of abolishing

[48] As in: C- 379/87 *Groener*, ECLI:EU:C:1989:599 and C-36/02 *Omega*, ECLI:EU:C:2004:614. For more see: Von Bogdany, A.; Schill, S. W., Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, Common Market Law Review, Vol. 48, 2011, p. 1421; and Novak, S., *Dijalozi između ustavnih sudova država članica Europske unije i Suda Europske unije*, Pravni vjesnik, No. 3-4, 2020, pp. 113-136.
[49] Para 74 of the *Sayn-Wittgenstein* Judgment.
[50]C-391/09 *Runevič-Vardyn and Wardyn*, ECLI:EU:C:2011:291.
[51]*Ibid.,* para. 86.
[52] Paras 81 and 82 of the *Runevič-Vardyn and Wardyn* Judgment.
[53]C-438/14 *Bogendorff von Woffersdorff*, ECLI:EU:C:2016:401.
[54] Para. 32 of the *Bogendorff von Woffersdorff* Judgment.
[55] Para. 49 of the *Bogendorff von Woffersdorff* Judgment. See, also: Mohay, A.; Tóth, N.. *What's in a name? Equal treatment, Union citizens and national rules on names and titles*, pp. 9-10, http://ceere.eu/wp-content/uploads/2016/03/Mohay-T%C3%B3th-Whats-in-a-name-WP04.pdf, 10 February, 2025.
[56] Para. 67 of the *Bogendorff von Woffersdorff* Judgment.

privileges and inequalities and prohibiting the wearing of titles of nobility (ie. public order)[57] could be a legitimate reason for refusing to change a surname, but not for refusing to recognize a change of name.[58]However, answer to this question requires proportionality test since in German legal system there is no strict prohibition on maintaining titles of nobility as a part of the family name or a name acquired through adoption.

Finally, inthe *Freitag*[59]as well as in the *Mirin*[60]case, the CJEU based its decision exclusively on freedom of movement. In *Freitag* case, the CJEUemphasizes that the circumstances in this case can raise doubts about the plaintiff's identity as well as the credibility of the documents used or the truth of the information contained in them, which represents a restriction of freedom of movement.[61] Therefore, "the registry office of a Member State may not refuse to recognize and enter in the civil status register a name which a national of that Member State has lawfully acquired also in another Member State of which he is also a national, and which corresponds to his birth name, on the ground that the possibility of requesting such registration on the basis of a declaration in the registry office is conditional on the fact that that name was acquired during habitual residence in that other Member State, UNLESS there are other provisions in national law which effectively allow the recognition of that name".[62]

In the *Mirin* case, the CJEU emphasized that the Member State's refusal to recognize the name of its national, validly acquired in another Member State, hinders the exercise of the right to move and reside freely in the territories if the Member States, enshrined in art. 21 of the TFEU.[63]Since it can be justified „only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions",[64] national legislation which prevents recognition of a personal name must, in principle, be regarded as being incompatible with the EU law.[65]

[57] *Loc. cit.*
[58] Para. 83 of the *Bogendorff von Wolffersdorff* Judgment.
[59]C-541/15 *Freitag*, ECLI:EU:C:2017:432.
[60]C-4/23 *Mirin*, ECLI:EU:C:2024:845.
[61] Paras 37 and 38 of the *Freitag* Judgment.
[62]*Ibid.,* para. 47.
[63] Paras 41 and 54 of the *Mirin* Judgment.
[64]*Ibid.,* para 59.
[65]*Ibid.,* para. 60. This case concerns not only recognition of the name but also of the gender.

5. RECOGNITION OF A PERSONAL NAME IN CROATIA

5.1. Setting the stage on a national level

There are lots of legal sources dealing with personal name in Croatia. On substantial level there are: Personal Name Act[66] and Law on State Registers.[67] Also, Croatia is a contracting State to the Paris Convention[68] as well as to the Convention on the Issue of Multilingual Extracts from Civil Status Records.[69]

On the conflict-of-laws level there is a Private International Law Act (PIL Act).[70] There are also a numerous bilateral agreements that apply to recognition of foreign decisions which are, given that they are concluded during the former State (SFRY), sometimes even more burdensome for the applicant than contemporary legal sources.[71]

With regard to the recognition of status in the Republic of Croatia, the method of recognition depends on the particular element of a status which needs to be recognised. Thus, there is a procedural as well as recognition by PIL rules, but also automatic recognition within the scope of application of European or international law.

Traditional (procedural) recognition concerns foreign judgments, issued by a (competent)court or other (competent) public authority.[72] It envisages control of several formal requirements which may affect recognition. One of the formal requirements is finality, attested by the court of origin, which sometimes proves to be impediment to recognition. In line with the doctrinal views, as well as the

[66] Personal Name Act, Official Gazette, No. 118/12, 70/17, 98/19, entered into force 1.1.2020.
[67] Law on State Registers, Official Gazette, No. 96/93, 76/13, 98/19, 133/22, entered into force 1. 1. 2023.
[68] Paris Convention on the issue of certain extracts from civil status records for use abroad, 27. 9. 1965. (Official Gazette of the SFRY – International agreements and other agreements, 9/1967, 4/1970) and notification of succession (Official Gazette of the Republic of Croatia– International agreements, 6/1994).
[69] Convention on the Issue of Multilingual Extracts from Civil Status Records, 18. 9. 1976. (Official Gazette of the SFRY – International agreements and other agreements, 8/1991) amd notification of succession (Official Gazette of the Republic of Croatia– International agreements, 6/1994).
[70] Private International Law Act, Official Gazette, No. 101/17, 67/23, entered into force 29. 1. 2019.
[71] More about it see in: Hoško, T., *Recognition of a status acquired abroad: Croatia,* Cuadernos de Derecho Transnacional, Vol. 14, no. 1, 2022, pp. 1198-1199..
[72] Vuković, Đ.; Kunštek, E., *Međunarodno građansko postupovno pravo*, Zgombić & Partneri, Zagreb, 2009, p. 424. It includes also a judicial settlements, but they are not relevant in connection to personal names.

case law, impossibility to prove finality or the lack of finality in the country of origin renders the application for recognition inadmissible.[73] Other requirements which may lead to non-recognition are: violation of *audiater et altera pars principle*,[74] exclusive jurisdiction of Croatian courts,[75] exorbitant jurisdiction of the court of origin,[76] manifest incompatibility with public policy,[77] existence of a final earlier domestic decision between the same parties in the same subject matter or a final foreign decision which is recognized or recognizable in Croatia.[78] Although there are also other methods of recognition, if the validity of the judgment is challenged or recognition is needed for other purposes, traditional recognition will be required.

Recognition by PIL rules is not discussed in Croatian private international law theory.[79] However, it takes place with respect to the recognition of a personal name. Usually, recognition by PIL rules requires a submition of an authentic instrument or certificate or equivalent document providing the facts of the case. There is also an acceptance method, also used regarding the names acquired abroad, without reference to a foreign decision or use of a classic connecting factor.

5.2. Recognition by PIL rules

In Croatia, the question of name recognition usually comes up in the context of the registration of a name acquired abroad. Registration is dependant on recognition by the corresponding rules, except in a case of change of personal name abroad. The Private International Law Act, which entered into force in 2019, for the first time offers the explicit provisions regarding the personal names.

According to Croatian PIL Act, „The personal name of a natural person is governed by the law of the State of which he/she is a national.".[80] At first sight a simple conflict rule allowing for application of any national law. However, read

[73] Dika, M.; Knežević, G; Stojanović, S., *Komentar Zakona o međunarodnom privatnom pravu*, PiP „NOMOS", Beograd, 1991., p. 286.
[74] Art. 68 of the PIL Act.
[75] *Ibid.,* art. 69 (1).
[76] *Ibid.,* art. 69 (2).
[77] Art. 71 of the PIL Act. Since in this Act no special *fraus legis* provision exists, fraudulent intention may also be considered in the public violation context. See: Hoško, T., *Novo uređenje međunarodnog privatnog prava u Hrvatskoj – Zakon o međunarodnom privatnom pravu*, Zakonitost, Vol. 1, No. 1, 2019, p. 22.
[78] Art. 70 (1) of the PIL Act.
[79] Hoško, *op. cit*., bilj. 71, p. 1201.
[80] Art. 18 para. 1. of the PIL Act.

in conjunction with art. 3 para 2 of the same Act, dealing with the determination of relevant nationality in cases of dual or multiple nationality, it leads to problematic outcomes.

First scenario, in which one of nationalities is the Croatian nationality will lead to the exclusive application/relevance of Croatian nationality. Such an approach practically equates the single and multiple nationals holding Croatian nationality, both cathegories being subjected to Croatian substantive law. Giving precedence to Croatian nationality without a requirement that there is a substantial connection goes against the basic principle of private international law, which is application of the most closely connected law. Not to mention that, according to arts. 18 and 20 of the TFEU, it is considered discrimination based on nationality.[81]

Second scenario, in which person holds a multiple foreign nationalities will lead to the application of the effective nationality, which is easier to justify from the point of view of private international law but can also be challenged as discriminatory.

These problems can be solved through the direct refrence to CJEU and/or ECtHR jurisprudence,[82] depending on the circumstances of the case.

There are exceptions to this general rule with regard to spouses as well as with regard to children, but they also have their weaknesses.

According to art. 18 para 2, „If the marriage is concluded in the Republic of Croatia, the bride and the groom can determine their surname according to the law of the country of which one of them is national or, if at least one of them has a habitual residence in the Republic of Croatia, according to Croatian law". This particular provision represents an exception not only with regard to the para 1 of the art. 18 but also with regard to the method of recognition of the new name. Namely, according to art. 6 para 5 of the Law on Personal Names, „Changes in personal names that have been approved for Croatian nationals under the laws of other States, and which they no longer use because they acquired a new personal name, are registered without carrying out the personal name change procedure." Thus, in these cases straigthforward acceptance is the only method of recognition. However, in the PIL Act there is no mention of the applicable law(s) for the determination of a surname in case of registered partners. Due to provision of art. 6 para 5 of the Law on Personal Names it should not create any difficulties

[81] Confirmed by the *Garcia Avello* Judgment (C-148/02 *Garcia Avello*, ECLI:EU:C:2003:539).
[82] See titles III. and IV. of this Article.

regarding the recognition of a name validy changed abroad, due to prescribed acceptance of the name validly changed abroad; but the question remains which law is applicable for the change of surname when partnership is concluded in Croatia.

According to art 18 para 3, „Legal representatives may determine the child's personal name in front of the registry office according to the law of the country of which one of them is a national or, if at least one of them has a habitual residence in the Republic of Croatia, according to Croatian law,". It is safe to say that this limited party autonomy that legislator allowed increases the chances of recognition of a name acquired abroad. However, even a „favour principle"[83] based rules may not always give a straightforward answers.

Namely, in scenario in which Croatian nationals as a legal representatives of the child born abroad named their child according to the law of their habitual residence abroad and according to that law surname is formed in a way contrary to the art 3 para 1 of Croatian Law on Personal Names,[84] question may arise whether this provision must be applied as an overriding mandatory rule.

In our view the answer should be negative due to several reasons. First, although there is no doubt about their application, even national mandatory rules do not have an absolute character.[85] Thus, whenever the *lex causae* gives the same or greater protection than national overriding mandatory norms, their application would not be justified.[86] Second, Croatian Personal Name Act is very liberal, accomodating a number of names and surnames which in itself shows the intention of the legislator to accomodate as many situations as possible. Third, despite the constitutional protection of the Croatian language and latin script, case law shows that Croatian authorities regularly recognise the names using the diacritical marks which are not known in Croatian alphabet. Forth, and maybe the decisive reason, according to art 6 para 5 of the Law on Personal Names, changes in personal names that have been approved for Croatian citizens under the laws of other States, are simply accepted without any further procedure. Thus, without control on how the name is formed.

[83] More about it see in: Gössl, Melcher, *op. cit.,* note 6, p. 1021.
[84] „A child can have the surname of one or both parents" and the name given abroad encompasses neither of the two.
[85] Bogdzevic, K., *Overriding Mandatory Provisions in Family Law and names*, ELTE Law Journal, No. 1, 2020, p. 55.
[86] Bogdan, M., *Private International Law as Component of the Law of the Forum*, Recueil des Cours: Collected Courses of The Hague Academy of International Law, Brill/Nijhoff, 2011, Vol 348., p. 186; as cited by Bogdzevic, *op. cit*., p. 55.

Unfortunately, on top of all the alaborated vaguesnesses of the art 18 of the PIL Act, another one piles up. Namely, according to art. 9 para 2. of the PIL Act, a *renvoi* applies in personal name matters. There the question remains whether it has to be taken into account in relation to recognition by PIL rules also. In our view, it should be generaly excluded in name matters since it goes counter a favour principle and makes no sense in light of the favor principle.

6. CONCLUSION

As is obvious from all that has been said so far, there is still no general international or European legal framework with regard to personal names. Consequently, national provisions of the EU Member States apply, which may lead to non-recognition of a name validly acquired abroad. It may be difficult to predict in advance whether or not the recognition of the name acquired abroad will go straightforward in the State of recogniton or not.

Although a limping personal status is an ordinary risk of life and the responsibility for the proper precautions is on the parties,[87]heterogenous factual circumstances make it difficult not only for the parties but also for the States to know in advance what conditions must be fulfilled to ensure the cross-border portability of a name. European citizenship, fundamental freedoms and human rights often take on the role of facilitating recognition of a personal name. Despitedifferent approaches (either from the human rights angle or, primarily, fundamental freedoms angle) jurisprudence of both European courts (ECtHR and CJEU) unequivocaly supports the need for a uniform personal name across State borders.

In order to accommodate legitimate expectation of the holder of the rightto the name, but also the requirements laid upon national judiciary *via* ECtHR and CJEU case law, many national legislators adapt their national law accordingly.In the conflict-of-laws area, there is a visible trend of accepting the „favour principle" approach, while in relation to recognition number of methods increases, mainly due to influence of the EU law.

Judging by the legislation and the case law, intention of the Croatian authorities is to enhance(in as many cases as possible) recognition of a personal name acquired abroad. However, there are still some scenarios left which leave the room for a

[87] Kinsch, P., *Recognition in the Forum of the Status Acquired Abroad – Private International Law Rules and European Human Rights*, in: Boele-Woelki, K.; Einhorn, T.; Girsberger, D. & Symeonides, S. (eds.): Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr, Eleven International Publishing, 2010, p. 260.

direct invoking of fundamental freedoms or human rights, ie. ECtHR and CJEU jurisprudence.

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Review paper

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PARENTAL CHILD ABDUCTION IN THE EU

ABSTRACT

Parental child abduction happens when one parent takes a child to another country without the other parent's permission, usually during custody disputes. This issue remains a serious challenge in the European Union (EU) because it involves different legal systems that must work together, often leading to delays and inconsistent rulings. This paper explores the legal and practical difficulties of handling the cases of child abduction, focusing on existing legal frameworks, and the protection of children's rights. The EU relies on key legal tools, such as the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention, 1980) and the Brussels IIb Regulation (2019/1111), to resolve international abduction cases. These laws are designed to ensure that children are returned quickly to their country of habitual residence while protecting their rights. However, differences in how courts interpret terms the best interests of the child and grave risk of harm can cause delays and legal uncertainty, making enforcement difficult. A clear example of these challenges is the Mansour v. Slovakia case, where Slovak authorities failed to enforce the return of a child taken from Ireland. The European Court of Human Rights (ECtHR) ruled that Slovakia's delays violated the father's rights, showing how slow legal processes can unfairly decide custody disputes. To provide a broader perspective, this paper compares Slovakia's child abduction statistics with chosen EU countries and explains key terms such as child abduction, child maintenance, best interest of child to clarify their impact on international family law cases.

Key words: *Child Abduction, Hague Convention, Best Interest of Child, Regulations, Case of Slovakia*

1. INTRODUCTION

Child abduction occurs when a child is taken or kept in another country without permission, violating custody agreements set by law. This is defined in Article 3

of the Hague Convention on the Civil Aspects of International Child Abduction.[1] In many cases, one parent removes a child from their habitual residence – the country where they lived and had their daily life without the other parent's consent. This can lead to serious emotional, legal, and social consequences for both the child and the left-behind parent. In such situations, the child may feel torn from a familiar environment, especially if they lose contact with close relatives and friends. This kind of move can negatively affect their relationships, education, and overall feeling of safety, particularly when it happens during a dispute between parents.[2]

When a child is suddenly taken away from their home country, it can disrupt their sense of security and stability. According to Outline of HCCH 1980 Child Abduction Convention, being taken away from their home country or kept in another country without permission can have a negative effect on a child. A child's habitual residence is where they lived and had their daily life before being wrongfully removed or kept away. Suddenly removing a child from their familiar environment, where they have close family and social connections, can have serious consequences. As more families move between countries, the number of international child abductions has also increased. Finding, recovering, and returning these children can be complicated and challenging.[3]

A key legal principle in child abduction cases is the best interests of the child. This means that courts must consider what is best for the child's well-being when making decisions. In some cases, courts may decide that returning the child is not the best option if it would cause harm. However, delays in court decisions and enforcement can also be harmful, as seen in cases like Mansour v. Slovakia, where legal delays allowed the child to remain in another country permanently.[4]

Another important issue is child maintenance, which refers to financial support that a parent provides for their child's upbringing. In international child abduction cases, child maintenance can become complicated, especially if the abducting parent moves the child to a country where enforcement is difficult.[5]

[1]European Union Agency for Fundamental Rights., *Handbook on European law relating to the rights of the child*, Publications Office of the European Union, Luxembourg 2022, p. 309.
[2]Buck, T., *International Child Law*, Routledge-Cavendish, London 2020, p. 335.
[3]HCCH., *Outline – Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2025.,
https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf, 1 March 2025.
[4]Mansour v. Slovakia [2020] ECtHR 60399/15, Judgment of 21 January 2020, https://hudoc.echr.coe.int/eng?i=001-200214, 1 March 2025.
[5]Slovensko., *Maintenance*, 2023, https://www.slovensko.sk/en/lifesituation/life-situation/_maintenance/, 24 February 2025.

This paper explores the legal challenges of parental child abduction, including how laws are applied, and how children's rights are protected. Additionally, statistics from the Central Authority for International Child Protection (CIPC) are provided to show how many child abductions occur in Slovakia each year. The data highlights that the most involved EU countries are the Czech Republic, Austria, and Germany, as these countries have strong family ties with Slovakia, leading to frequent cross-border custody disputes.[6]

2. LEGAL FRAMEWORK

2.1. Hague Convention 1980

The world has changed in many ways since 1977, when the Permanent Bureau of the Hague Conference on Private International Law started studying international child abduction. According to Rhona Schuz, the author of The Hague Child Abduction Convention in a Changing World, the research led to the creation of the 1980 Convention on the Civil Aspects of International Child Abduction, which aims to protect children from the negative effects of abductions. Many changes over time have influenced international child abduction and how the return process under the Convention is applied. These include new social norms that have changed the profile of abductors, new legal rules that give more importance to the human rights of children and parents in family disputes and alsothe new psychological studies. Political changes around the world have also played a big role. The European Union has developed its own rules for handling child abduction cases within its member states. At the same time, more countries have joined the Convention, including Japan, Iraq, Russia, and Pakistan. These countries have different laws, politics, and cultures compared to the Western democracies that first signed the Convention.[7]

The Convention was developed at The Hague Conference on Private International Law (HCCH), on the 25th of October in 1980. The Convention has been ratified by over 100 countries, including all EU member states. Consist of 45 Articles, which primary objects are to deter international parental child abduction by ensuring the swift return of children to their habitual residence, to restore the *status*

[6]Centrum pre medzinárodnoprávnu ochranu detí a mládeže. *About - Center for the International Legal Protection of Children and Youth*, 2025 https://www.cipc.gov.sk/index.php/en/the-center/ 1 March 2025.
[7]Schuz R., *The Hague Child Abduction Convention in a Changing World*. In: Douglas G,Murch M, Stephens V, eds. International and National Perspectives on Child and FamilyLaw: Essays in Honour of Nigel Lowe, Intersentia, Brussel 2018, p. 315.

quo ante meaning returning the child to the country where they lived before the abduction, preventing a parent from gaining an advantage through wrongful removal or retention, to ensure that custody disputes are resolved in the appropriate jurisdiction, rather than being influenced by the unilateral actions of one parent, to protect the child's best interests by reducing prolonged legal battles and ensuring continuity in their upbringing. The Convention is based on the principle that child abduction is harmful and should be prevented through international cooperation between judicial and administrative authorities.[8]

According to Outline of HCCH 1980 Child Abduction Convention, the Convention is designed to protect children from the harm caused by being taken or kept away from their home country without permission. It creates a system where countries work together to quickly return the child to their habitual residence. Although it was created before the United Nations Convention on the Rights of the Child (UNCRC), it helps put some of its rules into practice, especially those in Articles 9, 10, 11, and 35. The Convention also protects the right of parents to visit their children. It applies to children up to the age of 16 (Article 4).[9]

The 1980 Hague Convention on the Civil Aspects of International Child Abduction[10] is predicated on expeditious procedures, reflecting a consensus that swift resolution serves the Convention's deterrent purpose and the child's welfare.[11] Article 11 of the Hague Convention explicitly requires judicial authorities to act "expeditiously" in return proceedings and provides that if no decision is reached within six weeks from commencement, the applicant has a right to request a statement of reasons for the delay. In practice, however, this six-week benchmark is frequently exceeded, undermining the Convention's objective of prompt return. The European Court of Human Rights has repeatedly stressed that, in child abduction and custody matters, the adequacy of state measures is inextricably linked to their timeliness, because delays can lead to irreversible estrangement between the left-behind parent and child.[12] In Mansour v. Slovakia,

[8]Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
[9]HCCH., *Outline – Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2025,
https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf, 1 March 2025.
[10]Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
[11]Article 3(1) of the UN Convention on the Rights of the Child stipulates that the child's best interests shall be a primary consideration in all actions concerning them; see Rhona Schuz, *The Hague Child Abduction Convention in a Changing World*, observing that the Convention's emphasis on prompt return is broadly aligned with protecting children from the harms of abduction.
[12]International Bureau for Children's Rights., *Handbook: The rights of the child in the context of police intervention*, 2022,

the ECtHR found that protracted Slovak proceedings effectively allowed the passage of time to determine the outcome of a Hague application, in violation of the State's positive obligations under Article 8 of the European Convention on Human Rights.[13]

Despite its clear structure and objectives, the Convention's success in practice depends on how quickly national authorities act. Delay in a child abduction situation can have consequences for the relationship between the child and the left-behind parent.[14] Therefore, speed is a key element of the Convention's framework, supported by an implicit duty on courts and administrative authorities in Contracting States to reach a decision within six weeks from the start of the proceedings.[15]

The Mansour case exemplifies how procedural inefficiencies and enforcement gaps can thwart the Convention. There, a father in Ireland sought the return of his two children wrongfully retained in Slovakia (their habitual residence being Ireland) under the Hague Convention and the EU's Brussels IIa Regulation. Despite a Slovak court ordering the children's return in 2011, the order remained unenforced for years. The abducting mother engaged in dilatory tactics—filing an extraordinary appeal (a discretionary prosecutor general's remedy) and parallel custody proceedings while Slovak courts granted stays and repeatedly revisited the merits instead of promptly enforcing the return order.[16] By the time enforcement was reconsidered, the children had been in Slovakia for over four years, leading the courts to find that a return would now contravene the children's interests given their integration and lack of recent contact with the father.[17] In condemning Slovakia's handling, the ECtHR emphasized that the authorities, "*by a wrongful application of the substantive law and [by] the excessive length of the proceedings… enabled the issue of the return of the children to be resolved in an unendorsed and unsupervised way by the passage of time, rather than by a judicial*

https://policehumanrightsresources.org/content/uploads/2022/05/Handbook_rights_child_ENG.pdf?x62992, 25 February 2025

[13]Mansour v. Slovakia [2020] ECtHR 60399/15, Judgment of 21 January 2020, https://hudoc.echr.coe.int/eng?i=001-200214, 1 March 2025.

[14]Buck, T., International Child Law, Routledge-Cavendish, London 2020, p. 345.

[15]Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

[16]Markham, J., Slovak violation of Hague Abduction Convention. International Family Law, 2017, https://www.international-divorce.com/2017/12/slovak-violation-of-hague-abduction. html, 27 February 2025.

[17]Garayová, L., *Slovakia: Legal opinion on compliance of the proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood*, In: P. Sobczyk (Ed.), The impact of EU law on the family law of selected Central European countries, Instytut Wymiar u Sprawiedliwości, Warsaw 2024, p. 133–153.

decision".[18] This outcome subverted the Convention's core purpose, effectively rewarding the abductor's non-compliance and negating the pro forma return order.

The Mansour judgment and similar cases (such as *Hoholm v. Slovakia*, where a left-behind Norwegian parent faced nearly seven years of Slovak proceedings) reveal a pattern of delay in Slovakia's past practice.[19] Recurrent issues included multiple appeals and extraordinary remedies, confusion between custody merits and the summary return determination, and weak enforcement mechanisms. Indeed, a systemic problem was the willingness of courts to conduct fresh welfare assessments and entertain new evidence due to the time elapsed, blurring the line between a Hague return proceeding and a custody adjudication. This conflation of return and custody described by commentators as a misapplication of the child's best interests test at the return stage tends to prolong litigation and undermine the Convention's speedy-return principle.[20] Enforcement gaps further aggravated delays: in Mansour, authorities did not promptly secure the children's hand-over when the return order first became final, allowing the mother to evade compliance. Such lapses contravene the duty of Contracting States to use all necessary measures to secure the prompt return of the child (Hague Convention art. 7).[21] As the ECtHR noted, protraction can irreparably harm family bonds, so "urgent handling" is essential.

Slovakia's experience prompted legal reforms. By 2016, Slovak legislation was amended to expedite Hague cases – imposing a 12-week outer time limit for return proceedings, restricting dilatory appeals, and mandating priority enforcement of return orders.[22] These measures, taken in response to international and domestic judicial criticisms, aim to realign practice with the Convention's Article 11 requirements. The Mansour case thus stands as a cautionary tale: procedural inefficiency and enforcement failures can de facto decide custody in favor of abductors, in direct tension with the Convention's object of preventing wrongful removals from conferring tactical advantage. Compliance with Article 11's expediency mandate is crucial to ensure that abduction disputes are resolved by

[18]Mansour v. Slovakia [2020] ECtHR 60399/15, Judgment of 21 January 2020, https://hudoc.echr.coe.int/eng?i=001-200214, 1 March, 2025.
[19]Hoholm v. Slovakia [2021] ECtHR 35632/13, Judgment of 15 June 2021 https://hudoc.echr.coe.int/eng?i=001-210568, 7 March 2025.
[20]Hague Conference on Private International Law., *The implementation and operation of the 1980 Hague Child Abduction Convention: A guide to good practice – Part V: Mediation*, 2013, https://assets.hcch.net/docs/f672f082-bed0-4679-9840-ad857d0d9411.pdf, 5 March 2025.
[21]Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
[22]Garayová, L., *The protection of families in the Slovak legal system*. In T. Barzó& B. Lenkovics (Eds.), Family protection from a legal perspective, Ferenc Mádl Institute of Comparative Law & Central European Academic Publishing, Budapest 2021, pp. 221-254.

law rather than by the passage of time. More about the impact of the Convention on Slovakia and case law in more detail can be found in subsequent sections of this study.

2.2. The Brussels IIb Regulation (2019/1111)

Within the European Union, the Hague Convention's operation has been supplemented and reinforced by uniform jurisdictional rules – initially the Brussels IIa Regulation (Council Regulation (EC) No 2201/2003)[23] and, more recently, its recast, the Brussels IIb Regulation (Council Regulation (EU) 2019/1111).[24] These instruments apply to child abductions between EU Member States, providing additional procedures to secure prompt returns and the recognition of orders, with one notable exception: Denmark has an opt-out from EU Justice and Home Affairs matters and is not bound by these Regulations. (Denmark did conclude a separate agreement to apply Brussels IIa, but it did not adopt Brussels IIb, meaning that abduction cases involving Denmark continue to be governed solely by the Hague Convention framework without the recast Regulation's enhancements.) In all other Member States, Brussels IIa was in force from 2005 until mid-2022, after which Brussels IIb became applicable to new cases.

Brussels IIa expressly covered international child abduction as part of its parental responsibility provisions, and it strengthened the Hague Convention's objectives in several ways. First, it reiterated the need for speedy proceedings, effectively incorporating the six-week guideline for deciding return applications. Second, Article 11 of Brussels IIa introduced specific obligations for intra-EU abductions: the court in the State of refuge must give the child (if mature enough) an opportunity to be heard, and if the court refuses to return the child under a Hague Convention exception, it must transmit its decision and case file to the child's state of habitual residence without delay (Brussels IIa, art. 11(6)–(7)). This sets up what has been called a "second chance" mechanism: the authorities in the home Member State can then re-examine custody and, notwithstanding the foreign non-return order, issue a fresh judgment requiring the child's return. Under Article 11(8) of Brussels IIa, such a judgment overrides the non-return decision and is directly enforceable across the EU.

[23] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels IIa)
[24] Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (Brussels IIb)

In practice, this means that an abducting parent cannot foreclose the custody determination by securing a non-return from the asylum state's court; the final word lies with the courts of the child's habitual residence, reflecting the principle of mutual trust among EU judiciaries. Notably, a return order emanating from the home state under this procedure is enforced without *exequatur* (no further legalization) in the other Member State, via a uniform certificate procedure. The Court of Justice of the EU has upheld this system, emphasizing that Brussels IIa aims to prevent a wrongful removal from creating an unfair jurisdictional advantage for the abducting parent (sometimes referencing the *effet utile* of the Hague Convention within the Union).

The recast regulation (also called Brussels IIbis recast or Brussels IIter) became fully applicable on 1 August 2022, replacing Brussels IIa for new cases. Brussels IIb retains the fundamental structure of its predecessor regarding child abduction, but introduces refinements to improve efficiency and child-centric procedures. For example, Brussels IIb continues to prioritize expedited handling of return cases and the hearing of the child, but it also abolishes *exequatur* for all decisions in matters of parental responsibility (streamlining cross-border enforcement even further). It enhances cooperation by requiring designated Central Authorities in each Member State to assist with the operation of the Regulation and by standardizing forms for cross-border family procedures. Importantly, Brussels IIb preserves the override mechanism for non-return orders, while tightening certain procedural timelines and ensuring that courts better coordinate Hague and EU law obligations. One notable change is that Brussels IIb imposes a clearer duty to give the child a genuine opportunity to express his or her views, in line with Article 21 of EU Charter of Fundamental Rights and Article 12 UNCRC, before deciding on return or custody (a response to concerns that children's voices be heard in abduction cases). The recast also clarifies rules on jurisdiction to deter "rush to court" scenarios for instance, it refines the definition of a child's habitual residence and the continuity of jurisdiction rules in abduction contexts. With Denmark not participating in Brussels IIb, a Denmark-related abduction (e.g. child taken from Denmark to Germany or vice versa) does not benefit from these EU mechanisms. In such cases, the left-behind parent must rely solely on the 1980 Hague Convention process, since Brussels IIb's special enforcement provisions and mutual recognition rules do not apply.

In summary, Brussels IIa and IIb both affirm that within the EU, a wrongful removal or retention should not result in a slower or weaker response than under the Hague system – indeed, the Regulations augment the Convention by closing procedural loopholes. The EU regime underscores that the prompt return of the child, or alternatively a swift definitive custody adjudication by the home state, is

essential to serve the child's best interests and to dissuade abductions.[25] The contrast between the EU framework and the delays seen in cases like Mansour is stark: where EU law applies, Member States are legally bound to tighter deadlines and cooperative measures to avoid protracted litigation. Nonetheless, the efficacy of these instruments still hinges on national courts' diligence. As seen in Slovak practice before reforms, even the best legal framework can falter if procedural inefficiencies, expansive interpretations of Hague exceptions, or lackluster enforcement undermine the spirit of urgency that the Convention and Brussels Regulations demand. The ongoing challenge is to ensure that domestic authorities throughout the EU give real effect to the six-week rule and related duties, thereby upholding the Convention's goals and the child's right to a prompt resolution of their family situation.

2.3. Convention on the Rights of the Child (UNCRC, 1989)

Is the United Nation Convention on the Rights of the Child relevant for a child abduction? We can consider that the Convention on the Rights of the Child aligns with our article on parental child abduction by emphasizing the best interests of the child and the right to maintain contact with both parents. Although the UNCRC does not specifically regulate international child abduction, several of its key provisions are relevant to the Hague Convention (1980) and Brussels IIb Regulation (2019/1111).[26]

According to Article 3 of CRC Convention, the best interests of the child should always come first in any decision involving children. This idea is also in the 1980 Hague Convention, which helps return children to their home country to avoid unnecessary changes in their lives. According to Article 9, children have the right to stay in contact with their parents, and they should not be separated unless it is necessary for their well-being. In child abduction cases, this supports returning the child quickly to their home country so they can keep a relationship with both parents. According to Article 12, children have the right to express their views in legal cases that affect them.[27] The Brussels IIb Regulation (2019/1111) also

[25]U.S. Department of State. *Diplomacy for families: Resolving international parental child abduction*, 2023, https://2021-2025.state.gov/diplomacy-for-families-resolving-international-parental-child-abduction/, 26 February 2025.
[26]Convention on the Rights of the Child
[27]*Ibid.*

strengthens this by making sure courts listen to children's opinions in custody and abduction cases.[28]

While the UNCRC does not directly regulate international parental child abduction, it provides essential normative guidance that complements instruments like the 1980 Hague Convention and the Brussels IIb Regulation. Central among its provisions is Article 3(1), which establishes that *"in all actions concerning children... the best interests of the child shall be a primary consideration."*[29] This principle is not merely aspirational but has evolved into a binding interpretative standard in both domestic and international child law.[30] This standard not only informs national custody decisions but also shapes the interpretation and application of international instruments such as the 1980 Hague Convention and EU regulations concerning cross-border family disputes. It compels decision-makers—including administrative authorities and judges—to ensure that all measures taken in the context of cross-border family disputes give primary weight to the child's welfare.[31]

In the context of child abduction proceedings, this principle plays a dual role: first, as a justification for the Convention's presumption of return, and second, as the rationale behind narrow exceptions to that presumption—particularly where there is a grave risk of harm or the child objects to being returned. The drafters of the 1980 Hague Convention anticipated this convergence, viewing the swift return of the child to their habitual residence as typically consistent with their best interests, in line with the subsidiarity and continuity principles. However, as academic commentary suggests, tensions may arise when courts stretch the best interests test to justify prolonged procedures or refusals to return, thereby undermining the Convention's protective function.[32]

[28]Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (Brussels IIb)
[29]Convention on the Rights of the Child
[30]Eekelaar, J.; Tobin, J., *Art. 3: The best interests of the child*, In: J. Tobin (Ed.), The UN Convention on the Rights of the Child: A commentary. Oxford University Press, Oxford 2019, p. 51-78.
[31]Mol, C.; Schuthof, F., *Comparing the decision-making rights of adults with declining cognitive abilities with those of children*, Utrecht Law Review, 20(2), Utrecht 2024, p. 24–39.
[32]Garayová, L., *Protecting children's rights in the age of digitalisation: Legal implications for the best interests of the child*, Pakistan Journal of Life and Social Sciences, 22(2), Multan 2024, p. 7351–7366.

2.4. Council of Europe Law

Under Council of Europe law, there are conventions that help prevent child abduction and ensure children are returned if taken illegally – the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody, and the Convention on Contact concerning Children. The European Court of Human Rights (ECtHR) handles child abduction cases and usually follows the Hague Convention when interpreting Article 8 of the European Convention on Human Rights (ECHR). The ECtHR also considers what is best for the child before making a decision, considering the best interest of child really important.[33]The Article 8 of ECHR will also be important for our presented case – Mansour v. Slovakia.

3. CASE STUDY – MANSOUR V. SLOVAKIA[34]

Mr. Rafat Mansour, a Slovak citizen living in Ireland, took Slovakia to the European Court of Human Rights (ECtHR), claiming that the Slovak authorities failed to return his children to Ireland under the Hague Convention (1980) and Brussels II bis Regulation, violating his right to family life (Article 8 ECHR) due to long court delays and lack of enforcement.Mr. Mansour, a Slovak national, married a Slovak woman in 2004, and they settled in Ireland. The couple had two children, born in 2006 and 2008, both of whom were Irish nationals. On 6 January 2011, the mother took the children to Slovakia but did not return to Ireland, leading to a custody dispute between the parents. Mr. Mansour later filed a legal case in Slovak courts, arguing that the children had been wrongfully retained in Slovakia.In 2011, Mr. Mansour asked Slovak courts to return his children to Ireland, arguing that it was their habitual residence under the Hague Convention and Brussels II bis Regulation. The courts agreed and ordered the children's return, but the mother refused to comply.In 2012, Mr. Mansour started enforcement proceedings, but the Michalovce District Court delayed the case after the mother challenged the return order. Even though the Slovak Prosecutor General rejected her appeal, courts later declared the return order unenforceable in 2013 due to procedural issues.Frustrated with the delays, Mr. Mansour took his case to the Slovak Constitutional Court in 2013, which ruled in his favor in 2015, stating that Slovak authorities had violated his parental rights and their international legal duties. However, by this time, courts argued that too much time had passed and

[33]HCCH., *Outline – Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 2025.,
https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf, 1 March 2025.
[34]Mansour v. Slovakia [2020] ECtHR 60399/15, Judgment of 21 January 2020, https://hudoc.echr.coe.int/eng?i=001-200214, 1 March, 2025.

that the children had already adapted to Slovakia. In 2016, Slovak courts refused to enforce the return order, citing psychological reports showing the children were settled.Mr. Mansour filed two more constitutional complaints in 2016 and 2017. The court ruled in his favor again, saying that the four-year delay had violated his right to family life (Article 8 ECHR) and his right to a fair trial (Article 6 ECHR). He was awarded damages, but by then, the children had remained in Slovakia for years, and the courts refused to act further.The European Court of Human Rights (ECtHR) ruled that Slovakia violated Mr. Mansour's right to family life under Article 8 of the European Convention on Human Rights (ECHR). The court found that Slovak authorities failed to take the necessary steps to enforce the return order, allowing the children to stay in Slovakia. Because of the long legal delays, the case was decided by the passage of time rather than judicial enforcement, which went against the purpose of the Hague Convention (1980).The ruling also criticized Slovakia's legal system, which allowed unnecessary procedural obstacles, extraordinary appeals, and misinterpretation of legal rules, making the enforcement of return orders ineffective. The ECtHR highlighted that parental child abduction cases must be handled urgently, as delays harm both the left-behind parent and the child's well-being. In Mr. Mansour's case, the delays led to the loss of meaningful contact with his children.As a result of these failures, the ECtHR awarded Mr. Mansour €10,000 in damages for emotional distress and €5,400 to cover legal costs and expenses. This judgment serves as a warning that courts must act quickly and efficiently in child abduction cases to prevent similar violations in the future.[35]

4. CHILD ABDUCTION IN SLOVAKIA

4.1. Center for the International Legal Protection of Children and Youth

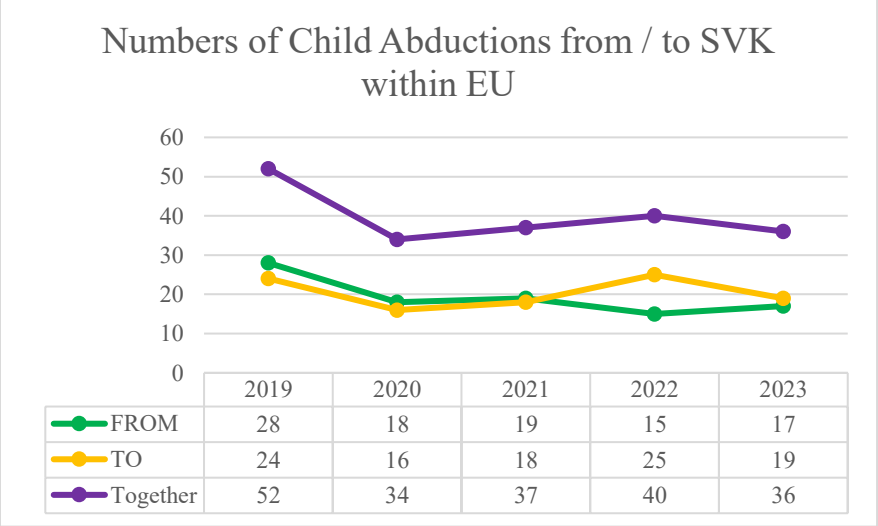
The Centre for International Legal Protection of Children and Youth (CIPC) is a Slovak state authority responsible for legal matters concerning children and youth in Slovakia. Its powers and responsibilities are defined by Act No. 305/2005 Coll. on Social Protection of Children and Social Guardianship and other related laws. CIPC is also the designated authority for implementing international conventions and EU laws in this area. Its main goal is to protect and uphold children's rights internationally. The CIPC focuses on the best interests of the child and carefully evaluates each case, taking into account the child's unique situation and needs.[36]

[35]Mansour v. Slovakia [2020] ECtHR 60399/15, Judgment of 21 January 2020, https://hudoc.echr.coe.int/eng?i=001-200214, 1 March, 2025.
[36]Centrum pre medzinárodnoprávnu ochranu detí a mládeže. *About - Center for the International Legal Protection of Children and Youth*, 2025, https://www.cipc.gov.sk/index.php/en/the-center/ 1 March 2025.

The CIPC primarily provides free legal aid in civil law and assists with various international family law matters. It helps recover child maintenance through international treaties, EU laws, or reciprocal agreements and ensures the return of wrongfully removed or retained children under the Hague Convention. The organization also supports parents in matters related to custody and visitation rights and offers mediation services for international adoptions following the Hague Convention on Intercountry Adoption. Additionally, CIPC provides consultations on cases within its authority and facilitates cooperation with foreign authorities on cross-border legal matters. To support families effectively, CIPC has a team of lawyers and psychologists ready to offer affordable assistance and expert advice.[37]

4.2. Child Abduction statistics in Slovakia

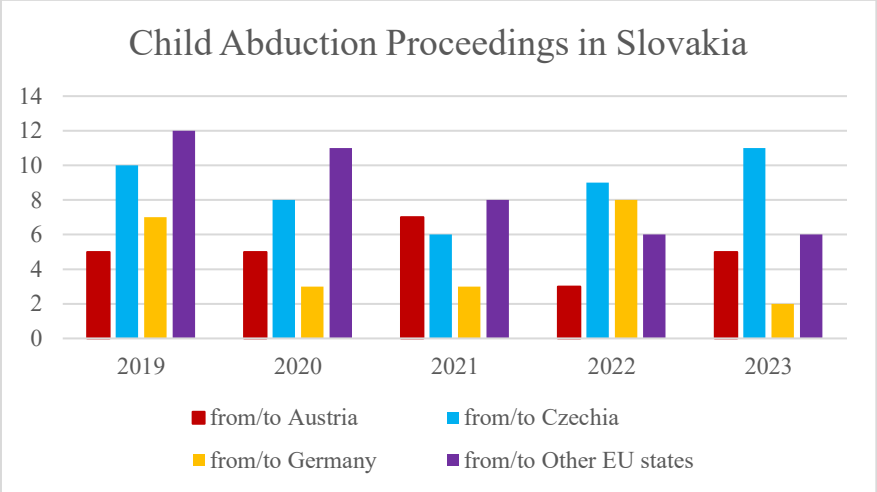
According to the Annual Reports on the Activities of the Center for the International Legal Protection of Children and Youth for the Years 2019-2023, there are several proceedings of child abduction within the EU. These statistics focuses on the cases of Slovakia and other EU countries.



	2019	2020	2021	2022	2023
FROM	28	18	19	15	17
TO	24	16	18	25	19
Together	52	34	37	40	36

Source: Annual Reports on the Activities of the Center for the International Legal Protection of Children and Youth for the Years 2019-2023[38]

[37]Centrum pre medzinárodnoprávnu ochranu detí a mládeže. About - Center for the International Legal Protection of Children and Youth, 2025, https://www.cipc.gov.sk/index.php/en/the-center/ 1 March 2025.
[38]Centrum pre medzinárodnoprávnu ochranu detí a mládeže. Annual Reports on the Activities of the Center for the International Legal Protection of Children and Youth for the



Source: Annual Reports on the Activities of the Center for the International Legal Protection of Children and Youth for the Years 2019-2023[39]

Years 2023, https://www.cipc.gov.sk/wp-content/uploads/2024/04/Vyrocna-sprava-2023.pdf, 27 February 2025.
Centrum pre medzinárodnoprávnu ochranu detí a mládeže. Annual Reports on the Activities of the Center for the International Legal Protection of Children and Youth for the Years 2022, https://www.cipc.gov.sk/wp-content/uploads/2024/02/vyrocna-sprava-CIPC-2022.pdf, 27 February 2025.
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[39]Centrum pre medzinárodnoprávnu ochranu detí a mládeže. Annual Reports on the Activities of the Center for the International Legal Protection of Children and Youth for the Years 2023, https://www.cipc.gov.sk/wp-content/uploads/2024/04/Vyrocna-sprava-2023.pdf, 27 February 2025.
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The highest number of child abduction proceedings involves Austria, Czechia and Germany, with significantly more cases compared to other EU countries. These three states have strong family and migration ties with Slovakia, which may explain the higher frequency of cross-border parental disputes.

5. CONCLUSION

Parental child abduction is a serious problem in the European Union, affecting both children and left-behind parents. While international laws like the Hague Convention (1980) and the Brussels IIb Regulation (2019/1111) are meant to help solve these cases quickly, slow court processes, legal loopholes, and different interpretations of the law often cause delays. The Mansour v. Slovakia case showed how legal delays can change the outcome of a custody case, making it impossible for the left-behind parent to get their child back.

The Mansour v. Slovakia case highlights how judicial delays and poor enforcement of international agreements can weaken parental rights and affect custody disputes. The Slovak authorities failed to act quickly, making it impossible for Mr. Mansour to have his children returned to Ireland. By the time the courts ruled, the children had already settled in Slovakia, and the return was seen as being against their best interests. This case shows how long legal processes can unfairly decide custody disputes by letting time determine the outcome instead of proper legal enforcement. This ruling puts pressure on Slovakia and other EU countries to handle international parental child abduction cases more efficiently. It serves as an important reminder that courts must act fast to comply with the Hague Convention (1980) and the Brussels IIb Regulation (2019/1111). The ECtHR judgment in Mansour v. Slovakia can be consider as a landmark ruling that calls for urgent reforms in Slovakia's legal system. It emphasizes the need for faster and more effective legal procedures to ensure that international child abduction cases are handled fairly, and that parents' rights are protected.[40]

Centrum pre medzinárodnoprávnu ochranu detí a mládeže. Annual Reports on the Activities of the Center for the International Legal Protection of Children and Youth for the Years 2020, https://www.cipc.gov.sk/wp-content/uploads/2024/02/vyrocna-sprava-CIPC-2020.pdf, 27 February 2025.
Centrum pre medzinárodnoprávnu ochranu detí a mládeže. Annual Reports on the Activities of the Center for the International Legal Protection of Children and Youth for the Years 2019, https://www.cipc.gov.sk/wp-content/uploads/2024/02/vyrocna-sprava-CIPC-2019.pdf, 27 February 2025.
[40]Mansour v. Slovakia [2020] ECtHR 60399/15, Judgment of 21 January 2020, https://hudoc.echr.coe.int/eng?i=001-200214, 1 March, 2025.

One of the biggest challenges is that courts in different countries interpret key legal terms differently. Terms like habitual residence, best interests of the child, and grave risk of harm do not always have the same meaning everywhere, which can lead to confusing and unfair decisions. While the Hague Convention's goal is to return children quickly to their home country, some courts delay the process because of legal appeals and concerns about the child's well-being. This often leaves children in legal limbo and makes it harder for parents to maintain their relationship with them.

Slovakia, like other EU countries, struggles with enforcing return orders. Statistics from the Central Authority for International Child Protection (CIPC) show that most child abduction cases in Slovakia involve the Czech Republic, Austria, and Germany, as many families have strong ties across these borders. This shows the need for better cooperation between countries to make sure child abduction cases are handled fairly and quickly.

To fix these problems, courts must act faster, reduce unnecessary legal delays, and make sure child abduction cases are treated as urgent matters. Stronger cooperation between EU countries, better enforcement of legal time limits, and clearer rules will help parents and children get fair and consistent decisions. By improving these processes, the EU can make sure that international child abduction cases follow the principles of the Hague Convention, Brussels IIb Regulation, and the UN Convention on the Rights of the Child.

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THE FAMILY RECONSTRUCTED: BALANCING ADULT AUTONOMY AND CHILDREN'S RIGHTS IN MODERN FAMILY LAW*

ABSTRACT

This study critically examines the evolution of family law and its transformation in response to contemporary societal shifts. Once anchored in principles that prioritized stability, intergenerational continuity, and the protection of children, modern family law increasingly emphasizes adult autonomy, equality, and personal fulfillment. Legal reforms such as the liberalization of divorce, the recognition of diverse family forms, and the rise of assisted reproductive technologies have redefined marriage and filiation, often prioritizing individual rights over relational responsibilities. The growing trend of "adult-centrism" in family law challenges the ability of legal systems to fulfill their protective role. This paper calls for a recalibration of legal doctrines to balance adult rights with those of children. This analysis contributes to the ongoing dialogue on how family law can navigate the intersection of legal pluralism, technological advancement, and cultural change without compromising its foundational commitment to protect the most vulnerable our children.

Keywords: *family law, children's rights, adult autonomy, best interests of the child, marriage, divorce, parentage, UN Convention on the Rights of the Child, legal recognition of family structures, reproductive rights, child commodification.*

1. INTRODUCTION

Family law has undergone seismic shifts in the past half-century, evolving from a framework centered on the stability of the familial unit and protection of children to one that increasingly emphasizes individual choice, adult autonomy, and equality. Traditionally, the legal regulation of family life was grounded in the notion that the family is a fundamental social institution requiring stability and

continuity for the benefit of all its members – especially children. National laws and international declarations alike affirmed that the family *"is the natural and fundamental group unit of society and is entitled to the full protection by society and the State".*[1] In practice, this meant marriage was supported as a lifelong union, divorce was restricted, and the parent-child relationship was guarded to ensure children's upbringing in a secure environment. The main concern was the welfare of children and the intergenerational continuity of family lines.

In contemporary society, however, conceptions of family and the aims of family law have radically transformed. The latter 20th and early 21st centuries witnessed the liberalization of divorce laws, the legal recognition of non-traditional family structures (such as cohabiting couples, single-parent families, and same-sex parent families), and the proliferation of assisted reproductive technologies (ART), enabling new modes of procreation. These changes were driven by a growing emphasis on adult rights – the right to personal fulfillment, equality, and reproductive self-determination. Modern legal frameworks place considerable weight on adult autonomy, sometimes appearing to prioritize adults' desires to marry (or not), divorce, and have children by various means over the older ethic of duty and responsibility within family relationships.

This article critically examines how family law's evolution has tilted the balance between adult-centric rights and children's rights, applying a child-focused lens to ask whether contemporary legal regimes adequately serve the best interests of the child. While acknowledging the gains of modern reforms – greater gender equality, freedom from forced unions, and recognition of diverse loving families – the analysis probes the potential costs to children's welfare when adult prerogatives take center stage.

2. HISTORICAL FOUNDATIONS OF FAMILY LAW AND ITS PURPOSE

For much of history, family law was designed as a protective and regulatory framework to uphold the stability of the family as an institution. In many societies, marriage was not merely a private contract between individuals but a cornerstone of social order, seen as vital for rearing children and transmitting property and values across generations. The law's intended purpose was to buttress this stable

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[1] UN General Assembly, Universal Declaration of Human Rights, 217 A (III), 10 December 1948, Article 16(3).

unit: ensuring that children were born and raised within a recognized family structure, that parental responsibilities were clear, and that continuity between generations was maintained. The Universal Declaration of Human Rights of 1948 captured this traditional view by declaring the family to be society's natural foundation deserving maximal support. Under this paradigm, individual desires were often subordinate to family cohesion and duty. Spouses were expected to remain married except in the most dire circumstances, and parents were expected to fulfill their roles for the sake of their children and the broader family lineage.

Historically, family law doctrines heavily favored paternal authority and marital unity. In many legal systems of the 19th and early 20th centuries, fathers were deemed the natural guardians of children with superior custody rights, reflecting a patriarchal model of the family. Children were often seen almost as paternal property or at least under the exclusive stewardship of parents. Over time, this absolute paternal right was moderated by emerging notions of child welfare – for example, the tender years doctrine that arose in the late 19th century gave preference to mothers as nurturers for custody of young children, presuming that during a child's tender years, the mother has the superior skills to care for the child and she should have custody of the child.[2] Nonetheless, the overarching principle was that parents knew what was best for their children, and the state should not interfere except in extreme cases of abuse or neglect. This concept of family autonomy or privacy meant that the internal affairs of the family – including child-rearing practices – were largely shielded from outside scrutiny, on the presumption that keeping the family intact was in children's best interests.

Law and social policy strongly encouraged that children be born within marriage to promote what was considered a stable environment. In many jurisdictions, children born outside of wedlock historically suffered legal disadvantages (labeled illegitimate, with restricted inheritance rights and social stigma). Such rules, while punitive to children by today's standards, were justified historically as upholding the sanctity of marriage and the ideal of a two-parent upbringing. Reformers concerned with social order even supported restrictive marriage and divorce laws as a form of social engineering to prevent marital instability. By making marriage the gateway to family life and making exit difficult, the law sought to guarantee continuity: adults were expected to commit to the long haul for the sake of family unity. When separations did occur, continuity was pursued by preferring one stable custodian rather than any disruptive joint arrangements. Stability and continuity in

[2] Hartenstein, J., *Tender Years Doctrine*, in The Wiley Blackwell Encyclopedia of Family Studies, Wiley Blackwell, 2016, https://doi.org/10.1002/9781119085621.wbefs449.

caretaking were seen as crucial for a child's development.[3] Thus, even as custody standards gradually evolved toward focusing on the child, the emphasis was on providing a stable, continuous home life after divorce, reflecting family law's protective ethos.

Another foundational purpose of traditional family law was the protection of those seen as vulnerable dependents – namely wives (in eras when women had fewer rights and were economically dependent) and children. The law imposed reciprocal duties on family members: husbands were obliged to support wives and children; in return, wives owed duties like fidelity and homemaking, and children owed obedience. The state enforced child support from fathers and could intervene via doctrines like *parens patriae* (allowing state guardianship of children) if parents utterly failed in their duties. However, such intervention was relatively rare and often came only when the family unit had already broken down (for instance, in orphanage or child cruelty cases). By and large, the legal system presumed that preserving the family unit was the best way to protect children. This is epitomized in the best interests of the child standard that began to surface in the early 20th century – initially in custody disputes, where courts proclaimed that the child's welfare was "the first and paramount consideration." In practice, that principle is often aligned with keeping children in a familiar, stable family environment.

It was only in the later 20th century that children began to be seen as individual rights-holders under the law rather than merely passive beneficiaries of adult protection. The 1989 Convention on the Rights of the Child (CRC) crystallized this shift. It requires that *"in all actions concerning children, ... the best interests of the child shall be a primary consideration."*[4], signaling that a child's welfare is not just a societal interest but a right. The CRC also affirms children's rights to preservation of identity, to be cared for by parents, and not to be discriminated against based on birth or family status. These developments, however, came at a time when family law was already in flux. Thus, historical family law set the stage with its focus on stability and protection, but it would soon collide with powerful social changes that redefined what family, marriage, and parenthood mean.

[3] Huntington, C., *The Empirical Turn in Family Law*, Columbia Law Review, vol. 118, 2018, p. 227.

[4] UN General Assembly, Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989.

3. LIBERALIZATION OF DIVORCE: IMPLICATIONS FOR FAMILY STABILITY AND CHILDREN'S WELL-BEING

One of the most dramatic transformations in modern family law has been the liberalization of divorce. In the decades after World War II – particularly from the 1960s through the 1980s – jurisdictions around the world moved away from restrictive, fault-based divorce regimes to much more permissive systems, often featuring no-fault divorce. Under fault-based divorce (the historical norm), a marriage could only be dissolved if one spouse proved the other guilty of a serious marital wrong (such as adultery, cruelty, or abandonment). This standard reflected the view that marriage should be indissoluble except for grave causes, reinforcing family stability by making divorce difficult. Starting in the late 20th century, however, societal attitudes shifted in favor of treating marital breakdown as a private matter and a relief for unhappy partners rather than a wrongdoing to be penalized. Spurred by changing gender roles, the sexual revolution, and a growing emphasis on personal happiness, states began to allow divorce by mutual consent or unilateral no-fault grounds (e.g., irretrievable breakdown of the marriage) with minimal hurdles.

The consequences for family stability – and for children – have been huge. The introduction of no-fault divorce correlated with a sharp rise in divorce rates in many countries, especially in the 1970s and 1980s. For example, the United States divorce rate roughly doubled in the 15 years following California's pioneering no-fault law of 1970.[5] Across Europe, divorce became increasingly common once laws were reformed: Italy legalized divorce in 1970 (after having been forbidden), Spain in 1981 after the end of Franco's regime, and even historically Catholic Ireland removed its constitutional ban on divorce via referendum in 1996.[6] These changes reflected a societal pivot towards adult freedom – the freedom to exit a marriage that no longer meets one's needs – but they also meant that more children experienced parental separation than ever before. By the 2000s, a substantial proportion of children in Western countries would see their parents divorce or separate during childhood. This reality raises the question: Did the legal system's newfound solicitude for adult autonomy in divorce pay sufficient regard to children's well-being?

Critics of no-fault divorce argue that in making divorce easier, the law became wholly adult-centered, with the welfare of children subservient to adult interest.

[5] Schoenfeld, E., *Drumbeats for Divorce Reform*, Policy Review: The Journal of American Citizenship, vol. 77, May-June 1996.

[6] García-Fernández, M., *From National Catholicism to Romantic Love: The Politics of Love and Divorce in Franco's Spain*, Contemporary European History, 2021.

Donald Moir, writing in the midst of the early 1990s divorce debates, described no-fault divorce as a "remarkable aspect" of legal reform precisely because it prioritized the desires of adults to dissolve marriages without regard to fault.[7]

Indeed, traditional divorce law – for all its flaws – at least formally took the breach of familial obligations seriously (e.g., a guilty spouse might be penalized in property division or custody as a way to uphold the norm that abandoning one's family is harmful). No-fault schemes, by contrast, treat the continuation or termination of marriage as a matter of personal choice, not duty. The fundamental change was from a law that strove to uphold and sustain the institution of the family to a law that facilitates its dissolution. In practical terms, this meant that a parent could unilaterally decide to end a marriage without needing to demonstrate justification, and the legal system would simply move on to sorting out the aftermath (property, custody, etc.), rather than attempting to preserve the family.
From a child's perspective, the rise of easy divorce has been double-edged. On one hand, high-conflict or violent marriages can be ended more swiftly, potentially rescuing children from exposure to toxic home environments. Studies have found, for instance, that allowing no-fault divorce has led to declines in domestic violence rates[8] and even a reduction in spousal homicide. No-fault divorce enables an abused or desperate parent to leave without proving fault in court – a process that, under fault regimes, could be lengthy, humiliating, or even dangerous if it enraged the abusive spouse. In this sense, adult autonomy to divorce aligns with children's interests: few would argue a child is better served by living in a household torn by violence or severe conflict for the sake of nominal "stability." The best interests of the child may well favor an amicable separation over a hostile union.

On the other hand, the normalization of divorce has undeniably introduced new instabilities into many children's lives. Even in the absence of abuse, the dissolution of a family unit is a major stressor for children. They may suffer emotional confusion, loss of daily contact with one parent, economic hardship (if the divorce results in lower combined family income), and dislocation (moving homes or schools). Decades of social science research have debated the magnitude of divorce's impact on children. While a majority of children adapt adequately in the long run, a substantial minority experience negative outcomes – such as academic difficulties, behavioral problems, or trust issues in relationships – that can often be traced to the conflict and disruptions associated with divorce. The key

[7] Moir, D. S., *No Fault Divorce and the Best Interests of Children*, Denver University Law Review, vol. 69, 1992, p. 663.
[8] Stevenson, B.; Wolfers, J., *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, The Quarterly Journal of Economics, vol. 121, no. 1, February 2006, pp. 267–288, https://doi.org/10.1093/qje/121.1.267.

mediating factor is not divorce per se but how it is handled: low-conflict divorces with cooperative co-parenting and adequate support cause far less harm than high-conflict, litigious divorces or situations where one parent effectively disappears.
Family law has responded to these challenges by developing child-focused measures within the divorce process, even as the threshold for divorce remains low. For example, custody law has evolved toward an explicit best-interests-of-the-child standard in virtually all jurisdictions. Rather than automatically awarding custody to fathers (as was common centuries ago) or to mothers under a "tender years" presumption (common until the mid-20th century), courts now weigh factors like each parent's caregiving capacity, the child's attachment and stability, and in many places the child's own wishes, to determine post-divorce arrangements. The outcome should serve the child's welfare, even if that means, for instance, awarding primary custody to a father when he has been the child's primary caregiver (something nearly unheard of a hundred years ago). Additionally, there is a trend toward joint custody or shared parenting, aiming to keep both parents involved in the child's life. This trend acknowledges that children generally benefit from the continued love and support of both parents and that divorce should not mean the collapse of one parent-child relationship. In many places, joint custody (legal, physical, or both) is either encouraged or presumed, provided the parents can cooperate.

Furthermore, to mitigate the harm of divorce on children, some jurisdictions have implemented procedural safeguards. For instance, a number of U.S. states require divorcing parents of minors to attend parent education programs that teach about the effects of divorce on children and encourage co-parenting strategies.[9] These classes remind parents that while their marriage may be ending, their responsibilities as co-parents continue and that minimizing conflict is crucial for the child. Some countries impose a cooling-off period or require mediation before a divorce is finalized, partly in hopes that parents may reconcile or at least settle issues amicably with children's needs in mind.

Despite these adaptations, a persistent critique is that divorce law itself does not require consideration of a child's best interests at the point of deciding to dissolve the family unit. In other words, when a court grants a divorce, it typically does not ask, "Is this divorce in the best interests of the children?" Doing so would arguably undermine the very premise of no-fault divorce by reintroducing a barrier – the need to justify the divorce in terms beyond the adult's wishes. No-fault statutes

[9] Parent Education Class in Divorce, DivorceWriter, https://www.divorcewriter.com/parent-education-class-divorce#:~:text=DivorceWriter,form%20of%20parent%20education%20class, 10 February, 2025.

deliberately frame dissolution as a matter of personal autonomy. Thus, the tension remains: the family law system will apply the best interest standard to determine how children will live after the divorce, but it will not question whether the divorce should occur in light of the children's interests. This can be seen as a legal acknowledgment that forcing parents to stay together for the sake of the children may often backfire or intrude on fundamental rights to liberty and privacy. Yet it leaves a gap where children's voices or interests are largely absent in the decision that deeply alters their family structure.

The liberalization of divorce has been a story of expanding adult freedoms with mixed implications for children. It ended many loveless or harmful marriages (a clear benefit in cases of abuse or deep conflict), but it also contributed to a culture in which marital permanence is less assured, eroding the sense of security for many children. The challenge for modern family law is how to balance these outcomes – protecting children's need for stability without trapping family members in unhealthy relationships.

4. RECOGNIZING DIVERSE FAMILY STRUCTURE

Concurrent with the revolution in divorce law, the late 20th and early 21st centuries have witnessed a pluralization of family forms and a corresponding transformation in the law of filiation (parent-child legal relationships). The traditional nuclear family model – married husband and wife raising their biologically related children – is no longer the sole or even dominant setting in which children grow up in many societies. As social attitudes evolved, laws have been reformed to recognize and protect families that diverge from this model, including single-parent families, cohabiting (unmarried) parents, same-sex couples with children, blended families (step-parents and step-children), and in a few cases, multi-parent arrangements. These reforms were largely driven by principles of adult equality and anti-discrimination: for example, the push for same-sex marriage and parenting rights was rooted in the idea that LGBTQ+ individuals should have the same family life opportunities and recognition as heterosexual individuals. Similarly, ending the stigma of illegitimacy for children born outside marriage was motivated by a sense of fairness and the reality of rising nonmarital births. Here, too, we need to explore the effects on children's rights and welfare: Do these expanded definitions of family benefit children by giving them secure legal ties to their caregivers, or do they sometimes prioritize adult validations at children's expense?

One of the earliest shifts was the increasing prevalence of children born to unmarried parents. In the mid-20th century, unmarried parenthood was heavily stigmatized and often led to legal disadvantages for the child. Over the last few decades, however, births outside marriage have become common. In the European Union, for instance, 42.2% of all births in 2022 were to unmarried mothers – a stunning rise from 17% in 1993.[10] Several countries (France, Sweden, etc.) now see the majority of births outside of wedlock. In Latin America, the percentages are even higher. This societal shift pressed legal systems to abolish the concept of illegitimacy. Most jurisdictions enacted laws to ensure that a child's rights – to paternal support, to inheritance, to the parents' care – do not depend on the marital status of the parents.[11] For example, the UN Convention on the Rights of the Child explicitly requires that children not suffer discrimination on the basis of "birth or other status".[12] Equal protection for children born out of wedlock is now a widely accepted norm. This is clearly a child-centric improvement: the law no longer punishes children for a status they have no control over and ensures they have equal opportunities in life.

Some jurisdictions, while not giving cohabitation the same legal status as marriage, provide mechanisms for cohabiting parents to have the same rights and duties as married ones toward their children. The removal of legal stigmas has allowed children in single-parent or cohabiting households to enjoy more secure relationships with both parents. From the child's perspective, what matters is having responsible, loving caregivers and legal clarity about who is responsible for them – whether or not the parents are married. In this respect, the modernization of filiation law to accommodate nonmarital families has largely been a win for children's rights.

Among the most transformative (and sometimes contentious) changes has been the legal recognition of same-sex couples as families, including the right to marry and to raise children. In the span of a few decades, many countries moved from criminalizing homosexual relationships to allowing gay and lesbian couples to marry or enter civil partnerships and to be legal parents through adoption, donor conception, or surrogacy. This shift was driven by adult autonomy and equality – the idea that the ability to form a family and have it recognized is a fundamental human right that should not be denied on the basis of sexual orientation. The U.S.

[10] Eurostat, 2022.

[11] Barzó, T., *From Marital Property Law to Family Property Law: Theoretical and Practical Aspects of Property Law Regulations Protecting Families*, Law, Identity and Values, vol. 1, 2021, p. 23, https://doi.org/10.55073/2021.1.23-39.

[12] UN General Assembly, Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989.

Supreme Court's landmark Obergefell v. Hodges decision in 2015, for example, held that same-sex couples have a fundamental right to marry.[13] According to the ruling, allowing same-sex parents to marry was seen as beneficial to the children being raised in those families by placing them on an equal footing with peers from married heterosexual households. Landmark cases in Europe, such as E.B. v. France (2008), forced countries to drop blanket bans on adoption by homosexual individuals, reasoning that decisions should focus on the individual child's welfare rather than categorical exclusion based on sexual orientation.[14] By now, numerous countries (across Europe, the Americas, and elsewhere) permit same-sex couples to adopt children jointly, and 34 countries worldwide have marriage equality.[15]
From a child-centric perspective, the recognition of diverse family structures has had positive protective effects when implemented carefully. Children in families that don't fit the old mold are less likely to fall through legal cracks. For instance, several jurisdictions now recognize psychological parents or de facto parents – adults who have acted as a parent to the child – even if they are not biological or adoptive parents. This can protect children in cases where a long-term carer or a relative has raised the child.

However, some challenges remain in this area, particularly where social change outpaces legal change or where the interests of adults and children may diverge. One debate is over the intentional creation of families that deviate from the two-parent model. For example, some single individuals choose to have children via ART or surrogacy, knowing the child will effectively have one primary parent. Some scholars question whether intentionally bringing a child into a single-parent situation (when two-parent care might have been possible through adoption by a couple, for instance) is optimal for the child, or whether it prioritizes the adult's desire to have a child on their own terms. The law generally permits single parenthood by choice – many countries allow single people to adopt, and fertility clinics serve single women – based on the principle that individuals have a right to procreate or to family life regardless of marital status. The countervailing view is that a child ideally deserves the material and emotional support of two caregivers, but importantly, no law actually prevents single people from having children (short of antiquated rules in a few places). The CRC's stance is neutral here: it says children have the right "to be cared for by his or her parents", but does not mandate two parents if one can provide adequate care.

[13] Obergefell v. Hodges, 576 U.S. 644 (2015).
[14] E.B. v. France, Application No. 43546/02, ECtHR, Judgment of 22 January 2008.
[15] Gulati, S.; Kaur, N., *Marriage Equality Around the World: A Myth or Reality*, International Journal for Research in Applied Science and Engineering Technology, 12, 2024. 1086-1094. 10.22214/ijraset.2024.59007.

Another challenge arises with polygamous or polyamorous family structures, which some cultures or subcultures practice. Globally, a number of countries (mostly with Islamic law influence) legally allow polygamy, and children may grow up in polygynous households (one father, multiple mothers). International human rights bodies have generally been critical of polygamy due to concerns about women's and children's welfare, and most Western jurisdictions do not recognize plural marriage. In terms of children's rights, the key issues are often inheritance and support – ensuring that fathers in polygamous unions support all their children adequately and that co-wives' children are treated equally. Where polygamy is illegal but practiced (e.g., in some immigrant communities), children might not have legal recognition of one of their parents' unions.

In sum, the recognition of non-traditional family structures in law has largely been about expanding adult rights – the right to marry whom one loves, the right not to marry at all and still have children, and the right to form families according to one's values. Yet most of these changes, when implemented with care, also promote children's rights. They eradicate unjust discrimination against children and they provide many children with more secure, loving homes. A child who is loved and cared for by two mothers or two fathers is undoubtedly better off if both those adults can be legal parents rather than one being treated as a legal stranger. Likewise, a child with unmarried parents benefits from laws that ensure they have the same support and inheritance rights as any other child. The law's child protection function is thus served by adapting to social reality – by recognizing that the best interests of children can be met in a variety of family configurations, so long as there is commitment, stability, and care.

5. ASSISTED REPRODUCTIVE TECHNOLOGIES AND SURROGACY: CHALLENGES FOR CHILDREN'S RIGHTS

Few areas illustrate the conflict between adult desires and children's interests as starkly as the realm of assisted reproductive technologies (ART) and surrogacy. Advances in medicine and technology – from in vitro fertilization (IVF) and sperm/egg donation to gestational surrogacy – have made it possible to create families in ways that were not imagined a century ago. These technologies offer hope and fulfillment to many would-be parents: infertile heterosexual couples, same-sex couples, and single individuals can now have biologically related children with the help of donors or surrogates. From the standpoint of adult autonomy, the rise of ART embodies the idea that individuals have a right to reproductive self-determination – to overcome nature's limitations and have a

child if they so choose, often phrased as a right to found a family using modern methods. However, this brave new world of reproduction raises intricate questions about children's rights, identity, and welfare. When a child is conceived with the genetic contribution of someone outside the rearing family (a donor) or carried to birth by someone other than the intending parent (a surrogate), the straightforward link between biological parentage and social parentage is broken. Law and policy must grapple with issues such as: Who are the legal parents? Should the child have a right to know their genetic origins? What if the adults' agreements (e.g., a surrogacy contract) conflict with what later seems best for the child? How do we prevent the buying and selling of children, or exploitation of women's bodies, while respecting the wishes of adults to have children?

The CRC in Article 7 proclaims that from birth, a child has "as far as possible, the right to know and be cared for by his or her parents". In the context of donor conception (sperm, egg, or embryo donation), this right comes into play because a donor-conceived child has genetic parents who are not the ones raising them. For much of the history of sperm donation (since the mid-20th century), anonymity was the norm; donors and recipient parents were often promised secrecy, and children were not told of their origins. The practice aimed to protect the adults: donors might not donate if they feared later responsibility or contact, and infertile couples might not use donors if they feared stigma or confusion. The child was assumed to be fine not knowing, especially if never told they were donor-conceived. Contemporary viewpoints have shifted dramatically on this issue in many jurisdictions. Sweden was a pioneer, enacting in 1985 a law that banned anonymous sperm donation and gave children the right to obtain the donor's identity when they reach maturity.[16] The United Kingdom followed suit: as of 1 April 2005, donors in the UK lose the right to anonymity once any child conceived from their donation turns 18, meaning the child can request identifying information. Other nations in Western Europe, Australia, New Zealand, and parts of Canada have implemented similar policies eliminating donor anonymity in favor of children's rights to know their genetic parents. Even France, long committed to donor anonymity, reformed its bioethics law in 2021 to allow children conceived with donor gametes to learn the donor's identity at adulthood, reflecting a significant shift in values.[17] However, not all jurisdictions agree – notably, the United States and many other countries – many countries of Central

[16] Diduck, A.; Peleg, N.; Reece, H. (eds.), *Law in Society: Reflections on Children, Family, Culture and Philosophy*, Koninklijke Brill NV, The Netherlands, 2015, p. 551.

[17] Committee on Social Affairs, Health and Sustainable Development, Report by Rapporteur Ms. Petra De Sutter (Belgium, SOC), Origin - Reference to Committee: Doc. 14419, Reference 4349, 22 January 2018.

and Eastern Europe - still permit anonymous donation, leaving it to the parents whether to tell the child.

Of course, identity rights must be balanced with other rights, like the right to privacy of donors or parents. Some argue that forcing disclosure could infringe donors' privacy or lead to fewer donors, thereby limiting adults' access to ART (and thus indirectly limiting some children's chance to be born at all). Courts like the European Court of Human Rights have wrestled with this balance: in Odièvre v. France (2003),[18] for example, the ECHR upheld France's system of anonymous childbirth (allowing mothers to give birth under secrecy and give up the child, to avoid infanticide/abortion alternatives) – essentially prioritizing the mother's privacy and public policy over the adoptee's right to know origin. But that case was closely divided. In general, the trend is toward greater openness.

Surrogacy causes additional legal debates regarding parentage. Surrogacy – an arrangement where a woman (the surrogate) carries a pregnancy for intending parent(s) – raises an even more complex web of rights. There are two main types: traditional surrogacy (the surrogate's own egg is used, making her the genetic mother) and gestational surrogacy (the surrogate is not genetically related to the child; an embryo created via IVF, using either the intended mother's egg or a donor egg, is implanted in her).[19] Surrogacy can be altruistic (unpaid beyond expenses) or commercial (with a fee). Jurisdictions' approaches vary widely: some ban all forms of surrogacy (e.g., France, Germany, many countries in Europe and Asia) on the grounds that it commodifies women and children, and contradicts public policy; some permit only altruistic surrogacy under strict conditions (e.g., Canada, UK, Australia state laws); others have more open commercial surrogacy markets (certain U.S. states, Ukraine, Georgia, etc., though this is changing). For the child, the foremost issues are legal parentage and citizenship, and the preservation of identity and relationships. Ideally, the law should ensure that from the moment of birth, the baby has clear legal parents who will care for them – without ambiguity or litigation. In practice, achieving this is tricky. Surrogacy agreements try to pre-arrange that the intending adults will be the legal parents and the surrogate (and her spouse, if any) will relinquish any parental rights. Many places (like several U.S. states and India in the past) enforce such contracts, making the intended parents the legal parents as long as procedures were followed. In contrast, other legal systems view surrogacy contracts as unenforceable or void. For instance, in Italy, a child born via surrogacy could not be registered as the child of the

[18] Odièvre v. France, Application No. 42326/98, ECtHR, Judgment of 13 February 2003.
[19] Erdösová, A., *Náhradné materstvo ako bioetický problém z pohľadu ochrany základných práv a slobôd (Surrogacy as a Bioethical Problem from the Perspective of the Protection of Fundamental Rights and Freedoms)*, Justičná revue, vol. 72, no. 4, 2020, pp. 471-480.

intending parents, because the law refused to recognize the surrogate's consent to give up the child. Even in places that allow surrogacy, thorny situations can arise: What if the surrogate refuses to relinquish the baby after birth? What if the intended parents abandon the child (e.g., upon discovering a disability or in a dispute between the commissioning couple)?

A child-centric critique of some ART practices is that they risk treating children as objects to be procured rather than individuals with rights. In commercial surrogacy, especially cross-border arrangements, money changes hands for the production of a baby – raising the specter of child-selling, which is prohibited by international law (the CRC's Optional Protocol on the Sale of Children, for example). Reputable surrogacy programs try to frame the payment as for the surrogate's services and inconvenience, not buying the child. Nonetheless, where large sums are paid, the arrangement starts to resemble a market transaction.

Recognizing the need to protect children in these new circumstances, some international initiatives have started. The Hague Conference on Private International Law is working toward a convention on international surrogacy, akin to the Hague Adoption Convention, to set standards and resolve cross-border parentage issues. Likewise, there are calls to explicitly affirm in international law a child's right to identity that covers donor and surrogate situations. The concept of "origins" has been explored in some scholarship and even court decisions. For example, some have argued that multiple aspects of identity rights (name, nationality, parentage) in instruments like the CRC and other human rights treaties together support the "child's right to know their origins".

In terms of law and policy, some countries have begun to incorporate child-focused measures in ART and surrogacy regulation. For instance, the UK, in regulating surrogacy, still insists that the surrogate is the legal mother at birth (reflecting caution and the birth-mother principle), and only transfers parentage by court order after birth with the surrogate's consent – this is intended to ensure no child is handed over without the birth mother's fully informed, postnatal consent, theoretically a protection for the child and surrogate. British law also requires that at least one intending parent be genetically related to the child in surrogacy, to avoid situations of a child born with no genetic tie to any commissioning parent. In contrast, some U.S. jurisdictions allow contracts even without genetic ties (gestational surrogacy with donor egg and donor sperm), which maximizes adult autonomy but raises the question of the child's complete genetic disconnect from the commissioning parents.

ART and surrogacy embody the tension between adults' powerful desire to have a child and the imperative to safeguard children's rights and dignity. Modern

family law is increasingly called upon to mediate this tension. Where successful, it finds ways to allow the creation of these much-wanted children while building in protections: preserving their knowledge of origins, ensuring they have stable legal parentage and citizenship, and preventing their treatment as commodities. Where regulation is absent or solely adult-oriented, the risk is that children become the products of other people's projects – a notion incompatible with the idea of the child as a rights-bearing individual.

6. TOWARD A CHILD-CENTRIC FAMILY LAW: POLICY RECOMMENDATIONS

Having examined modern family law and its evolution, it becomes clear that further adjustments are needed to restore equilibrium between adult autonomy and children's rights. The goal of these policy recommendations is to realign family law with its original protective purpose – safeguarding the welfare of children and the stability of their upbringing – while still honoring the legitimate gains of contemporary reforms, such as gender equality and personal freedom. In essence, the aim is a family law framework that puts children first without unduly infringing on adult rights.

1. Integrate Child Impact Assessments into Family Law Reforms:

Whenever new family law legislation or policy is proposed, a formal Child Impact Assessment should be conducted. This means carefully evaluating how the change will affect children's well-being and rights, and not just considering the benefits for adults. For example, if a jurisdiction considers legalizing a new form of adult partnership or a novel reproductive technology, the assessment would examine potential outcomes for any resulting children (in terms of stability, identity, emotional health, etc.).

2. Fortify the Best Interests of the Child Principle in All Proceedings:

The best interests standard should explicitly extend to all legal proceedings that substantially affect children, even if children are not the primary litigants. Currently, best interests are central in custody and adoption cases, but they could be given greater weight in, say, divorce proceedings or relocation disputes. One approach could be requiring that in any divorce involving minor children, courts verify that arrangements have been made that consider the children's welfare (housing, schooling, parenting time).

3. Enhance Post-Divorce Co-Parenting Enforcement:

One of the greatest harms to children from divorce or nonmarital breakups the loss of contact with a parent. To counter this, parenting time orders (visitation) should be taken seriously by courts; consistent failure to honor a child's time with the other parent without good cause should have legal consequences. Programs that

facilitate cooperative parenting, such as parenting coordination or mediation for post-divorce disputes, can reduce the conflict children experience.

4. Guarantee Children's Right to Identity in ART and Adoption:

Laws concerning adoption, donor conception, and surrogacy should be reformed to prioritize the child's right to know their origins, as far as possible consistent with their best interests. Creating confidential registries for donor conception and surrogacy where information about the biological/genetic and birth origins of the child is recorded. Upon reaching a suitable age of maturity (typically 18, or earlier with court approval in special cases), the child should have the right to access identifying information about their donor(s) or surrogate, if they wish. In adoption, move toward open adoption arrangements where safe and appropriate – meaning the child or adoptive family maintains some level of contact or at least knowledge of the birth family. Even where full contact is not feasible, non-identifying information and a channel for later contact can help fulfill identity needs. The days of entirely secret adoptions with sealed records should be left behind.

5. Regulate surrogacy with an International and Child-Centric Approach:

Given the global nature of surrogacy today, there is a pressing need for international cooperation. Nations should work through frameworks like the Hague Conference to establish common minimum standards for surrogacy that include the prohibition of surrogacy arrangements that amount to sale of children. Any compensation should be strictly for reasonable expenses or service, not a price for the baby. Every child born via surrogacy should have clear legal parent(s) responsible for them immediately. This may mean pre-birth orders or expedited post-birth procedures to transfer parentage, depending on each country's method, but leaving a baby in limbo is unacceptable.

6. Reaffirm that Parenting is a Responsibility, Not Just a Right:

Family law should consciously project the message that while adults have rights to form a family, these rights come coupled with responsibilities. One practical step: incorporate statements of principles in family legislation (or even constitutions) that underscore parents' duties toward their children. For example, a provision could state, "Every parent has the responsibility to ensure, to the best of their ability, the conditions of care, protection, and development necessary for their child, and the state shall support parents in fulfilling this responsibility."

7. Child-Centered Training for Judges and Lawyers:

To implement the above reforms effectively, those who work in the family justice system should be trained to think in a child-centric way. Judges handling family cases should be well-versed in child development, psychology of family dynamics, and the relevant human rights standards (like the CRC). Lawyers too should aim to counsel clients (the parents) with an eye toward the children's welfare, not just the parent's wishes.

In proposing these recommendations, the emphasis is on balance: not a rollback to archaic rules that denied adults freedom and often harmed women and children in different ways, but not a laissez-faire approach either that treats children as mere appendages to adult lives. It calls for a renewed commitment to children's welfare as the touchstone of family law. In a world where the notion of family is fluid, such a commitment can be the steady compass.

7. CONCLUSION

The evolution of family law in the modern era is a mixture of progress and challenge. On one hand, we have witnessed the emancipation of individuals within the family: women's equality in marriage, freedom from loveless or abusive unions, recognition of diverse love and parenting, and the marvels of technology enabling parenthood against biological odds. These changes have enriched the lives of countless adults – and by extension, benefited many children who are now raised in homes built on love and choice rather than coercion or social convention. On the other hand, the speed and scope of these transformations have at times outpaced our legal and social systems' ability to ensure that no child's well-being is compromised. The family, in all its new forms, remains the primary environment in which children grow. It is therefore imperative that as we reconstruct the legal definition and incidents of "family," we do so in a way that keeps sight of the child.

Historically, family law's north star was the protection of the next generation – sometimes expressed in rigid, paternalistic ways, yet fundamentally about providing children with stable families. Contemporary law, enamored with adult rights, must not lose that inheritance. The challenge moving forward is to harmonize the two paradigms: to assert that adult autonomy in family life finds its limit where it would seriously undermine a child's fundamental interests, and conversely that children's welfare is usually best secured by supporting loving caregivers – who themselves need rights and freedoms. As the UN Convention on the Rights of the Child encapsulates, children have the right to be raised by their parents (biological or adoptive) whenever possible, the right to express their views, and the right to have their best interests be a primary consideration in all matters affecting them. These principles offer guidance for every hard question, from divorce to donor conception.

A truly child-centric family law would not see itself as antithetical to adult happiness; rather, it recognizes that in the long term, the flourishing of society's children and the fulfillment of its adults go hand in hand. Adults who grow up safe, loved, and secure as children are far more likely to become happy and

autonomous individuals who form healthy families of their own. Thus, investing in children's rights within family law is essentially investing in the next generation's autonomy and well-being. The policy recommendations outlined – from integrating child impact assessments into lawmaking to enforcing identity rights – are practical steps toward this investment. They aim to ensure that in the joyful exercise of personal freedoms that characterize our age, we do not inadvertently short-change our youngest and most vulnerable. Keeping this insight at heart will help ensure that the soul of family law remains firmly oriented toward nurturing each child, even as the family itself takes new forms.

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PROTECTED BY ARTICLE 56 TFEU'S DOME? NAVIGATING THE BORDERS OF INTRA-EU POSTING OF THIRD-COUNTRY NATIONALS*

ABSTRACT

This contribution addresses the intra-EU posting of third-country national (TCN) workers who are lawfully residing and employed in a 'sending' Member State of the EU/EEA. It is essential to note that unlike other forms of intra-EU labour mobility, posted workers do not move within the EU in their own capacity, as they are not entitled to any direct right to free movement there. By virtue of this legal mechanism, TCN workers may be posted by posting entrepreneurs within the EU/EEA, despite such workers' inability to personally exercise the right to free movement of workers, which is reserved for Union / EEA citizens. Nonetheless, they benefit from the rights conferred by the Posting of Workers Directives and the Regulations on social security coordination. Moreover, the contribution demonstrates clearly that (TCN) posted workers do not intend to enter the labour market of the host Member States. It also shows that the concept of 'habitual employment' cannot be, so to say 'absolutised'. While analysing the CJEU's recent judgment in C-540/22, I come to the conclusion that the Court ruled (wrongly, in my opinion) against the explicite use of "derived right" of third-country national posted workers, as it turned to the institution of the free movement of workers (persons) instead of the one belonging to free movement of services. One could say that it nevertheless 'inadvertently' upheld such a right in case of postings for a period of under 90 days and such workers should be protected by Art. 56 TFEU's title "dome".

Keywords: *Posting of workers, posted workers, third-country nationals, Court of Justice of the EU, 'derived right' of residence*

1. INTRODUCTION

Jean-Jacques Rousseau once stated that when travelling from Paris to Marseille, you had to change legislation more than you have to change horses. The aim of the European Union's internal market[1] is precisely to eliminate obstacles hindering intra-EU freedom of movement, including within the framework of freedom to provide services.[2] Obviously, intra-EU movement (as well as movement towards the European Union) today looks in many ways fundamentally different from what the founders of the European project (and let alone Jean-Jacques Rousseau) had imagined. The expectation that European enlargements would bring mass permanent migrations over the course of the past decades, never quite materialized to the extent that some expected or even feared. Indeed, mobility within the framework of the internal market of the European Union has taken shape in a variety of ways. While the history of free mobility of labour within the European Communities (and then the EU) unfolded, the other forms of mobility started developing that were not based on the free movement of workers. These mobility streams add to the mobility landscape, are more circular and short-term, but increasing in volume and importance, and are changing the face of the traditional single European labour market. Thus, this very market has come to consist of various streams of mobility, of which long-term mobility is just one.[3] Indeed, in the course of the development of the European Union's internal market, three forms of labour mobility have emerged – migration to another Member State under the provisions of the TFEU[4] concerning freedom of movement for workers and

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[1] Under Art. 26 para. 2 of the Treaty on the functioning of the European Union, the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

[2] Jorens, Y., *Cross-border EU Employment and its Enforcement. An Analysis of the Labour and Social Security Law Aspects and Quest for Solutions*, Springer 2022, p. 1.

[3] Cf. Lens, D.; Mussche, N.; Marx, I., *Europe's ever expanding mobility patterns - posting, third country nationals and the single European labour market*, CSB WORKING PAPER, no. 19.08, July 2019, p. 2. See also: Kiełbasa, M., "*Nowy wspaniały świat (delegowania pracowników)?", czyli o zasadności (niektórych) zmian w delegowaniu pracowników w Unii Europejskiej słów kilka* [in:] *Verba volant, scripta manent : księga jubileuszowa dedykowana profesor Bogusławie Gneli*, Kaźmierczyk, A., Michałowska, K., Szaraniec, M. (eds.), Warszawa 2023.

[4] Cf. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Consolidated version of the Treaty on European Union Consolidated version of the Treaty on the Functioning of the European Union Protocols Annexes to the Treaty on the Functioning of the European Union Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, OJ C 202, 7.6.2016, p. 1–388.

freedom of establishment (Articles 45 and 49 TFEU), daily or weekly cross-border commuting covered by freedom of movement for workers (Article 45 TFU) and temporary mobility through posting of workers in the framework of freedom to provide services (Article 56 TFEU).[5] The latter form has even been described as the case, where the most complex transnational configurations between companies, workers and authorities are to be found.[6]

Herein, I shall focus on the latter form, including especially the so-called 'third-country nationals' ('TCNs'). Indeed, the posting of third-country national workers is a growing phenomenon of labour mobility, which is view by some as an alternative to the traditional avenues of migration to and between EU Member States.[7]

Crucially, unlike the other types of intra-EU labour mobility, posting workers means that workers who have been posted are not moving intra-EU in their own capacity, as they are not entitled to any direct free movement right in the EU. Their mobility occurs within their employer's freedom to provide services.[8] In practice, an employer (i.e. a company) established in one Member State (the sending country) sends its own employees to work temporarily in another Member State (the host country) to provide certain services. The posting activity can take three different forms: posting to perform a contract of services (including sub-contracting), intra-group posting (namely, posting to an undertaking owned by the same group in a second Member State), and hiring out through a temporary employment agency (where the agency provides workers to an employer established in a second Member State). Posted workers are entitled to equal

[5] Cf. Bottero, M., *Posting of Workers in EU Law. Challenges of Equality, Solidarity and Fair Competition*, Kluwer Law International, Alphen aan den Rijn 2021, p. 21. The Author rightly notes the misconception that in the public discourse there is a general feeling that identifies any foreign worker coming from a low-wage Member State who performs a working activity (especially in the construction sector) in a high-wage Member State, as a posted workers – which of course is not necessarily the case – see also: Schwarz, S., Kiełbasa, M., *Posted or Sent in the Context of the Revision of Social Security Coordination Regulations*, Labour Mobility Initiative Association (ELMI), Krakow 2018, p. 4; Kiełbasa, M., *Prawa socjalne w Unii Europejskiej a granice swobód rynku wewnętrznego,* Warszawa 2017, p. 181 et seq.

[6] Cf. Schramm, Ch., *Mobility within the European Union: Capturing its complexity to guide policy*, [in:] *Temporary labour migration: Towards social justice?* Kuptsch, Ch., Mieres, F. (eds.), Geneva: International Labour Office, 2025, p. 65.

[7] Cf. European Labour Authority, *Report on the cooperation practices, possibilities and challenges between Member States – specifically in relation to the posting of third-country nationals. Final Report ELA/2022/RS/027/ELA.306-2021/TITLE 3/2.2*, February 2023, s. 6.

[8] Cf. OECD, Mobility and Integrated Labour Markets for Third-country Nationals in Greater Copenhagen, OECD Reviews on Local Job Creation, OECD Publishing, Paris, 2025, https://doi.org/10.1787/ba2a4777-en., p. 141.

treatment with nationals of the host Member State in regard to a series of employment conditions. These include, among others, remuneration, accommodation, and allowances. When the effective duration of the posting exceeds 12 months (or 18 months in case of motivated notification by the posting company), (even) more protective employment standards of the host Member State apply.[9]

Some scholars argue that the overlap of migration and employment regimes as well as the cross-border provision of services might contribute to creating additional vulnerabilities for TCNs. Posted TCNs are reportedly undemanding in respect of their labour and social rights when posted from their sending EU countries to other EU countries.[10]

Until a few years ago, the number of third-country nationals posted within the EEA was rather limited, but in recent years the number of posted third-country nationals has increased sharply.

A recent report with figures from 2021 shows that third-country nationals are mainly posted to other Member States from Slovenia, Poland, Spain and Lithuania. From Slovenia, 60% of the posted workers are third-country nationals, mainly from van Bosnia and Herzegovina. From Poland, 17% of the posted workers are third-country nationals, mainly from Ukraine.[11]

When it comes to the data on posting TCNs from Poland, based on PDs A1[12] issued in our country, they show e.g. that in 2021 a grand total of 115,240 PDs A1 were

[9] *Ibidem*, pp. 141-142. See also: Verschueren, H., *Posting of Third Country Nationals (TCN). Note on the case law of the CJEU on posting of third-country nationals*, European Labour Authority, Posting360 Programme, July 2024, p. 1-2. Cf. Posting Directives described further in subchapter 2.2. hereof

[10] Cf. Danaj, S.; Vah Jevšnik, M.; Kiełbasa, M.; Szaraniec, M., *There and gone again? Migration to and posting of third-country nationals from Slovenia and Poland,* European Labour Law Journal 2023, pp. 4-5.

[11] Cf. Verschueren, H.*, Posting of third-country nationals in the EEA: need for clarification of the conditions in a legislative initiative*, European Labour Law Journal 2024, Vol. 15:4, op. cit., p. 877-878. See also: Danaj, S.; Vah Jevšnik, M.; Kiełbasa, M.; Szaraniec, M., *There and gone again?*, op. cit., pp. 4-5, as well as Kiełbasa, M.; Szaraniec, M.; Mędrala, M.; Benio, M., *Posted workers from and to Poland. Facts and Figures,*2022, Leuven: POSTING.STAT project VS/2020/0499.

[12] Portable Document A1 (PD A1) (previously the E101 certificate) establishes the presumption that the holder is affiliated to the social security system of the Member State which has issued the certificate and confirms that the person concerned has no obligations to pay social security contributions in another Member State – cf. De Wispelaere, F.; De Smedt, L.; Pacolet, J., *Posting of workers. Report on A1 Portable Documents issued in 2023,* Luxembourg: Publications Office of the European Union, 2025, p. 10.

issued in Poland under both Art. 12 and Art. 13 of the Basic Regulation[13] to third-country nationals, constituting 17.2% of all such attestations issued by the Polish authorities under those two legal bases; 13.8% of all PDs A1 issued under the two above legal bases were issued to Ukrainians.[14]

The latest available data demonstrate that the Polish Social Insurance Institution (ZUS) issued 840 578 PDs A1 under Art. 12 and 13 Regulation 883/2004 – of which so much as 23.4 % - 197 461 were issued to third-country nationals[15] - of note is a major increase of more than 6 percentage points in just three years (!).

2. THIRD-COUNTRY NATIONALS AS POSTED WORKERS

2.1. TCN posted workers – what's in a name?

The starting point of the present reflections is that one of the fundamental features of labour migration policy in Europe is the divide between free labour mobility by EU citizens on the one hand and nationally controlled labour migration by third-country nationals on the other.[16] The principles governing free movement of persons (workers)[17] and free movement of services respectively enable EU workers to reside and work in any Member State of their choosing and/ or to be posted to any other Member State for delivering a service job. While the regulation

[13] Cf. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1–123 (hereinafter: Regulation 883/2004 or Basic Regulation).

[14] Cf. Kiełbasa, M.; Szaraniec, M.; Mędrala, M.; Benio, M., *Posted workers from and to Poland, op. cit.,* p. 102.

[15] See Szybkie, A.; Delert-Urban, K., *Delegowanie obywateli państw trzecich z perspektywy praktyki Zakładu Ubezpieczeń Społecznych, Presentation delivered during the 8th European Labour Mobility Congress*, Krakow, 18 Feb 2025, slide 8.

[16] Cf. Paul, R., *Strategic contextualisation: free movement, labour migration policies and the governance of foreign workers in Europe,* Policy Studies 2013, 34(2), p. 122–141.

[17] Free movement of workers became part of the European Economic Community (EEC) project when Italy introduced the concept during the negotiations in the 1950s. Italy regarded the free movement of workers as an appealing tool to export its surplus labour. Right from the start, when the regulation of free movement of workers was negotiated at the beginning of the 1960s, fears existed that Germany and France would face a wave of Italian workers. Similarly, at the occasion of some other EU enlargements, the free movement of workers came into the political attention of the Member States, as fears existed that opening the labour market would result in mass-movements and a destabilisation of the labour market. This was the case for Greece joining in 1981, and Spain and Portugal in 1986, as well as other newly acceding Member States, especially from Central and Eastern Europe. The fears resulted in transition periods during which old Member States were allowed to keep their labour markets closed to the new members – cf. Lens, D.; Mussche, N.; Marx, I., *Europe's ever expanding mobility patterns,* op. cit., p. 3-4.

of these principles happens at the EU level, labour migration from outside the EU, in contrast, is largely governed (controlled) by the EU Member States that sovereignly decide on the conditions as well as on the number of TCN labour migrants they admit to their labour market.[18]

Moreover, for a long time, the expectation regarding a single European labour market was that labour migration was something that would take place mainly within Europe, not from the outside into Europe (or involving persons who are not EU citizens). Indeed, the belief was that a larger, more fluid and flexible European labour market would reduce the need for workers from far away. In reality, an increasing number of third-country nationals (TCNs) are mobile within Europe as posted workers.[19]

On the basis of jurisprudence of the Court of Justice of the EU,[20] regardless of the fact that third-country nationals cannot personally exercise the right to free movement of workers[21] (which is limited to nationals of the Member States), TCNs who hold a valid work and residence permit in one Member State may be posted within the EU[22] (or, actually, within the European Economic Area[23]). Arguably, the first of such judgments was issued in the Vander Elst[24] case. In that judgment the CJEU confirmed that the possibility of employers established in one

[18] Por. Lens, D.; Mussche, N.; Marx, I., *A hole in the wall of fortress Europe: The trans-European posting of third-country labour migrants,* International Migration 2022; 60, p. 160 i n.
[19] Cf. Lens, D.; Mussche, N.; Marx, I., *Europe's ever expanding mobility patterns,* op. cit., p. 2.
[20] By the way, the Court's activism has been challenged over the decades by academics as much as by politicians and the media. Already in the 1980s, there were voices accusing the Court of Justice of transgressing its mandate and engaging in judicial policy-making beyond its political mandate - cf. Mussche N.; Lens, D.; *The ECJ's Construction of an EU Mobility Regime – Judicialization and the Posting of Third-Country Nationals*, Journal of Common Market Studies 2019, Vol. 57, no. 6, p. 1252. See also: Kiełbasa, M., *Zasada "równa płaca za tę samą pracę w tym samym miejscu" zgodna z prawem Unii Europejskiej - glosa do wyroków Trybunału Sprawiedliwości z 8.12.2020 r., C-626/18, Polska przeciwko Parlamentowi i Radzie oraz C-620/18, Węgry przeciwko Parlamentowi i Radzie,* Europejski Przegląd Sądowy, no. 6 (189) 2021, p. 38 et seq.
[21] Cf. Lens, D.; Mussche N.; Marx, I., *A hole in the wall of fortress Europe,* op. cit., s. 173.
[22] Cf. Verschueren, H., *Posting of Third Country Nationals (TCN). Note on the case law of the CJEU on posting of third-country nationals*, European Labour Authority, Posting360 Programme, July 2024, p. 3.
[23] The European Economic Area, abbreviated as EEA, consists of the Member States of the European Union (EU) and three countries of the European Free Trade Association (EFTA) (Iceland, Liechtenstein and Norway; excluding Switzerland) – European Commission, Statistics Explained, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:European_Economic_Area_(EEA).
[24] Cf. the CJEU judgement in C-43/93 Vander Elst v Office des Migrations Internationales [1994] ECR I-3803.

Member State to send their employees to perform economic activities in another Member State also applies where the posted workers are third-country nationals, if they are lawfully and habitually employed[25] in the Member State where their employer is based. The Court of Justice also ruled that third-country nationals enjoying such status, who are posted to another EU Member State, do not require work permits in the EU Member State where they are posted (host Member State).[26]

[25] It is important to add that the concept of 'habitual employment' from that well-known judgment cannot be, so to say 'absolutised'. The CJEU points out to that in judgment C-244/04 Commission v Germany, indicating that '*(...) Germany cannot, in that regard, rely on the formula used by the Court in paragraph 26 of the judgment in Vander Elst, by arguing that such a requirement of prior employment enables it to verify that a posted worker who is a national of a non-member State has lawful and habitual employment in his employer's Member State of establishment. As the Advocate General noted in point 38 of his Opinion, it is important to put that formula in the context of the question referred by the national court in the case which gave rise to the judgment in Vander Elst. In that regard, it must be observed that the Court did not couple the concept of 'lawful and habitual employment' with a requirement of residence or employment for a certain period in the State of establishment of the service provider.'* (para. 55).
This was put even more emphatically by Advocate General L.A. Geelhoed in his Opinion in this case (of 15.09.2025). Namely, he indicated that '*on reading Vander Elst more closely the question is whether it can be said that the Court did indeed lay down a specific criterion in this judgment and, if it did, what this criterion must be deemed to be. As was pointed out by the Commission, by determining in the operative part of its judgment that the nationals of non-member countries are 'lawfully and habitually' employed by the service provider, the Court merely repeated the wording of the preliminary question put to it by the referring national court. This could be regarded as an indication that the Court did not intend to set a distinct standard in this regard* (para. 38). Furthermore, according to the Advocate General Geelhoed, *"[i]t would thus appear to me that the Court was emphasising the need to ensure that only workers from third countries who are legally resident in the Member State of establishment of the service provider and are legally employed by that service provider in that Member State should be able to be posted for the provision of services in other Member States without further restrictions being imposed by the host Member State in respect of these two subjects. The Court, significantly, did not make the fulfilment of either criterion subject to a given duration of residence or employment. This means that it did not accord the aspect of being 'habitually' employed in the Member State of origin the significance which has been attached to it by Luxembourg, the Federal Republic of Germany and even Committee K.4*'. (para. 40). As rightly commented in the legal doctrine, the Court emphasised that it had only ruled in the context of the specific circumstances of the case, but had in no way intended to make this an additional condition for the posting of third-country nationals – see Verschueren, H*., Posting of third-country nationals in the EEA, op. cit.,* p. 880.
[26] Cf. the CJEU judgement in C-43/93, para. 26.

2.2. TCN posted workers – relevant legal framework

When it comes to the legal framework to be relied on, the Posting of Workers Directive 96/71/EC[27] (along with Directive 2018/57[28] amending it, as well as Directive 2014/67[29]) also applies even if a posted worker is not a Union citizen. Indeed, no nationality requirements have been stipulated in this Directive[30] (nor in the other two posting Directives). At the same time, recital 20 of Directive 96/71 explicitly states that the Directive is without prejudice to national laws relating to the entry, residence and access to employment of third-country nationals[31] and that issues influences posting of TCN workers heavily, as it will be demonstrated below.

Moreover, also the social security coordination rules in the European Union, set out in the Regulation 883/2004[32] and Regulation 987/2009[33] extend to third-country workers posted within the EU (and more broadly – the European Economic Area (EEA)). The personal scope of these Regulations was expanded by Regulation 1231/2010[34] to encompass all third-country nationals legally residing in a Member State. Furthermore, the CJEU has interpreted the condition of legal residence broadly, including third-country nationals temporarily residing in a Member State under a temporary visa. Such individuals may transfer to another Member State, provided their presence is in accordance with its laws

[27] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1–6 (hereinafter: Directive 67/71 or Basic Directive).
[28] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, PE/18/2018/REV/1 OJ L 173, 9.7.2018, p. 16–24 (hereinafter: Directive 2018/957 or Revision Directive).
[29] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159, 28.5.2014, p. 11–31 (hereinfter: Directive 2014/67 or Enforcement Directive).
[30] Cf. Verschueren, H*., Posting of third-country nationals in the EEA,* op. cit., p. 877.
[31] Cf. Verschueren, H., *Posting of Third Country Nationals (TCN). Note on the case law of the CJEU,* op. cit., p. 3.
[32] Cf. Regulation 883/2004 mentioned above.
[33] Cf. Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1–42 (hereinafter: Regulation 987/2009 or Implementing Regulation).
[34] Cf. Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality OJ L 344, 29.12.2010, p. 1–3 (hereinafter: Regulation 1231/2010).

governing entry and stay. This was confirmed especially in the Balandin ruling of the Court,[35] where the Court clarified the notion of 'legal residence' under Regulation (EU) No 1231/2010. The CJEU noted the different purposes of the notions of (i) *'residence'*, clarified by Regulation 883/2004, and (ii) 'legally resident' in Regulation 1231/2010. It clarified that the objective of Regulation 883/2004 was to ensure that people benefit from social security coverage while ensuring they are subject only to the social security scheme of one Member State. In this context, 'residence' intends to determine the Member State to which the person concerned is more closely connected, in light of their habitual centre of interests.[36] By contrast, the CJEU highlighted that Regulation 1231/2010 aims to extend the personal scope of Regulations 883/2004 and 987/2009 to third-country nationals not already covered, solely on the grounds of their nationality. With recourse to this Regulation's preparatory works and also to the interpretation of Directive 2011/08, the CJEU concluded that neither the duration of the presence of the third-country nationals in the territory of a Member State, nor their centres of interest are relevant to establish if they are legally residing in a Member State. As such, '*third-country nationals […] who temporarily reside and work in different Member States in the service of an employer established in a Member State, may rely on the coordination rules laid down by Regulations No 883/2004 and 987/2009 in order to determine the social security legislation to which they are subject, provided that they are legally staying and working in the territory of the Member States'* (par. 44).[37]

Thus, already in the context of the above-described principles, mostly formulated by the Court of Justice of the EU, there has been an assumption that third-country nationals, provided that they are legally staying and working in the territory of the Member States.[38] are, in a situation of posting abroad, as if they were, 'under the protective dome' of the Art. 56 TFEU, made use of by the posting entrepreneur (an idea I develop in the following sections).

The idea that these workers are just under such a 'dome' is accompanied by the issues that they do not need a work permit and that they are not seeking access to the labour market of the host Member State. I elaborate on this in subsequent units of the text.

[35] Cf. the CJEU judgment in C-477/17 Raad van bestuur van de Sociale verzekeringsbank v D. Balandin and Others, EU:C:2019:60.
[36] Cf. European Labour Authority, *Report on the cooperation practices, possibilities and challenges between Member States,* op. cit., p. 27.
[37] *Ibidem*, p. 27.
[38] Cf. the CJEU judgment in C-477/17, para. 48.

2.3. Posted TCNs remain affiliated to the sending Member State

It was already in the seminal case of Rush Portuguesa, that the Court of Justice held that posted workers *"return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State".*[39] Then, in its judgement in C-43/93 Vander Elst, the Court stated that *"workers employed by an undertaking established in one Member State who are temporarily sent to another Member State to provide services do not in any way seek access to the labour market in that second State, if they return to their country of origin or residence after completion of their work".*[40] This was then reiterated a number of times already – e.g.in the Court's judgment in Commission v Luxembourg[41] (where the Court emphasised the return of such workers to their country of origin / residence upon the completion of their posting mission), Commission v Germany,[42] Commission v Austria,[43] Danieli[44] most recenty – in SN and others.[45]

Of note in this regard is especially the judgement in C-244/04 Commission v Germany, as it concerned (*inter alia*) a particularly burdensome practice of the German authorities, requiring posted workers, who are third-country nationals with lawful situation in the sending MS, to obtain a national visa issued *'according to Vander Elst'* (in reference to the judgment in C-43/93) before entering Germany, also for a short-term stay, and providing automatic expulsion in the event of entry without this visa. The Court thoroughly analysed this issue in its case law and it found that any administrative procedure which is not declaratory in nature constitutes a disproportionate restriction on the freedom to provide services. It therefore ruled that interpreting German law as requiring such TCN posted workers to obtain a visa before entering Germany and as providing for automatic expulsion in the event of entry without a visa, is in breach of the obligations under Article 56 TFEU.

Irrespective of the above, German case law violates the principle of autonomy of concepts in EU law, which requires that concepts used in EU law and in national law should be interpreted independently, by assuming that the notion "paid

[39] Cf. the CJEU judgment in C-113/89 Rush Portuguesa Ldª v Office national d'immigration**.**
[40] Cf. the CJEU judgment in C-43/93, para. 21.
[41] Cf. the CJEU judgment in C-445/03 Commission v Luxembourg, para. 38.
[42] Cf. the CJEU judgement in C-244/04 Commission v Germany, para 59.
[43] Cf. the CJEU judgement in C-244/04 Commission v Germany, para. 51.
[44] Cf. the CJEU judgement in C-18/17 Danieli & C. Officine Meccaniche and Others, para. 48.
[45] Cf. the CJEU judgement in C-540/22 SN and others v Staatssecretaris van Justitie en Veiligheid, para. 80.

activity" used in the Regulation (EU) 2018/1806 includes posted workers, while this does not arise from any existing EU regulation or case law. For that reason, German courts are obliged not to refuse requests for a preliminary ruling procedure to determine a binding interpretation of EU law concerning this notion.[46]

Moreover, the Court while confirming its various positions contained in the judgment against Luxembourg, emphasized "*that a Member State may check that an undertaking established in another Member State, which deploys on the territory of the first-mentioned Member State workers who are nationals of a non-member State, is not availing itself of the freedom to provide services for a purpose other than the accomplishment of the service concerned*" (para. 40). It further indicated that a requirement that the service provider furnishes a simple prior declaration certifying that the situation of the workers concerned is lawful, particularly in the light of the requirements of residence, work visas and social security cover in the Member State where that provider employs them[47], would give the national authorities, in a less restrictive but as effective a manner as checks in advance of posting, a guarantee that those workers' situation is lawful and that they are carrying on their main activity in the Member State where the service provider is established. Such a requirement would enable the national authorities to check that information subsequently and to take the necessary measures if those workers' situation was not regular. Such a requirement could in addition take the form of a succinct communication of the documents required.[48]

Yet, despite that ruling, the issue of an administrative visa called '*Vander Elst visa'* constitutes a restriction on the freedom to provide services (further confirmed by the Court in similar cases concerning Austria and Belgium), especially given that the country continues to require it. As the main receiving country of posted workers in the EU, Germany's disregard for the CJEU's judgment combined with the added bureaucracy and the prolonged processing times for the issuing of the Vander Elst visa indicates the country's efforts to manage, to some degree, the incoming posting of third-country nationals. These barriers might have had a relatively deterring or slowing down effect on the posting of third-country nationals, especially from Poland to Germany.[49]

[46] For more, see Schwarz S.; Kiełbasa *M., Cases of deportation of Ukrainian citizens duly posted to Germany. Legal analysis*, retrievable at: https://labourinstitute.eu/en/knowledge/opinions-and-positions/
[47] Cf. Verschueren, H., *Posting of Third Country Nationals (TCN). Note on the case law of the CJEU,* op. cit, p. 5.
[48] Therein, para. 41.
[49] Cf. Danaj, S.; Vah Jevšnik, M.; Kiełbasa, M.; Szaraniec, M., *There and gone again?, op.cit.,* p. 29-30.

3. POSTING OF THIRD-COUNTRY NATIONALS - 'DERIVED' RIGHT OF RESIDENCE IN THE HOST MEMBER STATE?

3.1. Setting the scene

What prompted a thorough examination of the existence of a "derived right of residence" for third-country nationals posted from another EU/EEA Member State in the host Member State was one of the most recent questions for a preliminary ruling - in the Dutch-Slovak case of C-540/22.[50]

The referring Dutch court noted that in its judgment in Commission v Austria, the Court held that the area of entry into a Member State and residence there of nationals of non-Member State in connection with a posting by a service provider established in another Member State is not harmonised at Community level, but that the control exercised by a Member State so far as that legislation is concerned cannot affect the freedom to provide services of the undertaking which employs those nationals.[51]

It was in the above-mentioned judgment in C-168/04 Commission v Austria that the European Commission submitted that, within the framework of freedom to provide services, each service provider transfers to his employees the 'derived right' to receive a residence permit for the period needed for the provision of services.[52] According to the European Commission, the decision concerning the right of residence is purely formal in character and should be recognised automatically.[53] Therefore, this raised the question of whether the right of freedom to provide services, as laid down in Articles 56 and 57 TFEU, does not also entail a derived right for workers posted in the context of the cross-border provision of services? The Dutch referring court first observed that it could have been inferred from paragraph 59 of the judgment in Commission v Austria that this was not the case, since the regulation of the entry and residence of third-country nationals has not yet been harmonised. Nevertheless, it further stated that it could be argued that the obligation arising from Article 56 TFEU to remove all obstacles to the free movement of services means that the deployment, within the framework of that

[50] Cf. the CJEU judgment in C-540/22.
[51] Cf. the CJEU judgment in C-168/04 Commission v Austria, EU:C:2006:595, para. 60, with reference to: the judgment of 3 February 1982, Seco and Desquenne & Giral, 62/81 and 63/81, EU:C:1982:34, para. 12 – contained in the *Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice in case C-540/22*, para. 15.
[52] Cf. CJEU judgment in C-168/04, para. 31 and 32.
[53] Cf. *Summary of the request for a preliminary ruling in C-540/22*, op. cit., para. 16.

movement of services, of workers from a third country who are employed by a service provider established in another Member State should not be made subject to the possession of an individual residence permit because that obligation would make the provision of services by means of the posting of workers from a third country unnecessarily difficult.[54] This was precisely the narrative concerning 'the dome' of Art. 56 TFEU protecting such workers (and by definition – also the posting entrepreneur) and it prompted me to research the issue further. In its judgment, the Court agreed with the view of Advocate General Rantos, and ruled that Articles 56 and 57 TFEU must be interpreted as meaning that third-country workers who are posted to a Member State by a service provider established in another Member State must not automatically be recognised as having a 'derived right of residence', either in the Member State where they are employed or in the Member State to which they are posted.[55] The rejection of a 'derived right of residence' was already rightly dubbed in literature as 'very unconvincing'. Indeed, if a service provider has a non-EU workforce (even partially, as it was the case of Mr Vander Elst) and wishes to provide services that entail the movement of persons into another Member State, it cannot do this effectively if it cannot send its employees there. This is not the same as the deterrent effect as regards non-EU family members returning to the original Member State: it is stronger, because it directly prevents the initial exercise of the free movement right in question.[56] Therefore, the rejection in question actually goes to the very core of that freedom. It appears that the position of the Advocate General (and the Court) was based on two grounds. First, in seeking an interpretation (and examples of its application) of the notion of the '*derived right'* of a third-country national (legally residing and employed in one Member State) posted to another Member State, the AG Rantos used an analogy - but one derived from another EU internal market freedom (therefore - not from the scope of freedom to provide services).

Secondly, the Advocate General pointed out that the Commission had already invoked the existence of a *'derived right of residence'* for third-country national workers posted to a Member State in the case which ended in the already-cited judgment in C-168/04 Commission v Austria, yet he assumed that the very position had not been upheld by the Court in that judgment. Indeed, in the view of Advocate Rantos, the CJEU's reasoning was to examine whether the national legislation at issue was compatible with Article 56 TFEU in the light of its established case law in the area of restrictions on the freedom to provide services, without mentioning the existence of a derived right of residence (sic!).

[54] Ibidem, para. 17.
[55] Cf. the CJEU judgment of in C-540/22, para. 55.
[56] Cf. Peers, S., *Free Movement of Services and Non-EU Citizen Staff – a U-turn from the CJEU? Comments on Case C-540/22, SN, ECLI:EU:C:2024:530*, European Journal of Migration and Law 26 (2024), p. 531.

However, I reckon that the Advocate General's position on both grounds was wrong. When it comes to the second ground (I shall explain the first one later on below) - the Commission in C-168/04 argued that "*within the framework of freedom to provide services, each service provider transfers to his employees the 'derived right' to receive a residence permit for the period needed for the provision. In so far as the posted workers do not in any way seek to access the labour market of the State in which they are posted, the ground for automatic refusal laid down in Paragraph 10(1)(3) of the FrG* [Austrian provisions – MK] *is disproportionate in relation to the objective of safeguarding public policy and public security.'*[57]

It would appear that the Commission's statement above regarding the transfer of a 'derived right' to workers posted by a service provider should be considered solely in the context of a measure serving the purpose of their posting - that is, the performance of a service previously contracted to the service provider. Relevant in this respect is the second sentence of para. 31 of the Court's judgment in C-168/04, pointing to the essence of posting (in the context of its comparison with the migration of workers) - i.e. the above-mentioned fact that posted workers do not in any way seek to access the labour market of the host Member State. And it is to this extent that the Austrian regulation proved, in the CJEU's view (accurately – in my opinion), to be incompatible with the internal market rules as the CJEU stated both in para. 31 *in fine*, as well as in paras. 67-68 of the judgment, summarising the issue at stake.

Thus, the CJEU in its judgment against Austria failed, so to say 'to dot the i's' and cross the t's' by not indicating directly that such a 'derived right of residence' exists (failing to refer directly to the content of para. 31 and the Commission's submissions therein), but it instead indicated that Austria failed to fulfil its obligations under freedom to provide services, arising precisely from the failure to recognise such a 'derived right of residence'. Therefore, it actually acknowledged 'the derived right of residence' transferred by a service provider to its posted workers, although indirectly, without using that formulation. In my opinion, both the AG Rantos and the Court failed to take stock of that.

When it comes to the first ground, there is, in my view, no legal justification for referring *per analogiam* to another freedom (freedom of movement of persons / workers) in order to explain the 'derived right' in relation to the posting of workers, which belongs to freedom to provide service after all. Indeed, reference should have been made to the interpretation of this concept within the case law on the freedom to provide services - i.e. the *'parent'* freedom (including – a reference to

[57] See therein, para. 31.

its legal nature), the most authoritative for the interpretation of the Court's judgment at hand. The 'derived right' - in the context in question - has only appeared twice in the case law of the CJEU - in the judgment C-168/04 Commission v Austria and in the Vander Elst case. And it is to the latter case that the Court should refer - as the correct interpretation of this concept is contained there.

The Advocate General G. Tesauro in his Opinion in that case observed that *'examination of the French legislation at issue reveals no real difference between the situation of the Portuguese workers involved in the Rush Portuguesa case and that of the Moroccan workers involved in these proceedings: with regard to the application of the contested legislation in particular, the requirement that foreign workers should be recruited through the OMI and the prohibition on engaging staff without work permits each group is in fact in the same position. The Portuguese workers were subject to a transitional scheme which deprived them of the rights given to other Community workers by Articles 1 to 6 of Regulation (EEC) No 1612/68 (...) in particular, those workers did not receive equal treatment as regards the right to take up employment (as provided for by Article 1 of the regulation) and could therefore be subjected to "special recruitment procedures for foreign nationals" (....); on the other hand, those workers enjoyed full equality of treatment in the pursuit of employment (specifically, conditions relating to pay, dismissal, re-employment, social and tax advantages and so on) as provided for by Article 7 et seq. of the regulation. Precisely because they did not fall within the rules set out in Articles 1 to 6 of the regulation, the workers in question were not able to claim any original right not to have applied to them the provisions of the French Labour Code concerning the obligation to recruit through the OMI and to obtain work permits; however, they were able to claim a derived right in those terms, provided that they were employed by an undertaking established in another Member State, as was the case in the circumstances before the Court.*[58]

Similarly, the Moroccan workers employed by Vander Elst have no right to equal treatment vis-à-vis Community nationals, as far as the conditions and procedures relating to taking up employment [italics used in the original text of the Opinion by the AG Tesauro – MK] *are concerned.* They are entitled to equal treatment only as far as conditions of work or remuneration and social security arrangements are concerned, as provided for in Articles 40 and 41 of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco. *(...) From the point of view of the application of the French legislation on the right of aliens to take up employment, the status of the Moroccans employed by Vander Elst would therefore appear to be just the same as that of the Portuguese nationals*

[58] Cf. the Opinion of the Advocate General G. Tesauro in C-43/93 Vander Elst, para. 20.

employed by Rush Portuguesa. In both cases it was perfectly compatible with the status of such workers for the French authorities to control and limit their access to employment; (on the French labour market – MK) in both cases, however, the application of the national legislation was capable of conflicting with Article 59 et seq. of the Treaty, in so far as those workers were temporarily posted to France to provide services by undertakings established in other Member States.[59]

What appears from the above seems to be the right of the host Member States' authorities to control and limit access of TCN posted workers to employment (meant as making use of the freedom enshrined in Art. 45 et seq. TFEU) in the host Member States. Should such authorities try to extend their reach to TCN workers posted to their territory (and therefore – to another, different freedom of the internal market) – this should be viewed as the infringement of that very freedom - to provide services under Art. 56 TFEU.

3.2. Legal certainty over 'derived rights'?

What is more, the Court correctly conducted a proportionality test examining whether the requirement to obtain residence permits for posted TCNs, which are subject to high fees and are often issued for shorter periods than requested, constitutes an unlawful restriction on the freedom to provide services. The test showed that... such a national law requirement is indeed, without any doubt. an impermissible restriction on the freedom to provide services.

However, then, the Court ruled that *'ensuring that posted workers have legal certainty by enabling them more easily to establish that they are posted lawfully in the territory of the Member State in which the service is being provided and, accordingly, that they are staying there legally, it must be conceded that such an objective constitutes an overriding reason in the public interest* (see, to that effect, judgment of 19 January 2006, Commission v Germany, C-244/04, EU:C:2006:49, paragraphs 47 to 49)'.[60] In the eyes of the Court, *'it should also be noted, regarding the proportionality of such a measure, that obliging service providers established in a Member State other than that in which they supply their services to apply for a residence permit for each third-country worker that those service providers intend to post, in order that those workers may physically have a secure document, constitutes a measure appropriate for attaining the objectives of increasing legal certainty for posted workers* (sic!). *That permit, which must be drawn up, pursuant to Article 1(1) and Article 2(1) of Regulation No 1030/2002, (...), ensures*

[59] *Ibidem,* para. 20.
[60] See the CJEU judgement in C-540/22, para. 85.

recognition by the public authorities of the right of a foreign national who has attained the age of majority to reside in the national territory and proves that posted workers have a right of residence in the host Member State'.[61]

3.3. Carrying out services for less than free months entails 'derived rights'?

According to the Court, *'the other Member States cannot be criticised for requiring a posted third-country worker to obtain a secure document issued by their own services. Moreover, the fact that a third-country worker has a residence permit and permission to work in one Member State does not necessarily mean that that worker may stay in another Member State, even though he has been posted there for the purposes of a supply of services, as that other Member State may make that posting subject to meeting certain requirements, so long as the conditions recalled in paragraphs 74 to 76 of the present judgment are satisfied*.[62] Then, the Court conceded that '*it is true that, according to settled case-law, grounds of public policy may not be relied on against a person unless there is a genuine and sufficiently serious threat to a fundamental interest of society and, moreover, those grounds must not serve purely economic ends* (*see, by analogy, judgment of 2 March 2023, PrivatBank and Others, C-78/21, EU:C:2023:137, paragraph 62). However, the fact remains that it must be possible for Member States to carry out such checks*'. Here, the CJEU did not offer any justication. It only added that '[*a]ccordingly, the objective consisting in the need to check that the worker concerned does not represent a threat to public policy must be regarded as capable of justifying a restriction on the freedom to provide services'.*

This analysis let the CJEU to state that *'[a]s regards whether a measure consisting of obliging an undertaking established in another Member State to apply for and obtain a residence permit for each third-country worker that it intends to post to the host Member State for the purpose of carrying out a supply of services the duration of which is longer than three months is consistent with the principle of proportionality, not only does such an obligation appear appropriate for attaining that objective, it cannot be regarded as going beyond what is necessary for that purpose, provided that it entails refusing residence only to persons who represent a genuine and sufficiently serious threat to one of the fundamental interests of society. '*[63]

[61] *Ibidem,* para. 86.
[62] *Ibidem,* para. 88.
[63] *Ibidem*, paras. 94-96. See, also, to that effect, judgments of 21 January 2010, Commission v Germany, C-546/07, EU:C:2010:25, paragraph 49, and of 14 February 2019, Milivojević, C-630/17, EU:C:2019:123, paragraph 67.

The problem lies in the fact that, according to the judgment in C-168/04 Commission v. Austria - a finding by the sending state that a posted TCN is not a threat to public order by issuing him a residence permit in the sending state precludes the receiving state from examining the same again. The Court correctly cited this judgment, but only to then cancel it by invoking another judgment.... of 1977 (sic!) according to which *'the assessment of the threat which a person may represent for public policy may vary from one country to another and from one moment to another (...),*[64] *the fact that such a check exists cannot render irrelevant the carrying out, by the Member State in which the supply of services is to be carried out, of a check that the stay of the person concerned in its territory does not give rise to a risk of a threat to its own public policy, even though, pursuant to Article 21(1) of the CISA, such a check takes place only after a three-month period.*[65]

Finally, in response to a further question from the Dutch court, the CJEU concluded that the Dutch provision stating that while it is true that '*Article 9(1) of Directive 2014/67 provides that Member States may require service providers established in another Member State to declare the supply of services to the national authorities and, at that time, to declare the identity of the workers they intend to post, as well as the nature and duration of the activity* (accordingly, that provision offers those authorities, at the time of that declaration, the possibility of assessing the tasks to be performed during that posting and the time needed to complete them), *even where a Member State has availed itself of that possibility, the fact of providing that the period of validity of the residence permits granted may not, in any event, exceed a certain duration, which is determined by the piece of national legislation in question, does not in itself appear to be contrary to EU law, even if that period may thus be shorter than the period needed to carry out the service for which those workers are posted. Indeed, it is settled case-law that a national measure the purpose of which is not to regulate the conditions concerning the provision of services by the undertakings concerned and any restrictive effects of which on the freedom to provide services are too uncertain and indirect for it to be regarded as being capable of hindering that freedom, does not contravene the prohibition laid down in Article 56 TFEU'.*[66]

And, while the CJEU's jurisprudence to date has been pretty much unanimous in recognising that even giving the impression that there may be difficulties in completing the assignment for which the workers have been posted – constituted a breach of Art. 56, in its judgment in C-540/22 the Court considers that the

[64] See, to that effect, judgment of 27 October 1977, Bouchereau, 30/77, EU:C:1977:172, para. 34.
[65] Cf. the CJEU judgement in C-540/22, para. 98.
[66] *Ibidem,* para. 114-115.

expulsion of posted workers from the territory of the host Member State before the period necessary to carry out the work '*does not appear to infringe EU law'* because... '*the potential restrictive effects that* [such a provision] *may have on the freedom to provide services are simply, in the eyes of the Court - 'too uncertain and too indirect to be regarded as a measure likely to infringe that freedom'* (sic!).

4. CONCLUSION

In the light of the considerations raised in the article, one may say that, when navigating the intra-EU posting of TCNs' environment, the following borders (and features) could be envisaged. Firstly, the third-country national posted workers enjoy the rights arising from the posting Directives and from social security coordination Regulations (in the latter case – when they are are legally staying and working in the territory of the Member States.

Secondly – (TCN) posted workers do not intend to enter the labour market of the host Member State as, having completed their duties, they return to their country of origin or residence.

Thirdly, the Court of Justice in its recent judgment in C-540/22 ruled (wrongly, in my opinion) against the explicite use of *"derived right"* of third-country national posted workers, as it failed to refer directly to that legal institution, while at the same time actually upholding it (!) (using another formulation) in C-168/04. What is more, the Court turned to free movement of workers (persons) instead of the one belonging to free movement of services when intepreting the notion of 'derived rights'. One could say that it nevertheless upheld such a right in case of postings for a period of under 90 days. Such postings of TCNs were actually not the subject of the judgment, but the Court seems to have '*inadvertently*' stated that only stays of third-country nationals of more than 3 months were within the competence of the Member States, which means that stays of less than 3 months are not within that competence. Therefore, it may be said that the judgment actually reinforces the argument that, for stays of less than 3 months, Member States cannot insist on residence permits for posted third-country nationals, which is a positive '*side effect'* of the judgment in C-540/22.

A question remains of how this sits with the German Vander Elst visa mentioned herein? (or for that matter – with any domestic measures which infringe upon the freedom to provide services and are not justified. Well, it should result in Germany (and other EU Member States) adjusting its law and practice to enable a simple prior declaration certifying that the situation of the workers concerned is lawful, particularly in the light of the requirements of residence, work visas and social

security cover in the Member State where that provider employs them, as suggested by the Court.

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LEGAL ARGUMENTATION IN COURT DECISIONS

ABSTRACT

The primary goal of this paper is to point out the need to conduct empirical research into the arguments used in judicial decisions and how much. Studies on legal argumentation without empirical research represent only a theoretical framework that does not correspond to social reality and dynamics, primarily because the aforementioned studies view all arguments equally. Existing research, as well as the logic of judicial reasoning, suggests that in practice the opposite is true, and that some arguments are used much more often, while others are used rarely or almost never. In addition, we will answer questions that are closely related to research on the use of arguments, of which we highlight: which court decisions fall under the so-called easy cases, and which in the so-called hard cases, the question of the existence of legal gaps and the question of the rationality of the decision, and the latter includes the question of the value of the syllogistic form of reasoning. The author presents five relevant empirical studies - Lazzaro (1970), Struck (1971), Raisch (1988), Pokol (2000) and Harašić (2010). At the same time, the author suggests that when analyzing decisions, start from the list of arguments of individual theorists and suggests the most influential lists - Tarello's and Perelman's.

Keywords: *legal argumentation, empirical research, court decision, easy and hard cases, legal gaps, rationality.*

1. INTRODUCTION

Argumentation - as the presentation of claims for and against in a controversial situation, is possible in every human activity - everyday speech, philosophy, morality, law, politics, etc. We are interested in argumentation in law, and in the prototype of legal activity - judicial activity, that is, in judicial decisions. Making judicial decisions is not a simple job or skill - it requires extensive legal education and knowledge of how to write decisions and argue in doing so. A large number of authors were and are engaged in legal argumentation. Since in this paper we are

not dealing (primarily) with the theory of legal argumentation in general, but with the need for empirical research into it, we will only state that the theory of argumentation appears in time in the 5th century BC with the sophists (Protagoras, Georgija, Prodicus, Hippias),[1]all the way to authors in the 20th and/or 21st centuries: e.g. Viehweg, Toulmin, Hart, Perelman, Aarnio, Dworkin, Alexy, Peczenik, Atienza, Marmor, MacCormck, Kravietz, Klatt, Schauer, Shapiro, Walton, Sartor, Zarefski, Walton/Macagno/Sartor, Eisenberg, Barnes/Dharmananda/Moran.[2]

2. EMPIRICAL RESEARCH OF ARGUMENTATION

Studies on legal argumentation without empirical research on how to use arguments represent only a theoretical framework that does not correspond to social reality and dynamics, primarily because the aforementioned studies view all arguments equally. Existing research, as well as the logic of judicial reasoning, suggests that in practice the opposite is true, and that some arguments are used

[1] There are numerous works on the Sophists as the originators of legal argumentation, who worked from a rhetorical aspect, and we highlight the work here: Taylor, CC; Lee Mi-K., *Sophists,* Stanford Encyclopedia of Philosophy, 2020, Edward N. Zalta (ed .), https://plato.stanford.edu/entries/sophists/, February 20, 2025.

[2] Viehweg, T., *Topik und Jurisprudenz,* C. H. Beck, München, 1953; Toulmin, S., *The Uses f Argument*, Cambridge University Press, Cambridge, 1958; Hart, H. L. A., *The Concept of Law*, Clarendon Press, Oxford, 1961; Perelman, Ch., *Logique juridique. Nouvelle rhétorique*, Dalloz, Paris, 1976; Aarnio, *On Legal Reasoning*, Turun Ylioposto, Turku, 1977; same: *The Rational as Reasonable. A Treatise on Legal Justification*, Reidel Publishing Company, Dordrecht, 1987; Dworkin, R., *Takinng Rights Seriously*, Harvard University Press, Masschusetts, 1977; Alexy, R., *A Theory of Legal Argumentation. The Theory of Rational Duscourse as Theory of Legal Justification*, Clarendon Press, Oxford, 1989; Peczenik, A., *On Law and Reason*, Kluwer Academic Publishers, Dordrecht (ect.), 1989; Atienza, M., *For a Theory of Legal Argumentation*, Rechtstheorie, year 21, 4/1990, 393-413; *demokratischen Rechtsstaats*, Suhrammp Verlag, Frankfurt am Main, 1992; Marmor, A., *Interpretation and Legal Theory*, Clarendon Press, Oxford, 1992; MacCormick, N., *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, 1995; Kravietz, W. *et al*., *The Reasonable as Rational? On Legal Argumentation and Justification*, Duncker & Humbolt, Berlin, 2000; Klatt, M., *Making the Law Explicit; The Normativity of Legal Argumetation,* Hart Publishing, Oxford, 2008; Schauer, F., *Thinking Like a Lawyer. A New Introduction to Legal Reasoning*, Harvard University Press, Cambridge, Massachusetts, 2009; Shapiro, S. J., *Legality*, Harvard University Press, Cambridge, Massachusetts, 2011; Walton, D., *Methods of Argumentation*, Cambridge University Press, Cambridge, 2013; Sartor, G., *Defesaible Legal Argumentatio,* Handbook of Legal Reasoning and Argumentation, Springer, 2018; Zarefski, D.,*The Practice of Argumentation: Effective Reasoning in Communication,* Cambridge University Press, Cambridge, 2019; Walton, D.; Macagno, F.; Sartor, G., *Statutory Interpretation*, Cambridge University Press, Cambridge, 2021; Eisenberg, M. A., *Legal Reasoning*, Cambridge University Press, Cambridge, 2022; Barnes, J.; Dharmananda, J.; Moran, E., *Modern Statutory Interpretation*, Cambridge University Press, Cambridge, 2023.

much more often, while others are used rarely or almost never. We are aware of five relevant empirical studies. They were conducted by: Giorgo Lazzaro in the book *Argomenti dei giudici* from 1970,[3] Gerhard Struck in the book *Topische Jurisprudenz* from 1971,[4] Peter Raisch in the book *Vom Nutzen der überkommenen Auslegungskanones für die praktische Rechtsanwendung* from 1988,[5] Béla Pokol in the article *Statutory Interpretation and Precedent and Hungary* published in the magazine *Ostereuroparecht* from 2000,[6] Žaklina Harašić in the book *Court argumentation* from 2010.[7] We will present these studies.

2.1. Lazzaro

Lazzaro (1970) showed the use of five arguments in 105 decisions of the Italian Court of Cassation. It is clear that these are decisions from the period from 1948 to 1966, in which the use of the following arguments is shown: 1. the argument starting from general principles (in 22 decisions), 2. the argument of non-redundancy (20 decisions), 3. the historical argument (20 decisions), 4. the argument of preparatory works (19 decisions), 5. the apagogic argument, or more often called the argument *ab absurdo* (24 decisions). The decisions are taken from two_collections - *Foro italiano* and *Giuridico Italiano*. We can object to this research that it is not clear what method Lazzaro used to select the decisions. What makes Lazzaro's research different from Struck's, Raisch's and Pokol's, and similar to that of Harašić, which we will present below, is that he showed the use of all arguments with examples, by citing the part of the reasoning in which he found the use of the arguments.

2.2. Struck

Struck (1971) compiled a catalog of 64 legal topos that he found in the explanations of German legislative, judicial and administrative acts. Topoi are used mainly in the sense of standard arguments, and the catalogue should show the extent of their distribution. The catalogue was created, as the author says, based on some generally accepted principles of classification, such as standardity, their

[3] Lazzaro, G., *Argomenti dei giudici,* s. n. t, Torino, 1970.
[4] Struck, G., *Topische Jurisprudenz*, Athenaeum Verlag, Frankfurt am Main, 1971.
[5] Raisch, P., *Vom Nutzen der überkomennen Auslegungskanones für die praktische Rechtsanwendung,* Müller, Juristiche Verlag, Heidelberg, 1988.
[6] Pokol, B., *Statutory Interpretation and Precedent and Hungary*, Osteuroparecht, year 46, 3-4/2000, p. 262-277.
[7] Harašić, Ž., *Sudska argumentacija*, Pravni fakultet Sveučilišta u Splitu, Split, 2010.

diffusion, and importance in argumentation. The choice of topoi should correspond to their relevance. It is clear that these are topoi that are found in different branches of law, for example, in the criminal code, civil code, family law, cadastral law, and executive law. Some are considered so clear that they are rarely pronounced, for example: *lex posterior derogat legi priori*, *lex posterior derogat legi generali*, *lex iudicata pro veritate accipitur*, *ne ultra petita*, *audiatur et altera pars*, compensation, *casum sentit dominus*, private autonomy, purpose, interest, legal certainty. Struck's research, at least when it comes to those in court decisions, was not presented in the context of the reasoning of the decisions in which he found them, but rather he merely referred to those decisions. We consider this a shortcoming of Struck's research, regardless of the purposes he wanted and tried to achieve.

2.3. Raisch

In Raisch (1988) we find a presentation of the results of research on the methods of explaining the decisions of the senate of the German Federal Court/Civil Law Section (BGHZ), which he found in the official collections of that court. A total of 92 decisions were taken. Raisch himself sees the lack of selection of decisions from the collections, because "there remained hidden opinions of court members who did not find access to the written reasons for the verdict".[8] Raisch believes that it can be assumed that the senate that decided on publication did not attach importance to the omitted part for the course of interpretation.[9] Raisch examined four indicators of the reasoning of judgments: reference to precedents, citation of literature, the presence of the canon of interpretation, and the presence of, as he calls them, "other arguments." At the same time, he provided very detailed statistical data.[10] Precedents are referred to in 96.7% of decisions, while literature is cited in 89.1% of cases. Under the term canon of interpretation, he examined linguistic interpretation (which is represented in 60% of cases), historical interpretation (29.3%), systematic interpretation (69.3%), analogy (12%), and reference to principles of law (13%). Among the "other arguments," he classified three categories of arguments. The first group includes the argument from the nature of things, the argument from fairness, and the essence of the legal institution. The second type of "other arguments" he considers to be "traditional platitudes," by which he means the claims of the Senate about the evidence of a decision. For example: "There is no reasonable reason to decide differently"; "there is no reason that these principles should not apply here"; "there is no

[8] Raisch, P., *op. cit.* note 5, p. 84.
[9] *Loc. cit.*
[10] *Ibid*., pp. 88-92.

doubt…". Judges use platitudes in 36.9% of cases. In the third group of indicators, the author provides a number of topoi, such as "position of the parties' interests", "protection of trust", "experience", "legal certainty", etc. Although it is not sufficiently visible, it can be concluded that the topoi, together with the first group of other arguments, appear in 67.4% of cases.

2.4. Pokol

Pokol (2000) conducted a research on the interpretation of the law and precedents in 2000 decisions of the Hungarian higher courts. To investigate the interpretation of laws, Pokol took an equal number of civil and criminal cases from the official collection of the higher courts in Hungary, in the years 1977, 1988, 1990 and 1999. He analyzed linguistic interpretation, interpretation of legal dogmatics, interpretation referring to case law and precedents, interpretation referring to fundamental constitutional rights in the decisions of the Hungarian Supreme and Constitutional Courts, and interpretation referring to the will of the legislator. He did not investigate the reference to precedents in the same period, but starting from 1991 onwards, ending with 1999. Pokol seems to have investigated only cases in which judges name the aforementioned types of interpretation (or arguments). How Pokol expressed his results based on the data he provided about calling on precedents and case law. In 1991, there were 3 civil and 16 criminal decisions in which courts referred to precedents or case law; in 1992, the ratio was 8 civil decisions to 21 criminal decisions; in 1993, there were 4 of the former and 5 of the latter; in 1994, the ratio was 10 to 16, etc.

Pokol points out some other characteristics of the interpretation of Hungarian higher courts. For example, the courts are completely unfamiliar with referring to special monographs or legal studies, and he notes a small number of references to commentaries on laws. Furthermore, there are no cases of references to general legal principles, while references to precedents and case law are increasing. He also provides data that most decisions of higher courts consist of 1,200 to 1,500 words. As significant features, we would like to highlight: the author analyzes a large number of decisions; determines the period of research; demonstrates the use of some arguments with examples; and provides some characteristics of the style of Hungarian decisions.

2.5. Harašić

Harašić (2010) investigates judicial argumentation, or the use of arguments, in the last ten years of the last century (i.e. from 1990 to 1999). The research examines

court decisions in a sample of decisions in civil, commercial, criminal and administrative cases. This research, unlike previous ones, is based on two premises. First, it investigates the use of arguments in complete decisions. We emphasize this because publications in which decisions are published often state the legal position, with minimal factual information, or without it. And without factual information, we cannot fully understand the argumentation. Second, it investigates the argumentation in decisions of courts of all levels, and not, as is done in publications, where only the argumentation of higher courts is cited. Higher courts act on legal remedies and address only the issues raised in legal remedies. The decisions were selected using the stratified random sample method, while in previous research it is not sufficiently clear how the sample of decisions in which the argumentation is analyzed was formed. We found that most of the arguments that appear in the decisions from the sample are on Tarello's list (1980), which the author himself claims are argumentation schemes that have a long history and can therefore be considered specifically legal.[11] The main goal of the research was to determine how many arguments Croatian judges refer to in their decisions and how. Starting with the most numerous, we came to the following order of appearance of arguments: 1. argument *a contrario* (5.3%), 2. objective argument, argument from authority and argument based on general principles (3.8%), 3. systematic argument (2.5%), 4. argument *a simili ad simile* (1.3%), 5. argument *a fortiori* (1.0%), 6. argument from the nature of things (0.7%), 7. argument *a cohaerentia* (0.5%), while we did not find a single example of the use of historical argument. We also showed that, of the total number of decisions in which arguments are used (44.5%), there are more decisions in which arguments appear independently (37.4%) than those in which several arguments are combined (7.1%), again by degrees. So, empirical research on argumentation has the primary goal of establishing which arguments and how many of them are used by judges in their decisions. It should be said that we can understand argumentation in a narrower and broader sense. Argumentation in the narrower sense is the use of a certain argument by the judge in such a way that it is named, or it is not named, but it is beyond any doubt that it is the use of an argument that can be recognized by some list (e.g. Tarello's or Perelman's). However, in a broader sense, just by making decisions and justifying them, judges argue, regardless of whether their argumentation can be subsumed under one of the theoretically listed arguments. Furthermore, we believe that we should adopt two basic premises from Croatian empirical research: to investigate the use of arguments in complete decisions and in decisions of courts of all instances. Why in complete decisions? Because publications in which decisions are published often state the legal position, with minimal factual information, or without it. And without factual

[11] Tarello, G., *Argumentacija tumačenja i sheme obrazlaganja u pridavanju značenja normativnim tekstovima*, Zbornik za teoriju prava IV, Beograd, 1990, p. 242.

information, we cannot fully understand the argumentation. However, we should investigate the argumentation in decisions of courts of all instances, and not, as is done in publications, to cite only the argumentation of higher courts. Higher courts act on legal remedies and address only the issues raised in legal remedies.

3. LIST OF ARGUMENTS WHOSE USE WE ARE INVESTIGATING

The arguments we will analyze should be taken from a specific list or lists. The most influential are Tarello's and Perelman's lists. Tarello gave his list of arguments in the book *L'interpretazione della legge* from 1980.[12] The author himself says that these are argumentation schemes that have a long history, so they can be considered specifically legal.[13] That list consists of the following arguments: 1. argument *a contrario*, 2. argument *a simili ad simile*, 3. argument *a fortiori*, 4. argument of completeness of legal regulation, 5. argument of coherence of legal regulation, 6. psychological argument, 7. historical argument, 8. apagogic argument, 9. teleological argument, 10. economic argument, 11. authoritative argument, 12. systematic argument, 13. naturalistic argument, 14. argument fairness, 15. argument of general principles.

Unlike the arguments from Tarello's list, Perelman's list provides an overview of arguments that are applied both in legal discourse and outside of it. Those arguments are given in the book *Traité de l'argumentation. La nouvelle rhétorique* from 1958 co-authored with L. Olbrechts-Tyteca.[14] Its authors point out that, in contrast to the rules of formal logic, which must be respected in order for the conclusions to be valid, there are no necessary argumentation techniques in argumentation that would determine which arguments will be connected and in what way. It depends on the speaker's commitment.[15]All types of argumentation techniques can be divided into connection procedures and separation procedures. These two techniques work simultaneously and complementarily: the only difference is which one is placed in the foreground of the analysis.[16] Within connection procedures, we distinguish between quasi-logical arguments, arguments based on the structure of reality, and arguments that base the structure of reality. Each of the individual types of arguments can be further analyzed, so

[12] Tarello, G., *L'interpretazione della legge,* Giufré, Milano, 1980.
[13] Tarello, G., *Argumentacija …*, *op. cit.* note 11, p. 242.
[14] Perelman, C.; Olbrechts-Tyteca, L., *Traité de l'argumentation. La nouvelle rhétorique,* Presses Universitaires de France, Paris, 1958.
[15] Wilkinson, J.; Weaver, P., *The New Rhetoric: A Treatise on Argumentation*, London, Notre Dame, 1969, p. 130.
[16] *Ibid*., p. 43.

among quasi-logical arguments we distinguish those that resemble logical structures - arguments of contradiction and incompatibility, arguments of identity and transferability. The second group of quasi-logical arguments includes those that resemble mathematical relations - arguments based on the whole and the part, the argument of comparison and the argument of probability. Among the arguments based on the structure of reality, we distinguish three further groups of arguments: (1) arguments that apply to successive connections - the argument of causality, pragmatics, the argument of goals and means, etc., (2) arguments that apply to the connections of coexistence - the argument of procedures, the argument of a group member, the argument of being, of symbolization, and (3) complex arguments - the argument of double hierarchy and the argument of different degrees and order. Among the arguments that establish the structure of reality, two groups are distinguished: (1) the argument of example, illustration and role model, and (2) the argument of analogy and the argument of metaphor. Hasanbegović, among other objections to Perelman's classification, also objects to insufficient distinction, because there is an overlap of certain types of arguments, but he also finds the reason for this in that it corresponds to Perelman's understanding of the result, which is never one or correct, but can also be different.[17] No matter how exhaustive Perelman's list of arguments seems, it also proves to be elastic, so that almost any statement for or against someone's point of view could be declared an argument and classified into one of the categories of arguments.

Regarding the listing and classification of arguments, we agree with the following findings: first, it is impossible to exhaustively list all arguments, since in social relations there are many controversial issues and many value and interest positions about them, and then many reasons for and against these positions; secondly, there are no final arguments, i.e. such as would close the debate on any controversial issue and for which no counter-arguments could be given; thirdly, there are no such arguments, or few of them, which are binding for all subjects in a disputed issue.[18]

Is it possible to hierarchically rank all legal arguments (and arguments in general)? Visković maintains that a complete systematization of argumentation is unfeasible - because it is against its essential characteristic *of ars inventoriae* that it constantly creates new and changes relationships between existing arguments.[19] He believes that it would still be possible to compile a loose and flexible systematization, in which there could be room for legal argumentation using the highest and most

[17] Hasanbegović, J., *Perelmanova pravna logika kao nova retorika*, Istraživačko-izdavački centar SSO Srbije, Beograd, 1988, pp. 161, 162
[18] Visković, N., *Argumentacija i pravo,* Pravni fakultet u Splitu*,* Split, 1997, p. 50.
[19] *Ibid.*, p. 83.

convincing arguments, for all legal value principles and for the interest-target argument as an expression and means of value principles.[20]

4. EASY CASES AND HARD CASES

Another important question is whether a particular decision belongs to the cases, which are usually called *easy cases* or in cases, which are called *hard cases*. The idea of the difference between these cases is associated with the name of one of the insignificant authors of the 20th century – H. L. A. Hart. Hart himself is the first type cases most often used term *plain cases*, and for the second type he used the term *penumbral cases* ("shadowed cases").[21] Different terminology for the aforementioned cases has sharpest critic Hart's theories on *plain cases* and *penumbral cases* - Ronald Dworkin. He is particularly deals with cases other types and names them *hard cases*. First puck cases name *easy cases*.[22]

What is the difference between easy and hard cases? According to legal dogmatics, the difference between these cases is whether or not there is a written rule that represents the basis for decision-making.[23] Dworkin believed that not every judge could decide *hard cases*, so he introduces the fictitious judge Hercules, who is smart, intelligent and sharp and as such makes decisions in the most difficult cases, in which there is no legal norm that would be properly applied to the established factual situation (*hard cases*), and therefore, in such cases, he invents a legal principle that is applied to a specific case.[24]

We can also use simplicity/complexity of interpretation as a criterion for differentiation. Thus, we would say that *easy cases* are those in which the legal norm is completely or mostly clear, so it is possible to bring the facts of the case under it without interpretation or with a simpler interpretation. On the contrary,

[20] *Ibid*., p. 84.
[21] Hart, H. L. A, *Positivism and the Separation of Law and Morals*, in: Dworkin, R. (ed.), The Philosophy of Law, Oxford University Press, Oxford, 1977, same: *The Concept of Law*, Clarendon Press, Oxford, 1961, p. 123.
[22] Dworkin, R., *Law's Empire*, Fontana Press, London, 1986, p. 265.
[23] Pődör, L., *Easy Cases and Hard Cases – A General Overview of an Eternal Question of Legal Theory*, Elektronikus Periodika Archivum Honlap: https://dfk-online.sze.hu/koszonto, year 12, 1/2020, p. 55, 4 March 2025.
[24] Dworkin, R., *Taking Rights Seriously*, Duckworth, Cambridge, 1977. On Hercules, especially p. 105-130.

hard cases would be those in which the legal norm is not clear, which is why a more complex interpretation is needed.[25]

Although *clear cases* are relatively neglected in legal literature[26] and are not theoretically very interesting, they should be given due attention. In this sense, Wróblewski very conveniently expressed: "Ignoring simple cases causes great uncertainty... The immediate suitability of a norm to decide a standard case is a necessary basis for the normal functioning of any legal system, so the increase in the number of factual situations that cause doubt and therefore the need for legal argumentation is one of the signs that something has gone wrong in the legal system."[27]

Although we are talking about the interpretation of legal norms and legal principles here, it should be said that factual judgments, as well as conclusions and arguments in establishing facts, are no less important. And in order to arrive at those that constitute the factual situation, a qualification is carried out on the facts, which is sometimes really difficult to separate from interpretation. Factual problems can also influence the characterization of a case as "easy" or "hard". It seems that Pavčnik, for example, pointed out the importance of qualification when he said that "cases can be difficult" because they relate to complex life cases where it is difficult to establish which group of legally relevant facts is.[28]

In our opinion, the border between these two types of cases is sometimes difficult to determine, because a case that seems clear, turns out (most often in the arguments of the higher court) to be difficult and vice versa - a case that we considered "difficult" can become "easy". Are there, as Crowe calls them, *not-so-easy cases?*[29]

It is also important to answer the question whether the courts, in cases where the decision cannot be fully covered by legal norms, should be given discretion and

[25] Although the term "simple" like the term "complex", is not unambiguous. Thus Pődör says that a case can be easy for one judge and difficult for others. Thus Pődör, L., *op. cit.* note 23, p. 60.
[26] Crowe, J., *Not-So-Easy Cases*, Statute Law Review, year 40, 1/2019, p. 75.
[27] Wróblewski, J., *Meaning and Truth in Judicial Decision*, A-TIETO Oy, Helsinki, 1983, p. 34.
[28] Pavčnik, M., "Legal *Decisionmaking as a Responsible Intellectual Activity: A Continental Point of View"*, Washington Law Review, year 72, 2/1997, p. 501.
[29] The difference between easy, not-so-easy and hard cases is as follows: easy cases require the judge to merely *articulate* his decision, not-so-easy cases require the judge *to explain* his decision, and hard cases require the judge to *justify* his decision (Crowe, J., *op. cit.* note 26, pp. 75 et seq.).

whether it leads to arbitrariness?[30] There is a view that discretion leads to arbitrariness and that judges should therefore not be given discretion. According to the same, the fight for the principle of legality (and security) is also going against the expansion of the discretionary power of judges. [31]These authors find the theoretical basis for judicial arbitrariness in the school of free law, and later in the fanatical mysticism expressed through the *"Fuhrerprinzip"*, according to which judges apply the legal norm as the will of the national leader.[32] Experience has shown, however, that judicial arbitrariness is much more dangerous than legislative arbitrariness.[33]

We also state the contrary position that the fact that a judge is given discretionary powers does not mean arbitrariness at the same time. Thus, in Croatian procedural theory, it is considered that in situations where the law does not determine any rules of procedure, one cannot speak of a system of arbitrary treatment. Namely, the judge must justify his choice in the explanation of his decision; parties may criticize his choice; the higher court has the right to cancel the decision when it finds that the lower court, when choosing procedural methods, used those that are not in accordance with the spirit of the procedural system.[34] Dworkin's opinion is that in *hard cases,* in which the judge bases his decision on principles, and precisely because of the possibility of applying the principles, the need for the judge's discretion disappears.[35] It also assumes that judicial discretion is not necessary, especially in the European-continental system, because judges, at least in theory, are "operators" of a system designed by legal scholars and built by legislators, and there is only one correct solution to a legal problem.[36]

[30] According to Alexi, this question arises not only in cases where the decision cannot be covered by legal norms, but also when it cannot be covered by the rules of the legal method and the doctrines of legal dogmatism. (Alexy, R., *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification,* Clarendon Press, Oxford, 1989, p. 5.).

[31] Cappelletti, M.; Merryman, J. H.; Perillo, J. M., *The Italian Legal System. An Introduction*, Stanford University Press, Stanford, California, 1967, p. 154.

[32] *Loc. cit.*

[33] *Loc. cit.*

[34] Triva, S.; Dika, M., *Građansko parnično procsno pravo*, seventh edition, Official Gazette, Zagreb, 2004, p. 119.

[35] In cases where there is no legal norm on the basis of which the judge could resolve the case, one of the parties has the right to have the case resolved in its favor. The judge's duty is to discover the rights of the parties even in such "difficult cases" (the so-called *rights thesis*), and not, as Hart and the legal positivists hold, to retrospectively create new rights. See: Dworkin, R., *Taking …*, *op. cit.* note 24, pp. 81, 82.

[36] Apple, J. G.; Deyling, R. S., *A Primer on the Civil-Law System*, p. 30, https://www.govinfo.gov/content/pkg/GOVPUB-JU13-PURL-LPS55055/pdf/GOVPUB-JU13-PURL-LPS55055.pdf, February 28, 2025.

5. LEGAL GAPS

When a judge encounters a social relationship that (in his opinion) represents a legal gap, he is obliged to fill it. Why is the issue of legal gaps important? As we will see below, there are two extreme positions – from the fact that legal gaps are numerous to the fact that legal gaps do not exist. The concept of legal gaps is very controversial.[37] Three types of legal gaps are usually distinguished. In its basic form, a legal gap implies an important and conflicting social relationship that is not regulated by legal norms, and due to its importance it should be.[38] These are normative legal gaps. The second are technical legal gaps – here the legal relationships are regulated, but technically insufficiently (due to, for example, the lack of some important element of the norm).[39] The third are value-based legal gaps, in which case there is a position of some subjects that the norm regulates a certain social relationship in a value-deficient, above all unjust, way.[40] To this understanding of legal gaps, let us add that the subjective positions of various interpreters (including judges) on the (non)existence of gaps can be different in the same case.

As for the understanding of the number of legal gaps, Kantorowitz's position is well-known, that there are as many gaps as there are words in the law.[41] Vasić, Jovanović and Dajović, on the other hand, believe that legal gaps not only exist, but also necessarily appear due to the nature of law. They point out that this is necessary, on the one hand, due to the legislator's failure to regulate all aspects of

[37] Bobbio says that the problem of legal gaps becomes historically relevant from the moment when a legal source, i.e. the law, has surpassed all others, so that legislators take the position that their creations are sufficient to resolve all present and future disputes (Bobbio, N., *Lacune del diritto,* in: Comanducci, P.; Guastini, R., (eds.), *L'analisi del ragionamento giuridico*, year II, Giappichelli, Torino, 1989, p. 189.

[38] Visković, N., *Teorija države i prava,* Birotehnika, Zagreb, 2006, p. 260. Comanducci believes that the problem of legal gaps, from the judge's point of view, arises when the judge believes that a certain behavior, relevant to the case he has to resolve, is not defined by law as either prohibited, mandatory, or permitted (Comanducci, P., *Sulle lacune: note in margine a Bobbio*, in: Comanducci, P.; Guastini, R., (eds.), L'analisi del ragionamento giuridico, year II, Giappichelli, Torino, 1989, p. 211. Guastini, on the other hand, defines them as the phenomenon where the legislator regulates a series of factual situations, but fails to regulate one or more of their possible combinations (Guastini, R., *Tumačenje i argumentacija* (from Italian translated by L. Burazin), Naklada Breza, Zagreb, 2023, p. 367.

[39] Visković, N., *Teorija …*, *op. cit*. note 38, p. 236. Guastini believes that there is a technical gap in an order when it lacks a norm whose existence is a necessary condition for the ability of some other norm to operate (Guastini, R., *op. cit.* note 38, p. 132).

[40] Visković, N., *Teorija …*, *op. cit.* note 38, p. 236. Or as Guastini says, it is about the non-existence of a norm that – according to the subjective ethical-political (i.e., value) preferences of the interpreter – should exist (Guastini, *op. cit.* note 38, p. 133).

[41] Pokrovac, Z., *H. U. Kantorowitz i slobodnopravni pokret* (doctoral dissertation), Split, 1995, p. 264.

a relationship with general norms and all its peculiarities, and because the legislator cannot foresee the future and every change that occurs in a relationship or to anticipate new relationships that will yet appear.[42] Similarly, Visković says that the starting point is that law strives to fully encompass the relationships that are its subject, and which are important for the survival of society, contain strong conflicts of interest and are externally controllable, but due to their complexity, dynamism and variability, this does not succeed in all cases, so social relationships remain unregulated or insufficiently regulated.[43]

The possibility of legal gaps has not always been recognized. According to the oldest, but still present, legalistic conception, law is understood as an expression of the will of the legislator, and then the legislator's request that all legally relevant relations be regulated by law should be respected. Therefore, the legal system is complete and there are no gaps because the legislator orders it so.[44] The conception that understands law as the unity of general and individual norms, and in doing so particularly emphasizes the role of the judge, says that legal gaps exist with respect to the law, but not with respect to the law as a whole, since the judge also creates law and must resolve every disputed legal case.[45]

Several means are provided for filling the gaps. First and foremost is certainly the argument from analogy, which is sometimes considered a procedure of interpretation in the strict sense, and not for the method of eliminating gaps.[46] Two of its forms are usually highlighted – *analogia legis*, where the gap is filled by applying a legal provision, and *analogia iuris*, where the gap is filled by applying some principle to an unregulated relationship.[47] Analogy comes into play only if there is an essential similarity between the non-normative and the normed relationship, which is determined by the objective interpretation.[48] Furthermore, in legal theory, depending on the legal systems, the following means for filling the

[42] Vasić, R.; Jovanović, M.; Dajović, G., *Uvod u pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2014, p. 367.
[43] Visković, N., *Teorija …*, *op. cit.* note 38, p. 234.
[44] Only those social relations that the legislator has regulated are legally relevant, and "legal gaps do not exist either because the legislator is indifferent to all other relations or because he has tacitly qualified all other relations as permissible " *(*Gény F., *Methodé d' interpretation et sources du droit privé positif*, LGDJ, Paris, 1919, t. I., p. 70 et seq).
[45] Visković, N., *Pojam prava*, second edition, Logos, Split, 1981, p. 248. Comanducci hold that to problem legal emptiness , looking with location judge reports then when referee hold that certain behavior , relevant for case who must be resolved, is not determined by law as either prohibited, mandatory, or permitted (Commanducci, P., *op. cit.* note 38, p. 211).
[46] We hold that in practice there is no strict boundary between interpretation by means of *an a simili argument* and filling in gaps, and that when a judge uses an argument from analogy, he is simultaneously filling in a legal gap.
[47] E.g. Harašić, Ž., *op.cit*. note 7, p. 109.
[48] *Ibid.*, p. 56.

gaps are mentioned: principles of natural law, general legal principles, norms from comparative law, rules of social morality, norms that used to be valid, customs, norms that a judge makes based on a sense of fairness, norms recommended by legal science, norms of natural law, argument *a fortiori,* argument *a contrario*.[49] From the perspective of parliamentary sovereignty (in the continental European system), it would be most desirable for legal gaps to be filled by legislative intervention, but since it is often slow and belated, it is used much less frequently to fill gaps.

Perelman asks whether a gap can be addressed not only when the law is silent, but also when it is unclear.[50] In doing so, Perelman raises the question of the distinction between interpretation (when the law is unclear) and gap-filling (when the law is silent). This is usually resolved by saying that interpretation presupposes that there is a legal provision for the case to be decided, while gap-filling presupposes that no provision is provided for the case, and then some legal principle must be used.[51] It is possible, as Perelman says, that there is a vacillation in legal systems, so that what one system considers interpretation may be qualified as gap-filling in another.[52]

This issue can also be considered from the following aspect. The position that proceeds from the fact that filling legal gaps is separated from interpretation, starts from the fact that the limits of interpretation are the limits of the text of the norm. The meaning that would be attached to a norm, which is linguistically untenable, is not the meaning that is arrived at by interpreting the law. When filling a legal gap, the judge does not stick to the text of the norm, but goes beyond its framework and gives a new one: when interpreting, he gives the meaning of the norm.[53] Thus, Zaccaria says that the argument based on analogy has a productive function and has the effect of normative invention through finding and formulating a new norm, and expands the descriptive description of the subject or type of subjects in a given provision and includes subjects or types of subjects that are not strictly

[49] On other legal means, apart from the argument of analogy, see: Ost, F; Van der Kerchove, M., *Entre la lettre et l'esprit. Les directives d'interpretation en droit*, Bruylant, Bruselles, 1989, p. 3; Visković, N., *Pojam …, cit*. note 45, p. 250; D'Alessio, R., *Completezza, chiusura e integrazione dell'ordinamento*, in: Modugno, F. *Appunti per una teoria generale del diritto*, Giappichelli, Torino, 1997, p. 253-280.; Vasić, R.; Jovanović, M.; Dajović, G., *op. cit.* note 42, p. 372, 373); Lukić, R. D., *Uvod u pravo*, second edition of the 1995 edition (edited by J. Hasanbegović and M. Božić), Official Gazette, Beograd, 2022, p. 347.
[50] Perelman, C., *Pravo, moral i filozofija*, Nolit, Beograd, 1983, p. 134.
[51] For example, La Torre, M.; Pattaro, E.; Taruffo, M., *Statutory Interpretation in Italy*, in: MacCormick, N. D.; Summers, R. S., (eds.), *Interpreting Statutes*, Aldershot (etc.), 1991, p. 218; Vrban, D., *Država i pravo,* Golden Marketing, p. 461; Vasić; Jovanović; Dajović, *op. cit*. note 42, p. 367.
[52] Perelman, C., *op. cit*. note 50, p. 135.
[53] Vasić, R.; Jovanović, M.; Dajović, G., *op. cit*. note 42, p. 371.

linguistically covered, but are "similar".[54] In addition, the judge always interprets the law, but does not have to fill legal gaps, and sometimes he may not. as, for example, in criminal law.

Guastini, on the other hand, believes that in order to avoid a legal gap and resolve the case, we should probably interpret the normative text, i.e. go back to the text and interpret it differently.[55] That is, he believes that just as gaps can be avoided through interpretation, they can in some way be produced through interpretation: in the sense that available normative texts can be interpreted in such a way that a gap appears.[56]

6. RATIONALITY

The conclusion of a court decision should be rational, in the sense that it should be reasons (arguments) on which the decision is based should be stated. Otherwise, it is not reasoned, and therefore not rational. In doing so, we assume that legal provisions (norms) are mandatory arguments. In addition to them, there are also optional or supplementary arguments, for example the argument *a contrario*, a. *a simili ad simile*, a. *a fortiori*, etc., which are used to interpret legal provisions (norms).

The idea of rationality is one of the most important ideas associated with law. Rationality in legal, especially judicial, work is most often discussed in connection with interpretation. [57] For example, the same text can be interpreted in completely different ways by different courts. In doing so, each judge is convinced of his own rationality. Can they all be rational if they give different interpretations of the same text? This is believed to be possible because there are no generally accepted criteria for the rationality of legal interpretation.[58]

[54] Zaccaria, G., *Analogy as Legal Reasoning – The Hermeneutic Foundation,* in: Nerhot, P., (ed.), Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics, Springer Science+Business Media BV, 1991, p. 57.
[55] Guastini, *op. cit*. note 38, p. 129.
[56] Guastini *op. cit*. note 38, p. 131.
[57] Of course, interpretation is very close to argumentation. Namely, arguments are the means used by interpretation. As Novak states, "one of the central questions of argumentation theory is when legal reasoning is considered rational." (Novak, M, *Legal argumentation in practice,* Planet GV, Ljubljana, 2010, p. 12). On rationality in argumentation see also: Kauffeld, JF, *Two views of the Necessity to Manifest Rationality in Argumentation*,
https://scholar.uwindsor.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1334&context=ossaarchive, February 10, 2025.
[58] Malec, A., *The Is-ought Problem and Legal Rationality*, Studies in Logic, Grammar and Rhetoric, year 11, 24/ 2007, p. 9.

When we talk about rationality, we usually mean logical rationality. *Logical rationality* says that the conclusion is valid if it logically follows from certain premises, which are logically consistent and linguistically correct. It sets a minimum logical requirement for the regularity of legal reasoning.[59] This type of rationality belongs to the field of formal logic, since the truth of the conclusion is based only on formal assumptions (premises). [60] Related to logical rationality, the prevailing view is that the syllogism is an indicator of the logical correctness of the judgment. [61] This also applies to the so-called easy cases and the so-called hard cases - how we divided them considering their complexity. We defined easy cases as those in which the legal norm is completely or mostly clear, so it is possible to subsume the facts of the case without or with a simpler interpretation (argumentation), while hard cases would be those in which the legal norm is not clear, so a more complex interpretation (argumentation) is needed.[62] Any conclusion - whether in the case of clear or difficult cases, can be presented in the traditional form of syllogism (so-called simple pimping). [63]If the case is more complex, in order to preserve the form of the syllogism, the above premise containing the legal norm should be formulated as a complex sentence. If we do not want to present the case in the form of a syllogism, we can also present the conclusion by introducing an additional (or additional) premise - the so-called complex (sophisticated) justification.[64]

7. EXAMPLE OF ARGUMENTATION IN COURT DECISION

Here is an example of a verdict (UsZg, UsI-1753/2019-12 of October 14, 2020) in which the procedure is being conducted to determine the utility contribution for the construction of a building and the administrative court of first instance - used three arguments: systematic argument, authority argument and target argument. In this judgment, the court explicitly reasons in two places (I/ and II) with an

[59] "Logical necessity is an important condition of rationality." - Novak, M, *op. cit.* in note 57, p. 39.
[60] Cerar, M, *(I)rationality of modern law,* BONEX ZALOŽBA, Ljubljana, 2001, p. 125.
[61] Uzelac, on the other hand, considers the doctrine of legal syllogism to be "obsolete and outmoded". Uzelac, A., *Istina u sudskom postupku* (master's thesis), Zagreb, 1992, p. 22.
[62] *Supra* note 25.
[63]According to the point of view of some authors, all ways of justifying a court decision can be reduced to three models: the model of simple pimping, complex or sophisticated pimping, and discursive alternative pimping. V. Summers, R.; Taruffo, M., *Interpretation and Comparative Analysis*, in: MacCormick, N. D.; Summers, R. S. (ed.), *Interpreting Statutes*, Aldershot (etc.), 1991, p. 492.
[64] *Loc. cit.*

isthematic argument, since the provisions of the mentioned laws are interpreted by bringing them into relation:

I/ "Article 23, paragraph 1 of the Act on Municipal Economy (Official Gazette, No. 36/95, 109/95, 21/96, 70/97, 128/99, 57/00, 129/00 and 59/01 - hereinafter referred to as the Act), stipulates that municipal contributions are public monetary payments paid for the construction and use of facilities and devices of the municipal infrastructure referred to in Article 30, paragraph 1 of this Act." Therefore, the court connects Article 23, paragraph 1, and Article 30, paragraph 1 of the Act.

Article 2, paragraph 6 of the General Tax Act (Official Gazette, No. 127/00, 86/01 and 150/02) stipulates that contributions are monetary payments paid for the use of certain services or the exercise of rights.

Comparing the aforementioned provision of the General Tax Law with the aforementioned Article 23, paragraph 1 of the Law, ... it is evident that "a fee paid for the construction and use of facilities and devices of communal infrastructure" is precisely "a monetary fee paid for the use of certain services."

Article 2, paragraph 6, and Article 23, paragraph 1 of the Act are linked.

II/ "Article 90, paragraph 2 of the General Tax Act stipulates that the statute of limitations for the determination of tax liabilities and interest begins to run after the end of the year in which the tax liabilities and interest should have been determined.

Article 92 of the General Tax Act stipulates that the absolute limitation period for the tax authority's right to determine tax liability and interest, initiate misdemeanor proceedings, collect taxes, interest, enforcement costs and fines, and the taxpayer's right to a refund of taxes, interest, enforcement costs and fines begins six years from the date on which the limitation period first began to run.

Article 24, paragraph 2 of the General Tax Act stipulates that rights arising from tax-debt relations shall expire upon statute of limitations.

Having observed the above provisions, the Court concludes that the statute of limitations began to run … and has expired … Therefore, this Court concludes that the issuance of a decision on the determination of the utility contribution after the absolute statute of limitations has expired is unlawful …"

Here the court connects Article 90, paragraph 2, Article 92 and Article 24, paragraph 2 of the Act.

The second argument used by the court is the argument of authority referring to the decision of the Constitutional Court, which reads:

"*The decision of the Constitutional Court of the Republic of Croatia, Case No. U-III-1104/2017, dated 13 September 2017, adopted a binding legal position stating* that the communal fee, or communal contribution, is a monetary public benefit which, as a form of public benefit, falls within the scope of Article 2, paragraph 6 of the General Tax Act."

In the third case, we show the use of the target argument:

"*The meaning of* the limitation *period is* that no one can indefinitely take the right to claim or establish a specific benefit from another person, because such a circumstance would lead to the consequence that the debtor's successor, even after fifty years, would be determined to have a certain obligation that he does not even know exists."

We believe that the use of the objective argument is undoubtedly supported by the fact that the court here views the legal institution of limitation in general with regard to its purpose, goal, or, as the court states, "meaning." That purpose is: establishing legal certainty and certainty.

So, we quoted the part of the decision from which the argumentation is visible. Let's note that this is argumentation in the narrower sense, it means the use of a certain argument by the judge in such a way that it is named, or it is not named, but it is beyond any doubt that it is the use of an argument that can be recognized by Tarell's list. Based on the criteria of argumentation complexity and the use of three arguments, this is a hard case. The conclusion of the decision is explained and therefore rational.

8. CONCLUSION

In this paper, we have pointed out the need to conduct empirical research on argumentation on which arguments and in what number are used by judges in making decisions. As we have said, studies on legal argumentation without empirical research represent only a theoretical framework that does not correspond to social reality and dynamics, primarily because the aforementioned studies view all arguments equally. Existing research, as well as the logic of judicial reasoning, suggests the hypothesis that in practice the opposite is true, and that some arguments are used much more often, while others are used rarely or almost never. In addition, we answered questions that are closely related to research on the use of arguments, of which we highlight: which court decisions fall under the so-called "easy cases", and which in the so-called "difficult cases", the question of the existence of legal gaps and the question of the rationality of the decision, and the latter includes the question of the value of the syllogistic form of reasoning. The author presents five relevant empirical studies - Lazzaro (1970), Struck (1971), Raisch (1988), Pokol (2000) and Harašić (2010), with their advantages and disadvantages. The author suggests that when analyzing decisions, one should start from the lists of arguments of individual theorists and suggest the most influential lists – Tarello's and Perelman’s.

We have shown with an example, how we think arguments in court decisions should be analyzed. We believe that the analyzed case is a hard case.

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Review paper

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LIABILITY FOR DAMAGE CAUSED BY ARTIFICIAL INTELLIGENCE IN COMMERCIAL RELATIONSHIPS*

ABSTRACT

This paper examines the legal framework for liability arising from artificial intelligence (AI) systems in commercial relationships within the Slovak Republic and the European Union. It analyzes the adequacy of current regulations in addressing the unique challenges posed by AI implementation in business contexts. The study employs a comparative legal analysis method to evaluate the objective liability approach in the Slovak Commercial Code against the proposed EU Directive on AI Liability, which introduces a rebuttable presumption of causality. Through critical assessment, the paper identifies potential legislative gaps and their implications for legal certainty and stakeholder protection. The research contributes to the ongoing discourse on AI-related legal challenges by proposing solutions to address these gaps, including the creation of specific AI liability provisions within the Commercial Code. These recommendations aim to balance legal certainty and protection for injured parties with support for AI innovation, providing a foundation for future legislative developments in this rapidly evolving field.

Keywords: *Artificial intelligence, liability, commercial law, EU Directive, legal framework*

1. INTRODUCTION

Artificial Intelligence (AI) is increasingly becoming an inseparable part of business operations. Its widespread adoption not only simplifies our lives but also brings significant benefits in terms of innovation and enhanced work efficiency. However, it also raises ethical and legal concerns, particularly regarding liability for damages caused by AI. Current Commercial law frameworks face new

challenges in relation to AI systems, which hold a certain degree of autonomy and the ability to learn independently. This paper examines the current legal framework in the field of AI liability in commercial relationships. The paper investigates how current legal frameworks in the Slovak Republic and the European Union address AI liability in commercial relationships. Additionally, evaluates whether these existing legal frameworks are sufficient to handle the unique challenges in connection with damages caused by AI systems. The research considers the complexities of AI systems, such as their autonomy and self-learning capabilities, which can complicate traditional notions of liability. By comparing Slovak and EU approaches, the study aims to identify potential gaps in legal protection and propose solutions for a more comprehensive framework governing AI liability in Commercial law.

The main objective of this paper is to critically evaluate the adequacy of the current legal framework for liability in the Slovak Republic and the European Union concerning damages caused by AI systems in commercial relations. Based on this objective, we have formulated the following hypothesis: The current legal framework for liability in the Slovak Republic and the European Union lacks sufficient flexibility and specificity to effectively cover all aspects of liability for damages caused by AI systems in commercial relationships, potentially leading to legal uncertainty and gaps in the protection of injured parties.

This paper employs a qualitative research approach, primarily utilizing doctrinal legal analysis and comparative legal methods. The methodology includes a comprehensive literature review of academic sources, legal texts, and policy documents related to AI liability in commercial relationships. An in-depth legislative analysis focuses on current legal frameworks in the Slovak Republic and the European Union, with particular attention to the Commercial Code and the proposed AI Liability Directive. The study conducts a comparative analysis between Slovak and EU approaches to AI liability, identifying similarities, differences, and potential gaps in legal frameworks. A critical evaluation assesses the adequacy and effectiveness of existing and proposed legal mechanisms in addressing AI liability issues in Commercial law. Finally, the paper synthesizes findings to formulate conclusions and recommendations for potential legislative amendments.

2. WHAT IS THE LEGAL STATUS OF ARTIFICIAL INTELIGENCE IN COMMERCIAL RELATIONSHIPS?

Despite the term AI having been in use for approximately 70 years, a unified scientific definition has yet to be established. With the adoption of the Artificial Intelligence Act, EU policymakers have formulated a legislative definition for the concept of an AI system. This represents the first statutory definition of the term, which is defined in Article 3(1) of the Artificial Intelligence Act (hereinafter: AI Act) as follows: AI system means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.[1]

For the purpose of defining the legal status of AI, it is crucial to focus on the fact that according to the cited regulation, an AI system is software, which currently excludes the issue of AI's legal personhood. We perceive AI more as an object that can be the subject of commercial relationships. We can state that currently, AI is not granted legal personhood under current legislation. AI is not considered a natural or legal person, and therefore cannot independently participate in legal relationships, be a party to a contractual relationship, sign contracts, or bear responsibility. We are of the opinion that granting legal personhood to AI could lead to a situation where people who develop or use AI might avoid their own liability for potential damages caused by AI.

AI systems can be utilized not only internally within companies but also as the subject of contractual agreements with external parties. Currently, numerous AI-based products and services are offered to consumers, including autonomous vehicles, translation applications, and monitoring devices. This expanding market demonstrates the growing integration of AI technologies across various sectors, highlighting the need for clear legal frameworks to govern these commercial relationships and ensure consumer protection.[2]

* The paper was prepared within the project APVV-21-0336 "*Analysis of judicial decisions using artificial intelligence methods*".

[1] Article 3 of Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJ L, 2024/1689, 12.7.2024, hereinafter: AI Act.

[2] Ebers, M., *Liability for artificial intelligence and EU consumer law*, 12 [2021] JIPITEC 204 para 1. p. 207, available at: https://heinonline.org/HOL/LandingPage?handle=hein.journals/jipitec12&div=22&id=&page=, January 4, 2025.

Considering this development, several questions and issues arise. One of the key concerns is determining the conditions under which a commercial enterprise can be held liable to consumers for damages caused by AI-based products or services. In connection with this issue, the following section will examine the current legal framework governing AI liability in more detail.

3. NAVIGATING THE LEGAL LABYRINTH

In the following section of our paper, we will examine the current legal framework governing this issue in more detail. This analysis will consider the unique challenges posed by AI systems, including their autonomous decision-making capabilities and the potential for unforeseen consequences, in order to establish a comprehensive understanding of the existing liability legal frameworks in this rapidly evolving field.

3.1 Current Framework for AI Liability In Slovak Republic

AI has become an integral component of modern business practices, enabling unprecedented levels of efficiency and innovation. From generative AI tools crafting marketing materials to sophisticated machine learning algorithms optimizing supply chains, companies increasingly leverage AI to gain a competitive edge. This technological revolution spans across various sectors, transforming traditional business models and creating new opportunities for growth and development.[3] However, the widespread adoption of AI in commercial settings also brings significant responsibilities, particularly in the realm of business law relationships. As AI systems become more autonomous and influential in decision-making processes, questions of liability, ethical considerations, and legal compliance come to the forefront. The complexity and opacity of AI systems often termed the "black box effect"[4] create challenges in attributing fault, as their decision-making processes may deviate from original

[3] Goldenberg, D., *AI Terms in Commercial Agreements: Safeguarding Your Business in the Era of Artificial Intelligence*, VLP Law Group, 2 December 2024, available at: https://www.vlplawgroup.com/blog/2024/12/02/ai-terms-in-commercial-agreements-safeguarding-your-business-in-the-era-of-artificial-intelligence-a-blog-post-by-david-goldenberg/, January 4, 2025.
[4] Cassauwers, T., *Opening the 'black box' of artificial intelligence,* European Commission, available from: https://projects.research-and-innovation.ec.europa.eu/en/horizon-magazine/opening-black-box-artificial-intelligence, February 22, 2025.

programming.[5] Businesses must navigate these complex issues to harness the full potential of AI while mitigating associated risks and ensuring adherence to evolving regulatory frameworks.

AI is an exceptional tool, but it is not flawless. From a legislative perspective, we recognize that one of the most significant challenges in the field of AI is determining liability for damage caused by AI systems. The legal framework for liability for damages under the Commercial Code[6] provides us with clear rules. According to Paragraph 757 of the Commercial Code (CC), the provisions of Paragraph 373 et seq. of the CC apply similarly to liability for damage caused by breach of an obligation stipulated by the CC. The Commercial Code contains general legal provisions on liability for damage arising from breach of obligations in commercial contractual relationships, i.e., contractual liability, in Paragraphs 373 to 386. This regulation is conceived as objective liability, which is moderated by exculpatory reasons specified in Paragraph 374 of the CC. While the Slovak strict liability regime offers advantages for claimants, it lacks provisions addressing AI-specific challenges such as emergent behaviour or distributed responsibility across developers, users, and operators. In special cases of contractual liability for damage, the law provides for deviations from this general regulation, allowing flexibility in application to various types of commercial relationships and situations.[7]

Nevertheless, in cases of damages caused by AI systems, it is not always clear how these rules can be applied given the complexity of AI systems themselves, their autonomy, self-learning capabilities, as well as the number of individuals and companies involved in the development and operation of AI systems.[8] For example, an AI-powered trading algorithm might make unconventional investment decisions that result in significant financial losses. Such scenarios exemplify the "emergent behaviour" of AI systems, where outcomes deviate unpredictably from initial programming, complicating causal attribution[9]. Determining whether the AI developer, the company using the AI, or the AI itself should be held liable becomes a complex issue.[10]

[5] Garcia, B., *The regulation of AI liability in Europe: A critical overview of two recent directive proposals – the (new) AILD and the (revised) PLD*, e-Publica, 11(3), 2024, p. 30.
[6] Act No. 513/1991 Coll. Commercial Code.
[7] Ovečková, O., *Tort liability for damage in the Commercial Code (§ 757 - unresolved problems*), Legal Horizon, 103, 2020, No. 6, p. 421.
[8] Burylo, Y., *Civil liability for damage caused by artificial intelligence: the modern European approach.* Entrepreneurship, Economy and Law, 6, 2022, p. 6, available at: http://pgp-journal.kiev.ua/archive/2022/6/1.pdf, January 25, 2025.
[9] Garcia, B., op. cit., p. 28 – 41.
[10] Dou, W. W.; Goldstein, I.; Ji. Y., *AI-Powered Trading, Algorithmic Collusion, and Price Efficiency*, November 9, 2023, available from:

3.2 Current Framework for AI Liability In European Union

While the AI Act establishes risk classification and operational requirements for AI systems, it does not directly regulate liability for AI-induced damages. The EU addresses this gap through the proposed AI Liability Directive,[11] which represents the first comprehensive attempt to regulate non-contractual civil liability specifically for AI.[12]

We have identified several key areas in the proposal AILD relating to AI liability, which we see as crucial, and these are in particular Articles 3 and 4. The Article 3 of the AILD addresses the disclosure of evidence and introduces a rebuttable presumption of non-compliance. National courts are empowered to order the disclosure of relevant evidence about specific high-risk AI systems suspected of causing damage. This can be requested by a potential claimant who has previously been refused such evidence, or by a claimant in an ongoing case. The request must be supported by facts and evidence demonstrating the plausibility of the claim for damages. The disclosure is limited to necessary and proportionate evidence to prevent blanket requests, and safeguards are included to protect legitimate interests such as trade secrets and confidential information. A rebuttable presumption of non-compliance with a duty of care is introduced for defendants who fail to disclose or preserve evidence when ordered.[13] We can say that this article aims to balance the need for claimants to access relevant information with the protection of defendants' interests and the efficiency of court proceedings.

Article 4 of the AILD introduces a rebuttable presumption of a causal link in cases of fault involving AI systems. This presumption applies when specific conditions are met, including the demonstration of the defendant's fault, the reasonable likelihood that the fault influenced the AI system's output, and proof that the AI system's output caused the damage. For high-risk AI systems, providers must comply with specific requirements related to data quality, transparency, human oversight, accuracy, robustness, and cybersecurity. Users of high-risk AI systems must adhere to proper usage instructions and monitoring. The presumption doesn't apply if the defendant can show that evidence is reasonably accessible to the claimant to prove causality. For non-high-risk AI systems, the presumption only

https://www.law.nyu.edu/sites/default/files/DGJ_AI_Trading_Collusion_Market%20Manipulation_Penn_NYU_Law.pdf, February 11, 2025.

[11] Directive on liability for damage caused by artificial intelligence, available from: https://www.ai-liability-directive.com/, January 5, 2025 (hereinafter: AILD).

[12] Garcia, B., *op. cit.,* p. 30.

[13] Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence. COM (2022) 496 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0496.

applies if the court deems it excessively difficult for the claimant to prove causality. In cases of personal, non-professional use, the presumption applies only if the user materially interfered with or failed to determine the AI system's operating conditions. The defendant retains the right to rebut this presumption.[14] This article aims to balance the interests of claimants and defendants by easing the burden of proof for claimants while allowing defendants to challenge the presumption, thus addressing the unique challenges posed by AI systems in liability cases.

To sum up, AILD represents a significant step in European legislation, addressing the challenges of liability in AI-related damages. It introduces two key innovations: the disclosure of evidence and a rebuttable presumption of causality. In the context of AI liability issues, it is also worth mentioning the Revised Product Liability Directive[15] (hereinafter: PLD) that substantially modifies the current product liability regime by including software within its scope, integrating new circumstances to assess the product's defectiveness and introducing provisions regarding presumptions of defectiveness and causation.[16]

The revised PLD maintains strict liability without proof of fault and expands its scope to include electricity, digital manufacturing files, and software. It defines "damage" as material loss resulting from death, personal injury, property damage, and non-professional data loss or corruption. The proposal introduces new criteria for product defectiveness, including cybersecurity requirements, and broadens the list of potentially liable economic operators. Articles 8 and 9 address disclosure of evidence and burden of proof, aligning closely with the proposed AILD. The revised PLD empowers national courts to order defendants to disclose relevant evidence upon request from claimants presenting plausible compensation claims. Regarding burden of proof, claimants must demonstrate product defectiveness, damage suffered, and the causal link between them, with certain presumptions introduced to aid claimants facing excessive difficulties due to technical or scientific complexity. The European Commission justifies not inverting the burden of proof to balance innovation incentives with consumer protection, aiming for a fairer distribution of the burden between parties.[17]

[14] Ibid.
[15] Proposal for a Directive of the European Parliament and of the Council on liability for defective products, COM (2022) 495 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0495.
[16] De Bruyne, J.; Ooms, W., *Tort Liability and Artificial Intelligence: Some Challenges and (Regulatory) Responses.* In: Smuha, N. A., ed. The Cambridge Handbook of the Law, Ethics and Policy of Artificial Intelligence. Cambridge: Cambridge University Press, 2025. p. 162.
[17] Garcia, B., *op. cit.,* p. 32-33.

3.3. Summary

The current strict liability approach in the Slovak Commercial Code, where fault is not a requirement for establishing liability, could be seen as more advantageous for claimants compared to the fault-based system outlined in the AILD. However, the AILD introduces a potentially beneficial element for claimants: a rebuttable presumption of non-compliance. This specific presumption is not addressed in the Slovak Commercial Code. Given the AILD's minimum harmonization approach, Slovakia has the option to maintain its existing strict liability framework while also incorporating aspects of the AILD, potentially creating an even more favourable system for injured parties.

4. PROPOSALS TO ADDRESS THE LEGAL GAP

The current state of legal framework in the Slovak Republic does not provide a specific scope for AI liability. There is no particular provision for liability for damage caused by AI within the specific cases of liability for damage regulated in the Commercial Code or even Civil Code. This gap in the legislation creates legal uncertainty and potential problems in determining liability in cases where an AI system causes damage.

The question is whether to fill the specified gap in the issue of AI liability by amending the Civil Code or the Commercial Code. There is a fundamental difference between them in the Slovak legal order, since the Civil Code introduces subjective liability for damage and the Commercial Code introduces objective liability, which, in our opinion, is more advantageous for the injured party. Moreover, AI systems are predominantly deployed in commercial relationships, making the Commercial Code a more appropriate venue for AI liability provisions. Such an approach addresses the unique challenges of AI in B2B and B2C relationships. Additionally, provide businesses with single, comprehensive source for understanding their AI liabilities in commercial relationships. We maintain that addressing AI liability within the Commercial Code offers a more targeted, effective, and commercially relevant approach to managing the unique challenges posed by AI systems in commercial relationships. We believe that this approach would provide stronger protection for injured parties while offering clearer guidance for businesses developing and deploying AI technologies.

As we identified in the previous chapter, the proposed AILD introduces several key changes in this area. Once the Directive is adopted, it will be necessary to implement these rules into Slovak law. As one of the options, we propose the creation of a specific provision on liability for AI within the Commercial Code, in

particular because of the more favourable legal treatment for the weaker party, namely the damaged party, most often the consumer. For example, we have introduced a new provision within the section on liability for damages, which would specifically address liability for damage caused by AI systems in commercial relationships.
This modification might include:

i. Clearly define responsible entities in the AI value chain.
ii. Incorporate the AILD's rebuttable presumption of causality for high-risk AI systems.
iii. Establish rules for evidence disclosure in AI-related damage cases.
iv. Introduce a mechanism for periodic legislative review to keep pace with technological advancements.

We believe that such a provision might provide stronger legal security and at the same time ensure effective protection for damaged parties. However, it is important to strike a balance between protecting users and enhancing innovation in AI. Precisely in view of the rapid evolution of AI technologies, it seems to us that it could be beneficial to introduce a provision for periodic review and updating of this legislation.

In our opinion, the proposed amendment could contribute to the creation of a comprehensive and effective legal framework for dealing with liability for damage caused by AI in commercial relationships, while considering the particularities of the Slovak legal system and ensuring compliance with European legislation at the same time.

5. CONCLUSION

Our research confirms that current legal frameworks in Slovakia and the EU are inadequately equipped to address the complexities of AI-induced damages in commercial relationships. The Slovak Commercial Code's strict liability regime, while advantageous for claimants, lacks the nuance required to handle AI's unique characteristics such as emergent behaviour and distributed responsibility. Conversely, the EU's proposed AILD introduces innovative concepts like rebuttable presumptions of causality, but its fault-based approach may create procedural hurdles for injured parties. Our analysis supported the hypothesis that existing regulations lack the flexibility and specificity needed to effectively govern AI liability, potentially leading to legal uncertainties and gaps in stakeholder protection. To address these shortcomings, we have proposed amending the Slovak Commercial Code to include AI-specific liability provisions. By integrating proposed elements, Slovakia could create a hybrid model that balances

its existing strict liability framework with the EU's innovation-friendly approach. This would provide stronger legal certainty for businesses while ensuring effective protection for damaged parties. The rapid evolution of AI technologies necessitates ongoing dialogue between legislators, technologists, and legal scholars. Future research should explore sector-specific liability models and assess the long-term impacts of these proposed reforms on judicial efficiency and AI innovation. In conclusion, while current frameworks fall short, the proposed amendments offer a path toward a comprehensive and adaptable legal regime for AI liability in commercial relationships. By prioritizing both innovation and accountability, these reforms can foster a business environment where AI's potential is realized without compromising legal protections for all stakeholders.

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Review paper

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THE ANTHROPOCENTRIC PARADIGM OF ARTIFICIAL INTELLIGENCE REGULATION IN EUROPEAN UNION LAW*

ABSTRACT

This article examines the specific characteristics of the European Union's regulatory framework for artificial intelligence (AI), which stands out among global strategies due to its human-centric approach. It first focuses on conceptualizing the notion of "artificial intelligence". Subsequently, it identifies the sources of risk and potential threats associated with AI applications that justify the need for its regulation. The next section analyzes the fundamental principles of the EU regulatory model, which is based on a balanced approach and the promotion of trustworthy AI. Furthermore, the article explores the key legal mechanism introduced under the AI Act to safeguard values and fundamental rights deemed particularly significant by the EU legislator. Finally, the article presents concluding remarks on the European Union's approach to AI regulation.

Keywords: *Artificial Intelligence, AI Act, European Union, Public Regulation of AI, European approach to AI*

In short, success in creating AI, could be the biggest event in the history of our civilisation.
But it could also be the last, unless we learn how to avoid the risks.
Stephen Hawking[1]

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[1] This quote comes from a speech delivered at the inauguration of the Centre for the Future of Intelligence at the University of Cambridge on 19 October 2016. See University of Cambridge, The Best or Worst Thing to Happen to Humanity? Stephen Hawking Launches Centre for the Future of Intelligence, https://www.cam.ac.uk/research/news/the-best-or-worst-thing-to-happen-to-humanity-stephen-hawking-launches-centre-for-the-future-of, 13 April, 2025.

1. INTRODUCTION

Artificial Intelligence (hereinafter AI) is no longer a technology of the future - it has become a technology of the present. Modern AI systems operate in the background of nearly every aspect of our lives, often influencing decisions that affect us without our direct awareness. They recommend movies and music on streaming platforms, manage urban traffic, support medical diagnostics, analyze financial data, and assist in automating business processes. AI is integrated into our smartphones, cars, banking systems, e-commerce, and even public administration.

Thanks to the rapid advancement of machine learning algorithms and increasing computational power, AI has become not only ubiquitous but also increasingly sophisticated. Generative models, such as chatbots and content creation systems, are transforming communication and access to information, while autonomous systems can make decisions in critical sectors such as healthcare, finance, and the justice system.

However, the expanded use of AI brings not only significant benefits but also new challenges and risks. Concerns arise regarding privacy, algorithmic transparency, the impact of AI on the job market, and the ethical implications of its application. Decisions made by algorithms can be biased, difficult to interpret, and even discriminatory. Moreover, AI can become a tool for information manipulation, surveillance, and social control. The growing significance of AI and the risks associated with it have naturally attracted the attention of legislators worldwide. In response to the challenges posed by AI, individual countries and international organizations have adopted different approaches to its regulation.

On a global scale, three major players in the field of AI stand out - the United States (hereinafter the US), China, and the European Union (hereinafter the EU) - each of which has developed its own regulatory model for this technology. The model adopted in the US is limited to sector-specific regulations, relying on a free-market approach, as the country prioritizes stimulating the development of innovative technologies and maintaining a competitive edge. In the case of China, AI regulations are closely tied to state-driven policy discourse, with the primary objective of ensuring control over the development and use of AI.

The EU takes a fundamentally different approach, being the first in the world to establish comprehensive, horizontal legal frameworks for AI - Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU)

2018/1139, and (EU) 2019/2144, as well as Directives 2014/90/EU, (EU) 2016/797, and (EU) 2020/1828, OJ L 2024/1689 of 12/7/2024 (hereinafter referred to as the AI Act or Regulation). The adopted regulations focus on promoting trustworthy, human-centric AI, balancing the benefits of technological advancement with the need to protect individual rights and safeguard the interests of society as a whole.

This article focuses on the third approach - the EU model of AI regulation, which establishes an anthropocentric paradigm in the public law regulation of this technology. The aim of the study is to provide an overview of this regulatory framework, with particular emphasis on protected rights and the legal mechanism ensuring their enforcement.

2. WHAT IS AI? IN SEARCH OF A UNIFIED DEFINITION

From the perspective of the historical development of cybernetic technologies, AI is not a new invention. Its origins date back to the second half of the 20th century when, alongside advancements in computer science, the first research began on algorithms enabling machines to mimic human thought processes. The creation of the term "artificial intelligence" is attributed to John McCarthy,[2] who defined it as an interdisciplinary field of science and engineering focused on constructing systems capable of exhibiting intelligent[3] behaviors characteristic of humans.[4] For decades, AI was primarily developed in "laboratory" conditions, remaining a subject of interest mainly for specialists in computer science, mathematics, engineering, and cognitive science. A breakthrough occurred at the turn of the 20th and 21st centuries when the rapid advancement of neural networks and machine learning algorithms led to the emergence of systems capable of independently processing information and making decisions. AI began to move beyond the realm of research and experimentation, entering sectors such as the economy, public administration, and everyday life. The current abundance of AI-based solutions

[2] The term "artificial intelligence" is believed to have been first used by John McCarthy during the Dartmouth conference in 1956. See McCarthy, J.; Minsky, M.L.; Rochester, N.; Shannon, C.E., *A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence*, August 1955, http://jmc.stanford.edu/articles/dartmouth/dartmouth.pdf, 13 April, 2025.

[3] According to the Oxford English Dictionary, intelligence is defined as "the faculty of understanding". See Oxford English Dictionary, https://www.oed.com/dictionary/intelligence_n, 13 April, 2025.

[4] See McCarthy, J., What is Artificial Intelligence?, November 2007, p. 2, https://www-formal.stanford.edu/jmc/whatisai.pdf, 13 April, 2025. This understanding of AI emerged in the early 1950s and is associated with the Turing test, which aimed to assess whether a machine could exhibit intelligent behavior indistinguishable from that of a human.

and its dynamic development make the task of precisely defining this concept extremely challenging, if not impossible. The approach to defining AI varies depending on the context- its meaning differs in everyday language, in scientific and technological environments, and within legal discourse.

From the perspective of this analysis, the definition proposed by the EU, developed for the regulation of this technology, is of particular importance. The process of shaping the EU's definition of AI was gradual. One of the first definitions included in official EU documents was proposed by the European Commission in the 2018 communication *Artificial Intelligence for Europe*.[5] It stated that: "Artificial intelligence (AI) refers to systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals. AI-based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, speech and face recognition systems) or AI can be embedded in hardware devices (e.g. advanced robots, autonomous cars, drones or Internet of Things applications).

Although this definition served as a starting point for further legislative work, it remained too general. It did not specify concepts such as "intelligent behaviour", and the examples of AI applications it provided did not fully reflect the broad spectrum of this technology's capabilities.[6]

[5] The European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee for the Regions, Artificial Intelligence for Europe, COM(2018) 237 final, Brussels, 25 April 2018, https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:52018DC0237, 13 April, 2025.

[6] It is worth mentioning that the High-Level Expert Group on Artificial Intelligence (HLEG), established by the European Commission, also contributed to the development of an AI definition. The group proposed the following definition: "Artificial intelligence (AI) systems are software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behaviour by analysing how the environment is affected by their previous actions. As a scientific discipline, AI includes several approaches and techniques, such as machine learning (of which deep learning and reinforcement learning are specific examples), machine reasoning (which includes planning, scheduling, knowledge representation and reasoning, search, and optimization), and robotics (which includes control, perception, sensors and actuators, as well as the integration of all other techniques into cyber-physical systems)". See the High-Level Expert Group (European Commision) on Artificial Intelligence, Ethics Guidelines for Trustworthy AI, April 2019, p. 8, https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60651, 13 April, 2025.

It is worth noting that the further development of the EU's conceptual framework for AI was also significantly influenced by work carried out at the level of the Organisation for Economic Co-operation and Development (OECD). In its 2019 recommendation, the OECD introduced a more precise definition of AI systems as: "machine-based systems that, for explicit or implicit objectives, infer, from the input they receive, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment."[7]

This definition became a reference point for the further work of the EU legislator, who adopted the following legal definition in the final version of the Regulation: "AI system means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments."[8]

In the current landscape and in light of projected AI development trends, this definition appears to be the most comprehensive, while also remaining flexible and resilient to future technological changes. It highlights the key characteristics of AI systems, particularly their ability to operate autonomously and adapt after deployment, distinguishing them from traditional, static systems. Another crucial aspect is the recognition of the impact AI-driven decisions can have on both virtual and real-world environments. This broad conceptualization allows for an extensive interpretation of AI applications - ranging from predictive and recommendation systems to autonomous machines and analytical tools - whose functioning may have social, economic, or legal implications.

For the purposes of this article, AI will be understood in accordance with the definition adopted in the EU Regulation.

3. THE NEED FOR REGULATING AI

Undoubtedly, the need for AI regulation has arisen due to its rapid development and the simultaneous increase in risks associated with its expanding application, which - if left unchecked - could lead to serious negative consequences in the long

[7] OECD Recommendation of the Council on Artificial Intelligence, 22 May 2019, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449, 13 April, 2025.
[8] Article 3 item (1) of the AI Act.

run. The spectrum of potential risk sources and resulting threats related to AI usage is vast, stemming from various domains.[9] Therefore, it is challenging to comprehensively address this issue within the scope of a single article. Nevertheless, it is worth examining the key aspects of this topic. To structure this discussion, four main areas of risk can be distinguished:

1. Technical Risks – these stem primarily from the complexity and technological limitations of AI systems. Examples include:
   - unpredictability and the "black box" problem – AI models, especially those based on machine learning, may produce unexpected results, with decision-making mechanisms difficult to interpret even for their creators;[10]
   - algorithmic errors and model drift – AI models can lose accuracy over time, particularly when the data they rely on changes, leading to increasingly flawed outputs;[11]

[9] To illustrate this scale, it is worth referring to the findings presented in the study by Slattery, P.; Saeri, A. K.; Grundy, E. A. C.; Graham, J.; Noetel, M.; Uuk, R.; Dao, J.; Pour, S.; Casper, S.; Thompson, N., *The AI Risk Repository: A Comprehensive Meta-Review, Database, and Taxonomy of Risks From Artificial Intelligence*, August 2024, http://dx.doi.org/10.13140/RG.2.2.28850.00968, 13 April, 2025. This study constitutes a meta-analysis of 43 existing classifications of AI-related risks and identifies 777 unique threats. The key risk categories include discrimination and toxicity, privacy and security violations, disinformation, malicious activities, challenges in human-computer interaction, socio-economic and environmental risks, as well as failures and technological limitations of AI systems.

[10] Although the architecture of machine learning-based systems (such as neural networks or decision trees) is generally transparent, the learning process itself means that programmers have no control over the specific parameter values, which are autonomously developed by the algorithms based on training data. As a result, these models learn complex conceptual representations—often at a level of abstraction that has no direct equivalent in the model's structure. Additionally, internal parameters can interact in nonlinear and multilayered ways, making it extremely difficult to fully interpret the relationships between input data and the model's outputs. Even the creators of such systems may be unable to precisely determine how a given result was produced or explain why the model made a particular decision. For this reason, such systems are often referred to as "black boxes" — their internal logic remains opaque, despite their operational effectiveness. See Zednik, C., *Solving the Black Box Problem: A Normative Framework for Explainable Artificial Intelligence*, March 2019, Philosophy & Technology, p. 4-6, https://doi.org/10.48550/arXiv.1903.04361, 13 April, 2025.

[11] One practical manifestation of algorithmic errors in artificial intelligence models is the phenomenon of so-called "hallucinations" – instances where an AI system generates content that appears coherent and plausible, but is in fact entirely false or nonexistent, such as fabricated data, quotes, sources, or references. This problem is particularly prevalent in large language models, which rely on statistical relationships between words without genuinely "understanding" the truthfulness of the information they produce. For example, a study conducted in 2023 aimed to assess the reliability of bibliographic references generated by ChatGPT in academic texts. The research team examined 178 generated citations, of which as many as 39% contained incorrect or non-existent DOI identifiers, while an additional 16% referred to publications that could not be located using available

- sensitivity to input data – AI performance may be compromised if it receives incorrect or manipulated data (e.g., adversarial attacks[12]).

2. Social Risks – these arise from AI's impact on society, such as:
   - lack of transparency and technological complexity – The advanced nature of AI systems makes them difficult for the average user to understand, lowering public trust in AI-driven decisions;
   - exploitation of AI for disinformation and manipulation – AI algorithms can be misused to deceive the public, generate fake content (e.g., deepfakes), or personalize information in a way that fosters social polarization through "filter bubbles";[13]
   - workforce automation and labor market shifts – AI-driven automation in key industries may lead to job losses, increasing social tensions and economic inequalities.[14]
3. Legal Risks – these result from inadequate regulatory frameworks and delays in AI-specific legislation:

databases. See Athaluri, S.; Manthena, S.; Kesapragada, V.; Yarlagadda V.; Dave, T.; Duddumpudi, R., *Exploring the Boundaries of Reality: Investigating the Phenomenon of Artificial Intelligence Hallucination in Scientific Writing Through ChatGPT References*, April 2023, Cureus, https://doi.org/10.7759/cureus.37432, 13 April, 2025.

[12] Adversarial attacks are intentional manipulations of input data designed to cause AI systems to make incorrect or misleading decisions. The literature distinguishes several main types of such attacks, including: evasion attacks (modifying input data at inference time to mislead the system), poisoning attacks (corrupting training datasets to insert vulnerabilities), backdoor attacks (embedding hidden triggers that activate malicious behavior), model extraction attacks (attempts to reconstruct or steal a model) and inference attacks (deducing sensitive information from model outputs). See more on this: Anderson, H; Fordyce A.; Oprea, A; Vassilev, A., *Adversarial Machine Learning: A Taxonomy and Terminology of Attacks and Mitigations*, January 2024, National Institute of Standards and Technology (NIST), p. 18, https://doi.org/10.6028/NIST.AI.100-2e2023, 13 April, 2025.

[13] The Global Risks Report 2024 by the World Economic Forum indicates that disinformation and fake content, fueled by advanced technologies such as generative artificial intelligence, represent the most serious short-term threat to the world. The ability of current AI models to realistically generate content can be exploited to manipulate electoral processes, stock markets, and public discourse. As the report notes, these phenomena may lead to increased social polarization, a decline in public trust, and the destabilization of democratic institutional systems. Additionally, the report identifies threats posed by AI to personal rights — technologies such as deepfakes or voice cloning are already being used to produce pornographic content without the consent of the individuals depicted. See World Economic Forum, The Global Risks Report 2024, January 2024, https://www.weforum.org/publications/global-risks-report-2024/, 13 April, 2025.

[14] Ajilore, O.; Choi, J. Y.; Kadkol, S.; Kim, J. J. H.; Lee, S.; Nahass, G. R.; Nyugen, T.; Soh, J.; Solomon, I.; Srivatsa, A.V.; Yeh, H., *AI Anxiety: a comprehensive analysis of psychological factors and interventions*, March 2025, AI and Ethics, p. 5-6, https://doi.org/10.1007/s43681-025-00686-9, 13 April, 2025.

- lack of comprehensive AI regulations – AI has long operated in a largely unregulated space or under general laws that do not address its unique characteristics, leading to gaps in user protection;
- unclear legal status of AI – The autonomous nature of AI raises questions about liability and accountability for its decisions and potential damages;
- mass data processing without adequate oversight – AI systems process vast amounts of sensitive data, increasing risks of unauthorized data collection, user profiling, and privacy violations without proper regulatory safeguards.

4. Ethical Risks – These concern AI's impact on fundamental social values and moral dilemmas:
    - dependence on training data quality – AI learns from available datasets, meaning that if those datasets contain biases, the AI will replicate and amplify them, potentially leading to discrimination against specific social groups;
    - scope of AI autonomy – AI's ability to operate independently, especially in critical fields such as justice and healthcare, risks dehumanizing decision-making processes, where individuals become mere objects of algorithmic calculations rather than subjects of ethical, social, and emotional considerations.[15]

It is crucial to emphasize that the risks associated with AI are multifaceted and dynamic, and their scope is not exhaustive. The above classification into four main risk categories represents just one possible framework, adopted for the purposes of this discussion to better illustrate the scale and nature of the challenges that AI legislation must address.

[15] Douglas, D. M.; Lacey, J.; Howard, D., *Ethical risk for AI*, August 2024, Springer, p. 1-3, https://doi.org/10.1007/s43681-024-00549-9, 13 April, 2025. Steimers, A.; Schneider M., *Sources of Risk of AI Systems*, March 2022, International Journal of Environmental Research and Public Health, p. 18-19, 21-22, https://www.mdpi.com/1660-4601/19/6/3641, 13 April, 2025.

4. THE ANTHROPOCENTRIC PARADIGM OF AI REGULATION

4.1. The EU approach to AI regulation: a brief overview

The regulation of AI has been integrated into the EU's *Europe fit for the Digital Age strategy,*[16] which has been one of the key priorities of the European Commission for the years 2019–2024. This process was gradual and multi-stage, preceded by extensive expert analyses, discussions, and public consultations officially launched in 2018.[17] Recognizing both the immense potential and risks associated with AI development, EU institutions took the first concrete steps toward establishing a coherent and unified regulatory policy. Below are the key stages of this process that had a decisive impact on the final shape of AI regulations within the EU.

The starting point for the EU's further strategies on AI was the *Declaration of Cooperation on Artificial Intelligence*, signed in April 2018, which set the direction for a coordinated approach among member states towards this technology.[18] Based on the principles outlined in the declaration, the European Commission published the *Artificial Intelligence for Europe* communication later that same month. This document served as a clear political signal that the EU not only recognized the growing significance of AI but also intended to actively shape its development and regulation. It was also an official confirmation that AI would become one of the pillars of the EU's digital strategy.

In the document, the European Commission outlined recommendations for establishing a robust European strategic framework, emphasizing that the EU must

[16] It is worth mentioning, however, that although the EU's key efforts in shaping AI regulation took place in the early second decade of the 21st century, its interest in this area dates back to 2012. That year marked the beginning of the first initiatives aimed at developing a unified EU strategy for emerging technologies, including artificial intelligence. One significant research initiative from this period was the RoboLaw project (*Regulating Emerging Robotic Technologies in Europe: Robotics facing Law and Ethics*), conducted between 2012 and 2014. The project aimed to analyze the impact of emerging technologies on legal norms, social values, and ethics, as well as assess the adequacy of existing legal frameworks. See The Community Research and Development Information Service (CORDIS), *Project RoboLaw (ID: 289092)*, https://cordis.europa.eu/project/id/289092/reporting/en, 13 April, 2025.

[17] See the European Commission press release, Artificial Intelligence: Commission Kicks Off Work on Marrying Cutting-Edge Technology and Ethical Standards, March 2018, https://ec.europa.eu/commission/presscorner/detail/en/ip_18_1381, 13 April, 2025.

[18] See the European Commission press release, EU Member States sign up to cooperate on artificial intelligence, April 2018, https://digital-strategy.ec.europa.eu/en/news/eu-member-states-sign-cooperate-artificial-intelligence, 13 April, 2025.

strengthen its technological and industrial capabilities while ensuring balanced development among member states in the digital transition. A key objective was also the need to increase investment in AI research and development, enabling Europe to compete with global leaders in this field, such as the US and China.[19] At the same time, the document emphasized that the development of AI cannot take place in isolation from the EU's fundamental values and fundamental rights.[20] The Commission advocated for a balanced approach", combining the benefits of technological advancement with the need to protect individuals and safeguard the interests of society. Accordingly, it announced the necessity of establishing a coherent regulatory framework that addresses both legal and ethical aspects to ensure the safe and responsible deployment of AI. [21]

Another significant milestone in shaping the EU's AI regulations was the publication of the *White Paper on Artificial Intelligence: A European Approach to Excellence and Trust* (hereinafter White Paper)[22] in February 2020. This document summarized previous initiatives and outlined future regulatory steps, reaffirming the necessity of maintaining a balanced approach to AI development. The vision presented in the White Paper was built on two key pillars: the ecosystem of excellence and the ecosystem of trust. The first pillar focused on fostering AI research, innovation, and investment, particularly through collaboration between Member States and the private sector. The second pillar aimed to ensure that AI development in Europe aligns with the EU's fundamental values and does not threaten citizens' fundamental rights.[23]

As part of these principles, the European Commission recommended the Trustworthy AI concept, which must meet the following criteria: human oversight, technical robustness and safety, privacy and data governance, transparency, diversity, non-discrimination and fairness, social and environmental well-being, and accountability.[24] It was emphasized that adherence to these principles is

[19] Communication Artificial Intelligence for Europe, p. 2-3.
[20] For values and fundamental rights that, in the EU's view, are particularly at risk in the case of unregulated AI use, see section 4.3. of this article.
[21] Communication Artificial Intelligence for Europe, p. 3-4.
[22] The European Commission, White Paper on Artificial Intelligence - A European approach to excellence and trust, COM(2020) 65 final, Brussels, 19 February 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52020DC0065, 13 April, 2025.
[23] White Paper, p. 3, 6-29.
[24] These guidelines were developed by the High-Level Expert Group on AI, established by the European Commission in 2018. For more information, see Directorate-General for Communications Networks, Content and Technology (European Commission) and High-Level Expert Group on AI, Ethics Guidelines for Trustworthy AI, Publications Office, 2019, p. 11, https://data.europa.eu/doi/10.2759/346720, 13 April, 2025.

crucial for increasing public trust in AI, and their implementation should be a prerequisite for the deployment of AI systems in the European single market.[25] The White Paper also undertook a broader identification of risks associated with the use of AI, highlighting potential material harms (to health, safety, and property) as well as non-material harms (privacy violations, discrimination, and restrictions on civil liberties).[26] Based on this assessment, a preliminary risk-based regulatory model was proposed.[27]

This model was further refined in the first official draft of the regulation establishing harmonized rules on AI,[28] presented by the European Commission in April 2021. The proposed regulatory framework was based on the principles outlined in the White Paper and the results of public consultations.[29] In the draft, the Commission set out four main objectives:

- AI system safety – ensuring that the deployment of AI does not violate fundamental rights or EU values,
- Effective enforcement of fundamental rights protection – implementing control mechanisms and accountability measures to prevent discrimination, privacy violations, and non-transparent algorithmic decision-making,
- Legal certainty for investment and innovation – creating a stable legal framework that remains resilient to the rapid evolution of AI technologies, reducing the need for frequent legislative amendments,
- A unified AI market in the EU – preventing regulatory fragmentation and enabling businesses to operate across the Union without the need to comply with divergent national regulations.

One of the key mechanisms to achieve these objectives was the risk-based AI regulatory model. This approach tailors regulatory requirements to the level of risk an AI system may pose to users and society.

[25] White Paper, p. 11.
[26] See more on this topic in section 4.2. of this article.
[27] White Book, p. 19-21.
[28] The European Commission, Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM(2021) 206 final, Brussels, 21 April 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206, 13 April, 2025.
[29] See the European Commission press release, *White Paper on Artificial Intelligence: a Public Consultation Towards a European Approach to Excellence and Trus,* February 2020, https://digital-strategy.ec.europa.eu/en/library/white-paper-artificial-intelligence-public-consultation-towards-european-approach-excellence-and, 13 April, 2025.

The draft Regulation, following the ordinary legislative procedure, underwent further legislative work. Throughout the process, numerous EU bodies and institutions submitted their positions, opinions, and proposed amendments, including the European Economic and Social Committee,[30] the Council of the EU,[31] the European Central Bank,[32] the Committee of the Regions,[33] and the European Parliament.[34] As a result of these deliberations, nearly three years after the publication of the first AI Act draft, the European Commission announced that a political agreement had been reached on the final shape of AI regulations.[35]

The AI Act was adopted on June 13, 2024. In its core provisions, the Regulation first defines its purpose,[36] subject matter, and scope of application, covering aspects such as the development, market placement, deployment, and use of AI systems. Additionally, it establishes fundamental definitions used in the act, including terms such as "artificial intelligence system", "provider", and "user" (Chapter I).

[30] See more on this in the European Economic and Social Committee, Opinion of the European Economic and Social Committee on Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts, [COM(2021) 206 final — 2021/106 (COD)], EESC 2021/02482, OJ C 517 of 22/12/2021, p. 61–66.
[31] See more on this in the Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts - General approach, 2021/0106(COD), Brussels, 25 November 2021, https://data.consilium.europa.eu/doc/document/ST-14954-2022-INIT/en/pdf, 13 April, 2025.
[32] See more on this in the European Central Bank, Opinion of the European Central Bank of 29 December 2021 on a proposal for a regulation laying down harmonised rules on artificial intelligence, (CON/2021/40) 2022/C 115/05, CON/2021/40, OJ C 115 of 11/03/2022, p. 5–11.
[33] See more on this in the European Committee of the Regions, Opinion of the European Committee of the Regions — European approach to artificial intelligence — Artificial Intelligence Act (revised opinion), COR 2021/02682, OJ C 97 of 28/02/2022, p. 60–85.
[34] See more on this in the European Parliament, European Parliament Legislative Resolution of 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, P9_TA(2023)0236, https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.html, 13 April, 2025.
[35] See the European Commission press release, Commission welcomes political agreement on Artificial Intelligence Act, December 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6473, 13 April, 2025.
[36] Art. 1 item (1) of AI Act: "The purpose of this Regulation is to improve the functioning of the internal market and promote the uptake of human-centric and trustworthy artificial intelligence (AI), while ensuring a high level of protection of health, safety, fundamental rights enshrined in the Charter, including democracy, the rule of law and environmental protection, against the harmful effects of AI systems in the Union and supporting innovation".

Subsequently, the Regulation establishes a catalog of AI-related practices deemed unacceptable (Chapter II). It also defines the criteria for classifying high-risk AI systems, the rules governing their use, and the obligations imposed on providers and entities deploying such systems. Additionally, it introduces provisions regarding notifying authorities and notified bodies, outlining their role in the conformity assessment process for AI systems to ensure compliance with regulatory requirements (Chapter III).

In the following sections, the Regulation addresses transparency obligations for providers and entities deploying certain AI systems (Chapter IV) and regulates general-purpose AI models. It defines classification rules and requirements for their market placement, including safety and transparency obligations. Additionally, it provides for the use of codes of practice as a tool to help providers fulfill their obligations effectively (Chapter V).

Furthermore, the regulation includes measures to support innovation, particularly by promoting AI research and development and facilitating small and medium-sized enterprises (SMEs). It also establishes provisions for regulatory sandboxes, allowing for the testing of new AI technologies in controlled environments (Chapter VI).

Next, the AI Act addresses the governance of AI systems within the EU. It defines the supervisory structure and the roles of institutions responsible for implementing and enforcing the regulations (Chapter VII). Additionally, it establishes an EU database for high-risk AI systems, aimed at monitoring and registering information about these systems (Chapter VIII).

The Regulation also includes provisions on post-market monitoring, information exchange, and market surveillance. It outlines the obligations of providers to report and disclose potential risks associated with AI systems (Chapter IX). Additionally, it introduces codes of conduct and guidelines for AI users, aiming to facilitate compliance with regulations and promote best practices in AI governance (Chapter X).

The final section of the AI Act addresses the delegation of powers and committee procedures, establishing mechanisms to adapt the Regulation to future technological developments (Chapter XI). It defines a penalty system for non-compliance, outlining the consequences for entities failing to meet their obligations in the AI sector (Chapter XII). Lastly, it includes final provisions,

specifying the dates for the phased implementation of different chapters[37] (Chapter XIII).

4.2. Key Legal Mechanism in the AI Act: A General Framework

In simple terms, the protection of EU values and fundamental rights under the AI Act is based on a two-track regulatory model, which aims, on the one hand, to eliminate the risk of their violation and, on the other, to promote the development of Trustworthy AI.

The central element of this model is a risk-based approach that classifies AI systems according to the level of threat they pose to protected values and rights. Within this framework, key areas most vulnerable to the negative effects of AI use are identified, followed by the determination of appropriate regulatory measures and requirements proportional to the potential risk posed by a given system.

During the design phase of the regulatory framework, AI systems were generally divided into three categories: (a) unacceptable risk, (b) high risk, and (c) low or minimal risk. However, it is worth noting that the final version of the regulation explicitly defines only the first two categories. There is no direct reference to low- or minimal-risk systems, which raises certain interpretative uncertainties.

The first category includes AI systems that, when used in the manner specified in Article 5 of the AI Act, directly threaten protected values. In this context, unacceptable risk refers to dangers arising from the improper use of these technologies. These include:

- systems that manipulate user behavior through subliminal, manipulative, or deceptive techniques that limit their ability to make informed decisions,
- systems that exploit the vulnerabilities of sensitive individuals, such as children, the elderly, or people with disabilities, to influence their decisions in a way that may harm them,
- social scoring systems that assess individuals based on their social behavior, personal traits, or personality characteristics, potentially leading to unfair or discriminatory treatment,

[37] The AI Act entered into force on August 1, 2024, while the first provisions concerning prohibited AI practices came into effect on February 2, 2025. Further regulations, including those related to notifying authorities, general-purpose AI models, and penalties, will come into force on August 2, 2025. Full application of the provisions regarding high-risk AI systems will take effect on August 2, 2026. See more on this in Article 113 of the AI Act.

- crime prediction systems that evaluate the likelihood of committing an offense solely based on individual profiling,
- uncontrolled biometric data collection systems, such as the mass gathering of facial images from the internet or surveillance footage to create databases,
- emotion analysis systems in professional and educational contexts that monitor and interpret the emotions of employees and students,
- biometric categorization systems that classify people based on their biological traits, such as race, political beliefs, or sexual orientation,
- remote real-time biometric identification systems in public spaces, such as facial recognition technologies used directly by law enforcement authorities.

The use of these systems for the purposes mentioned above is prohibited under the Regulation.

The second category consists of high-risk AI systems. These include systems that meet both of the following criteria: (a) they are intended for use as a safety-related component of a product covered by EU harmonized legislation, listed in Annex I of the AI Act, or they themselves constitute such a product (Article 6 item 1a AI Act) and (b) they are subject to mandatory third-party conformity assessment before being placed on the market or put into service (Article 6 item 1b AI Act).

This primarily applies to AI systems used in areas where maintaining high safety standards is essential, including aviation, railway transport, road vehicles, elevators, cableways, industrial machinery, and pressure equipment.

High-risk AI systems also include those listed in Annex III of the AI Act. For example, this applies to systems used in areas such as critical infrastructure, education and vocational training, employment, workforce management and access to self-employment, as well as the administration of justice and democratic processes.

The marketing and deployment of high-risk AI systems are permitted provided that they comply with the obligations set out in Articles 8–15 of the AI Act. These include ensuring high-quality datasets used to train the AI system (Article 10 AI Act), developing and maintaining documentation necessary for assessing the system's compliance and intended purpose (Article 11 AI Act), fulfilling information obligations towards entities using AI systems while ensuring an adequate level of transparency (Article 13 AI Act), and guaranteeing human oversight of the system (Article 14 AI Act).

With regard to low- or minimal-risk AI systems, although the Regulation does not explicitly regulate them, it should be noted that they are subject to general transparency obligations outlined in Chapter IV. These include the requirement to disclose when a person is interacting with an AI system (Article 50 item 1 AI Act) and the obligation to inform about the artificial origin of generated content and ensure its proper labeling (Article 50 item 2 AI Act).

4.3. The human-centric approach – to protect values and fundamental rights

The anthropocentric paradigm of AI regulation in EU law finds its roots in the European values enshrined in Article 2[38] of the Treaty on European Union, and the rights guaranteed by the Charter of Fundamental Rights of the European Union (hereinafter: CFR). In the context of the risks identified in Section 3 of this article, it is evident that the uncontrolled use of AI systems may seriously endanger the realisation of those values and lead to violations of individual rights.[39]

An analysis of the directions outlined in EU policy and legal documents allows for the formulation of specific guidelines that shape the EU legislator's approach to regulating artificial intelligence in relation to protected rights:

[38] "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[39] See, e.g., White Paper, p. 14–15. The EU has identified threats to its values and fundamental rights in numerous documents. For example, in the report by the Committee of Experts on Internet Intermediaries, Algorithms and Human Rights – Study on the Human Rights Dimensions of Automated Data Processing Techniques and Possible Regulatory Implications, it is noted that the development of algorithms and artificial intelligence poses risks to the right to a fair trial, privacy protection, freedom of expression, and may lead to discrimination and electoral manipulation. Algorithms used in the judicial system may reinforce biases and reduce decision-making transparency, while predictive policing technologies employed in law enforcement databases may disproportionately affect minority groups. Furthermore, user profiling in social media and advertising systems impacts media pluralism, creating so-called filter bubbles and increasing the risk of disinformation. See more on this the Committee of experts on internet intermediaries (Council of Europe), Algorithms and human rights - Study on the human rights dimensions of automated data processing techniques and possible regulatory implications, March 2018, https://edoc.coe.int/en/internet/7589-algorithms-and-human-rights-study-on-the-human-rights-dimensions-of-automated-data-processing-techniques-and-possible-regulatory-implications.html#, 15 March, 2025. For more, see e.g. the Council of the EU, Presidency Conclusions on the Charter of Fundamental Rights in the Context of AI and Digital Transformation, 11481/20, Brussels, 21 October 2020, https://data.consilium.europa.eu/doc/document/ST-11481-2020-INIT/pl/pdf, 13 April, 2025.

- human dignity (Article 1 CFR) – AI development should always uphold human primacy, avoiding situations where algorithms replace individual autonomous decisions or lead to the dehumanization of individuals,
- respect for private and family life (Article 7 CFR) and protection of personal data (Article 8 CFR) – AI technologies must comply with data protection regulations, ensuring users retain control over their personal information and preventing excessive intrusion into private life,
- freedom of expression and information (Article 11 CFR) and freedom of assembly and of association (Article 12 CFR) – AI use in media and public spaces must not restrict access to information, result in censorship, or manipulate public opinion,
- non-discrimination (Article 21 CFR) and equality between women and men (Article 23 CFR) – AI must not reinforce biases or lead to unequal treatment based on gender, age, origin, or other personal characteristics,
- the rights of the child (Article 24 CFR) and the integration of persons with disabilities (Article 26 CFR) – AI development should consider vulnerable groups, ensuring equal access to services and protection from the potential negative effects of automation,
- fair and just working conditions (Article 31 CFR) and consumer protection (Article 38 CFR) – AI should not worsen employment conditions or violate consumer rights through unfair business practices or lack of transparency in automated decision-making systems,
- environmental protection (Article 37 CFR) – AI development should follow sustainable principles, taking ecological and public health aspects into account,
- the right to an effective remedy and to a fair trial (Article 47 CFR) and the presumption of innocence and right of defence (Article 48 CFR) – the use of AI in justice systems must ensure transparency, impartiality, the right to defense, and the ability to appeal decisions influenced by algorithmic processes.

The EU's approach is characterised by the belief that the development of artificial intelligence is not an end in itself and must not come at the expense of the established legal, social, and axiological order. The human being remains the key point of reference – not the market or technology – and must be the main beneficiary of the implemented solutions.

5. CONCLUSION

The dynamic development of AI, as well as the growing risks associated with its use, make its regulation an undeniable necessity. While AI holds immense potential for innovation and economic growth, it also comes with significant threats. The absence of appropriate regulations could lead to a situation where this technology spirals out of control, becoming a tool for violating individual rights, deepening social inequalities, or spreading disinformation.

In this context, the EU's approach deserves particular recognition, as it was the first to undertake the creation of a comprehensive legal framework for AI. The anthropocentric paradigm of AI regulation adopted by the EU is based on the premise that technological development, even if it may contribute to the transformation of society, should not come at the expense of fundamental values and rights. The EU model balances technological progress with the need to protect individual rights, democracy, and the rule of law. Consequently, the AI Act is not only a protective instrument but also a tool for building public trust in AI, which is a crucial condition for its continued development in a responsible and socially acceptable manner.

The introduced risk-based approach allows for a tiered level of regulation - more stringent requirements, and even outright bans, are imposed on AI systems that may pose real threats, while low- or minimal-risk systems are subject to fewer restrictions. This approach does not constitute a barrier to innovation but aims to establish a framework for the sustainable and safe deployment of AI.

However, it should be remembered that this is only the beginning of the EU's efforts in AI regulation. The regulation has not yet come into full force, and member states are working on adapting their legal frameworks to the new provisions. The effectiveness of these regulations and their impact on the development and implementation of AI thus remain an open subject for further research.

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ARTIFICIAL INTELLIGENCE IN COMPANY LAW: MORE THAN SOFTWARE?

ABSTRACT

We are witnessing the growing application of Artificial Intelligence (AI) across all areas of human activity. The field of Company Law is no exception, as commercial companies, in the course of their operations, require sufficient amounts of accurate information in order to make sound decisions. In this context, the issue of business decision making arises at multiple levels ranging from routine operational decisions to fundamental entrepreneurial choices that may have long-term and significant effects on the company's survival and development In the European Union, the long-anticipated AI Act has entered into force. It addresses certain legal questions associated with the use of AI technologies. This paper explores the technological background of AI and considers the legal implications of situations where a company's management delegates decision-making authority to an algorithm. Any automation of decision-making processes not subject to human oversight and control must be approached with great caution. In the use of AI, the management must always act with due care. This obligation remains in force regardless of the growing trend toward so-called Algorithmic Management. This paper provides an overview of the current regulatory framework and analyzes the EU AI Act, including the issue of legal classification of AI systems. The Act regulates which areas of human activity may be subject to restrictions or prohibitions on the use of AI, a question directly relevant to the field of Company Law. Finally, the paper offers concrete recommendations for legally acceptable use of AI in corporate practice.

Keywords: *Artificial intelligence (AI), Liability of directors, EU AI Act, Entrepreneurial decision, Legal liability*

1. INTRODUCTION

The rapid growth of artificial intelligence has led to fundamental changes in the

business environment and raised questions about how legislation needs to adapt to these changes. Thanks to technological advances, algorithms and AI systems are now able to process huge data sets, learn from experience, and suggest or even make decisions that were traditionally the domain of humans. Today, computers not only outperform humans at chess and data analysis, but are also used in business management—from automated investment decision-making to human resources management. This raises the question of whether algorithms can become "members" of management or at least important advisors who significantly influence business decisions. In the corporate sector, the business judgment rule and the responsibility of board members are taken into account when they rely on algorithmic analyses in business decisions. The judiciary is examining the use of AI tools in case law and criminal law and how transparency, impartiality, and human control over such decisions can be ensured. In public administration, the focus is on constitutional and administrative frameworks for automated decision-making, with an emphasis on protecting citizens' fundamental rights, non-discrimination, and the right to an effective remedy. In healthcare, clinical decision support provided by AI systems is being analyzed and research is being conducted into how the potential for improving treatment outcomes can be reconciled with patient safety requirements, a clear division of tasks, and ethical standards. As early as the middle of the last decade, the media reported on the case of a company that appointed an algorithm called Vital to its board of directors, which allegedly gave it voting rights on investment decisions. Although this "AI director" remained legally only an advisor without formal status as a board member, this example shows the potential of AI to participate at the highest levels of corporate decision-making. These trends signal that AI in business is no longer limited to auxiliary tools, but can play an active role in the management of a company. A similar step was recently taken (in 2023) in the United Arab Emirates, where the International Holding Company (IHC) of Abu Dhabi announced that it would appoint an AI system as an observer to its board of directors. This AI observer is not a formal voting member, but participates in meetings, analyzes data, and makes recommendations to the board. IHC is thus the second practical experience of UI integration at a high level of corporate management after Vital. IHC stated that it wants to use AI to identify trends and opportunities in the market more quickly and expects the AI system to "learn" by monitoring board meetings and provide better support for decision-making over time. In addition, according to a survey by the World Economic Forum, almost half of the top managers surveyed in a projection for the period 2025–2030 expect that they could be replaced by Artificial Intelligence.[1] These trends signal that AI in business is no longer limited to being an auxiliary tool, but can play an active role in the management of a

[1] World Economic Forum, The Future of Jobs Report 2025, str. 29, available at: https://www.weforum.org/publications/the-future-of-jobs-report-2025/, March 1, 2025.

company.

The development described above raises a number of legal questions, such as whether algorithms can legally and practically take over the functions of management bodies in companies and thus have the status of a creation that is more than software or an object in the legal sense. It is also legitimate to ask to what extent human managers may or must delegate business decisions to AI systems, and what obligations they have in doing so, and who bears responsibility if the AI makes a mistake - the company (as the system user), the board members, or the system manufacturer.[2] Furthermore, it is a fact that many jobs that were previously performed by humans are already being automated by AI, which inevitably affects the position of workers and the business organization system of a company. Finally, it is necessary to examine whether the existing normative framework is sufficient to legally regulate the new technological reality, or whether additional new rules are needed, which we are considering in particular through the AI Act - the general EU regulation on artificial intelligence.[3]

These issues are complex and interrelated. In the second chapter of the article, we analyze the use of AI in business decisions - from supporting analytical tools to autonomous systems - and consider the legal limits and obligations of management when introducing such systems. The third chapter discusses the inevitable process of automating business functions and the impact of AI on the position of employees and the day-to-day operations of the company. The fourth chapter provides a summary of the legal requirements set out in the EU AI Act, including the definition of high-risk AI and new regulatory requirements for commercial enterprises. Unpredictable and therefore uncontrolled failures in artificial intelligence systems can cause harm to a wide range of stakeholders. The EU AI law introduces the criterion of the risk-benefit ratio. This means that the risks of harm are socially and legally acceptable as long as the use of these systems brings more benefits than harm. This is determined on the basis of a cost-benefit analysis. The fundamental question, however, is whether it is constitutionally justified from the perspective of the state's duty to protect its citizens to accept the unknown and unpredictable risks of how artificial intelligence works. This supports the view that AI law is an important element in the system for protecting the rights of legal and

[2] Especially critical of the work and plan of the European Commission in the field of artificial intelligence and digitization is Graf von Westphalen, F., *Disruptive Technology Creates Disrupted Law*, ZIP, 2020, p. 737.

[3] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32024R1689, accessed March 1, 2025.

natural persons in the EU. In its famous 1978 decision in the Kalkar case,[4] The Constitutional Court of the Federal Republic of Germany has given priority to the protection of citizens' fundamental rights over "practical reasons", which is a significant indicator of the change in social consciousness regarding the understanding of the aforementioned rights.

2. ARTIFICIAL INTELLIGENCE IN BUSINESS DECISION-MAKING IN COMPANIES

Business decision-making is at the very core of the management function - the management board makes decisions on business management, investments, strategic guidelines, finances and other issues crucial to the success of the company. Company law expects members of the management board to act with the due care of a diligent and conscientious businessman, which the Croatian Company Act formulates as an obligation to conduct business with the aforementioned care.[5] This standard of conduct means that management must invest reasonable effort and attention in obtaining relevant information, analyzing options, and selecting the option that it reasonably believes is in the best interests of the company. The unique nature of business decisions is that they often involve business risks and there is no clearly correct answer in advance. In contrast to some management tasks that are strictly defined by law or corporate documents (where management has no discretion—e.g., fulfillment of prescribed obligations, implementation of meeting resolutions, etc.), management has a certain degree of discretion in genuine business decisions. [6] Such decisions include, for example, the decision to invest in a new project, launch a new business venture, acquire another company, or select a development strategy. What they have in common is that there are often several permissible courses of action or at least a dilemma between taking a particular course of action and refraining from doing so. Only

[4] The Kalkar judgment of the German Constitutional Court (BVerfG, Decion from 08.08.1978 - 2 BvL 8/77). A key part of the reasoning behind this judgment reads that, it is crucial to require of the Legislator, in view of its duty to protect, to adopt a regulation that excludes with absolute certainty all threats to fundamental rights that may arise from the approval of technical installations and their operation would be to misjudge the limits of human cognitive abilities and would largely prohibit any state approval of the use of technology. In shaping the social order, assessments based on practical reason must therefore suffice. Uncertainties beyond this threshold of practical reason are inevitable and as such must be borne by all citizens as socially appropriate burdens. The text of the judgment is available at https://openjur.de/u/166332.html, March 1, 2025.

[5] See Art. 252. Croatian Companies Act ("Official Gazette" No. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 152/11 - official consolidated text, 111/12, 125/11, 68/13, 110/15, 40/19, 34/22, 114/22, 18/23, 130/23, 136/24).

[6] Brnabić, R, *Uprava d.o.o.-a – granice poslovne prosudbe*, Pravo u gospodarsvu, godina 59, 5/220, p. 335–337.

time will tell which decision was the best one, as the results depend on numerous unpredictable factors. Therefore, before making a decision, the members of a company's board of directors must gather an appropriate amount of information, analyze relevant data, consider alternative options and potential risks, and decide in good faith, putting the interests of the company above personal motives. If they do so, they cannot be reasonably blamed, even if the outcome is not favorable.[7] If, on the other hand, the board makes a hasty decision without sufficient information or for the wrong reasons (e.g., for personal gain at the expense of the company), even a positive outcome does not necessarily release the board members from liability. For this reason, boards of directors, supervisory boards, and CEOs of companies use artificial intelligence to support strategic and operational decisions. AI can be used as an advanced analysis tool that processes information faster and more thoroughly than humans and suggests optimal decisions. For example, machine learning systems can analyze financial markets and recommend investments or better assess the credit risk of customers than traditional models, thus providing management with a better basis for decision-making. [8] In its simplest form, AI acts as a supporting tool—a more complex version of data analysis software—and the final decision rests with human managers. However, technological developments also open up the possibility of algorithms making independent decisions within a given framework.

2.1. Delegation of decisions and limits of Artificial Intelligence autonomy

A key legal issue in this context is the delegation of decisions to AI systems. According to traditional principles of corporate law, management and directors may delegate certain tasks and decisions to subordinate managers or external advisors, but must retain ultimate responsibility and oversight (known as ultimate management responsibility). Delegating tasks is essential—without it, the complex administration of large companies would not be possible. However, there are limits here as well: the most important and essential management tasks that the law expressly assigns to management may not be delegated, while routine or preparatory activities may be transferred to others, provided that management ultimately makes an independent and responsible decision based on the information gathered. This principle remains the basis for the introduction of AI into decision-making—human management bodies must remain in control of the process and retain the final say in decisions. In other words, even the most advanced AI should be a management tool and not replace management itself. In

[7] Barbić, J., *Pravo društava - društva kapitala, Knjiga druga, Sv. I.*, 8. Izdanje, Organizator, Zagreb, 2025, p. 1016.
[8] Tischbirek, A., *Ermessensdirigierende KI*, Zeitschrift für Digitalisierung und Recht (ZfDR), Vol. 3, 4/2021, p. 312.

practice, this means that fully binding decision-making by the AI system (for example, management accepting all AI decisions in advance without review) would contradict the principle of corporate decision-making bodies. This approach is also followed by the GDPR, which in Art. 22 sets a limit on fully automated individual decisions and reflects the general view that important decisions should not be left solely to machines without human involvement..[9] Today's AI remains largely specialized for specific types of tasks. For example, AI may be successful in deciding whether to approve a loan or select an investment portfolio, but it cannot "lead" the entire business strategy of a company in the way that human management does.

2.2. Delegation of decisions and limits of AI autonomy

A key legal topic in this context is the delegation of decision-making to AI systems. According to traditional principles of corporate law, management and directors can delegate certain tasks and decisions to subordinate employees or external advisors, but must retain ultimate responsibility and oversight (the so-called ultimate management responsibility). Delegation of tasks is necessary - without it, the complex management of large companies would not be feasible. However, there are limits, so the most important and original management tasks that the Law explicitly entrusts to management may not be delegated, while routine or preparatory activities may be transferred to others, provided that the Management ultimately makes a decision independently and responsibly based on the information collected. This principle remains the basis for the introduction of AI in decision-making - human management bodies must remain masters of the process and retain the last word in decisions. In other words, even the most advanced UI should be a management tool, and not a substitute for the Management itself. In practice, this means that completely binding decisions to the UI system (e.g. for the management to accept in advance all decisions made by the UI without review) would be contrary to the principle of independent decision-making by the company's organs.[10] This starting point is also followed by the GDPR Regulation, which in Article 22 sets a limit on fully automated individual decisions, reflecting the general position that key decisions should not

[9] Möslein points out that with sufficient technological progress, it is not ruled out that algorithms will take over some segments of business management. Möslein F., *Digitalisierung im Gesellschaftsrecht. Unternehmensleitung durch Algorithmen und künstliche Intelligenz*, Zeitschrift für Wirtschaftsrecht (ZIP), Vol. 39, 5/2018, p. 207.

[10] Lücke states that the management's decision to follow UI decisions would be legally unsustainable and incompatible with the management's duties and thus without legal effect. Lücke, O., *Der Einsatz von KI in der und durch die Unternehmensleitung*, Betriebs-Berater (BB), Vol. 15, Heft 35/ 2019, p. 1989.

be left exclusively to machines without any human involvement.[11]

The literature elaborates on various models of AI participation in management decisions.[12] At least two groups of such models are usually distinguished. In a company's business decision-making processes, the AI system can be a competent decision maker - which is the case when the company's management has effectively entrusted the AI with making decisions, and it actually delegates those decisions to the company's employees. On the other hand, the AI may have the status of a controlled decision maker. In this case, the AI still makes decisions, but within the framework set by management, so that the impact of those decisions on the business is in line with management's plans.[13] In the first case, KI functions as an "independent manager"; in the second case, it is primarily an information tool or an automated assistant whose decisions can be checked and corrected by humans. In the practice of current KI implementation in companies, this second model predominates: algorithms propose or implement decisions in a certain segment (e.g. automatic credit approval up to a certain amount), but management retains the authority to set criteria, monitor results and intervene if necessary. However, this does not diminish the importance of the fact that a decision proposed or made by a KI can have the same effect as if it had been made by a human being - for example, an algorithmic recommendation that is always automatically confirmed by management becomes a de facto management decision. In this sense, the adaptation of institutions such as the Business Judgment Rule and other standards for cases of dependency on KI is discussed. Under the business judgment rule, the board of directors is not liable for a business decision if it was made on the basis of appropriate information, to the best of its knowledge and belief, and in the best interests of the company. The question is whether this rule also applies when the management has relied on the analysis or recommendation of the UI system. Modern approaches suggest that the use of KI in business decision-making, with appropriate additional precautions and controls, can be understood as the behavior of a prudent and conscientious businessman or manager, provided that management has ensured the reliability of the system and verified its results as objectively as possible. If the algorithm is carefully selected and tested, and the management regularly monitors its functioning, any misjudgment by the KI system in the decision-making process can be treated as a

[11] See Art. 22. General Data Protection Regulation (GDPR), https://eur-lex.europa.eu/eli/reg/2016/679/oj/eng, March 1, 2025.
[12] See for instance Langenbucher, K., *KI und Aktienrecht, Europäische Zeitschrift für Wirtschaftsrecht (EuZW)*, Vol. 6, 18/ 2024, p. 857. and further. Cf. Sharff, C., *Wie künstliche Intelligenz Entscheidungen prägt. Eine Multiple-Case-Study über Entscheidungen künstlicher Intelligenz im Kontext von Unternehmen*, Springer, Wiesbaden, 2024, p. 53.
[13] Sharff, C., *op. cit.,* note 12*,* p. 53. and further.

business risk that does not automatically entail the liability of the management (there are analogous situations in which a human expert can give wrong advice despite due care). If, on the other hand, the management introduces a KI system into the company negligently and without thorough examination, or if it ignores obvious defects in the functioning of this system, it can be held liable for negligence (e.g. lack of supervision or organizational failure).[14]

2.3. Due Diligence of Management in the Use of Artificial Intelligence

Board members and directors who use AI in decision-making are subject to traditional fiduciary duties of due diligence, but these duties now need to be specified in a new way. Some authors argue that a board considering the introduction of AI must act with the care of a good and conscientious businessman, which means that it has a duty to consider the possibilities of using AI wherever it is appropriate for the fulfilment of a particular task. In other words, if there is an available AI application that can significantly improve decision-making in a particular area (e.g. market analysis, customer enquiry processing) and if its effectiveness has been proven, management should at least consider using it. This goes beyond the general duty of management to stay informed and use all reasonably available means for the benefit of the company.[15]

If, in a specific situation, the failure to implement a proven AI technology constitutes a clear disregard for the available information or tools (i.e., if the decision made would be unreasonably worse without the help of AI), it could be assumed that management has violated its duty of care. In practice, such a conclusion would only be reached in exceptional cases – for example, if there is a generally accepted and reliable industry standard for a specific type of analysis to

[14] Langheld, G., Haagen C., *Einsatz Künstlicher Intelligenz bei unternehmerischen Entscheidungen*, NZG, Vol. 25, 33/2023, p. 1537.

[15] Of course, there is no absolute obligation to use AI in every case. Telle concludes that the law does not currently impose an explicit obligation on the administration to use AI. Rather, it is a dynamic obligation that depends on the circumstances: if, in a given situation, the failure to implement proven AI technology constitutes a clear disregard of available information or resources (i.e., a decision without AI would be unreasonably worse), then it could be assumed that the administration has breached its duty of care. In practice, such a conclusion would only be reached in exceptional cases - for example, where there is a generally accepted and reliable industry standard that requires a certain type of analysis to be performed using an AI tool, but management persistently and without justification refuses to do so, thereby making decisions based on significantly inferior information. As a result, the standard of care is gradually evolving: the use of some forms of narrow AI systems may already be considered part of reasonable business practice ("state of the art"), and management that ignores this must have valid reasons why such technology is inappropriate for them. Telle, M., *Einsatz Kunstlicher Intelligenz Zur Vorbereitenden Unterstutzung von Leitungsentscheidungen Des Vorstands Einer AG*, Duncker & Humblot, Berlin, 2023, p. 60.-61.

be performed with an AI tool, but a particular management team persistently rejects it without justification and thus makes decisions based on significantly poorer information. The standard of due diligence is therefore gradually evolving. If management decides to use AI in the decision-making process, a number of specific duties arise to ensure that its use is responsible and lawful.

The literature suggests providing guidelines (checklists) for administrations. These guidelines include a number of practical measures: It is necessary to carefully select the appropriate AI system for a specific task (evaluate available solutions and decide whether to develop your own system or purchase a ready-made one, ensuring that the AI is suitable and reliable for the purpose); the algorithm must be set up to optimize the desired goals within reasonable limits; ensuring high-quality data for learning (the "garbage in, garbage out" principle warns that even the most advanced AI will produce poor results if the input data is poor. Therefore, management must ensure that the data sets are relevant, representative, free of bias, and that their use is legally permissible). Conduct thorough testing and validation of the UI system prior to full implementation (sufficient pilot phase with representative examples to confirm the functionality and reliability of the system). Ensure continuous monitoring of the operation of the UI system even after implementation. In addition, technical support for the UI system must be provided by qualified personnel, such as a designated Chief Digital Officer (CDO) or other IT experts, as members of management often lack the expertise to gain detailed insight into the algorithm. It is important to have a team within the company that is familiar with AI and can intervene in its work. There must also be the possibility of human intervention or shutdown of the AI system if it delivers incorrect or inappropriate results: Responsible persons should have the authority and technical ability to adjust parameters, stop the AI, or take it out of service if circumstances require it.[16]

2.4. Liability for decisions made with the help of AI

When management uses AI in decision making, the question arises: Who is responsible if such a decision causes harm to society or third parties? Since AI has neither legal personality nor formal responsibility, the ultimate responsibility lies with human actors: the company, board members, and possibly technology producers. For example, if the AI system makes a bad investment decision that causes a loss to the company, that decision was formally made by management (who implemented it based on the AI's recommendation). Board members could be held liable to the company if they are found to have acted negligently in

[16] So Lücke, O., *op.cit.,* note 10, p. 1992.

connection with the use of AI. As explained above, the standard of care is adjusted here: if all obligations are met (proper system selection, monitoring, etc.), even an unexpected AI error can be treated as a business risk rather than a management error. In principle, unforeseeable individual errors made by self-learning algorithms should not automatically be held against management, provided they are not organizational or supervisory errors - such errors are similar to unforeseeable human errors, against which reasonable measures do not provide complete protection. On the other hand, if the damage was caused by the company's management's failure to take appropriate organizational measures and controls (e.g., because it used AI in hiring decisions without any review, so that the system was biased and unlawfully discriminated against applicants), the members of the company's management could be held liable for breach of duty - for failing to establish a system of control and legality in the use of the tool.

It is important to note that the liability of the directors does not preclude the potential liability of the manufacturer or supplier of the UI system to the company (e.g., under contracts or general product and service liability rules) if the system is defective. For example, if a software company supplies a bank with an AI system for making credit decisions, and the system causes financial damage due to a programming error, the bank may seek damages from the company. However, under the general rules, the company's management cannot shift all responsibility to external consultants or tools - it must still prove that it exercised due care in selecting, hiring and monitoring them. In the European context, there is already a broader debate about the need for specific liability rules for AI.[17]

3. AUTOMATION OF SPECIFIC TYPES OF WORKING TASKS

The use of artificial intelligence is not limited to strategic management decisions, but extends to a wide range of business tasks within companies. Many repetitive, analytical, or operational tasks that were traditionally performed by humans can now be partially or completely automated by AI systems. This transformation is often referred to as digital automation or algorithmic management when AI takes over the role of monitoring employees.

Examples of automated business functions include financial transactions related to algorithmic trading on stock exchanges (known as high-frequency trading),

[17] Langenbucher, K., *Künstliche Intelligenz in der Leitungsentscheidung des Vorstands*, ZHR, Vol. 8, 6/2023, p. 733.

where systems autonomously buy and sell securities according to predefined models; automatic transaction verification for fraud detection; and AI based accounting software that categorizes expenses or forecasts cash flows. In marketing and sales departments, AI analyzes customer data and personalizes offers, manages prices (dynamic pricing), and chatbots communicate independently with customers in customer service; recommendation systems (as used by large online platforms) enable tailored, individual sales strategies. Autonomous systems and AI also have a place in human resources departments, where they are used, for example, in personnel selection. Systems that filter resumes and evaluate applicants; algorithms that assess candidates' characteristics by processing video interview recordings; then AI to monitor employee performance (analyzing sales results, monitoring typing or the use of computer applications) and even to make recommendations for promotions or dismissals. AI systems can significantly improve the work of predictive maintenance departments in manufacturing plants by anticipating machine failures and scheduling maintenance work. Supply chain optimization (demand forecasting and automatic material ordering); logistics and delivery routes are determined by algorithms; inventory management in warehouses with AI-controlled robots. AI is becoming an important tool in automated document processing. It is often used as a digital assistant (personal secretary) that schedules meetings, answers standard queries, or creates reports. Some companies have virtual legal or tax advisors that use knowledge databases and artificial intelligence to provide preliminary opinions before a case is reviewed by a human expert.

The automation of work processes brings numerous advantages, as it increases efficiency, reduces labor costs, speeds up information processing, and theoretically reduces human error or bias. AI can work around the clock, process thousands of requests per minute (e.g., in automated decision-making for routine loans or insurance), and thus significantly improve the scalability of companies. In addition, AI improves objectivity in some areas. For example, a well-designed recruitment algorithm can eliminate employer bias toward a particular gender or race and focus solely on meritocratic metrics. In human resources, there are already systems that analyze performance based on measurable indicators and warn of possible unconscious biases on the part of managers when evaluating employees.

However, the advantages are accompanied by disadvantages. First of all, mass automation raises the question of replacing human labor. What does it mean for employees when "the robot becomes the boss"? In fact the robots already act as supervisors in some areas of the workplace – one example is a system for monitoring delivery drivers or warehouse workers, where an algorithm assigns tasks and monitors performance. This type of "algorithmic boss" can create a feeling of dehumanization within the management system. Employees can find

themselves in a situation where an invisible algorithm assigns them work tasks without human intervention and then evaluates the employee's efficiency in performing these tasks. Labor law and employee protection are facing new questions: Do employees have a right to know whether the decision about their promotion or dismissal is made by AI? How can it be ensured that such a decision is neither discriminatory nor arbitrary? According to Art. 22 GDPR, a person (e.g., an applicant or employee) has the right not to be subject to a decision based solely on automated processing that produces legal effects or similarly significant effects. This means that in many cases, an employee can request a human review of a decision made by an algorithm. This obliges employers to require human involvement in important decision-making processes, at least as a final check. It is certainly not acceptable for an algorithm to terminate an employee's employment contract without human review, for example.

Another problem is excessive reliance on AI. When systems work well over a long period of time, there is a risk that users the humans will begin to blindly trust their decisions and no longer question them. Algorithms can also be used as an alibi for controversial decisions ("that's what the algorithm said"), thereby blurring responsibility. Management must take care to maintain a critical attitude: if, for example, it turns out that the UI's sales forecast is wrong in the same direction from quarter to quarter, it should recognize this and adjust the model rather than continuing to blindly believe its inaccurate forecasts just because the "intelligent system" calculated them. The paradox of automation is that highly automated systems can dull the attention of human operators. People intervene less, so they may not notice the problem until late in the game when the system makes a mistake.

In addition, transparency and explainability of automated decisions are becoming increasingly important. Many AI systems, especially those based on deep learning and neural networks, function as "black boxes" – their decisions are often opaque (not easily explainable in human terms).[18] This poses a challenge when the company has to justify its decision to a supervisory authority, a court, or the public. For example, if a bank denies a customer a loan based on the UI assessment, it must be able to explain the reasons for the denial in accordance with consumer rights and non-discrimination regulations. However, if the reason is hidden in the complex statistical patterns identified by the AI, it can be difficult to articulate clearly. Management is therefore advised to introduce the principle of "explainable AI" wherever possible – i.e., to use models that deliver understandable results or

[18] Papadouli, V., *Artificial Intelligence's Black Box: Posing New Ethical and Legal Challenges on Modern Societies*, in: Kornilakis A. et al. (Eds.), *Artificial Intelligence and Normative Challenges-International and Comparative Legal Perspectives*, Springer, Cham, 2023, p. 42.

at least additional modules that explain the algorithm's decisions. Management must be able to objectively justify why it took (or did not take) the UI system's recommendation into account when making a decision. Management does not have to explain how the impact assessment arrived at a particular recommendation (which it often cannot even know), but it should document the reasons why it considered that recommendation to be reliable or useful. An example of a good approach: If an AI passes extensive testing and demonstrates a high degree of accuracy in its predictions, management can cite this empirical data as the basis for its confidence in the AI. This provides evidence that the decision was made in an informed and thoughtful manner and not blindly following the dictates of a machine.[19]

A special segment of automation that many companies are confronted with is personnel decisions using AI—e.g., automated human resources management systems (HR). The AI Act classifies such systems (for hiring, employee evaluation, or contract termination) as high-risk AI systems precisely because they have the potential to significantly impact people's lives. This means that employers who use such tools must meet strict requirements (more on this in the next chapter). Even now, however, employers must take anti-discrimination regulations into account—if, for example, the AI system unconsciously learns to favor a certain candidate profile that correlates with the male gender, the employer is responsible for correcting this bias so that gender discrimination does not occur in employment.[20] Finally, automation is also changing the internal organization of companies. Some traditional hierarchies can be flattened—when software gives workers instructions, the number of middle managers can be reduced. New roles are emerging, such as data analysts and CI specialists, who work alongside traditional managers. Companies must invest in training their employees so that they can work effectively with AI systems (e.g., so that team leaders know how to interpret reports generated by AI). Organizational resilience also takes on a new dimension: a failure or error in an AI system can cause a systemic problem (for example, if an

[19] Langheld, G., Haagen C., *op.cit.,* note 14*,* p. 1538.

[20] When assessing discrimination by algorithms, a number of reactions can be found which point at the difficulties in establishing the relationship between antidiscrimination law and algorithm-based decisions. See Morondo Taramundi, D., *Discrimination by Machine-Based Decisions: Inputs and Limits of Anti-discrimination Law*, in: Custers, B.; Fosch-Villaronga, E. (Eds.), *Law and Artificial Intelligence- Regulating AI and Applying AI in Legal Practice*, Asser Press, The Hague, 2022, p. 75. *Conf.* Langheld, G., Haagen C., *op. cit.* in fn. nr. 14*, ibid.* Algorithmic bias is often a reflection of bias in the data used to train the system. This underscores the need for high quality (accurate) input data and for testing the model for fairness. In Germany, the literature already refers to organizational obligations of employers when dealing with algorithmic systems, analogous to occupational safety obligations - e.g., the obligation to check whether the decision-making system functions fairly and without discrimination.

inventory management system incorrectly predicts demand, this can lead to overstocking or shortages). Crisis mechanisms must therefore be planned for such cases (e.g., falling back on human decision-making or redundant systems).

In short, automation through AI promises efficiency, but requires well-thought-out integration into work processes and good change management. Companies that succeed in benefiting from AI while maintaining a human face in management and respecting employee rights will have an advantage. With the new regulation, European legislators want to create an appropriate regulatory framework for the responsible use of AI, which will be discussed in more detail in the next chapter.

4. EUROPEAN UNION AI ACT

The AI Act is the first comprehensive attempt to regulate artificial intelligence in the EU and introduces comprehensive and risk-based regulation of the development, use, and marketing of artificial intelligence systems. In other words: With this law, the European Union aims to create a common legal framework for AI that balances the need to protect the public interest and fundamental rights with the promotion of innovation. The law has extraterritorial effect and also applies to companies outside the EU if they use AI systems in their business activities within the EU or use them in a way that affects citizens of EU member states. Such an approach, similar to that of the GDPR system, reflects the EU's efforts to enforce high standards worldwide ("Brussels effect") and encourage other countries outside the EU to regulate AI technologies in a similar manner. The AI Act is intended to be a legally binding EU regulation, meaning that it will apply directly and uniformly in all member states.[21]

The normative structure of the AI Act reflects the dual nature of this regulation—it combines elements of traditional product safety law and modern digital regulation. It draws heavily on proven concepts from the EU's new legal framework for the marketing of products (e.g., conformity assessment requirements, responsibilities of manufacturers, importers, and distributors). However, the AI Act goes beyond mere product safety by introducing rules designed to ensure the protection of fundamental rights and ethical values in relation to AI technology. This is unusual for the regulations of the New Legislative Framework, but justified in the case of the AI Act, as it regulates an area of law that cannot be harmonized and interpreted exclusively through product-related regulations. This applies in particular to the legal regulation of the

[21] Voigt, P., Hullen, N., *Handbuch KI-Verordnung*, Springer, Berlin, 2024, p. v. (Foreword).

status of generic AI models, which should be constantly taken into account, especially in the context of protecting the rights of workers and consumers, but also of other legal and natural persons. The AI Act is divided into chapters covering the following topics: definitions and general scope (including exceptions, e.g., exclusion of AI systems used exclusively for military and security purposes), a list of prohibited AI practices, detailed rules for high-risk AI systems, specific transparency requirements for certain AI systems with limited risk, obligations relating to generic AI models for general purposes, the creation of an institutional framework for oversight (national supervisory authorities and a European AI Board), and provisions on enforcement and sanctions for infringements of this Regulation.[22]

4.1. EU AI Act – Key provisions and implications for business

The AI Act introduces a risk-based approach to regulation. At the heart of the Act is the classification of AI systems according to the level of risk their use poses to human health, safety, and fundamental rights. The regulation recognizes four levels of such risks. Systems with unacceptable risk include, for example, cases where the use of AI systems violates fundamental human rights. From the perspective of EU regulations, it is therefore unacceptable for the government to introduce a kind of "social scoring" system for citizens (as is the case in China) or to use subconscious manipulation techniques that can harm people. The implementation of such systems is not permitted. The next category is high-risk AI systems. Such systems represent a key category subject to strict requirements under the AI Act. Annex III of the regulations provides an exhaustive list of areas considered high risk. Particularly relevant for companies are AI systems in the areas of recruitment, employee management, and access to self-employment, AI for the management of basic private and public services (e.g., credit scoring systems), creditworthiness assessment systems, product safety components, and the like..[23]

AI systems with limited risk are those that do not pose a high risk but still require certain transparency measures. The AI Act lists chatbots that communicate with humans as an example. Companies or institutions that use these algorithms in their work are required to inform their customers that they are communicating with AI and not with another human being. For this group, the regulation sets out virtually

[22] *Ibid.*
[23] For example, Chapter III states that AI systems used to select or filter individuals in hiring processes or to make decisions about termination of employment are considered high-risk - meaning that a company that uses an algorithm for hiring or automated decisions about termination of employment must comply with the requirements of the AI Act. *Ibid*., p. 47.

no specific requirements other than general ones, such as general product safety requirements. The focus of companies will, of course, remain on high-risk systems. The AI Act imposes a whole range of horizontal requirements that such systems must meet in order to be used or placed on the market. These requirements include establishing and maintaining an AI risk management system (identifying potential risks and measures to mitigate them throughout the system's life cycle), ensuring high-quality data for training, testing, and validating AI (the aim is to ensure the relevance and representativeness of the data and minimize bias in the data set), the creation of technical documentation and the keeping of records (logs) on the operation of the AI system to enable monitoring and accountability, and ensuring a certain level of transparency for example, when an AI system communicates decisions or recommendations to users, it must be clear that the decision was made or suggested by the AI (with an indication of the most important parameters on which it was based). The responsibility for fulfilling these obligations lies primarily with the provider of the UI system, i.e., the party that places the system on the market or puts it into service under its own name. This is typically a software manufacturer or technology company that develops a UI system for distribution. However, users of high-risk AI systems (e.g., a company that purchases such a system and uses it internally) also have certain obligations: They must use the system in accordance with the instructions, monitor its implementation themselves, report serious incidents or malfunctions to the competent authorities, and refrain from making unauthorized changes to the system that could increase the risk. So if a bank uses another party's UI system to assess the creditworthiness of its customers, it is obliged to monitor its work and warn the manufacturer and supervisory authorities of any unexpected results that could pose a risk to customers.

The AI Act implies that a company's management and supervisory bodies will also have to take responsibility for checking the legal compliance of AI systems in future. The board of directors cannot claim that it did not know how the employee evaluation system worked if it potentially violated the law—it is the duty of company management to ensure that systems with the necessary certifications are used and that procedures for monitoring these systems are implemented within the company. In some critical sectors (such as finance, transportation, or healthcare), the AI Act's mechanisms (e.g., mandatory conformity assessment) will give regulatory authorities insight into and control over AI in companies. Overall, the AI Act introduces proactive regulation before AI reaches users, it must meet certain standards. This is a different approach from the previous one, which often involved reacting only after problems arose (e.g., court cases involving discrimination).

The question of data management also remains open, which the AI Act only touches on marginally with regard to data quality. The AI Act does not address these issues of data ownership and value for the time being, but it does lay the groundwork by defining the obligations associated with the use of data.[24]

5. CONCLUSION

The considerations in this article show that artificial intelligence in Corporate Law is much more than just software. This conclusion also applies to most other areas of human life and work. Due to its ability to process large amounts of data in a short time, machine learning, autonomous decision-making, and adaptation, AI is becoming an increasingly better assistant in decision-making and management. Executive boards and managing directors are faced with the challenge of integrating AI into management processes while upholding the fundamental legal principles of responsibility, transparency, and protection of the interests of society and third parties. AI is already contributing to better information and greater efficiency in the work of numerous companies' executive boards. Algorithms can extract patterns from huge amounts of data that are imperceptible to humans and make recommendations that lead to faster and often better business decisions. Using the AI can be a competitive advantage – managers who ignore these tools could fall behind. On the other hand, completely delegating strategic decisions to a machine would contradict the legal and ethical framework of human society. The human factor remains indispensable when setting goals, assessing risks, and making decisions that require value judgments (e.g., weighing the interests of shareholders, employees, etc.). In complex situations that require moral reasoning, intuition, and creativity, AI cannot yet fully replicate human judgment (and may never be able to do so). The existing legal framework governing the duties of corporate bodies does not prevent the meaningful use of AI, provided that management acts with due care and responsibility. On the contrary, one could almost say that reasonable and conscientious corporate management, depending on the nature and scope of the company's business activities, would be obliged to examine the possibility of using all means that could help it make a decision based

[24] Graf von Westphalen points out that the traditional concept of ownership (as a right to a tangible object in civil law) does not fit well with the phenomenon of data generated by machines and AI. The question of "who owns the data" produced, for example, by AI systems in autonomous driving or by business AI in market analysis, has not been clearly resolved. The EU is creating a legal framework for the exchange of industrial data. However, companies find themselves in a situation where they have to resolve the rules for data management internally on the basis of their own autonomous rules. Westphalen points out that the concept of the "data economy" also requires an adjustment of accounting rules – perhaps valuable data sets and trained models will be recognized as intangible assets on the balance sheet in the future. Graf von Westphalen, F., *op. cit.,* note 2, p. 744-745.

on adequate information, in accordance with the standards of a prudent businessman. However, precisely because of the aforementioned requirement for attention, management must remain in control of the process and critically monitor AI. Legal obligations such as organizing oversight, ensuring data quality, and auditing systems are all derivatives of the general duty of care that have been adapted to the new context. If these obligations are met, management can use AI without exposing the company or themselves to unacceptable risks.

Furthermore, the automation of functions through AI is changing the way business is done, but it also requires a new social contract within the company. Employees must be guaranteed that they will not be treated unfairly by an algorithm and that there is a mechanism for appealing and human review of decisions. Employers, in turn, can use AI to eliminate subjective biases and increase productivity. However, they should be careful not to create an "opaque machine bureaucracy" that undermines employee trust. Trade unions and works councils will also play an important role here, as they are already involved in examining the introduction of employee monitoring systems in some countries. Human oversight of AI is important not only for technical reasons, but also to preserve human dignity in the work process.

The EU AI Act is a pioneer in the global regulation of AI and introduces relatively strict but necessary rules, especially for high-risk areas of human activity. Its implementation will ensure minimum standards of quality and safety, which will also benefit companies (as it will strengthen user confidence in AI products and services). The challenge, of course, is to find the right balance so that innovation is not stifled by excessive regulation. The AI Act attempts to strike a balance by providing relief for smaller players and focusing on areas with the highest risks. For the business sector, compliance with the AI Act will become part of the compliance routine, similar to the GDPR or environmental regulations. This may require new expertise in corporate legal departments, but in the long run it will create predictability and a "level playing field" for all. In any case, the question of legal liability mechanisms for damages caused by the use of AI systems remains open. The injured party must not be left in a legal vacuum between the responsibilities of the manufacturer and the purchaser (user) of the AI system. The trend is to close these gaps by adapting existing regulations (e.g., by extending strict liability). The question of the confidentiality of algorithms as a company's trade secret in relation to the community's demand for transparency regarding the work of these companies is also controversial. Companies invest heavily in AI and protect their algorithms as trade secrets, but on the other hand, the public interest may demand insight when these algorithms decide, for example, on loans or insurance for citizens. The issue of market competition must not be ignored either. The dominance of a few large technology companies in the AI development

market would certainly not be desirable, which is something that responsible legislators should keep in mind.

All of these issues are relatively new to Croatian company law. As a member of the EU, Croatia is obliged to incorporate AI law into its legal system. This also means training lawyers, judges, and corporate lawyers in all aspects of AI. Company law may need to change in some respects in the future (e.g., requiring mandatory IT expertise for certain bodies or defining rules for autonomous decisions within companies), but fundamentals such as the responsibility of bodies, the protection of minority shareholders, and corporate transparency will remain equally important, albeit taking on new forms through the prism of AI. Artificial intelligence has the potential to improve and streamline corporate governance—through more informed decisions, automated routines, and predictive analytics—but it is not a risk-free panacea. It is a powerful tool, and every powerful tool requires a robust framework for accountability. Therefore, legislators must proceed with great caution when making any changes to regulations that give economic reasons priority over fundamental human rights. Company law and related regulations in the EU are moving in precisely this direction: integrating AI into the legal system in such a way that innovation is promoted but abuse and harm are prevented. The challenge for legal scholarship is to continue to critically accompany these changes. Just as legal theorists once discussed legal machines and warned of the dangers of mechanical application of the law, we must now ensure that algorithmic governance serves people and society, and not the other way around.

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Review paper

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SLOVAK PRIVATE AND PUBLIC LAW IN DIGITAL SERVICES - A TENTATIVE ROMANCE*

ABSTRACT

The digitalization of public and private services in Slovakia has exposed significant discrepancies in adoption, regulation, and technological implementation. While private digital services, particularly e-commerce, have flourished, e-government services remain underutilized due to rigid legal frameworks, administrative burdens, and cyber security concerns. The requirement for Qualified Electronic Signatures (QES) in public services contrasts sharply with the more flexible use of electronic signatures in private transactions. Furthermore, inconsistencies between Slovak and European Union regulations on electronic signatures and digital identity have led to legal ambiguities that hinder seamless integration. Using a multidisciplinary approach that combines legal analysis, policy review, and case studies, the paper examines regulatory inconsistencies, barriers to private sector participation in public digital services, adoption of e-wallets, and the implications of security breaches, such as the recent large-scale ransom are attack on public infrastructure. The findings highlight the urgent need for a more harmonized regulatory framework, greater cooperation between the government and private enterprises, and the adoption of user-friendly digital policies. The paper argues that Slovakia's digital transformation requires a shift toward more flexible authentication measures, enhanced cyber security strategies, and improved public trust in e-government services. By addressing these issues, Slovakia can achieve a more secure, efficient, and accessible digital ecosystem for both public and private sectors.

***Keywords**: e-government, electronic signatures, digital transformation, legal frameworks*

1. INTRODUCTION

The objective of this paper is to explore the reasons behind the decline in the utilization of Slovak public electronic services, even during lockdowns, while the

proportion of online sales in Slovakia has consistently been above average compared to other member states.

Ideally, there would be no significant disparities in public and private legal frameworks, and technical solutions would be interoperable and platform-independent. For instance, a government authentication tool could serve as an identity proof in electronic commerce. Similarly, there should no major differences in requirements regarding the proper type of electronic signature for a specific transaction.

By analyzing inconsistencies between Slovak private and public law and between Slovak and European regulation, we can comprehend the complex legal environment in which a user is situated. Considering that there are currently several types of valid electronic IDs from which older versions do not permit the creation of qualified electronic signatures, which are required in the majority of public services, we can understand why public electronic services can be confusing to use.

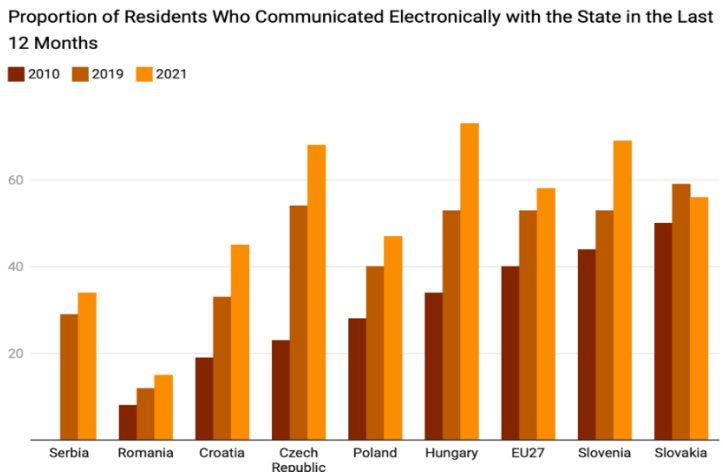
This paper delves deeper into the potential of recent initiatives, such as the streamlined process for establishing a limited liability company electronically and the introduction of national and European e-wallets, to bridge the gap between private and public electronic services. Nevertheless, the 2025 ransomware attack on the Slovak cadastral system, from which the cadaster's electronic services have yet to fully recover, has significantly eroded public trust in e-government. The aim of this paper is to contribute to the ongoing discourse on digital transformation by presenting empirical evidence and analytical insights specific to the Slovak context. By addressing the identified issues, the paper advocates for a more harmonized legal framework and, in the case of electronic public services, emphasizes the importance of predictability and transparency, which should result in increased confidence in electronic public services and their increased usage.

2. SLOVAKIA'S DIGITAL DILEMMA: PUBLIC VS. PRIVATE ADOPTION

The COVID-19 pandemic necessitated an accelerated digital transformation among governments, employers, and citizens. The United Nations identified this transformation as an opportunity for fostering digital inclusion and, in the long term, as a foundation for the advancement of innovative technologies such as

artificial intelligence (AI), block chain, robotics, and drone technologies.[1] Additionally, digitalization was seen as a means of enhancing the resilience of public services, healthcare, and economic systems. Several nations demonstrated remarkable adaptability in response to this challenge. For instance, governments in Latin America and the Caribbean implemented measures that led to an increase in government-related digital transactions from 21% prior to the pandemic to 39% during it. Nevertheless, the same study indicated that approximately 50% of citizens still completed their most recent transaction in person.[2] Comparable trends were observed in Central Europe. According to Erste Bank, the proportion of citizens who engaged in electronic communication with their respective governments between 2019 and 2021 increased in all countries except Slovakia.[3]

Chart No. 1: Proportion of Residents who communicated electronically with State in the last 12 months



Source: Denník N, proportion of citizens who engaged in electronic communication with their respective governments

* The paper was created as part of the research grant project VVSG No. 2024-3381, titled: Human Rights and Ethical Aspects of Digitalization and E-Commerce.

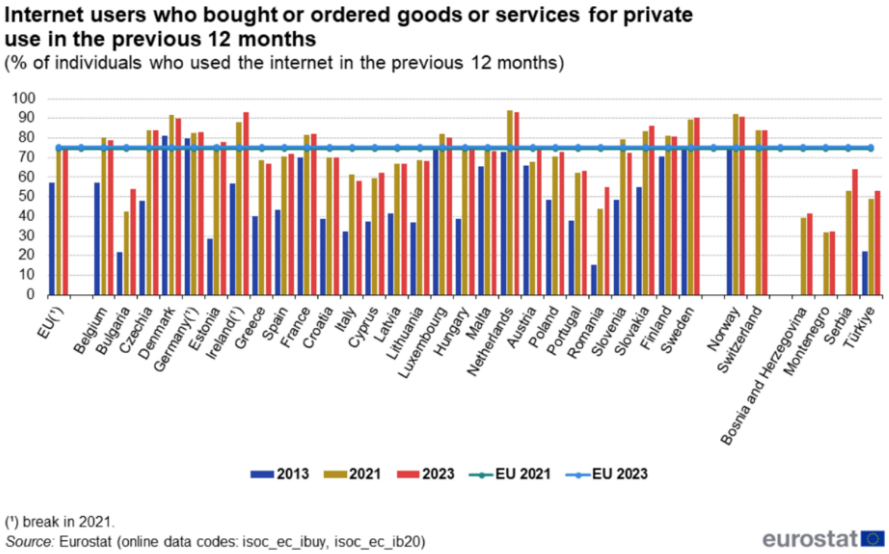
[1] COVID-19: Embracing digital government during the pandemic and beyond, UN. Department of Economic and Social Affairs, April 2020, https://digitallibrary.un.org/record/ 3856978?v=pdf&ln=en, 24 January, 2025.

[2] Roseth, B.; Reyes, A.; Yee Amézaga, K., *Public Services and Digital Government during the Pandemic: Perspectives of Citizens, Civil Servants, and Government Institutions, Inter-American Development Bank*, 2021, http://dx.doi.org/10.18235/0003122, 24 January, 2025.

[3] Tomek, R., Graf dňa: RozširovanieGovernmentusavlaninaSlovenskuako v jedinejkrajineregiónuzastavilo,Denník N, N Press, s.r.o., 16. February 2022, https://e.dennikn.sk/2724194/graf-dna-slovensko-sa-v-elektronickej-komunikacii-so-statom-prepadlo-pod-priemer-eu/, 24 January, 2025.

Meanwhile, data from Eurostat (2023) reveal that 75% of internet users in the European Union engaged in online purchases or ordered services. In Slovakia, the proportion of online sales remained above the EU average.[4]

Chart No. 2: Internet users who bought or ordered goods or services for private use in the previous 12 months



Source: Eurostat, E-commerce statistics for individuals for 2023

These statistics underscore a significant discrepancy between private and public digital services in Slovakia. While the utilization of e-government services declined during the pandemic-induced lockdowns, e-commerce transactions exhibited a steady upward trajectory.

Through a multidisciplinary methodology that integrates legal analysis, policy evaluation, and case studies, this paper posits that the reasons for the statistical results can be attributed to two explanations.

This first explanation is based on the variations in the legal frameworks governing public and private regulation of electronic signatures significantly influences their

[4] Eurostat, E-commerce statistics for individuals, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce_statistics_for_individuals#75_.25_of_internet_users_bought_or_ordered_goods_or_services_online_in_the_EU_in_2023, 24 January, 2025.

application. The divergence in regulatory standards between public electronic services and private contractual use may result in unnecessarily strict limitations on the acceptable types of electronic signatures in public services, in contrast to the more flexible approaches adopted in comparable private-sector contexts.

Secondly, technical limitations, including inadequacies in state-issued electronic identification (e-ID) systems, have failed to meet user expectations. We argue that the Slovak government's shortcomings in providing timely and transparent communication regarding the hardware limitations of e-IDs, coupled with the implementation of opaque solutions—such as the distinction between qualified and advanced electronic signatures in certain cases—have led to an unnecessarily complex system for users.

This paper also argues that the Slovak government has been slow and selective in granting private enterprises access to specific government-provided digital services. For instance, certain businesses have been granted legal access to national identity databases, thereby gaining a competitive advantage in their services. The implementation of e-wallets based on European regulations could address this disparity. However, the Slovak government has opted for a distinct national e-wallet initiative, independent of the existing European framework, which is exclusively designed to serve law enforcement authorities.

Finally, we hypothesize that the aftermath of the most significant ransomware attack on public services in Slovak history may have a lasting impact on public trust in e-governmental services. Specifically, the inadequate communication regarding the incident, the extensive scope of its impact, and the prolonged duration of the disruption are likely to negatively influence public perception of e-governmental services.

3. REGULATION OF ELECTRONIC SIGNATURES

The legal framework governing electronic signatures is established by Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ L 257, 28.8.2014, p. 73–114 (hereinafter: eIDAS Regulation). At the national level, the eIDAS Regulation is further implemented through Act No. 305/2013 Coll. on the electronic execution of public authority powers (hereinafter: e-Government Act). The e-Government Act regulates the use of electronic signatures within public law. In the realm of private law, electronic signatures are governed by the Civil Code Act No. 40/1964 Coll. (hereinafter: Civil Code). Both the e-Government Act and the Civil Code are

supplemented by Act No. 272/2016 Coll. on Trust Services for Electronic Transactions in the Internal Market (hereinafter: Trust Services Act).

From a legislative perspective, a clear distinction exists between the regulation of public and private law concerning electronic signatures, which in itself does not present an issue. However, as this paper will illustrate, contradictions arise between the e-Government Act, the Civil Code, and the eIDAS Regulation regarding the use of electronic seals, the recognition of electronic signature types beyond qualified electronic signatures, and inconsistencies within the national framework. Before further analyzing these contradictions, it is necessary to define electronic signatures and seals and outline their various classifications.

3.1. Electronic signatures and the electronic seals

From a technical standpoint, an electronic signature and an electronic seal constitute data in electronic form that are attached to or logically associated with other electronic data for the purpose of authentication (Article 3 (10,25) of the eIDAS Regulation).

A distinction must be made between electronic signatures and digital signatures. Whereas an electronic signature is a legal concept defined by the eIDAS Regulation, a digital signature pertains to a mathematical and cryptographic method employed to create electronic signatures.[5] According to ETSI TR 119 100, a digital signature is defined as *"data appended to, or a cryptographic transformation of a data unit that allows a recipient of the data unit to prove the source and integrity of the data unit and protect against forgery."*[6]Not all electronic signatures fall within the scope of digital signatures, necessitating differentiation between these concepts.

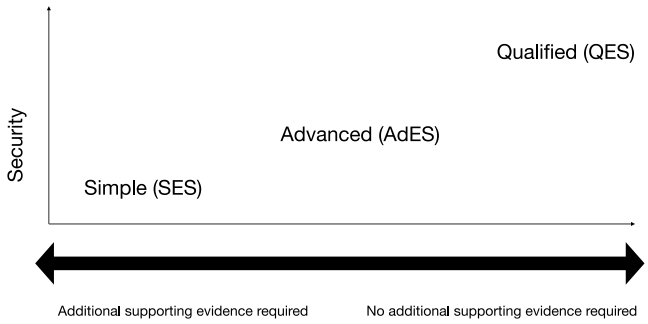
The eIDAS Regulation recognizes three types of electronic signatures:

a) Qualified (QES),
b) Advanced (AdES)
c) Simple (SES).

Each of these signature types holds legal validity, with their primary distinction being the level of security provided.

[5] eSignature FAQ, What is the difference between an electronic signature and a digital signature? European Commision, https://ec.europa.eu/digital-building-blocks/sites/display/DIGITAL/eSignature+FAQ, 27 January, 2025.
[6] ETSI TR 119 001 V1.2.1 (2016-03), Electronic Signatures and Infrastructures (ESI); The framework for standardization of signatures; Definitions and abbreviations, https://www.etsi.org/deliver/etsi_tr/119000_119099/119001/01.02.01_60/tr_119001v010201p.pdf, 27 January, 2025.

Chart No. 3: Relation between different types of electronic signatures and their security



The primary function of an electronic seal (ESeal) is to ensure the authenticity and integrity of an electronic document issued by a legal entity. The eIDAS Regulation defines an ESeal as *"data in electronic form, which is attached to or logically associated with other data in electronic form to ensure the latter's origin and integrity"* (Article 3 (25) of the eIDAS Regulation). Unlike electronic signatures, which signify an individual's intent, ESeals safeguard the integrity of documents issued by legal entities, whether public or private. Therefore, a document issued by a legal entity that represents a declaration of intent or an official decision must be electronically signed rather than merely sealed.

Both electronic signatures and electronic seals are created using similar technical methods. A QES and a Qualified Electronic Seal (QESeal) are both defined as an advanced electronic signature or seal created through a qualified electronic signature/seal creation device and based on a qualified certificate for electronic signatures (Article 3 (12,27) of the eIDAS Regulation).

A QES is the only type of electronic signature that holds the same legal effect as a handwritten signature (Article 25 (2) of the eIDAS Regulation). Other types of electronic signatures, including QESeals, do not possess this equivalent legal standing.

The creation of a QES or QESeal necessitates the fulfillment of all technical requirements, including the use of a certified qualified electronic signature/seal creation device, such as an e-ID chip card. The European Union maintains a

publicly available list of these qualified devices.[7] Additionally, the QES/QESeal must be generated using a qualified certificate issued by a certified entity, also documented on the European Union's official registry.[8]

Compared to QES/QESeal, advanced electronic signatures (AdES) and advanced electronic seals (AdEseal) are either missing a qualified electronic signature/seal creation device or a qualified electronic signature/seal certificate. Although these types of signatures and seals offer a lower level of security compared to QES/QESeal, they remain valid and provide a reasonable degree of trustworthiness.

The Simple Electronic Signature (SES) is the most commonly utilized form of electronic signature. Examples of SES include an email sender's name, click-wrap or scroll-wrap agreements in e-commerce[9],and various forms of digital communication such as messaging applications. Although SES is the least secure form of electronic signature, this does not inherently render documents signed using SES invalid. However, due to its lower security threshold, legal acts signed with SES may be more susceptible to challenges regarding authenticity. As will be demonstrated in subsequent sections, Slovak courts have historically exhibited reluctance in recognizing SES as a legally valid expression of will and have often required QES, despite the widespread use of SES by consumers and commercial entities.

4. QUALIFIED ELECTRONIC SIGNATURES VS. ADVANCED ELECTRONIC SIGNATURES IN E-GOVERNMENT

Until January 2024, Slovak residents could access public services exclusively through the use of Qualified Electronic Signatures (QES), which were required for the authorization of submitted filings. To generate a QES, users needed both a qualified electronic device and a qualified electronic certificate. Given that QES represents the highest and most secure form of electronic signature, it is evident why the government mandated its use. To facilitate compliance, the state issued

[7] Qualified Signature/Seal Creation Devices and Secure Signature Creation Devices, European Commission, eIDAS Dashboard, https://eidas.ec.europa.eu/efda/browse/notification/qscd-sscd, 27 January, 2025.
[8] EU/EEA Trusted List Browser, eIDAS Dashboard, https://eidas.ec.europa.eu/efda/trust-services/browse/eidas/tls, 27 January, 2025.
[9]Treščáková, D., *Právoelektronickéhoobchodu, Širšiesúvislosti*. Praha: Leges, 2021, p. 62

electronic IDs (e-IDs) as qualified electronic devices, accompanied by qualified electronic certificates.

To promote the adoption of public e-services, the government designated certain services as exclusively electronic, such as the Register of Public Sector Partners, the Business Register, tax filings, and various judicial services, including initiating enforcement proceedings and submitting petitions for Reminder Proceedings. Additionally, the government mandated the use of e-government services for specific groups, including attorneys and legal entities. Consequently, this policy resulted in a substantial user base for QES, as individuals and businesses needed to utilize QES to continue their operations and meet legal obligations. It is important to note that QES generated by any qualified electronic device and qualified electronic certificate issued under the eIDAS Regulation must be accepted, with electronic IDs being the most prevalent among Slovak residents.

According to the Ministry of Interior of the Slovak Republic, between December 2013 and December 2024, the Slovak government issued a total of 5,329,419 e-IDs. In 2024 alone, 665,112 e-IDs (qualified electronic devices) and 109,935 qualified electronic certificates were distributed.[10] This indicates that in 2024, only 109,935 Slovak residents opted to activate their QES, despite the availability of a free-of-charge qualified electronic certificate, which could be obtained online after the issuance of an e-ID.

This disparity can be attributed to the government's failure to address the expiration of e-ID integrated chips with sufficient foresight. Ultimately, this oversight compelled the government to waive the QES requirement for certain services and permit the use of Advanced Electronic Signatures (AdES). Unfortunately, determining which public services necessitate QES and which allow AdES remains a challenge for users.

On May 26, 2021, the Ministry of Interior issued a press release informing users that, within one month, the five-year certification of chips embedded in e-IDs would expire.[11] Users who had not downloaded a qualified certificate for

[10]Prehľadvydávania elektronický chobčianskychpreukazov a certifikátov pre vytvorenie kvalifikovaného elektronického podpisu (eIDštatistika) k 31.12.2024 (PDF, 200 kB), https://www.minv.sk/swift_data/source/policia/md_ode/eid_statistika/2024_eid_statistika/eID%20statistika_12.pdf, 30 January, 2025.

[11]Platnosťcertifikátu pre vydávanie e-podpisunaobčianskychpreukazoch a cudzineckýchdokladochkončí 26. júna, používaťvydanécertifikátyvšakbudemožnéaž do koncaroku 2022, Ministry of Interior of the Slovak Republic, 26. 05. 2021 Press Release, https://www.minv.sk/?tlacove-spravy&sprava=platnost-certifikatu-pre-vydavanie-e-

electronic signatures were granted a grace period until June 25, 2021, to obtain a new certificate. Failure to do so necessitated requesting a new e-ID for continued use of QES. Meanwhile, individuals possessing e-IDs issued before June 21, 2021, could generate QES until the end of 2022. However, from January 1, 2023, neither citizens nor legal residents with e-IDs issued before June 20, 2021, were able to create QES, effectively preventing their access to e-government services.

We contend that the government could have taken proactive measures to mitigate disruptions caused by the expiration of e-IDs. Initially, the public largely disregarded the issue, but as the deadline approached, it became apparent that individuals without a valid QES would be unable to file tax records or utilize e-government services. Reports from public media indicated that, in December 2022, applicants for e-IDs and residency cards faced extended waiting times merely to submit renewal applications. The Ministry of Interior confirmed that between December 1, 2022, and mid-January 2023, the state received over 130,000 applications for e-ID issuance. In December alone, 92,674 applications were submitted, and 54,341 ID cards were issued—three times the number issued in December 2021.[12] Furthermore, in December 2021, the government introduced new biometric e-IDs, cautioning that the transition to this technology would result in processing delays.[13]

By December 2022, it became evident that the government lacked the capacity to process the surge in e-ID renewal requests. As a result, in a last-minute decision, the government introduced Decree No. 511/2022 Coll. on December 19, 2022, allowing, for the first time, the use of AdES in electronic public services.[14] This decree was initially intended as a temporary measure for individuals with e-IDs issued before June 20, 2021, who could no longer generate QES due to expired e-

podpisu-na-obcianskych-preukazoch-a-cudzineckych-dokladoch-konci-26-juna-pouzivat-vydane-certifikaty-vsak-bude-mozne-az-do-konca-roku-2022, 2 February, 2025.

[12]Kosno, L., Žiadosti o nové e-občianskelámalirekordy. Štáttvrdí, žedokladydoručívčas, Ringier Slovakia Media s.r.o., 18.1.2023, https://zive.aktuality.sk/clanok/mpybc5l/ziadosti-o-nove-e-obcianske-lamali-rekordy-stat-tvrdi-ze-doklady-doruci-vcas/, 2 February, 2025.

[13]Bezkontaktné biometrickéobčianské preukazy pre obyvateľov EÚ budúrealitou. Ministerstvo vnútrapripravujeichvydávanie, SITA Slovenskátlačováagentúraa.s, 17. 11. 2022, https://sita.sk/bezkontaktne-biometricke-obcianske-preukazy-pre-obyvatelov-eu-budu-realitou-rezort-vnutra-pripravuje-ich-vydavanie/, 2 February, 2025.

[14]Decree No. 511/2022 Coll. of the Ministry of Investments, Regional Development, and Informatization of the Slovak Republic on Recognized Methods of Authorization

ID chips.[15][16]The provision was set to expire in June 2023, during which affected users were expected to obtain new e-IDs. However, given the significant number of individuals still in possession of expired e-IDs, the government repeatedly extended the expiration deadline—first to December 31, 2023, then to December 31, 2024, and most recently to December 31, 2025.[17]

The integration of AdES in public e-services could have facilitated greater innovation, including the development of remote electronic signatures and increased participation from private sector entities in e-governmental services. However, since AdES is regarded as a temporary measure, its implementation remains limited. At present, a total of 249 public services permit the use of AdES, yet identifying which services require QES versus AdES necessitates searching an Excel sheet[18]on the National Agency for Network and Electronic Services' website.[19] Given that the average public service user may lack the technical knowledge to differentiate between QES and AdES, the system remains unnecessarily complex.

Although both QES and AdES are theoretically available for use in electronic public services, their adoption has not resulted in substantive advancements in e-governmental services. The existence of 249 AdES-enabled services suggests an acknowledgment that not all public services require the stringent security of QES. Nevertheless, the lack of transparency regarding AdES implementation raises concerns. Presently, the primary benefit of permitting AdES in public services is that residents with e-IDs issued before June 20, 2021, are not compelled to obtain a new e-ID. However, this concession alone cannot be regarded as an innovation in digital governance.

[15]Kosno, L., Podpisujetesa e-občianskymstaréhotypu? Dočasné riešeniemáfungovaťibapolrok, Ringier Slovakia Media s.r.o., 25.11.2022, https://zive.aktuality.sk/clanok/zOxZBFl/podpisujete-sa-e-obcianskym-stareho-typu-docasne-riesenie-ma-fungovat-iba-polrok/, 2 February, 2025.
[16]Vyhláška o uznanýchspôsobochautorizácie a nasadenézmeny, National Agency for Network and Electronic Services, https://www.slovensko.sk/sk/institucie-formulare-a-ziado/vyhlaska-o-uznanych-sposoboch, 2 February, 2025.
[17]Predĺženiepoužívaniauznanéhospôsobu autorizácie, National Agency for Network and Electronic Services, 06. 11. 2024, https://www.slovensko.sk/sk/oznamy/detail/_predlzenie-pouzivania-uznaneho, 2 February, 2025.
[18]Vyhláška o uznanýchspôsoboch autorizácie a zoznam služieb, National Agency for Network and Electronic Services, 30. 12. 2022, https://www.slovensko.sk/_img/CMS4/Zoznam_sluzieb_USA.xlsx, 2 February, 2025.
[19]Vyhláška o uznanýchspôsobochautorizácie a zoznamslužieb, National Agency for Network and Electronic Services, 30. 12. 2022, https://www.slovensko.sk/sk/oznamy/detail/_vyhlaska-o-uznanych-sposoboch, 2 February, 2025.

4.1. Qualified electronic seals in public services

As previously stated, under the eIDAS Regulation, electronic seals serve as evidence that an electronic document has been issued by a legal entity, thereby ensuring the certainty of the document's origin and integrity (Article 3(25) of the eIDAS Regulation). However, pursuant to Section 23, Paragraph 1, Letter a) of the e-Government Act, Qualified Electronic Seals (QESeals) may be used to authorize electronic documents in the same manner as a Qualified Electronic Signature (QES). Consequently, there is no legal distinction between a public document signed using a QES or a QESeal, nor is there any difference if a legal entity signs a petition with either a QES or a QESeal.

When the Slovak Parliament enacted the e-Government Act in 2013, the accompanying Justification Report[20] asserted that an electronic seal is functionally equivalent to an electronic signature. Furthermore, it ambitiously claimed that the authorization of acts within the scope of the e-Government Act was fully aligned with the forthcoming eIDAS Regulation. However, with regard to electronic seals, this assertion is demonstrably inaccurate.

The authors of this paper are not privy to the rationale behind equating QES with QESeals in the e-Government Act. Given that this provision has remained unchanged since 2013, we infer that the intention was to streamline the administration of electronic public documents by permitting the use of QESeals without the additional requirement of a QES. However, since treating QESeals as equivalent to QES contravenes the eIDAS Regulation, we question the legality of the Slovak e-Government Act in this regard. Nevertheless, we are unaware of any legal precedent in which a public document electronically signed solely with a QESeal has been invalidated due to non-compliance with the eIDAS Regulation. However, it is crucial to acknowledge that Slovak public electronic documents retain legal validity across the European Union. If such documents are "signed" exclusively using QESeals, there is a risk that they may be rejected by receiving parties within the EU.

4.2. Mandate certificates in public services

Annex I of the eIDAS Regulation delineates the prerequisites for the issuance of qualified certificates for electronic signatures. Article 28, Section 3 of the eIDAS

[20]Government Bill on the Electronic Form of the Exercise of Public Authority and on Amendments and Supplements to Certain Laws (e-Government Act), Explanatory Report – Special Part, https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=384288, 2 February, 2025.

Regulation permits the inclusion of additional specific attributes in a qualified certificate, provided that such attributes are non-mandatory. Furthermore, these additional attributes must not compromise the interoperability and recognition of qualified electronic signatures across jurisdictions.

In the Slovak Republic, these ostensibly non-mandatory additional attributes have, in practice, been rendered obligatory. To facilitate the implementation of the eIDAS Regulation within Slovak national law, the legislature enacted Act No. 272/2016 Coll. on Trust Services for Electronic Transactions in the Internal Market and on Amendments and Supplements to Certain Acts (hereinafter:Trust Services Act). This statute introduced a distinct category of qualified certificate known as the "Mandate Certificate" (Section 8, Paragraph 1 of the Trust Services Act).

The Mandate Certificate diverges from a standard qualified certificate in that it incorporates supplementary attributes, including data facilitating the identification of the public body that the signatory, as a natural person, represents. The principal function of Mandate Certificates is to provide verifiable proof of the signatory's authorization to: (a) act on behalf of or in the name of the principal, (b) undertake activities in compliance with specific regulations, and (c) exercise functions stipulated under special regulations. Consequently, Mandate Certificates are issued to judges, attorneys, bailiffs, employees of public bodies, and other agents executing public duties.

Despite being a variant of a qualified certificate, the Mandate Certificate has been rendered mandatory for public authorities under the provisions of the e-Government Act (Section 23, Paragraph 1). This statutory requirement stipulates that: *"A public authority shall, in the exercise of public authority, authorize an electronic submission or an electronic official document using a qualified electronic signature created with a Mandate Certificate or a qualified electronic seal."* The imposition of this requirement raises concerns regarding its compliance with the eIDAS Regulation, as it appears to contravene its provisions by mandating a specific type of qualified certificate.

To facilitate the transition between paper-based and electronic documents, as well as vice versa, the e-Government Act introduced a procedural mechanism known as Guaranteed Conversion (Section 35 of the e-Government Act). This process enables the transformation of a document from one material form to another, specifically from paper to electronic format and vice versa. Additionally, Guaranteed Conversion accommodates the conversion of electronic documents in cases where an archival PDF format becomes obsolete. The legal significance of Guaranteed Conversion lies in the principle that the newly generated document retains the same legal effect and applicability for legal purposes as a certified copy

of the original document from which it was derived (Section 39, Paragraph 1 of the e-Government Act).

Given the legal ramifications of the Guaranteed Conversion process, its execution is entrusted exclusively to specific professions, including attorneys, notaries, banks, and postal service providers (Section 35, Paragraph 3 of the e-Government Act). Furthermore, Decree No. 70/2021 Coll. on Guaranteed Conversion prescribes that the authorization of this process must be executed using a Mandate Certificate.

The introduction and mandatory imposition of Mandate Certificates present a unique anomaly in the landscape of electronic signatures. At the national level, Mandate Certificates are treated as distinct from standard qualified certificates, despite their technical similarities. Moreover, their obligatory use by private entities in the context of Guaranteed Conversion exacerbates regulatory ambiguity. No compelling justification—compliant with the eIDAS Regulation—has been provided to explain why an attorney cannot utilize a standard qualified certificate to authorize the Guaranteed Conversion process. It is plausible that, as in the case of qualified electronic seals (QESeals), the primary purpose of Mandate Certificates is to streamline administrative procedures for public authorities. By requiring Mandate Certificates, public administration officials can efficiently verify the professional status of individuals such as attorneys, notaries, bailiffs, judges, and other public functionaries.

4.3. Electronic seals and signatures in private law

Electronic signatures and seals within the realm of private law are governed by Section 40, Paragraph 3 of the Civil Code. This provision stipulates that the written form of a legal act is preserved when such an act, performed via electronic means, is authenticated using a qualified electronic signature (QES) or a qualified electronic seal (QESeal).

4.4. Electronic seals

Similar to the application of QESeals in e-government services, the Civil Code permits the use of QESeals for electronic signatures in private law matters[21]. However, this stands in contradiction to the eIDAS Regulation, which explicitly

[21]Števček, M.; Dulak, A.; Bajánková, J.; Fečík, M.; Sedlačko, F., Tomašovič, M. a kol., *Občianskyzákonník II. 2. vydání.* Praha: C. H. Beck, 2019, marg. č. 10, p. 321.

prohibits the use of electronic seals for the creation of electronic signatures. Another noteworthy peculiarity of the Civil Code is its failure to expressly restrict the issuance of electronic seals to legal persons, as mandated by Article 3 (24,25) of the eIDAS Regulation. Consequently, an individual unfamiliar with the eIDAS Regulation might incorrectly infer that: (a) electronic seals, particularly QESeals, can be utilized to create electronic signatures, and (b) any individual, rather than exclusively legal persons, can be issued electronic seals.

This discrepancy between the Civil Code and the eIDAS Regulation likely persists due to the limited practical application of electronic seals in private law matters. Since Slovak residents are issued qualified electronic certificates as part of their electronic identification (eID) or residency cards, there is no significant demand for separate electronic seals for legal persons. A company's managing director, for instance, can always utilize their personal qualified electronic certificate to generate a QES. This further supports the argument against the use of electronic seals for the creation of electronic signatures, as they do not confer any practical advantages over QES.

4.5. Electronic signatures

Regarding electronic signatures, two key issues warrant discussion: (1) the creation of QES and its equivalence to a notarized signature, and (2) the absence of national private law provisions recognizing advanced or simple electronic signatures.

4.6. Notarized signatures

Notarized signatures are either mandated by law or agreed upon by contracting parties. The primary significance of a notarized signature lies in the involvement of an impartial third party who verifies the identity of the signatory and confirms that the individual is alive and of sound mind at the time of signing. This verification enhances the credibility of the legal act recorded in the contract.

It remains debatable whether QES (or QESeals) can achieve the same level of credibility as a notarized signature. Unlike notarized signatures, the creation of a QES does not necessitate the presence of an independent third party. Instead, under Section 40, Paragraph 5 of the Civil Code, an electronic time stamp must be appended to the electronic signature for it to have the same legal effect as a notarized signature. The purpose of this time stamp is to verify the exact moment

of QES creation. However, the Civil Code does not specify when the time stamp should be applied to the QES.

In the domain of public electronic services, if an electronic signature is to have the effect of a notarized signature, an electronic stamp must be appended after the QES is created, as mandated by Section 23, Paragraph 1, Letter (b) of the e-Government Act. Consequently, an electronic document bearing an electronic stamp applied before the creation of a QES would be considered equivalent to a notarized signature in private law but not in public law matters.

This inconsistency in regulatory requirements for public and private law raises concerns. There appears to be no justifiable rationale for the existence of two distinct regulatory frameworks governing electronic signatures with the effect of notarized signatures in public and private law contexts. A harmonized legal approach would enhance clarity, reduce ambiguity, and ensure consistent application of electronic signature regulations across different legal domains.

4.7. Advanced and simple electronic signatures

While public law acknowledges the use of Advanced Electronic Signatures (AdES) in certain e-government services, Slovak private law does not formally recognize either AdES or Simple Electronic Signatures (SES). The acceptance of SES as a valid means of expressing intent has primarily been established through judicial decisions. However, to our knowledge, there is no judicial ruling that has explicitly addressed a private law dispute involving AdES.

As previously noted, SES is the most widely used form of electronic signature, commonly employed in various contexts, ranging from click-wrap and scroll-wrap agreements in e-commerce to emails and messaging applications. Nevertheless, Slovak courts initially encountered difficulties in recognizing declarations of intent signed using SES as legally valid. Instead, they required that all electronic declarations of intent be signed with a Qualified Electronic Signature (QES); otherwise, such declarations would be deemed invalid..

For example, the Regional Court in Žilina, in its judgment file no. 8Co/184/2018, declared the loan agreement concluded via internet banking invalid, because: *"To comply with the written form requirement, the agreement must be signed by the contracting parties in accordance with Section 40(4) of the Civil Code. However, the submitted loan agreement does not contain the defendant's handwritten signature nor a qualified electronic signature (an IP address is an identifier of a computer but not a qualified electronic signature). According to the Electronic*

Signature Act, a legal act is considered to be in written form if an act performed by electronic means is signed with a qualified electronic signature. A written statement must also be signed, meaning it becomes valid only after being signed by the acting party. A contract that is required to be in writing but has not been signed by its participants cannot produce the intended legal effects."

In contrast with this decision stands judgment file no. 6Co/30/2013 of Regional Court in Trenčín which stated that *"The absence of a qualified electronic signature in the case of an electronic legal act is not a reason for its invalidity. The validity of the contract is not contingent upon the presence of a qualified electronic signature. ... A travel arrangement contract can be validly concluded by sending an order in electronic form, which is then confirmed and delivered to the ordering party."*

Even the Supreme Court of the Slovak Republic, in its ruling file no. 2 Sžo 505/2009, in relation to the validity of a simple electronic signature, stated: *"Under the term 'electronic signature,' in addition to its statutory definition (§ 3, § 4 of Act No. 215/2002 Coll.), it is necessary to include forms of electronic signatures that are not explicitly defined by law, such as the simple inclusion of the sender's name and surname at the end of an email communication, a signature template automatically attached to an outgoing email, or any other marks or identifiers that contracting or other parties consider an identification code, by which they are able to identify the sender. These types of electronic signatures must be regarded as electronic signatures within the meaning of this term. Although a 'simple' electronic signature cannot be denied legal effect under the Directive, anyone wishing to use it for legal acts would have to prove that the requirements under § 40(3) and (4) of the Civil Code are met."*

On the European level, there are two judgments of The European Court of Justice (ECJ) which acknowledge the validity of click wrap contracts signed by SES.

First was the case of Majdoub v. CarsOnTheWeb in which ECJ concluded *"that the method of accepting the general terms and conditions of a contract for sale by 'click-wrapping', such as that at issue in the main proceedings, concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of that provision, where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract".*[22]

[22]Judgment of the Court of Justice of 21 May 2015, Majdoub v. Cars On The Web., Deutschland GmbH. (C-322/14), EU:C:2015:236

The most recent judgment is the decision in the case of Cobult UG v. TAP Air Portugal SA from 2024 in which ECJ considered whether a passenger can validly conclude a signed agreement for reimbursement through a form available on the website of the operating air carrier. The ECJ declared that *"in the event of cancellation of a flight by the operating air carrier, the passenger is deemed to have given his or her 'signed agreement' to reimbursement of the cost of the ticket by a travel voucher where he or she has filled in an online form on the website of that air carrier, by which he or she chose such a means of reimbursement to the exclusion of reimbursement by a sum of money, where that passenger has been able to make an effective and informed choice and, accordingly, to give informed consent to the reimbursement of the cost of his or her ticket by a travel voucher rather than by a sum of money, which presupposes that that air carrier has provided to that passenger, in a fair manner, clear and full information as to the various means of reimbursement available to him or her."*[23]

Despite the absence of explicit regulation in the Slovak Civil Code, the cited judicial decisions demonstrate that Simple Electronic Signatures (SES) are recognized as a valid form of electronic signature in both consumer and commercial contracts. Furthermore, we argue that the presumption established in Section 40, Paragraph 3 of the Civil Code—whereby a legal act performed electronically retains its written form if signed with a Qualified Electronic Signature (QES) should likewise extend to both Advanced Electronic Signatures (AdES) and SES.

5. WHEN PUBLIC MEETS PRIVATE

Slovak public services have been modeled after the United Kingdom's e-government framework.[24] As a result, these services are structured around thematic "Topics", each representing a distinct domain in which state-provided services are required. These topics comprehensively encompass various aspects of public administration, including business registration, vehicle ownership, taxation, and social services. The transition to digitalization has not altered the substantive nature of these services; rather, it has transformed traditionally paper-based processes into digital formats. Notably, the Slovak e-government portal,

[23]Judgment of the Court of Justice of 21 March 2024, Cobult UG v TAP Air Portugal SA (C-76/23),EU:C:2024: 3137

[24] Minutes from the K9.5 Better services working group of the Ministry of Investment, Regional Development and Informatization of the Slovak Republic, 11. November 2019 session, https://platforma.slovensko.digital/t/mirri-pracovna-skupina-k9-5-lepsie-sluzby-dizajn-manual/3160/76, 17 February, 2025.

slovensko.sk, historically did not facilitate private transactions. However, this restriction was lifted during the COVID-19 pandemic, marking a significant shift in its operational scope.

5.1. Subsidies that broke the camel's back

During the COVID-19 pandemic, the Slovak government implemented various subsidy schemes to support businesses and individuals affected by lockdown measures. One such scheme provided financial assistance to commercial tenants who were forced to close their establishments due to government restrictions. Under this program, eligible tenants could apply for a subsidy covering up to 50% of their rent for the period during which their leased premises were subject to restricted use. However, a key condition for accessing this subsidy was the requirement for tenants to enter into a specific agreement with their landlords, wherein the landlords would agree to provide a rent discount. The government would then match the amount of the discount granted by the landlord in the form of a subsidy to the tenant.[25]

To facilitate this process, the government introduced a standardized contract form integrated into slovensko.sk, the national electronic public services portal. Once the form was completed, both the landlord and the tenant were required to use their electronic mailboxes and Qualified Electronic Signatures (QES) to sign the agreement and submit it to the relevant ministry. This marked a significant development in Slovak e-government services, as it was the first instance in which a purely private contractual arrangement was allowed to be formalized and processed through the state's digital public services infrastructure.

Despite the scheme's successful implementation, a critical legal question remains unresolved: under which legal framework was this special contract between landlords and tenants established? The electronic completion and mutual authorization of the form effectively functioned as an agreement concerning rent discounts and the waiver of subsidy payments in favor of landlords. However, it remains unclear whether this contractual arrangement was electronically signed under civil law, given that the process followed the same procedural framework as standard public service requests. This ambiguity raises important considerations regarding the intersection of public services and private contractual relationships in the context of digital governance.

[25] O dotácienanájomnéužmôžužiadaťpodnikateliazasiahnutídruhouvlnoupandémie, Ministry of Economy of the Slovak Republic, https://www.mhsr.sk/top/o-dotacie-na-najomne-uz-mozu-ziadat-podnikatelia-zasiahnuti-druhou-vlnou-pandemie, 17 February, 2025.

5.2. Public law likes (a) company

The most recent instance of integrating private legal matters into the Slovak e-government services portal is the ability of founders of a limited liability company (LLC) to electronically conclude the company's articles of association.

Since February 2023, an amendment to Act No. 513/1991 Coll. Commercial Code (hereinafter: Commercial Code) Article 110a) and Act No. 530/2003 Coll. on the Commercial Register (Article 7a) has enabled the establishment of an LLC through a simplified electronic process. This process streamlines company formation by providing founding partners with an electronic form that includes predefined options. However, this method imposes certain limitations: the LLC may have no more than five founding partners, it can select only 15 business activities from a predefined list, and the founding partners must act personally, as representation by a proxy is not permitted. Additionally, each founding partner must possess a Qualified Electronic Signature (QES) to sign the electronic form and the articles of association.

Compared to the traditional process of establishing an LLC, this simplified approach offers two key advantages. First, it grants greater flexibility to founding partners, allowing them to form a company at any time and, theoretically, from anywhere in the world. Second, it replaces the requirement for notarized signatures on the articles of association with the use of QES, thereby eliminating the need for in-person authentication.

Despite these undeniable benefits, the introduction of this electronic procedure raises a legal question similar to the one encountered in the subsidy scheme. In the traditional paper-based process, the signatures of founding partners must be notarized. As previously noted, there are distinct legal frameworks governing the equivalence of a notarized signature in electronic legal acts under public and private law. This leads to a fundamental legal uncertainty: which legal framework governs the conclusion of a private contract[26] executed on a public digital platform? At present, neither the Slovak e-Government Act nor the Civil or Commercial Code provides a definitive answer to this question.

[26] Smejkal, V., et al., *Právoinformačních a telekomunikačníchsystémů.* 2. vyd. Praha : C. H. Beck, 2004. p. 343.

5.3. Electronic public services in commercial activities

Access to public services provides certain businesses with a significant advantage. One of the most sought-after public services is the Register of Residents, managed by the Ministry of the Interior. This register consolidates personal data of Slovak citizens and foreign nationals residing in Slovakia, including their residency information.[27] Access to this database enables businesses to verify the identity of their clients efficiently. However, such access has been exclusively granted to banks.

For instance, Tatrabanka, one of Slovakia's major financial institutions, claims that access to the Register of Residents has saved significant time for approximately 60,000 clients.[28] Customers no longer need to visit a physical branch to update their residency or other personal details, as the bank's internal records are automatically synchronized with the register whenever a change occurs. This privileged access was granted through an amendment to the Act No. 483/2001 Coll. Banking Act (hereinafter: Banking Act), which enabled the conclusion of electronic communication agreements between banks and public institutions via a dedicated information system. According to Section 90, Paragraph 3 of The Banking Act, this system must ensure *"smooth, reliable, and secure information exchange."*

At present, banks remain the only private entities permitted to access public registers. Attorneys, notaries, and other businesses subject to anti-money laundering (AML) regulations are excluded from such access, despite their legal obligations to perform due diligence. While the protection of personal data against unauthorized access and potential breaches is a legitimate concern, the current legal framework fails to reconcile data protection with the practical need for businesses to access relevant public registers in order to comply with AML requirements.

[27]Register obyvateľov SR, Ministry of Interior of the Slovak Republic, https://www.minv.sk/?register-obyvatelov-sr, 20 February, 2025.
[28]Miklošovičová, S.: Ušetrímečas 60-tisíc klientomročne, Press release, 26. 04. 2023, https://www.tatrabanka.sk/sk/blog/tlacove-spravy/usetrime-cas-60-000-klientov-rocne/, 20 February, 2025.

5.4. The tale of two e-wallets

The European Digital Identity Framework[29], which entered into force in May 2024 and amended the eIDAS regulation, has introduced an EU Digital Identity Wallet (EUDI Wallet) is to allow *"the user to securely store, manage and validate personal identification data and electronic attestations of attributes for the purpose of providing them to relying parties and other users of European Digital Identity Wallets, and to sign by means of qualified electronic signatures or to seal by means of qualified electronic seals"* (Article 3 (42) of eIDAS Regulation). EUDI Wallet is expected to be publicly released by 2026.

The European Commission lists several advantages of EUDI Wallets, such as: identifying a payer of transaction, identification to open bank accounts without visiting a branch, storing professional qualifications, claiming prescriptions, accessing social security benefits, SIM registration, identification for the purposes of travel and booking, signing contracts, as a proof that a person is a legitimate representative of an organization, storing mobile driving license.[30]

In anticipation of of EUDI Wallets, Slovakia has amended the Trust Services Act (Sections 10 and 11) to align with the new European framework. This legislation designates the Ministry of the Interior as the official provider of EUDI Wallets on behalf of the state (Article 5a (2), paragraph (a) of the eIDAS Regulation) and establishes procedures for issuing and revoking wallets based on the requirements for a qualified trust service.

However, Slovakia is also developing its own national e-wallet, an electronic alternative to physical identity cards and driving licenses, set to launch between February and March 2025.[31] The legal framework for this initiative is defined by Act No. 364/2024 Coll., which amends Act No. 8/2009 Coll. on Road Traffic. According to this legislation, data stored in the national e-wallet can only be verified using a dedicated mobile verification application managed by the Ministry of the Interior, and only law enforcement authorities are authorized to accept this digital identity as a legally binding alternative to physical documents.

[29] Regulation (EU) 2024/1183 of the European Parliament and of the Council of 11 April 2024 amending Regulation (EU) No 910/2014 as regards establishing the European Digital Identity Framework, OJ L, 2024/1183, 30.4.2024

[30]Why EU Digital Identity Wallets, European Commision, https://ec.europa.eu/digital-building-blocks/ sites/display/EUDIGITALIDENTITYWALLET/Benefits, 20 February, 2025.

[31]Minútapominúte, 30. December 2024 11:49, Denník N, N Press, s.r.o., https://dennikn.sk/minuta/4383371/, 20 February, 2025.

A critical uncertainty remains: Will Slovakia's national e-wallet be integrated into the EUDI Wallet, or will it operate as a standalone system? The coexistence of these two parallel digital identity solutions appears redundant and may create confusion among users. If the national e-wallet remains a separate initiative with limited use cases, its long-term viability is questionable.

5.5. The Great Hack

At the time of writing, public trust in Slovak electronic public services has suffered a severe setback due to a major cybersecurity breach. On January 5, 2025, at 8:50 AM, the Geodesy, Cartography, and Cadastre Office of the Slovak Republic fell victim to a ransomware attack, which encrypted all cadastral data, rendering real estate ownership records and associated services inaccessible.[32]

In the immediate aftermath, the Ministry of the Interior downplayed the severity of the incident. In a press release, the ministry initially stated:
"Due to the necessary adjustments to the information systems managed by the Geodesy, Cartography, and Cadastre Office of the Slovak Republic, the cadastral departments of the district offices will not provide services on Tuesday, January 7, 2025, and will offer services in a limited capacity on the following days as well".[33]

Despite assurances from the Cadastre Office and the Ministry of the Interior that recent backups existed[34], the reality has been far more troubling. More than 50 days after the attack, electronic cadastre services have not yet been fully restored, and operations remain reliant on a limited backup system.

This cyberattack is the most severe in Slovakia's history, with wide-ranging repercussions: real estate transactions have been delayed or frozen, creating uncertainty in the property market; property tax collection has been disrupted, potentially affecting municipal revenues; insurance companies have struggled to verify property ownership for policy underwriting and claims processing; the

[32]Trangel, J., Všetko o hackerskom útoku na kataster: Prehľadné otázky a odpovede, Ringier Slovakia Media s.r.o., 9.1.2025, https://zive.aktuality.sk/clanok/D0efBvf/vsetko-o-hackerskom-utoku-na-kataster-prehladne-otazky-a-odpovede/, 23 February, 2025.
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construction sector has faced delays due to difficulties in obtaining necessary land registry data.

Beyond its economic and administrative impact, the attack has also had a profound psychological effect. Public trust in governmental competence and the security of electronic data has been significantly eroded.[35] The incident has also become a subject of widespread online ridicule, with social media users creating memes mocking the government's response.[36]

Perhaps most concerning is how the attack has exposed the vulnerability of Slovakia's digital infrastructure. It has also highlighted a broader political issue: the reluctance of officials to engage in transparent communication with the public. Rather than acknowledging the full scope of the crisis, authorities appear to have prioritized damage control and political optics over accountability.[37]

6. CONCLUSION

The digitalization of public and private services in Slovakia has revealed significant discrepancies in legal frameworks, technological implementation, and user adoption. While private digital services, particularly e-commerce, have flourished, public e-government services have struggled to achieve similar levels of accessibility and efficiency. This divergence is partially attributable to inconsistencies in legal regulation, such as the contradictory treatment of electronic signatures and seals under national and EU law, as well as the rigid and sometimes impractical requirements for qualified electronic signatures in public services.

The Slovak government's approach to digital identification, particularly through electronic IDs and mandate certificates, has proven to be both restrictive and administratively burdensome, limiting user engagement and stifling potential innovation. While recent allowances for advanced electronic signatures (AdES) in

[35]Haluza, I., Kolaps katastra ohrozuje dôveru. Predávať byty a pôdu možno budeme zase iba s pečiatkou z úradu, hovorí farmár, Denník N, N Press, s.r.o., 15. January 2025, https://e.dennikn.sk/4406012/kolaps-katastra-ohrozuje-doveru-predavat-byty-a-podu-mozno-budeme-zase-iba-s-peciatkou-z-uradu-hovori-farmar/, 23 February, 2025.
[36] See Facebook posts from ZOMRI on January 14, January 23, February 5 2025.
[37]Burčík, M., Päťdnízahmlievania a päťhlavnýchmomentov. Pádkatastraštátnezvládolvysvetliť, SME.sk, Petit Press, a.s.,10. January 2025, https://domov.sme.sk/c/23434070/kataster-pad-vlada-komunikacia.html, 23 February, 2025.

certain public services indicate a step toward flexibility, the lack of transparency and clarity regarding their implementation diminishes their practical effectiveness. Furthermore, the reluctance to integrate private sector solutions into public digital services, as exemplified by the limited access of businesses to essential public registers, further constrains the development of a more integrated and efficient digital ecosystem.

Moreover, recent security failures, such as the catastrophic ransomware attack on the Cadaster Office, highlight the urgent need for more robust cybersecurity measures and crisis management strategies. The erosion of public trust resulting from this incident underscores the importance of not only implementing secure digital infrastructure but also fostering transparent communication and proactive policymaking.

This paper contributes both scientifically and professionally to the evolving discourse on the intersection of law and digital services, particularly within the Slovak context. From an academic standpoint, this paper provides a foundational analysis of how Slovak private and public law are evolving or encountering challenges in response to the demands of an increasingly digitalized society. In the realm of private law, it highlights how Slovak jurisprudence has cautiously recognized electronic contracts as equivalent to traditional written or oral agreements. In the domain of public law, it emphasizes that fostering greater flexibility, transparent communication, and predictability could enhance public trust in e-government services.

On a professional level, this paperaims to provide actionable insights for legal professionals, policymakers, and digital service providers engaged with Slovakia. It identifies legislative and administrative deficiencies that impede the effective integration of digital services and advocates for the adoption of European-level solutions over national approaches. Such harmonization has the potential to significantly enhance the uptake of public services on unified platforms, encompassing both public and private sectors. Furthermore, facilitating secure business access to electronic public databases could inadvertently foster greater utilization of public services.

Ultimately, the Slovak experience serves as a case study of the broader challenges faced by governments attempting to balance security, accessibility, and legal compliance in digital services. Addressing these issues requires a more harmonized approach to legal frameworks and a user-centered focus that prioritizes both security and convenience. Without such measures, Slovakia risks falling further behind in its digital transformation, both in the public and private spheres.

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