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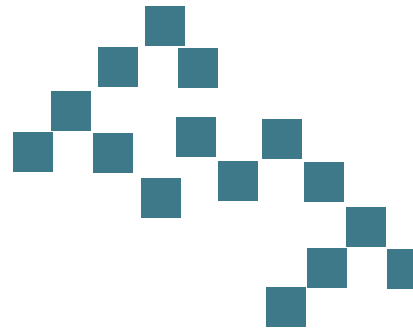

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Issues of awards given as a part of social arbitration in a collective dispute. *De lege lata* and *de lege ferenda* remarks

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Abstract: Social arbitration as the third method of resolution of collective disputes can be used to resolve a dispute in an amicable manner. Thanks to this method, parties to the collective dispute can end their conflict thanks to the arbitration award with no need to go on strike. The author analyses the legal nature of arbitration awards and presents consequences of the related labour law legislation. The conclusion is as follows: current legal regulations are in need of change, especially when it comes to the execution, amendment and supplementation of an award issues as a part of social arbitration with the involvement of trade unions, employers or their organisations.

1. Introduction

Collective labour disputes constitute a material element of the economic system of a state. It remains a valid question whether amicable methods of dispute resolution can be used effectively to avoid using strikes as a last resort. Social arbitration is one such amicable form. To evaluate the importance of this institution and its possible application objectively, one cannot ignore the nature of an arbitration award. However, it has to be explained first what collective disputes are and who they apply to.

While analysing collective disputes, one should note that a collective dispute is a legal concept separate from the concept of an individual employee dispute. The principal difference between an industrial dispute and

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an individual dispute is the scope of the subject and object of the dispute. According to art. 2 of the Act of 23 May 1991 on the resolution of collective disputes[1], parties to the dispute can be employers, their organisations and employees who can only be represented by their trade union. The party to the dispute will therefore not be the individual employee, but the employees represented by an entity acting for the collective interests of the employees. In fact, a trade union is the one who can initiate and carry out a collective dispute. Additionally, pursuant to art. 1 of the said Act, a dispute can relate to working, remuneration or social benefit terms as well as to union rights and freedoms of employees or other groups having the right to form trade unions. It is not permitted to conduct a collective dispute to support individual employee claims if their resolution is possible by way of proceedings before the agency resolving disputes relating to employee claims[2].

The legislator provided for three amicable methods of collective dispute resolution. The first method is by bargaining. If it is ineffective as understood in art. 10 of the Act one shall proceed to mediation. The lack of an agreement at the stage of the mediation proceedings authorises the trade union to initiate a strike action[3]. However, a trade organisation that does not wish to take advantage of this right can also initiate social arbitration pursuant to art. 16 RCD. The essence of social arbitration is to authoritatively resolve a dispute with the involvement of the social arbitration college in a competent District Court (one employer dispute) or Supreme Court (multi-employer dispute). Such a college can issue an award ending this stage of the collective dispute[4].

The paper analyses two ways to conclude arbitration proceedings, i.e. conclusion of a collective agreement and issuance of an arbitration award. For this form of dispute resolution to be successful, it is important to actually be able to end the dispute by opting for one of these two variants of conflict resolution. They should give the parties a feeling of a stable settlement of the dispute that is consistent with the applicable laws.

1 Act on the resolution of collective disputes of 23 May 1991, Journal od Laws 2020, item 123, hereinafter: "RCD" or "Act".

2 Article 4 (1) RCD.

3 Article 17 (2) and Article 15 RCD.

4 Article 16 (2) and Article 16 (6) RCD.

The institution of social arbitration must inspire confidence in both parties to the dispute. Both the employee and the employer side should be certain that the award or agreement will be enforced without any problems whatsoever. Only clear and comprehensive regulation of the arbitration will make it possible to resort to arbitration proceedings to end a collective dispute rather than go on a strike. For this reason, the analysis covers the legal nature of an arbitration award in the context of practical problems with applying social arbitration in Polish legal reality.

The aim of this study is to determine whether legal regulations concerning the methods for ending social arbitration are comprehensive and clear or whether they need to be changed, and if yes, to what extent. The analysis uses the dogmatic-legal and legal-comparative methods. The countries under analysis share one common feature: they have all implemented legislation to resolve collective disputes. Research into legal mechanisms in the states concerned leads to the conclusion that these mechanisms are close to one another in terms of their objective: in each state, the legislator strives to ensure that the arbitration proceedings are effective in discouraging non-amicable forms of collective dispute resolution. Legal regulations of the countries in question are influenced by labour law standards adopted by international and European organisations.

2. Ways to end social arbitration

2.1. Collective agreements as the second method of collective dispute resolution in arbitration proceedings in addition to arbitration awards

An award issued by a social arbitration college is not the only way to resolve a dispute at this stage. Just like with bargaining or mediation, parties to arbitration proceedings can enter into agreements resolving the dispute. According to § 9 of the Regulation of the Council of Ministers of 16 August 1991 on the procedure before social arbitration colleges[5] after the opening of a college session encourages the parties to reach an agreement.

[5] Ordinance of the Council of Ministers of 16th August 1991, Journal of Laws 1991, No. 73, item 324, hereinafter: "PSA".

Such an agreement as the source of the appropriate content of the labour law, determining rights and obligations[6] has the legal nature characteristic for agreements based on RCD[7] resulting from bargaining and mediation[8]. It should determine: parties to the dispute, precise claims of the trade unions and normative collective provisions if they apply to the general situation of the employees. It can also contain individual provisions if they influence the contents of the employment relationship[9].

According to the Supreme Court, collective agreements are considered contractual provisions applying exclusively to entities covered with their contents. However, they are not treated as generally applicable legal regulations[10]. According to the representative theory, parties to a collective agreement execute it not only on their behalf but also on behalf of members they represent or individuals other than their members. It means that it is possible to make direct demands regarding the fulfilment of duties by individual employees and employers towards each other[11]. Agreements are based on the principle of the freedom of agreements by way of the submission of declarations of will in the course of social arbitration[12]. The doctrine

6 See Krzysztof Wojciech Baran, "Porozumienia zawierane w sporach zbiorowych jako źródła prawa pracy," *Monitor Prawa Pracy*, no. 9 (2008): 455; Janusz Żołyński, "Postępowanie arbitrażowe jako metoda rozwiązywania sporu zbiorowego," *Monitor Prawa Pracy*, no. 10 (2011): 517.

7 Grzegorz Goździewicz, "Charakter porozumień zbiorowych w polskim prawie pracy," *Work and Social Security*, no. 3 (1998): 23; Łukasz Pisarczyk, "Pokojowe (ireniczne) metody rozwiązywania sporów zbiorowych," in *System prawa pracy. Zbiorowe prawo pracy*, vol. V, ed. Krzysztof Wojciech Baran (Warszawa: Wolters Kluwer S.A., 2014), 643–644; see Baran, "Porozumienia," 453–54. The labour law doctrine includes doubts regarding the distinction of agreements being specific sources of the labour law, see Ludwik Florek, "Charakter prawny porozumień zbiorowych," in *Prawo pracy. Refleksje i poszukiwania. Księga jubileuszowa Profesora Jerzego Wratnego*, ed. Gertruda Uścińska (Warszawa: IPISS, 2013), 114–17.

8 Ludwik Florek, *Ustawa i umowa w prawie pracy* (Warszawa: Wolters Kluwer Polska sp. z o.o., 2009), 258.

9 Pisarczyk, "Pokojowe," 650–52.

10 Polish Supreme Court, Judgment of 22 February 2008, Ref. No. II BP 36/07, Journal of Laws 2009, no. 11–12, item 138.

11 Wacław Szubert, *Układy zbiorowe pracy* (Warszawa: Państwowe Wydawnictwo Naukowe, 1960), 10–11.

12 Compare Paweł Nowik, *Metoda negocjacji układowych w zakresie kształtowania wynagrodzenia za pracę pracowników administracji publicznej. Doświadczenia polskie i europejskie* (Lublin: Wydawnictwo KUL, 2014), 90–1.

notices elements of a civil law agreement contained in such agreements that, however, do not rule out the possibility that above-mentioned acts compiled at the arbitration stage in a collective dispute can be seen as sources of the labour law based on the act[13]. Agreements signed by parties to the dispute in the course of social arbitration entail an automatic change of collective interests of employees the satisfaction of which the trade union demanded into individual subjective rights just like agreements executed at the bargaining and mediation stage[14].

2.2. Arbitration awards – decisions of social arbitration colleges

If an agreement resolving a collective dispute is not reached in the arbitration proceedings an arbitration award will be issued. In practice, one can distinguish substantive decisions considering the demand made by a trade union and dismissing collective claims made with regard to payment, working and social benefit conditions[15]. When a trade union makes a claim regarding union rights and freedoms, a decision can be made to dismiss that claim, i.e. considering the trade union's position ungrounded or to grant the application in whole or in part[16].

A social arbitration college also issues typically formal awards. These type of awards includes a decision to refuse to hear the arbitration, *de facto* to reject the application to the inadmissibility of social arbitration as understood in RCD regulations, even though no legal basis for such a conclusion

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13 See Pisarczyk, "Pokojowe," 650–51; see also the topic of a collective agreement in Florek, *Ustawa*, 224–27.

14 Andrzej Marian Świątkowski, "Ustawa o rozwiązywaniu sporów zbiorowych," in *Zbiorowe prawo pracy*, eds. Jerzy Wratny, Krzysztof Walczak (Warszawa: C.H. Beck, 2009), 334.

15 E.g. according to the information obtained as a part of access to the public information, the award rejecting the related request of the applicant was issued by the social arbitration college at the Regional Court in Piotrkow Trybunalski in 2012, Decision of the College for Social Arbitration at the Regional Court in Piotrków Trybunalski, Judgment of 2012, Ref. No. KAS - z 1/12, unreported. Data referring to specific awards under social arbitration that were referred to in the article were collected on the basis of enquiries emailed to all Regional Courts in Poland.

16 Artur Rycak, "Praktyka arbitrażu społecznego w zbiorowych sporach pracy w Polsce," in *Arbitraż i mediacja w polskim prawie pracy*, ed. Grzegorz Goździewicz (Lublin: Wydawnictwo KUL, 2005), 142.

of arbitration proceedings can be found in PSA or even less in RCD[17]. Additionally, a decision to discontinue proceedings exists in legal transactions[18].

In the issued award, the social arbitration college also refers the case to a competent social arbitration college for the ruling, e.g. the college at the Supreme Court[19]. Decisions of the social arbitration college at the Supreme Court adopted the rule according to which "employer disputes can be transformed during the proceedings before a social arbitration college into a single multi-employer dispute if parties to these disputes are willing and the subject matter of the dispute applies to workers employed in at least two workplaces"[20]. In the analysed case being the basis for the issue of the above-mentioned award, the college primarily examined its competence to hear the dispute. It was necessary due to the fact that the dispute was conducted as eight separate disputes in the bargaining and mediation phase. Findings made by the college led to the conclusion according to which trade unions representing all workers covered with disputes in the bargaining and mediation phase jointly applied for the submission of

17 It has to be stated that both RCD and PSA do not introduce the possibility to reject a request, only to return it due to formal defects not remedied on time, see: Walery Masewicz, *Zatarg zbiorowy pracy* (Poznań: Polski Dom Wydawniczy "Ławica", 1994), 97–98. Some representatives of the labour law science indicate that the college issues substantive awards considering demands of the trade union in part or in whole or dismissing them in part of in while, see: Bogusław Cudowski, *Spory zbiorowe w polskim prawie pracy* (Białystok: Temida, 1998), 114. However, if arbitration is not admissible due to the fact that there was no bargaining or mediation carried out or when proceedings before the college demonstrate that the dispute is not a collective dispute the request will have to be rejected for purposive reasons. The postulate that the trade union's request can be rejected by the issue of an award by the social arbitration college is justified. Checking whether a dispute is a collective dispute lies within the competences of the college, see Rycak, "Praktyka," 142. The labour law doctrine also contains the view according to which a request can be destroyed due to the inadmissibility of arbitration proceedings due to its return by the court president, see: Walery Masewicz, *Ustawa o związkach zawodowych Ustawa o rozwiązywaniu sporów zbiorowych* (Warszawa: Wydawnictwo Prawnicze PWN, 1998), 180.

18 E.g. in 2005-2014, the social arbitration college at the Regional Court in Łodz dismissed arbitration proceedings twice: in one case, it was due to the trade union's loss of its mandate to represent employees, in another case, it was due to the withdrawal of the request for social arbitration.

19 Rycak, "Praktyka," 142.

20 Decision of the College for Social Arbitration at the Supreme Court of January 26, 2006, Ref. No. III KAS 1/05, Journal of Laws 2007, no. 3–4, item 59.

the dispute for resolution by the social arbitration college at the Supreme Court as a multi-employer dispute[21].

3. Legal nature of arbitration awards

In light of art. 16 clause 6 RCD, the arbitration award is binding for parties to the dispute unless they agree differently. If both the trade union in its application for social arbitration and the employer responding to that application fail to submit, pursuant to art. 16 clause 6 RCD, an appropriate statement of application for arbitration with the issue of an award non-binding for the parties, the decision of the social arbitration college, in principle, will bind the parties[22]. The employer can express their position on the subject responding to the application of the trade union or in another letter before the date of the commission's session but not later than upon the opening of that session[23]. Contrary to the situation in which both parties express their conclusive consent to the binding nature of the college's decision, a trade union can decide to initiate a protest action in the form of a strike if the award is non-binding. Purposive considerations are in favour of this postulate[24]. The parties can autonomously choose the dispute resolution variant after the mediations end and apply non-amicable resolution methods. An award in arbitration proceedings whose binding power results from the will of the parties ends the proceedings related to the occurrence of a collective dispute with the employer[25]; as a consequence, the collective dispute is resolved[26]. The statement of the binding power[27] shall be contained in

21 Ibid.

22 Świątkowski, "Ustawa," 374.

23 Janusz Żołyński, *Ustawa o rozwiązywaniu sporów zbiorowych. Komentarz. Wzory pism* (Warszawa: Wolters Kluwer Polska sp. z o.o., 2011), 92.

24 See Grzegorz Goździewicz, "Mediacja i arbitraż w polskim prawie pracy," in *Arbitraż i mediacja w polskim prawie pracy*, ed. Grzegorz Goździewicz (Lublin: Wydawnictwo KUL, 2005), 24.

25 Zbigniew Hajn, *Zbiorowe prawo pracy. Zarys systemu* (Warszawa: Wolters Kluwer Polska sp. z o.o., 2013), 188.

26 Bogusław Cudowski, "Rola państwa w rozwiązywaniu sporów zbiorowych," *Państwo i Prawo*, no. 10 (1994): 69.

27 In turn, the college at the Regional Court in Olsztyn examining the case, granted the trade union's request in full by obliging to introduce the salary agreement of 21 February 2005 in the award not binding the parties, issued on 4 April 2006. Decision of the College for Social

the award itself[28]; however, this situation does not always happen[29]. According to § 11 clause 3 PSA, an arbitration award should also contain the name and content of the college, award issue date, definition of parties, indication of the subject matter of the dispute, the resolution[30] and its justification, the statement whether the award binds the parties and signatures of members of the college[31].

If the award does not contain any of the above-mentioned elements, it seems that it is not possible to supplement them pursuant to art. 351 § 3 of the Act of 17 November 1964 – Code of Civil Procedure[32] for two reasons. Firstly, provisions of the Code of Civil Procedure do not apply to arbitration proceedings before social arbitration colleges – obviously with some exceptions. Civil procedure was referred to only in one place of the provision regulating the arbitration procedure, however, it only had to do with evidentiary proceedings. In the light of § 8 clause 2 PSA, a college can take evidence in line with the provisions of the Code of Civil Procedure on evidence. Secondly, it is the social arbitration college rather than a public court that issues an award; this is why, in light of the linguistic interpretation of

Arbitration at the District Court in Olsztyn, Judgment of 2006, Ref. No. Kas-z.1/06, unreported. The above data come from the information obtained by email as an answer to enquiries addressed to Regional Courts. See more Maciej Jarota, "Arbitraż społeczny – fakultatywna czy obligatoryjna metoda rozwiązywania sporów zbiorowych? Przyczynek do dyskusji o wykorzystaniu postępowania arbitrażowego w zbiorowych stosunkach pracy," *ADR Arbitraż i Mediacja*, no. 2 (2018): 48–49.

28 Goździewicz, "Mediacja," 23.

29 Rycak, "Praktyka," 145.

30 In practice, the awards of the social arbitration college sometimes lacks the dispute resolution, which cannot be considered positive at this stage of the dispute. E.g. in the operative part of the award of 7 May 2015 regarding the proceedings requested by the trade union against the employer, the social arbitration college at the Regional Court in Warsaw limited itself to the indication that the parties failed to reach an agreement. Decision of the College for Social Arbitration at the District Court in Warszawa, Judgment of 2015, Ref. No. XXI Kas-z 2/14, unreported. The operative part of the decision did not refer to the dispute resolution while item 5 of the award states that the award is not binding for the parties. See more Maciej Jarota, "Arbitraż społeczny – fakultatywna czy obligatoryjna metoda rozwiązywania sporów zbiorowych? Przyczynek do dyskusji o wykorzystaniu postępowania arbitrażowego w zbiorowych stosunkach pracy," *ADR Arbitraż i Mediacja*, no. 2 (2018): 48–49.

31 Świątkowski, "Ustawa," 374.

32 Act on the Code of Procedural Civil of 17 November 1964, Journal od Laws 2020, item 1575, as amended, hereinafter: "CPC".

art. 351 § 3 CPC in connection with art. 351 § 1 CPC, it is not possible to supplement an award issued pursuant to § 11 PSA.

It is worth mentioning that, in the past, according to art. 9 of the Regulation of the President of the Republic of Poland of 27 October 1933 on extraordinary disputes committees for the resolution of collective disputes between employers and employees in the industry and commerce[33], the legal construct in force in Poland provided that the committee's award had the economically prevailing importance in the work branch covered with the award, the Council of Ministers could issue a regulation if requested by the minister of social care to give binding legal effect to the award in the entire area for which the award was issued or in a part of the area where it attained prevailing importance. Such an award, as understood in the said regulation, would apply directly to all employees and employers. Said legal regulations have overcome the rule of committee awards contained in the pre-WWII Law of Obligations, typical for collective labour agreements (c.l.a.), according to which they are only binding for those parties who have executed them[34].

To summarize this part of the discussion, a concern may be expressed about the impossibility to supplement an existing award, if necessary. Similarly, the Polish legislation does not provide for rectification of an award should there be an obvious error in the dispute resolution. In the Polish legal reality, there are no legal regulations that would precisely define the manner in which the panel should act if it is necessary to amend the award from the proceedings.

4. Execution of arbitration awards

While analysing the issues of arbitration awards, it is worthwhile to consider whether parties to the employment relationship are entitled to the claim for the execution of an award issued by a social arbitration college on the same terms as those applying to the formulation of demands

[33] Ordinance of the President of the Republic of Poland 27th October 1933, Journal of Laws 1933, No. 82, item 604.

[34] Marek Włodarczyk, "Historia porozumień normatywnych na szczeblu zakładu pracy w Polsce," in *Studia z prawa pracy. Księga pamiątkowa ku czci Docenta Jerzego Logi*, ed. Zbigniew Góral (Łódź: Wydawnictwo Uniwersytetu Łódzkiego 2007), 210.

referring to the execution of provisions of the collective agreement executed in the course of social arbitration. The view that it is possible for employees and employer to make direct civil law claims based on an arbitration award just as is the case with the collective agreement[35] is debatable[36].

As soon as demands made by the trade union are transformed into individual rights pursuant to the collective agreement executed at the arbitration stage, individual employees acquire the right to claim the satisfaction of individual rights guaranteed to them. In turn, the issue of an arbitration award not being a source of labour law does not entail the legal transformation of employee interests to be satisfied by the employer on the basis of the decision of the social arbitration college into rights of individuals with an employment relationship. The conclusion of this analysis is that the issue of an award does not result in an automatic transformation of employees' collective interests into their rights[37]. Reference publications present the prevailing view that, to enforce the employer's observance of the arbitration award referring to employee interests, it is only possible for the trade union to exert pressure by organizing a strike or another non-amicable method of resolution of collective disputes even with no renewed procedure for the initiation of a collective dispute[38].

The Polish model of an amicable resolution of collective disputes does not provide for sanction for the failure to comply with an award issued in the arbitration proceedings[39] even though the failure to comply can be considered a violation of art. 26 clause 1 clause 2 RCD[40]. The enforceability of

35 Żołyński, *Ustawa*, 95. In 1960ies, doubts existed regarding the enforceability of collective labour agreements as far as the enforcement of resulting obligations is concerned. Free market economies adopted the inadmissibility of the formulation of individual employee claims against a participant in the collective labour agreement. A particular significance of rights vested in the employee organisation representing employees rather than individual rights was stressed, see Szubert, *Układy*, 229.

36 See Świątkowski, "Ustawa," 376; see also Pisarczyk, "Pokojowe," 676.

37 See Świątkowski, "Ustawa," 376; see also a different position: Żołyński, *Ustawa*, 94.

38 See Pisarczyk, "Pokojowe," 680; Krzysztof Wojciech Baran, *Zbiorowe prawo pracy. Komentarz* (Warszawa: Wolters Kluwer Polska sp. z o.o., 2010), 442; Cudowski, *Spory*, 115; see also a different position: Żołyński, *Ustawa*, 94.

39 Goździewicz, "Mediacja," 25.

40 Pisarczyk, "Pokojowe," 680.

arbitration awards is not subject to enforcement proceedings[41]. This fact is demonstrated in the linguistic interpretation of art. 777 CPC, in particular, the lack of an indication of awards issued in the social arbitration mode in its contents and the absence of a legal standard in RCD that would establish the admissibility of enforcement of such awards by way of enforcement proceedings[42].

Such deficiencies may raise doubts whether a trade union is actually able to effectively enforce pay and work conditions, social benefits, or trade union rights and freedoms established by an arbitration award. Hence, the trade union organisation, unlike the employer, will essentially go for a strike method rather than arbitration proceedings. Mediation failing, the trade union party will count on a strike as a viable method to achieve its demands from a collective dispute stage. The mere fact that an arbitration award will become non-binding if one of the parties submits a relevant declaration hardly encourages the use of the social arbitration method. Since parties to a collective dispute are not bound by the arbitration award, decisions of the social arbitration committee are treated as non-mandatory for the trade union and the employer. On the other hand, the inability to effectively enforce a binding arbitration award means that arbitration proceedings actually lose their sense as a constructive method of resolving a controversy.

5. Arbitration awards in selected European states vs. Polish legal realities

In light of the unique nature of an arbitration award and a limited possibility of its enforcement in Polish labour law, it is worthwhile to analyse the said institution from the perspective of selected examples of European states. Legal regulations of individual European states define the legal nature of arbitration awards in an inconsistent manner. In some European states, arbitrators issue awards. In the Russian Federation, an arbitration award is binding for the parties. They are obliged to execute it in pain of the fine of 2000-4000 roubles. If the employer fails to comply with the award the trade

41 Żołyński, *Ustawa*, 93.

42 Baran, *Zbiorowe*, 442.

union can initiate a protest action in the form of a strike[43]. In France, the arbitrator's decision can be appealed against to the Supreme Court of Arbitration consisting of the equal number of judges from the Council of State and judges from the Court of Cassation[44].

In light of art. 20 clause 4 of the Latvian Act of 26 September 2002 on employment relationships, compliance with an arbitration award is voluntary in Latvia. If parties compile a written agreement to determine the binding power of the arbitration award that arbitration award shall have legal effects typical for a collective agreement[45]. In Great Britain, an award issued in the course of an optional arbitration is binding if the parties decide during the pending procedure that they would comply with the award irrespective of its contents[46].

In Slovakia, awards issued by an arbitrator regarding the execution of collective agreements can be appealed against to a District Court that repeals the arbitrator's award if it is in conflict with the legal regulations or with the collective agreement. In the same country, an arbitrator's decision regarding the conclusion of a collective labour agreement is final with no appeal possible, unlike decisions referring to disputes regarding the execution of duties under collective agreements. If a court annuls the arbitrator's award the dispute shall be referred to the same arbitrator for reassessment. The lack of consent to the participation of the same person as the arbitrator results in the nomination of an arbitrator on the request of any of the parties by the Minister of Labour, Social Affairs and Family of the Slovak Republic[47].

In Spain, art. 21 clause 3 V ASEC provides that a binding arbitration award is enforceable immediately. Each award is submitted to

43 Elena Gerasimowa, "The Resolution Of Collective Labour Disputes," in *Labour Law in Russia: Recent Developments and New Challenges*, eds. Vladimir Lebedev and Elena Radevich (Newcastle: Cambridge Scholars Publishing, 2014), 274.

44 Michel Despax, Jaques Rojot, and Jean Pierre Laborde, *Labour Law in France* (Alphen aan den Rijn: Kluwer Law International, 2011), 347.

45 In Greece, like in Latvia, the arbitrator's award entails legal effects typical for a collective agreement, see Theodore Konaris, *Labour law in Hellas* (Alphen aan den Rijn: Kluwer Law International, 2002), 239.

46 Steven Hardy, *Labour Law in Great Britain* (Alphen aan den Rijn: Kluwer Law International, 2002), 44–45.

47 Helena Barancová and Andrea Olšowská, *Labour Law in Slovak Republic* (Alphen aan den Rijn: Kluwer Law International, 2002), 191.

the SIMA office. After that, the award is forwarded to an appropriate agency for publication if required under the law. The award has the same legal effects as a collective labour agreement[48].

In Germany, parties to a dispute can appeal from the decision of an arbitration committee to a labour court within 2 weeks of the award announcement. The appeal can be upheld in the event of a law violation. The German labour law doctrine indicates that parties rarely decide to undermine the resolution made at the arbitration stage in collective disputes in this manner[49]. In Denmark, an award issued at the arbitration stage is final even though, if material rules of the procedure influencing the resolution of the case are violated it is possible to consider the award invalid before the labour court[50].

Polish legal regulations do not assume the two-tiered procedure in arbitration proceedings[51]. As already mentioned, parties in Slovakia and Germany have the possibility to appeal against an arbitration award to a labour court. Analysed legal solutions applied in above-mentioned countries make the appellate review of an arbitration award possible, which is particularly desirable for a discretionary ruling by an arbitration agency in a specific case, in a manner not limited with statutory criteria. The aspect of determination of an entity competent to consider the means of challenge of arbitration awards is also extremely important. The labour court seems to be competent to assess an arbitration award because judges who are labour law practitioners are able to guarantee reliability and independence while analysing arbitration proceedings in a collective dispute.

It should be remembered that, according to the rule set out in art. 262 § 2 item 1 of the Act of 26 June 1974 – Labour Code[52] public courts cannot

48 Manuel Alonso Olea and FermÍn Rodríguez - Sañudo, *Labour Law in Spain* (Alphen aan de Rijn: Kluwer Law International, 2002), 156.

49 Manfred Weiss and Marlene Schmidt, *Labour Law in Germany* (Alphen aan den Rijn: Kluwer Law International, 2008), 236.

50 Ole Hasselbalch, *Labour Law in Denmark* (Alphen aan den Rijn: Kluwer Law International, 2011), 300–01.

51 Polish Supreme Court, Resolution of 23 May 1986, Ref. No. III PZP 9/86, Journal of Laws 1987, no. 4, item 77; Polish Supreme Court, Resolution of 10 December 1986, Ref. No. III PZP 72/86, Journal of Laws 1987, no. 4, item 47.

52 Act on the Labour Code of 26 June 1974, Journal od Laws 2020, item 1320.

interfere with disputes regarding the establishment of new payment and working terms or the application of labour law standards to the nomination of college members at the social arbitration stage[53]. The lack of a two-tier system in social arbitration in Poland provokes doubts[54]. In particular, the literature rightly indicates that the delegation of three, by definition, independent members of the college from the employer side and three members from the trade union to form the college is only apparent; in fact, a dispute is resolved by a professional judge. Individuals indicated by the trade union or by the employer do not vote against their principals[55].

The statement of reasons for the draft collective labour code of 2008 prepared by the Labour Law Codification Commission[56] provides that social

53 Żołyński, *Ustawa*, 93.

54 In the previous legal regime applicable in 1980ies, the Public Prosecutor General argued that purposive considerations (the need to amend awards) warrant the application of remedies provided for in civil procedure regulations but the Supreme Court did not share this position in its decision of 10 December 1986, III PZP 72/86, see Polish Supreme Court, Resolution of 23 May 1986, Ref. No. III PZP 72/86, unreported. The labour law doctrine also indicated that, even though the nature of arbitration proceedings is different than the nature of litigation, this circumstance does not entail the right to conclude that it is not possible to appeal against an arbitration award on the basis of autonomous findings of the parties, see Andrzej Marian Świątkowski, "Spory zbiorowe (I)," *Praca i Zabezpieczenie Społeczne*, no. 8 (1987): 13–17.

55 See Cudowski, *Spory*, 112; Żołyński, *Ustawa*, 93; Żołyński, *Ustawa*, 438.

56 Http://www.mpips.gov.pl/gfx/mpips/userfiles/File/Departament%20Prawa%20Pracy/kodeksy%20pracy/ZKP_04.08..pdf., accessed May 9, 2016, hereinafter: CLC. The CLC draft was submitted to the President of the Council of Ministers on 5.12.2006 even though its contents refer to "April 2007", while the draft description found at the website provides the information that the draft originated in April 2008. The Labour Law Codification Commission had been preparing the draft for a few years on the basis of the Ordinance of the Council of Ministers of 20th August 2002 on the establishment of a labour law codification commission, Journal of Laws 2002, No. 139 item 1167, as amended. The Commission initially worked under the leadership of Tadeusz Zieliński. As of 5.12.2003, the Commission consisted of: Michał Seweryński, a professor at the Łódz University (the chairman); Ludwik Florek, a professor at the Warsaw University (deputy chairman); Grzegorz Goździewicz, a professor at the M. Kopernik University in Toruń; Zbigniew Hajn, a professor at the Łódz University, a judge at the Supreme Court; Andrzej Kijowski, a professor at the A. Mickiewicz University in Poznań, a judge of the Supreme Court; Walerian Sanetra, a professor at the Białystok University, President of the Supreme Court; Barbara Wagner, a professor at the Jagiellonian University, judge of the Supreme Court; Jan Wojtyła, a professor at the K. Adamiecki University of Economics in Katowice; Jerzy Wratny, a professor

arbitration as a resolution method for dispute of the voluntary nature of awards issued by an arbitration commission does not fulfil the role expected by the legislature. In light of this fact, authors of the project observed that it was necessary to reinstate the importance of arbitration by considering that the arbitrator's decision would be binding for the parties and end the collective dispute. Additionally, authors of the draft believe that above-mentioned problems justify the introduction of the rule according to which an arbitration award would be subjected to judicial control when it comes to its legal compliance and interests of the parties, which would strengthen the rule of law and social peace in collective labour agreements. This position of the Labour Law Codification Commission was expressed in the suggestion contained in art. 156 § 2 CLC that assumed that each of the parties to a collective dispute would be able to appeal to a court against an arbitration award within 7 days of its receipt if that award blatantly violates the party's interest or the law[57]. The appeal would be made to a district court in the case of a one employer dispute and to a regional court in the case of a multi-employer dispute – both these courts having jurisdiction in the dispute initiation location. Even though an appeal from an arbitration award is not provided for in the following draft of the collective labour code of 14 March 2018 by the new Labour Law Codification Commission[58], there is no doubt that the concept worked out in 2006 is worth considering.

at the Rzeszów University; dr Eugenia Gienieczko, Director of the Labour Law Department in the then Ministry of Labour and Social Policy. In 2005, Teresa Liszcz, a professor of the Maria Curie-Skłodowska University in Lublin, later a judge in the Constitutional Tribunal, joined the Commission.

57 Art. 158 § 2 of the draft Collective Labour Code from mid 1990ies suggested that each of the parties and the labour inspector could be granted the right to appeal against the arbitrator's award violating the laws, see Cudowski, *Spory*, 115.

58 The text of the draft collective labour agreement, see https://www.gov.pl/web/rodzina/bip-teksty-projektu-kodeksu-pracy-i-projektu-kodeksu-zbiorowego-prawa-pracy-opracowane-przez-komisje-kodyfikacyjna-prawa-pracy, accessed January 23, 2021. The last Labour Law Codification Commission was established pursuant to the Ordinance of the Council of Ministers of 9th August 2016 on the establishment of a labour law codification commission, Journal of Laws 2016, item 1366. The Commission consisted of: Prof. UG dr hab. Marcin Zieleniecki – the Chairman, Prof. dr hab. Arkadiusz Sobczyk, Prof. UJ dr hab. Leszek Mitrus, Prof. UW dr hab. Łukasz Pisarczyk, Prof. UAM dr hab. Michał Skąpski, Prof. UG dr hab. Jakub Stelina, Prof. UW dr hab. Jacek Męcina, Prof. UKSW dr hab. Monika Gładoch, Prof. UAM dr hab. Anna Musiała, Prof. WSH dr hab. Marek Pliszkiewicz,

One has to welcome the rule corresponding, among other things, with the German or French legislation, that is expressed in art. 156 § 2 CLC and guarantees the parties to a dispute the right to appeal against the arbitration award while satisfying conditions provided for in the laws. Considering that the appellate review of arbitration awards is necessary in complicated collective labour relationships, the suggestion presented in CLC is very desirable. However, it would be worthwhile to think about a prolongation of the 7-day deadline for the appeal to 14 days. Such a solution would make a professional preparation of the appeal possible, especially in cases with complicated factual and legal circumstances.

One has to note that satisfying the appeal condition, i.e. blatant violation of an interest of the party, can turn out to be ambiguous. It can be difficult to define the blatant nature of the arbitrator's undesirable resolution if the arbitrator has the freedom of decision with no statutory model imposed in advance. The grounds for an appeal will be evaluated by an independent court. It seems that, even though the court analysing the legal compliance of an award will be limited by the proper application of the principles of interpretation of the law, it will have the margin of decision when it comes to the analysis of the party's interest. Therefore, the court hearing the appeal would have the particular responsibility for the correct determination of facts and an appropriate dispute resolution.

While analysing the issue of an appeal from the arbitrator's award, the participation of a labour inspector at this stage of the dispute is worth considering. In light of the 2006 proposal, the labour inspector would not have the right to appeal[59] even though, in certain situations such as the announcement of a strike, suspension of operations of a plant or its part by the employer for more than 3 months, creation of a major threat to public interest, the labour inspector would be able to initiate a collective dispute pursuant to art. 154 § 2 CLC. According to art. 156 § 1 CLC, the arbitrator would resolve a collective dispute by issuing an award to be delivered

Prof. UŁ dr hab. Mirosław Włodarczyk, Dr Jakub Szmit, legal counsel Marta Matyjek, attorney at law dr Liwiusz Laska.

59 The granting of this right to the labour inspector was postulated by Michał Seweryński, see: Michał Seweryński, "Wybrane zagadnienia rozwiązywania sporów zbiorowych w Polsce," in *Arbitraż i mediacja w prawie pracy*, ed. Grzegorz Goździewicz (Lublin: Wydawnictwo KUL, 2005), 52.

to the parties, to an appropriate labour inspector and to the National Labour Dialogue Consultant. Therefore, the labour inspector would receive the arbitrator's award and, in certain cases, would in fact be able to initiate arbitration proceedings according to CLC but would not be able to appeal against the decision issued by way of social arbitration. Such a situation can cause doubts whether the suggested participation of the labour inspector in social arbitration would be sufficient. It seems that the lack of interference from the labour inspector at the stage of the appeal against the arbitrator's decision is justified in the context of the desirable autonomy of the will of parties to the dispute regarding the application of arbitration proceedings. The freedom of trade unions and employers should also cover the making of decisions regarding the undermining of arbitration awards.

6. Conclusions

The above considerations allow us to formulate three principal conclusions. Firstly, the Polish legislature should offer an in-depth analysis of institutions lacking in PSA. A reference should be introduced to labour law regulations to state that in cases not regulated in the appropriate regulation on the amendment and supplementation of an arbitration award and the rejection of an arbitration application, CPC provisions shall be applied accordingly. As a consequence, the amendment and supplementation of an arbitration award would be permitted in line with cases specified in art. 350 § 1 CPC and art. 351 § 1 CPC. Such an action would also remove doubts regarding the interpretation of the possibility that the social arbitration college may reject the employee application for procedural reasons.

Secondly, the failure of parties to the dispute to respect binding arbitration awards is also a problematic issue. Legal consequences of the parties' failure to comply with the award issued by an arbitrator within specific time limits has to be set out precisely in the Polish act. The example of Russia is interesting here, where a fine is imposed for non-compliance with the award. Indeed, it would be worth adopting such a sanction in the Polish legal reality – a pecuniary penalty could be imposed by the National Labour Inspectorate (PIP). Additionally, the arbitration award should be included in the catalogue of enforcement titles referred to in art. 777 § 1 of the Code of the Civil Procedure so that it could be efficiently enforced in practice.

It also seems appropriate to adopt the principle that an arbitration award is binding on the parties to a collective dispute and is made immediately enforceable, as is the case, for example, in Spain. Such a legal construct could increase confidence in this method of collective dispute resolution. Legal certainty that the award will be enforced is essential from the perspective of the effectiveness of social arbitration itself.

Thirdly, it is worth considering whether it might be necessary to introduce the possibility of an appeal against an arbitration award in such socially important cases relating to the resolution of collective disputes. It seems that this solution would contribute to an increased importance of social arbitration. Judicial control over the award issued in arbitration proceedings would promote trust among parties to the dispute, which could mean that this method of resolution of collective disputes would be used more frequently. Award correctness verification would also make it possible to eliminate errors that can appear in practice during the case assessment. It would not be unusual if such a possibility is introduced into Polish legislation. In France, Slovakia or Germany, an option to appeal against an arbitration award is guaranteed by law. It seems that, just like in Germany, the Labour Court should be competent to hear appeals. Obviously, it remains an open point whether the case should be examined by the Court of Appeal or the Supreme Court. Given that social arbitration committees competent for in-company disputes operate at District Courts, it would not necessarily be desirable to make the District Court an appellate body. However, if awards are reviewed by the Court of professional judges, there is a reason to believe without any doubt that the process will be carried out with due diligence.

In view of the foregoing, how should we assess the above-described regulations on the settlement of a collective dispute through social arbitration? First of all, do they provide the balance between social partners? It ought to be emphasized that seemingly these regulations affect the legal situation of both employers and trade unions to an equal extent. Nevertheless, the provisions are unclear and the enforcement of an arbitration award uncertain, which makes the trade unions reluctant when it comes to this form of dispute resolution. However, this is a disadvantage for the employer itself as well. Failing successful mediation, the employer must be aware that a strike is forthcoming.

If we interpreted the principle of equal treatment of parties to a collective dispute in its broad sense, we could not unambiguously claim that the rule is complied with, given that only a trade union party is vested with the right to institute arbitration proceedings. Still, the rule is not absolute, and we should share the view that it is permissible that in certain situations the legislator may intentionally differentiate the rights of the subjects of collective labour relations in order to achieve a legal balance in practice[60]. It seems legitimate whenever the legislator differentiates between the legal situation of the trade unions and the employers in this respect. It cannot be presumed that the employer could also submit a motion to initiate social arbitration in a binding manner. This would be an excessive interference in the collective dispute resolution procedure, giving the employer a real opportunity to block the trade union's right to organise a strike for some indefinite period of time. Given the current problems in the application of arbitration proceedings and an illusory, non-binding nature of arbitration awards, this would be a highly dysfunctional step. Pre-arbitration measures, i.e. negotiations and mediations give the parties to a collective dispute the opportunity to reach an agreement before a strike is initiated in the wake of a failed mediation. Postponing the possibility of resorting to a non-amicable action due to pending arbitration initiated by the employer could adversely affect the success of previous dispute resolution methods. The employer would then be basically deprived of any pressure in the event of a dispute, which could mean its lower involvement in the amicable settlement of the dispute during negotiations or mediations.

It is particularly worth noting that the common objective of bargaining, mediation and arbitration is to prevent non-amicable actions, especially strikes. However, arbitration is the last amicable stage of collective disputes in the light of RCD regulations. It does not necessarily mean that it is the most important method of dispute resolution even though, in the Polish legal reality, arbitration is the final tool making reconciliation of the parties possible. In turn, a strike can negatively impact various aspects of daily life, in particular, it can worsen the employer's economic situation. Therefore, so as not to permit an automatic cessation of work by employees

[60] Paweł Nowik, *Pojęcie równowagi prawnej w zbiorowym prawie pracy* (Lublin: Wydawnictwo KUL, 2016), 90–91.

after unsuccessful mediation, one has to guarantee complete and clear mechanisms of arbitration proceedings. From this perspective, changes in the legal nature of an arbitration award, the possibilities to appeal against it, enforce, supplement or amend it are unavoidable. A comprehensive analysis of the arbitration award institution by the legislature is necessary to strengthen social arbitration as an amicable dispute resolution method.

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New technologies in Polish commercial arbitration on the background of European Union regulations

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Abstract: Commercial arbitration in Poland has to face contemporary problems, including those related to the constant development of information technologies, and therefore new technologies. It is seen during the COVID pandemic. This article is intended to assess the state of Polish regulation on the background of European Union regulations in the above-mentioned area and to propose potential changes to the Polish legislation[1] if they are needed.

1. Introduction

In this article, I will describe the role of new technologies in Polish commercial arbitration. This article hypothesizes that the Polish provisions are sufficient in the field of the new technologies in the Polish commercial arbitration, but with an exception for cases involving consumers. To prove this hypothesis I will check the current Polish regulations and how they work in practice[2], especially during the COVID pandemic.

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1 Karol Ryszkowski, "New technologies in the Polish commercial arbitration," in *Právo, obchod, ekonomika: zborník príspevkov (Právo - obchod - ekonomika)*, eds. Jozef Suchoža, Ján Husár, and Regina Hučková (Košice: Univerzita Pavla Jozefa Šafárika Vydavateľstvo Šafárik Press, 2020), 249.

2 Ryszkowski, "New technologies in the Polish commercial arbitration," 249.

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2. Results

2.1. New technologies in the Polish regulations in the matter of commercial arbitration

Generally, we can say that there is no special procedure concerning using new technologies in the Polish Code of Civil Procedure (further "CCP"[3])[4]. But due to art. 1184 CCP, arbitration courts in Poland may have wide freedom both in the choice of grounds and adjudication procedure, and thus also with regards to the use of new technologies in proceedings before them. According to the above-mentioned art. 1184 CCP "§1. Unless otherwise provided by statute, the parties may agree upon the rules and procedure before the arbitral tribunal.

§2. Unless otherwise agreed by the parties, the arbitral tribunal may, subject to statutory provisions, conduct the arbitration in such manner as it considers appropriate. The arbitral tribunal shall not be bound by the provisions on procedure before the court"[5].

However, the freedom to apply new technologies in Polish commercial arbitration is not complete.

There is a special regulation about arbitration in consumer matters in the CCP. It is worth mentioning because one of these provisions is connected with new technologies[6]. According to art. 1164^1 CCP "§1. An arbitration agreement covering disputes arising out of contracts to which a consumer is a party may be made only after the dispute has arisen and shall be in writing. Art. 1162 §2 shall not apply.

§2. In an arbitration agreement referred to in §1, it must also be indicated, under pain of invalidity, that the parties are aware of the consequences of the arbitration agreement, and more specifically with respect to the legal force of an arbitral award or settlement concluded before the arbitral tribunal equal to that of a judgment of the court or settlement

3 The Polish Code of Civil Procedure of 11 November 2014, Journal of Laws 1964, No. 43, as amended.

4 Ryszkowski, "New technologies in the Polish commercial arbitration," 249.

5 POLISH CIVIL PROCEDURE CODE, http://arbitration-poland.com/legal-acts/print,139.html.

6 Ryszkowski, "New technologies in the Polish commercial arbitration," 250.

concluded before the court upon recognition or enforcement thereof by the court"[7].

According to the above-mentioned art. 1162 CCP "§1. The arbitration agreement shall be in writing.

§2. The requirement as to the form of the arbitration agreement shall also be met if the agreement is contained in correspondence exchanged between the parties or statements made using telecommunications enabling the content thereof to be recorded. Reference in a contract to a document containing a provision on submission of a dispute to arbitration shall meet the requirement as to the form of the arbitration agreement if the contract is made in writing and the reference is such that it makes the clause an integral part of the contract"[8].

So in consumer matters, papers or statements exchanged by means of distance communication that make it possible to consolidate their content cannot be considered as an arbitration clause, so it can be said that the consumer protection does not take into account the development of the new technologies[9]. The reason for such strict regulation is the safety of the consumer as the weaker party.

We can see the new technologies not only as a useful tool but also as the object of the arbitration as well. There is no special regulation about the arbitrability of new technologies in Polish arbitration. Regardless of the kind of qualification of the new technologies disputes matters in the field of Polish law, because of art. 1157 CCP. On 8th September 2019, the amendment to the arbitration proceedings entered into force. The amendment covered, among other provisions art. 1157 CCP regulating the arbitrability[10]. According to it "Unless a special provision provides otherwise, the parties may subject to arbitration:

1) disputes regarding property rights, with the exception of cases regarding maintenance;

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7 POLISH CIVIL PROCEDURE CODE, http://arbitration-poland.com/legal-acts/print,139.html.

8 POLISH CIVIL PROCEDURE CODE, http://arbitration-poland.com/legal-acts/print,139.html.

9 Ryszkowski, "New technologies in the Polish commercial arbitration," 250.

10 Karol Ryszkowski, "Spory ze stosunku spółki w postępowaniu przed sądem polubownym w świetle nowelizacji KPC," *ADR. Arbitraż i Mediacja*, no. 2(50) (2020): 85.

2) disputes regarding non-property rights, provided they can be the subject of a court settlement"[11].

Because of the current wording of art. 1157 CCP, the view that, in art. 1157 CCP, a reservation has been made that disputes over property or non-property rights - which might be the subject of a court settlement, might be submitted for arbitration, except for maintenance cases. This reservation ought to be understood in such a way that if the dispute were subject to the resolution of a state court, the parties, as to the rights in dispute, could conclude a settlement, therefore the arbitrability is subject to the settlement of the dispute (amicable settlement)[12]. It is nowadays only valid for non-property rights disputes[13]. Based upon art. 184 CCP "Insofar as their nature so permits, civil cases may be settled before an action is brought in court. The court shall consider a settlement agreement to be inadmissible if the content thereof is contrary to the law or principles of community life or if it seeks to circumvent the law"[14].

2.2. Online Dispute Resolution (ODR)

Information technologies support in various ways not only the court settlement of disputes but also (...) out-of-court amicable forms. Firstly, by providing the parties with communication tools enabling synchronous (teleconference, chat) or asynchronous (e-mail) remote communication. (...) Secondly, legal information databases may play an important role in the settlement of disputes, providing negotiating parties with information on applicable regulations or court rulings issued by courts in a given jurisdiction. (...) Thirdly, computer programs called negotiation decision support systems (NDSS) generate prompts regarding the decisions of individual parties at a given stage of the negotiation process, as well as present important information of a different type (...). Fourthly, a computer program might propose a comprehensive solution to the dispute between the parties by a fully

11 POLISH CIVIL PROCEDURE CODE, http://arbitration-poland.com/legal-acts/print,139.html.

12 Karol Ryszkowski, "Klauzula porządku publicznego w postępowaniu przed sądem polubownym a zdatność arbitrażowa," *ADR. Arbitraż i Mediacja*, no. 1(21) (2013): 77.

13 Ryszkowski, "New technologies in the Polish commercial arbitration," 250.

14 Code of Civil Procedure, Art. 184. Admissibility of a settlement agreement., Legalis, accessed February 08, 2021.

automated allocation of individual disputed issues between the parties. (...) The research and practical-IT trends related to the use of new information technologies, especially network technologies, in alternative dispute resolution is known as Online Dispute Resolution (ODR)[15].

Online Dispute Resolution (ODR) is a form of online dispute resolution using ADR methods. There are many terms in the doctrine that describe the same phenomenon, including Electronic ADR (eADR), Internet Dispute Resolution (iDR), and Online ADR (oADR), but ODR is the most common. There are many categories of online dispute resolution, including online arbitration[16].

The ODR is regulated in the following EU normative acts[17]:

– directive 2013/11/EU of the European Parliament and of the Council of 21st May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, "Directive on consumer ADR"[18],
– regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, "Regulation on consumer ODR"[19].

The issue of new technologies in Polish arbitration is not included in the CCP. Regardless of the regulation of the ODR matter, the European Union legal acts do not contain any provisions regarding arbitration in consumer matters, including online arbitration[20].

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15 Adam Zienkiewicz, "Nowe technologie informatyczne na tle pozasądowego rozwiązywania sporów konsumenckich w prawie Unii Europejskie," *Edukacja Prawnicza*, no. 11 (2014): 14.

16 Karolina Mania, "ODR (Online Dispute Resolution) – podstawowe zagadnienia," *ADR. Arbitraż i Mediacja*, no. 1(9) (2010): 74.

17 Ryszkowski, "New technologies in the Polish commercial arbitration," 251.

18 Directive 2013/11/EU of the European Parliament and of the Council of 21st May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, (O.J.E.C. L 165, 18.6.2013), p. 63–79.

19 Regulation (EU) of the European Parliament and of the Council No. 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (O.J.E.C. L 165, 18.6.2013), p. 1–12.

20 Ryszkowski, "New technologies in the Polish commercial arbitration," 251.

2.3. New technologies in the EU regulations in the matter of commercial arbitration

In addition, it should be noted that there is no regulation in the European Union law regarding arbitration as a whole. Aside from the issue of new technologies, Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[21] has been replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12th December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[22], which, in accordance with a recital (12) and Art. 1 clause 2. lit. d) does not apply to arbitration. Additionally, pursuant to recital (12) of this Regulation "This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'[23]), which takes precedence over this Regulation". Furthermore, in accordance with the art. 73 point 2 this regulation does not affect the application of the New York Convention[24]. The current trends in the bodies of the European Union are consistent with the position resulting from the EU legal acts. Since there are convention provisions, such as the New York Convention and soft law acts, such as the UNCITRAL Model Law on Commercial Arbitration[25], EU legislative intervention is not needed in this area.

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21 Regulation (EC) of the Council No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J.E.C. L 12, 16.1.2001, p. 1–23).

22 Regulation (EU) of the European Parliament and of the Council No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J.E.C. L 351, 20.12.2012, p. 1–32).

23 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York, 10th June 1958.

24 Karol Ryszkowski, *Klauzula procesowego porządku publicznego w arbitrażu handlowym w prawie polskim na tle innych systemów prawnych* (Warszawa: C.H. Beck, 2019), 235–236.

25 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19–09955_e_ebook.pdf.

We cannot say that the EU is inactive on the new technologies ground. The EU's efforts can be seen in the creation of the European Commission for the Efficiency of Justice (CEPEJ) on 18 September 2002[26].

In this creation was "… demonstrated the will of the Council of Europe to promote the rule of law and fundamental rights in Europe, on the basis of the European Convention on Human Rights [the Convention for the Protection of Human Rights and Fundamental Freedoms[27]], especially its Articles 5 (Right to liberty and security), 6 (Right to a fair trial), 13 (Right to an effective remedy) and 14 (Prohibition of discrimination)"[28].

The activity of this entity may be useful in the development of new technologies in court proceedings, including commercial arbitration. An example of a solution that may prove helpful is the CEPEJ study "… on the establishment of a certification mechanism for AI tools and services used in the fields of justice and the judiciary. The study begins to implement the CEPEJ Charter on the use of AI in judicial systems and their environment, adopted in late 2018. Broadly, the CEPEJ proposes certification and labeling criteria for AI tools based on principles outlined in the Charter, including (1) the Principle of respect of fundamental rights; (2) the Principle of non-discrimination; (3) the Principle of quality and security (with regards to the processing of judicial decisions and data, using certified sources and intangible data in a secure technological environment); (4) Principle of transparency, impartiality, and fairness; and (5) Principle of "under user control" (ensuring users are informed actors and in control of their choices). The proposed CEPEJ certification requirements will likely impact

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[26] Council of Europe, Resolution Res(2002)12 establishing the European Commission for the efficiency of justice (CEPEJ) (Adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804ddb99.

[27] Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950 as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, ETS No. 5: ETS No. 009, 4: ETS No. 046, 6: ETS No. 114, 7: ETS No. 117, 12: ETS No. 177.

[28] Council of Europe, "MAKING JUSTICE MORE EFFICIENT, 15 years serving justice in Europe," https://rm.coe.int/prems-083118-bil-2013–15e-anniversaire-cepej-web/16808b5ee4: 4.

a number of "Legal Tech" areas, such as case law search engines, online dispute resolution, predictive analysis, automated legal drafting, and so on"[29].

Moreover, this study directly refers to the New York Convention in the paragraph which stated that the "… certification of artificial intelligence systems in the judicial sphere would also make it possible to support private and public projects and to establish standards that reach beyond Europe, justifying, for example, the development of international mechanisms for the recognition and enforcement of foreign decisions (..) or arbitral awards (..) made by or with the assistance of artificial intelligence"[30].

From the EU soft law acts which have their influence on ADR, and thus commercial arbitration, it is worth mentioning the Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (Text with EEA relevance) (notified under document number C(2001) 1016)[31], in Poland known as 2001/310/EC or 2001/310/WE.

In paragraph (14) of the preamble of 2001/310/EC, its aim is stated. According to it "(14) In accordance with Article 6 of the European Human Rights Convention, access to the courts is a fundamental right".

Recommendation 2001/310 / EC formulates four rules for the functioning of ADR bodies. These are 1) impartiality, 2) transparency, 3) efficiency (easy availability, low cost or no payment for consumers), 4) fairness. In fact, these principles differ little from the previous ones. This is just a different approach to similar requirements[32].

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29 Eric Chang, "A Roundup of Tech and Dispute Resolution News, March 9, 2021," http://arbitrationblog.kluwerarbitration.com/2021/03/09/a-roundup-of-tech-and-dispute-resolution-news/.

30 European Commission for the Efficiency of Justice, "Possible introduction of a mechanism for certifying artificial intelligence tools and services in the sphere of justice and the judiciary: Feasibility Study," https://rm.coe.int/feasability-study-en-cepej-2020–15/1680a0adf4, 31.03.2021, p. 27.

31 European Commission, Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (Text with EEA relevance) (notified under document number C(2001) 1016) O.J.E.C. L 109, 19/04/2001 P. 0056 – 0061.

32 Bartosz Ziemblicki, *Arbitraż online, Online Arbitration Press* (Wrocław: Online Arbitration Press, 2017), 100.

Moreover, these rules are commonly accepted in commercial arbitration, maybe with the exception of effectiveness which is not always connected with lower costs. However, in cases with a low amount of value of the dispute, there is a simplified type of procedure called small claims.

Small claims have fundamental importance for the arbitration proceedings because of guaranteeing the implementation of speed in arbitration[33].

2.4. Implementation of EU regulations in the matter of commercial arbitration in the Polish legal system

Solutions from the Directive on consumer ADR were introduced to Polish arbitration by the Act of 23rd September 2016 on Out-of-Court Consumer Dispute Resolution[34]. Pursuant to the justification for this Act, the Polish legislator having to bear in mind the fact that under the out-of-court consumer dispute resolution system there will also be ADR entities that currently resolve disputes using the mediation or arbitration procedure regulated in the provisions of the Code of Civil Procedure (CCP), in order to maintain the coherence of the system, these procedures had to be adapted to the requirements of the ADR directive[35].

In the case of arbitration, the situation is more attractive for the parties, as there is greater freedom of both the arbitration court and the parties in

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33 Karol Ryszkowski, "Problem small claims w arbitrażu handlowym w prawie polskim," in *Maloznačnì spori: êvropejskij ta ukraïns'kij docvìd virìšennâ*, eds. Ìrina Ìzarova, Radoslav Flejszar, and Roksolana Hanik-Pospolìtak (Kiïv: VD "Dakor", 2018), 148. About small claims institution see also Andrzej Olaś, "Some remarks on the pending reform of the polish domestic small claims procedure," in *Maloznačnì spori: êvropejskij ta ukraïns'kij docvìd virìšennâ*, eds. Ìrina Ìzarova, Radoslav Flejszar, and Roksolana Hanik-Pospolìtak (Kiïv: VD „Dakor", 2018), 100, Karol Ryszkowski, "Kwestia small claims w arbitrażu handlowym w prawie polskim," *Zeszyty Naukowe Uniwersytetu Rzeszowskiego*, no. 114, *Seria Prawnicza, Prawo* 32 (2021) and Joanna Szumańska, "Postępowanie przyspieszone w arbitrażu (*fast track*)," *Przegląd Prawno-Ekonomiczny*, no. 2(39) (2017): 259.

34 Act on Out-of-Court Consumer Dispute Resolution of 23 September 2016, Journal of Laws 2016, Item 1823, as amended.

35 Karol Ryszkowski, "The Arbitration in Consumer Matters and New Technologies in Polish Law Against the Background of European Union Law," in *Právo, obchod, ekonomika 10: zborník vedeckých prác = Law, Commerce, Economy 10: Collection of Scientific Works*, eds. Jozef Suchoža, Ján Husár, and Regina Hučková (Košice: Univerzita Pavla Jozefa Šafárika Vydavatel'stvo Šafárik Press, 2021), 184–195. Full text: https://unibook.upjs.sk/img/cms/2021/pravf/pravo-obchod-ekonomika-10.pdf, 186.

shaping the rules of the procedure itself. Nowadays, with the COVID-19 epidemic, the common courts work to a very limited extent. They practically do not hold hearings in open court, while meetings by videoconference are limited for technical reasons. On the other hand, in arbitration proceedings the question of whether to hold a hearing in open court, i.e. summon the parties to an arbitration court, or conduct a hearing by videoconference, teleconference, through the exchange of documents containing the parties' statements, or otherwise - for example by via instant messaging, it is, in fact, the responsibility of the arbitration court itself. In this respect, it is usually only bound by its regulations. Evidence can be taken through just such a videoconference where, for example, a witness, expert, or party can be heard. You can also hear a witness in writing, moreover, CCP now also introduces such a possibility, but here arbitration was the leader and it showed the way to such simplified evidence proceedings. Arbitral tribunals, especially electronic ones, commonly use electronic services[36].

Arbitral tribunals conduct online proceedings - without paper service (except for the lawsuit), and traditional hearings are replaced by teleconferences. For instance, the Court of Arbitration at the Polish Chamber of Commerce in Warsaw is technically prepared for them. Thanks to that, even during the COVID pandemic, hearings (in the form of audio and audiovisual) are held there continuously[37]. So as we can see that the CCP regulations are in general sufficient for the new technologies in the Polish commercial arbitration, even during the COVID-19 pandemic[38], especially due to the above-mentioned art. 1184 CCP.

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36 Patrycja Rojek-Socha, "Prof. Gołaczyński: Arbitraż szansą dla przedsiębiorców w czasie epidemii," https://www.prawo.pl/prawnicy-sady/arbitraz-szansa-dla-przedsiebiorcow-w-czasie-epidemii-prof-dr,500636.html.

37 Marcin Zawistowski, "Czy sądy polubowne mogą zastąpić sądy powszechne?," https://prawo.gazetaprawna.pl/artykuly/1470813,sady-polubowne-sady-powszechne-koronawirus.html.

38 Ryszkowski, "New technologies in the Polish commercial arbitration," 252.

3. Conclusions

The provisions about arbitration in consumer matters in the CCP do not take into account the development of new technologies. However, Polish arbitration practice is not endangered in the field of the new technologies. As the practice shows the Polish provisions are sufficient in the field of the new technologies in Polish commercial arbitration, but with the exception in consumer matters due to consumer protection. So my hypothesis is confirmed[39], especially due to the freedom guaranteed by art. 1184 CCP.

The role of new technologies in Polish commercial arbitration is important, mainly from the time when the COVID-19 pandemic has begun. Generally, Polish provisions are not an obstacle to the new technologies in the Polish commercial arbitration[40]. We cannot say that Polish regulation is not consistent with EU legal acts, because there is no regulation in the European Union law regarding arbitration. The current trends in the bodies of the European Union are consistent with the position resulting from EU legal acts. Since there are convention provisions, such as the New York Convention and soft law acts, such as the UNCITRAL Model Law on Commercial Arbitration, EU legislative intervention is not needed in this area. However, actions taken by the European Commission for the Efficiency of Justice may have a positive impact on the use of new technologies in court proceedings, also in the field of commercial arbitration.

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[39] Ryszkowski, "New technologies in the Polish commercial arbitration," 252.

[40] Ryszkowski, "New technologies in the Polish commercial arbitration," 252.

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Legal status of farmers involved in short food supply chains, a comparative study

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Abstract: The legal status of farmers involved in food marketing is not determined by the EU legislator, however, EU policy encourages farmers' participation in short food supply chains. The article aims to determine whether a farmer selling his products, both processed and unprocessed is subject to a favourable legal regime intended for the agricultural sector, or whether this activity qualifies him as a commercial entrepreneur. The legislation of three EU Member States and the law of the USA were subject to a comparative legal analysis, based on the dogmatic method. The study found that under the EU Member States' law, farmers involved in short food supply chains are granted a privileged agricultural status, which certainly strengthens their market position in competition with food businesses and big retailers and is an incentive to undertake and conduct the activity of agri-food marketing. In turn, under American law, agricultural activity and direct marketing are economic activities that cause farmers to operate within a business as an entrepreneur. The main tool to support the participation of US farmers in short food supply chains is financial programmes offering incentives to direct marketing. It was concluded that the systemic legal solutions, as in the presented legislation of the EU countries, in contrast to aid programmes, provides farmers with favourable conditions in the long term, without additional bureaucracy and the need to fill out documents and applications, thus giving them a sense of confidence and stability in engaging in food direct marketing.

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1. Introduction

The term "short supply chains" has been defined in EU law in article 2 of Regulation (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)[1] and complemented by article 11 of the European Commission Delegated Regulation (EU) No 807/2014 supplementing the Rural Development Regulation[2]. Short Food Supply Chains (SFSC) cover various forms in which direct sale plays an important role[3].

The legal status of a farmer involved in direct sales of agri-food products is not determined by the EU legislator. Member States are free to adopt their provisions in this regard. However, EU policy encourages farmers' participation in short food supply chains. The Common Agricultural Policy 2013–2020 provided support for "developing direct sales and local markets" and improving the functioning of the food supply chain[4]. The post-2020 CAP legislative proposal, lists, *inter alia*, "the promotion of short supply chain and local markets" as an aspect of cooperation between at least two entities which should be covered by support,[5] and within the CAP objective "to improve the farmers' position in the value chain," aims, for example, to increase fruit and vegetable concentration of supply and

1 O.J.E.U. L 347, 20 December, 2013.

2 Commission Delegated Regulation (EU) No. 807/2014 supplementing Regulation (EU) No. 1305/2013 of the European Parliament and the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and introducing transitional provisions, O.J.U.E. L 227, 31 July 2014.

3 See more in Anna Kapała, "EU legal instruments supporting short food supply chains and local food systems," *Revista General de Derecho Europeo*, no. 52 (2020) online.

4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future", 18 November 2010, COM(2010) 672 final.

5 Recital 45 of the Proposal for a Regulation of the European Parliament and of the Council establishing rules on support for strategic plans to be drawn up by the Member States under the Common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulation (EU) No. 1305/2013 of the European Parliament and of the Council and Regulation (EU) No. 1307/2013 of the European Parliament and of the Council, COM/2018/392 final – 2018/0216 (COD).

the placing on the market, including through direct marketing[6]. As part of The Farm to Fork Strategy, which is at the heart of the Green Deal, the EC's goal is to create sustainability, including short supply chains, to strengthen regional and local food systems[7]. The EC acknowledged that "the calls for shorter supply chains have intensified during the current outbreak" of COVID-19[8].

The question of how EU Member States determine the definition of direct sales and whether the law contributes to the undertaking of this activity by farmers seems interesting to be investigated. Appropriate legal regulations providing for simplifications and incentives to a farmer conducting food marketing, are important tools strengthening their position in food chains, in relation to food businesses and big retailers, and thus determining the development of local supply chains.

Therefore, it is reasonable to ask what is the legal status of a farmer who sells agricultural products produced on his farm, both unprocessed and processed, within short supply chains. The aim of the article is to determine whether such a farmer is subject to a privileged legal regime intended for the agricultural sector, or whether the activity of processing and selling products qualifies him as a commercial entrepreneur. The legislation of three EU Member States: Italy, France, Poland and the law of the USA will be subject to comparative legal analysis. US legislation has been selected for consideration because the local food system movement has been developing there for two decades, with many interesting forms of short supply chains, which raises the question of how the legislator encourages farmers to participate in these chains. Based on this analysis, conclusions will be formulated as to which legal solutions offer the greatest facilitation for a farmer to participate in short supply chains.

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6 Article 42 b) Proposal for a Regulation of the European Parliament and of the Council establishing rules on support for strategic plans to be drawn up by Member States under the Common agricultural policy […].

7 Communication From The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, Brussels, 20 May 2020, COM(2020) 381 final.

8 Ibid.

2. The legal status of a farmer in Italy

In Italian law, a farmer has the status of an agricultural entrepreneur, which includes the category of direct producer (*coltivatore diretto*) and a professional agricultural entrepreneur (*imprenditore agricolo professionale*). An agricultural entrepreneur is subject to a privileged legal regime, dedicated to the agricultural sector, separate from the commercial entrepreneur's regime, and therefore enjoys privileges in the field of tax law, social security, as well as national and EU support measures. An agricultural entrepreneur is a natural person (as well as a partnership, a capital company or a cooperative) who performs one of the basic agricultural activities listed in the Civil Code (land cultivation, animal husbandry, forestry) or activities related to basic agricultural activities, which include the processing of agricultural products and their marketing[9]. Therefore, two important issues need to be clarified, first, what conditions must be met for a farmer to qualify as an "agricultural entrepreneur" and what criteria must be met by the activity of processing products and their marketing in order to qualify as so-called "related agricultural activities".

Referring to the first issue, a farmer will be an agricultural entrepreneur if the criteria of Art. 2135 of the Civil Code, concerning the activity conducted by him, and art. 2082 of the Civil Code, defining the general category of the entrepreneur are met jointly. According to Art. 2082 of the Civil Code an entrepreneur is a person who carries out an economic activity, i.e. one that is professionally carried out and organized for the purpose of producing or exchanging goods or services (such activity constitutes an "enterprise".) The economic nature of the activity means that it is market-oriented, i.e. that is not an activity conducted solely for a self-supply[10]. An "organized" activity is one that is based on a set of production factors for capital (real estate and movable property) and labour[11]. An activity is "professional" when it is carried out professionally, that is, not occasionally or sporadically but continuously[12]. Therefore, in Italian law, a farmer

9 Article 2135 of the Italian Civil Code: Regio Decreto 16 marzo 1942, n. 262, Approvazione del testo del Codice civile, Gazzetta Ufficiale n.79, 4.04.1942.

10 Alberto Germanò, *Manuale di legislazione vitivinicola* (Torino: Giappichelli, 2017), 30.

11 Ibid, 29.

12 Ibid, 30.

who carries out an agricultural activity in a professional manner based on the organization of labour factors and capital, consisting in the cultivation of land, forest, animal husbandry or related activities, provided that the result is market-oriented products, is an "agricultural entrepreneur" in the meaning of Art. 2135 of the Civil Code. In other words, his activity meets the conditions of an "enterprise" according to Art. 2082 of the Civil Code, and due to the type of (agricultural) activity, he belongs to a special category of an agricultural entrepreneur.

An agricultural entrepreneur who performs the activity of processing products and selling processed or unprocessed products, which is not agricultural by nature, but industrial and commercial, does not, however, become a commercial entrepreneur within the meaning of art. 2195 of the Civil Code, thanks to the notion of the so-called "related activities". These are activities that, *par nature*, are not of an agricultural nature, such as processing, marketing, agritourism, energy production, but their performance in connection with one of the strictly agricultural activities makes them qualify as agricultural and be subject to the same regulation as agricultural activities. *A contrario*, failure to meet the criterion of connection with typical agricultural activity will result in the establishment of a commercial enterprise, within the meaning of Art. 2195 of the Civil Code.

The second issue concerns the clarification of the criteria for linking processing and selling activities with agricultural activities. According to Art. 2135 of the Civil Code "related" are activities carried out by the same entrepreneur aimed at processing, storage, marketing and value-adding, the object of which are products obtained predominantly from land or forest cultivation or animal husbandry. The linkage criteria consist of the fact that the same agricultural entrepreneur performs the basic and related activities, using the resources and equipment of his farm[13]. It should be added that the related activity is not equivalent to agricultural activity, but is an additional, secondary and complementary activity. The activity of this nature is functionally related to the basic agricultural activity, serves

[13] See more on the definition of agricultural activities in Italian law in Alberto Germanò, "L'impresa Agricola," *Diritto e Giurisprudenza Agraria e dell'Ambiente*, no. 9/10 (2001): 504.

its development and implementation of the goal set for it, and supplements the income obtained from basic agricultural activity[14].

Processing involves changing the form or texture of a product in its natural form, resulting in a different end product, for example, cheese or milk butter, grape wine, olive oil. If an agricultural entrepreneur processes raw materials which come "predominantly" from his agricultural production activity, he retains his legal "agricultural" status. The criterion of quantitative advantage stated in the quoted provision[15] allows the purchase of agricultural products from another producer in order to increase the value of the final product, which, however, must mainly consist of its own products. Besides the linkage criteria specified by the Civil Code, more detailed criteria for the performance of direct selling activities are laid down in specific regulations[16].

Agricultural entrepreneurs who independently and professionally carry out the activity of running a farm ("agricultural enterprise") are subject to social security for agriculture and in this respect benefit from the same facilities provided for direct agricultural producers (Article 1 (4) of the d.lgs. 99/2004[17]). In addition, a professional agricultural entrepreneur who has entered the social insurance department for agriculture is granted tax facilities in the field of indirect taxes as well as credit, defined by the applicable regulations for natural persons with the status of a direct agricultural producer[18].

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14 Alberto Germanò, "L'impresa Agricola," 514 and Eva Rook Basile, *Impresa agricola e concorrenza, Riflessioni in tema di circolazione dell'azienda* (Milano: A. Giuffrè, 1988), 52.

15 Germanò, *Manuale*, 36.

16 See article 4 of *Decreto Legislativo 18 maggio 2001, n. 228 "Orientamento e modernizzazione del settore agricolo, a norma dell'articolo 7 della legge 5 marzo 2001, n. 57"*, (Gazzetta Ufficiale n. 137, 15.06.2001) - *Supplemento Ordinario n. 149*. See more in Anna Kapała, "Legal status of direct sales of agricultural and food products in the legislation of selected EU Member State," *Przegląd Prawa Rolnego* 26, no. 1 (2020): 65–77.

17 Decreto Legislativo 29 marzo 2004, n. 99, Disposizioni in materia di soggetti e attivita', integrita' aziendale e semplificazione amministrativa in agricoltura, a norma dell'articolo 1, comma 2, lettere d), f), g), l), ee), della legge 7 marzo 2003, n. 38, (Gazzetta Ufficiale n. 94, 22.04.2004).

18 Art. 1 par. 5 bis decreto legislativo 99/2004.

The taxation of agricultural enterprises is treated in a privileged way by Italian tax law. There is a special tax regulation[19] on agricultural income that applies to basic agricultural activities as well as to related agricultural activities, but only to the processing, storage, manipulation, marketing and enhancement of products obtained mainly from soil or forest cultivation or animals husbandry, provided that these products belong to the catalogue of products specified in the ministerial decree[20]. In particular, income from direct sales qualifies as agricultural (subject to cadastral taxation following article 34 of the income tax decree), if a product, being a result of a related activity consisting in processing, is included in the List of the Ministerial Decree.

The conducted analysis allows us to answer the question formulated in the introduction. Under Italian law, a farmer who sells unprocessed and processed food produced mainly from his own crops or from livestock farming qualifies as an agricultural entrepreneur subject to a privileged legal regime. This is possible thanks to the broad definition of agricultural activity, including the so-called related activities, to which belong processing, marketing, increasing the value of the product. However, a number of conditions with regard to the performance of related activities must be met, mainly the criterion of the unity of the entity and the farm, and the use of a majority share of their own products. The Italian regulation thus supports the participation of the farmer in short supply chains, allowing him to produce and sell food while granting him the privileged status of an agricultural entrepreneur.

The current wording of Art. 2135 of the Italian Civil Code was introduced in 2001 (by Decree-Law 228/2001), although from the beginning of the Civil Code, i.e. from 1942, the definition of agricultural activity also included the processing and sale of agricultural products. Consequently, the Italian farmer has long been legally allowed to participate in short supply chains. According to the Italian Institute of Services for the Agricultural

[19] Art. 32 and 34 of Testo unico delle imposte sui redditi (TUIR) di cui al Decreto del Presidente della Repubblica No. 917/1986 (Gazzetta Ufficiale n. 302, 31.12.1986, Supplemento Ordinario, as amended).

[20] Currently biding is: Decreto 13 febbraio 2015 Individuazione dei beni che possono essere oggetto delle attività agricole connesse, di cui all'articolo 32, comma 2, lettera c), del testo unico delle imposte sui redditi (Gazzetta Ufficiale n. 62 of 16.03.2015, Serie Generale).

Food Market (ISMEA) elaboration of the Italian Statistics Office data, in 2010 direct sales were practised by 26% of agricultural enterprises that place their own product on the market (i.e. about 1 million companies, excluding those that produce exclusively for self-consumption) with significant differences depending on the type of prevailing production sold by the company. In the case of processed products, direct sales are carried out by 76% of the companies[21]. What can be seen from a recent ISMEA survey in 2020 the number of farms, of the analysed sample, that decided to start direct sales increased by 22%[22].

3. The legal status of a farmer in France

The French Civil Code does not establish the category of an agricultural entrepreneur but introduces a definition of agricultural activity performed by a farmer (*exploitant agricole*) in article L.311–1 of the Rural Code[23]. The farmer is a separate legal category in relation to the entrepreneur and is subject to specific regulations in the field of civil law, social security and tax law. A farmer (*exploitant agricole*) is a person who conducts agricultural activity as defined in the civil code. The definition, unlike the Italian one, does not mention *expressis verbis* the activity of marketing or transformation of agricultural products. However, it not only includes a typical agricultural activity, defined in the doctrine *par nature* but also agricultural activity *par relation* or *dérivées* (also referred to as *accessoires*),[24] taking into account the farm diversification and multi-activity[25].

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21 Flaminia Ventura and Mario Schiano lo Moriello, "Opportunità e minacce per la filiera corta e la vendita diretta in Italia, Documento realizzato dall'ISMEA nell'ambito del Programma Rete Rurale Nazionale Piano 2016," *Scheda Progetto Ismea 10.2 Competitività e Filiere agroalimentari*, (settembre 2017): 8.

22 Antonella Finizia, Mariella Ronga, Mario Schiano Lo Moriello, and Franco Torelli, "I canali commerciali alternativi per le aziende agricole: vendita diretta e filiera corta I modelli, le criticità e le opportunità di sviluppo," *Documento realizzato nell'ambito del Programma Rete Rurale Nazionale 2014–20*, (ottobre 2020): 4.

23 Code rural et de la pêche maritime, version consolidée au 14 avril 2020, article L. 311–1 as amended by LOI n° 2019-469 du 20 mai 2019 – article 4(V) (Journal Officiel de la République Française No. 0117, 21.05.2019).

24 Luc Bodiguel and Micheal Cardwell, "Evolving definitions of 'agriculture' for an evolving agriculture?," *The Conveyancer and Property Lawyer*, no. 5 (2005): 430.

25 Véronique Barabé-Bouchard and Marc Hérail, *Droit rural* (Paris: Ellipses, 2011), 6.

Typical agricultural activity (*par nature*) is based on the criterion of the biological cycle. It includes "all the activities corresponding to the harnessing and the exploitation of a biological cycle of vegetable or animal character and constitutes one or more stages necessary for the progress of this cycle." More important for the current study is the concept of so-called "derived agricultural activity" or *par relation*, which includes "activities carried out by a farmer that constitute an extension of the act of production or are to support a farm." These are various activities, often of a "commercial" nature, which, however, benefit from the special treatment accorded by rural law to agricultural activities, if they are carried out under several predetermined conditions[26]. Direct sales, as well as the processing of agricultural products obtained on the farm, are recognized, by interpretation, as belonging to the second category of agricultural activity, being an extension of the act of production[27].

What criteria must be met for the activity to be considered an agricultural derivative? One condition results directly from article L. 311–1 of the Code rural. The activity should be carried out by persons who already have the status of a farmer (*exploitant agricole)*, due to their activity based on the biological cycle criterion[28]. Other criteria were further specified in the jurisprudence, according to which, to fall under the notion of the activity of an "extension of the production act," direct sales must be conducted simultaneously on the same farm with an agricultural activity by nature, which is a similar criterion to the Italian one. If this is the case, this activity will not be considered an act of commerce but it remains within the sphere of agriculture[29]. The condition of the inseparability of direct sales from

[26] The activities, thus very broadly defined, present a civil character. They, therefore, fall within the jurisdiction of the civil courts and not that of the commercial courts, cit. *Mémento Agriculture 2017–2018* (Levallois-Perret: Editions Francis Lefebvre, 2016), 13.

[27] Barabé-Bouchard and Hérail, *Droit rural*, 7; Didier Krajeski, *Droit rural* (Issy-les-Moulineaux: Defrénois, 2016), 19; Luc Bodiguel and Micheal Cardwell, "Évolution de la définition de l'agriculture pour une agriculture évoluée. Approche comparative Union europeenne/Grande Bretagne/France," *Revue du Marché commun et de l'Union européenne*, no. 490 (2005): 458. Kapała, "Legal status of direct sales," 72–73.

[28] *Mémento Agriculture 2017–2018*, 14.

[29] Bodiguel and Cardwell, "Evolving definitions of 'agriculture,'" 432; *eidem* "Évolution de la définition de l'agriculture," 459, see there endnote no. 48, in which the authors give rulings regarding the condition of coexistence of agricultural activities *par nature*, like for

the agricultural activity by nature must, therefore, be met[30]. Otherwise, the activity being an extension or having the farm as support will come under commercial law or another civil law branch[31].

In relation to direct sales, the qualifying condition is, additionally, the origin of the products being in a sale. The processing or sale of products bought from third parties, if there is no link with an intervention in the biological cycle after their purchase, cannot be considered as an extension of the production act, but is a commercial activity[32]. However, the exteriority of certain products, if they constitute necessary and minority additives that cannot be derived from agricultural activities, will not give rise to commercial activities[33]. Therefore, farm production must outweigh the external supply[34].

Direct sales that meet these criteria remain in the sphere of agriculture, irrespectively of whether agricultural products have previously been processed and whether the sale takes place at a fixed point and with the help of specialised staff[35]. The method of sale (direct sale to the consumer at a market, on the farm, via the catalogue, via the Internet), as well as the method of processing - industrial or simply artisanal – are irrelevant[36].

In the field of tax law, the definition from article L 311–1of the Code rural is not applied. However, the criterion of "farm support activities" was

instance: Cour Administrative d'Appel de Bordeaux, du 9 octobre 2001, published in "Recueil Lebon" n° 99BX02611; Cour de Cassation, Chambre Sociale, du 6 décembre 2001, published in "Bulletin Cassation" n° 5130; Cour de Cassation, Chambre Sociale, du 11 juillet 2002, published in "Revue de Droit Rural", février 2003, n° 310.

30 Bodiguel, who points out that the sale of agricultural products must "inextricably bound up with an *activité agricole par nature*": Bodiguel and Cardwell, "Evolving definitions of 'agriculture,'" 433.

31 Bodiguel and Cardwell, "Évolution de la définition de l'agriculture," 456, who provides rulings: Cour de Cassation Chambre Sociale, 6 décembre 2001, published in "Bulletin Cassation" 2001, n° 5130 (conditionneuse de légumes); Krajeski, *Droit rural*, 19; Kapała, "Legal status of direct sales," 73.

32 Krajeski, *Droit rural*, 19.

33 Bodiguel and Cardwell, "Évolution de la définition de l'agriculture," 460 and the ruling cited there: Cour de Cassation, Chambre Sociale, du 23 mai 1991, pourvoi n° 89–13.098. See also Barabé-Bouchard and Hérail, *Droit rural*, 8.

34 *Mémento Agriculture 2017–2018*, 15.

35 Ibid, 14.

36 Ibid, 15; Barabé-Bouchard and Hérail, *Droit rural*, 8.

taken over in tax law by applying a limit on the amount of income obtained from ancillary commercial and non-commercial activities. Farmers can retain the receipts coming from these activities, to determine the agricultural profits, if their average for the three calendar years preceding the opening date of the financial year does not exceed either 50% of the average agricultural receipts gained in the same period or 100,000 Euro[37].

The social security scheme for the self-employed in agricultural professions applies to persons engaged in the activities or on the holdings, enterprises or establishments listed in article L 722–1 of the Code rural[38]. As regards *activité accessoire*, social security applies to all forms of establishments managed by the farmer for the purpose of processing, packaging, and marketing agricultural products, provided that these activities constitute an extension of the act of production[39].

Synthetically, it can be said that in French law, as in Italian law, a farmer performing the processing of his farm products and their marketing, together with the agricultural activity by nature, retains his agricultural status and his activities are considered agricultural in civil law. As a consequence, he can benefit from tax facilitations granted to agricultural activities, and a special treatment under the social protection scheme, established for "self-employed in agricultural professions"[40]. Article L 311–1 in its first version was introduced in 1993 with further amendments[41]. Therefore, French farmers, like Italian farmers, have had the legal ability to process and sell food for decades. Data from the 2010 agricultural census reveals that 21% of farm businesses – some 107,000 enterprises – sell some of their produce through *circuits courts*. What is more for 40% of enterprises distributing via *circuits courts*, this type of sale represented more than 75% of turnover[42].

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37 Article 75 Code général des impôts arrêté du 6 avril 1950 (Journal Officiel de la République Française No. 0103, 30.04.1950).

38 Barabé-Bouchard and Hérail, *Droit rural*, 17.

39 Bodiguel and Cardwell, "Evolving definitions of 'agriculture,'" 431.

40 Kapała, "Legal status of direct sales," 75.

41 Création Loi 93-934 1993–07–22 annexe Journal Officiel de la République Française 23 juillet 1993.

42 Fabien Santini and Sergio Gomez y Paloma, eds., *Short Food Supply Chains and Local Food Systems in the EU. A State of Play of their Socio-Economic Characteristics* (European Commission Joint Research Centre, 2013), 86.

4. The legal status of a farmer in Poland

In Polish law, farmers have a privileged position in terms of business law, taxes and social security. They are not regarded as entrepreneurs, thus they do not have to register their business, nor incur income taxes thereof[43]. Their activity is limited, however, as a general rule, only to agricultural activities, which, according to its definition in the Entrepreneurs' Law Act, include manufacturing activities in the area of crops, animal husbandry, horticulture, forestry and inland fishery[44]. The income from such activities is not subject to income tax[45]. In addition, the legislator created a separate, more privileged social insurance system for farmers, that allows them to pay significantly lower contributions compared to those paid by entrepreneurs[46].

The processing of agricultural products and the marketing of food by a farmer is not covered by the definition of agricultural activity, therefore, like any other activity not included in this definition, performed on a continuous and organized basis, leads to an economic activity that requires its registration, and the entity running it becomes an entrepreneur. However, the legislator made an exception to this rule by introducing regulation on "retail agricultural trade" which allows farmers to process their agricultural products and to market the food produced on their farm[47]. Although the "agricultural retail trade" has not been included in the legal definition of agricultural activity as, for example, in the case of Italian law, thus it is still not a typical "agricultural" activity carried out by farmers, however, its

43 Anna Kapała, "Agricultural Retail Trade Regulation as a Legal Instrument to Support Local Food Systems," *European Food and Feed Law Review* 15, Issue 3 (2020): 231–236.

44 Article 6, paragraph 1 (1) Ustawa z dnia 6 marca 2018 r. prawo przedsiębiorców, (t.j. Dz.U. z 2019 r. poz. 1292, ze zm.), Act on Entrepreneurs' Law of 6 March 2018, consolidated text Journal of Laws 2019, item 1292, as amended.

45 Article 2, paragraph 1, (1), Ustawa z 26 lipca 1991 r. o podatku dochodowym od osób fizycznych (t.j. Dz.U. z 2019 r. poz. 1387 ze zm.), Act on Personal Income Tax of 26 July 1991, consolidated text Journal of Laws 2019, item 1387, as amended.

46 Ustawa z dnia 20 grudnia 1990 r. o ubezpieczeniu społecznym rolników (t.j. Dz.U. z 2019 r. poz. 299), Act of 20 December 1990 on social insurance for farmers, consolidated text Journal of Laws 2019, item 299; Kapała, "Agricultural Retail Trade," 233.

47 Agricultural retail trade was introduced into the Polish legislation by the Act of 16 November 2016 on amending certain acts to facilitate the sale of food by farmers, Journal of Laws 2016, item 1961.

regulation allows farmers to participate in short food supply chains without losing their legal status.

Significant is the provision that excludes the processing and direct sales of the food from the business law regime. As a result, these activities can be carried out by the farmer without the obligation to register a business[48] and with the possibility of remaining in the agricultural social security system. In addition, agricultural retail trade enjoys special and favourable treatment in terms of income tax, as the income from this activity is exempt from taxation with personal income tax if it does not exceed PLN 40,000 per year (about EUR 8 845,54). Annual income above that limit is taxed at only 2%[49].

Hence, farmers conducting agricultural retail trade do not lose their privileged legal status and do not become entrepreneurs. They benefit from the exemptions and simplifications which certainly strengthen their market position in competition with food businesses and are an incentive to undertake and conduct the activity of food sales[50]. As pointed out by the legislator in the justification of the draft law on agricultural retail trade, new provisions restore "the farmer's traditional role of a food producer and processor, and at the same time open up a new market of natural and healthy food for consumers". They also provide an opportunity "to improve the household budgets of farms with additional income from sales of products, which is important for small and medium-sized farms losing the price war with a large food producer".

What criteria the processing and the direct sales activities must meet to qualify for an exemption from business regulation? One criterion is that food processing should be "non-industrial", which can be interpreted as processing without the use of production lines and technologies specific to large-scale production and processing. The final product should consist of at least 50% of plant or animal products originating from their farm, without counting the water, therefore farmers can purchase products from outside their farms in order to produce a wide variety of food, including complex products and ready meals. The next criterion assumes that the

48 See Article 6, paragraph 1 (4) Act on the Entrepreneurs' Law.

49 Article 21, paragraph 1 (71a) Act on the Personal Income Tax.

50 Kapała, "Agricultural Retail Trade," 233.

processing and sales of products ought to be, with some exceptions, conducted without intermediaries, i.e. personally by the farmer or members of his household.

The law also sets requirements regarding to whom the food can be sold. The list includes not only final consumers but also retail stores and other retail sales establishments, like local restaurants or canteens, delivering food to final consumers, though only to those located in the same province as the farm. Such provision enables farmers to participate in all forms of short supply chains, not limited only to direct sales. The retail agricultural trade regulation entered in force only in January 2017, before that the legal situation as to the possibility of conducting direct sales was unclear, however, farmers were selling directly only their unprocessed agricultural products. The data show how the introduction of the regulation encouraged farmers to participate in SFSC. According to data from the Chief Veterinary Inspectorate Register[51], in April 2018 1,776 registered entities were conducting agricultural retail trade in products of animal origin or complex food in Poland. The number has grown four times within a little more than a year (in April 2017 this number amounted to 387), and currently, it is 12 748. What is more, this number does not include farms selling products only of plant origin, due to the lack of availability of such data from inspection bodies, thus the real number of all farmers undertaking agricultural retail trade is much bigger. These data prove the new regulations encourage farmers to undertake this activity.

5. The legal status of a farmer in the USA

In the US legal system, a farmer is an entrepreneur and the farming and marketing of agricultural products is an economic activity[52], just like any other, to which, however, many aid programs are directed. Farms, as a consequence, are organized in business. Most of them are a form of simplest business, i.e. sole proprietorships. This kind of business structure is effective without any legal filings. It arises automatically when an individual starts

[51] https://pasze.wetgiw.gov.pl/spi/demo/index.php, accessed February 28, 2021.

[52] Neil Hamilton, "The study of agricultural law in the United States: Education, Organization and Practice," *Arkansas Law Review* 43 (1990): 505.

their own business or farming operation[53]. As a rule, it refers to a person who owns the business. The owner is personally responsible for debts and any actions taken on behalf of the business and has in his name lawsuits, taxes, permits, licenses, patents, etc. Since the income earned by a sole proprietorship is the income earned by its owner, taxes are paid by the sole proprietor (often as self-employment taxes) and not by the business itself[54].

A farm business may be also organized as a partnership or limited partnership, corporation (for-profit or nonprofit), S-corporation, limited liability company (LLC), and cooperative[55]. The concept of American law is to facilitate the formation of business in order to allow an individual farmer to engage in the efficient production of food[56]. The ability to use various legal entities to form and operate agricultural-related businesses gives the sector access to financing, limited liability, and business operation benefits provided by flexibility in the organizational structure[57].

Due to the complex US law system, farmers often have to deal with multiple legal issues deriving from federal, state, and local laws[58]. In the field of direct marketing, they would have to face, for example, federal authorities requirements regarding financial grants for the activity, and at

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53 Rusty Rumley, "Sole Proprietorships, Business Organizations Reading Room," *The National Agricultural Law Center Publications*, 3, accessed June 16, 2020, https://nationalaglawcenter.org/wp-content/uploads/assets/readingrooms/businessorgs-sole.pdf.

54 Ibid, 3; Anna Kapała, "Legal status of direct marketing in US law," *Diritto agroalimentare*, f. 3 (2020): 553–54.

55 See more, for instance: Michaela Tarr, Charles Cunningham, and Rusty W. Rumley, *Texas direct farm business guide* (United States Department of Agriculture, 2013), 16–22, accessed June 16, 2020, https://nationalaglawcenter.org/wp-content/uploads/assets/articles/TX-DFB.pdf.

56 Hamilton, "The study," 506.

57 Ibid, 507–08; Kapała, "Legal status of direct marketing in US law," 553–54.

58 See, for example, the Oregon Farm Direct Marketing Law (FDML) of 2011, which took effect in 2012. The law clarified licensing and food safety requirements for direct-to-consumer sales at farmers markets, farm stands, and similar venues. It also included a «cottage food» provision allowing farms to make and sell certain low-risk, value-added products from farm-grown ingredients, direct to consumer, without a food processor's license. See more about it: Lindsay Trant, Christy Anderson Brekken, and Lauren Gwin, "Farm Direct at five years: An early assessment of Oregon's farm-focused cottage food law," *Oregon State University Journal of Agriculture, Food Systems, and Community Development* 8, Issue 3 (2018): 85–104.

the local level, zoning regulations. Numerous federal statutes subsidize, regulate, or otherwise directly affect agricultural activity, and there is no uniform definition of agricultural activity in US law. It is specified in various legal acts, for the purposes of these acts[59].

Direct marketing of agricultural products is not included in the definitions of agriculture. Generally, it is described as any kind of commercial enterprise in which the producer sells directly to the consumer. It takes many forms, like roadside stands, pick-your-own operations; open-air markets; farmers' markets, including those in inner cities; and street-selling from trucks[60]. Its legal definition is provided by the act "Farmer to Consumer-Direct Marketing Act of 1976 7 USC 3001" now included in the 7 U.S. Code § 3002. The term "direct marketing" for purposes of the act means: "the marketing of agricultural commodities at any marketplace (including, but not limited to, roadside stands, city markets, and vehicles used for house-to-house marketing of agricultural commodities) established and maintained for the purpose of enabling farmers to sell (either individually or through a farmers' organization directly representing the farmers who produced the commodities being sold) their agricultural commodities directly to individual consumers, or organizations representing consumers, in a manner calculated to lower the cost and increase the quality of food to such consumers while providing increased financial returns to the farmers".

The Act recognizes the importance of direct farm-to-consumer marketing businesses, stating explicitly that its purpose is "to promote, through appropriate means and on an economically sustainable basis, the development and expansion of direct marketing of agricultural commodities from farmers to consumers". It is aimed to encourage the undertaking of this activity, which would result in lower prices to consumers, higher returns for farmers, reduction in middleman costs, and improved

[59] Richard G. Heifner, "A history of government's role in the food and agricultural marketing system," in *US Programs affecting food and agricultural marketing*, eds. Walter J. Armbruster and Ronald D. Knutson (New York: Springer Science and Business Media, 2013), 43; Kapała, "Legal status of direct marketing in US law," 550.

[60] Facts About: Farmer-to-Consumer Direct Marketing, Agricultural Marketing Service Report Number 575, U.S. Department of Agriculture. Agricultural Marketing Service 1978, accessed June 11, 2020, https://www.nal.usda.gov/exhibits/ipd/localfoods/items/show/120.

farmer-to-consumer understanding[61]. To achieve this, it set up a state assistance program: The Federal-State Marketing Improvement Program, specially designed to facilitate direct marketing. It provided matching funds to state agencies for exploring new marketing opportunities for food and agricultural products and to improve and expand farmers' markets, roadside stands, community agricultural development programs, agritourism activities, and other farmer-to-consumer direct marketing activities[62].

Owing to the Farmer-to-Consumer Direct Marketing Act, direct marketing became an officially recognized program[63]. Funds were authorized, and appropriations of $1/2 million for fiscal 1977 and $1.5 million for 1978 were made available for grants to States[64]. It was observed in the literature that the economic incentives of both producers and consumers contributed to the increasing use of direct marketing strategies by U.S. farmers[65]. After enacting the Direct Farmer to Consumer Act of 1976, according to the 1978 Census of Agriculture, 125,186 farms, or 5.6% of farms, engaged in direct sales to consumers (non-edible products are excluded). Since that time, the number has slowly increased and direct marketing support programs have been continued. According to the 2007 Census of Agriculture, the number of farms that reported sales of agricultural products directly to individuals was 136,817 (U.S. Department of Agriculture - USDA 2007). The value of direct marketing sales has increased by about 50% over 2007–2009 (USDA 2009)[66].

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61 Facts About: Farmer-to-Consumer Direct Marketing, Agricultural Marketing Service Report Number 575.

62 Heifner, "A history of government's role," 52–53.

63 Allison Brown, "Counting farmers markets," *Geographical Review* 91, Issue 4 (2001), Issue online (2010): 655.

64 Facts About: Farmer-to-Consumer Direct Marketing, Agricultural Marketing Service Report Number 575.

65 Hiroki Uematsu and Ashok Mishra, "Use of direct marketing strategies by farmers and their impact on farm business income," *Agricultural and Resource Economics Review*, no. 40/1 (2011): 1–2, accessed June 15, 2020, https://www.researchgate.net/publication/227365483_Use_of_Direct_Marketing_Strategies_by_Farmers_and_Their_Impact_on_Farm_Business_Income.

66 Ibid.

An important direct marketing support program was envisaged in the recent Farm Bill of 2018[67]. Under the Local Agriculture Market Program (LAMP), contained also in 7 U.S. Code § 1627c, "direct producer-to-consumer marketing" is one of the activities eligible for grants. The term "direct producer-to-consumer marketing" has the meaning given the term "direct marketing from farmers to consumers" in section 3002 of this title, which was cited above and which repeats the definition set out in the Act of 1976. The program sets up the state grants for each of fiscal years 2019 through 2023 for the conduct of activities to support and promote a diversity of operations concerning direct marketing, such as domestic direct producer-to-consumer marketing; farmers' markets, roadside stands, community-supported agriculture programs, agritourism activities, and other direct to consumer marketing practice, local and regional food business enterprises (both direct-to-consumer and intermediated market channels). It is also aimed to support the processing, aggregation, distribution, and storage of local and regional food products that are marketed locally or regionally, and value-added agricultural products, as well as marketing strategies for producers of local food products and value-added agricultural products in new and existing markets.

Although the program refers to the definition of "direct marketing from farmers to consumers" which concerns "agricultural commodities", it also provides grants for the marketing of "value-added agricultural product". The latter, according to its definition, can be a product marketed as "a locally produced agricultural food product" or which is "a result of the change in physical state or the manner in which the «agricultural commodity or product was produced, marketed, or segregated (…)"[68]. This means that within the LAMP program direct marketing may concern also processed agricultural and food products[69].

The analysis of the legislation concerning direct marketing shows that in US law the main method of supporting a farmer to participate in short supply chains are programmes offering financial aid to conduct and expand strategies of direct marketing. Nevertheless, the farmer managing a direct

67 Agriculture Improvement Act of 2018, P.L. 115–334.

68 See the definition of «value-added agricultural product» in 7 USC § 1627c(a)(12).

69 Kapała, "Legal status of direct marketing in US law," 557.

farm business, besides having the opportunity to use these incentives of financial character, encouraging different direct marketing strategies, must deal with lots of laws and regulations. These rules concern not only obvious aspects of the activity, such as paying taxes or hiring employees but they refer to nearly every action a producer might take. What makes it even more complicated is that local, state, and federal government authorities in implementing and enforcing the direct farm business regulations, make their own (sometimes overlapping) requirements[70]. The data of the U.S. Department of Agriculture show that in 2018 in the USA about 8% of U.S. farms market foods locally, through direct-to-consumer or intermediated sales[71], which is an increase of 2,4% from the 1978 data.

6. Conclusions

The study found that under Italian, French and Polish law, the farmer involved in short food supply chains, retains his privileged agricultural status. In Italian and French law this is possible due to a broad definition of agricultural activity encompassing food processing and marketing carried out by a farmer jointly with the agricultural activity *par nature*, whose products originate in prevalence from his farm. In Polish law, direct marketing and processing are not included in the agricultural activities definition, however, a farmer who conducts them does not become an entrepreneur due to an explicit exemption of these activities (named "agricultural retail trade") from being subject to the business regime. The fact that farmers can benefit from a favourable treatment in terms of tax law, social security and business law, certainly strengthens their market position in competition with food businesses and are an incentive to undertake and conduct the activity of food sales. Therefore, in the presented legislation of three Member States, the main tool encouraging a farmer to become involved in the SFSC is the special treatment of food sales by farmers and the privileged legal status granted to the farmer.

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70 Bryan Endres, Lisa R. Schlessinger, and Alexander B. Gura, *New York Direct Farm Business. A Legal Guide to Market Access* (2013), 5, accessed June 15, 2020, https://nationalaglawcenter.org/wp-content/uploads//assets/articles/NYdirectmarket.pdf.

71 Christopher Burns and James M. Macdonald, "America's Diverse Family Farms," 2018 Edition, *Economic Information Bulletin*, no. 203 (2018), accessed November 3, 2021, https://www.ers.usda.gov/webdocs/publications/90985/eib-203.pdf?v=6080.

In contrast, in US law agricultural activity and direct marketing are business activities. Farmers interested in conducting them must choose the legal structure under which the business will operate. Direct marketing is mainly conducted by smaller farms, for which the simplest form of business structure would be the sole proprietorship. The main tool to support the participation of the farmer in short food supply chains is financial programs funded for the development of direct marketing. Programs offering financial incentives to direct marketing certainly contribute to the development of this activity, which is proved by the economic results. However, the complexity of laws and overlapping local, state and federal authorities' requirements and restrictions regarding different aspects of the activity, and local zoning laws, can cause farmers a significant impediment to conducting it. Therefore, some researchers recommend that the role of public policy is to reduce market barriers to local food production and to provide assistance with regulatory compliance[72].

Applying for financial support from programs requires time, knowledge and effort to prepare the appropriate documentation and meet the conditions of the programs, which can discourage small farmers. Moreover, such programs are prepared for a certain period of time, with no guarantee that they will be provided for the following years, as it depends on the state policy and state financial capacities. While the systemic legal solutions, as in the presented legislation of the EU countries, in contrast to aid programmes, provides farmers with favourable conditions in the long term, without additional bureaucracy and the need to fill out documents and applications, thus giving them a sense of confidence and stability in engaging in food direct marketing. The mere offering of financial aid to farmers, without creating a legal opportunity for them to legally sell their agri-food products, is not a sufficient and effective solution. Certainly, a combination of both tools presented: a special privileged legal status granted to a farmer marketing food with financial aid, would be the most advantageous solution to encourage farmers to participate in the SFSC. The first tool lies in the discretion of national legislators, the second, as regards the EU Members, so

[72] Renée Johnson, *The Role of Local and Regional Food Systems in U.S. Farm Policy*, Congressional Research Service Report (2018), 35–36, where the Author points out to Robert P. King, *Can Local Go Mainstream*?, C-FARE webinar, April 11, 2011.

far has been foreseen by the EU in its agricultural policy, which will hopefully provide similar support measures for the SFSC also in the next programming period of 2022–2027.

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"New conditionality" in the EU's "new generation" Agreements with Asian Countries

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Abstract: The objective of the study is to verify the implementation, by the EU, of the treaties' obligations to proliferate "non-trade" European values in agreements with Asian countries. The thesis of the study is that the EU with "new generation" agreements strengthens the cohesion of the western hemisphere and creates the conditions for its enlargement. An instrument supporting the strengthening and development of the western hemisphere is the policy of "change through trade" combined with the promotion of "free and fair trade". We claim that this policy contributed to political change in the world – the expansion of international law, the principles of the UN Charter, and EU values. Influence beyond the parties to the agreements takes place, although formally the agreements only govern the relationship between the parties. This influence is the outcome of, among other things, demonstrating the implementation of the values and benefits of value-based cooperation. By agreements (FTAs, IPAs and political) with Asian countries, the network of connections among the states of the Western hemisphere is developed and the community of values reinforced. The institutionalisation of the community of values of EU-Asian countries also fosters the institutionalisation of ties among the democratic Asian countries.

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1. The objective of the study

The objective of the study is to verify the implementation, by the European Union (EU), of the treaties' obligations to proliferate "non-trade" European values in Free Trade Agreements (FTAs) and Investment Protection Agreements (IPAs) as well as political agreements with Asian countries[1]. The verification was conducted by applying the formal-dogmatic approach (analysing international texts). Together with the critical constructivism method, these approaches identify the link between norms and the conditions and effects of their implementation. The division of values embraced by trade agreements into: trade (free and fair trade) and non-trade (workers' rights, sustainability) was conducted on the basis of vague criteria since these values are indivisible. The "free and fair trade" is correlated with peace and justice ("McDonald's Theory"[2]). "Non-trade" values have an impact on the functioning of the market – they are cost-driving elements, they shape a "level playing field"[3].

In the study, we present conclusions drawn from the assessment of the policy of "conditionality" and norms, which establish this policy conducted through the prism of universal norms and values of international law. Conclusions resulting from the assessment of the economic effects of the agreements have been formulated with the application of the non-quantitative methods.

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1 The EU and Japan are joined by the Economic Partnership Agreement and Strategic Partnership Agreement. EU-South Korea economic relations are governed by the FTA. The EU-ASEAN (Association of South East Asian Nations) FTA negotiations, which started in 2007, were interrupted in 2009. To fill the gap, negotiations on bilateral (trade and investment) agreements were launched. Agreements were concluded with Singapore and Vietnam. EU-Indonesia negotiations and an investment protection agreement with Myanmar are ongoing. FTAs are being negotiated with Australia, India, and New Zealand.

2 According to which no country in which McDonald's operates will ever attack the (other) country in which McDonald's is located (Thomas L. Friedman, *The World is Flat. A Brief History of the Twenty-first Century* (New York: Farrar, Straus, Giroux, 2005), 421).

3 Fabian Zuleeg, David Baldock, Pablo Ibáñez Colomo, Emily Lydgate, Marley Morris, Martin Nesbit, Jacques Pelkmans, Vincent Verouden, and Larissa Brunner, *Ensuring a post-Brexit level playing field*, European Policy Center, 2019, 10–11, 34–43, 98–115, 120–137, accessed March 2021, https://www.epc.eu/content/PDF/2019/pub_9223_brexit_lpf.pdf.

The thesis of the study is that the EU with "new generation" agreements strengthens the cohesion of the western hemisphere and creates the conditions for its enlargement. An instrument supporting the strengthening and development of the western hemisphere is the policy of "change through trade" combined with the promotion of "free and fair trade".

The auxiliary thesis is the recognition that the *modus operandi* of introducing the EU's values does not infringe the state's right to self-determination ("the principle of the sovereign equality"[4]; and Article 2.7 of the UN Charter[5]. The apparent conflict of values is a derivative of existing a common part of the collection of norms included in "international" and "domestic" affaires; the vagueness of their division – the common part is connected with progressive "internationalisation" of the affaires[6].

The study focuses on a comparison of the scope and implementation of 'old' and 'new' conditionality in EU agreements. The study is placed in the broader context of cooperation within the West and with countries outside this hemisphere.

2. Literature review and research gap

Research devoted to human rights and freedoms in EU foreign policies have been conducted for many years. One of the streams of the research is "conditionality" in economic agreements initially focused on the bundles of relations between the EU- African, Caribbean and Pacific countries (ACP) or the EU-candidate states. In the case of the relations with the ACP, the Community/EU was searching for a shaky balance between the desire to support social and economic development while ensuring the respect for human rights and freedoms and the willingness to stop the expansion of the Eastern Bloc.

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4 Hans Kelsen, "The Principle of Sovereign Equality of States As A Basis For International Organization," *The Yale Law Journal* 53(2) (1944): 207–220.

5 David R. Gilmour, "The Meaning of "Intervene" within Article 2 (7) of the United Nations Charter. An Historical Perspective," *The International and Comparative Law Quarterly* 16 (2) (1967): 330–351; Leland M. Goodrich, "The United Nations and Domestic Jurisdiction," *International Organization* 3(1) (1949): 14–28.

6 Thomas Oppermann, "Intervention," in *Encyclopedia of Public International Law*, ed. Rudolf Bernhardt (NHPC, 1982), 233–236.

In the case of the candidate states, "conditionality" was inscribed in the Copenhagen criterion and referred to as Europeanisation – a candidate state declares the will of its implementation. "Conditionality" was implemented in relations of unequal partners; the stronger party of the EU "paid" for respecting the values – in new states (ACP) or young democracies (candidates) – with economic concessions. Simultaneously, the concessions did not threaten the economic interests of the EU, as the parties did not compete at the economic level. The implementation of values, "conditionality" encountered, however, barriers in the recipient states. One of them was the limited ability to internalise these "foreign" values.

However, the above bundles of studies are poorly linked. One of the streams was determined by the optics of human rights; it was reflected in studies, among others, by Philip Alston and J.H.H. Weiler[7], Barbara Brandtner[8], Mielle Bulterman[9], Elena Fierro[10], Lorand Bartels[11], Justice Nwobike[12], Andrew Williams[13], Caroline Dommen[14]. The second stream was created by studies on the enlargement of the EU. Alston and Weiler, Bartels, Bulterman, and Fierro focused their studies on conditionality and human rights clauses

7 Philip Alston and J.H.H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights," *European Journal of International Law* 9 (1998): 658–723.

8 Barbara Brandtner and Allan Rosas, "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice," *European Journal of International Law* 9(3) (1998): 468–490.

9 Mielle Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (Antwerp: Intersentia, 2001).

10 Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (The Hague: Martinus Nijhoff Publishers, 2004).

11 Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press, 2005).

12 Justice Nwobike, "The Application of Human Rights in African Caribbean and Pacific – European Union Development and Trade Partnership," *German Law Journal* 6 (10) (2005): 1381–1406.

13 Andrew Williams, *EU Human Rights Policies: A Study in Irony* (Oxford: Oxford University Press, 2006).

14 Caroline Dommen, "The WTO, international trade, and human rights," in *Beyond the Nations State. Human Rights in Times of Globalization*, ed. Michael Windfuhr (Uppsala: Global Publications Foundation, 2005), 52–74; Caroline Dommen, "Trade and human rights: towards coherence," *International Journal on Human Rights* 2, Issue 3 (2005): 7–24.

in Community foreign policy. Wiliams analyzed human rights in the context of trade. Nwobike examined development aid policy as an instrument for the implementation of human rights in beneficiary states. Dommen analyzed the impact of WTO cooperation on human rights protection in developing countries. The effect of existing different bundles of relations resulted in a restricted cohesion in research; perceiving – in a limited scope – the feedback loop of the "values and economy".

From this perspective, relations between the EU and Asian countries open a new research area. The EU's partners are the stable states; on the one hand, they are unwilling to adopt "foreign values", and on the other hand, economic co-operation with them promising mutual benefits poses a new challenge of rivalry to the EU. Therefore, the EU's capability to "pay" for respecting the values with economic concessions is substantially limited. The contribution to fill the research gap thus determined is the objective of this study.

3. EU's "conditionality" policy – concept

"Conditionality" is the EU's systemic policy in frames of which the EU encourages its partners to base their trade relations on the foundation of adopted values (not directly connected to "trade & investment") and verifies their implementation.

The catalogue of values embraced by "conditionality" has been extended. Initially, it was created, among others, by norms oriented to the change of internal relations in a state (party); they were norms connected to human rights and freedoms, labour rights or support for Small and Medium Enterprises, SMEs (at the "expense" of state-owned enterprises of the heavy industry).

In "new generation[15]" agreements, the objective scope of regulations was extended (among others by intellectual property rights, and services), whereas the catalogue of values was complemented by norms changing the parties' universal and regional environment. The integral part of these agreements are Trade and Sustainable Development (TSD) chapters. The legal basis of

[15] "First generation" agreements comprised agreements until 2006, reducing customs duties. Besides that the EU concludes agreements – Deep and Comprehensive Free Trade Areas: to support close economic relations with EU's neighbours.

the policy of "conditionality" are the norms of the TEU[16] and TFEU[17] (articles 3.5[18] (with regard to art. 3.1) as well as 21.1., sentence 1[19]).

The agreements implementing the policy of "conditionality" are both agreements between the EU and the party (FTA – Free Trade Agreement) as well as mixed agreements (IPA – Investment Protection Agreement, political agreement). Which are chosen depends on the objective scope of the agreements (in FTAs EU has exclusive competences, while in the mixed agreements the competences are shared with member states, articles 3, 4, 207 and 216 TFUE[20].

The catalogue of values included in agreements comprises: the "provisions whereby the Parties will reiterate their commitment to promote, protect and fulfil human rights and fundamental freedoms, which are universal and indivisible, as well as to promote the values of democracy, good governance, the rule of law, and the principles of non-discrimination, equality and solidarity"[21]. Including in trade agreements non-trade norms-values differentiates the EU's trade agreements from "classical" trade agreements[22].

The effects of implementation of policy of "conditionality" are twofold. On the one hand "conditionality" is an instrument enhancing the coherence

16 The Treaty on European Union (consolidated version) OJ of the EU 2012, No. C 326/01.

17 The Treaty on the Functioning of the European Union (consolidated version) OJ of the EU 2012, No. C 326/01.

18 "In its relations with the wider world, the Union shall uphold and promote its values… It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

19 "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."

20 Christophe Hillion and Panos Koutrakos, *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford and Portland: Hart Publishing, 2010).

21 *Answers from the Commission to written questions*. OJ 2018 C 415/06.

22 Regulations of classical FTAs focused on tariff cuts and trade in goods.

of the implemented political strategy (Article 21.3[23]), as well as fulfils the political strategic objectives in international relations using "trade". On the other hand, "conditionality" constrains the circle of the partners of agreements to states/economic groupings approving of the objective values. Thus, the EU resigns from the co-operation with other ones, treating the adoption of values as an indispensable element of a negotiated agreement must compensate the other party for their acceptance[24]. Consequently, the price for the implementation of the EU's political-strategic objectives in international relations is restricting or resigning from trade advantages with entities rejecting the EU's values, when these advantages could be the source of financing of the implementation of EU's internal strategies. Another threat from refraining from trade with "bastards[25]" being the allies of the West, is replacing them by authorities equally not respecting the values, only that they are hostile towards the West.

4. New agreements and new recipients of "conditionality"

4.1. New agreements

The European Union's ("new generation") FTAs, IPAs as well as political agreements are an element of the EU's broader strategy combining economic objectives with social and political ones. The EU's pursuit of bilateral agreements is motivated by the failures of multilateralism (WTO). Bilateral agreements are the only effective instrument for implementing the EU's values and objectives in the areas governed by these agreements. Bilateralism as a modus operandi is the same for the EU, the US, and China[26].

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23 "The Union shall respect the principles and pursue the objectives… in the development and implementation of the different areas of the Union's external action…, and of the external aspects of its other policies. The Union shall ensure consistency between the different areas of its external action and between these and its other policies."

24 Article 21.1., sentence 2 "The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the (EU) principles".

25 As President Roosevelt justified the cooperation with dictator Somoza in a conversation with his Secretary of State: "Sumner Welles, once said «Somoza's a bastard! (son of bitch)» and Roosevelt replied, «Yes, but he's our bastard (son of bitch)»" Paul Coe Clark Jr., *The United States and Somoza, 1933–1956. A Revisionist Look* (London: Praeger, 1992), xii.

26 Alan Hervé, "The European Union and its model to regulate international trade relations," Fondation Robert Schuman, accessed February 1, 2021, https://www.robert-schuman.eu/

But the agreements not only influence relations among the parties, but also the pluri- and multilateral relations. As it was investigated in the previous section, the EU, by agreements, pursues the policy of "change through trade[27]", directly implementing EU's systemic norms expressed in the TEU.

The novelty of concluded FTAs determines extending their objective scope to norms beside establishing the free trade area (i.e. gradually abolishing customs duties, eliminating or restricting the technical[28], sanitary and phytosanitary[29] barriers). These new areas include:

- improving market access for service suppliers[30];
- protection of intellectual property rights, geographical indications, access to the public procurement market as well as facilities in terms of a public-private partnership (PPP), etc. These norms directly influence economic activities, and are not embraced by the "first generation" agreements;
- sustainable development, human rights, labour rights as well as fair and ethical trade. These norms are also related with economy, although perceived, by the EU, among others, through the prism of the system of values represented and promoted in external relations.

The adopted solutions in terms of sustainable development co-create an executive scheme of regulations in trade agreements of the European model of sustainable development[31]. According to this scheme,

en/european-issues/0554-the-european-union-and-its-model-to-regulate-international-trade-relations.

27 It translates into the conditionality of granting and withdrawing benefits, e.g., in terms of GSP+, the EU withdrew preferences from Belarus (June 2007 "in response to Belarus' violations of the core principles of the International Labour Organisation." European Commission. "EU will withdraw GSP trade preferences from Belarus over workers' rights violations", last modified June 18, 2007, https://ec.europa.eu/commission/presscorner/detail/en/IP_07_844.

28 Recognition of standards.

29 They do not lower the standards of health and consumer protection.

30 Liberalisation in the sphere of financial, telecommunication, transport, postal and courier services, etc.

31 The solutions agreed will be reproduced; see "Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements," last modified February 26, 2018, https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf.

the matter of sustainable development was distinguished in FTAs in the formula of Trade and Sustainable Development (TSD) chapters[32]. In accordance with these regulations: 1) FTA commitments are closely tied to multilateral international agreements (including the ILO conventions); and 2) the agreements envisage the operations of civil society institutions implementing and monitoring the implementation of sustainable development (and in Vietnam, *de facto*, the authorities' consent to the establishment of civil society institutions[33]).

The philosophy of "new generation" FTAs is based on the recognition that it is possible to achieve an "effect of leverage", i.e., achieve an impact of increased trade and investment to achieve progress on the promotion of decent work and environmental protection or the fight against climate change. The effects of this policy are measurable[34]. The analogical references to values are repeated by IPAs.

4.2. Parties of agreements

The first partners – recipients of the policy of "conditionality" were the ACP states. This group was later joined by candidates for membership in the EC/EU. In this group, for many years, there were not any countries from South or Central America or Asia. This "geographic exclusion" was a result of the division of tasks between the USA and European allies. The area of a tight co-operation for the EU were Europe and Africa; whereas the USA extended the umbrella of the "Monroe doctrine[35]" over South and Central America and also included the Asia region to its responsibility area (under the regime of the "hub and spoke").

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32 The aim of the EU is distinguishing a part devoted to the TSD in each EU's FTA.

33 The parties recognised that the civil society institutions and organisations will share responsibility for monitoring the implementation of these commitments (they were included in a new EU support programme, among others, offering financial support).

34 The example are changes in labour law (in Vietnam, but also in Georgia, El Salvador, and Guatemala in terms of enhancing the labour standards).

35 On December 2, 1823, US President James Monroe, in annual message to Congress, divided the world into Western (American) and Eastern (European) sphere of influence. Recognising these hemispheres as areas of exclusive interest, determined by neighbourhood, excluded political influence of states from outside the hemisphere (e.g., European colonisation and political influences on the American continent).

The EU has been gradually going beyond the transatlantic area. In the economic sphere, it was correlated with globalisation, in others it results, among others, from striving to the "strategic autonomy[36]". The EU's conclusion of agreements with Asian countries has been determined by the economic potential of countries in this region, combined with the threats to the international order located here and radiating far and wide.

The EU's trade agreements with Asian countries began with the FTA with South Korea, which was later complemented by the Framework Agreement (it provides basis for closer political cooperation)[37]. The provisions regulating "conditionality" were included in chapter 13 of the FTA. The political framework of the co-operation determined in the Framework Agreement is underlined already in the Preamble, where the parties referred to "their traditional links of friendship and the historical, political and economic ties, which unite them". They emphasised that their relationship is of a comprehensive nature. They committed themselves to a regular political dialogue, which was to result in a partnership in all fields. They emphasised the community of values[38] as well as they share the perception of challenges faced by the international community (climate issues, sustainable development, terrorism, countering the proliferation of weapons of mass destruction, etc.). The Preamble included an extremely wide catalogue of the spheres of co-operation. Such an extensiveness and cohesion of the catalogue indicates the intention to build ties among the allies. The commitments in this regard were specified in Title I, II and III of the Framework Agreement. The implementation of this agreement decides about the development of the strategic alliance.

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36 Among others, President of the European Council Charles Michel was talking about it in his speech of 28 September 2020 – "Strategic autonomy for Europe - the aim of our generation" and President of the French Republic Macron (interview of 16 November 2020 "Doktryna Makrona: rozmowa z prezydentem Francji").

37 The EU-South Korea FTA was ratified in 2015 (since 2011 it was provisionally applied). Domestic Advisory Groups and mechanism for setting differences monitor implementation of the Agreement in the area of sustainable development and workers' rights.

38 Mark R. Kramer and Marc W. Pfitzer, "The Ecosystem of Shared Value," *Harvard Bussines Review* (October 2016); Plamen Akaliyski, Christian Welzel, and Josef Hien, "A community of shared values? Dimensions and dynamics of cultural integration in the European Union," *Journal of European Integration* (2021): 1–21, https://doi.org/10.1080/07036337.2021.1956915.

Another Asian partner bound with the EU is Japan. Since 1 February 2019, the EU is linked to Japan by the Economic Partnership Agreement (EPA) and the Strategic Partnership Agreement (SPA) (works on the Investment Protection Agreement (IPA) continue). The next two countries in the region which have signed agreements with the EU are Singapore and Vietnam. On 21 November 2019, the FTA with Singapore entered into force (the IPA is awaiting ratification), on 30 June 2019, the FTA and the IPA with Vietnam were signed.

There are many similarities between the EU FTA with South Korea and other Asian partners. The community of values was recalled by the EU and Singapore in the Preamble of the FTA. This FTA also includes norms determining "conditionality" regarding to the TSD. A broad reference to the community of values was also included in the Preamble of the EU-Japan EPA. In this EPA the TSD Chapter was also distinguished. In the case of the EU-Japan relations – similarly to the case of South Korea – there is a legal basis (the political agreement) of the strategic alliance. In the Preamble and text of the SPA, a detailed catalogue of common values and threats embraced by the co-operation were included.

There are also ongoing talks, such as negotiations on trade agreements with Australia and New Zealand. They are well advanced. The agreements will create new legal frameworks and give a strong development impulse to the advanced economic co-operation between the EU and those – geographically distant, but politically close – states. There is, however, a lack of substantial progress in negotiations on the FTA with India started in 2007.

Summing up, the process of establishing bilateral economic, political, and social ties between the EU and the democratic states of the Indo-Pacific region is advanced[39]. Finalisation of the process – reproducing the ties between the USA and the states of the region – will strengthen the cohesion of the Western hemisphere and may contribute to the institutionalisation of the co-operation among the states of the Indo-Pacific region[40]. The new in-

[39] The region, in the US and its European Allies nomenclature, stretched from the east coast of Africa, across the Indian Ocean and into the western Pacific, encompassing Australia and Japan.

[40] Jerzy Menkes, "Demokratyczny Diament Bezpieczeństwa – kontekst prawnomiędzynarodowy," in *Demokratyczny Diament Bezpieczeństwa – budowa nowego ładu pacyficznego*, ed. Andżelika Kuźnar (Warszawa: C.H. Beck, 2021), 12–57.

stitutions of cooperation of democratic Indo-Pacific states and their plurilateral relations with the EU are turbulent. Threats are both external, from counter-system states (China, Russia, North Korea) and internal – derived from rivalry or failure to communicate. The Australia-UK-US agreement[41] and France's reaction in the form of summoning ambassadors "for consultations" and announcing a slowdown in EU-Australia FTA negotiations is an illustration of this[42]. France reacted to one of the consequences of AUK-US, namely when Australia decided to buy American submarines instead of French ones.

4.3. EU-China, Comprehensive Agreement on Investment

Recently, in December 2020, the principles of the Comprehensive Agreement on Investment (CAI) with China were agreed on[43]. From the perspective of "conditionality", an ambiguous picture emerges from the analysis of this agreement. This agreement, and more broadly the economic relationship with China, forces the EU to review in practice the hierarchy of values (expressed in conditionality) and economic interests, economic realities[44]. On May 2021, the European Parliament passed a resolution "on Chinese countersanctions on the EU entities and MEPs and MPs" to freeze ratification of the EU-China CAI. The freeze of ratification[45] was a consequence of the allegations on human rights violations in the region of Xinjiang.

41 "Joint Leader Statement on AUKUS," accessed September 15, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/15/joint-leaders-statement-on-aukus.

42 Niklas Swanström and Jagannath Panda, "AUKUS: Resetting European Thingk on Indo-Pacific?," *Institute for Security & Development Policy. Special Pape*r (October 2021).

43 European Commission, "EU-China Comprehensive Agreement on Investment (CAI)," last modified January 22, 2021, https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237.

44 Katharina Meissner and Lachlan McKenzie, "The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes," *Journal of European Public Policy* 26, no. 9 (2019): 1273–1291.

45 "10. Takes the position that any consideration of the EU-China Comprehensive Agreement on Investment (CAI), as well as any discussion on ratification by the European Parliament, has justifiably been frozen because of the Chinese sanctions in place; demands that China lift the sanctions before Parliament can deal with the CAI, without prejudice to the final outcome of the CAI ratification process; expects the Commission to consult with Parliament before taking any steps towards the conclusion and signature of the CAI; calls on the Commission to use the debate around the CAI as leverage to improve the protection

On the one hand, *the agreement in principle* was announced directly before taking office by US President J. Biden, in the situation of the escalation of tensions in USA-China relations. The criticism of China's actions, from the USA, its allies, and institutions of the West (e.g., NATO) relates not only to trade in the broadest sense, but also compliance with international law and universal values. The announcement of the Agreement may be a promise of a concession from the main EU states in relations with China.

On the other hand, already the CAI includes a wide and differentiated catalogue of norms of the "conditionality" nature; it signals that the analogical norms will be included in the FTA. Controversial is, however, the hierarchy of values in the Preamble; defence of economic interests in the formula of a "level playing field" precedes the reference to the UN Charter and the Universal Declaration of Human Rights. These references are – in comparison with the TSD in "new generation" FTAs – narrow. Simultaneously, the parties agreed that the co-operation will be realised with the respect for "the objective of sustainable development", and to "promote investment in a manner supporting high levels of environmental and labour rights' protection, including fighting against climate change and forced labour". In the agreement, an imbalance between the meaning assigned to sustainability and human rights and freedoms as well as labour rights is noticeable (e.g., CSR was reduced to a relation with "sustainable growth"). The parties confirmed, however, their obligations assumed as a member of the International Labour Organization. In the IA, the possibility of "reviewing, monitoring and assessing" regarding human rights and freedoms as well as labour rights was not envisaged. To sum up, the EU has achieved the inclusion of a TSD chapter in the EU-China EU IPA in line with the practice of new generation agreements. However, the normative content of the chapter has been truncated compared to TSD's chapters in other EU agreements. The complete picture of the continuation of the policy or concessions will only emerge from the FTA and the implementation of agreements.

The signing and subsequent freezing of the ratification of the CAI were influenced by China's behaviour, the attitude of the US and the West's

of human rights and support for civil society in China and reminds the Commission that Parliament will take the human rights situation in China, including in Hong Kong, into account when asked to endorse the CAI".

failure to develop (and subsequently work out) a concerted foreign policy. Trump's policy of weakening Western ties de facto forced the EU to seek strategic autonomy, including the widening of the circle of cooperation. The EU's decision to conclude economic agreements with China reflected China's economic and political weight combined with the philosophy of the "change through trade". The agreement was signed despite the evolution of Chinese policy contrary to Western expectations. The Chinese authorities have both rejected Western values (convergence) and abused the WTO membership to gain unilateral advantages contrary to WTO objectives. Western recognition of China as a strategic rival and the consolidation of allies are changing the way of conducting the policy.

5. "Conditionality" *versus* self-determination

With respect to "conditionality" in the European Union's agreements (primarily, with the ACP, but also with candidate states) an objection was raised that the EU imposes, in this way, "its" system of values and that such an operation is contrary to the "right to self-determination" – the principle of the UN Charter.

By the policy of "conditionality" the state's right to choose freely its political, economic, social, and cultural systems will be infringed. The state's right to "freely chose" is confirmed and guaranteed by articles 1, para 2 and 55, para 1 of the UN Charter as well as art. 1.1 of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. However, there are no grounds for qualifying the "conditionality" constituting *modus operandi* in shaping the internal relations of the states-parties and the system of values of the international community as *contra legem* actions. The principle of *volenti non fit iniurja* (to a willing person, injury is not done) co-decides about that and about linking the EU's values to compliance with the values accepted by the international community. The norms embraced by "conditionality" – including those constituting the TSD – in all EU agreements are consistent with the *jus cogens* norms of international law and international commitments of the parties.

From the perspective of assessing the effectiveness of the policy, the lack of "conditionality" decides about the competitiveness of other offers of cooperation addressed to the ACP countries from China and Russia, as well as states from other regions. The negative evaluation of the realization of

the commitments embraced by "conditionality" is a source of disputes of Poland and Hungary (EU members) with the EU as well as arguments over deepening the EU's ties with Turkey. By concluding agreements, the EU demonstrates its international credibility and normative powers.

6. Conclusions

In this study we have formulated and proven the thesis that the EU with "new generation" agreements strengthens the cohesion of the western hemisphere and creates the conditions for its enlargement. An instrument for that is the policy of "change through trade", which is implemented by the "conditionality" in EU agreements.

The West believes in the possibility of bringing about the desirable changes, from the perspective of the values represented, and hopes that such changes will benefit everyone. The balance of the effects of "conditionality" in the lifetime of the agreements is positive. Standards of adherence to international law, respect for the principles of the UN Charter, the dissemination of EU values are improving. The balance is positive despite the fact that many states systematically violate the commitments made, and there is a regression in respect for the values covered by conditionality in many states.

This regression is influenced by, inter alia, the agreements concluded by the EU. And the impact of these agreements is not limited to the parties. The broader impact of EU agreements, beyond the parties to the agreements, is the result of, among other things, demonstrating the realisation of the values and benefits of value-based cooperation. With its agreements (FTAs, IPAs, and political agreements) with Asian countries, the EU is developing and strengthening the network of links between the countries of the Western hemisphere, reinforcing the Western community of values. The institutionalisation of the community of values of EU and Asian countries also fosters the institutionalisation of ties between democratic Asian countries. Through these agreements, the EU pursues an objective of strategic autonomy in a formula complementary (not competitive) to the relationship in the triangle: EU with Asian countries and the US.

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General principles of law and taxation

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Abstract: Although the general principles of law at first sight do not bring about numerous associations with the sphere of taxation where the processes of compliance with legal rules or applying them must end with a precise numerical result, both the relevance and the significance of these principles in the sphere of tax law are more and more noticeable. The principle of proportionality has been invoked in probably every second VAT judgment of the Court of Justice for years. The principle of legal certainty has made its way to the case law of the said court as well as the Constitutional Tribunal in Poland. The importance of other principles is definitely on the rise.

1. Introduction

The notion of general principles of law brings about numerous associations with some basic rights and fundamental freedoms that cannot be eliminat-

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ed or even limited without serious grounds by a statute, not to mention through by-laws or any type of executive action. They are linked with basic natural (hence also a link with natural law), social, and political rights. This creates, at the first sight, rather limited connections with the sphere of tax law. *Prima vista* one can think about the protection of the right to private property and *nullum tributum sine lege* principle which actually has roots in the beginnings of the previous millennium. The general wording, if not vagueness of general principles, makes one think that the potential of such principles in the field of taxation is highly limited as one can hardly make a precise calculation of the amount of tax to be remitted on the basis of such generally worded principles.

The authors of this article prove the contrary and highlight the general principles that have already gained significance in the field of tax law, or can be expected to become far more important in this field of law in the very near future.

2. The aim of the general principles of law

One may pose questions regarding the need to have general principles in the system of law. Precise rules are rather simple to follow (at least theoretically if one takes into account the intricacies of tax law), but the same cannot be said about general principles which, by their very nature, cannot be precise. On one hand, the general principles may be useful in filling certain loopholes that are unavoidable in legal systems. On the other hand, they can allow the adjusting of legal norms to certain situations where the application of precise rules might lead to unacceptable results (from the perspective of fairness or social justice, for example). They are perfectly suitable if one needs to choose from among a variety of interpretative possibilities.

The general principles have been correctly described in the legal scientific literature as tools allowing the protection of individuals. This is especially true in the field of taxation when one can hardly imagine imposing taxes on the basis of generally worded principles, but one definitely ought to be ready to envision limiting the scope of taxation on the basis of general principles – similarly to criminal law where a court cannot convict a person on the basis of a general principle alone, but can definitely use one to acquit a person.

For a variety of reasons, the general principles constitute tools that work in one direction only – to the benefit of the individual. First of all, applying the principles against an individual, for instance, to close the loophole allowing non-taxation would mean that the common requirement of statutory imposition of taxes (no taxation without representation) is circumvented. Secondly, the use of principles against one individual to balance his situation with the situation of another individual is also unimaginable. At the same time, it is possible to rely on the same principle to relieve an individual, under a general principle, from his duties in order to make his treatment equal with the treatment of another person. If, for example, income earned by a man is taxed using the rate of 10% and woman's income at the rate to 20%, the principle of equal treatment may be used to provide certain relief to a woman, but not to levy an additional tax burden on a man. This academic example reminds one of the problem of relationships between general principles. Decreasing the woman's tax burden would not collide with any other principles, but increasing the man's tax would do so. It could not be accepted under the principle of legal certainty (and: *nullum tributum sine lege*). One can hardly expect an average male individual to become familiar with all rules that do not explicitly apply to him and assess their fairness under a constitutional system.

3. Place of general principles in hierarchy of law

This article relates to two legal systems – the law of the European Union (EU) and Polish domestic law, where the former system embraces the latter and, therefore, the latter must be in conformity with the former. General principles function in both of these systems and, as may seem rather puzzling at first sight, they mutually influence each other despite the fact that one would rather expect this relationship to work one way, i.e. only the EU system would impact on the domestic legal systems of EU Member States. This is generally true as the general principles of the EU legal system must be observed by its Member States understood as legislative, executive, and judicial authorities. One must, however, bear in mind that the unwritten general principles of EU law originate from the constitutional principles of its Member States. This is where one can observe the mutual influence

mentioned above[1]. This peculiar relationship does not, however, eliminate the need to position the general principles of EU law and of the Polish domestic legal system in their respective legal orders.

It is easier to start with the reference to Polish law where general principles are worded in the Constitution of the Republic of Poland of 2 April 1997[2]. Under Article 8(1) of the Constitution, the Constitution shall be the supreme law of the Republic of Poland. Therefore, general principles contained in the Constitution, as all of its provisions, are hierarchically above other provisions of Polish law. It is worth noting that under Article 90(1) of the Constitution, the Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters. Poland has done so with regard to the European Union. This was an internal constitutional process aimed at giving EU law supremacy in Poland.

It should also be mentioned that principles that can be considered to be general principles are to be found in various chapters of the Constitution. They are not located in any specific part of it. The rule of law principle appears nearly at the beginning of the Constitution – its Article 2 says that the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice. The right to ownership is protected under Article 64 and the requirement to impose taxes and other duties by statutes is expressed as far as in Articles 84 and 217 of the Constitution. Numerous other provisions amounting to general principles are contained somewhere in between the above mentioned extremes[3]. Moreover, the general principles are not viewed as an independent normative category of the Polish Constitution[4].

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1 Such a mutual relationship is possible because the Member States of the EU have highly similar cultural backgrounds – see, for instance, Marek Zirk-Sadowski, *Prawo a uczestniczenie w kulturze* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 1998), 108.

2 Journal of Laws 1997, No. 78, item 483, as amended.

3 Catalogues of Constitutional provisions viewed as expressing principles vary in literature – see Andrzej Pułło, *Zasady ustroju politycznego państwa. Zarys wykładu* (Gdańsk: GSW Wydawnictwo, 2018), 30 et seq.

4 See, Piotr Tuleja, "Pojęcie zasady konstytucyjnej," in *Zasady ustroju Rzeczypospolitej Polskiej w nowej konstytucji*, ed. Krzysztof Wójtowicz (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1997), 22.

The general principles of EU law are not homogenous in nature, either. Some of them are unwritten. Some authors describe them as unwritten (or: originally unwritten) primary law[5]. They are positioned as either equal to primary law of the EU or as placed somewhere between its primary and secondary law[6].

4. General principles of law of relevance in the sphere of taxation

As was mentioned earlier, the general principles of law do not bring about very many associations with the law of taxation. This is especially true with regard to the views presented by those who need to make their (or their clients') organizations comply with tax law in their daily routine, namely in-house tax managers or accountants. They need to reach exact numbers representing the amount of tax to be remitted to tax offices. The general principles do not seem to facilitate the process of achieving this purpose. On the contrary, as some of them are rather vague and are definitely not based on precise numbers, they can blur the picture of a precise set of rules that the tax law seems to be. Employees of the tax administration would be even less likely to apply the general principles of law particularly if such application might lead to limiting the scope of taxation or the amount of tax.

A different approach is likely to be presented by tax lawyers specializing in litigation whose skills and reasoning must be used far beyond filling in tax returns as they deal with controversies. In their day-to-day practice they are focused rather on convincing courts about the proper understanding of rules (which can be affected by the principles) or even about the need to reject some of the rules as contrary to the principles. This approach of litigators leads to the rather extensive use of general principles in case-law.

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5 See, for instance, Ziemowit Jacek Pietraś, *Prawo wspólnotowe i integracja europejska* (Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2006), 48 et seq. This author mentions the following principles in this category: respecting human rights, equality, subsidiarity, proportionality, solidarity, flexibility, legal security (comprising the principle of legal certainty, protection of legitimate expectations, and non-retroactivity). Some authors point to an "unnamed principle" as a constitutional category in Poland – see Jan Galster, "Zasada nienazwana jako kategoria konstytucji," in *Zasady ustroju Rzeczypospolitej*, 63.

6 Cezary Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki* (Warszawa: C.H. Beck, 2000), 486.

Summarizing the above remarks, the practical relevance of the general principles of law depends on the field of practice. Moreover, it must be noted that there is a whole string of general principles of law, and that their relevance for the application in the sphere of taxation is obviously varied. One could identify the following principles as crucial for tax law: the principles of legal certainty, proportionality, equality, protection of legitimate expectations, prohibition of retroactivity, and respecting the ability-to-pay. One should mention the principle of protecting private property as well. There are certain principles underpinning modern political systems that are indirectly connected with taxation. It is also possible to indicate other principles with a rather minor impact on taxation or with an impact on certain rules of taxation. Today, the right to privacy is becoming more and more linked with tax law.

In the following sections of this article selected principles of high relevance in the sphere of tax law have been highlighted. Procedural guarantees have been left out of the scope of this article, but they could well be subject of many other scholarly writings[7].

5. Principle of legal certainty

The analysis should begin with the principle of legal certainty which is of crucial importance, especially if one takes into account the fact that taxes are mostly calculated by taxpayers themselves (self-assessed). The principle of legal certainty is even viewed as a constitutional value[8].

Taxpayers, especially if they are expected to calculate their tax themselves and remit it to the tax authorities, should be able to trust what is written in the journal of laws. Lack of trust may be engendered by an insufficient number of precise rules[9].

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7 This problems has been partly tackled by Andrzej Gorgol, "Structuring of Statutory Values of Polish Tax Procedures," *Review of European and Comparative Law* 44, no. 1 (2021): 19 et seq.

8 See, Marzena Kordela, "Pewność prawa jako wartość konstytucyjna," in *Wykładnia Konstytucji. Aktualne problemy i tendencje*, ed. Marek Smolak (Warszawa: Wolters Kluwer, 2016), 149 et seq.

9 See, Maria Borucka-Arctowa, "Zaufanie do prawa jako wartość społeczna i rola sprawiedliwości proceduralnej," in Maria Borucka-Arctowa et al., *Teoria prawa, filozofia prawa, współczesne prawo i prawoznawstwo* (Toruń: Wydawnictwo Uniwersytetu Mikołaja Kopernika, 1998), 18.

In Poland, the Constitution does not explicitly set specific quality requirements for national tax legislation (other legal acts do not provide such requirements, either). Polish courts and the Constitutional Tribunal (*Trybunał Konstytucyjny*) nevertheless formulate specific quality requirements in relation to tax law based on constitutional principles[10].

It is worth noting that, according to the Constitutional Tribunal, tax legislation needs to be more precise than legislation in other areas of law. The Tribunal clearly expressed this opinion e.g. in its judgment of 13 September 2011 (ref. no. P 33/09)[11]. The dispute concerned the subject of real estate tax. Although the same definition was applicable for the purposes of both construction law and tax law, the Constitutional Tribunal emphasized that it should not be interpreted in an identical manner – the interpretation for the purposes of tax law should be narrower (*per analogiam* reasoning cannot be applied to broaden the scope of taxation, imprecise terms should not be used to delimit the scope of taxation)[12].

The administrative courts and the Constitutional Tribunal have developed the principle of strict interpretation of provisions imposing taxes. The principle that doubts concerning the interpretation of tax law provisions should be resolved in favour of the taxpayer has also been developed on the basis of the rule of law principle. This means that the effects of imperfections in the tax law should be borne by the State, and not by the taxpayer[13]. Before *in dubio pro tributario* was introduced as a statutory principle, it had often been based on the constitutional rule of law principle.

The Constitutional Tribunal indicates that tax law provisions should be clear and precise. Lack of clarity and precision might be perceived as a violation of the rule of the principle expressed in Article 2 of the Constitution (for instance, the judgment of 29 October 2003, ref no. K 53/02)[14]. However, the cases in which the Constitutional Tribunal held that tax law provisions were so indeterminate that they must be perceived as unconsti-

10 Krzysztof Lasiński-Sulecki, Wojciech Morawski, and Jowita Pustuł, "Depicting National Tax Legislation: Poland," in *Tax Legislation. Standards, Trends and Challenges*, eds. Włodzimierz Nykiel and Małgorzata Sęk (Warszawa: LEX a Wolters Kluwer business, 2015), 345.

11 Journal of Laws 2011, No. 206, item 1228.

12 Lasiński-Sulecki, Morawski, and Pustuł, "Depicting National Tax Legislation," 345.

13 Lasiński-Sulecki, Morawski, and Pustuł, "Depicting National Tax Legislation," 345.

14 Polish Monitor 2003, No. 51, item 797.

tutional have been rare. The Tribunal believes that declaring a provision unconstitutional is an extreme solution. This is only acceptable when the provision cannot be interpreted in any manner that would be in line with the Constitution. Therefore, vagueness of legal provisions is not sufficient reason to hold that a provision is unconstitutional, unless it is so vague that it cannot be understood[15].

At some point the Polish general anti-avoidance rule (GAAR) was considered to be contrary to the rule of law principle by the Constitutional Tribunal (the Tribunal has not dealt with current, more elaborate GAAR rules yet)[16]. The text of the Tribunal's judgment sets very high standards for any GAAR. The Tribunal held that: "One of the elements of the principle of trust in the State and its laws, as derived from the principle of the rule of law (Article 2 of the Constitution), is the prohibition of sanctioning – in the sense of attributing negative consequences to, or refusing to recognize the positive consequences of – the lawful behaviour of the addressees of legal norms. Thus, where the addressee of a legal norm concludes a lawful transaction and thereby achieves a goal which is not prohibited by law, the objective (including the tax objective) accomplished in this manner should not be regarded as tantamount to prohibited objectives"[17]. According to the Tribunal the requirement for the legislator to comply with the principles of correct legislation stems from the rule of law principle. This requirement is functionally tied with the principles of legal certainty, legal security, and protection of trust in the State and its laws. The constitutional requirements of correct legislation are particularly infringed, as the Tribunal continued, when the wording of a legal provision is so vague and imprecise that it creates uncertainty amongst its addressees as regards their rights and duties, by creating an exceedingly broad framework within which the authorities charged with applying the provision are required, *de facto*, to assume the roles of law-makers in respect to these vaguely and imprecisely regulated issues. The Tribunal indicated a number of general clauses that were used in Art. 24b of the General Tax Law: "one could not

15 Lasiński-Sulecki, Morawski, and Pustuł, "Depicting National Tax Legislation," 346.

16 Ref no. K 4/03, Journal of Laws 2004, No. 122, item 1288.

17 Bogumił Brzeziński and Krzysztof Lasiński-Sulecki, "Poland," in *A Comparative Look at Regulation of Corporate Tax Avoidance*, ed. Karen Brown (Springer, 2012), 273.

have expected", "other significant benefits", "benefits stemming from the reduction of tax liability"[18].

The Polish Constitutional Tribunal also considered a situation where one cannot check all the facts relevant for the purposes of taxation to be in breach of the principle of legal certainty (judgement of 12 February 2015, SK 14/12)[19].

Similarly, the principle of legal certainty has been recognized by the Court of Justice. In its judgment of 6 November 2008 in the case *Kollektivavtalsstiftelsen TRR Trygghetsrådet v Skatteverket*, C-291/07,[20] the Court opted for the interpretation in line with the principle of certainty where the core issue was to understand an interpreted provision in such a way that all the circumstances relevant from the perspective of taxation could be identified by a taxpayer. The Court held:

> "30. Such an interpretation is consistent with the objective pursued by Article 9 of the Sixth Directive, which (…) is to lay down a conflict of laws rule to avoid the risk of double taxation or non-taxation.
>
> 31. In the same way (…) that interpretation facilitates the implementation of that conflict of laws rule, in that it serves the interests of simplicity of administration – of the rules on the place of supply of services – as regards the rules governing the collection of taxes and the prevention of tax avoidance. The supplier of services needs merely to establish that the customer is a taxable person in order to ascertain whether the place of supply of services is in the Member State in which he, the supplier, is established or in the Member State in which the customer's activities are based.
>
> 32. Furthermore, that interpretation is in line with the objectives and operating rules of the Community VAT system since it ensures, in a situation such as that at issue in the main proceedings, that the ultimate consumer of the supply of services bears the final cost of the VAT payable.

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18 www.trybunal.gov.pl. An analogous problem in a comparative context was analysed in: Rebecca Prebble and John Prebble, "Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law – A Comparative," *Saint Louis University Law Journal* 55 (2010): 21 et seq.

19 Journal of Laws 2015, item 235.

20 ECLI:EU:C:2008:609.

> 33. As the Advocate General observed (…), such an interpretation is also consistent with the principle of legal certainty; furthermore, it enables the burden on traders operating across the internal market to be reduced and facilitates the free movement of services".

It is interesting to note the development of the concept of "tax certainty" where the search for the taxpayer's secure position takes place also through instruments like dispute resolution mechanisms[21].

6. Principle of proportionality

The principle of proportionality has been referred to extensively by the Court of Justice in VAT cases and, to a far lesser extent, in excise duty cases as well as in cases connected with treaty freedoms. For the purposes of applying the principle of proportionality, the freedom or right guaranteed by EU law is viewed as a point of reference. The freedom or right can be limited (usually by introducing certain domestic formal requirements) if the aim of this restriction or limitation is legitimate under EU law. Usually counteracting tax evasion is perceived as a legitimate aim. Any restrictions or limitations must not go beyond what is necessary to attain the legitimate aim of restriction or limitation – this is the core element of assessment for the needs of the principle of proportionality.

There have been numerous VAT cases based on the principle of proportionality[22], but it would be interesting to refer to an excise duty case. In its judgment of 2 June 2016 the Court of Justice in the case *ROZ-ŚWIT Zakład Produkcyjno-Handlowo-Usługowy Henryk Ciurko, Adam Pawłowski spółka jawna v Dyrektor Izby Celnej we Wrocławiu*, C-418/14,[23] held: "the principle of proportionality must be interpreted as precluding national legislation under which, in the event of failure to submit a list of statements from purchasers within a prescribed time limit, the excise duty applicable for motor fuels is applied to heating fuels even though it has been found

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21 See, Achim Pross, Sandra Knaepen, and Mark Johnson, "Embracing Tax Certainty through Improved Dispute Resolution," *International Tax Review* 28, Issue 10 (2017): 16 et seq.

22 See a book on the principle of proportionality: Artur Mudrecki, *Zasada proporcjonalności w prawie podatkowym* (Warszawa: Wolters Kluwer, 2020).

23 ECLI:EU:C:2016:400.

that the intended use of that product for heating purposes is not in doubt" (para. 41).

The principle of proportionality in the sphere of tax law has been used by the Court of Justice more extensively by far than by the Constitutional Tribunal[24]. The Constitutional Tribunal perceives the legal basis for the principle of proportionality in Article 31(3)[25] and Article 2 (the rule of law). The scope of the latter is far broader. Owing to this, Article 2 is more useful in the sphere of taxation.

7. Principle of equality

Many variations of tax treatment cannot be considered to be in violation of the principle of equality[26]. For instance, excise duties are used to differentiate the competitive position of goods in order to reduce demand for some of them (e.g. alcoholic beverages with high content of alcohol by volume, cigarettes). Beer, wine, or heated tobacco products are taxed less heavily as an element of social policy. However, differences in taxation of goods cannot be used to discriminate against products of other Member States of the European Union.

Interestingly the principle of neutrality of VAT is considered by the Court of Justice to be an expression of the equality principle. As we can read in the opinion of Advocate General Pikamäe delivered on 14 May 2020 in the case *United Biscuits (Pensions Trustees) Limited, United Biscuits Pension Investments Limited v Commissioners for Her Majesty's Revenue and Customs*, C-235/19[27]: "According to settled case-law, the principle of fiscal neutrality means that supplies of goods or services which are similar, and which are therefore in competition with each other, may not be

[24] See, Polish Constitutional Tribunal, Judgement of 6 December 2016, ref. No. SK 7/15, Journal of Laws 2016, item 2209.

[25] "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health, or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

[26] Cynthia A. Vroom, "Equal Protection versus the Principle of Equality: American and French Views on Equality in the Law," *Capital University Law Review* 21 (1992): 218.

[27] ECLI:EU:C:2020:380.

treated differently for VAT purposes. It should be borne in mind, from that aspect, that the principle of fiscal neutrality is a particular expression of the principle of equality at the level of secondary EU law and in the specific area of taxation" (para. 77).

There have not been numerous constitutional tax cases regarding the principle of equality.

8. Protection of legitimate expectations

There are two principles connected with introducing changes to tax laws. One of them is the principle of the protection of legitimate expectations and the other the principle of the prohibition of retroactivity.

David Blundell writes: "It is a well-established facet of the case law of the European Court of Justice that legitimate expectation cannot be used to override the limits of relevant legislation. For example, no legitimate expectation can arise if it would be inconsistent with the EC Treaty"[28].

This thesis is generally true under both EU law and the domestic constitutional order in Poland. Yet, taxpayers must be given a chance to adjust to changing rules.

9. Prohibition of retroactivity

Retroactivity of tax law is condemned in scholarly writings, sometimes even without further elaborations[29]. Definitely tax rules cannot be applied retroactively if they work to the detriment of their addressees. Simultaneously, relieving taxpayers from certain duties with retroactive effect may not be forbidden. The main problem that one may notice nowadays is that there is a thin red line between retroactive and retrospective application of tax rules. Current GAAR in Poland can serve as a good example. It applies to advantages obtained after its entry into force. The problem is that these advantages are sometimes connected with tax arrangements introduced before the entry into force of the GAAR. This seems to be an example of retrospective application of the GAAR. But the tax authorities sometimes attempt to apply the GAAR to a situation where all the tax-relevant facts had taken place before the entry into force of the GAAR and a tax return for a given year was

[28] David Blundell, "Ultra Vires Legitimate Expectations," *Judicial Review* 10 (2005): 155.

[29] See, Michael J. Graetz, "Retroactivity revisited," *Harvard Law Review* 98 (1985): 1821.

filed only later. This seems to be an example of retroactive application of tax law, which cannot be accepted.

10. Ability-to-pay

As is sometimes suggested in the literature, the ability to pay is sometimes treated as synonymous with justice in taxation[30] but it is not fully precise. One can definitely claim that confiscatory taxation is not acceptable (see judgment of the Constitutional Tribunal of 18 November 2014, ref. no. K 23/12[31] and other judgments referred to therein)[32]. The prohibition of confiscatory taxation applies predominantly in the sphere of income taxation[33]. It is worth mentioning that the Spanish Constitution explicitly prohibits confiscatory taxation in its Article 31. Limits of taxation are also analysed with the right to privacy principle[34]. Apart from that, delineating the legal limits of an acceptable economic burden of taxation is rather difficult, if not impossible.

11. Risk of jeopardizing the system of principles

It should be emphasized only that the principle of interpretation does not allow any court to go beyond the possible meaning of interpreted provisions. One might wonder whether this is the case in the case law of the Court of Justice[35].

The general principles of EU law are among the sources of the EU. They are defined in the literature as "an unwritten Community law the particular significance of which is that it has as its primary aim the protection of

30 See, Alfred G. Buehler, "Ability to Pay," *Tax Law Review* 1, Issue 3 (1946): 243.

31 Journal of Laws 2014, item 1663.

32 See also Janusz Orłowski, "Konstytucyjna zasada powszechności opodatkowania. Wybrane zagadnienia," *Studia Prawnoustrojowe*, no. 22 (2013): 88; Piotr Pietrasz, *Opodatkowanie dochodów nieujawnionych* (Warszawa: Oficyna a Wolters Kluwer business, 2007), 44.

33 See, Bogumił Brzeziński, "Zasady ogólne prawa podatkowego," *Toruński Rocznik Podatkowy* (2015): 16.

34 See, for instance, Andrzej Gomułowicz, "Ochrona wolności i praw ekonomicznych a granice opodatkowania – zasady i kontrowersje," *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, no. 3 (2005): 32.

35 See, Krzysztof Lasiński-Sulecki, "Italmoda: Does the EU VAT Directive the Source of Individual's Obligations," *International VAT Monitor*, no. 5 (2015): 300 et seq.

the rights of the individual"[36]. Depriving taxable persons of certain rights expressly and precisely granted to them under EU directives (or under national provisions) can hardly be reconciled with the way in which general principles, especially, unwritten ones, work[37].

The principles of the interpretation of EU law extend to national legal orders through the interpretation of directives in a way conforming with EU law (reconciliatory interpretation). If, for a certain reason, domestic law is worded in a way that does not allow the incorporation of the effects of interpretation of EU law in line with the anti-abuse and anti-fraud approaches developed by the Court of Justice, divergences between the norms of EU law and domestic law may arise. Such divergences cannot be eliminated in the course of interpretation of national law. Its provisions must be changed with the/any effects of this change restricted for the future only[38].[39]

Similarly, the EU's general principles may and should affect the interpretation of domestic law. They cannot be applied if the wording of domestic provisions does not allow such an interpretation. Even if one can imagine the application of certain (written) general principles in horizontal cases, it would be far more difficult to accept such (especially unwritten) principles in vertical cases against individuals[40].[41]

12. Conclusions

This article can be concluded with the remark by Joseph Stiglitz that "Every tax system is an expression of a country's basic values – and its politics. It translates into hard cash what might otherwise be simple high-flown rhetoric"[42]. This is particularly true in the field of tax law. The general prin-

36 A. G. Toth, *Legal Protection of Individuals in the European Community*, 1978, Vol. I, 86 as quoted by Anthony Arnull, *The General Principles of EEC Law and Individual* (London and Leicester: Leicester University Press, 1990), 1.

37 Lasiński-Sulecki, "Italmoda," 303.

38 See also Marcel G. H. Schaper, "The Need to Prevent Abusive Practices and Fraud as a Composite Justification," *EC Tax Review* 23, no. 4 (2014): 220.

39 Lasiński-Sulecki, "Italmoda," 303.

40 See Takis Tridimas, *The General Principles of EC Law* (Oxford: Oxford University Press, 1999), 31–32.

41 Lasiński-Sulecki, "Italmoda," 303.

42 Joseph Stiglitz, *The Roaring Nineties* (New York: W.W. Norton & Company, 2003), 177 [cited from:] Hans Gribnau, "Equality, Legal Certainty and Tax Legislation in the Netherlands:

ciples of EU and Polish legal orders significantly affect the interpretation of tax rules. Moreover, certain rules may be inapplicable due to their inconsistency with general principles. It should also be mentioned that the topic of general principles of law applicable in the sphere of taxation is distinct from another highly interesting topic of general principles of tax law[43].

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43 On this topic, see, for instance, Bogumił Brzeziński, "Zasady ogólne prawa podatkowego (próba inwentaryzacji)," *Kwartalnik Prawno-Finansowy*, no. 1 (2018): 23 et seq.

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Actual challenges for the implementation of judgments of the European Court of Human Rights

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Abstract: The author analyzes the problem of the implementation of judgments of the European Court of Human Rights (ECtHR). In light of the European Convention on Human Rights (ECHR), a special role in its control mechanism is played by the Committee of Ministers of the Council of Europe. Despite the measures taken, there have been delays in the execution of judgments or the lack of their implementation for years. The author analyzed this problem in light of the latest reports of the Committee of Ministers and the recommendations of the Parliamentary Assembly. He pointed to the need for greater activity in this process of other bodies of the Council of Europe, including: the Commissioner for Human Rights, the Venice Commission, the CPT, the ECRI as well as institutions of the civil society. In the last decade, the interest of the Parliamentary Assembly of the Council of Europe in this matter has clearly increased. The author postulates that parliamentarians sitting in this body should be more active in this regard in their countries. They have instruments of control on the executive power, which could be used to increase the effectiveness of the execution of the ECtHR's judgements.

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1. Introduction

The European Convention of Human Rights[1], and its controlling system (The European Court of Human Rights, The Committee of Ministers of the Council of Europe) is considered as the most significant and most effective regional system of the protection of human rights[2], as compared with other human rights regional systems[3]. It involves a supranational mechanism which enables the individuals to achieve their right on the international level[4]. This mechanism of individual applications should overcome the discrepancy between the goals of international protection of human rights and execution of human rights norms at the state and local level. Successful and fast implementation of its judgments on the national level is of great importance for the Court, because the credibility and legitimacy of this system of protection depends on it[5].

The main achievements of those institutions include securing minimum standards across the continent as they deal with increasing expansion, complexity, multidimensionality, and interpenetration of their human rights activities[6].

One of the most important problems is implementation of the ECtHR's judgments[7]. The aim of this study is to identify and analyze problems with

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1 The Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5.

2 Janneke Gerards, *General principles of the European Convention on Human Rights* (Cambridge: Cambridge University Press, 2019), 48.

3 Avidant Kent, Nikos Skoutaris, and Jamie Trinidad, eds., *The future of international courts: regional, institutional, and procedural challenges* (London-New York: Routledge, 2019).

4 Bożena Gronowska, *Europejski Trybunał Praw Człowieka. W poszukiwaniu efektywnej ochrony praw jednostki* (Toruń: Wydawnictwo „Dom Organizatora", 2011), 59.

5 Bojan Tubić, "The execution of judgments of the European Court of Human Rights," *Zbornik radova (Pravni fakultet u Novom Sadu)* 53(10) (2019): 211.

6 Steven Greer and Rose Slowe, *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges* (Cambridge: Cambridge University Press, 2018), 32.

7 Hellen Keller and Cedric Marti, "Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights," *European Journal of International Law* 26, no. 4 (2015): 829; Adam Bodnar, *Wykonywanie orzeczeń Europejskiego Trybunału Ochrony Praw Człowieka w Polsce. Wymiar instytucjonalny* (Warszawa: Wolters Kluwer, 2018), 49.

enforcement of ECtHR's judgments that occur at the beginning of the third decade of the 21st century. The following research methods are used: legal-dogmatic, legal-comparative, analyzing of documents and the method of system analysis.

The subject of verification in this study will be the following research hypothesis: "Although the system of human rights protection based on the European Convention on Human Rights is considered the most effective regional system for the protection of human rights, its effectiveness is more seriously weakened by problems with the implementation of ECtHR's judgments. What is needed here is not only the improvement of the supervisory mechanisms of the Committee of Ministers, but also greater involvement of other Council of Europe institutions (mainly the Parliamentary Assembly, the Commissioner for Human Rights, the Venice Commission, the CPT, the ECRI), as well as civil society organizations. The possibilities of parliamentarians to influence their governments in the process of executing the judgments of the ECtHR have not been fully used".

2. General characteristic of the European Court of Human Rights and its jurisprudence

2.1. The Strasbourg case law

Studies have exposed the domestic effects of judgments of the ECtHR as a challenge to the various levels of legal orders in Europe. The starting point is the divergent impact of the ECtHR's jurisdiction within the Convention States. Strasbourg case law is increasingly important for most areas of society. The case law of the Court are highlighted and discussed against the background of the principle of subsidiarity[8]. The Pilot-Judgment Procedure of the ECtHR is oriented to tackling structural human rights deficiencies in member states which is reconcilable with the European Convention on Human Rights[9].

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8 Linos-Alexander Sicilianos, "The Role of the European Court of Human Rights in the Execution of its own Judgments: Reflections on Article 46 ECHR," in *Judgments of the European Court of Human Rights - Effects and Implementation*, eds. Anja Seibert-Fohr and Mark E. Willinger (London: Routledge, 2014), 293.

9 Dominik Haider, *Pilot-Judgment Procedure of the European Court of Human Rights* (Leiden: BRILL, 2013), 42.

The ECtHR is perceived in a broader context of judicial power in a globalized world[10]. The analyses explore the Court's uniqueness as an international adjudicatory body in light of its history, structure, and procedure, as well as its key doctrines and case law[11]. The questions are shown: What was the best model for such an international organization? How should it evolve within more and more diverse legal cultures? How does a case move among different decision-making bodies?[12] It is discussed how the Court supports a liberal representative and substantive model of democracy, and outlines the potential for the Court to interpret the Convention so as to support more deliberative, participatory and inclusive democratic practices[13].

In the human rights courts, including the ECtHR, the central role played by the notion of consensus in the case law. The role exerted by the notion of consensus in this framework can be used not only to understand the evolving character of the rights and freedoms recognized by these international treaties, but also to reaffirm the international nature of these regional human rights courts[14].

'European consensus' is a tool of interpretation used by the European Court of Human Rights as a means to identify evolution in the laws and practices of national legal systems when addressing morally sensitive or politically controversial human rights questions. If European consensus exists, the Court can establish new human rights standards that will be binding across European states. It opens the way to answer such questions, as: Should prisoners have voting rights? Should terminally ill patients have a right to assisted suicide? Should same-sex couples have a right to marry and adopt?[15] The import meaning has ECtHR's jurisprudence concerning

10 Paulo Pinto Albuquerqe and Krzysztof Wojtyczek, eds., *Judicial power in a globalized world: liber amicorum Vincent De Gaetano* (Cham: Springer, 2019).

11 Andrzej Bisztyga, *Europejski Trybunał Praw Człowieka* (Katowice: GWSH, 1997), 39.

12 Angelika Nussberger, *The European Court of Human Rights* (Oxford: Oxford University Press, 2020), 24.

13 Rory O'Conell, *Law, democracy and the European Court of Human Rights* (Cambridge: Cambridge University Press, 2020), 38.

14 Francisco José Pascual Vives, *Consensus-based interpretation of regional human rights treaties* (Leiden-Boston: Brill Nijhoff, 2019), 37.

15 Vasilis Tsevelekos, *Building consensus on European consensus: judicial interpretation of human rights in Europe and beyond* (Cambridge: Cambridge University Press, 2019), 58.

the right to life[16]. The human rights connecting with the freedom of information and freedom of media are important subject of jurisprudence of the European Court of Human Rights[17]. The ECtHR' case-law on freedom of expression and media and journalistic freedoms has been widely analyzed[18].

2.2. Judicial activism

Judicial activism in respect of the protection of human rights and dignity and the right to due process is an essential element of the democratic rule of law in a constitutional democracy as opposed to being 'judicial overreach'. Selected recent case law of the ECtHR, as well as other international courts, illustrates that these Courts have, at times, engaged in judicial activism in the service of providing equal protection of the law and due process to the powerless but have, on other occasions, employed legalistic but insupportable strategies to sidestep that obligation[19]. Some analyses demonstrate the negative impact, in terms of unpredictability and legal uncertainty, of the discretion used by the Court when it comes to the regime of reparation. They reveal the adverse influence of such a high discretion on the quality of its rulings - ultimately on the coherence of the system and on the Court's authority[20].

2.3. Areas of the human rights protection

The Internet's importance for freedom of expression and other rights comes in part from the ability it bestows on users to create and share information, rather than just receive it. Within the context of existing freedom of expression guarantees, the studies evaluate the goal of bridging the 'digital divide'

16 Stephen Skinner, *Lethal force, the right to life and the ECHR: narratives of death and democracy* (Oxford: Hart), 48.

17 Michelle Farell and Edel Hughes, eds., *Human rights in the media: fear and fetish* (Abington-New York: Routledge, 2019).

18 Dirk Voorhoof, *Freedom of expression, the media and journalists: case-law of the European Court of Human Rights: a publication of the European Audiovisual Observatory* (Strasbourg: European Audiovisual Observatory, 2020), 28.

19 Sonja C. Grover, *Judicial Activism and the Democratic Rule of Law Selected Case Studies* (Cham: Springer International Publishing, 2020), 42.

20 Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge: Cambridge University Press, 2014), 48.

- the gap between those who have access to the Internet and those who do not. ECtHR, as well as other international courts try to answer the following questions: First, is there a right to access the Internet, and if so, what does that right look like and how far does it extend? Second, if there is a right to access the Internet, is there a legal obligation on States to overcome the digital divide?[21]

The ECtHR is one of the most significant institutions confronting the interactions among states, religious groups, minorities, and dissenters. In the 25 years since its first religion case, *Kokkinakis v. Greece*[22], the Court has inserted itself squarely into the international human rights debate regarding the freedom of religion or belief[23]. The ECtHR has mainly been concerned with religious courts in terms of compliance with the requirement for a fair hearing by an independent and impartial tribunal under Article 6 of the European Convention of Human Rights and has come to various conclusions. The judgment *Bélámé Nagy v. Hungary*[24], and in particular many associated dissenting opinions, demonstrate that the matter is worthy of study, particularly in the contemporary context of religious freedom[25].

The potential of international human rights law to resolve one of the gravest human rights violations to have surfaced post 9/11: extraordinary rendition has been analyzed. Although infamously deployed as a counter-terrorism technique, substantial evidence confirms that European states colluded in the practice by facilitating the transportation of suspects through their airspace or airports and in some cases, secret detention on their territories. Despite recent findings of the ECtHR, difficulties persist in holding many European States accountable for the role they played both at the domestic and international level[26].

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21 Anne Peacock, *Human rights and the digital divide* (London: Routledge, 2019), 32.

22 Application No. 14307, judgment in 1993, ECHR 20.

23 T. Jeremy Gunn and Malcolm D. Evans, eds., *The European Court of Human Rights and the freedom of religion or belief: the 25 years since Kokkinakis* (Leiden-Boston: Brill Nijhoff, 2019).

24 Application No. 53080/13, judgment of 10 February 2015.

25 Michał Rynkowski, *Religious courts in the jurisprudence of the European Court of Human Rights* (Leiden-Boston: Brill, 2019), 21.

26 Susanne Egan, *Extraordinary Rendition and Human Rights Examining State Accountability and Complicity* (Cham: Springer International Publishing, 2019), 67.

The ECtHR is being applied to military operations of every kind from internal operations in Russia and Turkey, to international armed conflicts in Iraq, Ukraine and elsewhere. The challenge that this development presents to the integrity and universality of Convention rights has been analyzed. The questions have been raised: Can states realistically investigate all instances where life is lost during military operations? Can the Convention offer the same level of protection to soldiers in combat as it does to its citizens at home? How can we reconcile the application of the Convention with other international law applicable to military operations?[27]

'Urgent' is a word often used, in very different contexts. Yet together with a reference to human rights violations, it likely triggers images of people caught up in armed conflict, facing terror from either the state, gangs, paramilitaries, or terrorists, or of people fleeing terror and facing walls, fences or seas, at risk of being returned to terror, or ignored, neglected, abused, deprived of access to justice and basic facilities, facing death, torture and cruel treatment. These ongoing and expected violations are explored in the context of (quasi-) judicial proceedings as international tribunals and domestic courts are increasingly called upon to order interim measures or accelerate proceedings in such cases[28].

There are analyses of the ECtHR jurisprudence on immigration policies, non-refoulement, humanitarian law and gender. It presents empirically based research of a quantitative, qualitative and comparative nature regarding the determinants of attitudes towards cosmopolitanism and more generally concerning public opinion on migration issues, and reflects on conceptions of and attitudes towards citizenship, while also imagining new forms of citizenship[29].

The research has been done of issues relating to the application of AI and computational modelling in criminal proceedings from a European perspective. It explores ways in which AI can affect the investigation and adjudication of crime. They examine how traditional evidentiary law is

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27 Stuart Wallace, *The application of the European Convention on Human Rights to military operations* (Cambridge: Cambridge University Press, 2019), 32.

28 Eva Rieter and Karin Zwann, eds., *Urgency and Human Rights The Protective Potential and Legitimacy of Interim Measures* (The Hague: T.M.C. Asser Press, 2021).

29 Mogens Chrom Jakobsen, Emnet Berhamu Gebre, and Drago Župarić-Iljić, eds., *Cosmopolitanism, Migration and Universal Human Rights* (Cham: Springer International Publishing, 2020).

affected by both new ways of investigation – based on automated processes (often using machine learning) – and new kinds of evidence, automatically generated by AI instruments. Drawing on the comprehensive case law of the ECtHR, it also presents reflections on the reliability and, ultimately, the admissibility of such evidence[30].

The future of economic and social rights is unlikely to resemble its past. Neglected within the human rights movement, avoided by courts, and subsumed within a single-minded conception of development as economic growth, economic and social rights enjoyed an uncertain status in international human rights law and in the public laws of most countries. However, today, under conditions of immense poverty, insecurity, and political instability, the rights to education, health care, housing, social security, food, water, and sanitation are central components of the human rights agenda[31].

Environmental law has always responded to risks posed by industrial society but the new generation of risks have required a new set of environmental principles, emerging from a combination of public fears, science, ethics, and established legal practice. The study taken shows how three of the most important principles of modern environmental law grew out of this new age of ecological risk: the polluter pays principle, the preventive principle, and the precautionary principle. The ECtHR, and other Courts have been invoking environmental law principles in a broad range of cases, on issues including GMOs, conservation, investment, waste, and climate change. As a result, more States are paying heed to these principles as catalysts for improving their environmental laws and regulations[32].

3. The problems with the implementation of judgments of the European Court of Human Rights

Among the issues connecting with the activity of the European Court of Human Rights very important meanings concerns the implementation of

30 Serena Quatrocollo, *Artificial Intelligence, Computational Modelling and Criminal Proceedings A Framework for A European Legal Discussion* (Cham: Springer International Publishing, 2020), 38.

31 Katharine G. Young, ed., *The future of economic and social rights* (Cambridge: Cambridge University Press, 2019).

32 Nicolas de Sadeleer, *Environmental principles: from political slogans to legal rules* (Oxford: Oxford University Press, 2020), 38.

judgments. Delays have been noted for several years in the enforcement of court judgments and particularly serious delays are observed in cases where a judgment demands that national legislation be modified[33]. It is analyzed in a general way and with connection to individual subjects, as for example prisoners' right to vote[34]. There are also analyses how individual states execute the ECtHR's judgments[35]. The studies look at the nature of judgments and their relationship with domestic measures to ensure implementation. It explores regional policy development concerning domestic implementation and shows that the co-ordinating role of the executive has been an important component of this[36].

The High Contracting Parties of the European Convention of Human Rights are obliged to execute judgments of the ECtHR. The Committee of Ministers of the Council of Europe supervises the execution of this obligation. On 1 November 1998 the long-awaited revision of the supervisory mechanism of the European Convention on Human Rights were put into effect[37], because on that date Protocol No. 11 to the ECHR has entered into force[38]. An action plan sets out the measures the Member State intends to take to implement a judgment. These acts are key tools of communication between the State and the Committee of Ministers in the procedure of supervision of the execution of judgments of the European Court of Human Rights.

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33 Christian Tomuschat, "Quo Vadis, Argentoratum? The success story of the European Convention on Human Rights. And a few dark Stasin," *Human Rights Law Journal* 13, no. 11–12 (1992): 401.

34 Ergul Celiksoy, "Execution of the Judgments of the European Court of Human Rights in Prisoners' Right to Vote Cases," *Human Rights Law Review* 20, no. 3 (2020): 555.

35 Donatas Murauskas, "Execution of Judgments of the European Court of Human Rights: Lithuanian Case," in *Legal Developments During 30 Years of Lithuanian Independence* (Cham: Springer International Publishing, 2020), 205.

36 Elizabeth Mottershaw and Rahel H. Murray, "National responses to human rights judgments: the need for government co-ordination and implementation," *European Human Rights Law Review* 6 (2012): 639.

37 George Nicolau, "The new perspective of the European Court of Human Rights on the effectiveness of its judgments," *Human Rights Law Journal* 31, no. 7–12 (2011): 269.

38 Ivonne S. Klerk, "Supervision of the Execution of the Judgments of the European Court of Human Rights: The Committee of Ministers' role under Article 54 of the European Convention on Human Rights," *Netherlands International Law Review* 45, no. 1 (1998): 65.

There are however critical analysis about the effectiveness of supervising the implementation of the ECtHR's judgments by the Committee of Ministers[39].

Non-execution of the judgments of the European Court of Human Rights is a matter of serious concern. The reasons for and dynamics of non-execution need to be fully considered. Non-execution is properly understood as a phenomenon that requires political rather than legal responses. This calls into question the usefulness of the infringement proceedings contained in Article 46(4) of the Convention and which it has recently been suggested ought to be embraced in attempts to address non-execution. Even if the practical difficulties of triggering Article 46(4) proceedings could somehow be overcome, the dynamics of non-execution suggest that such proceedings would be both futile and counterproductive, likely to lead to backlash against the Court and unlikely to improve States' execution of its judgments[40].

The efficacy and effectiveness of the European Convention on Human Rights depends on the implementation of judgments of the ECtHR. In the past and until recently, the trust in and actual authority of the Court has predominantly compensated for the lack of direct and executive power over signatory parties to the European Convention. However, the workload of the Court is increasing at an exponential rate; at the same time, individuals from several new member states are not making full use of this enforcement machinery. As a result of these two elements, combined with the lack of execution of some judgments for legal–political reasons, compliance with the Court's judgments has become a priority in the political agenda of the Council of Europe[41].

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39 Başak Çalı and Anne Koch, "Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe," *Human Rights Law Review* 14, no. 2 (2014): 321.

40 Fiona de Londras and Kanstantsin Dzehtsiarou, "Mission impossible? Addressing non-execution through infringement proceedings in the european court of human rights," *The International and Comparative Law Quarterly* 66, no. 2 (2017): 467.

41 Marinella Marmo, "The Execution of Judgments of the European Court of Human Rights — A Political Battle," *Maastricht Journal of European and Comparative Law* 15, no. 22 (2008): 235.

Questions were raised: Despite what the Convention provides, is the Court involved in supervising the execution of its judgments? What the Court does when it is engaged in this exercise? In order to answer these two questions, four aspects of the Court's practice that are linked to the execution process are examined. These are the four aspects of interest: just-satisfaction judgments under Article 41 ECHR, follow-up cases concerning individual measures, follow-up cases concerning general measures and the pilot-judgment procedure. The analysis of these aspects has lead to the conclusion that the Court indeed engages in supervising execution, but also that this does not mean that the Court is taking on the Committee's task and that supervising execution has not become in any way part of the Court's day-to-day work[42].

Due to the intergovernmental and confidential regime set up by the European Convention on Human Rights in view of supervising the execution of the judgments of the ECtHR, this field was for many years little suited to dialogue. However, a culture of dialogue has gradually emerged at the European and national levels in order to offer more transparency and legitimacy to the system; the ambitious gamble was that it would speed up and improve the compliance with the judgments of the Court. The current picture still seems to be diversified, with more bilateral and expert dialogue focused on the most serious cases at the European level. Meanwhile, a strategy for a more open and constructive dialogue with a very large panel of actors seems to be promoted in some countries[43].

One of the important problems is domestic judicial treatment of ECtHR case law[44]. This Court has been more and more confronted with criticism coming from the national sphere, including the judiciary. This culminated in constitutional court judgments declaring a particular ECtHR judgment non-executable, for reasons of constitutional law. Existing scholarship does not differentiate enough between cases of mere political unwillingness to

42 Lize R. Glas, "The European Court of Human Rights supervising the execution of its judgments," *Netherlands Quarterly of Human Rights* 37, no. 3 (2019): 228.

43 Elisabeth Lambert Abdelgawad, "Dialogue and the Implementation of the European Court of Human Rights' Judgments," *Netherlands Quarterly of Human Rights* 34, no. 4 (2016): 340–363.

44 David Kosař, *Domestic judicial treatment of European Court of Human Rights case law: beyond compliance* (London-New York: Routledge, 2020), 48.

execute an ECtHR judgment and cases where execution is blocked for legal reasons (mainly of a constitutional law nature)[45].

The specificity of the Strasbourg judgments is versatile and concerns many different areas of social life that it is not possible to effectively adapt legal norms and apply their interpretation by one entity of public authority. It can be said with full conviction that the execution of judgments is a continuous process and will last as long as the ECtHR is functioning; surely it will not end with the completion of the most difficult cases. It is important for the national system for the protection of human rights to be very efficient in the context of the protection of human rights. If, however, there is a violation of the norms of international agreements, the state must be effective in meeting obligations such as the judgments of the ECtHR. There are two aspects involved in fulfilling obligations under international law arising from the European Convention on Human Rights. The first one is the introduction of appropriate standards of respect for the rights and freedoms enshrined in the treaty, and the second one is the obligation to enforce judgments of the ECtHR in the case of a stated infringement of the Convention. Both obligations must be carried out simultaneously by the state – which, as a party to the Convention, respects its provisions and fulfills the required international legal obligations[46].

During the last decades, States no longer tend to invoke the principle of non-interference when it comes to the scrutiny of their human rights record by peer review, reporting mechanisms or judicial procedures. Nevertheless, compliance with the recommendations or judgments of international human rights fora is a persistent concern in a number of States. Infringement proceedings were introduced in the Council of Europe only with Protocol 14 to the ECHR. While for quite a long time dormant, the procedure was invoked against Azerbaijan[47]. On December 5, 2017, the Council of Europe's Committee of Ministers issued an interim resolution concerning

45 Martin Breuer, ed., *Principled Resistance to ECtHR Judgments - A New Paradigm?* (Berlin, Heidelberg: Springer, 2019).

46 Katarzyna Grzelak, "The role of the Polish government in execution of the judgements of the European Court of Human Rights," *Espaço Jurídico* 20, no. 2 (2019): 203.

47 Adrienne Komanović, "Infringement proceedings against Azerbaijan: judicialisation of the execution of the judgments of the European Court of Human Rights," *Anuario da Facultade de Dereito da Universidade da Coruña* 22 (2019): 138.

the European Court of Human Rights case of *Ilgar Mammadov v. Azerbaijan*[48]. In this resolution, the Committee, for the first time ever, launched infringement proceedings against a member state of the European Convention of Human Rights[49].

The reasons for poor execution of judgments in most Central and Eastern European states from the perspective of (il)liberalism, trying to draw out lessons concerning the understanding of current failures of those states to comply with the European Convention on Human Rights[50]. Some common reasons for non-execution of judgments can be identified across Central and Eastern European states. Those reasons can be *inter alia* located in legal formalisms, authoritarian judicial cultures and lack of self-criticisms of judicial structures. Central and Eastern European states could overcome the hurdles posed by the remains of socialist legal culture in a manner that will live up to their obligations concerning execution of judgments of the ECtHR[51].

For example, the Serbian authorities in charge of enacting legislation have not paid enough attention to the supervision of the execution of the ECtHR's judgments. The competence concerning the communication with the Committee of Ministers in the procedure of supervision of the execution of European Court judgments and submission of action plans and action reports is not regulated by domestic law. The active approach of the Government Agent of the Republic of Serbia has prevented the negative consequences that this legal gap may have on the fulfillment of international obligations of the Republic of Serbia[52].

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48 Application No. 15172/13, judgment of 22 May 2014.

49 Julie-Enni Astrow, "Interim Resolution CM/RESDH(2017)429: Execution of the Judgment of the European Court of Human Rights Ilgar Mammadov Against Azerbaijan (Council of Eur. Comm. of Ministers)," *International Legal Materials* 57, no. 2 (2018): 358.

50 Jerzy Jaskiernia, *Uwarunkowania efektywności prawa do dobrej administracji jako standardu europejskiego* (Kielce: Wydawnictwo Uniwersytetu Jana Kochanowskiego, 2020), 140.

51 Jernej Letnar, "A Glass Half Empty? Execution of Judgments of the European Court of Human Rights in Central and Eastern Europe," *Baltic Yearbook of International Law* 15, no. 1 (2016): 299.

52 Miloš Radovanović, "Submission of an action plan and an action report in the procedure for the execution of judgments of the European Court of Human Rights," *Zbornik radova Pravnog fakulteta u Nišu* 57(78) (2018): 379.

The developing approach of the ECtHR to the indication of specific non-monetary individual or general remedies and the impact of this practice on the execution of its judgments has been analyzed. The Court's remedial practice is fluid and pragmatic, with differences of perspective between Judges. The factors that influence judicial decision-making, and the implications of the Court's remedial approach both for its 'horizontal' relationship with the Committee of Ministers and its 'vertical' relationship with states were examined. It brings about a conclusion that the door is open to continued evolution, if not revolution, in the Court's remedial practice[53].

There are analysis how civil society has participated in the execution process to date, giving specific examples of where civil society has been more actively engaged and the benefits that their participation brings to the process[54].

4. Council of Europe's approach to solving the problems with the implementation of the ECtHR's judgments

The implementation of the ECtHR judgments is considered as an important issue in the activity of the Council of Europe[55].

The Committee of Ministers' in its 2019 Annual report[56], published on 1 April 2020, stresses the positive role of the ten years reforms of the system based on the European Convention on Human Rights undertaken in the framework of the "Interlaken process" started in 2010. However, it also shows that a considerable number of cases are still outstanding and that many new and old challenges lie ahead: problems of capacity of domestic

53 Alice Donald and Anne-Katrin Speeck, "The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments," *Human Rights Law Review* 19, no. 1 (2019): 83.

54 Lucja Miara and Victoria Prais, "The role of civil society in the execution of judgments of the European Court of Human Rights," *European Human Rights Law Review* 12, no. 5 (2012): 528.

55 *Supervision of execution of judgments and decisions of the European Court of Human Rights 2018. 12th Annual Report of the Committee of Ministers* (Strasbourg: Council of Europe Committee of Ministers, 2019), 9.

56 *Supervision of execution of judgments and decisions of the European Court of Human Rights 2019. 13th Annual Report of the Committee of Ministers* (Strasbourg: Council of Europe Committee of Ministers, 2020), 7.

actors, problems of resources, insufficient political will or even clear disagreement with a judgment.

The ECtHR's case law is an integral part of the action taken by the Council of Europe to protect democracy, the rule of law and human rights. It is now at the heart of European legal culture in the field of human rights and civil liberties[57]. The *acquis* of the Assembly, which has always highlighted the obligation for member States to implement the Court's judgments, is considerable in this field. Even if, from the standpoint of the Convention, this matter is above all the responsibility of the Committee of Ministers, the Parliamentary Assembly has shown that the monitoring it carries out in this field and the political influence it exerts on such occasions could provide greater support for the action of the Committee of Ministers and therefore present an added value. In particular, the Assembly has systematically called on national parliaments to be more proactive in the process of implementing the Court's judgments[58].

The Parliamentary Assembly urged in 2017 the Committee of Ministers "to use all available means to fulfill its tasks under Article 46.2 of the Convention", to continue to strengthen synergies, within the Council of Europe, between all the stakeholders concerned, to give renewed consideration to the use of the procedures provided for in Article 46, paragraphs 3 to 5, of the Convention, to co-operate more closely with civil society and guarantee greater transparency in supervising the implementation of judgments[59]. In February 2018 the Committee of Ministers submitted a reply to this recommendation, in which it referred to a number of measures taken to improve supervision of the Court's judgments' implementation in the context of the Brussels Declaration of 2015 and to the increase in the number of closed cases[60]. It stressed that the resources of the Department for the Execution of Judgments had increased significantly in the biennium 2016–2017. Moreover, it had started devoting part of its Human Rights DH meetings (which focus on the execution of the Court's judgments) to

57 Jerzy Jaskiernia, *Funkcje Konstytucji RP w dobie integracji europejskiej i radykalnych przemian politycznych* (Toruń: Wydawnictwo Adam Marszałek, 2020), 308–309.

58 PACE, The implementation of judgments of the European Court of Human Rights, Explanatory memorandum by Mr Eftastiou, rapporteur, Doc. 15123, 15 July 2020.

59 PACE Rec. 2110 (2017).

60 PACE, Doc. 14502, § 2, 5 and 7.

thematic debates to allow the representatives of member States to discuss their practices in executing judgments in specific areas (for example a debate on conditions of detention took place during the 1310th meeting in March 2018)[61].

In the contribution it prepared in response to Recommendation 2110 (2017) of the Assembly[62], the European Commission for Democracy through Law (Venice Commission) stated that it could "usefully contribute to a better execution of the ECtHR's judgments", as its role consisted, mainly, in drawing the national authorities' attention to the incompatibility of a legal act or of a practice with the Convention. This statement was not a surprise since on several occasions, the Venice Commission had issued in the past opinions (sometimes in co-operation with other Council of Europe departments or the Bureau of Democratic Institutions and Human Rights of the OSCE) on general measures adopted by the authorities with a view to executing the Court's judgments (for example, in the context of the execution of the following judgments: *Vyerentsov v. Ukraine*, concerning two draft laws on the guarantees for freedom of peaceful assembly[63], *Oleksandr Volkov v. Ukraine* concerning a draft law amending the law on the judicial system and the status of judges[64] or *Bayatyan v. Armenia* concerning a draft law amending the law on alternative national service[65]. The Venice Commission also took a stance on the amendment to the Russian Federal Constitutional Law adopted by the State Duma on 4 December 2015 and approved by the Council of the Federation on 9 December 2015[66]. According to this

61 Committee of Ministers, Rapporteur Group on Human Rights, GR-H(2017)8-final.

62 Venice Commission, CDL-AD(2017)017, Comments on Recommendation 2110(2017) of the Parliamentary Assembly of the Council of Europe on the Implementation of the judgments of the European Court of Human Rights with a view to the Committee of Ministers reply, adopted at its 112th plenary session (Venice, 6–7 October 2017), also appeared to the Committee of Ministers' reply to Recommendation 2110 (2017).

63 Application No. 20372/11, judgment of 14 April 2013. See opinion of the Venice Commission CDL-AD(2016)030.

64 Application No. 21722/11, judgment of 9 January 2013. See opinion of the Venice Commission CDL-AD(2015)0018.

65 Application No. 23459, judgment of 7 July 2011 (grand Chamber). See opinion of the Venice Commission CDL-AD(2011)051.

66 The amendment was signed by the President on 14 December 2015 and came into force on 15 December 2015.

law, the Constitutional Court has authority to declare the decisions of international courts (including the ECtHR) "non-executable" on the grounds that they are incompatible with the "foundations of the constitutional order of the Russian Federation" and "with the human rights system established by the Constitution of the Russian Federation". In its final opinion on this amendment, the Venice Commission pointed out that the execution of the ECtHR's judgments was an unequivocal, imperative legal obligation, whose respect was vital for preserving and fostering the community of principles and values of the European continent[67]. In its 2002 opinion on the implementation of the ECtHR's judgments, it had underlined the fact that the execution of judgments and its monitoring was not only a legal but also a political problem[68]. The Venice Commission's opinions prove to be a useful tool and method to ensure better implementation of the Court's judgments[69].

According to the 2019 Annual Report of the Committee of Ministers, 5 231 judgments were pending (on 31 December 2019) before the Committee of Ministers, at different stages of execution, in comparison with 6 151 at the end of 2018. The 10 following countries had the largest number of pending cases: Russian Federation (1 663, in comparison with 1 585 in 2018), Turkey (689, in comparison with 1 237 in 2018), Ukraine (591, in comparison with 923 in 2018), Romania (284, in comparison with 309 in 2018), Hungary (266, in comparison with 252 in 2018), Italy (198, in comparison with 245 in 2018), Greece (195, in comparison with 238 in 2018), Azerbaijan (189, in comparison with 186 in 2018), the Republic of Moldova (173, likewise in 2018) and Bulgaria (170, in comparison with 208 in 2018). There are fewer than one hundred cases concerning the other member States (Poland, which had 100 cases at the end of 2018, had 98 of them at the end of 2019). The overall number of judgments pending before the Committee of Ministers has considerably fallen in comparison with the end of 2016 (9 941)[70].

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67 CDL-AD(2016)016, § 38.

68 CDL-AD(2002)34, § 50.

69 Wolfgang Hoffmann-Riem, "The Venice Commission of the Council of Europe – Standards and Impact," *European Journal of International Law* 25, no. 2 (2014): 581.

70 PACE, Doc. 15123 (2020), § 12.

The issue is not only a quantitative one but also a qualitative one. Therefore, it is interesting to refer to the number of applications pending before the Court, whose statistics show slightly different figures from those of the Committee of Ministers. On 29 February 2020, of the 61 100 applications pending before the Court, more than two thirds came from the four following member States, namely the Russian Federation (25,2%), Turkey (15.7%), Ukraine (15.1%) and Romania (13%). They were followed by Italy (5.1%), Azerbaijan (3.3%), Bosnia and Herzegovina (2.7%), Armenia (2.7%), Serbia (2.1%) and Poland (2.1%). These statistics, which concern applications on which the Court has not yet ruled, often illustrate the extent of structural problems at the national level – problems which should have been resolved in the context of the execution of the Court's earlier judgments. This is particularly the case of the Russian Federation, Turkey, Ukraine and Romania, which come up high in both rankings. While Bosnia and Herzegovina, Armenia, Serbia and Poland are within the 10 countries with the highest percentage of cases pending before the Court, they rank respectively 16th (39 cases), 17th (38 cases), 13th (57 cases) and 11th (98 cases) in the statistics of the Committee of Ministers. While Hungary, Greece, the Republic of Moldova and Bulgaria are not among the countries having the highest number of cases pending before the Court, they still have many 'leading' cases pending before the Committee of Ministers[71].

With regard to the main themes under enhanced supervision, at the end of 2019, over half the cases related to five major problems: actions of security forces (17%), the lawfulness of detention on remand and related issues (10%), specific situations linked to violations of the right to life and ill-treatment (9%) conditions of detention and lack of medical care (8%), and excessive length of judicial proceedings (8%). These are followed by other interferences with property rights (7%), non-execution of domestic judicial decisions (5%), lawfulness of expulsion or extradition (4%), violations of freedom of assembly and association (4%) and of freedom of expression (4%). By the end of 2019 the share of cases concerning excessive length of judicial proceedings had decreased to 8% (in comparison with 22% in 2011), which may be due to the introduction of effective remedies at the national level. Together, these themes cover 76% of the cases pending

[71] PACE, Doc. 15123 (2020), § 13.

before the Committee of Ministers under enhanced supervision. For 81% of these cases, the breakdown by country is as follows: Russian Federation (19%), Ukraine (17%), Turkey (11%), Romania (8%), Italy (6%), Bulgaria (6%), Azerbaijan (5%), Poland (3%), Greece (3%) and Hungary (3%)[72].

The 2019 Annual Report shows a significant increase in the involvement of civil society in the process of implementation of the Court's judgments, in particular through the increased number of submissions presented to the Committee of Ministers under Rule 9.2. of its *Rules for the supervision of the execution of judgments and the terms of friendly settlements* (133 in 2019, compared to 64 in 2018 and 79 in 2017)[73].

The 2019 Annual Report also shows that the notion of "shared responsibility" for the implementation of the Convention norms works well with an increased involvement in the process before the Committee of Ministers of national actors, including ombudsman institutions and civil society, and at the Council of Europe, of other bodies, including the Commissioner for Human Rights, the CPT, the Venice Commission, the European Commission against Racism and Intolerance (ECRI), the Council of Europe Development Bank (which was one of the founders of the HRTF) and, last but not least, the Assembly itself. The case of *Zorica Jovanović v. Serbia*[74] concerning the disappearance of new-born babies from maternity wards, is a good example in this context: following good cooperation between the Serbian authorities and the Council of Europe, legislation setting up an investigatory mechanism to establish the fate of those babies was adopted at the beginning of 2020[75].

In their 2020 Annual Report[76] the Committee of Ministers have stated that despite the difficulties linked to the pandemic COVID-19, 2020 saw a significant reinforcement of the execution process, through a record number of communications from civil society organizations and national

72 PACE, Doc. 15123 (2020), § 62.

73 PACE, Doc. 15123 (2020), § 63.

74 Application No. 21794/08. Judgment of 26 March 2013. See decision adopted at the 1369th Meeting (DH), CM/Del?Dec(2020)1369/H460–30, 5 March 2020.

75 PACE, Doc. 15123 (2020), § 63.

76 *Supervision of execution of judgments and decisions of the European Court of Human Rights 2020. 14th Annual Report of the Committee of Ministers* (Strasbourg: Council of Europe Committee of Ministers, 2021).

human rights institutions and the first ever submission to the Committee of Ministers of a Rule 9 communication by the Council of Europe Commissioner for Human Rights, swiftly followed by four more. Notwithstanding, serious challenges continue to be raised in the context of the execution of many cases, in particular those concerning inter-state and other cases related to post-conflict situations and unresolved conflicts, "Article 18" judgments concerning abusive limitations of rights and freedoms and systemic/structural problems, such as ill-treatment or death caused by security forces and ineffective investigations, as well as non-Convention compliant detention conditions. In order to successfully cope with these challenges, member States' capacity for rapid, full and effective execution of the ECtHR's judgments needs to be strengthened and accompanied by further high-level political commitment as well as support from the Council of Europe. The number of judgments pending before the Committee reached 5,233, among the lowest counts since 2006. It follows the closure in 2020 of 983 cases (including 187 "leading" cases revealing notably structural or systemic problems), as a result of the adoption by respondent States of individual and a wide range of legislative and other general measures to execute the Court's judgments. Among the most significant cases which the Committee was able to close in 2020 were three cases regarding abusive limitations of the right to liberty and security in Azerbaijan (individual measures in *Ilgar Mammadov* and *Rasul Jafarov*), and a case concerning voting rights in local elections in Bosnia and Herzegovina (Baralija)[77].

As regards parliamentary involvement[78], more information has been obtained from 27 national delegations to the Assembly[79]. It follows that many national parliaments still lack permanent structures to monitor the implementation of the Court's judgments and the Convention's implementation in general. As regards the Assembly Secretariat's activities, the Parliamentary Project Support Division (PPSD) has organized a number of seminars for members of parliaments and their staff on the role of national parliaments in implementing the standards of the Convention.

77 Ibidem, 12.

78 Jerzy Jaskiernia, *Parliamentary Assembly of the Council of Europe* (Warsaw: University of Warsaw, Council of Europe Information Office, 2002), 89.

79 Information document AS/Jur(2019)85 of 8 November 2019.

A handbook on "National Parliaments as Guarantors of Human Rights in Europe" for parliamentarians was published in 2018 and is now available in 11 languages. The Assembly's role in monitoring the implementation of the Court's judgments has been emphasized in its recent PACE's resolution "The role and mission of the Parliamentary Assembly: main challenges for the future" of 10 April 2019[80].

The implementation of judgments of the ECtHR was a subject of PACE's resolution 2358 (2021) "The implementation of judgments of the European Court of Human Rights"[81]. Although primary responsibility for supervision of the implementation of judgments of the European Court of Human Rights lies with the Committee of Ministers, the Parliamentary Assembly has significantly contributed to this process. The Assembly recalled in particular its Resolutions 2178 (2017), 2075 (2015), 1787 (2011), 1516 (2006) and Recommendations 2110 (2017) and 2079 (2015) on the "Implementation of judgments of the European Court of Human Rights", in which it promoted national parliaments' involvement in this process. It also recalled that the implementation of a Court judgment, required by Article 46.2 of the Convention, may relate not only to the payment of just satisfaction awarded by the Court, but also to the adoption of other individual measures (aimed at *restitutio in integrum* for applicants) and/or general measures (aimed at preventing fresh violations of the Convention).

Since last examining this question in 2017, the Assembly noted further progress in the implementation of Court judgments, notably a constant reduction in the number of judgments pending before the Committee of Ministers (5 231 at the end of 2019) and the adoption of individual and general measures in many complex cases, which are still pending. This shows the efficiency of the reform of the Convention system started in 2010 after the high-level conference in Interlaken and the impact of Protocol No. 14 to the Convention, which entered into force in June 2010, in response to the extremely critical situation of the Court and over 10 000 judgments pending before the Committee of Ministers at that time. PACE welcomed

80 PACE Res. 2277(2019).

81 *Assembly debate* on 26 January 2021 (3rd Sitting) (see Doc. 15123 and addendum, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Constantinos Efstathiou). *Text adopted by the Assembly* on 26 January 2021 (3rd Sitting).

the measures taken by the Committee of Ministers to make its supervision of the implementation of Court judgments more efficient and the synergies that have been developed in this context within the Council of Europe as well as between its bodies and national authorities[82].

However, the Assembly remained deeply concerned over the number of cases revealing structural problems pending before the Committee of Ministers for more than five years. The number of such cases has only slightly decreased over the last three years. The Assembly also noted that the Russian Federation (including illegally annexed Crimea and temporarily occupied territories of Donetsk and Luhansk regions), Turkey, Ukraine, Romania, Hungary, Italy, Greece, the Republic of Moldova, Azerbaijan and Bulgaria have the highest number of non-implemented Court judgments and still face serious structural or complex problems, some of which have not been resolved for over ten years. This might be due to deeply rooted problems such as persistent prejudice against certain groups in society, inadequate management at the national level, lack of necessary resources or political will or even open disagreement with the Court's judgment. PACE was particularly concerned with the increasing legal and political difficulties surrounding the implementation of the Court's judgments and notes that any national legislative or administrative measure cannot add further obstacles to this process. The Assembly stressed the inadmissibility of member States to legitimize the possibility of non-implementation of the Court's decisions. The Assembly further expressed its concern for the obstacles to the implementation of the Court's judgments delivered in inter-States cases or showing inter-State features. It called on all States Parties to the Convention involved in the process of implementation of such judgments not to hinder this process and to fully co-operate with the Committee of Ministers. PACE once again condemned the delays in implementing the Court's judgments and recalls that the legal obligation for the States Parties to the Convention to implement the Court's judgments is binding on all branches of State authority and cannot be avoided through the invocation of technical problems or obstacles which are due, in particular, to the lack of political will, lack of resources or changes in national legislation, including the Constitution[83].

82 PACE Res. 2358 (2021), § 3.

83 PACE Res. 2358 (2021), § 4–7.

Thus, 70 years after the signing of the Convention, the Parliamentary Assembly invited all States Parties to the Convention to reaffirm their primordial commitment to the protection and promotion of human rights and fundamental freedoms, in particular though full, effective and swift implementation of the judgments and the terms of friendly settlements handed down by the Court. For this purpose, it strongly called on States Parties to the Convention to: 1) co-operate, to that end, with the Committee of Ministers, the Court and the Department for the Execution of Judgments of the European Court of Human Rights as well as with other relevant Council of Europe bodies; 2) submit action plans, action reports and information on the payment of just satisfaction to the Committee of Ministers in a timely manner; and to provide replies to submissions made by applicants, national institutions for the promotion and protection of human rights (NHRIs) and NGOs under Rule 9 of the Rules of the Committee of Ministers' for the supervision of the execution of judgments and of the terms of friendly settlements; 3) provide for effective domestic remedies to address violations of the Convention; 4) pay particular attention to cases raising structural or complex problems identified by the Court or the Committee of Ministers, especially those pending for over ten years; 5) not to adopt laws or other measures that would hinder the process of implementation of the Court's judgments; 6) take into account the relevant opinions of the European Commission for Democracy through Law (Venice Commission) when taking measures aimed at implementing the Court's judgments; 7) provide sufficient resources to relevant Council of Europe bodies and national stakeholders responsible for implementing Court judgments, including government agents' offices, and encourage them to co-ordinate their work in this area; 8) strengthen the role of civil society and NHRIs in the process of implementing the Court's judgments; 9) condemn statements discrediting the Court's authority and attacks against government agents working for the implementation of the Court' and NGOs working for the promotion and the protection of human rights[84].

As the implementation of Court's judgments still presents many challenges, the Parliamentary Assembly recommended that the Committee of Ministers: 1) continue to use all available means (including interim

[84] PACE Res. 2358 (2021), § 8.

resolutions) to fulfill its tasks arising under Article 46.2 of the Convention; 2) use once again the procedures provided for in Article 46, paragraphs 3 to 5, of the Convention, in the event of implementation of a judgment encountering strong resistance from the respondent State; however, this should continue to be done sparingly and in very exceptional circumstances; 3) give priority to leading cases pending for over five years; 4) consider transferring leading cases examined under standard procedure and pending for over ten years to enhanced supervision procedure; 5) continue to take measures aimed at ensuring greater transparency of the process of supervision of the implementation of Court judgments and a greater role for applicants, civil society and national institutions for the protection and promotion of human rights in this process; 6) continue to organize thematic debates on the execution of the Court's judgments during its meetings and consider organizing special debates on leading cases pending for over ten years; 7) continue to increase the resources of the Department for the Execution of Judgments of the ECtHR; 8) continue to step up synergies, within the Council of Europe, between all the stakeholders concerned, in particular the Court and its Registry, the Parliamentary Assembly, the Secretary General, the Commissioner for Human Rights, the Steering Committee for Human Rights (CDDH), the European Commission for Democracy through Law (Venice Commission), the European Committee for the Prevention of Torture (CPT) and the Human Rights Trust Fund (HRTF); 9) regularly inform the Assembly about judgments of the Court whose implementation reveals complex or structural problems and requires legislative action; 10) rapidly finalize its evaluation of the reform of the Convention system following the 2010 Interlaken high-level conference[85].

The analyzes undertaken by the Committee of Ministers and the Parliamentary Assembly on the implementation of the judgments of the European Court of Human Rights are characterized by a comprehensive approach. On the one hand, they focus on legal problems that often hinder and delay the implementation of judgments, and on the other hand, they point to political factors in individual countries that are the source of delays. It is particularly important that these analyzes are not limited to the role of the Committee of Ministers in the control of the enforcement of ECtHR

[85] PACE Rec. 2193 (2021), § 2.

judgments, although the role of this body in the ECHR's control system is crucial. In the last decade, the role of the Parliamentary Assembly, which systematically analyzes the state of execution of the judgments of the Tribunal, has exemplified significantly. Other organs of the Council of Europe system (e.g. the Commissioner for Human Rights, the Venice Commission, CPT, ECRI, HRTF) and civil society institutions also play an increasingly important role in this process. This comprehensive approach is already starting to bring tangible results. However, it would be hard to suggest now that the problem of the enforcement of ECtHR's judgments has already been resolved. The long list of judgments pending execution is a signal that this problem remains an important area of activity for the Council of Europe, which reduces its effectiveness and undoubtedly deserves attention and remedial action.

5. Final comment

In the light of this analysis, the initial research hypothesis was verified positive, indicating that the problem of the implementation of the judgments of the European Court of Human Rights cannot be narrowed down to the key role played by the Committee of Ministers of the Council of Europe in the control mechanism of the European Convention on Human Rights of the Council of Europe. The role of other CoE's bodies in this process should be increased, in particular: the Parliamentary Assembly, the Commissioner for Human Rights, the European Commission for Democracy through Law (Venice Commission), the Committee Against Torture (CPT), European Commission against Racism and Intolerance (ECRI) and the Human Rights Trust Fund (HRTF). Also activities of civil society institutions should be extended in this area as well.

In the last decade, the interest of the Parliamentary Assembly of the Council of Europe in this matter has clearly increased. This trend should be seen as a positive contribution. However, it should be postulated that parliamentarians sitting in the Parliamentary Assembly of the Council of Europe should be more active in this regard in their countries. They have instruments of control on the executive power in the country, which could be used to increase the effectiveness of the execution of the judgments of the European Court of Human Rights.

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Critical evaluation of new Council of Europe guidelines concerning digital courts

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Abstract: Digitalisation of courts plays an increasingly important role in dispute resolution. It has the ability to improve access to justice by facilitating faster and less costly access to courts, thereby making dispute resolution more effective and efficient. However, wide use of digital courts also has the potential to restrict access to justice. Attention needs to be given to issues of authentication and identification of the parties, digital divide, cybersecurity and personal data protection. This paper concerns recent guidelines of the Council of Europe that aim to fully address these issues and assist member States in ensuring that implemented digital techniques in the courts do not undermine human dignity, human rights and fundamental freedoms. The author answers and critically evaluates the specific questions and doubts relating to the content of the guidelines. The author's recommendations can be taken into consideration by the Council of Europe in future updates of the guidelines.

1. Introduction

Digitalisation of courts plays an increasingly important role in dispute resolution. It has the ability to improve access to justice by facilitating faster and less costly access to courts, thereby making dispute resolution more effective and efficient[1]. The concept follows from the ongoing transformation of na-

[1] Alan Uzelac and Cornelis Hendrik (Remco) van Rhee, "The Metamorphoses of Civil Justice and Civil Procedure: The Challenges of New Paradigms – Unity and Diversity," in

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tional judicial systems allowing remote access for the parties[2]. It is mainly designed to facilitate electronic communications with the courts[3].

Accelerating development of cyber justice in the European countries is due to the COVID-19 pandemic crisis. It has forced the implementation of new forms of communication in legal proceedings[4]. In Lithuania online filing, online payment of court fees and digital cases materials with online access are available in all civil and administrative cases using the centralised e-justice system LITEKO. In France it is possible to initiate administrative and commercial proceedings online on dedicated portals and to submit court documents in an electronic way[5]. Ireland has an online court platform for certain small claims[6]. In Poland the procedure for payment orders is fully electronic[7]. The claim is submitted through an individual

Transformation of Civil Justice, Ius Gentium: Comparative Perspectives on Law and Justice, ed. Alan Uzelac and Cornelis Hendrik (Remco) van Rhee (Cham: Springer, 2018); See further Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge: University Press, 2009); In Polish literature: Kinga Flaga-Gieruszyńska, "Nowe oblicza prawa i informacji o prawie w dobie informatyzacji," in *Informatyzacja postępowania cywilnego. Teoria i praktyka*, ed. Kinga Flaga-Gieruszyńska, Jacek Gołaczyński, and Dariusz Szostek (Warszawa: C.H. Beck, 2016), 1.

2 Lack of significant improvement in the functioning of the common courts is caused by incorrect and short-sighted definition of the objectives of the application of modern information technologies in the justice systems – see Jacek Gołaczyński, "e-Sąd przyszłości," *Monitor Prawniczy* 2 (2019): 96.

3 In this regard, UNCITRAL Technical Notes on Online Dispute Resolution, New York 2017, speaks about "mechanism for resolving disputes through the use of electronic communications and other information and communication technology".

4 Beata Gessel-Kalinowska vel Kalisz, "Wyrok arbitrażowy w czasie pandemii – dopuszczalność współczesnych form elektronicznych," *Przegląd Prawa Handlowego* 7 (2020): 24–31.

5 Online Dispute Resolution and Compliance with the Right to a Fair Trial and the Right to an Effective Remedy (Article 6 and 13 of the European Convention of Human Rights). Technical Study on Online Dispute Resolution Mechanisms. Prepared by Prof. Julia Hörnle, CCLS, Queen Mary University of London, Matthew Hewitson (South Africa) and Illia Chernohorenko (Ukraine), Strasbourg, 1 August 2018, CDCJ(2018)5 (hereinafter "Hörnle's Report"), p. 23.

6 "Hörnle's Report," 28–30.

7 "Hörnle's Report," 35–36. Since 1.1.2010, cases in the electronic proceedings by writ of payment have been examined by one e-court for the whole of Poland (www.e-sad.gov.pl). A plaintiff wishing to bring a case by writ of payment in the electronic proceedings by writ of payment must register on the website provided, download an ineligible certificate

account created on a dedicated IT platform. All acts and documents are available online. Belgium introduced the Central Solvency Register ('RegSol'), a digital platform enabling creditors, authorised agents and interested parties to commence, access or follow up pending insolvency files administered by the Business court[8]. It is expected that the process of courts digitalisation will continue after the recovery phase[9].

However, wide use of digital courts also has the potential to restrict access to justice by setting up technological barriers to all those who do not have the capacity to use technology. Moreover, attention needs to be given to issues of authentication of data and identification of the parties to the legal dispute, the problem of digital divide, cybersecurity and personal data protection[10].

To ensure that disputes are resolved fairly, appropriate and adequate international regulations are needed. In Europe such regulations have to follow the judicial guarantees enshrined in the European Convention on Human Rights (hereinafter "the Convention")[11], especially those pro-

for verification of the electronic signature, and then send the statement of claim, i.e. a form completed on the Internet. See Gołaczyński, "e-Sąd przyszłości," 96.

8 "Hörnle's Report," 16.

9 In Polish literature see further: Sławomir Cieślak, "Elektroniczne czynności sądowe – perspektywy rozwoju," in *Informatyzacja postępowania cywilnego. Teoria i praktyka*, ed. Kinga Flaga-Gieruszyńska, Jacek Gołaczyński, and Dariusz Szostek (Warszawa: C.H. Beck, 2016), 13–28; Jan Gąsiorowski, "Ograniczenia, możliwości i funkcjonowanie sądownictwa powszechnego i stałych sądów polubownych w sprawach cywilnych podczas trwania epidemii w Polsce," *ADR Arbitraż i Mediacja* 2 (2020); Jacek Gołaczyński and Dariusz Szostek, *Informatyzacja postępowania cywilnego. Komentarz* (Warszawa: C.H. Beck, 2016); Jacek Gołaczyński and Anna Zalesińska, "Kierunki informatyzacji postępowania cywilnego po nowelizacji kodeksu postępowania cywilnego z 4.7.2019 r.," *Monitor Prawniczy* 7 (2020); Jacek Gołaczyński and Anna Zalesińska, "Nowe technologie w sądach na przykładzie wideokonferencji i składania pism procesowych i doręczeń elektronicznych w dobie pandemii COVID-19," *Monitor Prawniczy* 7 (2020).

10 Maurizio Arcari, "New Technologies in International (and European) Law – Contemporary Challenges and Returning Issues," in *Use and Misuse of New Technologies Contemporary Challenges in International and European Law*, ed. Elena Carpanelli and Nicole Lazzerini (Cham: Springer, 2019), 357.

11 The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953, https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c, accessed September 15, 2021.

vided in Articles 6 and 13 of the Convention[12]. Such regulations recently take the form of guidelines prepared by the European Committee on Legal Co-operation (CDCJ). The final guidelines were finally adopted by the Committee of Ministers on 16 June 2021[13].

In this paper I'm going to answer the following questions:

1) What is the purpose of the guidelines?
2) Is the use of the term "ODR" in the title and the content of the guidelines correct?
3) What are the fundamental principles of the guidelines?
4) Do the guidelines sufficiently address the problem of the use of artificial intelligence algorithms in judicial systems?

The recommendations can be taken into consideration by the Council of Europe in future updates of the guidelines.

2. The purpose and character of the guidelines in view of the ECHR Convention

The guidelines largely follow the structure of principles developed in the jurisprudence of the European Court of Human Rights under Articles 6 and 13 of the Convention[14]. The choice of problems addressed in the guidelines are in line with the principle that the provisions of the Convention must

[12] Article 6 (1) of the Convention reads: "In the determination of his civil rights and obligations (…) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.", Article 13 of the ECHR reads: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[13] Available at https://www.coe.int/en/web/cdcj/online-dispute-resolution-mechanisms, accessed September 15, 2021.

[14] Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), updated on 31 August 2019, Council of Europe/European Court of Human Rights, 2019. See also Dovydas Vitkauskas and Grigoriy Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights: A handbook for legal practitioners* (Strasbourg: Council of Europe Press, 2017), available from: https://rm.coe.int/

be interpreted in the light of present-day conditions, while taking into account the prevalent economic and social conditions[15]. Currently, accelerating digitalisation of courts have crucial importance for the people's access to the justice.

In the guidelines we see baseline measures that governments, legislators, courts, developers and manufacturers, as well as service providers should follow in order to ensure that implemented digital techniques do not undermine human dignity, human rights and fundamental freedoms. The guidelines aim to assist member States in ensuring that such techniques are compatible with Articles 6 and 13 of the Convention without compromising the benefits.

It must be underlined that the guidelines represent not a "hard" but a "soft" law instrument. Its purpose is not to establish binding legal standards. It serves as a practical "toolbox" for member states to ensure that the practice of their digital courts comply with the requirements of Articles 6 and 13 of the Convention. The courts may assume that fulfilling the requirements set out in the guidelines ensures alignment with the principles developed in the jurisprudence of the European Court of Human Rights[16]. What is most important the guidelines are not only a declaration of principles but aspire to give practical advice and guidance. They address, in particular, key principles of a fair trial and effective remedy as interpreted by the European Court of Human Rights in its case-law.

To sum up the guidelines represent a modern approach to the regulation of digital modern tools in judicial systems. The Council of Europe offers a flexible legal instrument for the courts. The instrument is optional but gives the perspective of human rights and real assistance for the members states. No less important is that the guidelines are based on collaborative work and experience following from various states. It follows good practices and lessons from more experienced member states. Both the successes

protecting-the-right-to-a-fair-trial-under-the-european-convention-on-/168075a4dd, accessed September 15, 2021.

15 Marckx v. Belgium, 13 June 1979, §41, Series A no. 31; Tyrer v. the United Kingdom, 25 April 1978, §31, Series A no. 26.

16 Bernadette Rainey, Elizabeth Wicks, and Claire Ovey, in *Jacobs, White and Ovey: the European Convention on Human Rights* (Oxford: Oxford University Press, 2017).

and failures of particular digital court implementation were taken into consideration during the preparatory works.

3. Problematic use of the term "ODR" in the title and content of the guidelines

The guidelines use the term of "ODR" (Online Dispute Resolution) both in their title and the content. In my opinion this can be misleading for the users, especially judges. ODR is frequently understood as the electronic variant of the alternative dispute resolution (ADR) solutions, typically organized outside the court or not court-related[17]. An example is the unsuccessful and rarely used EU Online Dispute Resolution Platform[18]. The term "ODR" first appeared in the late 1990s and has developed over two decades in line with the expansion of the Internet and, particularly, online shopping and other transactions[19]. ODR was and is still widely used as a synonym of electronic alternative dispute resolution (eADR)[20]. But in opposition to the ADR tools, the guidelines analyzed in this paper are intended to cover use of new technologies in existing in-court proceedings conducted in front of the common

17 Julia Hörnle, "Encouraging Online Alternative Dispute Resolution (ADR) in the EU and Beyond," *European Law Review* 38 (2) (2013): 187–208; Maxime Hanriot, "Online dispute resolution (ODR) as a solution to cross border consumer disputes: the enforcement of outcomes," *McGill journal of dispute resolution* 2 (2015): 1–22.

18 See Regulation No. 524/2013 of the European Parliament And of the Council, of 21 May 2013 concerning the "out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the Union and a trader established in the Union".

19 In this respect, UNCITRAL Technical Notes on Online Dispute Resolution, New York 2017, define ODR as a "mechanism for resolving disputes through the use of electronic communications and other information and communication technology". See UNCITRAL Working Group III (Online dispute resolution) Thirty-third session, New York, 2016, Online dispute resolution for cross-border electronic commerce transactions, A/CN.9/WG.III/WP.140, http://www.uncitral.org/uncitral/en/commission/working_groups/3Online_Dispute_Resolution.html, accessed September 15, 2021. On ODR as a special arbitration system, in the context of Internet domain registration, see: Andrzej Szumański, ed., *System prawa handlowego, vol. 8, Arbitraż handlowy* (Warszawa: C.H. Beck, 2015), 1138–1139.

20 Julia Hörnle, "Encouraging Online Alternative Dispute Resolution (ADR) in the EU and Beyond," 187–208; Alicja Mól, "Alternatywne rozwiązywanie sporów w Internecie," *Przegląd Prawa Handlowego* 10 (2005): 48–52; Karolina Mania, "ODR (Online Dispute Resolution) – podstawowe zagadnienia," *ADR Arbitraż i Mediacja* 1 (2010): 73.

(state) courts. They are not directly destined for the ADR proceedings, such as mediation or arbitration.

As already explained, the main focus of the guidelines is to deal with the question how the guarantees referring to court procedures contained in Articles 6 and 13 of the ECHR can be secured in traditional (common) courts when electronic mechanisms for resolving disputes are being used. Although the guidelines expressly allow member states to extend application of these guidelines to ADR proceedings, this may not be fully practical. The problem is that the guidelines were drafted and aligned to existing in-court proceedings and not to ADR proceedings. A number of particular guidelines are not relevant to ADR and need far reaching adjustments to be used within specific ADR mechanisms (e.g. guidelines no. 17 and 20).

The authors of explanatory memorandum to the guidelines took considerable effort to justify the use of ODR term but in my opinion this will not help in the proper application of the guidelines in court practice. The explanatory memorandum only supplements the guidelines and judges may not be fully aware of its existence and importance. There is a risk that judges will not even bother to read the guidelines assuming that it is not applicable to their practice.

This confusion is not solved by the definition of ODR contained in the guidelines. It explains that ODR concept refers to a technique or mechanism used for dispute resolution that is carried out remotely through the use of computers, including mobile devices, and the internet. Such definition is quite general and vague. The additional explanation can be found only in the explanatory memorandum. It provides that ODR is not in itself a form of dispute resolution but rather a technique or mechanism that is used in existing in-court proceedings. This is not a new type of proceedings and not an alternative to any such in-court proceedings. ODR only provides new ways of access to existing types of in-court proceedings[21]. Therefore, it does not create a special model or channel of proceedings. Such extended

[21] Pavel Loutocký, "Online dispute resolution and the latest development of UNCITRAL model law," in *Cofola International 2015: current challenges to resolution of international (cross-border) disputes: conference proceedings*, ed. Klára Drličková (Brno: Muni Press, 2015), 243–256.

explanation seems to be satisfactory but also underlines the unclearness of the definition contained in the main document (the guidelines themselves).

In fact the confusion around the term ODR resulted in the necessity to include even the definition of "the court" in the guidelines. It now covers all authorities with competences to adjudicate legal disputes using ODR in civil and administrative proceedings. We may notice that a direct reference is made to the concept of a "tribunal" in the meaning of Article 6 of the Convention[22]. In result the guidelines cover proceedings before bodies entrusted with decision making functions and only those proceedings which are of a judicial nature. This delimitation is important because other activities carried out by such bodies may be of non-judicial nature. This means the guidelines do not apply to non-contentious and unilateral procedures which do not involve opposing parties and which are available where there is no dispute over rights[23]. The problem is, however, that we can determine the scope of the guidelines only by combined interpretation of the ODR and court definitions, taking into consideration the elaborated wording of the explanatory memorandum. This confuses the scope of the guidelines. Use of the unclear ODR term caused additional problems, like the necessity for explaining what types of proceedings are not covered by the guidelines.

For the sake of consistency with the final wording of the guidelines, I will use the term of ODR in next sections of this paper in the meaning adopted in the guidelines.

4. Does the Council of Europe provide appropriate fundamental principles for the guidelines?

The typical structure of the Council of Europe guidelines includes list of instructions for the member states, with the most important key principles presented before the main body of the detailed guidelines. One should

[22] In its judgements the European Court of Human Rights set out the criteria for the court to be recognized as tribunal in the meaning of Article 6 of the ECHR and the guidelines try to reflect those criteria.

[23] See Alaverdyan v. Armenia, application no. 4523/04, decision on admissibility of 24 August 2010,§ 35; Cyprus v. Turkey [GC], no. 25781/94, ECHR 2001-IV).

consider if the final principles were properly chosen and fully address the main challenges resulting from digitalisation of the courts.

In the guidelines we see the following four key principles:

1) Member states should seek to ensure trust and confidence in ODR,
2) ODR should not create substantial barriers for access to justice,
3) Procedural rules which apply to court proceedings in general should apply to ODR, unless the specific nature of a particular ODR mechanism requires otherwise,
4) Parties to proceedings involving ODR should be identified using secure mechanisms.

I fully agree with the idea that the very first principle of the guidelines should address trust and confidence in ODR. Indeed, it is crucial for the proper use of digital technologies in the courts. It is still the case that court participants, including judges, have fears and doubts regarding use of new technologies, in particular if it contains artificial intelligence components. The crucial issue would be to explain how member states can build and enhance trust and confidence in ODR. The explanatory memorandum only provides that this can be done only by applying the same key principles of a fair trial and effective remedy as interpreted by the European Court of Human Rights in its case-law in the context of existing in-court proceedings[24]. These basic principles need to be further explained and transposed into the digital context. The particular challenges arising from the application of these principles in the ODR context need to be analysed and addressed. The guidelines are too vague in this regard.

In my opinion the main practical problems are related to legal ignorance and lack of information on effective ODR techniques[25]. Transparent explanation for the public of their design and use is needed. ODR is to be fast, uncomplicated, inexpensive and effective. Cost reduction, speed of solutions, no need for direct meeting of parties are undeniable advantages of this approach[26]. The following three main features of ODR need

24 Vitkauskas and Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights*.

25 Comp. Hörnle, *Cross-border Internet Dispute Resolution*.

26 Mania, "ODR (Online Dispute Resolution) – podstawowe zagadnienia," 20.

to be promoted: transparency, fairness and accountability[27]. Such simple messages should be directed to the public in order to create trust and confidence and in my opinion the guidelines fails to explain necessity of such an approach. Additionally, I'm of the opinion that a digital dispute resolution system may work especially in those states where the justice system does not work effectively and consumer rights are not effectively enforced. ODR methods will then actually provide an important alternative to protracted court proceedings and judgments of dubious quality[28]. It seems that Council of Europe is too careful and reluctant to provide such additional argument for the ODR use in court practice.

The guidelines also lack emphasis on international dimension of dispute resolutions. Thanks to ODR it is possible to resolve disputes arising from cross-border transactions quickly, efficiently and effectively online. Moreover, ODR regulations should allow for free circulation between countries of ODR decisions so that enforcement proceedings can be initiated in different jurisdictions in order to settle a claim[29].

The second principle contained in the guidelines address problems of possible substantial barriers for access to justice due to the ODR implementation. One should notice that it refers to substantial barriers and not just any barriers. This means that some limitations are allowed, in particular those that follow from the nature of ODR, such as necessity of using electronic communication and having skills to operate digital devices. I believe that we all agree that especially in times of the pandemic crisis ODR could really contribute to more effective and efficient access to justice. However, the main obstacle to much wider use of ODR is access to technology. Some people do not have the necessary skills or facilities to use ODR and have a dispute resolved online. This problem is called the "digital divide". That is why courts should develop ODR techniques in such a way that the digital divide is adequately addressed. As it is correctly explained further in the guidelines, ODR mechanisms should have a simple

27 *Ibidem*.

28 *Ibidem*.

29 Piotr Rodziewicz, "Czy istnieje potrzeba wprowadzenia instrumentu prawnego dotyczącego Online Dispute Resolution (ODR) w zakresie rozstrzygania sporów wynikłych z transgranicznych transakcji handlu elektronicznego?," *Prawo Mediów Elektronicznych* 1 (2012): 43.

and user-friendly interface to enable as many people as possible to use the technology. The lesson from the pandemic crisis is that the switch to new technologies is possible for a major part of society and can be executed really fast. Many people have learned quickly how to use the technology. To sum up, in my opinion it is fully justified that the guidelines include such fundamental principle in the guidelines, but it does not mean that it can be used as an excuse for not introducing ODR techniques into existing civil and administrative proceedings.

I have doubts regarding the third fundamental principle following from the guidelines. Is seems to be too vague. It reads that "procedural rules which apply to court proceedings in general should apply to ODR". What we need here, however, is a reservation that where the specific nature of a particular ODR mechanism so requires some adjustments to particular (existing – traditional) procedural rules may be required (provided they do not undermine the principle of a fair trial or of an effective remedy). The current principle is over - simplified in this respect. The gravity centre of the principle should be laid on the particularities that stem from the specific use of ODR and its potential impact on procedural issues. It is an obvious statement that ODR can and should be subject to the same due process standards that apply to court procedure in an offline context, in particular independence, neutrality and impartiality. What we rather in the guidelines need is to clearly state what this means in practice in the context of the ODR use by the courts.

The last principle referring to identification of the parties seems to be redundant. This is more a technical issue and is obvious in case of electronic communication. In the EU this problem is already fully addressed by the eIDAS Regulation[30]. Moreover, these issues are also sufficiently explained in the other CoE guidelines, which are guidelines on electronic evidence previously adopted by the Council of Europe on January 30, 2019[31]. We know that separation of the digital identity from the physical one may

[30] 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).

[31] Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings (Adopted by the Committee of Ministers on 30 January 2019, at the 1335th meeting of the Ministers' Deputies), CM(2018)169-add1final.

create problems related to the identification of the persons[32]. But there are many well known and used secure mechanisms for identification, such as certificates to electronic signatures (the "digital ID" of a person), confirmation of identity by a payment system operator that has been used for paying court fees online or public trust services providing technological mechanisms that ensure proper identification (e.g. ePUAP in Poland).

Instead of the fourth principle one should rather include in the fundamental principles the problem of the rapid development of artificial intelligence (AI) algorithms in the courts[33]. The use of AI algorithms makes it possible to draft the most probable judicial decision (on the basis of past practice). This does not mean that a judge will no longer be needed because the judicial recognition, which is an expression of the so-called discretionary power of the judiciary is of crucial importance for justice systems[34]. The advanced instruments of data processing and analysis only make it possible to present to the judge a non-binding decision, but based on the analysis of regulations and case-law of the facts of the case, a proposal for a decision (even with a draft justification). This approach could benefit greater predictability of judgments in similar or even identical facts[35]. In my opinion an additional fundamental principle could address the risk

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32 The following monographs present in-depth analysis on the issue of electronic evidence and identification in the digital courts: George L. Paul, *Foundations of Digital Evidence* (American Bar Association, 2008); Paul R. Rice, *Electronic Evidence – Law and Practice* (American Bar Association, 2009), Allison Stanfield, *Computer Forensics, Electronic Discovery & Electronic Evidence* (Chatswood, LexisNexis Butterworths, 2009); Stephen Mason, ed., *Electronic Evidence* (London: LexisNexis Butterworths, 2017), Stephen Mason, ed., *International Electronic Evidence* (London: British Institute of International and Comparative Law, 2008).

33 See further: *A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework*. Prepared by the Expert Committee on human rights dimensions of automated data processing and different forms of artificial intelligence (MSI-AUT). Rapporteur: Karen Yeung, DGI(2019)05. See also Ephraim Nissan, "Digital technologies and artificial intelligence's present and foreseeable impact on lawyering, judging, policing and law enforcement," *AI & Society* 32 (2017): 539–574; Maxi Scherer, "Artificial Intelligence and Legal Decision-Making: The Wide Open?," *Journal of International Arbitration* 36 (2019): 539–574.

34 Such power is not only based on the law, but also on the social context of a case. See further Gołaczyński, "e-Sąd przyszłości," 97.

35 The predictability of court rulings is often demanded by the people – *Ibidem*.

of dehumanisation of the courts. As rightly pointed out by the consultative Council of European Judges in Opinion No. 14 of 2011: "The introduction of IT in courts in Europe should not compromise the human and symbolic faces of justice. (…) Justice is and should remain humane as it deals primarily with people and their disputes". To conclude, I recommend that the fourth principle of the guidelines should have the following wording: "Introduction of AI components should not compromise the human and symbolic faces of justice".

Another lesson from pandemic crisis is that cybersecurity matters a lot in current court practice. Cyber threats are and will be a real danger for justice systems[36]. High risks exist that court documents and evidence can be subject to manipulation and attack. A breach in security could result in forgery, or the disclosure of confidential information. Therefore, courts must consider mechanisms for enhancing data security. It is crucial that an appropriate level of cybersecurity in the ODR systems and their integrity are ensured. This requires secure authentication and access control. Indeed, we see that the guidelines already extensively address cybersecurity. Therefore, it is fully justified in my opinion to address this problem in the fundamental principles, as well. The wording of the potential fifth principle could be the following: "Members states should create mechanisms focused on cybersecurity".

5. Specific guidelines relating to use of artificial intelligence (AI) tools in judicial proceedings

The digitalisation of courts is an ongoing process that started more than 20 years ago in the European Union, in parallel with the expansion of the Internet[37]. Therefore, one may say, that the real reason for creating the guidelines by the Council of Europe now is the rapid development of more elaborated IT tools that can be used in the courts, such as those based on artificial intelligence algorithms. This is not just the problem of using the video-conferencing or standard communication techniques in the courts or even how to organize remote hearing or submit electronic

36 Mania, "ODR (Online Dispute Resolution) – podstawowe zagadnienia," 74.

37 See further Richard Susskind, *The Future of Law, Facing Challenges of Information Technology* (Oxford: Oxford University Press, 1998).

evidence[38]. Most of the European states already allow for video-conferencing in their courts with persons situated at a remote location, to ensure, for example, an appearance of witnesses and experts.

What we experience now is the introduction of automated decisions, involving more complex AI components[39]. ODR mechanisms leading to purely automated decisions use could be extended from minor simple cases (e.g. dispute over unpaid invoices), to more complex cases[40]. In some proceedings, with a significant reconstruction of the national civil procedure, it is even being considered to replace a judge with an IT system used for data processing and analysis[41].

Indeed, introduction of ODR mechanisms based on AI components create the potential for making automated decisions, recommendations and forecasts and thus can make civil and administrative proceedings more effective, accessible and affordable[42]. AI may contribute to fairer, more equal and more predictable outcomes. Some European states already use AI tools for anonymisation of the court decisions or translation services. Due to use of the AI components the work of a court may be significantly improved. The use of AI components may improve procedure and may allow for a more accurate and complete analysis of the case.

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38 Maria Biasiotti, Joseph Cannataci, Jeanne Bonnici, and Fabrizio Turchi, "Introduction: Opportunities and Challenges for Electronic Evidence," in *Handling and Exchanging Electronic Evidence Across Europe*, ed. Maria Biasiotti, Joseph Cannataci, Jeanne Bonnici, and Fabrizio Turchi (Cham: Springer, 2018), 4. In Polish literature see further Łukasz Goździaszek, "Normy informatyczne w prawie postępowania cywilnego," *Przegląd Sądowy* 2 (2017); Anna Kościółek, "Elektroniczne czynności procesowe w świetle nowelizacji z 10.7.2015 r.," *Prawo Mediów Elektronicznych* 1 (2017); Anna Kościółek, *Elektroniczne czynności procesowe w sądowym postępowaniu cywilnym* (Warszawa: C.H. Beck, 2012); Lucyna Łuczak-Nowrolnik and Anna Żebrowska, "Przeprowadzenie rozprawy i postępowania dowodowego drogą elektroniczną – założenia, cele, przyjęte rozwiązania," *Polski Proces Cywilny* 3 (2018).

39 Davide Carneiro, Paulo Novais, Francisco Andrade, John Zeleznikow, and José Neves, "ODR: an Artificial Intelligence Perspective," *Artificial Intelligence Review* 41 (2014): 211–240.

40 Sofia Samoili, Montserrat López-Cobo, Emilia Gómez, Giuditta de Prato, Fernando Martínez-Plumed, and Blagoj Delipetrev, *AI Watch. Defining Artificial Intelligence. Towards an operational definition and taxonomy of artificial intelligence*, EUR 30117 EN, Publications Office of the European Union, JRC118163, Luxembourg, 2020, 7–8.

41 Gołaczyński, "e-Sąd przyszłości," 97.

42 Scherer, "Artificial Intelligence and Legal Decision-Making: The Wide Open?," 539–574.

But there are also negative aspects of AI technologies, such as "black box" problem[43]. As rightly explained in point 41 of the Conclusions of the Council of the European Union: Access to justice – seizing the opportunities of digitalisation (2020/C 342 I/01): "outcomes of artificial intelligence systems based on machine learning cannot be retraced, leading to a black-box-effect that prevents adequate and necessary responsibility and makes it impossible to check how the result was reached and whether it complies with relevant regulations. This lack of transparency could undermine the possibility of effectively challenging decisions based on such outcomes and may thereby infringe the right to a fair trial and an effective remedy, and limits the areas in which these systems can be legally used". The European Commission emphasizes in the White Paper on AI that "the specific characteristics of many AI technologies, including opacity ('black box-effect'), complexity, unpredictability and partially autonomous behaviour, may make it hard to verify compliance with, and may hamper the effective enforcement of, rules of existing EU law meant to protect fundamental rights"[44].

The work of the Council of Europe concerning AI is already significant[45]. There are policies, recommendations, declarations, guidelines and other legal instruments that were issued by Council of Europe bodies. Even a special committee – which is called CAHAI (Ad hoc Committee on Artificial Intelligence)[46] – had been created recently. And as we see, the Council reasonably regulates AI using mostly soft legal instruments (in opposition to hard law instruments, such as convention). These soft instruments can be easily updated in line with technological development.

For the purposes of the guidelines, the definition of AI is based on the European Ethical Charter on the use of artificial intelligence in judicial systems and their environment adopted by the European Commission

43 Rosario Girasa, *Artificial Intelligence as a Disruptive Technology. Economic Transformation and Government Regulation* (Pleasantville: Springer, 2020), 4.

44 White Paper On Artificial Intelligence – A European approach to excellence and trust. European Commission, Brussels, 19.2.2020 COM(2020) 65 final: 12

45 https://www.coe.int/en/web/artificial-intelligence/home, accessed September 15, 2021.

46 https://www.coe.int/en/web/artificial-intelligence/cahai, accessed September 15, 2021.

for the Efficiency of Justice (CEPEJ) on 3–4 December 2018 (the Charter)[47]. It reads that: "Artificial intelligence or "AI" refers to a set of scientific methods, theories and techniques the aim of which is to reproduce, by a machine, the cognitive abilities of a human being". Such definition has advantage over much more complicated definitions proposed by European Union so far.

It is however important to stress that ODR is not the same as artificial intelligence and not all ODR techniques involve AI components. ODR is a wider concept covering all kinds of online mechanisms for dispute resolution, including tools for automation that do not necessarily include an element of AI[48]. This distinction between ODR and AI is correctly kept throughout the guidelines. However, while the requirements to meet the judicial guarantees stemming from the Convention apply to all ODR techniques, certain questions in this context bear increased significance with regard to AI components. This is particularly true for questions referring to automated decision-making without human intervention and the possibility for reviewing those decisions. We see it fully reflected in the guidelines.

Firstly, according to the guidelines, the parties should be notified when it is intended that their case will be processed with an ODR tool that involves an AI mechanism (guideline no 6). In particular, litigants have a right to obtain information on the reasoning underlying AI data processing operations applied to them. This includes the consequences of such reasoning[49]. Such transparency requirement is also confirmed by all existing recommendations, ethical codes and guidelines establishing ethical standards for designing, deployment and use of artificial intelligence, as established by the Council of Europe, the United Nations bodies, EU, OECD and other international institutions.

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47 European Commission for the Efficiency of Justice (CEPEJ). European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment, Adopted at the 31st plenary meeting of the CEPEJ (Strasbourg, 3–4 December 2018).

48 Carneiro, Novais, Andrade, Zeleznikow, and Neves, "ODR: an Artificial Intelligence Perspective," 211–240.

49 Jenna Burrell, "How the Machine 'Thinks': Understanding Opacity in Machine Learning Algorithms," *Big Data & Society* 3 (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2660674, accessed September 15, 2021.

Secondly, guideline no 18 provides that sufficient reasons should be given for decisions reached using ODR or with the assistance of ODR and, in particular, the decisions reached with the involvement of AI mechanisms. We clearly see that the Council of Europe does not stand against any use of AI in the justice systems, it just wants to set the limits for its use in accordance with the principles stemming from the Convention and other human rights legal instruments. The guideline in question aims to promote transparent decision-making for the parties and public. Decisions which prevent anyone to check how the result was reached pose the same threat to transparency and fair trial principle as decisions with no reasons included[50]. Litigants have a right to obtain information on the reasoning underlying AI data processing operations applied to them. This should include the consequences of such reasoning. When no information could be presented due to the nature of AI, courts should refrain from issuing decisions reached with the involvement of AI whose outcomes cannot be retraced.

Thirdly, guideline no 20 provides right to review in cases involving an ODR element, including cases involving AI mechanisms. This issue requires further analysis. As we know, EU institutions already have issued resolutions, in which they have firmly stood against implementation of purely automated decision-making. In the Conclusions of the Council of the European Union: Access to justice – seizing the opportunities of digitalisation (2020/C 342 I/01), the Council of the European Union we read in point 39, that "the use of artificial intelligence tools must not interfere with the decision-making power of judges or judicial independence. A court decision must always be made by a human being and cannot be delegated to an artificial intelligence tool". Additionally, the Council of Europe has adopted the Ethical Charter on the use of artificial intelligence in judicial systems that, among other principles, emphasizes the relevance of "under user control" principle i.e., "precluding a prescriptive approach and ensuring that users are informed actors and in control of their choices"[51].

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50 Wojciech Samek, Thomas Wiegand, and Klaus-Robert Müller, "Explainable Artificial Intelligence: Understanding, Visualizing and Interpreting Deep Learning Models," *ITU Journal: ICT Discoveries:* Special Issue 1 (2017): 1–10.

51 See European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment.

It does not mean that the guidelines, by indirectly allowing for purely automatic decisions, are in breach of the EU Institutions recent documents. Firstly, one should say that it is the internal decision of the member state of the Council of Europe to allow purely automatic decisions and only in such case the aforementioned guideline no 20 can be applied. Secondly, not all member states of the Council of Europe are member states of the European Union and are required to follow opinions presented by the EU authorities. Thirdly, these opinions are not binding EU regulations yet. In my opinion we should rather follow a flexible approach presented by the Council of Europe and the more rigid one presented recently by EU institutions.

The main problem is how the review of purely automated decisions should be made. The guidelines fail to provide required solution to this problem. This question becomes crucial when ODR instruments take the shape of tools for purely automated decision–making. In this context Article 13 of the Convention comes into play. Article 13 provides that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. In result parties should be allowed not only to contest purely automated decisions but also to request that such review is to be made by a human judge. The European Court of Human Rights does not specify on what level this remedy is to take place.

The use of ODR can open up new avenues of redress for infringements in the national judicial systems. In view of the unique character of the ODR I believe that the member state could decide, irrespective of existing review mechanisms, to establish an additional human review process on the same level as the one, on which the automated decision was made. Alternatively, the member state can leave the review by a human judge to its existing appeal level. In any case, this guideline should not require all automated decisions to be automatically subject to human review or to change the existing review model.

Another problem is that the guidelines do not fully addresses the design of ODR involving AI components. Such systems require more input from the stakeholders. I'm of opinion that the judiciary should be involved in the testing and piloting phases as it is important to ensure that the design of ODR do not deprive judges of their decision-making capacity. AI technology developers should also strive to better understand the justice system

and collaborate with judges and court staff to ensure that ICT architecture meets the needs of both the courts and the public[52].

To sum up, the guidelines could be more focused on the more elaborated ODR mechanisms based on the data collected and processed in the judicial process, in particular using AI components rather than simple techniques of electronic communication[53]. An important condition for the creation of such modern mechanisms is to make as much data as possible available and to allow the creation of digital data by the court as a result of evidence proceedings (including e-protocols, digitalization of all documents)[54]. It is also important to decide whether the AI system should only prepare a draft ruling with a justification and be subject to the final decision to be taken by the judge, or whether it should, in cases with simple factual states, fully replace the adjudicator. The latter solution requires an analysis of whether, in such case, we will still be dealing with a court within the meaning of the guidelines and the applicable laws (including the Human Rights Convention).

6. Summary and conclusions

New Council of Europe guidelines properly follow the structure of principles developed in the jurisprudence of the European Court of Human Rights under Articles 6 and 13 of the Convention. The time of its adoption is correct as the digitalisation of courts have now crucial importance for access to the justice. The guidelines have the nature of a soft legal instrument. It serves as a practical toolbox for member states to ensure that the practice of their digital courts comply with the requirements of Articles 6 and 13 of the Convention.

Answers to the questions presented in the introduction and proposed solutions can be taken into consideration by the Council of Europe in the future update of the guidelines.

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52 In this respect see Guidelines on how to drive change towards Cyber justice [Stock-taking of tools deployed and summary of good practices] of 7 December 2016, / European Commission for the Efficiency of Justice, CEPEJ(2016)13.

53 Gołaczyński, "e-Sąd przyszłości," 98.

54 *Ibidem*.

Firstly, the used term ODR (Online Dispute Resolution) is misleading. Risk exists that that the judges will not even try to familiarize themselves with the guidelines assuming that the document concerns only ADR proceedings. I'd rather recommend to replace the term of "ODR" with other terms, such as "cyberjustice" or "digital courts".

Secondly, some of the fundamental principles of the guidelines are misplaced. The gravity centre of the third principle should be laid on the particularities that stem from the specific use of ODR and its potential impact on procedural issues. Instead of the fourth principle (identification of the parties), directly addressed should be the development of artificial intelligence (AI) algorithms in the courts, as well the cybersecurity threats for justice systems. In this paper I recommended introduction of two additional fundamental principles to the guidelines: "Introduction of AI components should not compromise the human and symbolic faces of justice" and "Members states should implement mechanisms enhancing cyber security".

Thirdly, guidelines related to artificial intelligence should be further elaborated and explained. This includes both the review of the purely automatic decisions and its justification. Another problem that needs to be elaborated in the updated guidelines is the design of ODR systems including AI components. In this respect the guidelines could be also aligned with the new EU instruments that deals with the AI legal aspects (such as new draft resolution).

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The European Union in multi-crisis: towards differentiated legal integration?

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Abstract: The aim of this article is to present a general forecast of the development of processes of legal integration in the European Union in the coming years. The European Union is in 'multi-crisis', which may force the member states to adopt an organizational development scenario based on differentiation. The selectivity of this differentiation is understood both in terms of the heterogeneity of integration in some areas and the reduction in the number of states fully participating in integration. An analysis of the current trends and solutions proposed and taken by EU decision-makers shows that the EU legal system is not subject to federalization, but in fact the tendency to deepen integration does not conflict with intergovernmentalism. The multiplicity of problems resulting from the multi-crisis will most likely require the deepening of the current differentiation mechanisms and the emergence of new ones.

1. Introduction

The specificity of its current condition allows to apply to the European Union the concept of 'multi-crisis'[1]. Currently, this phenomenon consists of

[1] A category widely used in 2000s not only in social sciences. Cf.: Jatin Nathwani, Niels Lind, Ortwin Renn, Hans Joachim Schnellnhuber, "Balancing Health, Economy and Climate Risk in a Multi-Crisis," *Energies* 14, no. 4067 (2021): 1–13; Prasetyono Hendriarto,

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as many as ten individual crises. They are related to the following events: (a) health and social impacts of the Covid-19 pandemic; (b) the economic impact of the Covid-19 pandemic; (c) the withdrawal of the United Kingdom; (d) the quality of leadership at the level of the EU institutions and at national levels; (e) the increased role of national identities; (f) compliance with the rule of law by the member states; (g) intensified immigration processes from outside the EU; (h) lack of basic agreement on the EU's development vision; (i) north-south and west-east economic diversification; (j) deepening of the hierarchy between the member states.

The aim of this article is to present a general forecast of the development of integration processes in the European Union in the coming years in terms of its legal system, resulting from the current trends. At the beginning, the Author's concept of systemic principles relevant to EU law will be discussed, then – the theoretical views related to the differentiation of integration in the legal sphere will be elaborated, and finally – the legal and political tendencies currently occurring in EU practice will be assessed. The main idea of the article is that the multi-crisis will force the member states of the Union, as key players in an intergovernmental construction, to adopt an organizational development scenario based on differentiation. The selectivity of this differentiation is understood both in terms of object (heterogeneity of integration in individual areas) and subject (reduction in the number of states fully participating in integration processes)[2].

2. EU legal system in the Lisbon perspective

The systemic principles of EU law created by the Treaty of Lisbon in no way constituted a new quality in comparison with the previous situation. Rather, they expressed the continuation of the legal tradition rooted in the original versions of basic treaties and the established jurisprudence of

"Undestanding of the Role of Digitalization to Business Model and Innovation: Economics and Business Review Studies," *Linguistics and Culture Review* 5, no. S1 (2021): 160–173.

2 Some updated views present in Author's earlier works are recalled and marked in respective fragments of the article.

the Court of Justice[3]. In Author's own view there are seven primary principles of EU law[4].

The first principle is the homogeneity of values of the legal system of the Union and those of the member states. The axiology of the EU does not differ from its state counterparts, emphasizing the fundamental role of states in this organization. This is accomplished by upholding the principle of direct and indirect democratic representation in the EU decision-making process. The indirect representation, resulting from the accountability of EU intergovernmental institutions to national parliaments, is still more important than the direct representation in the European Parliament. The second principle is defined by the equality of member states and respect for the functions of the state, with particular emphasis on its responsibility for the security of citizens. The 'typical' principles of subsidiarity and proportionality are maintained, while the principle of conferral is strengthened – compared to pre-2009 period – by the explicit presumption of state competence. The implementation of each of the indicated principles is beneficial to the sovereignty of the state, as it guarantees not only legal autonomy, but above all, exercises the constant states' supervision over the Union's activity. The third principle relates to the division of competences between the Union and the state. However, it resembles to a small extent similar distinctions made in the constitutions of federal states, being rather an expression of the application of the concept based on the balance of profits and losses, typical for international agreements[5]. The group of exclusive EU competences is limited to five areas, and the competences of the Union in the area particularly essential for the sovereignty of the state, that is the common foreign and security policy, are strictly limited. The fourth principle is the lack of treaty provisions introducing the principle of the absolute primacy of EU law. The supremacy is largely the result of application of interpretative standards specific to the EU judicial system, which should

3 Cf. Jan Barcz, *Od lizbońskiej do polizbońskiej Unii Europejskiej. Główne kierunki reformy ustrojowej procesu integracji europejskiej* (Warszawa: Wolters Kluwer, 2020), 102–199.

4 Piotr Tosiek, "Prawne gwarancje pozycji państwa członkowskiego w systemie decyzyjnym Unii Europejskiej," in *Unia Europejska po Traktacie z Lizbony. Pierwsze doświadczenia i nowe wyzwania*, ed. Piotr Tosiek (Lublin: Wydawnictwo UMCS, 2011), 27–51.

5 Donald J. Puchala, "Institutionalism, Intergovernmentalism, and European Integration: a Review Article," *Journal of Common Market Studies* 37, no. 2 (1999): 319.

be assessed as a positive event for maintainence of a strong position of member states. The fifth principle is the recognition of the leading role of states in decision-making procedures relevant to the existence of the Union and the relationship between the Union and the state. Treaty changes can only be made with the consent of all states, and in each case not only the governments but also national parliaments play a fundamental role. Also, the accession of new states requires the conclusion of an interstate agreement ratified by all members and acceding states. Sovereignty is also strongly emphasized in the withdrawal procedure and the procedure for suspending of the member state in certain rights (Art. 7 TEU). The sixth principle relates to the construction of the Union as a non-state entity. The institutional system is not based here on the separation of powers, but on the principle of interinstitutional balance. It results from a compromise between intergovernmental and supranational approaches, where intergovernmental elements prevail in the most important spheres. The seventh principle is the central position of the state in the procedures of creating secondary law. The decision-making mechanisms continue to be based on a relative balance between the European Parliament and the Council, with a qualified majority requirement in the latter. In respect of the procedures for drafting delegated and implementing acts, the supervision of the member states is also present. The procedures in the area of common foreign and security policy are separated from other ones: they consist of the general principle of unanimity of states and exclusion of the supranational bodies. Also, the extension of the Union's competences based on the rules set out in Art. 352 TFEU requires the unanimity of states.

The seven principles in the Lisbon version define the essence of EU law perceived as a system. The most important task of this law is to create a structure focused on the resolution of inter-state legal conflicts[6]. In view of Christian Joerges, EU law is defined as the specific 'conflicts law' with no imperative to create a uniform legal regime. This approach takes into account the current contestation of the type of political system generated by the integration process, which is somewhat similar to the national undermining of the principles of the proper political order. National

[6] Cf. Piotr Tosiek, *Member State in the Decision-Making System of the European Union. The Example of Poland* (Lublin: Wydawnictwo UMCS, 2018), 93–104.

constitutional law in a democratic system, however, offers a structure that channels political contestation, and the law of the integration does not refer to this type of legitimization[7].

The same scholar emphasizes that potential legal conflicts occurring at the EU level are complicated in a way that makes them impossible to resolve in a centralist and hierarchical manner. The law that acts here as an intermediary between the various levels of competence, without creating a federal system. The task of this law is also the organization of relations between public institutions and private structures. Therefore, it must be a 'conflicts law' oriented not only on strictly legal solutions, but also on certain forms outside the treaty system[8].

There are five consequences of seeing EU law in this way[9]. First, the 'conflicts law' should be indirectly based on democratic rules. Under the influence of globalization and Europeanization, societies experience an increasing tear between the goals of actors making political decisions and the expectations of the addressees of these decisions. Secondly, the 'conflicts law' should be supranational in nature and therefore must be characterized by a justification for the existence of supranational jurisdiction. Due to increasing interdependence, the member states and the European Union are unable to guarantee the legitimacy of their policies separately. EU law should eliminate negative externalities, that is, compensate for the shortcomings of national democracies and derive its own legitimization potential therefrom. Third, the 'conflicts law' should be based on a certain degree of convergence of national legal systems. An important feature of EU law is the 'supranational recognition' consisting of non-discrimination and the requirement to justify actions imposed on national

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7 Christian Joerges, *Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form* (Vienna: Institute for Advanced Studies, 2010), 6; Idem, "The Lisbon Judgement, Germany's Sozialstaat, the ECJ's Labour-Law Jurisprudence, and the Reconceptualisation of European Law as a New Type of Conflicts Law," *ZERP-Diskussionspapier*, no. 1 (2010): 28–32; Michelle Everson and Christian Joerges, "Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism," *European Law Journal* 18, no. 5 (2012): 644–645.

8 Christian Joerges, "Integration durch Entrechtlichung. Ein Zwischenruf," *ZERP-Diskussionspapier*, no. 1 (2007): 14.

9 Christian Joerges, *Unity*, 21–25.

legal systems with the principle of proportionality. Fourth, the 'conflicts law' should be internally differentiated. The vertical, horizontal and diagonal collisions can be distinguished and, thus, an integral infrastructure of 'conflicts law' is being created, which is not limited to resolving individual conflicts in specific situations, but is oriented towards finding general solutions to universal problems. Fifth, the concept of 'conflicts law' is based on the premise that diversity and conflict are permanent features of European integration. The integration process must therefore be supervised by law, but the law cannot determine the directions of the progress of integration. It is the member states cooperating in a variety of intergovernmental modes that are responsible for EU development.

3. EU legal system in the perspective of differentiated integration

There are many views on differentiated integration in both political and legal science[10], but the approach most coherent with the Lisbon EU legal construction and the 'conflicts law' concept seems to be offered by intergovernmentalists[11] gathered around Frank Schimmelfennig[12]. That author finds at the starting point that integration is uniform when the EU rules are applied equally in all member states, and it is differentiated when the legal boundaries of EU law do not comply with the boundaries of EU membership. The differentiation thus results from intergovernmental negotiations on EU primary and secondary law and is based on the fact that member states may refuse to participate in integrated policies, accept individual rules or be excluded from participation in the integration system. If governments have consistent goals, are interdependent, and able to help each other achieve

[10] Cf.: Menelaos Markakis, "Differentiated Integration and Disintegration in the EU: Brexit, the Eurozone Crisis, and Other Troubles," *Journal of International Economic Law*, no. 23 (2020): 489–493; Tomasz Kubin, "Enhanced Cooperation, EMU Reforms and Their Implications for Differentiation of the European Union," *Baltic Journal of European Studies* 7, no. 2 (2017): 86–92; Jan Barcz, "Flexible Integration as a Target System of Governance for the European Union," *Yearbook of Polish European Studies* 18 (2015): 72–77.

[11] Christian Joerges' ideas do not belong to the intergovernmental trend. This article proposes, however, a combination of his concept with intergovernmentalism.

[12] Cf. Piotr Tosiek, "Integracja zróżnicowana jako cecha systemowa Unii Europejskiej. Perspektywa liberalno-międzyrządowa," in *Europa wielu prędkości. Problemy. Wyzwania. Konsekwencje*, eds. Marek Golińczak and Robert Klementowski (Wrocław-Warszawa: Wydawnictwo IPN, 2021), 53–68.

their goals, then negotiations are likely to lead to the uniform integration. Conversely, if governments have incompatible goals or are not interdependent in achieving them, or lack the ability to cooperate effectively, integration is unlikely to be unitary in nature[13].

Christian Jensen and Jonathan Slapin distinguish two basic differentiation options that may be applied in the current legal status of the European Union[14]. They are: (a) deepening of integration beyond the official structure of the EU; (b) deepening of integration within the official structure of the EU. In the latter case, there are two options. The first of them is defined, *inter alia*, in Art. 114 (4) TFEU as the possibility of maintaining national provisions at the time of introducing the provisions of EU law on the approximation of laws in the field of the functioning of the internal market. This allows a single state to avoid introducing regulations that have already been passed at the EU level and – although it is difficult – may induce other states not to adopt regulations that are known not to be implemented. The second option is defined in Art. 20 TEU (and clarified in Art. 329 TFEU) as the possibility of establishing enhanced cooperation on the basis of the Council decision taken at the proposal of the Commission with the consent of the European Parliament. Mention should also be made of more detailed treaty provisions allowing the establishment of regional associations of the Benelux states (Article 350 TFEU) or the participation of only certain states in cooperation in the field of research and technological development (Article 184 TFEU)[15].

The group of scientists[16] notes that the diversity of integration may result not only from treaty provisions, but also from secondary law. Legal

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13 Frank Schimmelfennig, "The Choice for Differentiated Europe: an Intergovernmentalist Theoretical Framework," *Comparative European Politics* 17, no. 2 (2019): 177–179.

14 Christian B. Jensen and Jonathan B. Slapin, "Institutional Hokey-Pokey: the Politics of Multispeed Integration in the European Union," *Journal of European Public Policy* 19, no. 6 (2012): 783–792.

15 Ibidem. Cf. the still up-to-date list of actual areas of enhanced cooperation: Tomasz Kubin, "A 'Last Resort' or a 'Bypass'? Development of Enhanced Cooperation and Its Meaning for the Problem of Stagnation of Integration in the European Union," *Yearbook of Polish European Studies* 20 (2017): 43.

16 Thomas Duttle, Katharina Holzinger, Thomas Malang, Thomas Schäubli, Frank Schimmelfennig, and Thomas Winzen, "Opting out from the European Union Legislation: the Differentiation of Secondary Law," *Journal of European Public Policy* 24, no. 3 (2017): 407.

acts may release individual states from certain obligations or introduce special rules, thus creating an unequal level of integration beyond primary law. There is also a specific complementarity in terms of accessibility and relevance between the differentiation at the level of primary and secondary law. In terms of accessibility, it was the secondary law that was initially a tool for differentiating member states, and it was only in the period preceding the 2004 enlargement that this task was taken over by primary law. In terms of relevance, a constant feature of the Union is the rule that some issues are regulated at the level of the treaty while others remain the subject of secondary law. Disputes in highly politicized areas (such as the integration of core state powers) are usually resolved through treaty-based differentiation, while heterogeneity in low-severity cases is subject to differentiation at the level of secondary law[17].

According to Schimmelfennig and his colleagues, the differentiation can be treated as a vertical or horizontal phenomenon. Vertical differentiation means that specific policy areas have been integrated at different speeds, resulting in different levels of centralization at different times. The horizontal variation relates to the territory and means that many integrated policies do not apply in some member states (internal horizontal variation), although some non-EU actors do participate in them (external horizontal variation)[18]. In another article a similar group of scientists[19] also proposed a classification of the effects of differentiation based on its persistence and subjective scope. These researchers noted that diversification is a routine phenomenon with the accession of new member states: governments and interest groups in the old states then fear that their position in terms of competition, migration and reallocation of funds will be weakened, and the new states associate their concerns with pressures related to market integration and the cost of adopting Union legislation. The transitional periods and derogations agreed in the accession treaties and the early post-accession legislation make it easier for both old and new member

17 Ibidem.

18 Frank Schimmelfennig, Dirk Leuffen, and Berthold Rittberger, *The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation* (Vienna: Institute for Advanced Studies, 2014), 6.

19 Duttle et al., "Opting Out," 408.

states to adapt to the new conditions. It is therefore the so-called instrumental differentiation. The situation is completely different when – unrelated to enlargements – more competences are transferred from the state to the EU level and supranational institutions. The diversified approach then allows less integration-friendly members to protect themselves from strong internal opposition and to remain at their preferred level of integration, refraining from vetoing the more ambitious majority projects. The said authors refer to this as the constitutional differentiation.

According to Schimmelfennig, constitutional differentiation is – as opposed to the instrumental one – less frequent, but more permanent. It is conditioned by concerns in some areas of state's key powers like monetary policy, internal policy, or defence and foreign policy. The constitutional differentiation takes into account the heterogeneity of states and societies, as well as their commitment to the protection of sovereignty, while not blocking the possibility of integration for other member states. Importantly, constitutional differentiation creates permanent institutional boundaries between the core, the semi-peripheral and the peripheral member states[20].

It is worth noting – so the leader of the group of researchers – that the two main integration projects after the completion of the internal market, namely the monetary integration and the integration in the field of justice and home affairs, turned out to be the constitutional differentiation. Successive enlargements and the crisis of the eurozone even strengthened the institutional divisions among the member states in these two areas, although at the same time third states were selectively integrated with the internal market (within the European Economic Area) and with specific EU policies (within the Schengen area)[21]. However, the differentiation solutions are based on the 'multi-speed' principle, creating only temporary differences in the integration. The core of the EU, which has always been pro-integrationist in nature, is of great importance here, offering the initially excluded member states the opportunity to join within a reasonable

[20] Frank Schimmelfennig, *Differentiation and Self-Determination in European Integration* (Barcelona and Leuven: Centre on Constitutional Change and Centre for Global Governance Studies, 2017), 14.

[21] Frank Schimmelfennig and Thomas Winzen, "Grand Theories, Differentiated Integration," *Journal of European Public Policy* 26, no. 8 (2019): 1175.

timeframe. Non-participants have the attribute of being peripheral usually of their own choice[22].

The legal differentiation should be treated as a 'relatively' permanent phenomenon, but not as a 'necessarily' permanent one. Katharina Holzinger and Frank Schimmelfennig believe that there are strong incentives to include closer cooperation in the legal and institutional framework of the EU. The structure of the Union is characterized by a high level of legitimacy, and the pursuit of legal uniformity leads to a relatively quick inclusion of subsequent member states in cooperation in all possible fields. At the same time, the prevailing ideology in domestic politics at the moment may have a negative impact on the logic of cooperation. The 'non-political' costs resulting from the reputation and ideological influence can also play an important role here. For other systemic and ideological reasons, states that do not participate in closer cooperation may actively participate in the creation of standards applicable within this cooperation, the participation of Denmark and the United Kingdom in cooperation in the former third pillar of the Union serving as examples[23].

According to Schimmelfennig, however, the diversification of integration is not always an appropriate strategy to deal with serious crises in the EU. Radical proposals to solve the eurozone crisis, consisting of a clear distinction between northern and southern states, have not been implemented due to the interdependence of these groups of states. The proposal to solve the immigration crisis, based on the diversification of asylum policy, was *de facto* accepted, but has led to a significant overburden of some states in this regard. Also, the dispute over the rule of law has not yet been resolved through differentiation, since liberal democracy is a fundamental value of the Union, and the independence of the judiciary is essential for the functioning of the EU legal system and the internal market. Undoubtedly, then, differentiation works when it is connected with acceleration of

22 Frank Schimmelfennig, "Is Differentiation the Future of European Integration?," in *Perspectives on the Future of the EU*, eds. Björn Fägersten and Göran von Sydow (Stockholm: Swedish Institute for European Policy Studies, 2019), 102–103.

23 Katharina Holzinger and Frank Schimmelfennig, "Differentiated Integration in the European Union: Many Concepts, Sparse Theory, Few Data," *Journal of European Public Policy* 19, no. 2 (2012): 301–302.

new rules, but it is not a good solution when member states cannot cope with the implementation of the rules already integrated[24].

4. EU multi-crisis as the engine of differentiated integration

The European Union is often called a 'crisis-resistant' entity[25]. However, many previous crises led to systemic reforms, which should be true also for the multi-crisis situation today. Politically at the moment, such a reform is unlikely to rely on treaty changes, while it is easier to adopt minor legal changes to the practice of Union's operation[26]. It is worth focusing on the latest trends in EU activity in order to refer to the two scenarios most often debated in public. The first is the federalization scenario, which ultimately means that all member states will transfer more powers to the EU level, and the second is the aforementioned differentiation scenario[27].

The analysis of today's EU policy shows a different likelihood of each of these scenarios materializing. An expression of the federalization is to be the shape of the mechanism known under the market name of *Next Generation EU*[28], called sometimes the 'Hamiltonian moment' of European integration[29]. Its essence is to increase the Union's own resources by EUR 750 billion based on the activity of EU institutions in the loan market

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24 Frank Schimmelfennig, "Is Differentiation," 119.

25 Agnieszka K. Cianciara, "Does Differentiation Lead to Disintegration? Insights from Theories of European Integration and Comparative Regionalism," *Yearbook of Polish European Studies* 18 (2015): 45.

26 Cf. David Sassoli, Antonio Costa, and Ursula von der Leyen, *Joint Declaration on the Conference on the Future of Europe*, Brussels, 10 March, 2021.

27 Those processes can be treated both as opposite or complementary phenomena. Cf. Tomasz Grzegorz Grosse, "Can 'Differentiated Integration' Lead to a Federation in Europe?," *Yearbook of Polish European Studies* 18 (2015): 31–32.

28 Cf.: Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, O.J.E.U. L 424, 15 December, 2020, 1–10; Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, O.J.E.U. L 433, 22 December, 2020, 23–27; Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, O.J.E.U. L 57, 18 February, 2021, 17–75.

29 Caroline de la Porte and Mads Dagnis Jensen, "The Next Generation EU: An Analysis of the Dimensions of Conflict Behind the Deal," *Social Policy & Administration* 55, no. 2 (2021): 399.

with the projected debt repayment in 2058. It should be noted, however, that the nature of new funds is not of new quality: their management is essentially intergovernmental, which contradicts the assumption of federalization. First, the consent of the member states to create new financial instruments did not constitute a transfer of new competences to the Union level as it was purely quantitative: it simply concerned an increase in the Union's own resources. Second, the new mechanisms do not rely on the full communitarization of the new debt, since an individual state only responds to the ceiling in which it participated in the fund. Also, the possibility to demand repayment of the debt of other states is temporary and limited to 0.6% of the GNI of the state executing the request. Third, national plans presented by member states are initially assessed by the European Commission, but finally adopted by the Council as an implementing decision (Art. 291 TFEU). Moreover, based on Art. 293 (1) TFEU, it must be assumed that the Council is able to amend the Commission proposal if it acts unanimously. Fourth, the implementation phase (granting specific loans) and its monitoring is the responsibility of the Commission, but this is scrutinized through a comitology procedure, allowing the implementing powers to be transferred to the Council[30]. The adoption of delegated acts by the Commission is also governed by Art. 291 TFEU, allowing the supervision by the Council. Fifth, the European Parliament, which does not even have the power to be informed about the details of how the money is spent, does not play any role in allocating concrete funds to states.

The second manifestation of federalization is to be the emergence of the principle of budgetary conditionality[31], challenged before the Court of Justice of the European Union by Hungary and Poland. It introduces the possibility of temporarily limiting the transfer of funds from the EU budget to a state that violates the rule of law. It should be noted, however, first, that the cases proving a violation are vague and the conditions for

[30] Cf. the 'examination procedure' in: Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, O.J.E.U. L 55, 28 February, 2011, 13–18.

[31] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, O.J.E.U. L 433, 22 December, 2020, 1–10.

adopting measures against states are difficult to meet. Second, the procedure is intergovernmental in nature: the dialogue with the state is conducted by the Commission (under the rules similar to Art. 258 TFEU), but final decisions are taken by a qualified majority in the Council (pursuant to Art. 291 TFEU). Moreover, the Council may, also by a qualified majority, amend the Commission proposal to impose penalty measures on the state. Third, it is apparent from the recitals to the regulation that, in exceptional cases, a state against which sanctions are to be applied may request that the matter be referred to the European Council for a political decision, which slows down the procedure. Fourth, also against the federalization concept, the role of the European Parliament is limited to some information and reporting obligations of the Commission.

The very practice of the functioning of the Commission under the leadership of Ursula von der Leyen does not indicate the feasibility of the federal scenario, either. Contrary to the tendencies apparently occurring in previous terms, including the Jean-Claude Juncker period in particular, the Commission tends to be openly expectant today, first demanding a response to emerging challenges from the member states. It seems, however, that when disregarding the PR activities, the constant feature of the EU executive institution for many years has been the sole presenting of conceptual documents, and not carrying out real political activities disagreed by the states. This was clearly visible in 2020: the real work on the recovery fund began only after the common Franco-German proposal had been presented.

An event that also contradicts the federal scenario is the practice used, in particular, in the first months of the Covid-19 pandemic. The lack of Union's competences in the field of health policy resulted in immediate re-nationalization of combating the disease, as well as the actual temporary liquidation of the functioning of the Schengen area. The then Commission's activity resulted in a relatively quick reaction and a decision to jointly purchase vaccines, but also this solution was taken according to intergovernmental rules.

It is therefore difficult to conclude that the European Union is moving towards a federation. On the contrary, the intergovernmentalism is still very strong and the Lisbon rules are prolonged. This process, however, is not related to the spill back of integration, but rather to decisions about its deepening made by states rather than supranational institutions. This

phenomenon has been widely described and explained by the representatives of the so-called new intergovernmentalism[32]. All of the above-mentioned multi-crisis elements clearly indicate not only the possibility, but also the necessity of the implementation of the differentiated integration scenario. The main reason for this is the large number of member states with different interests: Brexit has become a symbolic symptom of the EU's inconsistency. The growing role of national identities, non-compliance with the rule of law, inability to solve the problem of immigration, the lack of basic agreement on the future EU vision, as well as economic diversification between member states related to the functioning of the eurozone, are other indicators of possible differentiation.

The probability of the differentiation scenario depends on the strength of the preferences of the member states[33]. In legal terms, in the case of blocking of the differentiation tendencies with the use of mechanisms resulting from the current legal EU status, there is a high probability of deeper integration outside the EU legal system. Examples from the past are the creation and long-term operation of the Schengen area, the beginnings of monetary integration or – in more recent times – the Fiscal Compact. The already existing (Art. 7 TEU) and the newly introduced (extended approvals of national recovery plans or the budgetary conditionality) mechanisms may also contribute to the differentiation of powers and responsibilities of individual states. An extreme solution may be the adoption by some member states only of the treaty establishing the 'new Union'. This will result in *de jure* exclusion of some member states from the new organization, with the marginalization of today's Union and its legal system.

5. Conclusions

At least since 2008, the European Union has been in a deepening crisis, which after several years in terms of the subject matter covers so many areas

32 Christopher J. Bickerton, Dermot Hodson, and Uwe Puetter, "The New Intergovernmentalism: European Integration in the Post-Maastricht Era," *Journal of Common Market Studies* 53, no. 4 (2015): 703–722.

33 Cf.: Andrew Moravcsik, "Preferences, Power and Institutions in 21st-Century Europe," *Journal of Common Market Studies* 56, no. 7 (2018): 1650–1654; William Phelan, "European Legal Integration: Towards a More Liberal Intergovernmentalist Approach," *Journal of Common Market Studies* 56, no. 7 (2018): 1562–1577.

that it can be called a 'multi-crisis'. The still binding principles of the EU legal system resulting from the Treaty of Lisbon indicate the fundamental role of the member states, instead of supranational institutions, both in shaping of the content of EU law and the decision-making procedures. EU law is therefore, in essence, a 'conflicts law' aimed at solving dilemmas arising from the structure and functioning of a *sui generis* system.

One of the most widely debated theoretical problems are the concepts of differentiated integration. They relate not only to the political, but also – and perhaps above all – to the legal dimension of integration. An analysis of the current trends and solutions proposed and taken by EU decision-makers shows that the EU legal system is not subject to federalization, but in fact the tendency to deepen integration does not conflict with intergovernmentalism. The multiplicity of problems resulting from the multi-crisis will most likely require the deepening of the current differentiation mechanisms and the emergence of the new ones. However, they will not fundamentally change the intergovernmental nature of the Union, constituting rather a practical response to the needs existing at the moment. At the end of this process, it may be necessary to abolish the European Union in its present scope, which undoubtedly poses a challenge to the political and legal systems of the member states.

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Legal interpretation from the perspective of French jurisprudence: from positivist exegesis to free scientific research

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Abstract: The "natural law" movement provoked some discussions on the method of interpretation of law within European legal thought. Diverse methodological approaches referring to some social, historical, and multidimensional aspects and foundations of law were developed by French and German legal scholarship at the turn of the 19th and 20th centuries. The present article focuses on the main scientific positions on the method of interpretation of law present in French jurisprudence. Since the beginning of the 19th century, French legal studies were dominated by the positivist school of exegesis. Scholarship and legal practitioners sought the opportunity to rebuild their authority. It was accompanied by attempts to prepare a new theoretical ground for legal order. Then, some representatives of a new trend in scientific research considered pluralism of the methods applied in legal research. Raymond Saleilles postulated the need for the evolutionary perspective in legal science. This approach appears to be similar to the concept of the law of nature with variable content adopted by Rudolf Stammler in Germany. Since the last two decades of the 19th century, François Gény, the supporter of a greater flexibility in interpretation of a legal text, developed *libre recherche scientifique*.

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He questioned the idea of autonomy of legal science, calling for its integration with other disciplines.

1. Introduction

At the beginning of the 19th century, the transition from the paradigm of law of the normative order of the *Ancien Régime* to the paradigm of post-revolutionary law might be observed in France. A comparison between the legal reality before 1789 and the changes caused by the codification process initiated during the revolution and ended under Napoleon's rule were the essential point of consideration at that time. The introduced codes changed the legal reality in a fundamental way. Pre-revolutionary France was characterized by the variety of sources of law, the existence of legal regulations applying with varying scopes with regard to the personal and material dimension, and the recognition of a key part of courts in both: the application of rights and determining its content. The changes, which took place in the post-revolutionary period, were aimed at achieving the dominance of legislation and overcoming the existing legal pluralism by systematizing and harmonizing the sources of law.

It should be taken into account that the creators of the French Civil Code cautiously referred to the normative regulations of the Revolution time. Their goal was to create a stable and long-lasting system, and to support this goal, they turned to the tradition of the medieval reception of Roman law[1]. The Napoleonic codes served as a model for legislative considerations in other European countries[2]. According to the contemporary perception of law, the functions of judges were reduced to the mechanical application of law. Therefore, a significant limitation of the law-making activity of judges might have been noticed[3]. The reflection on the inter-

1 Jean Pascal Chazal, "Léon Duguit et François Gény, controverse sur la rénovation de la science juridique," *Revue interdysciplinaire d'études juridiques* 65, no. 2 (2010): 85.

2 Katarzyna Sójka-Zielińska, "Idee kodyfikacji napoleońskich. Od utopii do realizmu." *Czasopismo Prawno-Historyczne* 57, no. 2 (2005): 27.

3 Katarzyna Sójka-Zielińska, "Wizerunek sędziego w kulturze prawnej epoki Oświecenia," in *Prawo i ład społeczny. Księga Jubileuszowa dedykowana Profesor Annie Turskiej*, ed. Grażyna Polkowska (Warszawa: WPiA UW, 2000), 305.

pretation of law and its sources was revived then. From the perspective of the codes' authors, their works encompassed the implications of the law of nature.

At the same time, due to the lack of the national German codification and the significance of Roman law, German legal scholarship still concentrated on Medieval Roman law. *Pandectists* dominated German legal science in the field of private law, and the historical school was a leading current up to mid 19th century[4]. It was developed the idea that it was not possible to find the rational foundations of law, namely natural law. It was approved that some patterns for legislation might be drawn from the experience of previous generations, from history, particularly (in the perception of Friedrich Carl von Savigny) from the Roman law. Although, there was also developed an influential current of "Germanists" in the historical school that recognized medieval German law as the expression of the German *Volksgeist*[5]. It is significant that, in fact, Friedrich Carl von Savigny introduced the idea of a multidimensional approach to legal research. The *Begriffsjurisprudenz* (the German version of positivism) has dominated the German legal science in the 1850s. Then, in the last decades of the 19th century, several new tendencies have been initiated. Rudolf von Ihering developed *Interessenjurisprudenz*, the approach based on the research on the purpose of a legal rule[6]. It seems that Ihering's attitude towards legal

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4 See Herman Coing, "German *Pandektistik* in its Relationship to the Former *Ius Comune*," *The American Journal of Comparative Law* 37, no. 1 (1989): 9–15.

5 About the development of the German historical school, see more in Polish subject related literature, e.g., Artur Ogurek and Bartosz Olszewski, "Dzieje niemieckiej myśli prawa cywilnego do końca XIX w.," in *Acta Erasmiana II. Prace z myśli polityczno-prawnej oraz prawa publicznego*, ed. Mirosław Sadowski and Piotr Szymaniec (Wrocław: Katedra Doktryn Politycznych i Prawnych Pawie Uniwersytetu Wrocławskiego, 2012), 93–106; Grzegorz Jędrejek, "Teoria prawa niemieckiej szkoły historyczno-prawnej w świetle piśmiennictwa polskiego z XIX wieku," *Czasy Nowożytne* 8, no. 9 (2000): 175–194; Adrian Tabak, "Nauka prawa w ujęciu niemieckiej szkoły historycznej," *Biuletyn SAWP KUL* 13, no. 15/2 (2018): 291–300; Grzegorz Jędrejek, "Kilka uwag dotyczących oceny niemieckiej szkoły historyczno-prawnej w polskiej nauce prawa," *Czasy Nowożytne* 11, no. 12 (2001): 59–74. About the later perception of historical school, see Michael Stolleis, *A History of Public Law in Germany 1914–1945*, trans. Thomas Dunlap (Oxford: Oxford University Press, 2004), 3–4.

6 Rudolf von Ihering, *The Struggle for Law*, trans. John J. Lalor (Chicago: Callaghan & Co., 1879), http://onlinebooks.library.upenn.edu/webbin/book/lookupname?key=Jhering%2C%20

methods and jurisprudence has even led to the characteristic "openness" of the German legal science to the social science, particularly to economy and sociology.

The subject of interest of this article covers the main scientific positions on the method of interpretation of law which appeared in French jurisprudence at the turn of the19th and 20th century. The main questions the present study strives to answer are: What was the French methodology concerning the interpretation of legal acts? What was the attitude of French scholarship towards the patterns of legislation in comparison to the German jurisprudence? In this particular study the historic-descriptive method of theoretical analysis, legal (including formal legal method), and comparative methods were applied to address the research questions and to reach conclusions. Unfortunately, the modest scope of the article does not allow for an exhaustive treatment of the subject, therefore the internal ideological disputes within the indicated scientific currents have been omitted.

2. In search of the best interpretation of Legal Acts: Positivist School of Exegesis

In France, the process of the codification of law triggered the reduction of significant functions that had been previously performed by lawyers. There was made an assumption that the unification of sources of law, their systematization, clarity and precision of norms would contribute to better comprehension of law by everyone, not only by those who were educated in the legal science. In addition, this kind of conviction harmonized with the revolutionary narrative postulating civic equality, the transfer of sovereignty to the nation, and thanks to that the representative body was to perform the most important legislative functions. Therefore, it is not surprising that the legal community was exposed to a certain crisis of identity[7]. Scholarship and legal practitioners strove to rebuild their authority. There were undertaken some steps to prepare the theoretical ground for a new legal order. From the perspective of exegesists, the best interpretation of legal text should have met the criteria of predictability, and it should have

Rudolf%20von%2C%201818-1892.

7 Cf. Jean Louis Halpérin, *L'impossible Code civil* (Paris: PUF, 1992), 293.

been based on syllogistic reasoning, fidelity to the text, and the adoption of the principle of objectivity[8].

The purpose of the French Civil Code consolidating several legal orders was to overcome the uncertainty and arbitrariness of law. The intention of its creators was that the officially adopted text, due to its completeness, precision, compactness and clarity would not raise serious interpretation doubts. It would also enhance its prestige. Napoleon made also some efforts to make the Code not only understood but also well known. Therefore, he initiated its mass printing and distribution to the citizens. It was accompanied by the conviction that the Civil Code expressed some certain fundamental social values, which were not supposed to change significantly over the time. Hence, the theory of interpretation should have strengthened its coherence and durability.

The specificity of the approach presented above is well reflected in the statements of one of the creators of the Civil Code Jean Étienne Marie Portalis. He criticized the attitude of the leading representatives of the Age of Enlightenment towards jurisprudence. He was not in favor of the pursuit of constant legal reforms and the revolutionary spirit (*l'esprit révolutionnaire*), of which the previous projects had originated. Portalis also negatively assessed the code's simplification demand, and he put forward the thesis that the new code should have been based on reliable designs[9]. In his perception, legal acts are not the acts of pure authority or power, but they are acts of wisdom, justice, and reason. The legislator must bear in mind that laws are for people, not people for laws. Therefore, they must be adapted to the nature, habits, and situation of the society. New legislation should be passed gradually in order to recognize some possible unfavorable effects

[8] Julien Bonnecase suggests the division of the development of the exegesis school into three periods (the period of 1804–1830 - from the adoption of the Civil Code to the July Revolution; 1830–1880 - the peak of the exegesis school; 1880–1900 – the declining interest). See more Julien Bonnecase, *La Pensée juridique française de 1804 à l'heure présente: Ses variations et ses traits essentials* (Bordeaux: Delmas, 1933), 303 ff.

[9] Witold Wołodkiewicz, "Jean-Étienne-Marie Portalis. Jego wkład w prace legislacyjne Napoleona," *Palestra* 5–6 (2012): 237–238, Bernard Beignier, "Portalis et le droit naturel dans le Code Civil," *Revue d'Histoire des Facultés de Droit et de Science Juridique* 6 (1988): 77–101. See also Jean Étienne Marie Portalis, *Discours préliminaire au premier project de Code civil* (Bordeaux Édition Confluences, 2004), http://classiques.uqac.ca/collection_documents/portalis/discours_1er_code_civil/discours_1er_code_civil.pdf.

in practice. Institutions that function properly should be retained[10]. In this context, granting too much freedom of interpretation would favor the arbitrariness of law, and it would pose a threat to the order created by the legislator. The legislator turns out to be the institution, which (in order to realize a specific vision of a social order and respecting the values associated with it) makes key decisions concerning the shape of the rules that citizens should follow to achieve the desirable structure[11]. The choice made by the sovereign legislator should not be called into question. Therefore, such a theory of interpretation should be developed which does not depend on an individual interpreter.

The assumption that the law is an act of the sovereign's will, which was adopted at the beginning of the19th century, emphasized the importance of an authentic interpretation, in which the legislator interpreted the previously enacted text. This practice significantly limited the right of interpretation of other entities, granting the privileged position to the will of a sovereign[12]. Such practice could have jeopardized the legal stability and certainty due to the fact that the law was dependent on the decisions of

10 Pierre Antoine Fenet, *Recueil complet des travaux préparatoires du code civil*, *vol I* (Paris: VIDECOQ, Libraire, Place du Panthèon 6, près L'École de droit, 1856), 462, quoted in Sójka-Zielińska, "Idee kodyfikacji," 31–32. It should be also taken into account that Portalis critically assessed the achievements of the French Revolution in the context of civilization. He emphasized the irrationality, manifesting in the pursuit of the destruction of the existing habits and the weakness of the social ties. Portalis argued that private law yielded under enormous pressure of the public sphere - private interests, and the relationships between individuals were no longer taken into consideration because the interests of a state were exposed. The public sphere dominated over and manipulated civil law in order to gain some political goals. To counteract such tendencies, the creators of the Napoleon Code (including Portalis) have tried taking into account the voice of public opinion and the consultations with courts. Their proposal was to avoid some radical and exaggerated solutions which do not correspond to the moral condition and the state of a society. See Jan Baszkiewicz, "O powołaniu czasów Rewolucji i Napoleona do kodyfikacji," *Czasopismo Prawno-Historyczne* 57, no. 2 (2005): 13, 16.

11 Nader Hakim, *L'autorité de la doctrine civiliste française au XIX-e siècle* (Paris: LGDJ, 2002), 51.

12 The model of authentic interpretation of law did not originate in the thought shaped during the revolutionary period, but in the 17th century. Cf. Jean Louis Halpérin, "Legal Interpretation in France under the Reign of Louis XVI: A Review of the Gazette des Tribunaux," in *Interpretation of Law in the Age of Enlightenment: From the Rule of the King to the Rule of Law (Law and Philosophy Library)*, ed. Yasutomo Morigiwa, Michael Stolleis, and Jean Louis Halpérin, (Dordrecht: Sppringer, 2011), 23 –24.

political authorities[13]. It was possible to abandon the quest for the meaning of a legal act in accordance with the time when it was passed, and to focus on its adaptation to the current needs, which were determined socially, economically, and politically. However, in this context, the attention should be paid to the slightly different nature of the use of authentic interpretation in public and private law. Initially, the public law was based on parliamentary legislation, in the Napoleonic era – mainly on imperial decrees. Later, when the administrative issues rarely gained statutory regulation, the source of administrative law became the case law of the highest French administrative court - the Council of State[14]. The competence of the administrative judiciary in France was mainly determined by general clauses. Some non-specific terms as "public interest" or "public benefit reasons" increased the flexibility of law. In some way, they expanded the discretion of administrative authorities. Therefore, the administrative authorities were able to act according to the freedom they received.

In the area of private law, we can observe a gradual departure from the primacy of authentic interpretation in favor of interpretation of judges. To some extent, practical considerations contributed to this situation. It was necessary for a judge to ask the legislator for a binding directive in a specific case in the event of doubts arising in the course of proceedings (*référé législatif*)[15]. However, it significantly complicated and prolonged the proceedings. In addition, it was argued that this practice essentially meant granting the legislative authority the judicial function, which could have been regarded as a violation of the principle of separation of powers.

3. Raymond Saleilles and evolutionary perspective of law

A clear departure from the vision of perfect legislation, able to create a complete, coherent and clear enough system in order to eliminate all interpretation problems, has started since the second half of the 19th century. Raymond Saleilles (1855-1912) put forward the proposal of evolutionary

[13] Benoît Frydman, *Le sens des lois. Histoire de l'interprétation et de la raison juridique* (Paris: LGDJ, 2005), 396.

[14] Jerzy Malec and Dorota Malec, *Historia administracji i myśli administracyjnej* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2003), 88.

[15] Anna Klimaszewska, "Rewolucyjne dywagacje na temat podziału władzy, czyli krótka historia rekursu ustawodawczego we Francji," *Przegląd Naukowy Disputatio* 12 (2011): 12.

perspective in legal science. The sense and scope of regulations evolve with the changes in customs and ideas[16]. The law is transformed under the pressure of diverse social needs, which constantly evoke new combinations of visions and relationships. Therefore, legal science should constantly set and arrange the meaning of the provisions that had been created before with the requirements of social life. According to Saleilles, the idea of justice transforms into the natural law. However, his perception of natural law was different from comprehension in the previous centuries. The law is placed in contemporary social reality. The cooperation of representatives of legal doctrine and legal practice is needed because they determine the operation of law, its efficiency and usefulness in order to put forward the interpretation which adapts the act to its social function, and at the same time, it shapes and educates the community in the spirit of the act[17].

It should be taken into account that the above approach is similar to the concept of the law of nature with variable content created by Rudolf Stammler (1856–1938)[18]. Both scholars move away from the cause-and-effect-oriented theories trying to explain the social phenomenon of law[19]. At

16 Raymond Saleilles, "Droit civil et droit compare," *Revue International de l'Enseignement* 61 (1911): 12. For more about the theory of legal interpretation of Saleilles, see Robert Beudant and Edmund Eugene Thaller, *L'oeuvre juridique de Raymond Saleilles* (Paris: Libraire nouvelle de droit et de jurisprudence Arthur Rousseau, 1914), passim.

17 For more, see Raymond Saleilles, *Mélanges de droit comparé. Introduction à l'étude du droit civil allemand (à propos de la traduction française du Bürgerliches Gesetzbucg entreprise par le Comité de législation étrangère)* (Paris: F. Pichon, 1904), 3; Raymond Saleilles, *De la déclaration de volonté. Contribution à l'étude de l'acte juridique dans le Code civil allemand (art.116 à 144)* (Paris: F. Pichon, 1901), 289; Raymond Saleilles, "École historique et droit naturel, d'après quelques ouvrages rècents," *Revue Trimestrielle de Droit Civil* 1 (1902): 96 –97.

18 See Maria Szyszkowska, *Neokantyzm. Filozofia społeczna wraz z filozofią prawa natury o zmiennej treści* (Warszawa: PAX, 1970), 123–124. It should be taken into account that Rudolf Stammler and Leon Petrażycki had a dispute over who was the first of them who had put forward the idea of the return to natural law. See more Maria Szyszkowska, "Leon Petrażycki jako twórca nowej teorii prawa naturalnego," *Studia Iuridica* 74 (2018): 187.

19 About Stammler's perception of natural law, see Rudolf Stammler, *The Theory of Justice*, trans. Isaac Husic (New York: Macmillan Company, 1925, reprinted by Lawbook Exchange in 2000); Rudolf Stammler, *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung: Eine sozialphilosophische Untersuchung* (Berlin: Walter de Gruyter, 1924); George H. Sabine, "Rudolf Stammler's Critical Philosophy of Law," *Cornell Law Quarterly* 18, no. 3 (1933): 321–350;

the same time, Saleilles attaches great significance to historically targeted comparative analysis, on the basis of which it is possible to capture certain permanent economic and social needs[20]. In turn, Stammler, being greatly influenced by neo-Kantian philosophy[21], on the basis of epistemology of law distinguishes a solid form and a historically conditioned legal material derived from reason and based on experience, which should be considered in terms of compliance with this form. Thus, the unchanging formal elements may be perceived as "indicating factors", timeless categories of order, and only with their assistance we are able to indicate the direction to which the law should head. In this perspective, the goal is more important than causality that allows only cognitive penetration of the real world, but it is insufficient to define the function of law[22]. Therefore, both German and French scholars have treated the law as the manifestation of social life, the matter of which is complex, dynamic, and relative, but it needs some constant reference points to serve properly. Some universal criteria are needed to assess the rightness and legitimacy of law.

4. The idea of free scientific research

François Gény (1861-1959)[23] was also a supporter of greater flexibility in interpretation of the legal text. He put forward the idea of searching some new solutions in jurisprudence. Subordination to the legal acts provides the interpreter with excessive predictability and certainty[24]. It is helpful to review current sources of law in terms of their significance and interpretation possibilities. Gény recognizes written law and formal customs established in social consciousness and legal practice as the formal sources of law. He treats

Gustav Radbruch, "Legal Philosophy," in *The Legal Philosophies of Lask, Radbruch and Dabin*, trans. Kurt Wilk (Cambridge: Harvard University Press, 1950), 60.

20 Saleilles, "Droit civil," 27.

21 See more Deniz Couskun, *Law as Symbolic Form. Ernst Cassier and Anthropocentric View of Law* (Dordrecht: Springer, 2007), 303; Szyszkowska, "Leon Petrażycki," 187.

22 See Łukasz Pikuła, "Znaczenie marburskiej szkoły neokantyzmu dla polskiej teorii i filozofii prawa," *Estetyka i Krytyka* 26, no. 4 (2012): 111.

23 François Gény presents his digressions in his two main works: *Méthode d'interprétation et sources en droit privé positif* (1st edn. in 1899) and *Sciences et techniques en droit privé positif, nouvelle contribution à la critique de la méthode juridique*.

24 François Gény, *Méthode d'intrepretation et sources en droit privé positif; essai critique*, *vol. I* (Paris: LGDJ, 1919), 64-65.

the scholars' opinions as an auxiliary factor - they can inspire the interpreter but they are not independent sources of law.

The definition of the sources of law frames the discourse on the interpretation of law, but in fact it does not indicate what an interpreter is to do in the case unregulated by law or customs. It should be emphasized that the body applying the law never acts in a vacuum. It is always accompanied by a specific social context, in which key directives appear. One of them is the postulate that the judge should try to resolve issues as if they would have been settled by the legislator, who, on the one hand, strives to realize the ideal of justice, and, on the other hand, attempts to realize the ideal of utility[25]. However, it is necessary to confer the more specific content on these general ideas in order to put them into practice. There are three ways that ultimately lead to the same goal. First of all, the person who applies the law relates the absolute ideal of justice to his own conscience and reason. Therefore, he instinctively feels the foundations of justice in our nature. Secondly, he considers the facts, the nature of things, and sociological phenomena in order to adjust the exegesis of law to the specificity of a given social order. At this stage, the key is to apply the data provided by various scientific disciplines. Next, the interpreter deductively extracts more detailed material and formal principles from the abstract ideal of justice.

Gény presents some examples, e.g., everyone has rights to develop his abilities under the condition that he respects the fact that others are entitled to the same rights; striving for harmonization of social order and adaptation of private interests to this; equal rights; the fulfillment of voluntarily undertaken obligations; condemning unjust enrichment at the expense of others; the obligation to repair damage caused by own fault, etc.[26]. From the perspective of Gény, the interpretation of a legal text is a complex process, therefore he proposes the "free scientific research" (*libre recherche scientifique*) where the achievements of sociology, philosophy, psychology, political science, ethics, economics, history, and comparative law are essential due to the fact that they create a multidimensional base[27].

25 Gény, *Méthode d'intrepretation*, 91.
26 Gény, *Méthode d'intrepretation*, 105.
27 Gény, *Méthode d'intrepretation*, 137-138.

Scientific research provides some "starting points", which determine the content of law and the expectations associated with it. These points are also adopted in legal practice, where the interpretation of norms strives to adjust them to current goals and conditions. Gény presents four groups of "starting points": real, historical, ideal, and rational[28]. They all have their basis in biological, physical, and psychological phenomena which, in turn, converge in law and condense in its formulas, especially those of practical application. Gény presents the example of a marriage institution which combines various "starting points". Marriage is based on the recognition of the physical rights of procreation. This institution meets the approval in its historical development (especially in the Christian tradition) because of the social benefits of a durable family. Monogamy itself is also convergent with certain cultural ideals. In addition, Gény points out one more important element - reason that evaluates values and facts. According to him, it allows to order various "starting points" by granting them the appropriate rank when we relate them, on the one hand, to the general requirements of justice, and, on the other hand, to the specificity of real needs in terms of individual life and social order[29].

It should be emphasized, that judges cannot only apply the sense of rightness contrary to the written law. Their interpretation of law should apply intuitive rightness if this measure is necessary for the realization of justice, and when it is in accordance with written law. In this perspective, the rightness will also be related to the specific circumstances of a particular situation - the characteristics of persons, the consequence of decisions, the assessment of public opinion, etc.[30].

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28 François Gény, Sciences et techniques en droit privé positif, vol. II (Paris; LGDJ, 1915), 370–371.

29 Thomas J. O'Toole, "The jurisprudence of Francois Gény," *Villanova Law Review* 3, no. 4 (1958): 463. https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1456&context=vlr.

30 Ibid., 112. For more, see also Joseph Charmont, "Recent Phase of French Legal Philosophy," In *Modern French Legal philosophy*, ed. A. Fouillée at al., trans. Franklin W. Scott and Joseph P. Chamberlain (Boston: The Boston Book Company, 1916), 114–124; Nader Hakim, "Droit naturel et histoire chez François Gény," *Clio@Themis* 9 (2015): 1–18, https://cliothemis.com/IMG/pdf/Hakim-2.pdf.

5. Conclusion

In the 19th century, Roman law studies served as an essential conduit for the development of a coherent approach to the reform and codification of civil law in Germany. *Pandectists*, a new school of Roman law, dominated German legal science in the field of private law. The historical school approved that some patterns for legislation might be drawn from the experience of previous generations, from history. Friedrich Carl von Savigny put forward the idea of a multidimensional approach to legal research. The *Begriffsjurisprudenz* (the German version of positivism), beginning in the 1850s, has dominated the German legal science. Then, in the last decades of the 19th century, several new tendencies have been initiated. Rudolf von Ihering developed *Interessenjurisprudenz* and the approach based on the research on the purpose of a legal rule. The civil code *Bürgerliches Gesetzbuch* of 1896 was the outcome of German Roman law studies[31].

In France, since the early 19th century, the positivist school of exegesis dominated in legal studies. In half the century, some representatives of a new trend in scientific research considered pluralism of the methods applied in legal research. Raymond Saleilles postulated the need for the evolutionary perspective in legal science. Since the last two decades of the 19th century, François Gény, the supporter of a greater flexibility in interpretation of a legal text, developed *libre recherche scientifique*, calling for the integration of the legal science with other disciplines and the need of the development of some closer to life methods that would allow the better implementation of the practical objectives of law.

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[31] Paradoxically, at the beginning of the 20th century, as it had been before in France under the Napoleonic codes, more German specialists in civil law have were concerned with the interpretation and comments on existing rules of law.

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European Union model of whistleblowing

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Abstract: In October 2019, the European Union adopted the Directive on protecting persons reporting breaches of European Union law, commonly known as the „Whistleblower Protection Directive" (EU Directive). The protection of national policies is beyond the scope of the Directive, as its sole purpose is to encourage people to report „breaches of EU law", i.e., to strengthen „enforcement of the Union law and policies in specific areas". The Directive is not concerned with the protection of workers or employees. The Directive treats whistleblowers as an instrument for reporting irregularities. Another proof of the instrumental approach adopted in the Directive is the lack of any financial incentives for whistleblowers. This article's basic thesis is that despite dynamic and multifaceted changes in the economy of individual countries, the accepted model of whistleblowing in the European Union will depend on repeated multidimensional analysis of the principle of the lawyer's loyalty to the organization. The research presented below aims to prove the validity of the adopted thesis.

1. Introduction

On November 26, 2019, Directive (EU) 2019/1937 on the protection of persons reporting on breaches of Union law, commonly known as the Whistleblower Protection Directive, was published in the Official Journal of the European Union. Starting from December 17, 2019[1], Member States have two

[1] *See* Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, https://

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years to implement in their national legal systems regulations providing, inter alia, new whistleblower protection provisions, which are primarily designed to make available legal protection to whistleblowers. Whistleblowing in a „EU-vision of reporting irregularities" is intended to be an EU law enforcement tool and a key element in ensuring the effective enforcement of EU law. The Directive was created after pressure from the European Parliament to protect whistleblowers at the EU level. Moreover, scandals such as Luxleaks and the Panama Papers have influenced the European Parliament's legislative work, which has become an advocate of whistleblower protection[2]. The Directive's current text complies with international standards in this field, and its final version was influenced by the preceding Communications and Resolutions, which will be the subject of a narrow analysis in this article. The Commission has repeatedly indicated that whistleblowing will be European law enforcement tool that will ensure financial markets' stability, EU economies' balance, and fair competition. Moreover, it indicated the need to introduce comprehensive protection for public and private sector employees who have access to up to date information concerning their workplaces' practices and are usually the first to recognize irregularities[3]. Nevertheless, one element has been omitted by the Directive, i.e. a complete redefinition of the concept of loyalty between the employee and the employer. It should be pointed out that the reason for not reporting irregularities is the obligation of loyalty that employees owe to their organization and

eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:32019L1937; *See* the articles published on 26 September 2018 by the Nordic Correspondent of the Financial Times Richard Milne, Danske Bank whistleblower was British executive in Estonian branch", available at https://www.ft.com/content/32d47fd8-c18b-11e8-8d55-54197280d3f7, and by Reuters for The Guardian, Whistleblower at Danske Bank was firm's Baltics trading head, accesed August 12, 2021, https://www.theguardian.com/world/2018/sep/26/danske-bank-whistleblower-was-ex-baltics-trading-head-howard-wilkinson

2 European Parliament Resolution of 24 October 2017 on legitimate measures to protect whistle-blowers acting in the public interest when disclosing the confidential information of companies and public bodies (2016/2224(INI)), accesed August 12, 2021, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0402>.

3 *See* Communication from the Commission to the European Parliament the Council and the European Economic and Social Committee Strengthening whistleblower protection at EU level, accesed August 12, 2021, *available at* https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp content/uploads/2018/04/WhistleCommunication.pdf.

colleagues. Loyalty in informing about irregularities is a controversial topic that has, in a way, been overlooked by the EU legislator. Loyalty may result from gratitude for employment, or from the obligation to fully identify with the company. Based on this paper, the question that should be asked concerns the role of loyalty in the Directive, which is a necessary element of proper employer-employee relations and business relations. The Directive requires renouncing loyalty to the company when crucial interests of the European Union are at stake. The remark of Sissela Bok is, therefore accurate that „loyalty to colleagues and clients becomes an opponent of loyalty to the public interest, towards those who may be hurt if no disclosure is made"[4].

2. Theories of Whistleblowing

This article will present the definitions of whistleblowing proposed by foreign literature. The reason for such an operation is that Poland does not have a whistleblowing tradition, and therefore it is justified to use foreign doctrinal achievements. According to J. P. Near and M. P. Miceli, reporting irregularities is a form of social control (and not only) of an organization. Whistleblowing is a complex process by which members of an organization (former or present) disclose information about irregularities or illegal practices (of which the employer is aware) to persons or organizations that may take action in this regard[5]. R. Johnson gives an elaborate definition of whistleblowing, believing that whistleblowing is a form of objection that has three features: 1. It is about making information public individually; 2. this information is disclosed outside of the organization which makes it public; 3. information disclosed relates to a severe irregularity found in the structures of this organization. After all, the person reporting the irregularity is, in principle, a member of the organization. The perspective presented by R. Johnson is narrow and does not cover all elements of the basic definitions of whistleblowing[6].

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4 Sissela Bok, "Whistleblowing and professional responsibilities. In Ethics Teaching in Higher Education," ed. Daniel Callahan and Sissela Bok (Plenum Press: New York, 1980), 281.

5 Janet Near and Marcia Miceli, "Organizational Dissidence: The Case of Whistle-Blowing," *Journal of Business Ethics*, no. 4 (1985): 1–16.

6 Roberta Johnson, *Whistle-blowing: when it works – and why* (Lynne Rienner Publishers: Boulder, 2003), 3.

D. Schultz and K. Harutyunyan[7], in response to the definition presented by R. Johnson, indicate that there are two other possible characteristics of a whistleblower. Firstly, it is the motivation for revealing irregularities, which, as a rule, must assume good faith (author's note) in the disclosure process. The authors exclude whistleblowers whose disclosure intends to gain financial gain or harm a person or organization. However, it is not appropriate to exclude any financial advantage from reporting irregularities. Compensation or financial rewards are a characteristic element of the reporting process in, e.g., the United States. Such rewards either compensate for ostracization or loss of employment[8]. Secondly, the reporting person does so as a last resort. It is worth noting here that the D. Schultz and K. Harutyunyan indicate that the so-called „proper" reporting would refer to the disclosure of information outside the organization (so-called external reporting)[9]. Their thesis is that organizations or institutions should develop a sound internal self-control system that should be shared. This allows organizations to undergo internal controls under normal circumstances to detect and correct illegal and improper behavior, as allowed by organizations' reporting mechanisms. Whistleblowing intends to serve as an alternative - another channel for reporting misconduct when the internal structure prevents or obstructs the possibility of otherwise reporting misconduct.

All the definitions, as mentioned earlier in international literature, deserve a few remarks. First, if an employee comments or complains to his

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7 Dilara Huseynova and Katerina Piperigos, "Justice for justice: Protecting whistleblowers in the EU; Protection of whistleblowers - the why and the how," accessed August 12, 2021, http://transparency.eu/wp-content/uploads/2018/04/WB_Transparency-Group-CoE-17-18.pdf.

8 Łucja Kobroń-Gąsiorowska, "Dyrektywa Parlamentu Europejskiego i Rady w sprawie ochrony osób zgłaszających przypadki naruszenia prawa Unii (whistleblowing) — jej wpływ na polskie prawo pracy — wybrane uwagi," in *Różnorodność w jedności. Księga pamiątkowa dedykowana Profesorowi Wojciechowi Muszalskiemu*, ed. B. Godlewska-Bujok and K. Walczak (Wolters Kluwer, Warszawa 2019), 75-86, L. Paige Whitaker, "The Whistleblower Protection Act: An Overview 2007", accesed August 12, 2021, https://sgp.fas.org/crs/natsec/RL33918.pdf.

9 The subject of considerations in international literature is the so-called external reporting, i.e., by passing internal reporting channels; Heungsik Park, Brita Bjørkelo, and John Blenkinsopp, "External Whistleblowers' Experiences of Workplace Bullying by Superiors and Colleagues," Journal of Business Ethics 161, no. 3 (2020): 591–601.

employer about some irregularities in the workplace, the employee is not a whistleblower. These definitions take the view that an individual becomes a whistleblower when he or she approaches a potentially influential third party (e.g., a trade union, newspaper, government agency) with a comment or complaint about an unfavorable workplace situation[10]. The whistleblower's intention is to force the employer to act under pressure from a third party. The whistleblower is - the accuser. The employer is the accused. So why should the accused in any situation cooperate with the accuser? The defense (defendant) does not cooperate with the prosecutor as a rule.

Finally, it is worth pointing to one more issue here. If the whistleblower's reported irregularities prove to be false, the employer might not cooperate with the whistleblower from the very beginning of the report. There is some doubt that an employer would be interested in potential cooperation with an employee who approaches him with a complaint about some unfavorable situation in the workplace. It would be reasonable for the employer to cooperate with the employee in such a situation, even if this cooperation is for a different reason than responding to reported irregularities. There are, however, many reasons (possibly many good reasons) why an employer may not be willing to address all of the complaining employee's allegations. Thus, it would be unlawful to say that the employer is not cooperating. Perhaps, the employer is not seeing what the employee does, or it may not be economical or rational to make changes. The bottom line is that the whistleblower's allegations must be relevant in order for the employer to do something to remedy the situation.

For this article, It should be assumed that whistleblowing is the disclosure of material information or activities that are reasonably considered illegal, unethical, or otherwise inappropriate, regardless of whether the disclosure concerns the public or private sector. A person directly or indirectly related to an organization or institution with evidence of inappropriate behavior of a person or institution may become a „loyal" whistleblower. It takes the position that whistleblowers are most often employees

[10] The EU Directive allows internal reporting and does allow external reporting under the circumstances.

or persons directly or indirectly related[11]. It includes internal and external whistleblowing. The above remarks only open up a polemic in the literature, which I hope will start soon.

I believe that anyone can become a whistleblower who discloses irregularities in a workplace or public institution. My opinion is that for whistleblowing has the value of the information provided, not the whistleblower's motives[12]. A worker or civil servant is the only person or part of a small category of people aware of what is happening at work and is, therefore, best placed to act in the public interest by warning the employer or the general public[13]. Considering this, whistleblowing is a crucial mechanism in fighting for fairness and the public interest. Its role as a reporting mechanism for misconduct, fraud, and other forms of illegal or unethical behavior allows the public to be aware of violations that might otherwise remain hidden. This is especially actual of democratic states, where accountability and transparency, reinforced by reporting on irregularities, are fundamental values supporting state apparatuses' functioning.[14] Therefore, protecting the whistleblower from retaliation, disproportionate penalties, unfair treatment, and other forms is essential as it enables employees to use appropriate channels to speak out against abuse. Consequently, labor law primarily fulfills a protective function, protecting employees' rights. However, employees who disclose inside information are at risk of retaliation. Without protection from retaliation, many would-be whistleblowers will remain silent, thereby depriving anti-corruption investigators of the inside information they need. Therefore, protecting whistleblowers must be part of any anti-corruption strategy. However, establishing such a system is a challenge for any country, as whistleblowers' adequate protection

11 Łucja Kobroń-Gąsiorowska, "Interes Publiczny jako element podstawowy funkcji ochronnej prawa pracy - w kontekście ochrony sygnalistów," *Roczniki Administracji i Prawa,* no. 2 (2019): 333–343.

12 Kobroń- Gąsiorowska "Interes Publiczny," 333–343.

13 Case of Heinisch v. Germany, Application No. 28274/08.

14 Simon Wolfe, Mark Worth, Suelette Dreyfus and AJ Brown, "Whistleblower protection laws in G20 countries: Priorities for action, , accessed August 12, 2021, https://webarchive.nla.gov.au/awa/20140908101050/http://pandora.nla.gov.au/pan/148392/20140917-0713/blueprintforfreespeech.net/wp-content/uploads/2014/09/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf,,

requires a well-synchronized legal framework of criminal, administrative, procedural, and management provisions. In other words, protecting whistleblowers and fighting corruption requires the harmonization of different interests and resources.

3. The EU Directive as a "litmus test" of European policy goals in the field of whistleblowing

In October 2019, the European Union adopted a Directive on protecting persons who report breaches of EU law (the EU Whistleblower Directive). The European Parliament and other international organizations have repeatedly called for the enactment of Union (EU) law to protect whistleblowers. In addition to the obstacles to the legal basis for reporting, the EU overall had a minimal political interest in respecting rules that existed to a negligible extent in the individual Member States. Nevertheless, the EU could not stand idle after a series of reports from whistleblowers in the US and in the EU, which became the „instrument" for opening the whistleblowing debates. After extensive public consultation, the Commission proposed an EU Whistleblower Directive in April 2018. The Directive contains a broad definition of a whistleblower covering a wide range of policy areas, including the public and private sectors, which is in line with international standards. All forms of retaliation against whistleblowers are prohibited, and in the event of alleged retaliation, the burden of proof rests with the employer. The whistleblower must first use the internal reporting channels, and in the event of their ineffectiveness, he may report outside the organization. The Directive „cares" about the so-called European public interest, as the preamble itself confirms: 'at Union level, reporting and public disclosure of breaches by whistleblowers are one of the elements of the bottom-up enforcement of Union law and policies. They provide information for national and EU law enforcement systems, enabling the effective detection, investigation, and prosecution of breaches of Union law, thereby increasing transparency and accountability".[15]

The Commission indicated in general that „better protection for whistleblowers will translate into an increase in the overall level of worker

[15] Point 2 Preamble to the Directive of the European Parliament and of the Council (EU), 2019/1937, on the protection of persons who report breaches of EU law, 23 October 2019.

protection in line with the objectives of the European Pillar of Social Rights, in particular its principle 5 (fair working conditions) and 7 (security in the event of dismissal)". Ensuring a consistent, high level of protection for people who obtain specific information and report it in the course of their professional duties (whatever their nature), and thus expose themselves to the risk of retaliation in the workplace, will contribute to safeguarding workers' broadest rights. Such protection will be significant for those who work under contracts that do not guarantee job security and those who work in a cross-border context[16]. In return for reporting irregularities in good faith, the whistleblower who risks his position, job, reputation, and dignity obtains nothing.

4. Loyalty in the concept of whistleblowing

Loyalty to the employer (public or private) in reporting irregularities is a controversial issue that will undoubtedly be the subject of heated polemics among labor law and law practitioners. Whistleblowing is a particular type of action: report. Reports can be public - usually in a public indictment[17] - or confidential - disclosed through dedicated channels. In line with the central argument in this regard, with a correct understanding of the nature of employees 'loyalty, it becomes clear that whistleblowing does not endanger employees' loyalty to their employer. This is because signaling an employer's irregularities and being loyal to them serves the same purpose, the employer's moral welfare[18]. An employee's loyalty to the employer can contribute to strengthening the cooperation between the employee and the employer by making the employee more trustworthy and therefore more valuable as an employee; facilitates building authentic relationships in other areas of the employee's life; broadens the field of interest of the employee and gives him a richer identity; provides greater motivation

[16] Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, accesed August 12, 2021, https://eur-lex.europa.eu/resource.html?uri=cellar:a4e61a49-46d2-11e8-be1d-01aa75ed71a1.0013.02/DOC_1&format=PDF.

[17] Peter Jubb, "Whistleblowing: A Restrictive Definition and Interpretation," *Journal of Business Ethics* 21, (1999): 77–94.

[18] See more: Jukka Varelius, "Is Whistle-blowing Compatible with Employee Loyalty?," *Journal of Business Ethics* 85, no. 2 (2009): 263–275.

for the work of the employee; makes it possible to achieve greater unity in the life of the employee; improves the efficiency of the organization in which the employee works; contributes to the protection of valuable social institutions; while many employees share an attitude of loyalty to the organization that employs them, the organization can become a real community[19]. Such loyalty will contribute to reporting irregularities, using in the first place internal methods of reporting violations, e.g., in the workplace. However, I am aware that the employer may generate infringements, and then this argument is pointless.

Loyalty must be considered multidimensionally; it does not always have to be defined through the prism of caring for the welfare of the workplace/employer. It may result from high unemployment[20]. For Duska „loyalty" will not always precede the reporting of irregularities. Duska perceives the company as something that cannot be the object of the employee's or its member's loyalty. So the difference in perception is essential and because those who believe that employees have a duty of loyalty to the company do not consider the appropriate moral difference between individuals and corporations. So why can't a company be the kind of thing that you can be loyal to?[21]. It is unacceptable to make the company an unique object of loyalty or to give it a moral status that it does not deserve because it contributes to lowering the status of people who work for profit for this company. The relationship between the employer and employee is not based on sacrifice but profit expectations. This relationship allows them to the situation when expectations are not met on both sides. For Duska, the company is a mere psychic fiction because it is a group. The company has no moral status, except in the circumstances of the individual members who make it up. It is not and should not be a proper loyalty object[22]. Whistleblowing is not only acceptable but expected when a company harms society[23].

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19 Juan M. Elegido, "Does It Make Sense to Be a Loyal Employee?," *Journal of Business Ethics*, no. 3 (2013): 495–511.

20 Daniel Santoro and Manohar Kumar, *Speaking Truth to Power – A Theory of Whistleblowing* (Springer: Cham, 2018), 36.

21 Ronald Duska, "Whistleblowing and Employee, Loyalty," in *Contemporary Issues in Business Ethics*, ed. Joseph R. DesJardins and John J. McCall (Wadsworth Publishing Company: Portland, 1990), 142.

22 Duska, "Whistleblowing,"143.

23 Ibidem, 146.

R. Larmer[24] declares that there is no conflict between them: informing about irregularities and maintaining loyalty to the employer. Larmer tries to argue with Duska's views, pointing out that Duska's views on employee loyalty are insufficient because, although the company cannot be described as a person, loyalty remains to colleagues. He compares a worker's loyalty to loyalty to a friend who has a drug problem. In this sense, it is required that the issue be reported to the appropriate institution. Likewise, a loyal employee is not necessary to speak to the employer about the employer's actions as he knows that the employer will not take corrective action nevertheless. Correspondingly, the employee is loyal to the employer and takes steps to protect himself from unfair retaliation, e.g., through external reporting. Furthermore, loyalty cannot require ignoring immoral or unjust behavior within the company. Loyalty implies the feeling that the organization or employer to which the employee is loyal is not practicing unethical or illegal practices. The duty of loyalty not only allows reporting of irregularities but actually requires it. According to this view, the duty of loyalty requires an individual to "consider whether his actions contribute to the clear mission, values, and purposes of the organization to which he is loyal"[25].

Whistleblowing is not only an act of opposition to the dysfunction of democracy. It is primarily the objection of employees, members of the organization to unethical practices, the supervisor, the director, i.e., the employer, who are obligated to loyalty and confidentiality. R. Larmer points out that whistleblowing only appears to violate these obligations and therefore, the argument that it is an act of disloyalty and hence is morally wrong should be rejected[26]. He also makes an interesting argument that the main purpose of the employer is economic profit, and the loyal employee is the one who reports the irregularity. The primary motive in the work process for the employer is mainly financial. The reporting model in

[24] Robert Larmer, "Whistleblowing and employee loyalty," Journal of Business Ethics, no. 2 (1992): 128.

[25] Wim Vandekerckhove and Ronald Commers, "Whistle blowing and rational loyalty," *Journal of Business Ethics,* no. 1–2, (2004): 225–233. See also: loyalty concept according to Jukka Varelius, "Is Whistle-blowing Compatible with Employee Loyalty?," *Journal of Business Ethics*, no. 2 (2008): 263–275.

[26] Larmer, "Whistleblowing," 126.

the Directive is based on the model developed by R. Duska, which assumes that the company does not deserve the status of a person, therefore there is no such thing as a duty of loyalty to the company[27].

Whistleblowing must be seen as an element of the state's economic development and modern relations between private and public organizations. Perceiving whistleblowing as a „denunciation" may constitute a brake on the growth of this institution, and I mean the EU Directive, which, contrary to the assurances of the European Commission, is not a „game changer", because the European Union perceives it as a morally justified act against corporations and public institutions when their actions threaten only the interests of the European Union. Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, added: „the new whistleblower protection rules will be a „game changer". In a globalized world where the temptation to maximize profit sometimes at the expense of the law is real, we must support people who are willing to risk exposing serious breaches of EU law; we owe it to honest European citizens"[28].

However, the reasons behind an EU legislative initiative, i.e., the growing number of disclosures outside organizations affecting international opinion, should not be denied. For example, Snowden, Wikileaks, or Panana Papers have exposed many countries to no potential danger. Consequently, whistleblowing received wide public attention from the European Union and sparked a debate that led to the finalization of the legislative initiative. As it has already been indicated, the legislation of individual EU Member States treated the whistleblowing institution in a diametrically different way. The response of the state authorities has so far been limited to the creation of anti-terrorism or anti-fraud legislation. The EU directive assumes that starting with employees, former or current, public or private organizations, they will be able to correctly identify whether the perceived irregularity violates the broadly understood law and interests of the EU, and what is more, that these whistleblowers, through the prism of

27 Duska, "Whistleblowing," 295– 300.

28 European Commission, Press Release, Whistleblower protection: Commission sets new, EU-wide rules, accesed August 12, 2021, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3441.

undefined "good faith"[29] will report such an irregularity forpurely altruistic reasons, risking a great deal, and one can make a bold conclusion - risking everything. The EU Directive itself rejects the principle of loyalty to the employer/contractor / institution.

The concept of whistleblowing proposed by the European Commission, which deserves confirmation, is based on the best international practices in whistleblowing protection, rejects the principle of loyalty despite brief references to the so-called „good faith" of the whistleblower. It assumes that a private or public institution in which irregularities occur is an "object" (in line with R. Duska's concept) and, most importantly, does not provide any incentives for potential whistleblowers unless we assume that such an incentive is altruistic.

5. "EU concept of whistleblowing"

The model for reporting irregularities presented in the Directive even "orders" reporting of irregularities, which in my opinion is an incorrect procedure due to the complete omission of incentives for whistleblowers in the form of rewards. On the other hand, the protective circle outlined by the Directive, i.e. the protection of EU interests, is, in my opinion, based on the concept of R. Duska. To prove it, one should examine the negation of the idea of loyalty presented by R. Duska.

R. Duska assumes that in whistleblowing, there is no obligation of loyalty to his company, so the author negates the thesis of S. Bok[30], which maintains the existence of a conflict of loyalty the Employee to the employer.

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[29] See point 32 of the Directive: "In order to benefit from protection under this Directive, reporting persons should have reasonable grounds to believe, in the light of the circumstances and information at the time of reporting, that the matters they report are genuine. This requirement is an essential safeguard against reports made in bad faith, fraudulent or abusive reports, as it ensures that those who, at the time of reporting, have intentionally and knowingly provided incorrect or misleading information are not benefiting from protection. At the same time, this requirement ensures that the reporting person will not be deprived of protection where he has reported inaccurate information on breaches as a result of an unintentional error. Similarly, reporting persons should be entitled to protection under this Directive if they have reasonable grounds to believe that the information reported falls within its scope. The motives of reporting persons on their own should not play a role in deciding whether they should be granted protection".

[30] Bok, "Whistleblowing," 3.

Duska indicates that "there is no obligation of loyalty to the company, not even prima facie because companies are not things and therefore are not objects of loyalty". Companies or organizations cannot be given such a moral status because they do not "deserve, but to raise their status, one lowers the status of people working for companies"[31]. For Duska, loyalty is the essential and authentic relationship between people that cannot be ignored by reducing it to another relationship. "If the relationship of the role of the employer and employee is moral, it is more than economic, where the economic relationship is defined as a balance of competitive interest between the employer and employee." According to Duska, being loyal does not require absolute or even blind loyalty, e.g., be asked to lie in terms of product quality, price, or quantity control as part of broadly understood economic freedom and balance in labor relations, Duska points to a purely economic justification for reporting an irregularity[32]. A company or corporation (private sector): produces a good or service that is intended. However, generating profit is a fundamental function of the enterprise as a business because if the production of a good or service is not profitable, the company will cease to exist. In turn, employees, obligated to perform work, also seek to make a profit." Employee disclosure will be done - for profit. Duska points out that the company (employer) does not feel obliged to be loyal. The saying mentioned above," you cannot buy loyalty," is true. Loyalty depends on relationships that require self-sacrifice without expecting a reward"[33]. Duska emphasizes that the Employee works because the company pays him to earn money." An employer will end an employment contract with an employee if further employment is not profitable and the employee leaves the employer if it is beneficial for any of them. Official cannot be loyal to his supervisor who holds a specific function, because he cannot be loyal to a particular position in a situation where the person having a given function commits offenses that represent the broadly understood common good. The above should not be equated

31 Duska, "Whistleblowing," 156.

32 Norman Bowie, and Ronald Duska, "Business ethics", Review by: Ken Hanly, Journal of Business Ethics 11, no. 9 (1992): 718-28.

33 Ibidem, 16.

with conditions that must be met for whistleblowing to be lawful, although whistleblowing itself does not require justification.

The above indicated concept was adopted by the model of reporting irregularities included in the Directive, which provides for reporting irregularities that affect the functioning of EU law. Such a model is acceptable at the EU level, which does not have to ask the question after E. Boot „What conditions must be met for whistleblowing to be morally justified?"[34]. I reject the EU's full restraint entirely in rewarding whistleblowers for reporting breaches of EU law. However, it should be noted that financial rewards for whistleblowers in the concept of whistleblowing are obligatory, and it may be tempting to say that they are one of the basic elements of whistleblowing. The financial reward system for whistleblowers became a staple of the whistleblowing model as early as 1863, when the False Claims Act (FCA) was passed. The Sarbanes-Oxley Act supplemented the model for reporting irregularities in the US in 2002[35]. Along with this act and after the 2008 crisis, the Dodd-Frank Act of 2010[36], was introduced, which defined the rules for reporting irregularities for the financial sector. The Dodd-Frank Act adopted a robust whistleblower protection theregime, allowing the Securities and Exchange Commission (SEC) to offer financial rewards to whistleblowers under certain circumstances, which has proved to be a very effective way of encouraging whistleblowers to report, but at the same time provides financial security for whistleblowers that the EU does not offer in its directive. However, the Directive chose a different „model" that would not necessarily create a cooperation between the employee and the employer. The question to be asked concerns the essential aim of the Directive. The Directive has chosen to create an illusory sense of security and protection for those who report breaches of EU law. The European Union emphasizes reporting breaches of EU law in the European interest, a massive deterrent for whistleblowers without financial incentives.

34 Eric Boot, *The Ethics of Whistleblowing* (Routledge: London, 2019), 35.

35 Sarbanes-Oxley Act 2002, Washington D.C., U.S. G.P.O., 2002.

36 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o).

6. Conclusion

The foundation for assessing whether EU whistleblower law is a „game changer" is a question that does not concern adequate whistleblower protection, but how the European Union wants to reward whistleblowers who have been almost obligated to report without receiving anything in return. In this regard, the model of reporting irregularities adopted in US law allows whistleblowers financial rewards, enabling the whistleblower to deal with a problematic situation in the labor market.

In recent times, reporting on irregularities has become the dominant method of solving problems that affect essential matters relating to the interests of EU countries and national security. While reporting misconduct serves the public interest, too often, whistleblowers experience many forms of retaliation, so it makes sense to introduce appropriate rewards for them as a substitute for participating in the benefits of disclosure. The EU Whistleblower Directive is the first EU law to protect whistleblowers across the EU, adopting a broad definition of who can be a whistleblower, encompassing both the public and private sectors. As this paper has shown, the EU Whistleblower Directive is based on international standards on protection. During the transposition period, Member States also have to fill some legislative gaps and protection standards that are in line with the spirit of whistleblowing. To this end, it is expected that protection standards and incentives for whistleblowers will be raised[37].

The Directive attaches great importance to observe the whistleblower's data requirements, which are hard to find, for example, in a trial before a labor court. Concerning the use of the reporting channels, it should be positively assessed that the whistleblower first uses internal channels. Member States are now required to encourage internal channels without preventing whistleblowers from reporting outside the organization and, under certain conditions, also to the public media. The Directive unequivocally condemns all forms of direct, indirect, or attempted retaliation, such as dismissal, reduction of wages, discrimination, and abuse. On the other hand, there are still shortcomings in the text that could undermine the Directive's effectiveness. First of all, the fact that the scope of application of the Directive

[37] Kobroń-Gąsiorowska, "Dyrektywa Parlamentu," 75-87.

is limited to areas falling within the scope of EU competence may cause ambiguities and uncertainty in the case of court proceedings. The Directive is likely to improve and strengthen the rules on whistleblower protection and contribute to promoting a culture of transparency and accountability across Europe, not only to the benefit of workers and companies. However, these conclusions are too early, especially given that the level of whistleblower protection varies widely across the European Union.

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"Chilling Effect" in the Judicial Decisions of the Polish Constitutional Tribunal as an Example of Legal Transplant

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Abstract: The paper is dedicated to describing the way of reception by the Polish Constitutional Tribunal of the "chilling effect", i.e. an institution related to such activities of public authorities that form an indirect act of deterrence regarding the execution of constitutionally guaranteed rights and freedoms, esp. the freedom of expression. The discussed concept has originated in judicial decisions of the US Supreme Court and has spread into many contemporary legal systems, including jurisprudence of the European Court of Human Rights. Although it is evident that the Tribunal "took over" that concept from the ECHR, it in fact developed its own, unfortunately internally inconsistent, understanding of the chilling effect. Four different ways of application of chilling effect may be noticed in judicial decisions of the Polish CT, while only two of them reflect the perception of this institution by the US Supreme Court and the ECHR.

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1. Introduction

The purpose of this paper[1] is to discuss an institution (and, as some point out, a legal metaphor[2]) which is well-known in many contemporary legal systems, namely the so called "chilling effect", as introduced into the Polish legal system by the judicial decisions of its constitutional court, i.e. the Constitutional Tribunal. So far, it has been explicitly mentioned in more than twenty judgments and decisions of the Tribunal as well as appeared recently in the jurisprudence produced by other Polish courts.[3] Nowadays, the concept of the chilling effect (Polish: *efekt mrożący*) is becoming increasingly popular in Poland, not only in the judicial work and academic discussions, but also in the public debate in the broad sense. For instance, it has been invoked by the mass media in the course of disputes over the ongoing – to say euphemistically – controversial reforms of the Polish judicial system (which included "reshaping" the Polish Supreme Court), introduced in 2017 by the current ruling party.[4]

However, the aim of the present article is not to provide a mere description of the Polish version of the chilling effect as such, but this description serves another purpose. Since the analyzed institution has not been inserted into the Polish legal system by the constitution, a statute or any other act of positive (enacted) law, but through the judgments of the Constitutional Tribunal, it may be perceived as an example of the so-called judicial legal transplant. Thus, a discussion on the manner of implementing the chilling effect in Poland should be seen in a wider perspective, as an addition

1 This paper has been prepared as a result of the research project no. 2017/01/X/HS5/01344, financed by the National Science Centre (Poland) within the MINIATURA I funding scheme. A short summary of results of the research projects was presented in Piotr Chybalski, "Reception of chilling effect by the Polish Constitutional Tribunal" *Academia Letters* 654 (2021), https://www.academia.edu/46939730/Reception_of_chilling_effect_by_the_Polish_Constitutional_Tribunal, https://doi.org/10.20935/AL654.

2 See e.g. Andrzej Wróbel, "Krótki szkic o metaforze prawniczej," *Teka Komisji Prawniczej. Polska Akademia Nauk. Oddział w Lublinie* (2014): 139.

3 For instance in: Supreme Administrative Court, Judgment of 12 December 2014, Ref. No. I OSK 900/13, available at www.orzeczenia-nsa.pl, or Appellate Court in Warsaw, Judgment of 1 March 2017, Ref. No. VI ACa 1538/15, available at orzeczenia.waw.sa.gov.pl.

4 Wojciech Tumidalski, "Sędziowie czasu 'dobrej zmiany' rozważają swą przyszłość w todze," *Rzeczpospolita* (22 October 2018): 5.

to current debates among experts in comparative constitutional law concerning the advantages and drawbacks of judicial borrowings of constitutional ideas from foreign legal systems, including foreign judicially shaped institutions. The problem of usefulness of transplanting legal institutions from other legal systems to the domestic regime has belonged to important and highly controversial matters of comparative law for a long time. So far, no universally adopted attitude to this issue has been developed, but one can easily find clearly opposite opinions in literature, from broad approval expressed by Alan Watson[5] to a strong rejection by Pierre Legrand.[6] The problem of transplanting legal ideas is currently particularly visible in constitutional case-law. The number of instances when constitutional courts use foreign law seems to be steadily growing,[7] although the frequency varies throughout the world, which makes the future of such practice still fairly uncertain.[8] The Polish Constitutional Tribunal seems to belong to those constitutional courts which are quite open to taking advantage of foreign legal systems, including the case-law of its counterparts from various countries.[9] Nevertheless, some of the borrowings seem to have been made in a controversial manner, indicating dangers that may be caused by a careless and superficial use of comparative law in adjudicating domestic constitutional problems. In my opinion, the implementation by

5 Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Athens: University of Georgia Press, 1993).

6 See e.g. Pierre Legrand, "The Impossibility of 'Legal Transplants,'" *Maastricht Journal of European and Comparative Law* 4, vol. 2 (June 1997): 120–121.

7 See esp. statistical data provided in András Jakab et al. (eds.), *Comparative Constitutional Reasoning* (Cambridge: Cambridge University Press, 2017), 790.

8 Tania Groppi and Marie-Claire Ponthoreau, "Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future," in *The Use of Foreign Precedents by Constitutional Judges*, ed. Tania Groppi and Marie-Claire Ponthoreau (Oxford and Portland: Hart Publishing, 2014), 428–431.

9 See Ada Paprocka, "An Argument from Comparative Law in the Jurisprudence of the Polish Constitutional Tribunal," *Adam Mickiewicz University Law Review* 8 (February 2018): 242, https://doi.org/10.14746/ppuam.2018.8.16.

the Tribunal of the concept of the chilling effect may serve as a notable example of such a doubtful practice.[10]

2. American Origins

The institution of chilling effect is of American origin; it appeared in the jurisprudence of the Supreme Court of the United States in the middle of the 20th century. In 1952, the Court produced a judgment in *Wieman v. Updegraff*.[11] In a concurring opinion, Justice Felix Frankfurter argued that the teacher's duty to take an oath of loyalty to the USA, imposed by Oklahoma"s state legislation, could "chill that free play of the spirit which all teachers ought especially to cultivate and practice".[12] The term "chilling effect" emerged eleven years later in *Gibson v. Florida Legis. Investigation Comm*.[13] In both these judgments, "chilling" referred to the rights and freedoms guaranteed by the First Amendment to the US Constitution, i.e. freedom of belief, expression, press and assembly and the right to submit petitions. According to a classical view, "chilling effect occurs when individuals seeking to engage in activity protected by the First Amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity".[14] Similar definitions may be found in other judgments and many legal papers. For instance according to Black's Law Dictionary, chilling effect in its basic sense means "the result of law or practice that seriously discourages the exercise of a constitutional right, such as the right to appeal or the right to free speech".[15]. It is worth mentioning that this view is broader than the

10 It is worth adding that the Constitutional Tribunal's way of transplanting the concept of chilling effect into its jurisprudence has already been put into question in the Polish constitutional literature, but without a broad discussion of that matter. See Wojciech Brzozowski, *Niezależność konstytucyjnego organu państwa i jej ochrona* (Warsaw, Wydawnictwo Sejmowe, Warsaw, 2016): 173 (note 6). See also a newer student's paper by Katarzyna Kos, Evolution or Entropy of the Concept of Chilling Effect? – Polish Perspective, *Teisė* 110 (February 2019), https://doi.org/10.15388/Teise.2019.110.11.

11 344 U.S. 183, 195 (1952).

12 The text of this judgment may be found in various Internet sources, accesed Jenuary 10, 2021, see for instance scholar.google.com/scholar_case?case=719576855741010475l).

13 372 U.S. 539, 556–557 (1963).

14 Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect,'" *Boston University Law Review* 58 (1978): 693.

15 Bryan A. Garner (ed.), *Black's Law Dictionary* (Eagan: Thomson West, 2004), 724.

Supreme Court's original concept, because it does not link the chilling effect only to the scope of the First Amendment. However, it should be noted that in its later judgments made in the course of the 1960s, the Court extended the scope of application of the doctrine of chilling effect. Above all, the term was used in the context of protecting rights guaranteed by the Fourteenth Amendment, such as equal protection of laws with regard to all citizens. A notable example concerns judgments related to counteracting racial discrimination.[16]

It seems evident that, due to its vagueness, the above description of the chilling effect needs clarification. According to the US Supreme Court, the key problem is determining the presence of "an act of deterrence".[17] A chilling effect occurs when a person refrains from exercising his/her constitutional rights due to a fear of potential sanctions or when the exercise of such rights is tightened by specific additional requirements. It is stressed that a chilling effect may be caused by two typical reasons: a statute (state or federal) violating the US Constitution or a requirement to follow certain administrative procedures in order to be able to take advantage of a constitutionally guaranteed right. The second type of situation may be illustrated with an example referring to the freedom of assembly. We can speak of its violation if organizing an assembly requires a permission which may be granted only in an "unreasonably burdensome" procedure.[18]

The above remark indicates that not every action of the state resulting in deterrence regarding the use of constitutionally protected rights may be classified as causing the prohibited chilling effect. In each situation, the so-called balancing test is needed, which allows the court to determine if the state activities in question are justified in given circumstances. Still, the methods of reasoning used in determining whether the chilling effect occurs are characterized by a considerable degree of ambiguity, causing controversies among American lawyers.[19] Moreover, the term "chilling ef-

16 Note, "The Chilling Effect in Constitutional Law," *Columbia Law Review* 69 (1969): 834.

17 Michael N. Dolich, "Alleging a First Amendment 'Chilling Effect' to Create a Plaintiff"s Standing: a Practical Approach," *Drake Law Review* 43, no. 1 (1994): 176.

18 Note, "The Chilling Effect," 818.

19 See esp. the criticism of the usefulness of the concept with regard to the protection of the freedom of speech in Leslie Kendrick, "Speech, Intent and the Chilling Effect," *William & Mary Law Review* 54 (2013): 1684–1690.

fect" is often used in other legal contexts than the original one as well in everyday public debates. The evolution of its usage prompted the development of its second, broad meaning, i.e. discouragement from any practice.[20] As a result, the concept of the chilling effect is sometimes described as a legal cliché, which is used on various occasions.[21] Yet in its strict, legal sense, it remains an important institution of the system of protection of rights and freedoms in the United States, especially the freedom of speech.

3. The Concept of Chilling Effect according to the European Court of Human Rights

Soon after its appearance in United States law, the concept of chilling effect began spreading to other legal systems. Either it was explicitly transplanted (e.g. into Canadian law[22] or into the United Kingdom[23]) or similar legal institutions, like the German "choking effect",[24] were developed by the relevant judiciaries. Although a detailed description of the concept's "itinerary" falls beyond the scope of this paper, it is necessary to discuss shortly the perception of the chilling effect by the European Court of Human Rights. There are no doubts that the Polish Constitutional Tribunal was primarily inspired by the former's case-law when it decided to use the concept of chilling effect in deciding Polish constitutional problems.[25] The Tribunal often directly referred to the judgments of the European Court of Human Rights when

20 Garner, *Black's Law*, 724.

21 Bryan A. Garner (ed.), *A Dictionary of Modern Legal Usage* (Oxford: Oxford University Press, 1995), 151 –152.

22 See examples of the relevant Canadian case law, Kent Roach and David Schneiderman, "Freedom of Expression in Canada," *Supreme Court Law Review* 61 (2013): 471–472, 511–512.

23 With regard to the role of the chilling effect in the British defamation law see Eric Barendt et al., *Libel and the Media. The Chilling Effect* (Oxford: Oxford University Press, 1997), 189–194.

24 Eric Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2007), 218.

25 The judgments of the European Court of Human Rights have been an important source of inspiration for the Polish constitutional jurisprudence for many years. See Lech Garlicki and Ireneusz Kondak, "Poland: Human Rights between International and Constitutional Law," in *The Impact of the ECHR on Democratic Change in Central and Eastern Europe. Judicial Perspectives*, ed. Iulia Motoc and Ineta Ziemele (Cambridge: Cambridge University Press, 2016), 326.

describing its own application of this institution,[26] while it has never mentioned other foreign legal systems. Once, in a dissenting opinion, a constitutional judge seemed even to view the concept of the chilling effect as an invention of the Strasbourg Court.[27]

A brief analysis of the HUDOC database, enabling access to the entire case-law of the Court, indicates that the term "chilling effect" appeared several times since the 1970s in some documents produced by the then functioning European Commission of Human Rights.[28] The first example of its use by the European Court of Human Rights itself took place as late as in 1996, in *Goodwin* v *The United Kingdom*,[29] i.e. in one of the most significant judgments concerning the freedom of press as an important factor of the freedom of expression guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The case concerned the problem of protecting journalistic sources, i.e. a key matter related to preserving the fundamental role of the press in society – serving as the so-called public watchdog.[30] When discussing the legal obligation to disclose notes (which would have revealed the identity the source of information), imposed on a British journalist as a court injunction pursuant to the UK Contempt of Court Act 1981, the Strasbourg Court found a violation of Article 10 of the Convention. An important passage from that judgment includes a reference to the concept of chilling effect:

> Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect

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26 The following judgments may serve as examples: Polish Constitutional Tribunal, Judgment of 28 November 2007, Ref. No. K 39/07, Journal of Laws 2007, no. 230, item 1698, and Judgment of 19 July 2011, Ref. No. K 11/10, Journal of Laws 2011, no. 160, item 964.

27 Polish Constitutional Tribunal, Judgment of 27 October 2010, Ref. No. K 10/08, Journal of Laws 2010, no. 205, item 1364, dissenting opinion of Justice Mirosław Wyrzykowski.

28 See e.g. ECmHR, Decision of 5 April 1973 Case Donnelly and Others v The United Kingdom, application no. 5577/72, 5583/72, hudoc.int., and ECmHR, Report of 18 December 1987, Case Markt Intern Verlag Gmbh and Beermann v Germany, Ref. No. 10572/83, hudoc.int.

29 ECtHR Judgement of 27 March 1996, Case Goodwin v The United Kingdom, application no. 17488/90, hudoc.int.

30 See Alain Zysset, *The ECHR and Human Rights Theory. Reconciling the Moral and the Political Conceptions* (Abingdon: Routledge, 2017), 163.

> an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest[31].

Since *Goodwin* v *The United Kingdom*, the chilling effect has become an important and often used concept in the Court's judicial decisions.[32] Although the Court has not produced its own substantial definition,[33] even a brief analysis of the case-law shows that generally, the notion of the chilling effect is mostly understood in a similar way as by the US Supreme Court, i.e. as an inadmissible deterrence from taking advantage of the rights and freedoms proclaimed by the Convention. Above all, the assessment whether such a discouragement from the exercise of rights occurs plays an important role in the Court's proportionality tests,[34] whose purpose is to reveal whether certain state actions that limit the scope of some rights and freedoms are "necessary in a democratic society" in a given case.[35] Most of the Strasbourg Court judgments in which the notion of the chilling effect is invoked concern the already mentioned Article 10 of the Convention, in the context of not only the freedom of the press, but also, as an example, the problem of various national defamation rules (civil or criminal ones).[36] The second important set of case-law is related to Article 11, i.e. the freedom of assembly. For instance, in one of vital judgments on that matter,

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31 ECtHR Judgement of 27 March 1996, Case Goodwin v The United Kingdom, application no. 17488/90, para. 39, hudoc.int.

32 A simple search of judgments in which the term appeared made with the use of the HUDOC database brings more than 200 positive results.

33 Trine Baumbach, "Chilling Effect as a European Court of Human Rights' Concept in Media Law Cases," *Bergen Journal of Criminal Law and Criminal Justice* 6, no. 1 (May 2018): 111, https://doi.org/10.15845/bjclcj.v6i1.1555.

34 See e.g. Andrzej Wróbel's remarks concerning Article 8 of the Convention in Lech Garlicki, Piotr Hofmański and Andrzej Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1–18* (Warsaw: C.H. Beck, 2010), 490.

35 The phrase is included in the Convention in Article 8(2), Article 9(2), Article 10(2) and Article 11(2).

36 See e.g. ECtHR Judgement of 14 March 2013, Case Eon v France, application no. 26118/10, hudoc.int.

Baczkowski and Others v *Poland*,[37] the Court came to the conclusion that the Mayor of Warsaw's refusal to permit the organization of the so-called Equality Parade, which had been formally justified with the parade's initiators failure to provide a "traffic organization plan", constituted a violation of the Convention. The Court observed that:

> the refusals to give authorization could have had a chilling effect on the applicants and other participants in the assemblies. It could also have discouraged other persons from participating in the assemblies on the grounds that they did not have official authorization and that, therefore, no official protection against possible hostile counter-demonstrators would be ensured by the authorities.

Apart from case-law related to Articles 10 and 11 of the Convention, the Court has referred to the concept of chilling effect with regard to at least two other rights. Firstly, it mentioned Article 34, which provides for the access to the Court itself for "any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto", while, at the same time, instructing the state parties "not to hinder in any way the effective exercise of this right".[38] Secondly, what appears to be of particular importance in the context of the Polish Constitutional Tribunal's reception of the notion of chilling effect, it referred to the right to a fair trial guaranteed in Article 6 of the Convention. A central problem related to the application of the discussed concept in case-law concerning this rule was the matter of the internal independence of judges, being a crucial factor for assuring the fairness of court proceedings. For instance in *Parlov-Tkalčić* v *Croatia*,[39] the European Court of Human Rights determined that "the powers vested in the court presidents could not have reasonably been viewed as running counter, or having

[37] ECtHR Judgement of 3 May 2007, Case Baczkowski and Others v Poland, application no. 1543/06, hudoc.int.

[38] See e.g. ECtHR Judgement of 7 June 2007, Case Nurmagomedov v Russia, application no. 30138/02, hudoc.int.

[39] ECtHR Judgement of 22 December 2009, Case Parlov-Tkalčić v Croatia, application. no. 24810/06, hudoc.int.

'chilling' effects on, the internal independence of judges". It should be stressed that the Court links the problem of providing a satisfactory level of judicial independence not only with Article 6, but also with Article 10 of the Convention, i.e. the freedom of expression of judges.[40]

Despite the general consistency of the Court's application of the notion of chilling effect, there are several cases in which it seemed to go beyond the original rights-orientated feature of that concept. A notable example, perceived by some Polish lawyers as controversial,[41] is *Tysiac* v *Poland*,[42] which concerned the problem of denying the applicant a lawful abortion in Poland. When discussing Article 156(1) of the Polish Criminal Code of 1997, which provides criminal sanctions for performing illegal abortion, the Court expressed opinion that it "can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case". Such conclusion in fact was not linked to any rights or freedoms guaranteed by the Convention, but expressed the Court's general criticism of the vagueness of the above provision of the Criminal Code, which was used in a broad argumentation proving Poland's violation of Article 8 of the Convention.[43] Another interesting example of an alleged broad application of the concept of chilling effect may be found in the dissenting opinion of five Judges in *Dubská and Krejzová* v *The Czech Republic*.[44] The case concerned the impossibility of giving birth at home (with the assistance of midwives) in the Czech Republic, caused not by an explicit legal prohibition, but indirectly, by setting, as the dissenting Judges explained, "excessively rigid requirements regarding the equipment needed for a birth, which can only be met in hospitals". According to the cited minority, these restrictions resulted in a violation of Article 8 of the Convention due to

40 Sietske Dijkstra, "The Freedom of the Judge to Express his Personal Opinions and Convictions under the ECHR," *Utrecht Law Review* 13, no. 1 (January 2017): 9, https://doi.org/10.18352/ulr.371.

41 See. e.g. Michał Królikowski, "Glosa do wyroku Europejskiego Trybunału Praw Człowieka z 20 marca 2007 r. w sprawie Alicja Tysiąc przeciwko Polsce (nr skargi 5410/03)," *Przegląd Sejmowy* 80 (2007): 210 –211.

42 ECtHR Judgement of 20 March 2007, Case Tysiac v. Poland, application no. 5410/03, hudoc.int.

43 Article 8 of the Convention provides for the right to respect for private and family life.

44 ECtHR Judgement of 15 November 2016, Case Dubská and Krejzová v The Czech Republic Case, application no. 28859/11, 28473/12, hudoc.int, dissenting opinion of Judges Sajó, Karakaş, Nicolaou, Laffranque and Keller.

the fact that "Czech law (…) prevents *de facto* home births and has a chilling effect on mothers wishing to give birth at home".

4. The Polish Constitutional Tribunal's Reception of the Concept of Chilling Effect

The first time when the concept of chilling effect was used by the Polish Constitutional Tribunal was in 2006, in the judgment U 4/06.[45] The case concerned the constitutionality of the scope of enquiry performed by the so-called Banking Committee of Inquiry, which was set up by the Polish Sejm[46] in order to examine the decisions concerning the capital and ownership transformations in the banking sector and the activities of banking supervision authorities from 4th June 1989 to 19th March 2006. One of important matters discussed by the Tribunal regarded the possibility to examine, in the course of such parliamentary enquiry, the activities of the President of the National Bank of Poland (and in fact of several persons who had held that office during the above period). The judges claimed that such a matter exceeded the admissible scope of activity of a committee of inquiry, mainly due to the fact that the Constitution does not provide for parliamentary oversight over all the bodies of the National Bank of Poland. Besides, examining the way of their functioning could „create the impression of political pressure; such impression may have a negative 'chilling[47] effect' on the performance of their statutory competencies by bodies independent from the Sejm". It should be added that the Tribunal made no reference to case-law of the European Court of Human Rights concerning chilling effect.

Despite the fact that the Tribunal did not make any additional comments regarding its understanding of the notion of chilling effect, the cited passage evidently seems to indicate that it was perceived broadly. The bodies

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45 Polish Constitutional Tribunal, Judgment of 22 September 2006, Ref. No. U 4/06, Monitor Polski 2006, no. 66, item 680. English translation available at <trybunal.gov.pl/fileadmin/content/omowienia/U_4_06_GB.pdf>

46 The possibility to establish committees of inquiry (in fact called investigative committees, Polish: *komisje śledcze*) is provided for in Article 111(1) of the Polish Constitution, which stipulates that „the Sejm may appoint an investigative committee to examine a particular matter".

47 It should be noted that the term „chilling effect" (Polish: *efekt mrożący*) was incorrectly translated as "freezing effect" in the English version of the judgment, mentioned in note 45.

of the National Bank of Poland have no rights and freedoms enshrined in the Polish Constitution. Still, a key feature of the Bank within the Polish system of government is that it remains beyond the tripartite separation of powers, thus being independent of the parliament, the executive and the judiciary.[48] As a result, it follows from judgment U 4/06 that the concept of chilling effect became a tool used in order to protect the independence of certain constitutional authorities by maintaining their freedom from – intrinsically political – parliamentary oversight. This notion encompassed not only the National Bank of Poland, but also other authorities of similar systemic position, including the Commissioner for Citizens' Rights (the ombudsman) or the Supreme Audit Office[49]. Beyond any doubt, it also included the judiciary, especially since an examination of its activities by an inquiry commission was explicitly forbidden by the Tribunal in the same judgment, albeit with no recourse to the possibility of chilling effect harming judicial independence.

Later judicial decisions of the Tribunal indicate that the discussed concept was used inconsistently, and it is possible to distinguish four types of its application. Before we examine them, it is worth mentioning that the Polish constitutional court once tried to make some remarks concerning its understanding of the notion of chilling effect. In judgment K 39/07,[50] the Tribunal, referring to Tadeusz Kotarbiński, philosopher and founder of the Polish school of praxeology (the theory of human action), mentioned that such effect may be described as "potentiation of legal action" (Polish: *potencjalizacja działania prawa*), i.e. an indirect threat of making a person face legal consequences in case the person does not refrain from certain activity. It seems evident that this laconic expression is similar to

[48] The Bank is described by Polish constitutional lawyers as "a specific constitutional authority of executive character" (but not subordinated to the President of the Republic or to the Council of Ministers, which form the Polish "dualistic" executive power). See remarks by Lesław Góral and Katarzyna Koperkiewicz-Mordel concerning Article 227 of the Polish Constitution, in *Konstytucja RP. Tom II, Komentarz do art. 87–243*, ed. Marek Safjan and Leszek Bosek (Warsaw: CH Beck, 2016), 1602.

[49] The name of this constitutional body is sometimes translated literally as the Supreme Chamber of Control (Polish*: Najwyższa Izba Kontroli*).

[50] An English summary of this judgment is available at trybunal.gov.pl/fileadmin/content/omowienia/K_39_07_GB.pdf.

the already-mentioned broad and at the same time controversial notion of chilling effect that appeared in the United States after the Supreme Court had developed the "canonical", rights-orientated type of this concept. Although, as it will be shown later, the broad interpretation is clearly noticeable in the judicial decisions of the Polish Constitutional Tribunal, it was once strongly criticized from within the Tribunal itself. Justice Mirosław Wyrzykowski, dissenting from the majority position in K 10/08,[51] carried out a thorough analysis of the Strasbourg Court's view of the chilling effect. It led to the conclusion that this concept could not be invoked when assessing mutual relations between public authorities, in that case – between state prosecution and the judiciary. The judge claimed that the European Court of Human Rights had developed the institution of the chilling effect in relation to:

> the protection of personal rights from an excessive and disproportionate intervention of public authorities. In this interpretation, it is inseparably related to the existence of an infringement of a specific right or freedom, which has to be proven before chilling effect may be mentioned at all.[52]

As I entirely support this view, it should be noted that judgment K 10/08 was not the first one in which the Tribunal referred to the discussed concept. Thus, it is in my opinion unfortunate that the above justified criticism of the broad application of the concept of chilling effect appeared so late. Justice Wyrzykowski's remark might have been well applied to the Banking Committee of Inquiry case (U 4/06), when, as already mentioned, the notion of chilling effect appeared in the jurisprudence of the Constitutional Tribunal.

The first two ways of application of the concept of chilling effect by the Polish Constitutional Tribunal seem to be in accordance with the position of the European Court of Human Rights. The first one is related to various aspects of the problem of guaranteeing the freedom of expression

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51 Polish Constitutional Tribunal, Judgment of 27 October 2010, Ref. No. K 10/08, Journal of Laws 2010, no. 205, item 1364, English translation available at trybunal.gov.pl/fileadmin/content/omowienia/K_10_08_EN.pdf.

52 Own translation.

(Article 54(1) of the Constitution of the Republic of Poland[53]), its close "relative", i.e. the freedom of conscience (Article 53(1) of the Constitution of the Republic of Poland[54]), and the freedom of assembly (Article 57 sentence 1 of the Constitution of the Republic of Poland[55]). With regard to the first of the above constitutional freedoms, the chilling effect was above all invoked when the Tribunal's task was to assess the conformity to the constitution of various provisions stipulating criminal responsibility for certain types of defamation. The most notable judgment, P 10/06[56] (issued only a month after the decision concerning the Banking Committee of Inquiry), concerned the two basic types of criminal defamation, regulated in Articles 212[57] and 213 of the Polish Criminal Code of 1997.[58] The central problem was the admissibility of possible imprisonment (for a period of up to one year) of a person who committed defamation "through mass media", as provided for in Article 212(2) of the Criminal Code. When taking into account the Strasbourg Court's restrictive position concerning criminal defamation – as causing a chilling effect on public debates (thus easily infringing Article 10 of the Convention) – the Tribunal decided that the questioned provisions of the Criminal Code did not violate the Polish Constitution of 1997. The Tribunal balanced the potential harm to the freedom of expression with the need to protect human dignity (Article 30 of

53 "The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone". All translations of the provisions of the Polish Constitution of 1997 are taken from Ewelina Gierach and Piotr Chybalski (ed.), *Polish Constitutional Law. The Constitution and Selected Statutory Materials* (Warsaw: Wydawnictwo Sejmowe, 2009).

54 "Freedom of conscience and religion shall be ensured to everyone".

55 "The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone".

56 Polish Constitutional Tribunal, Judgment of 30 October 2006, Ref. No. P 10/06, Journal of Laws 2006, no. 202, item1492.

57 Article 212(1) of the Criminal Code defines defamation as "imputing to another person, group of persons, institution, legal person or organisational unit lacking legal personality such conduct or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type of activity".

58 A brief English description of the judgment is available in the CODICES database, www.codices.coe.int/NXT/gateway.dll?f=templates$fn=contents-frame-js.htm$vid=Publish%3A10.1048%2FEnu$3.0&cp=&sel=0&tf=main&tt=document-frameset.htm&t=contents-frame-js.htm&och=onClick.

the Constitution of the Republic of Poland[59]). According to the majority's opinion (three out of twelve judges submitted dissenting opinions), "honor and good reputation", evidently infringed by defamatory statements, stay in close relationship to human dignity, which justifies bringing criminal sanctions to the perpetrators of such acts. The Tribunal's position evidently seems to be less restrictive towards criminal defamation than the standards promoted by the European Court of Human Rights as well as by the Council of Europe in general.[60] Still, it cannot be claimed that the Tribunal rejects the concept of chilling effect as an important factor harming the freedom of expression. In its later judicial decisions, recourse to this legal metaphor played an important role in declaring certain regulations that provided sanctions for various defamatory practices as not conforming to the Polish Constitution. For instance in the judgment SK 70/13,[61] the Tribunal opted for a restrictive interpretation of Article 226(1) of the Criminal Code, which provides sanctions for insulting a public official. In the Tribunal's view, the provision in question should not be applied to situations where an insulted official is at the same time a politician. An opposite interpretation would mean that Article 226(1) could serve as an instrument of limiting public debate by means of chilling effect. Another important example is a negative assessment of the constitutionality of Article 256(2) of the Criminal Code, as amended in 2009, that concerned the use of "fascist, communist or other totalitarian symbols". In K 11/10,[62] the Tribunal broadly referred to the Strasbourg Court"s position in *Vajnai* v *Hungary*[63] (which concerned the use of a five-pointed red star), after which it came to the conclusion that the vagueness of the provision in question and the possibility

59 "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities".

60 It is worth noting that the Parliamentary Assembly of the Council of Europe has undertaken many actions promoting decriminalisation of defamation, e.g. the Resolution 1577 of 4 October 2007 Towards decriminalisation of defamation.

61 Polish Constitutional Tribunal, Judgment of 12 February 2015, Ref. No. SK 70/13, Journal of Laws 2015, item 234.

62 Polish Constitutional Tribunal, Judgment of 19 July 2011, Ref. No. K 11/10, Journal of Laws 2011, no. 160, item 964. English translation available at trybunal.gov.pl/fileadmin/content/omowienia/K_11_10_EN.pdf.

63 ECtHR Judgment of 8 July 2008, Case Vajnai v Hungary, application. no. 33629/06, hudoc.int.

of multiple meanings of the seemingly totalitarian symbols do not justify imposing criminal liability on their use, since such liability may cause a chilling effect on public debate.[64]

Nevertheless, the Tribunal retains – in some cases – its "liberal" position concerning the impact of a possible chilling effect on the exercise of constitutional rights. Apart from the above-mentioned criminal defamation case (P 10/06), it is worth to stress the Tribunal's approval of Article 52(1) of the Code of Misdemeanors, which provided for a fine or restriction of liberty with regard to anyone organizing an assembly without a prior notification to relevant authorities (the so-called spontaneous assembly). In K 15/08,[65] the Tribunal explicitly took into account the position of the European Court of Human Rights in *Baczkowski and Others* v *Poland*, claiming that the obligation to notify the authorities about a planned gathering could result in chilling the freedom of assembly. However, after balancing it with the need to protect public order and the safety of participants in the gathering, it decided to uphold the provision. That said, it strongly criticized the rigid three-day deadline for the notification, but since such obligation did not result from the examined Article 52(1) of the Code of Misdemeanors, it fell outside the scope of the case.

The second matter in which the concept of chilling effect proved to be useful for the Polish Constitutional Tribunal concerned the problem of judicial independence. The leading judgment (K 39/07[66]) regarded the 2007 amendments to the Act on the System of Common Courts of 2001, which introduced an accelerated procedure for lifting a judge's immunity, e.g. by imposing on the relevant court the obligation to decide on the waiver of the immunity within 24 hours from the submission of the application, and without hearing the judge in question. The Tribunal turned down the new procedure stating, among others, that:

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64 See Uladzislau Belavusau, *Importing European and US Constitutional Models in Transitional Democracies* (Abingdon: Routledge, 2013), 156.

65 Polish Constitutional Tribunal, Judgment of 6 March 2012, Ref. No. 15/08, Journal of Laws 2012, item 297.

66 Polish Constitutional Tribunal, Judgment of 28 November 2007, Ref. No. K 39/07, Journal of Laws 2007, no. 230, item 1698, English summary available at trybunal.gov.pl/fileadmin/content/omowienia/K_39_07_GB.pdf.

> the situation in which the derogation of immunity is excessively available leads to a "chilling effect", whereby the very fact of filing a motion requesting the derogation of immunity of a judge results in diminishing the judge's reputation[67].

Moreover, it noted that "the jurisprudence of the European Court of Human Rights confirms that the very emergence of the 'chilling effect' is often regarded as a sufficient prerequisite for the negative assessment of a national law". The presentation of reasons of the ruling included direct referrals to the Court's judicial decisions such as *Lombardo and Others* v *Malta*[68], *Baczkowski and Others* v *Poland* and *Dyuldin and Kislov* v *Russia*.[69]

The Tribunal followed the way paved by K 39/07 in its later jurisprudence relating to judicial independence. In U 9/13,[70] it noted that the right of the Minister of Justice to demand any case file from the chair of an appellate court could have a chilling effect on the judge by "exercising at least an indirect pressure on the way in which the case in question is decided".[71] As a result, such a competence, stipulated not in a statute, but in a by-law (regulation) issued by the Minister of Justice themselves, could have been questioned in the light of the principle of separation of powers and the right to a fair trial.[72]

Furthermore, the concept of chilling effect was used in order to limit the possible legal consequences of judicial errors. In SK 9/13[73], the Tribunal upheld a narrow interpretation of Article $417^1(2)$ sentence one of the Civil Code, which provides for state liability for damage arising from judicial

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67 The English summary of K 39/07, mentioned in note 66, para. 8.

68 ECtHR, Judgment of 24 April 2007, Case Lombardo and Others v Malta, application no. 7333/06, hudoc.int.

69 ECtHR, Judgment of 31 July 2007, Case Dyuldin and Kislov v Russia, application no. 25968/02. hudoc.int.

70 Polish Constitutional Tribunal, Judgment of 8 May 2014, Ref. No. U 9/13, Journal of Laws 2014, item 674.

71 Own translation.

72 The Polish constitutional doctrine refers to this right simply as the right to court. According to Article 45(1) of the Constitution, "everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court".

73 Polish Constitutional Tribunal, Judgment of 27 October 2015, Ref. No. SK 9/13, Journal of Laws 2015, item 1791.

decisions.[74] Although the right to compensation for illegal actions of public authorities has a strict constitutional basis (Article 77(1) of the Polish Constitution[75]), in the Tribunal's view, it should be limited in the light of the obligation to protect judicial independence (Article 178 of the Constitution[76]) and, indirectly, of the right to a fair trial. The Tribunal stated that the situation in which "any violation of law or any difference in jurisprudence" could lead to the civil liability of the state "would cause a chilling effect on judges and discourage them from effectively protecting the constitutional rights of the individual, in particular with regard to argumentation based on legal principles or the use of general clauses".[77] Thus, the right to compensation had to be limited only to "evident and grave violations of law" resulting from the final judgment of a civil court.

As it has already been suggested, the above manner of applying the concept of chilling effect seems to be in common with the standard of the European Court of Human Rights. It also reflects the Tribunal's perception of the constitutional right to a fair trial, especially due to the fact that since 2007, the Tribunal, supported by the entire doctrine of the Polish constitutional law, has seen judicial independence as a vital element of this right.[78] Still, a deepened analysis of the Tribunal's standard causes certain doubts. Above all, the Strasbourg Court's judicial decisions mentioned in K 39/07 do not relate to the right to a fair trial as guaranteed by Article 6 of the Convention, but to other protected rights and freedoms (e.g. the freedom of expression). Thus, it may seem that the Tribunal referred to them only in

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74 The provision stipulates that if damage is caused by a final and binding court decision or other final decision, remedy may be demanded once such decision has been declared incompliant with the law in the course of appropriate proceedings, unless separate regulations provide otherwise.

75 "Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law".

76 Article 178(1) of the Polish Constitution provides that "Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes".

77 Own translation.

78 This position appeared in Polish Constitutional Tribunal, Judgment of 24 October 2007, Ref. No SK 7/06, Journal of Laws 2007, no. 204, item 1482. See remarks of Paweł Grzegorczyk and Karol Weitz concerning "Article 45 of the Polish Constitution," in *Konstytucja RP. Tom I, Komentarz do art. 1–86*, ed. Marek Safjan and Leszek Bosek (Warsaw: CH Beck, 2016), 1097.

an ornamental way, in order to make its reasoning look strong. It should be also noted that matching the chilling effect with the principle of separation of powers in U 9/13 may, at least at first sight, seem controversial, but possible criticism is weakened if we take into account the further reference to the right to a fair trial. Finally, using the notion of chilling effect in order to narrow the right to compensation for judicial errors in SK 9/13 is, in my opinion, paradoxical. The right of compensation, as regulated in Article 77(1) of the Polish Constitution, belongs to important means of protection of rights and freedoms. The Tribunal's use of the concept of chilling effect in the above judgment in fact results in lowering the standard of protection of constitutional rights, while undoubtedly the concept was invented by the US Supreme Court in order to strengthen such standard.

The Tribunal's view of chilling effect becomes even more problematic when the third way of application of this metaphor is taken into account. It relates to the status of (and mutual relations between) various constitutional authorities that possess a certain degree of independence, such as the President of the National Bank of Poland, as stressed by the Tribunal in U 4/06. Apart from the case of the Banking Committee of Inquiry, such a broad use of the concept may be noticed in Pp 1/08,[79] i.e. in the decision issued in the course of proceedings against the Self-Defense party (Polish: *Samoobrona*). The case concerned the possible unconstitutionality of the party's activities[80] against its members who had been elected deputies to the Sejm in the parliamentary elections of 2005. Notwithstanding the fact that the Constitutional Tribunal decided to discontinue its proceedings due to formal reasons, it conducted a thorough examination of the Self-Defense party's practice against its own MPs. It revealed that the party leader had forced certain deputies to sign blank promissory notes (Polish: *weksel in blanco*), in which they had promised to pay the party a large sum of money. The notes could be used when a given Deputy decided to leave the Self-Defense parliamentary group or even voted otherwise than the

79 Polish Constitutional Tribunal, Decision of 24 November 2010, Ref. No. Pp 1/08.

80 Pursuant to Article 188(4) of the Constitution, the Constitutional Tribunal adjudicates regarding the conformity to the Constitution of the purposes or activities of political parties. A negative assessment of a party's activities results in its dissolution on the basis of the Act on Political Parties of 1997.

leader had recommended. The Tribunal stated that such activities of the party "were aimed at exercising a 'chilling effect' on potential secessionists, discouraging them with a perspective of facing a grave financial sanction".[81] As a result, the practices were deemed to violate the principle of voluntariness of membership in a political party, guaranteed by Article 11(1) of the Polish Constitution.[82] Moreover, but without explicitly invoking the term "chilling effect", the Tribunal stated that Self-Defense's activities were inconsistent with the principle of free parliamentary mandate (Article 104(1) of the Polish Constitution),[83] i.e. one of key principles concerning the contemporary Polish (and any other democratic) parliamentary system. As the Tribunal's assessment of the party's illegal practices cannot be, in my opinion, questioned, the application of the notion of chilling effect could not be justified. Both constitutional principles do not relate, at least not directly, to the sphere of rights and freedoms.

The final (fourth) way of application of the concept of chilling effect encompasses all other situations of its use by the Tribunal. In most cases, the Tribunal perceived it simply as any act of deterrence – no matter who exercised it, why it was exercised and to whom it was addressed. Thus, we are clearly dealing with the broadest interpretation of chilling effect that, as already mentioned, emerged in the USA. An analysis of the Tribunal's jurisprudence indicates a considerable number of cases of such a non-canonical application. For instance in U 5/06,[84] which concerned the state secondary school exam (Polish: *egzamin maturalny*), the Tribunal found that a regulation determining the technical details of organizing the exam put the students who decided to take it in the extended form in a detrimental position when compared to students taking the standard exam. Such law was described as creating a chilling effect on the former group of

81 Own translation.

82 "The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means".

83 "Deputies shall be representatives of the Nation. They shall not be bound by any instructions of the electorate".

84 Polish Constitutional Tribunal, Judgment 16 January 2007, Ref. No. U 5/06, Journal of Laws 2007, no. 10, item70.

students, discouraging them from trying to pass an ambitious version of the exam. Another interesting example is the already-mentioned K 10/08, which concerned a highly disputable problem of possible sanctions imposed on judges who performed their duties during the period of martial law (1981–1983), i.e. who participated in criminal procedures against anti-communist opposition (above all members of the "Solidarity" trade union). While criticizing the Supreme Court's resolution that in fact blocked the possibility of persecuting such judges, the majority of the constitutional judges claimed that:

> a chilling effect may occur not only with regard to individuals, but also in relation to state bodies, which – when facing the practical inability to enforce their rights when acting within the scope of their competences – will refrain from taking action in that respect. As it has been indicated above, it is obvious that the Resolution of the Supreme Court of 20 December 2007 may effectively 'discourage' law enforcement authorities from undertaking any attempts to hold criminally liable judges who adjudicated on the basis of the retroactive provisions of the Decree on Martial Law.[85]

It is interesting to notice that in order to give the grounds for this conclusion, the Constitutional Tribunal broadly, and in fact incorrectly, referred to the judicial decisions of the European Court of Human Rights. This argumentation prompted the earlier cited dissenting opinion of Justice Mirosław Wyrzykowski, who argued that the concept of chilling effect could be used solely in reference to the sphere of rights and freedoms.

Perhaps the broadest way of application of the notion of chilling effect, which is in fact unrelated to any act of deterrence, may be found in one of the most famous judicial decisions of the Polish Constitutional Tribunal, i.e. in the so-called Vetting Judgment (K 2/07).[86] When discussing the term "personal sources of information" included in the preamble of the Vetting Act of 2007, the Tribunal noted that it referred both to voluntary

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[85] The English translation of the judgment mentioned in note 51, para. III.3.4.

[86] Polish Constitutional Tribunal, Judgment of 11 May 2007, Ref. No. K 2/07, Journal of Laws 2007, no. 85, item 571, a detailed summary available at trybunal.gov.pl/fileadmin/content/omowienia/K_2_07_GB.pdf.

collaborators of the communist secret service and to all other persons who, in most situations unintentionally, delivered information to the officers of this service. As a result, including the term in the act "gave rise to the social stigmatization of persons deemed personal sources of information (chilling effect of the Act)". Unfortunately, the Tribunal did not provide any further comments on this surprising conclusion.

5. Conclusion

The above analysis of the use of the concept of chilling effect by the Polish Constitutional Tribunal indicates that the notion has become a fixed element in the jurisprudence of this court. It should not be surprising that, as it has been mentioned in the preliminary remarks of this paper, it started appearing in the judicial decisions of various Polish courts as well as in the public debate, especially in the course of the current crises taking place in Poland, e.g. with regard to judicial independence. Although in my opinion the usefulness of the discussed legal metaphor in the Polish legal system cannot be questioned, the way of its transplantation by the Tribunal causes serious controversies. It was, above all, affected by „the original error", i.e. by its surprisingly broad application in the Banking Committee of Inquiry judgment of 2006. As early as in its initial use of the notion, the Tribunal, apparently unintentionally, severed its connection to the sphere of protecting rights and freedoms, i.e. deprived it of its key or even defining feature. The subsequent call for a restrictive use of the notion of chilling effect, made after an analysis of the standards of the European Court of Human Rights by Justice Wyrzykowski in his dissenting opinion in K 10/08, came too late. The later judicial decisions of the Tribunal included the broad, and in the same time ambiguous, understanding of the discussed concept. Thus, the way of transplanting the concept of chilling effect into the Polish law from the Court's jurisprudence may be described as superficial, i.e. lacking an in-depth analysis of the original version of this notion. The problem of a possible lack of thorough research of foreign legal systems by courts who try to borrow foreign legal ideas has been noticed in comparative constitutional law for a long time.[87] Importing slogans instead of complex legal

[87] See for instance Basil Barkesinis and Jörg Fedtke, *Judical Recourse to Foreign Law. A New Source of Inspiration* (Abingdon: Routledge, 2006), 156–161.

institutions, sometimes resulting from the use of the so-called cherry picking technique, when the borrowed notions serve only to justify conclusions that a given court wishes to reach,[88] has always been a potential source of reservation towards the use of foreign legal institutions by the judiciary. Referring back to the case of the Tribunal's transplantation of the concept of chilling effect, it should be noted that the fact that the European Court of Human Rights is an international judicial body, i.e. strictly speaking not a foreign court, is, in my opinion, irrelevant. The threat of importing a legal institution incorrectly remains the same.

However, the above remarks should not be perceived as a criticism referring to „an erroneous transplantation" of the chilling effect by the Polish Constitutional Tribunal. Since according to Article 195(1) of the Polish Constitution judges of the Tribunal are, in the exercise of their office, independent and "subject only to the Constitution", it seems obvious that formally there are not bound by jurisprudence of any foreign or international judicial body, including the Strasbourg Court. Therefore the problem of an incorrect application of a foreign legal institution into the domestic legal system cannot exist from a strictly legal perspective. It seems evident that the mere idea of transplanting (or borrowing) refers to the sphere of inspiration that may influence – when referring to judges, not lawmakers – the contents of a given judicial decision. While referring to other legal systems a court only elaborates on foreign legal concepts in order to develop its own ones, and, desirably, to match them with particularities of the given national legal system[89]. As a result the problem of the transplantation of the chilling effect into the Polish constitutional jurisprudence is not the one of „an incorrect application" of that concept, but of developing a too broad and too vague legal institution. The inconsistence of the Tribunal's notion of chilling effect may lead to a conclusion that "the Polish version of chilling effect" is nothing but a mere slogan, and, as a result, its potential as an important tool of protecting rights and freedoms is weakened when compared

88 See Michal Bobek, *Comparative Reasoning in European Supreme Court* (Oxford: Oxford University Press, 2013), 240.

89 See Thomas Kadner Graziano, "Is it Legitimate and Beneficial for Judges to Compare," in *Courts and Comparative Law*, ed. Mads Andenas and Duncan Fairgrieve (Oxford, New York: Oxford University Press, 2015), 37.

to the ones of "counterpartying chilling effects", such as the one developed in judicial decisions of the Strasbourg Court.

On the other hand the analysis of jurisprudence of the Polish Constitutional Tribunal shows that there are notable examples of its judicial decisions when the chilling effect was used in its typical context, i.e. within the sphere of constitutional rights and freedoms. It is also interesting to note that Polish lawyers as well as other courts that refer to the concept pf chilling effect have not noticed the inconsistency of the Tribunal's way of application of this concept yet. Instead, often as a result of recourse to the judicial decisions of the European Court of Human Rights, a general perception of the notion of chilling effect by the Polish lawyers seems to be fully in common with foreign standards. The concept is, as a rule, invoked in instances of potential harm to the execution of certain rights and freedoms, e.g. the freedom of expression or the right to a fair trial.[90] Still, the mere fact that the concept of chilling effect has appeared in legal debates in Poland has been, in my opinion, prompted by the fact that the Constitutional Tribunal made the first step in transplanting this legal institution in 2006.

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[90] See e.g. Bogusław Kosmus and Grzegorz Kuczyński, remarks concerning "Article 15 of the Press Law," in *Prawo prasowe*, ed. Grzegorz Kuczyński (Warsaw: CH Beck, 2018), 324, or Piotr Wasilewski"s remarks concerning the problem of protection of satirical comments in the USA, Piotr Wasilewski, *Wolność prasowej wypowiedzi satyrycznej. Studium cywilistyczne na tle porównawczym* (Warsaw: Wolters Kluwer Polska, 2012), 195.

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Taxation of Academic Teachers' Royalties. Controversies in the context of the general interpretation by the Minister of Finance

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Abstract: The Act on Personal Income Tax stipulates a number of methods for calculating costs, which unfortunately often leads to disputes between taxpayers and tax authorities. The same also concerns the rules applicable specifically to academic teachers performing their duties under an employment relationship. Problems emerge both in the context of the manner and scope of eligibility for flat-rate 50% tax-deductible expenses. Notably, the interpretative problems stem not only from the provisions of tax law as such. They also emerge in the context of higher education reform. But even though the observed legal inconsistencies require urgent legislative action, the necessary amendment to the provisions of the Act of 20 July 2018 – Law on Higher Education and Science has yet to be introduced. Nearly two years after the Act's entry into force, the Minister of Finance finally decided to issue a general interpretation. Therein, it is stated that in terms of the applicability of 50% tax-deductible expenses, the Act of 20 July 2018 – Law on Higher Education and Science constitutes *lex specialis*, i.e. ultimately, the 50% cost deduction is applicable to the entirety of an academic teacher's remuneration. The following paper provides a critical analysis of the present regulations as well as possible solutions

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to the current fiscal and legal stalemate. In the authors' opinion, the general interpretation by the Minister of Finance fails to substantially amend the quality of the law whose provisions remain largely unclear. At the same time, its practical value for academia cannot be denied. Undoubtedly, the fact that the same was issued by the direct superior of tax authorities will make this opinion difficult to ignore in the context of individual cases.

1. Introduction

In general, personal income tax applies to all income understood as the difference between the total revenues and total tax-deductible expenses in the given fiscal year.[1] However, the Act provides a number of various methods for calculating said costs, which in practical application unavoidably leads to frequent disputes between taxpayers and tax authorities. The same also applies to academic teachers performing their tasks as part of an employment relationship. Problems arise both in terms of the manner and the scope of applicability of the so-called flat 50% costs. It is usually rightly assumed that the Act introduced the 50% tax-deductible costs as a preferential measure. However, one would be hard pressed to evidence such preferential treatment with regard to this group of taxpayers given that the actual application of said 50% costs becomes virtually impossible at times. It is noteworthy that the emerging interpretative difficulties stem not only from the provisions of tax law, but also from the implementation of the higher education reform and adoption of new regulations under the so-called Constitution for Science[2].

The current legal situation results in significant discrepancies that require urgent legislative correction. Unfortunately – to date – no adequate amendment to the provisions of the LHES has been introduced. Nearly two years after the Act's entry into force, the Minister of Finance elected

1 Art. 9 and Art. 22 of the Act of 26 July 1991 on Personal Income Tax, consolidated text Journal of Laws 2020, item 1426, as amended, hereinafter referred to as the PIT Act.

2 Act of 20 July 2018 – Law on Higher Education and Science, Journal of Laws 2018, item 1668, as amended, hereinafter referred to as the LHES, is applicable under the terms and conditions stipulated in the Act of 3 July 2018 – Regulations implementing the Act – Law on Higher Education and Science, Journal of Laws 2018, item 1669, hereinafter referred to as the Implementing Regulations.

to publish a general interpretation. Therein, it was posited that in terms of eligibility for 50% tax-deductible expenses, the LHES constitutes *lex specialis*, and consequently the cost deduction can be applied to the entirety of an academic teacher's remuneration. It seems that while in itself, this fiscal and legal direction is highly commendable, the general interpretation by the Minister of Finance fails to actually yield clearer and more ordered legislation. Indeed, the law remains inconsistent and still urgently requires suitable amendment – primarily in the context of copyright law as well as the specificity of academic teachers' work.

2. Preferential tax treatment. Overview of a global trend

Preferential taxation of royalties is relatively common in many countries in the world. Various variants thereof can be identified in both West and East European (former Eastern Bloc) countries, as well as on other continents, e.g. Asia and Central America. That is not to say that a single fiscal model is followed universally. Different tax instruments are adopted in different countries, but the underlying goal is always to facilitate preferential taxation of royalty revenues[3].

For instance in France, since 1 January 2008, under the Impatriate Tax Regime the favourable tax regime (Article 155 B) was extended to local hires (including French nationals) who relocate to France and meet the above residency criteria. Employees hired directly by a French company (excluding intra-company transfers) may elect to have 30% of their net remuneration treated as an impatriate premium and thereby exempted from French income tax up to the limit of the French reference net taxable salary (compensation received by other employees with respect to equivalent positions). Taxpayers who satisfy Article 155 B conditions benefit from a 50% tax exemption with respect to their foreign-source dividends, interest, royalties and capital gains (resulting from sale of securities) for a period of five years (subject to certain conditions concerning the source of such income).

Such solutions are also not unheard of in the former Eastern Bloc countries. For example in Belarus, individuals who receive royalties or fees for

[3] Examples cited after: "EY Organisation, Worldwide Personal Tax and Immigration Guide 2020–21," accessed April 14, 2021, https://www.ey.com/en_gl/tax-guides/worldwide-personal-tax-and-immigration-guide.

the creation, performance or other use of the results of intellectual activity may deduct associated expenses in accordance with the Belarusian tax law. All expenses must be supported by the relevant documents made in the established format. Explicit regulations contain descriptions of deductible expenses. Instead of claiming professional tax deductions based on documented expenses, certain individuals involved in creating intellectual property may claim tax deductions equal to 20%, 30% or 40% (depending on the type of activity) of the income derived. A professional tax deduction is provided to the taxpayer based on the annual tax return submitted to the tax authorities by the taxpayer. The tax authorities allow a deduction at the payer's choice in the amount of actually incurred and documented expenses or in the amount of an established percentage of taxable income. Instead of claiming professional tax deductions based on documented expenses, such individuals may claim tax deductions equal to 20% of the income derived. This professional tax deduction is provided to the taxpayer based on the annual tax return submitted to the tax authorities[4].

Meanwhile in Serbia, withholding tax is imposed at a rate of 20% on royalties from copyrights, rights related to copyrights and industrial property rights. Deductions from royalty income may vary between 34%, 43% and 50% of the total royalty income, depending on the source of income. Actual expenses incurred by an author are deductible if they are properly documented[5].

Preferential taxation of royalties has also been introduced in exotic (from the European perspective) countries such as China or Barbados. A China resident can enjoy a CNY60,000 deduction each year in computing his or her net taxable consolidated income, which is an aggregate of employment income, labour services income, copyright income and royalties. A non-resident foreign employee can enjoy a deduction of CNY5,000 per month on his or her employment income. Qualified charitable donations

4 Unlike in e.g. Hungary, where royalty income is included in ordinary taxable income, and is taxed, after the deduction of expenses, at the normal rate (15%).

5 "EY Organisation, Worldwide Personal Tax and Immigration Guide 2020–21," accessed April 14, 2021, https://www.ey.com/en_gl/tax-guides/worldwide-personal-tax-and-immigration-guide.

are also deductible. Business deductions. Independent personal services income and royalties can have a deduction of 20% of income.

In the case of the Barbados tax system, for resident "authors," 50% of royalties received in Barbados is exempt from tax. Section 2 of the Barbados Copyright Act provides that an "author" in relation to a work is the person who creates it. Section 7 of the act states that a work qualifies for copyright protection if the author was a citizen of or habitually resides in Barbados at the time the work was created. All other royalties received are aggregated with other income and subject to tax at the rates set forth in Rates.

Upon analysing the relevant tax and legal instruments, it becomes evident that Polish law also stipulates a preferential tax treatment of academic authors, but the recently introduced changes seem to (at least in principle) go much further than the aforementioned mechanisms operating in other countries. Moreover, the actual method of approaching this particular tax and legal problem also seems somewhat dubious.

3. New tax rules

In the financial context, the aspect of academic autonomy was strongly emphasised. Related to the above, one should highlight the considerable substantive status of intra-academic acts adopted by the competent bodies of a given institution, e.g. the senate, the rector. The same are also significant to the problem of preferable fiscal treatment of academic teachers discussed in this paper[6]. In particular, one should consider the new regulation's approach to so called tax-deductible costs with regard to taxation of the remunerations received by academic researchers (authors) which, if applied, would significantly reduce the level of the due personal income tax (PIT).

Under the current law, performance of the tasks of an academic teacher constitutes an individual creative activity within the meaning of copyright legislation[7]. Such wording of the regulation could suggest that all professional duties performed by academic teachers are eligible for the preferential

[6] See the explanatory memorandum to the Act of 20 July 2018 – Law on Higher Education and Science, Journal of Laws 2018, item 1668, hereinafter referred to as Explanatory Memorandum.

[7] Art. 116.7 of the LHES in conjunction with Art. 1.1. of the Act of 4 February 1994 on Copyright and Related Rights, Journal of Laws 2018, item 1293, as amended, hereinafter referred to as the Copyright Law.

treatment, i.e. included in the scope of the 50% tax-deductible expenditures. Indeed, this interpretation was endorsed by the Minister of Science and Higher Education who publicly declared that, in his assessment, the ministry had been able to develop a solution that would lay to rest any doubts as to the possibility of applying the increased rate of deductible expenditures with respect to the remuneration received by university staff performing the roles of academic teachers.[8] In the minister's opinion, the LHES takes into due account the actual circumstances of universities' overall functioning and the specificity of academic teachers' work by recognising their tasks as creative activity eligible for the 50% cost deduction[9].

Unfortunately, upon a closer analysis of legal provisions pertaining to the creative activity of academic teachers, one inevitably arrives at considerably less optimistic conclusions. The questionable effectiveness of the regulation is in fact so apparent that it is difficult to avoid the impression of a general confusion experienced subsequently by all the actors involved: university boards, fiscal authorities, academic teachers, and even, apparently, members of the cabinet from whom we have heard a deafening silence with regard to the interpretation provided by tax authorities, which hardly bodes well for the overall success of the newly introduced legislation[10].

Faced with a deluge of requests for official interpretation of the LHES submitted to the Ministry of Science and Higher Education by concerned academic authorities, officials consistently replied that the 50% tax-deductible expenditures will be applicable to the entire remuneration of an academic teacher[11]. At the same time, however, the Ministry of Finance issued a statement about ongoing (prolonged) works on the general interpretation

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8 See e.g.: information provided at the website dedicated to the Constitution for Science, accessed January 6, 2020, https://konstytucjadlanauki.gov.pl/sprawy-pracownicze-najczesciej-zadawane-pytania.

9 See e.g. communication of the Ministry of Science and Higher Education of 25 May 2018 "Koszty uzyskania przychodu – MNiSW za jednolitymi zasadami," unpubl. and communication of 8 June 2018 "Koszty uzyskania przychodu – stanowisko MNiSW i MF," unpubl.

10 See the letter from the Director of National Tax Information Office of 13 March 2019, no. 0112-KDIL3-3.4011.14.2019.1.MM, LEX no. 489750); See also: Jarosław Ostrowski, "Nowe autorskie koszty uzyskania przychodu," *Przegląd Podatkowy* no. 6 (2018): 30–35.

11 See: reply issued on 23 October 2019, unpubl.

of tax law. Regretfully, one has to conclude that the many months of consultations held between the respective ministries failed to yield satisfactory results. Given the growing uncertainty, the Minister of Science and Higher Education presented the Minister of Finance with a letter wherein he once again presented his own interpretation of the controversial law, in expectation that the same would be adopted as standard practice by tax authorities[12]. However, although the Minister of Finance reassured him that the general tax law interpretation long awaited by the academic circles would be promptly published, the Minister of Science and Higher Education's interpretation of the provisions was not corroborated[13]. In light of the above, it seems evident that the Minister of Science and Higher Education acted too rashly when confirming, in reply to the position of the Ministry of Finance, his opinion that the 50% cost deduction would apply to the entirety of an academic teacher's remuneration[14]. Furthermore, the statement in no way influenced the actual fiscal practice, even after the Ministry of Science and Higher Education officially voiced its concerns with regard to the interpretations provided by tax authorities and the extreme discrepancies observed in terms of the response of respective universities to the situation at hand[15].

When analysing the discussed problem, one should not neglect to consider the amount of controversy arising from the provisions of personal income tax law itself[16]. What further exacerbates the situation is the fact that the same are in fact only secondary to numerous fundamental problems related to Copyright Law as such. Contrary to the claims of the Minister of Science and Higher Education, the introduced regulation is not conducive

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12 Letter from the Minister of Science and Higher Education of 18 January 2019, ref. no.: DBF.WFSN.5013.1.2019.KK.

13 Letter from the Minister of Finance of 25 February 2019, ref.no.: DD3.8223.31.2019, unpubl.

14 Notification entitled "Nauczyciele akademiccy mogą stosować 50% kosztów uzyskania przychodów od całości wynagrodzenia," accessed January 6, 2020, https://konstytucjadlanauki.gov.pl/nauczyciele-akademiccy-moga-stosowac-50-kosztow-uzyskania-przychodow-od-calosci-wynagrodzenia.

15 Letter from the Minister of Science and Higher Educations of 9 May 2019 accessed July 27, 2019, https://uni.wroc.pl/wp-content/uploads/2019/02/50proc_KUP_pismo_MNiSW_190118.pdf.

16 Art. 5a. 38 – 40 and Art. 22.9. 3) and 22.9b.8) of the PIT Act.

to clarity and uniformity in the application of law[17]. In this context, the provisions of the LHES refer to Copyright Law and its definition of a work, rather than directly to tax-related legislation[18].

A juxtaposition of systemic regulations pertaining to higher education, fiscal and copyright concerns reveals the full scope and considerable significance of the observed disharmony. It is therefore unsurprising that the situation lends itself to a growing confusion of both the authors of the reform themselves, tax authorities, and consequently also the respective boards of Polish universities. When attempting to unravel the complex network of relationships touched upon by the LHES, one should begin by determining the actual subjective and objective scope of the newly introduced solutions for higher education.

4. Academic Teachers' Royalties and university activities

There are two groups of university employees, (academic teachers and staff members who are not academic teachers)[19] who may be employed as members of the: 1) didactic staff; 2) research staff; or research and didactic staff[20]. The primary tasks of academic teachers entail conducting research and educating students. However, this hardly represents the entirety of work they perform. They are also obliged to contribute to organisational work at their universities and continuously increase their professional competences. It should be noted at this point that the remuneration received under the relevant employment relationship covers also those types of duties. Given the specific wording of the LHES, the aforementioned formula greatly hinders the applicability of the provisions on 50% tax-deductible expenses. Specifically, it simply is not compatible with the new regulation[21] which de-

17 Letter from the Minister of Science and Higher Education of 23 November 2018, ref. no.: DBF.WFSN.74.135.2018.HŻ.

18 Art. 116.7 of the LHES in conjunction with Ar. 1.1. of the Copyright Law.

19 The new regulation retained previous dichotomic distinction between university staff members based on the specifics of their professional tasks, originally introduced in the Act – Law on Higher Education of 2005 (see also: and Michał Zieliński, Komentarz do art. 112 p.s.w.n., in *Prawo o szkolnictwie wyższym i nauce. Komentarz,* ed. Hubert Izdebski (Warszawa: Wolters Kluwer, 2019), LEX el.

20 See Art. 112 - 115 of the LHES.

21 Art. 116.7 of the LHES.

fines the performance of an academic teacher's tasks as individual creative activity within the meaning of art. 1.1 of the Copyright Law. Naturally, one cannot argue with the fact that, as such, the idea behind the regulation is reasonable and touches upon the very gist of the matter, however, already at this stage it becomes clearly evident that from the substantive and strictly practical perspective, the same is far from sufficient. Even though the provision includes all statutory tasks of academic teachers (i.e. members of research, didactic, or research and didactic staff) within the scope of its applicability, its actual wording does not facilitate the development of a uniform interpretation in terms of the extent to which the 50% tax-deductible expenditures are in fact applicable.

Numerous additional doubts arise from the specific structure of an academic teacher's remuneration. One has to ask whether, in light of the LHES provisions[22], it is correct to assume that the basic remuneration received by a research, research and didactic, or didactic staff member should be eligible for copyright protection and therefore fall within the scope of the 50% expenditure deduction stipulated by the PIT Act[23]? Although we fully approve of the adopted direction of legislative changes, it is our considered opinion that without an explicit solution to the mounting unclarity, the correct application of the LHES will be burdened with a high risk of erroneous interpretation of its provisions. For even should we assume that the increased 50% cost deduction can be applied to the full basic remuneration of a faculty member, one cannot forget that the salary received by a university employee actually consists of two elements: the basic remuneration and the length of service allowance. Furthermore, a university employee may also be eligible for so-called variable remuneration components: 1) special duty allowance, 2) performance allowance, 3) overtime pay, 4) allowance for working in onerous or hazardous conditions, 5) bonuses – in the case of employees who are not academic teachers, 6) other allowances, if specified in the internal collective labour agreement or remuneration policy[24]. This leads to another problem: are variable remuneration components also eligible for inclusion in the 50% tax-deductible expenditures framework

22 Art. 116.7 in conjunction with Art. 115.1–2 of the LHES.

23 Art. 22.9b.8) in conjunction with para 9.3) of the PIT Act.

24 Art. 136 of the LHES.

stipulated by the LHES[25]? This does not seem to be corroborated by the position adopted in administrative case law which concludes that such remuneration components do not constitute income from work subject to copyright as no cause and effect relationship can be identified in this case between the remuneration and actual creative work[26]. Adopting this interpretative direction in fiscal practice, however, would stand in blatant contradiction to both the intentions of the legislators and the ministerial interpretation of the relevant regulation[27].

Additional limitations to the applicability of the LHES stem from the numerous doubts related to the method of taxation with regard to the remuneration of staff members on paid sabbaticals. It is difficult to explicitly determine whether the increased level of tax-deductible expenditures ought to be applied immediately (when paying the salary due to a faculty member on a sabbatical) or rather only once the relevant copyrights are transferred to the employer (the current copyright and fiscal legislation and the provisions of the LHES prove decidedly inconsistent in this respect). Notably, also identifying the correct moment of payment as such is significant in this context.

Under the provisions of the LHES, the performance of professional tasks by an academic teacher constitutes creative activity within the meaning of Copyright Law. But for the results of an academic teacher's research to be eligible for copyright protection, they ought possess the specific attributes of a creative work[28]. What qualities must a result of an activity pos-

25 Art. 136.2.2)–3), and 6) in conjunction with Art. 138.3 of the LHES.

26 It is worth citing an excerpt from a Provincial Administrative Court in Poznań, Judgment of 24 January 2018, Ref. No. I SA/Po 831/17, LEX no. 2446370, whose statement of reasons reads "a payer will be eligible for 50% expenditure deduction in the month when employees receive remuneration in return for the use of disposal of copyrights, but excluding statutory bonus (and other bonuses, e.g. performance bonus) and service allowance, i.e. only with respect to the given employee's basic remuneration (…), because they do not constitute revenue generated from work subject to copyright as there is no cause and effect relationship between the remuneration and creative work. It should be added that additional controversy emerges in the event of temporary suspension of basic remuneration due to receipt of financing from sources other than the subsidy.

27 See: Letter from the Minister of Science and Higher Education of 23 November 2018 to rectors of state universities, ref. no.: DBF.WFSN.74.135.2018.HŻ.

28 Art. 1.1 of the Copyright Law.

sess to be classified as a creative work within the meaning of Copyright Law? Pursuant to its provisions, the object of copyright is any manifestation of creative activity of individual nature, established in any form, irrespective of its value, purpose or form of expression[29]. Protection may apply to the form of expression only and no protection is granted to discoveries, ideas, procedures, methods, operating principles, or mathematical concepts[30]. A work is in copyright since being established, even if its form is incomplete[31].

The provisions of Copyright Law do not specify whether a work can be established solely under a specific work contract. The above conclusion stems both from Copyright Law and the provisions of the civil code.[32] A work within the meaning of Copyright Law can also be established within the framework of an employment relationship[33] or a service contract[34]. This leads to the conclusion that there are no evident legal obstacles to qualifying the work of an academic teacher as creative activity. At this point, however, the point of gravity in the discussed problem shifts to another aspect of the same. It becomes necessary to determine the actual scope of an academic teacher's activity that is eligible for copyright protection and can therefore be subject to the increased tax-deductible expenditures.

A work is, above all, an intangible asset constituting the result of the author's intellectual activity. Hence, the definition of a work as a "manifestation" of a particular activity refers the same to an external result existing outside of the author's mind. As indicated in the doctrine, granting protection to a given result of human activity depends on several conditions. It must constitute an manifestation of creative activity (creativity condition), have an individual character (individuality condition), and be established in some form.

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29 Art. 1.1 of the Copyright Law.

30 Art. 1.2 [1] of the Copyright Law.

31 Art. 1.3 of the Copyright Law.

32 Art. 1.1 of the Copyright Law in conjunction with Art. 627 of the Act of 23 April 1964 – the Civil Code, consolidated text Journal of Laws 2019, item 1145, hereinafter referred to as the C.C.

33 Art. 12 and Art. 14 of the Copyright Law.

34 Polish Supreme Court, Judgment of 22 March 2018, Ref. No. II UK 262/17, LEX no. 2499800.

A key aspect for our present deliberations stems from the part of the definition which refers to a work as a "manifestation of creative activity"[35]. The creative aspect must therefore be somehow expressed as a result of such activity. This reference to a "manifestation (result, product) of creative activity" means that a thought or concept as such, regardless of how original, is not sufficient to warrant legal protection unless it is somehow manifested in a way that establishes its form and content. A work must be the result of creative activity, i.e. constitute a subjectively new product of the intellect. This quality of a work is typically referred to as "originality"[36] or "novelty"[37]. Furthermore, it must also have an "individual character"[38], i.e. it ought to be possible to associate the work with a specific author, thus establishing a certain "bond" that is subject to legal protection[39]. One should therefore ask oneself whether the work has been created by someone else before and if it is likely for it to be created by someone else in the future with the same result. If the answer to the later is affirmative, the work should be deemed as a repeatable, routine activity whose results

35 Aleksandra Nowak-Gruca, "Nauczanie i dzieła naukowe jako przedmiot prawa autorskiego. Uwagi na tle wybranych poglądów judykatury," *Przegląd Sądowy* no. 6 (2018): 92–104.

36 See Polish Supreme Court, Judgment of 15 November 2002, Ref. No. II CKN 1289/00, LEX no. 78613.

37 See e.g. Polish Supreme Court, Judgment of 22 June 2010, Ref. No. IV CSK 359/09, LEX no. 694269; Polish Supreme Court, Judgment of 25 January 2006, Ref. No. I CK 281/05, LEX no. 181263. See also: Janusz Barta and Ryszard Markiewicz, Komentarz do art. 1 ustawy o prawie autorskim i prawach pokrewnych, in *Prawo autorskie i prawa pokrewne. Komentarz*, ed. Janusz Barta and Ryszard Markiewicz (Warszawa: Wolters Kluwer, 2011), 22; Ewa Laskowska-Litak, Komentarz do art. 1 ustawy o prawie autorskim i prawach pokrewnych, in LEX el.; Rafał Marcin Sarbiński, "Komentarz do art. 1 ustawy o prawie autorskim i prawach pokrewnych," in *Prawo autorskie i prawa pokrewne. Komentarz*, ed. Wojciech Machała (Warszawa: Wolters Kluwer S. A., 2019), LEX el. *Ustawy autorskie. Komentarze. Tom I*, ed. Ryszard Markiewicz (Warszawa: Wolters Kluwer S. A., 2021),

38 See e.g. Provincial Administrative Court in Warsaw, Judgment of 18 February 2009, Ref. No. I ACa 809/08, LEX no. 1120180.

39 See Art. 16 of the Copyright Law; For more information see Maria Poźniak-Niedzielska and Adrian Niewęgłowski in *System Prawa Prywatnego, vol. 13, Prawo autorskie*, ed. Jerzy Barta (Warszawa: C. H. Beck, 2013), 9.

are reproducible. If the answer is negative, on the other hand, this fact attests to the individual character of the work (product, result)[40].

Practical concerns arising in the context of taxing the creative activity of academic teachers stem from the fact that the applicable copyright regulations do not correspond to solutions adopted in provisions pertaining to the organisation of higher education. Currently, in a situation where Art. 116.7 of the LHES directly refers to the provisions of Copyright Law, we are faced with a systemic clash between statutory regulations, where the object of copyright protection is not defined by the LHES or even the PIT Act, but rather by Copyright Law. The LHES does not contain provisions specifying that in the case of work performed by academic teachers and the specificity thereof, special types of works subject to copyright protection are produced. Indeed, there is nothing to suggest any departure from the legal definition to which the LHES directly refers – i.e. the definition of a "work" provided in the Copyright Law. It is therefore justified to directly apply the legal definition contained therein to the interpretative process. Under the principles of effective legislation, should the legislator wish to depart from the same, the alternative meaning of the concept (creative work of academic teachers) ought to have been clearly stipulated and its exact scope of reference determined.

5. Content and scope of the general interpretation by the Minister of Finance

The observed inconsistencies required swift legislative correction but the provisions of the LHES have not been amended. Nearly two years after its entry into force, the Minister of Finance finally decided to issue a general interpretation related thereto.[41] It was stated that in terms of the applicability of the 50% tax-deductible costs, the provisions of the LHES constitute *lex specialis*. The conclusion was that pursuant to the PIT Act, 50% tax-deductible costs should apply to the entirety of an academic teacher's remuneration.

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40 Supreme Administrative Court, Judgment of 11 July 2018, Ref. No. II FSK 1845/16, LEX no. 2528581.

41 General interpretation by the Minister of Finance, no. Nr DD3.8201.1.2018 of 15 September 2020 regarding the applicability of 50% tax-deductible costs to royalty revenues (Dz. Urz. 2020, item 107).

The Minister further underlined that in order for remuneration to be classified as a royalty, which justifies the application of 50% tax-deductible costs, it is necessary that: 1) a work subject to copyright be created, which conditions the author's entitlement to copyright protection and enables them to dispose of their copyrights to their work, 2) objective evidence exists to corroborate the creation of a work subject to copyright. It was further stated that with respect to works created as part of academic teachers' professional activity, the condition of clearly distinguishing authorship fees does not apply.

With regard to documenting the creation of works, it was suggested that the employer and employee may maintain a register of works created, including works with respect to which down payment on authorship fees is affected, as well as independently created professional works. In the register, the employer may confirm acceptance of the particular works or specify another time when the relevant copyrights are transferred thereto. The employer and employee may also document the creation of works in the form of statements. The obligation to submit relevant statements may be included as the provisions of the employment contract or the institution's internal regulations. Said statements should specify the work created (or being created) because simply declaring the performance of creative work shall not be deemed as sufficient.

It was also stressed in the interpretation that the provisions of the LHES are a separate regulation taking into account the actual circumstances of universities constituting the primary entities of the higher education system as well as the specificity of an academic teacher's work. The Minister of Finance observed that despite certain legal frameworks applicable thereto, the profession of academic teacher is not far-removed from so-called liberal professions. A significant part of tasks typically performed by academic teachers and considered in the evaluation of their work are a product of creative inventiveness and freely conducted creative and publication activity. No substantiation was provided, however, regarding the specific regulations on which this limitation to the fundamental rules of the employment relationship is based. The LHES nor the Labour Code do not account for the same. Neither was a more thorough justification provided to support the presented opinion regarding the legal position of an academic teacher which was classified as a liberal profession. Moreover, the interpretation

indirectly equates the authorship of an original publication, a lecture, or a seminar (which does not seem intentional). The Minister of Finance argued that the statutory scope of obligations bearing upon academic teachers requires taking independent actions in all areas of their professional activity with a view to creating works within the meaning of Copyright Law, and mentioned in this context: teaching materials, syllabuses, lectures, seminars, papers, monographic studies, etc. It seems that this wording may be misleading and may result in contradicting regulations other than the PIT Act: specifically the Copyright Law and the LHES.

With regard to the provisions pertaining to various forms of leave available to academic teachers, it is argued in the interpretation that during the period in which an employee does not perform the tasks of an academic teacher and therefore does not perform individual creative activity, the 50% cost deduction cannot be applied. It was simultaneously stated that the rules apply as of 31 August 2018 (date of entry into force of the discussed provision of the LHES), whereas the remuneration received before that date is subject to the previously applicable university policies regulating the calculation of an academic teacher's salary.

Although important from the practical perspective, the general interpretation by the Minister of Finance does not seem to solve many of the relevant legal problems. Specific reservations will be listed in the conclusions. At this point, however, we should consider its practical consequences relative to the aforementioned specificity of an academic teacher's work. In this context, it would be helpful to cite individual interpretations issued shortly before the discussed general interpretation by the Minister of Finance, which additionally emphasise its legal effects.

Specifically, this pertains to the types of remuneration received in relation to the scope of one's professional duties. Academic teachers employed by universities can generate income from:

- base salary,
- complementary base salary,
- pro-quality base salary,
- overtime allowance,
- special duty allowance,
- seniority allowance,
- additional remuneration for thesis supervisors,

- pay for reviewing scientific degree candidates,
- pay for participation in recruitment processes,
- other salary supplements,
- awards,
- severance pay (retirement, lay-offs, disability),
- reimbursement of the costs of work-related travel (lump sum compensation for using a personal vehicle on university business, reimbursement of business travel costs),
- remuneration for periods of authorised absence at work (holiday leaves, sick leaves),
- payments in lieu of leave not taken,
- holiday subsidies.

In light of numerous individual interpretations issued, 50% tax-deductible expenses can be applied to revenues paid to an academic teacher under an employment contract.[42] At the same time, it should be observed that the 50% tax-deductible expenses do not apply to all income received during periods of authorised absence from work. Notably, the Law on Higher Education and Science provides every academic teacher under the age of 65, employed full time, with the right to take a paid leave to recuperate.[43] The leave is granted in order to undergo recommended treatment in a situation where one's health effectively hinders one's ability to perform work duties. Recuperation leaves are granted based on a doctor's certificate stating that the condition of one's health requires a break from work and indicating the recommended treatment as well as the period of time necessary to effectively undergo the same. In other words, when an academic teacher's health deteriorates necessitating a break from work, he or she can nonetheless receive remuneration for the period of such professional hiatus. But this, in turn, means that the teacher no longer performs individual creative activity within the meaning of Art. 1.1 of the Copyright

[42] See, individual interpretation issued by the Director of the National Treasury Information of 13 July 2020, no. 0113-KDWPT.4011.20.2020.3.MG, LEX no. LEX 548424; individual interpretation issued by the Director of the National Treasury Information of 8 July 2020, no. 0112-KDIL2-1.4011.373.2020.2.KF, LEX no. 547949; individual interpretation issued by the Director of the National Treasury Information of 10 July 2020, no. 0114-KDIP3-2.4011.359.2020.1.JK3, LEX no. 548325.

[43] Art. 131 of the LHES.

Law. Hence, such academic teacher's eligibility for the 50% cost deduction is ceased during the recuperation leave. Notably, this exclusion does not apply to other forms of leave, e.g. research or holiday leaves. In such cases, the university is still able to apply 50% tax-deductible expenses when calculating one's remuneration and withholding personal income tax.[44]

6. Conclusion

In Poland, similarly to many other countries, the law stipulates a preferential approach to the taxation of royalties. However, as the LHES came into force, it introduced new, dedicated tax rules applicable specifically to academic teachers. Unfortunately, this was done rather sloppily, in a way that failed to guarantee cohesion between the provisions of tax law, the LHES, and copyright legislation. The general interpretation by the Minister of Finance aimed to "remedy" this situation, but failed to provide a viable permanent solution.

In the new general interpretation, the Minister of Finance stipulated that in order for an academic teacher's remuneration to be considered a royalty, a work must be created. In principle, this position has to be commended. However, given the above one might be taken somewhat aback by the subsequent part of the Minister's argumentation, the underlying premise being that the "*specificity of academic teachers' work*" must be taken into account as well as the similarities between an academic career and so-called liberal professions. Naturally, one can hardly disagree with the efforts aimed at emphasising the prestige and significance of academic teachers, particularly in the context of the current erosion of the academic ethos. But the direction of the narration itself does raise certain serious normative reservations. For what exactly is the significance of said factors – i.e. work conditions of specificity of liberal professions – in terms of actual provisions of copyright legislation or tax law? Indeed, in normative terms the interpretation seems inherently inconsistent. On the one hand, the authority correctly refers to the constitutive qualities of the result (work) that ought to be created as the outcome of an academic teacher's activity. But on the other, it evokes non-statutory arguments that have no normative significance to the issue at hand.

44 Art. 22.9. 3) of the PIT Act.

It should be underlined that sampled (and mixed) evaluations of the outcomes (not necessarily results) of academic teachers' work somewhat undermine the relevance of the previous arguments concerning the necessity of creating a work within the meaning of copyright laws. This is not only misleading for the readers of the interpretation but downright materially incorrect. The names of respective manifestations of activity (be it related to research or teaching) that cannot be classified as works within the meaning of applicable law, will have no constitutive significance. In the legal sense, they in no way guarantee the eligibility for preferential fiscal treatment. Hence, they in fact pose a risk for the taxpayer given the potential negative tax consequences related thereto. Naturally, one has to recognise the interpretation's positive practical implications for the academia, only strengthened by the fact that it was issued by the superior tax authority. For this reason alone, tax offices will be hard pressed to ignore the same in the context of individual cases.

In truth, however, it fails to significantly amend the official interpretation of the law that remains unchanged (and unclear). Instead, it endorses a certain (possibly only temporary) practice regarding the classification of academic teachers' professional activity. Unfortunately, in the presented configuration, the legislative negligence and interpretative irregularities observed at the meeting point between the LHES, copyright legislation and tax law, continue to prevail.

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Restrictions on rights and freedoms during the COVID-19 pandemic in a comparative perspective. First experiences, ed. K. Dobrzeniecki, B. Przywora, Warszawa: Instytut Wymiaru Sprawiedliwości 2021, pp. 540.

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The ability of international actors to preserve and protect their societies largely depends on maintaining security, including health security. The outbreak of the COVID-19 "coronavirus" pandemic brought about a long-forgotten debate on health issues that was reopened once again and that automatically stimulated lawmakers to make quick reactions by way of introducing new (inconsiderate) legislation. Importantly, many a lawyer felt apt to make comments on how to deal with the consequences of the pandemic and how to structure legislative responses. Now, we are after the first waves of the pandemic and that enables scholars to evaluate the reactions of States in times of a health crisis. Thus, the editors of the book under review gathered a group of authors to describe States' reactions to the COVID-19 pandemic.

Recovering from the pandemic is sure to bring constantly changing issues and challenges. The plethora of topics to be addressed seems to be conspicuous: it starts with the basic laws such as human and civil rights, State emergency and the preservation of public health (vaccines. quarantines) and ends with more specific issues connected, *inter alia*, to banking/finance, restructuring, commercial contracts, construction/real estate, consumer financial services, insurance, intellectual property, cybersecurity and privacy. There are also, of course, some (allegedly) prosaic, but important problems, that need to be dealt with. The most obvious example lawyers can imagine maybe that many courts now use video conference software to conduct hearings. This process of handling cases may be different for each judge. And it raises not only the issues of due process of law but also

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the issues of how to protect one's client's rights at a virtual hearing. The law aside, the way we work has drastically changed. Employers had little time to prepare for the profound effect that Covid-19 has on their workers and operations. Similarly, employees were put in a situation in which homework created challenges they had never encountered before. Businesses of almost all types and sizes are still reeling from the shock and short-term impact of coronavirus. The States reacted by granting financial relief which (apart from being inconsiderate and highly doubtful from an economic perspective as being counter-productive) were usually granted only to certain branches or firms. Thus, to some of them, States provided certain financial aid, whilst others were left to themselves, with the need of restructuring or declaring bankruptcy at the horizon.

Given the above, the book under review attempts to provide an overview of the current and possible future legal conditions and opportunities for all with an attempt of taking into account recent developments in a dynamic environment.

The book is written strictly from the domestic perspective. It is a compilation of articles devoted to various legal aspects of the pandemic in given countries. While the discussion on the significance of legal response to health insecurity is a not recent occurrence, the response to the COVID-19 pandemic seems in academic quarters to be a new challenge. The worldwide nature of the pandemic is something completely new as it creates a need for a collective response to effectively combat the disease and its effects. Therefore, the responses to the pandemic inevitably cause (severe) limitations to human rights and freedoms. The book also aims at analyzing those responses. At the same time, the authors recognize the crucial role of the comparative approach at the global and regional levels in combating threats to health security through bilateral and multilateral instruments and mechanisms aimed at monitoring, preventing and responding to such threats.

The book is divided into twenty-three parts devoted successively to Austria, Belgium, Belarus, Brazil, China, Czechia, Denmark, France, Spain, the Netherlands, Israel, Canada, Mexico, Germany, Peru, Sweden, Ukraine, USA, Hungary, Italy and the United Kingdom. Finally, a separate, but modest chapter summarizes the book with a set of concluding remarks. Overall, in their chapters, authors analyze the legal and practical solutions that

have been applied in the selected countries to prevent the development of the COVID-19 pandemic in order to bring conclusions as to what extent experiences and solutions can be used in the Polish legal system to prepare Poland for the future in the world of pandemics. Also, the articles discuss selected legal problems related to the measures directed at preventing the spread of COVID-19 in light of constitutional provisions (eg. State emergency provisions). Incidentally, the authors take a look into ongoing legislative works on new acts regulating the matter. Finally, their review of normative acts intends to show whether the interference with human rights and freedoms (in particular, right to assembly and right to privacy) is permissible under the constitutional arrangements and selected international and domestic standards, including proportionality. For example, in several countries, drastic restrictions on human and civil rights were said to be justified by the unprecedented threat posed by a rapid spread of the pandemic. On the other side, these restrictions hampered or even nullified the exercise of human and civil rights (especially, during the co-called lockdowns). The authors tried to review domestic anti-pandemic legislations to question or not the legality of the measures taken. They offer some sets of conclusions in their final remarks.

The States' reactions to the first waves of the pandemic varied and largely depended on a given State's approach to the coronavirus and its constitutional provisions. For example, while analyzing the situation in Austria, P. Czarny focuses on limiting the freedom of movement and freedom of economic activity in the light of constitutional regulation. He points out that the Austrian Constitution does not provide for the institution of a state of emergency and it does not contain provisions on the suspension of constitutional rights and freedoms in emergencies (the same provisions are included, *inter alia*, in the Constitution of Belgium). On the other side, the constitutional regulations concerning the criteria on which the admissibility of limiting fundamental rights depends are general and imprecise. The most important formal criterion is the requirement of a statutory basis (usually, this condition has been abided by). Also, the Austrian Constitutional Tribunal underlines the importance of the proportionality principle. In the light of these criteria, the author assesses a huge number of laws and regulations in Austria that were sparked by the COVID-19 pandemic. They include, in particular, the special act on counteracting COVID-19 of

March 2020 which provides for a far-reaching limitation of civil rights. As indicated above, the author thus studies judgments of the Constitutional Court to show that the guarantees of individual rights and freedoms have not been suspended in Austria. But to assess the legality of their introduction, constitutional principles continue to apply, including the need for a clear statutory basis, the requirement to observe the principle of proportionality, including precise (and not general) justification by the executive authorities of the necessity of the introduced restrictions. The author(s) might be applauded for highlighting the barriers for (often) unfettered willingness of States to combat the pandemic at all costs.

The editors of the book were careful not to neglect those States which have a relaxed approach to the pandemic. For instance, as opposed to Austria, the Belarusian authorities have consistently denied the appearance of the pandemic. Thus, neither the state of emergency nor any restrictions were introduced. The only limitation was the prohibition to enter Belarus by natural persons, including its citizens, crossing the land borders with Lithuania, Latvia, Poland and Ukraine. However, as K. Kakareko and J. M. Sobczak rightly pointed out, this restriction was sparked by political tensions with neighboring countries.

The seemingly most important conclusion reached in the book is that the States reacted to the pandemic in two basic forms. Either the pandemic was recognized as an event that could be managed through ordinary means or the pandemic was regarded as an extraordinary event that caused a state of emergency to be declared, but only if the constitutional provisions allowed the authorities to do so (the most prominent examples being Spain, Czechia, Hungary and France). In the latter case, the States benefited from special powers that severely limited the exercise of human and civil rights and freedoms. In my opinion, this is one of the most important conclusions of the book: the States did not hesitate to limit human rights and freedoms. More worrisome, the States seem likely to impose a far-reaching limitation in the foreseeable future unless people will vigorously and commonly object to the imposition of such extreme means. Also, the authors rightly noted that the States had adopted many soft law documents (guidelines, plans, procedures, etc.) that indicated the ways and means for providing basic services in the time of the pandemic.

As follows from the above, the authors persuasively proved that the limitation on civic and human rights and freedoms was severe. In particular, personal freedom (right to privacy – lockdowns, quarantines), as well as the freedom of economic activity and the freedom of religion, were restricted. The authors, however, could have presented a more in-depth analysis to show whether (why) these limitations were inconsistent with basic human and civil rights and freedoms.

This book is an interesting piece of scholarly writing. It has drawbacks, though. The authors could have been more critical in their assessment of the domestic legislations under their respective review. Sometimes an article simply boils down to a description of the COVID-19 legislation. Also, my big concern for the book is that it does not include any sort of (considerable) introduction or summary written in English. Also, summaries attached to each chapter are modest, to say the least. They do not fully reflect the content of articles and, sometimes, do not include the conclusions reached in a given article. Therefore, at their current state, the summaries often impart none of these, which significantly detracts from their usefulness. I identify these issues as the most significant drawbacks of the book under review. It is the duty of the authors and editors of such a book on such an important topic to provide an international reader with at least a cursory overview of the book, its content, theses and, most of all, conclusions. Absent such an English introduction/summary, the book is automatically devoid of its use in the wider context, to wit, in the international discussion on the legal issues arising out of the pandemic.

In sum, this book still has several strengths. It tries to explain to the reader how the response to the pandemic interfered with human rights and freedoms. Authors' ideas should become known to possibly the widest spectrum of readers. Therefore, the book has its original significance for the future: it contributes to the conscious evaluation of the limitations imposed by States by way of evaluating the pandemic restriction with basic rights and freedoms. The authors should be applauded for taking up again a difficult and complex subject at the very first stage of the pandemic. Their considerations are interesting. The breadth of issues and of arguments certainly proves that the authors fully committed themselves to the subject matter. Therefore, the added value of the book is the discussion on the legal

foundation of responses to the COVID-19 pandemic in light of basic rights and freedoms.

Naturally, it is not possible in a short review of such a book to comment in detail on every aspect of first reactions to the COVID-19 pandemic. But hopefully, it follows from this brief description that the book under review is a good piece. The authors do not avoid thorny issues and confidently present and defend their views. I would venture to conclude that anyone with a genuine interest in health safety would immediately identify with this book and regard it as valuable work. Thus, I expect that this book will find its way onto many shelves of those dealing with health safety and the COVID-19 pandemic.