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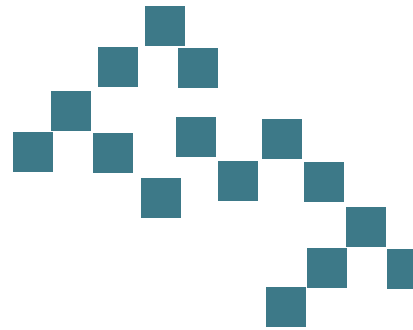

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Duty of loyalty and due care of the board member under Polish law

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Abstract: Duty of loyalty and due care of the board's members have been lately introduced to the provisions of the Polish Commercial Companies Code. This paper aims to define the duty of loyalty and due care of the board members, as presented in the Polish doctrine, as well as in the British, Spanish, and German laws. Additionally, the impact of the new provisions on the liability of the board members shall be described.

1. Introduction

Duty of loyalty and due care of the board's members have been widely adopted in the doctrine for a long time. However, the duty of loyalty was not directly regulated in Polish law, and the obligation of due care was regulated in the provision concerning the liability of the board members. Due to the amendment to the Polish Commercial Companies Code[1] adopted by the Act of 19 July 2019,[2] introducing the simple joint-stock company, the duty of loyalty and due care of the board members appeared in the form of a separate provision for the first time. Later on, due to the amendment

1 Act of 15 September 2000 Commercial Companies Code, Journal of Laws, 2022, item 1467, hereinafter abbreviated as CCC.

2 Journal of Laws, 2019, item 1655.

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of 9 February 2022[3], the duty of loyalty and due care was introduced in the private limited company and in the joint-stock company.

The latest amendment aims primarily to synchronize the provisions concerning boards' members in all three types of companies, so now the duty of loyalty and due care of the members of the management board, supervisory board, and board of directors is consonantly regulated (art. 209^1, 214^1, 300^{54}, 377^1, 387^1). Under these provisions, a board member, while performing his/her duties, shall act with due care resulting from professional integrity and honor the duty of loyalty to the company.

The priority of the amendment was to modernize the company law by stating *expressis verbis* the general duty of board members, similarly as such obligations have already been regulated in some European countries[4]. Moreover, the necessity to amend the provisions concerning the liability of board members by introducing a business judgment rule made it compulsory to refer to the duty of loyalty and due care. However, as the legislator used a general clause of duty of loyalty, there is a necessity to precise the scope of the duty. This paper aims to define the duty of loyalty and due care of the boards' members, as presented in the Polish doctrine, as well as in a comparative approach taking into consideration British, Spanish, and German law. Additionally, the new provision's impact on board members' liability shall be described.

2. Doctrinal views on the duty of loyalty – credit line

The Polish doctrine has commonly adopted the duty of loyalty[5]. Hence at first, a short description of the up-to-date views shall be described. This obligation of being loyal to the company derives directly from the relationship

[3] Act of 9 February 2022 on the amendment of the Commercial Companies Code, Journal of Laws, 2022, item 807. The amendment of the Code entered into force on 13 October 2022.

[4] Justification of the amendment proposal, www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=1515.

[5] Stanisław Sołtysiński, "Organy spółki akcyjnej," in *System Prawa Prywatnego, Vol. 17B. Prawo spółek kapitałowych*, ed. Stanisław Sołtysiński (Warszawa: C.H. Beck, 2010), 490; Andrzej Szumański, "Organy spółki z o.o.," in *System Prawa Prywatnego, Vol. 17A. Prawo spółek kapitałowych*, ed. Stanisław Sołtysiński (Warszawa: C.H. Beck, 2010), 479; Krzysztof Oplustil, *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej* (Warszawa: C.H. Beck, 2010), 498; Piotr Pinior, *Nadzór wspólników w spółce z ograniczoną odpowiedzialnością* (Warszawa: C.H. Beck, 2013), 89; Dominika Opalska, *Obowiązek lojalności w spółkach kapitałowych* (Warszawa: C.H. Beck, 2010), 122; Adam Opalski, "Przed

between the board members (membership in a management board, a board of directors, or a supervisory board) and the company, created due to the appointment to the board. As the shareholders mandate to the members of the boards the management and supervision over the company's assets, this legal relationship, which is of contractual and organizational nature[6], imposes on a board member a duty of loyalty (*fiduciary duty, Treupflicht*)[7] towards the company.

The duty of loyalty has been defined generally as the obligation to refrain from actions contrary to the company's interests resulting from the membership in a company's board, which results from the fact of entrusting the management or supervision over the company to a member of the body, by the shareholders or other authorized body[8]. The Polish doctrine formulated the following elements of the loyalty duty: the primacy of the company's interest, ban of abuse of competencies, the obligation to refrain in case of conflict of interests, prohibition of competition, the obligation to use corporate opportunities, availability to the company, confidentiality duty[9].

The duty of loyalty under the Polish Act has been specified in the form of the obligation to refrain from making decisions in the event of a conflict of interest (Art.209/377 CCC), prohibition of representation in contracts

Art. 368," in *Kodeks spółek handlowych. Komentarz,* Vol. III.A., ed. Adam Opalski (Warszawa: C.H. Beck, 2016), 1167.

6 See more on the legal nature of the membership in boards members: Pinior, *Nadzór wspólników*, 81–91 with the literature cited therein; Andrzej Kidyba, *Kodeks spółek handlowych. Komentarz.* Vol. I. (Warszawa: Wolters Kluwer, 2017), 928; Opalska, *Obowiązek lojalności*, 14; Adam Opalski, "Przed Art. 201," in *Kodeks spółek handlowych. Komentarz,* Vol. II.A., ed. Adam Opalski (Warszawa: C.H. Beck, 2018), 831–834.

7 Stephen Girvin, Sandra Frisby, Alaister Hudson, *Charlesworth's Company Law* (London: Sweet & Maxwell, 2010), 323–370; Derek French, Stephen Mayson, Chistopher Ryan, *Company Law* (Oxford: Oxford University Press, 2010), 480–486; Hans Joachim Priester, Dieter Mayer, *Münchener Handbuch des Gesellschaftsrechts. B. 3. Gesellschaft mit beschränkter Haftung* (München: C.H. Beck, 2009), 898–890; Michael Hoffman-Becking, *Münchener Handbuch des Gesellschaftsrechts. B. 4. Aktiengesellschaft* (München: C.H. Beck, 2007), 298–303.

8 Opalski, *Kodeks spółek*, 2018, 835; Opalska, *Obowiązek lojalności*, 136; Oplustil, *Instrumenty nadzoru*, 500; Marcin Spyra, "Spółka akcyjna," in *System Prawa Handlowego, T. 2B., Prawo spółek handlowych*, ed. Stanisław Włodyka (Warszawa: C.H. Beck, 2007), 413.

9 Pinior, *Nadzór wspólników*, 90; Opalska, *Obowiązek lojalności*, 144 onwards; Opalski, *Kodeks spółek*, 2018, 835–838; Oplustil, *Instrumenty nadzoru*, 501.

and disputes with management board members (Art. 210 § 1/ 379 § 1 CCC), prohibition of competition (Art. 211/380 CCC). Furthermore, the display of loyalty can also be found in Art. 15 CCC, which requires the consent of a shareholders' meeting for the execution by a company of a loan, credit, surety agreement, or a similar contract with a member of the management and supervisory board, or for the benefit of any of those persons. Again here, the legislator gives primacy to the company's interest.

Under these provisions, a general duty of loyalty was interpreted in the doctrine and also jurisprudence. Notwithstanding, in all mentioned provisions, the protection and primacy of the company's interest is the core of the legal relationship between the board member and the company.

As stated in a judgment of the Supreme Court of 11 March 2010[10], the provision of Art. 209 CCC indicates the primacy of the company's interest protection over the private interest of a management board member. Additionally, the Supreme Court stated that the conflict of interests does not have to exist *de facto*, as the hypothetical threat of conflict of interests shall be sufficient to protect the company's interest.

The Supreme Court, in a judgment of 24 July 2014,[11] adjudicated that by managing the company, a member of the management board must act in the best interests of the company, which should be interpreted from the general duty to manage the company's affairs as stated in Art. 201 § 1 CCC. All actions that adversely affect the company's financial situation, such as consulting or granting services to competitive entities, delivering goods and information, or giving loans to such an entity, shall be treated as competitive engagement.

In the Supreme court judgments, the protection of the company's interest, under Art. 15 CCC is extensive. Due to the resolution of the Supreme Court of 12 January 2022,[12] the consent of the shareholders' meeting requires the conclusion of a contract between a company and a third party when based on various factual and legal circumstances, the real beneficiary

[10] Polish Supreme Court, Judgment of 11 March 2010, Ref. No. IV CSK 413/09, Lex No. 677902.

[11] Polish Supreme Court, Judgment of 24 July 2014, Ref. No. II CSK 627/13, Lex No. 1545031.

[12] Polish Supreme Court, Judgment of 12 January 2022, Ref. No. III CZP 37/22, "OSNC" 2022, No. 7–8, Pos. 77.

of such an agreement is a member of the management or supervisory board, or other persons indicated in Art. 15 CCC. Hence it was stated in the justification of this resolution that the cited provision was intended to ensure that the interest of a company would be protected against the improper use by the boards' members of their powers (abuse of function). The Supreme Court, in a judgment of 7 March 2017[13], predicated that "a similar contract" means any contract in which there is a transfer of assets from the company to the persons quoted in Art. 15 CCC, likewise in the judgment of 7 February 2019[14] and in the judgment of the Supreme Court of 5 May 2019[15].

3. Duty of loyalty – a comparative approach

The existence of the duty of loyalty is regulated by statute in other European countries; among others, it is regulated in English law[16]or Spanish law[17]. Apart from the general clause of duty of loyalty and due care, particular displays of loyalty are encountered in national legislation. However, in some countries, the duty of loyalty is not *expressis verbis* stated but has been commonly adopted by the representatives of the doctrine, just like in German literature. These three jurisdictions of Great Britain, Germany, and Spain have been selected as they represent three dominant legal systems: the Anglo-Saxon, the German, and the Roman.

The most extensive displays of the duty of loyalty are indicated in the British Companies Act, that describes general duties of directors (se. 171–177 CA). Pursuant to sec. 172 CA, a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to the likely consequences of any decision in the long term, the interests of the company's employees, the

13 Polish Supreme Court, Judgment of 7 March 2017, Ref. No. II CSK 349/16, "OSNC" 2018, No. 1, Pos. 9.

14 Polish Supreme Court, Judgment of 7 February 2019, Ref. No. II CSK 8/18, Lex No. 2617977.

15 Polish Supreme Court, Judgment of 5 May 2019, Ref. No. V CSK 207/18, Lex No. 2692250.

16 Companies Act 2006, Sections 170–177, www.legislation.gov.uk/ukpga/2006/46/, hereinafter abbreviated as CA.

17 Real Decreto Legislativo 1 / 2010, de 2 de julio, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital, BOE-A-2010–10544, Art. 227–229, hereinafter abbreviated as LSA.

need to foster the company's business relationships with suppliers, customers and others, the impact of the company's operations on the community and the environment, the desirability of the company maintaining a reputation for high standards of business conduct, and the need to act fairly as between members of the company. So to achieve these goals, a director of a company must exercise independent judgment (sec. 173 CA), must exercise reasonable care, skill, and diligence (sec. 174 CA), and must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company (sec. 175 CA). Furthermore, a director of a company must not accept a benefit from a third party conferred by reason of his being a director or his doing (or not doing) anything as a director (sec. 176 CA[18]). Finally, pursuant to sec. 177 CA, if a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.

It is worth mentioning that a person who ceases to be a director continues to be subject to the duty to avoid conflicts of interest (sec. 175 CA) as regards the exploitation of any property, information, or opportunity of which he became aware at a time when he was a director. In a similar vein, a former director continues to be subject to the duty not to accept benefits from third parties (sec. 176 CA) as regards things done or omitted by him before he ceased to be a director. That implies that the interest of the company must also be protected towards persons who terminated their mandate, as they still have information or contacts that might be misused and inflict damage to the company.

In the British Companies Act, the concept of "shadow directors" appears as persons who are not formally a member of the board but may influence the company amidst different connections with the company[19].

[18] A "third party" means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate. Benefits received by a director from a person by whom his services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party. This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

[19] Pursuant to sec. 251 CA, "shadow director", in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. A person is not to be regarded as a shadow director by reason only that the

Due to a "particular" position of a shadow director, the duty of loyalty has also been extended to the shadow director. Under the provision of sec. 171 (5) CA, the general duties apply to a shadow director of a company where and to the extent that they are capable of so applying.

The above-mentioned provisions constitute the duty of loyalty, which was also confirmed in the doctrine. As it is underlined in the doctrine, the duty of loyalty deals mainly with two situations: first, transactions of a director, and second, the use of the corporate opportunity[20]. In the English literature as the most crucial displays of duty of loyalty are indicated: the obligation to act within powers, to promote the success of the company, to exercise independent judgment, to exercise reasonable care, skill, and diligence, to avoid conflict of interest, or not to accept benefits from third parties[21].

Similarly, in the German literature, the duty of loyalty (*Treupflicht*) embraces, among others, the requirements to care for the interest of the company and to avoid conflict of interest, the ban on competitiveness, the ban to abuse of function, and the power to represent the company, confidentially duty and the equivalent remuneration of directors[22]. Thus, the main characteristic of the duty of loyalty is special care for the company's interest and acting in a way enabling the maximum use of the possibilities of the company (*Geschäftschancen*).

The German law does not directly indicate the duty of loyalty, apart from its displays like the prohibition of competition (§ 88 AktG[23]) and the ban of self-dealing contracts (§ 112 AktG). Notwithstanding, § 93 AktG imposes on the management board the obligation to act with due care and the obligation of confidentiality duty. In managing the affairs, the members

directors act, inter alia, on advice given by that person in a professional capacity; in accordance with instructions, a direction, guidance or advice given by that person in the exercise of a function conferred by or under an enactment.

20 Carsten Gerner-Beuerle, Michael Schillig, *Comparative Company Law* (Oxford: Oxford University Press, 2020), 551.

21 Girvin, Frisby, Hudson, *Charlesworth's Company*, 323; C. Gerner-Beuerle, M. Schillig, *Comparative company*, 551.

22 Hoffman-Becking, *Münchener Handbuch*, 298; Priester, Mayer, *Münchener Handbuch*, 898.

23 Aktiengesetz of 6 September 1965, BGBl. I. S.1089, latest amendment by the Act of 3.6.2021, hereinafter abbreviated as AktG.

of the management board are to exercise the due care of a prudent manager, faithfully complying with the relevant duties. The members of the management board are to respect the secrecy of any confidential information and secrets of the company, particularly trade secrets or business secrets, of which they have become aware in the context of their activities in the management.

The Spanish legislator adopted a similar approach to the British Companies Act by pointing out that the administrative board members are under a duty of loyalty (*deber de lealtad*), to act in good faith in the company's best interest (Art. 227 LSC). In particular, the duty of loyalty means the obligation to act within the limits of their powers, the prohibition of disclosing company secrets, information, reports, and data, also after the expiry of the mandate, the obligation to refrain from participating in activities in the event of a conflict of interest, the obligation to remain independent in making decisions (Art. 228 LSC). The obligation to take actions necessary to avoid a conflict of interest, among others, the prohibition of using the company's assets for the own purposes of board members, the prohibition of using the company's property and obtained information, or using the company's business situation, the prohibition of receiving remuneration and receiving benefits from third parties in connection with the performance of the function, prohibition of engaging in competitive activities (Art. 229 LSC). The said prohibitions also apply if the beneficiary of benefits obtained contrary to the said obligation will be a person related to a member of the administrative board.

Considering the aforementioned legal systems, it should be underlined that the duty of loyalty shall embrace a similar scope. However, in British Companies Act, the obligation of due care (duty to exercise reasonable care, skill, and diligence) has been regulated as one of the elements constituting the general duties of directors. It has been indicated in the literature that the directors' duty of care is to be distinguished from all other duties, which are categorized as fiduciary duties or duties of loyalty[24].

In German law, the duty of care shall be treated differently, allowing one to assess the degree of guilt amidst the placement of the due care in the

[24] Paul Davies, *Introduction to company law* (Oxford: Oxford University Press, 2010), 154.

provision concerning directors' liability[25]. Under § 93 AktG[26], the management board members are to exercise the due care of a prudent manager, faithfully complying with the relevant duties. Thus in German law, due care is analogously regulated to the provisions of liability that existed in the Polish Commercial Companies Code before the amendment of 2022 (see the comments in part IV below) as an element of the proper performance of managing affairs.

The Spanish legislator indicates the duty of care as a general obligation to act with the due care of an orderly director while holding the office and performing the obligation. According to Art. 225 LSC, the directors must perform their duties and comply with the duties imposed by law and by-laws with the diligence of an orderly business person, taking into account the nature of the position and the functions attributed to each of them.

4. The scope of the duty of loyalty and due care under Polish law

The Commercial Companies Code amendments introduced the duty of loyalty and due care as the general obligations deriving from the membership in the company's board. The general duty of loyalty shall be treated as the primacy of the company's interest over the particular interest of shareholders, members of boards, or any of the stakeholders. Primarily, a member of the company's board must act in accordance with the statutory provisions and the company's by-laws and only exercise powers for the purposes for which they are conferred[27].

Under the provisions of Art. 209^1 §1, 214^1 §1, 300^{54}, 377^1 §1, 387^1 §1 CCC, a board member, while performing his/her duties, shall act with due care resulting from professional integrity and honor the duty of loyalty to the company. It may be assumed that the duty of loyalty must be understood more extensively than only the three aspects specified prior by the

25 Ernst- Thomas Kraft, in Michael Hoffman-Becking, *Münchener Handbuch des Gesellschaftsrechts. B. 4. Aktiengesellschaft* (München: C.H. Beck, 2020), § 26.II.4., mn 12; Priester, Mayer, *Münchener Handbuch*, 922.

26 Accordingly in § 43 GmbHG, Gesetz betreffend die Gesellschaft mit beschränkter Haftung of 6 April 1982, latest amendment by the Act of 15.7.2022.

27 Piotr Pinior, "Komentarz do art. 209 (1)," in *Kodeks spółek handlowych. Komentarz do zmian (tzw. prawo holdingowe)*, ed. Radosław L. Kwaśnicki, Filip Ostrowski, Andrzej Szumański (Warszawa: C.H. Beck, 2022), 366.

Polish Commercial Companies Code. However, these three formerly regulated aspects may not be omitted while defining the duty of loyalty.
One of the crucial aspects is the conflict of interest. In the event of a conflict of interest between the company and a member of the board and persons related to him or her, the board member is obliged to reveal the conflict of interest and shall refrain from participating in the decision-making process. Even though the provision of the conflict of interest is addressed primarily to the management board or board of directors, after implementing the general duty of loyalty, it shall also be considered by the supervisory board members. In particular, special attention shall be given to the decision of the supervisory board's members, giving consent to transactions planned by the company or within any of the competencies granted to members of the supervisory board in the by-laws (art. 222 par. 4 (3) and art. 388 par. 5 KSH).

A second aspect of the duty of loyalty refers to self-dealing contracts. Namely, the exclusion of the power of representation in contracts and disputes between the member of the management board or director and the company. As highlighted in the literature, such a restriction protects the company in self-dealing contracts and excludes a conflict of interest[28]. In case of misrepresentation, the contract shall be null and void[29]. Naturally, this ban shall be addressed to the members of the management board (directors) because the supervisory board is not empowered to represent the company in general. However, the right of representation shall be granted to the supervisory board or non-executive directors in contracts with the management board or directors, and additionally, under Art. 300^{60} CCC

[28] Andrzej Szumański, "Komentarz do art. 210," in Stanisław Sołtysiński, Andrzej Szajkowski, Andrzej Szumański, Janusz Szwaja, *Kodeks spółek handlowych. Komentarz,* Vol. II. (Warszawa: C.H. Beck, 2005), 525; Janusz A. Strzępka, Ewa Zielińska, "Komentarz do art. 210," in Piotr Pinior, Wojciech Popiołek, Janusz A. Strzępka, Ewa Zielińska, *Kodeks spółek handlowych. Komentarz*, ed. Janusz A. Strzępka (Warszawa: C.H. Beck, 2015), 530.

[29] However due to the amendment of Art. 39 CCC (Where a person who concludes the contract as an organ of a legal person does not have an empowerment or where he goes beyond its scope, the validity of the contract shall depend on its confirmation by the legal person on whose behalf the contract was concluded) it may be also assumed the suspended invalidity (*negotium claudicans*) instead of the nullity, see more: Wojciech Wyrzykowski, "Wpływ nowelizacji art. 39 k.c. na zasady reprezentowania spółki kapitałowej w umowach pomiędzy spółką a jej członkiem zarządu," *Przegląd Ustawodawstwa Gospodarczego*, no. 1 (2020): 23–28.

with the audit firms selected to examine the financial statement in a simple joint-stock company. Moreover, due to the latest amendment, in case of appointment of the supervisory board's experts (advisors) for the examination, at the company's expense, of a specific issue concerning the company's operations or its assets (Art. $219^2$and 382^2 § 2 CCC) the spuervisory board represents the company in contracts with the advisor. These special rules for representation again indicate the priority of the company's interest over the interest of the members of the boards or other stakeholders.

The third aspect is the ban on competitiveness. A board member may not engage in a competitive business, participate in competitive entities as a partner, or as a board member of a competitive legal person. Similarly to the conflict of interest, this prohibition shall also be extended to the supervisory board members, particularly if the participation or engagement in the competitive business may influence the supervision activity over the company. In any case, the board members also have broad access to company information and documents, so the extension of this prohibition is rational and justified. At least, it shall be required to reveal the engagement or participation in competitive entities.

All three aspects mentioned above constitute the duty of loyalty of the board's members towards the company. However, it should be emphasized that the duty of loyalty should also be considered from a broader perspective, comprising the general duty of acting in the best interest of the company, as well as the obligation to exercise independent judgments, to exercise power to manage the company with reasonable care, skill and diligence and confidentially duty. The violation of the duty may result in the liability of the board's members.

Therefore, the obligation of loyalty means the obligation to act in the best interest of the company, in a way contributing to the most significant development of the company, achieving profits, maintaining the company's good position on the market, and the obligation to take actions aimed at taking advantage of corporate opportunities and development prospects, as well as taking into account corporate social responsibility. The decision-making process shall require adequate skill and knowledge, so in order to make a decision, taking into consideration an average economic risk, the members of the board should also respect experts' opinions, and

depending on the circumstances of each particular operation they should collect information necessary to make a decision reasonably.

Another element of the loyalty duty is the obligation not to divulge any information concerning the company. This obligation was not previously *expressis verbis* specified in the act, but its occurrence was accepted in the doctrine, primarily as a manifestation of the obligation of loyalty of a board member[30]. The duty of confidentiality during the term of office is an obligation resulting from both the duty of loyalty and due care (e.g., when negotiating contracts with a third party). The obligation of confidentiality applies to board members while performing their mandate. However, under provisions of Art. 209^1 §2, 214^1 §2, 300^{55} §2, 377^1 §2, 387^1 §2 CCC, the obligation not to divulge any information concerning the company shall be extended after the termination of office. In this respect, it should be assumed that some aspects of the duty of loyalty should be binding on the members of the company's board also after the termination of their function as a member of the body[31].

This obligation implies a prohibition of disclosing information obtained in the course of performing the function, in particular trade secrets and business secrets, but it is not limited only to information for which steps have been taken to keep it secret. The obligation of confidentiality covers all information obtained during the performance of the mandate, resulting from analyzes of the company's situation, development forecasts, commissioned expert opinions, information on relations with contractors, and information on pending court disputes.

At the same time, the duty of loyalty means that it is unacceptable to be guided by the interests of only one shareholder or group of shareholders with the violation of the interests of the company. Hence, a board member acting for a company should take care of its proper development. Therefore he cannot use its potential for his own purposes or act in the interests of other entities, and he should refrain from taking any actions that might infringe the company's interests. Similarly, a board member shall be obliged

30 Opalski, *Kodeks spółek*, 2018, 840; Opalska, *Obowiązek lojalności*, 208.

31 Opalski, *Kodeks spółek*, 2018, 843; Opalska, *Obowiązek lojalności*, 216; Oplustil, *Instrumenty nadzoru*, 502.

to exercise independent judgments in the company's best interest and shall not take into consideration solely the particular interests of shareholders.

The obligation to act with due care means acting with the care, skill, and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill, and experience that may reasonably be expected of a person carrying out the functions in the company's board. Due diligence should be understood as diligence based on conscientious and reliable actions of individual members of the management board, with the use of professional knowledge and experience, which are necessary for the proper performance of the function of a management board member. Moreover, management board members should demonstrate the necessary skills in organizational processes and financial management, as well as knowledge of applicable law[32]. By introducing this obligation as a general duty of the board member, the legal character of due care has extensively changed. The obligation to exercise due care was interpreted differently in the literature and jurisprudence. First, it was treated as an element to be taken into account when assessing the degree of guilt of a board member[33] because due care was regulated in the provision concerning board members' liability (Art. 293 § 2, 483 § 3 CCC, were derogated on 13 October 2022). Second, some representatives of the doctrine claimed it performed a dual function, both as an element of a contractual obligation relationship,

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[32] Piotr Pinior, "Odpowiedzialność cywilnoprawna członków zarządu spółki z o.o. za wyrządzoną szkodę (wybrane problemy odpowiedzialności na podstawie art. 293 KSH)," in *Rozprawy z prawa prywatnego. Księga jubileuszowa dedykowana Profesorowi Wojciechowi Popiołkowi,* ed. Maksymilian Pazdan, Monika Jagielska, Ewa Rott-Pietrzyk, Maciej Szpunar (Warszawa: Wolters Kluwer, 2017), 555.

[33] Tomasz Siemiątkowski, *Odpowiedzialność cywilnoprawna w spółkach kapitałowych* (Warszawa: C.H. Beck, 2007), 177; Jacek Jastrzębski, "W sprawie odpowiedzialności członków zarządu organów spółek kapitałowych," *Przegląd Prawa Handlowego,* 2013, no. 7 (2013):16; Kidyba, *Kodeks spółek*, T. I, 1416; Katarzyna Bilewska, "Bezprawność a niedochowanie należytej staranności w rozumieniu art. 293 KSH," *Palestra* no. 3–4 (2007): 275; Paweł Błaszczyk, "Odpowiedzialność odszkodowawcza menedżerów spółek a przekroczenie tzw. dopuszczalnego ryzyka gospodarczego," *Przegląd Prawa Handlowego*, no. 11 (2009): 42; Wojciech Popiołek, "Obowiązek lojalności członków organów kolegialnych spółek handlowych," *Przegląd Prawa Handlowego*, no. 9 (2021): 33; Polish Supreme Court, Judgment of 9 February 2006, Ref. No. V CSK 128/05, Legalis; Polish Supreme Court, Judgment of 24 September 2008 Ref. No. II CSK 118/08, Legalis.

the breach of which may constitute an independent basis for liability, as well as in the assessment of the debtor's fault in the event of improper performance of an obligation[34]. Therefore, it was emphasized in the literature that the lack of a positive expression in the act of the obligations of members of organs resulting from the organizational relationship weakens the vindication of the responsibility of managers[35]. The sanctioning by law that the exercise of due care is directly related to the existence of an organizational relationship between a member of the body and the company allows to treat the breach of this obligation in the category of unlawfulness, i.e., as an act or omission contrary to the law, within the meaning of Art. 293 § 1 or Art. 483 § 1 CCC, and similarly as an improper performance of duties with the meaning of Art. 300^{125} § 1 CCC in a simple joint-stock company.

Acting with due care has traditionally been treated as a circumstance justifying a board member's guilt that might not itself be a premise of a board member's liability[36]. Amidst the Commercial Companies Code amendment, the duty of care has been regulated under the provisions of Art. 209^1 §1, 214^1 §1, 300^{54}, 377^1 §1, 387^1 §1 CCC as a separate obligation[37]. Independently, the duty of care while performing duties is a general obligation of all debtors under the provision of Art. 355 § 2 CC[38]. By indicating this duty towards board members, the professional character of their offices has been underlined. The breach of the duty of care shall constitute a premise for a boards member's liability, even if the act in consent with the law and the articles of association, for example, while adopting the business

[34] Adam Opalski, Krzysztof Oplustil, "Niedochowanie należytej staranności jako przesłanka odpowiedzialności cywilnoprawnej zarządców spółek kapitałowych," *Przegląd Prawa Handlowego*, no. 3 (2013): 17; Małgorzata Dumkiewicz, *Kodeks spółek handlowych. Komentarz* (Warszawa: Wolters Kluwer, 2020), Lex Art. 293, 4; Artur Nowacki, *Spółka z ograniczoną odpowiedzialnością. Komentarz.* Vol. II. (Warszawa: C.H. Beck, 2021), 2021, 1460; Robert Stefanicki, *Należyta staranność zawodowa członka zarządu spółki kapitałowej* (Warszawa: Wolters Kluwer, 2021), 139.

[35] Jastrzębski, "W sprawie," 18.

[36] Siemiątkowski, *Odpowiedzialność cywilnoprawna*, 177; Błaszczyk, "Odpowiedzialność odszkodowawcza," 41; Jastrzębski, "W sprawie," 16; Kidyba, *Kodeks spółek*, 1416; Pinior, "Odpowiedzialność cywilnoprawna,"553.

[37] Popiołek, "Obowiązek lojalności," 32.

[38] Act of 23 April 1964 Civil Code, Journal of Laws, 2022, item 1360, hereinafter abbreviated as CC.

decision, thus acting in excessive economic risk shall be a breach of the duty of due care.

Lastly, it must be mentioned that the duty of loyalty and due care shall affect the board member's liability amidst the introduction of the business judgment rule. Pursuant to Art. 293 § 3, 300^{125} § 2, 483 § 3 CCC, members of the board shall not abuse the due care if, being loyal to the company, they act in the frame of justified economic risk based on the information, analyses, and opinions which should be taken into consideration when applying due care. The essence of the business judgment rule is to release the directors from liability for the damage incurred by the company resulting from the wrongful decisions of board members if the decision was reached in a manner the board members reasonably believed to be in the best interests of the company, justified by the circumstances of a specific case and based on the information necessary for the decision to be adopted[39]. Thus a board member must prove the exercise judgments based on information and opinions eligible at the moment of adopting a decision, with reasonable skill and diligence.

5. Conclusions

The introduction of the duty of loyalty and due care of the board member to the Commercial Companies Code is a display of modernizing company law, as it indicates the general duties as standard rules for all the members of boards in Polish companies. Additionally, it has an impact on the liability of board members because the aforementioned obligations shall be a premise of the liability of board members. Hence, it might be helpful for companies to file claims against members for wrongful management or supervision.

[39] Paweł Błaszczyk, "Koncepcja „biznesowej oceny sytuacji" na tle prawa polskiego (uwagi de lege lata i de lege ferenda)," *Państwo i Prawo*, no. 3 (2012): 76; Piotr Pinior, "Monistic system in simple joint-stock company under Polish law," *Przegląd Ustawodawstwa Gospodarczego*, no. 2 (2020): 6; Filip Ostrowski, Komentarz do art. 483 in *Kodeks spółek handlowych. Komentarz do zmian (tzw. prawo holdingowe)*, ed. Radosław L. Kwaśnicki, Filip Ostrowski, Andrzej Szumański (Warszawa: C.H. Beck, 2022), 573.

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Interest of the Company- the Discussion on Axiological Choices

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Abstract: The obligation to act professionally and loyal to the managed corporation is a statutory component of the organizational relationship and expresses the essence of these bonds and the sense of entrusting the values of the company to these hubs for the purpose of its proper management. The sources of the administrator's duties cannot be limited to respecting statutory injunctions and prohibitions, since they designate only border points. They do not constitute a casuist regulation of all situations. Assuming the legislator's praxeological and axiological rationality in the process of legislating, it would be necessary to involve a lack of due professional diligence on the basis of civil law liability. However, most courts, as well as the majority of the representatives of doctrine, do not recognize the basis of this responsibility in the mere failure to observe the standards in question, regardless of the seriousness of negligence or inefficiency in the exercise of functions.

1. Introduction

The concept of the company's interest[1] cannot be considered in isolation from the objectives of the company, the principles of cooperation of members of

[1] It is perhaps the only mention of one a most relevant fact in all of the deliberations about problems of contemporary company law (on 13 Summit of Polish academic commercial law departments`lawyers, the John Paul II Catholic University of Lublin 2022). In the book:

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the corporate bodies in order to achieve them[2], as well as respecting the requirement of loyalty in the exercise of competence by board members and shareholders. The initial and crucial construction in commercial company law, which is difficult to overestimate, is the interest of the company, and therefore the correctness of its definition and the indication of the value associated with the need to safeguard it must be given a particular role[3]. The nature of the company is best reflected in its functional definition in the contract-based relationship, since, by the agreement of a commercial company, the shareholders undertake to pursue a common objective by making contributions and, if the agreement or statute so constitutes by cooperation in another specific way. Since cooperation to achieve a common goal takes place through the obligation to make positive contributions, this duty should also be accompanied by the need to refrain from acts or omissions which will prevent the attainment of a common goal.

2. Attempts of define the concept

Attempts[4] to define the concept in question should be focused on reading the interest of a particular company, taking into account in this process a number of variables[5]. It would be doubtful to match such a universal definition to companies in which conflicting interests of shareholders often cross. However, developing a flexible, juridical and doctrinal general concept of the company's interest focused on the specifics and objectives of the corporation is in all measure desirable. Thanks to the vague and appreciable

Due professional diligence of a member of the management board of a capital company (Warsaw: Wolters Kluwer 2020) took into consideration the author`s a wide-ranging context of the functioning of the law.

2 In the interests of clarity and rationality law should be codified, Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 46–127, consolidated version 12 August, 2022.

3 More *broadly* Tadeusz Rowiński, *Legal interest in civil law and non-trial proceedings* (Warsaw: Legal Publishing House,1971), 9.

4 Michał Romanowski, "Nature of the company as a determinant of its system and functions of its authorities — several reflections," in *Effectiveness of management and supervision in a commercial company in search of an optimal model of the company's system,* ed. Katarzyna Bilewska (Warsaw: Wolters Kluwer, 2018), 73.

5 See the arguments in this respect provided by the Polish Supreme Court, Judgment of 8 March 2005, Ref. No. IV CK 607/04, Legalis 254158.

language elements of the return of the company's interest and to a large extent the open formula of company law, it is possible to adapt the existing concepts to the changing conditions of their reading.

3. The value of the company's good

The value of the company's good is one of the basic interpretative criteria for the exercise of rights and obligations by shareholders. The interest of the company is an instrument for resolving conflicts between competing values protected by the legal order. This is important for the process of interpreting the desired standards for the performance by board members of the tasks entrusted to them in accordance with the requirements of professional diligence. Managers enjoy a relatively high degree of autonomy and ability to act independently when making decisions binding on the company regarding the management of the funds entrusted to them[6], while the economic owners bear the risk of failure.

4. The guiding principles

The guiding principles set out in commercial law protect the interests of the company in its pursuit of economic goals. In practice, there are different forms of capital companies and the accompanying differentiation of objectives, preferences and ownership structure, for example in a configuration in which strong management boards, de facto controlling the company, collide with a weak, distributed shareholding[7], unable to exert a significant influence on the day-to-day management and strategic decisions of the said body. Therefore, in many cases, it will be necessary to balance the individual interests involved, in particular the interests of the majority shareholders, with the interests of small shareholders[8], including disputes concerning the

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6 Company managers, incl. in France, are jointly and severally liable with independent company auditors Jacques Mestre, Marie-Ève Pancrazi *Droit commercial* (Paris: LGDJ, 2001), 285.

7 A joint-stock company is distinguished by the fact that the merger of capital managed by the company's hubs, Stanisław Sołtysiński, "Commentary on Articles 301–490," in *The Commercial Companies Code, vol. 3*, ed. Stanisław Sołtysiński, Andrzej Szajkowski, Andrzej Szumański, Janusz Szwaja (Warsaw: C.H.Beck, 2013), 10.

8 Against this background, it is worth noting the judgment of Polish Constitutional Tribunal, Judgment of 21 June 2005, Ref. No. P 25/02, Legalis 69111, in which the Court, juxtaposing the interests of majority shareholders with minority shareholders in the exercise of forced

further strategy of the undertaking by spreading over several years the development of corporations[9], conferring a measurable economic advantage and abandoning part of the profits to dividends[10].

5. Is there only value maximization?

The consideration of the concept of the company's interest is intrinsically accompanied by a dispute, particularly in the doctrine of whether there is an interest separate from the interests of its shareholders. The indicator of the company's interest is not to compare the particular interests of the partner with that of the company, but to weigh the interests which merit legal protection[11]. The common goal of the shareholders is, as a rule, to maximise its value[12]. The key position in the company is held by the shareholders (shareholders). The separation of management from ownership is aimed at counteracting the abuse by members of the board of directors of their powers to manage the corporation as well as to seek a balance between axiological values personalised in the company. Looking for an axiological and praxeological justification for constructing the optimal formula of the company's

buy-out institutions, took into account the guiding interest of corporations to conduct effective economic activity. See also separate sentences to this judgment. For example, the Supreme Court noted in the facts examined that it is not correct to take the view that the exclusion of the possibility of taking an action for determination is detrimental to the interests of minority shareholders. Polish Supreme Court, Judgment of 20 January 2022, Ref. No. III CZP 17/22, Legalis 2651586.

9 Jakub Zięty, *Powers of shareholders of Polish public companies in the light of Directive 2007/36/EC* (Warsaw: C.H.Beck, 2015), 52.

10 See also, for example, on dividend payment policy, CJEU Judgment of 1 August 2022, Case C-352/20, ECLI:EU:C:2022:606.

11 According to Jan Stranz (On the need for an objective interpretation of the company's interest, MOPH 2021, No. 4, in fine), decoding of the company's interest should be based on an objective concept that guarantees a uniform interpretation of the company's interests for each partner, regardless of the particular interests of the other shareholders at a given time. On the other hand, (The significance of the dispute over the method of interpreting the concept of 'interest of a capital company', PPH 2015, no 7, 11), the phenomenon of a capital company as a certain legal concept means that its nature is permeated by contractual and institutional concepts, so that the interest of a capital company cannot be considered objectively and abstractly in isolation from the search for the will of its shareholders who seek to satisfy their subjective interests.

12 Krzysztof Oplustil, *Corporate governance instruments in a joint-stock company* (Warsaw: C.H.Beck, 2010),173 et seq.

interest, there is no basis for constructing a separate interest of the company as a legal person, that is to say, its definition of its central position in the company's shareholders[13].

6. A compromise by valuing

The interest of the company is the resultant of the interests of all the members, determined by the purpose specified in the articles of association which they have undertaken to pursue[14]. This centering should be understood as the assumption of reaching a compromise by valuing, balancing rights, values and principles. The balancing process may concern only the legitimate interests of members, i.e. both majority and minority shareholders, in order to resolve disputes between individual interests protected by law by giving priority to one of them in the circumstances. As a result of the permanent conflict between the groups of shareholders, a significant problem may arise of the inability to achieve the assumed objectives and the further functioning of the corporation.

7. Political, social and economic changes

Political, social and economic changes, the challenges of modern times related to technological development and innovation, taking place in the global space, determine that the concept of the interest in question is increasingly perceived in a broader scope, by including the protection of stakeholders, i.e. through the prism of exposed axiological components of law. The proper formation of corporate governance is based on the assumption of a reinterpretation of the concept of the interest of a company by including in it the implementation of social tasks, which are part of the formula of socially

[13] On the attempt to "balance" the interests of the parent company with that of the subsidiary, Kamil Szmid, "Several comments on the amendment of the Commercial Companies Code," *MOPH*, no. 4(2021): 13–21 remarks on the background of distinguishing the concept of interest of a group of companies.

[14] Judgment of Polish Supreme Court, Judgment of 5 November 2009, Ref. No. I CSK 158/09, OSNC 2010, no 4, item. 63, Paweł Mazur, "The New Paradigm of Corporate Governance. Global trends in the discussion on the interests of the company and their possible impact on Polish law," *PiP*, no. 7(2022): 126. More Anna Maria Weber, Zofia Mazur, Aleksandra Szczęsna, "Sustainable Corporate Governance – Direction for the Evolution of Polish Company Law?," *PPH*, no. 6(2022): 20 and next, also quoted literature; Anna Maria Weber, Zofia Mazur, "Sustainable Corporate Governance All'Italiana," *PPH*, no. 10(2022): 30.

responsible business[15]. The implementation of the function of responsible business translates into corporate image assets. Attention is drawn to the growing role of the so-called soft regulations in creating a flexible concept of the interest of modern companies, including defining with them the determinants of the very concept of the company's interest by taking into account the broader social context in the defining findings.

8. The legislator axiological preferences

In many regulations, the legislator expressed consistent axiological preferences. It remains open to the extent to which the normative references to the interest of the company constitute a potential standard for securing the guiding role of this structure in the overall substantive and procedural mechanisms for the proper functioning of the corporation and, consequently, the protection of the good it constitutes. The legislator places the interest of the company within the general framework by imposing injunctions and prohibitions to the extent that it deems necessary detailed arrangements. The interest of the company is, for example, one of the grounds for an action for the annulment of the resolution of the shareholders' meeting, the protection of the interest of the company is also dictated by the obligation of a member of the management board to refrain from participating in the resolution of cases in the face of a conflict of interests, if it is exceptionally in the interest of the company to deprive shareholders of the pre-emptive right, and the safeguarding of the interests of the merging companies is served by the provisions of the Polish Commercial Companies Code. The protection of the interests of the company may therefore constitute a principle of commercial law, which protects the effective in the legislative assumption of counteracting in practice the phenomena of distortion of the mechanisms of a capital company.

[15] On the change of the paradigm of corporate governance in Anglo-Saxon countries, Paweł Mazur, "The New Paradigm,"116 et seq., along with the established literature of the subject and judicature. Sophisticated producers and consumers of such metrics should be interested in these new mechanisms that permit parties to contract out of the duty of loyalty in order to provide a complete picture of governance arrangements, Gabriel Rauterberg, Eric Talley, "Contracting out of the fiduciary duty of loyalty: an empirical analysis of corporate opportunity waivers," *Columbia Law Review*, vol. 117. January 2017): 32.

9. The role of a compass

The company's interest plays the role of a compass for the addressees of the law in making axiological choices. It constitutes a model, that is to say, a criterion of assessment, both of the activities of the shareholders and of the members of the boards of the company and of their mutual relations[16]. The legal return of the company's interest deserves an in-depth reflection within the legal discourse, which may constitute a contribution to changes in the law. It appears to be a particular obstacle to the opportunistic behaviour of some privileged groups, a specific legal and factual situation in the company vis-à-vis less favourable entities[17]. Manifestations of such activities are seen in three types of conflicts, i.e. between the members of the management board (also the supervisory board) and the shareholders, within the shareholders themselves and in relations with the company of persons associated with it. A member of the management board shall act autonomously within the limits of the powers conferred on him to manage and represent the company. At the core of the relatively wide-ranging normativeness of its independence lies the credit of trust of the shareholders of the company reducing transaction costs[18]. The lack of this trust would deprive the economic owners of the business relationship.

10. The consistent axiological preferences

Consistent axiological preferences to protect the interests of the company as a fundamental value can only be said if the principle of co-playing with each other deserving the legal protection of the interests of shareholders, or at least taking measures to reduce the costs of internal conflicts, is sufficiently taken into account. The construction of the relationship of particular trust which we are dealing with is the requirement of loyalty to the members of the board of directors, which is an emanation of their legitimate interests of

16 Adam Opalski, "On the concept of commercial company interest," *PPH*, no. 11(2008): 17.

17 Look at Kamil Szmid, *Nature of a joint-stock company as a delimitation of the principle of freedom of contract in Polish and American law* (Warsaw: C.H.Beck 2015), 21 et seq.

18 Trust is essentially combined with the reasonable expectations of entities that base contracts or other activities on this basis. More broadly Piotr Machnikowski, *Legal instruments for the protection of trust in the conclusion of a contrac*t (Wrocław: Publishing house of the University of Wrocław, 2010),59 et seq.

protecting the company's interests[19]. It should be noted here that the principle of loyalty towards a company also binds shareholders[20]. The literature of the subject assumes the existence of a universal duty of loyal conduct of members of the boards of acompany[21], defined as a duty of honest conduct and in accordance with the good customs of conduct[22]. The imperative of acting in the interests of the company cannot be limited to the statutory obligations of the board members, which are, moreover, generally defined in the Commercial Companies Code.

11. Loyalty?

Loyalty as a fundamental axiological value is to uphold the effective safeguarding of the correctness of the relations between the members of the body in question and the ownership body, which is identified with the interests of the company. This position is consistent with the views of doctrine. The basic measure of integrity, management and supervision of the company concerns entities whose professionalism is to be characterised by professionalism in relations of the type[23] in question, and it is combined with the

[19] Hence, inter alia, the conflict of interests should be understood as a potential threat to the interests of the company related to the personal ties of a member *of the management board,* Andrzej Szumański, Stanislaw Włodyka*, Commercial Companies Law* (SPH T.2A, Warsaw: C. H. Beck 2019) see point 12.6.1.6. Contradiction of interests.

[20] Due to the title of the study, it omits no less interesting issues of the duty of loyalty of shareholders and shareholders in the corporate relationship of the company, including their loyalty as a mechanism for limiting the power of the majority, as well as the mechanism of protection against abuse of minority shareholders, Dominika Opalska*, Obligation of loyalty in capital companies* (Warsaw: C. H. Beck, 2015), 237 et seq., Łukasz Gasiński, *Limits of freedom to shape the content of the statutes of a joint-stock company* (Warsaw: C. H. Beck, 2014), 191.

[21] It is derived primarily from a number of rules laid down in the Commercial Companies Code's provisions. On the phenomenon of informal intersection of boards and supervisory boards, see comments by Joanna Szalachy-Jarmużek, "Individual benefits, organizational losses? Loyalty and the phenomenon of intersection of boards and supervisory boards in the perspective of business practitioners," *Prakseologia*, no. 157, vol. 1(2015): 103 et seq.

[22] For disputes on how to decode the clause, see, inter alia: Małgorzata Modrzejewska, "Right to dividend and resolution of the general meeting excluding profit from distribution — remarks on the background of case-law examples," in *Commercial Companies Code after 15 years in force*, ed. *Józef Frąckowiak* (Warsaw: Wolters Kluwer, 2018), 600 in.

[23] More broadly Kamil Szmid, *Nature of a joint-stock company*, 296.

ability of an official to distinguish the good of the company[24] from actions detrimental to it[25]. Both the Loyalty Directive and the diligent conduct result from the company's design assumptions, in particular the functional and contractual arrangement of the relationship between the members of the management body and the division of ownership. The requirement of a member's loyal conduct vis-à-vis the company places the provisions of the Commercial Companies Code in the context of resolving standard conflict situations which occur or may occur in a capital company, that is to say, in sensitive areas having an undoubted impact on its proper functioning[26].

12. The outlined understanding of competences and obligations

The outlined understanding of competences and obligations is primarily the problem of trust, on which internal relations in the company are to be built and the objectives which in cooperation are to be achieved as a result of business activity in the form of an organizational company[27]. In the light of the axiological assumption based on the general principle of loyalty by the management board, their behaviour could be expressed, inter alia, by the failure of a member of the body to resign from the mandate in a situation where it would result in significant losses in the company[28]. Finally, the set of components of the company's interest would be difficult to limit to the determinants set out in expressis verbis by the provisions of positive law.

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24 The return of the good of the company is used by some authors, considering it to be an equivalent concept to the structure of the company's interest or a broader, more consistent with the axiology of law.

25 It remains open to the question whether the performance of the mandate may be placed in the category of a qualified breach of care by the administrator in the absence of the appropriate education and experience necessary for the management of the company. The view in this regard presented under the rule of K.H. considered it appropriate, among others. Appellate Court in Łódź, Judgment of 16 April 2014, Ref. No. I ACa 1157/13, Legalis 1067291. Commentators referring to this case-law generally do not state their own position.

26 Andrzej Szumański, in *Company Law*, ed.*Wojciech Pyzioł, Andrzej Szumański, Ireneusz Weiss*, (Bydgoszcz: Publishing House: Branta 2004), 765; Kamil Szmid, *Nature of a joint-stock company*, 299.

27 In its Judgment of 19 July 2007 (Ref. No. K 11/06, Legalis 84111), the Constitutional Court noted that the essence of entrusting a particular management person is the trust in the education, qualifications and experience of a particular manager.

28 Iwona Gębusia, *Company interest in Polish and European law* (Warsaw: C.H.Beck, 2017), 207 and literature established there.

Science and jurisprudence have an important role to play in shaping transparent standards, which general concepts, unspecified phrases and general clauses should be fulfilled by content appropriate to the problem being addressed[29]. An important role in this respect can and must be given to reading the values of the non-codified[30] normatively, a 'sectional' approach to the subject matter would be contrary to the nature of a commercial company in which the pursuit of a common objective is to accompany its entire life[31]. It should be borne in mind that compliance in the material sense also concerns the observance of ethical standards voluntarily adopted by organizations[32].

13. The amendment to the Commercial Companies Code

The amendment to the Commercial Companies Code, which entered into force in October 2022, require a separate study. I will outline one element at this point. The work is worth appreciating, but so far acting in the interest of shareholders is acting in the interest of the capital group. Meanwhile, the amendment to the Commercial Companies Code introduces an obligation for the parent company and the subsidiary to be guided by the interests of the company participating in the group of companies, and only next to it the interest of the group of companies. Thus, the question arises whether the project unequivocally qualifies the interest of the company as separate from the interest of the group of companies, and thus separate from the interest of the company's participants? Therefore, does it not affect the partners / shareholders of every capital company in Poland? So, have the conditions

[29] In the normative German order, a complex function is assumed, as it grants the measures of professional diligence a double function. They constitute - as in the case of the application of the quoted provisions of the Commercial Companies Code - the basic criterion for the manager's assessment, but moreover, this criterion serves as a general clause there, Marcus Lutter, Peter Hommelhoff, GmbH - Gesetz. Kommentar, Köln: Otto Schmidt 2019, commentary on § 43 GmbHG.

[30] At the same time, attention should be paid to the differences between the shareholding structure of native companies and those active especially on the American and English *markets*, Paweł Mazur, *The New Paradigm*, 123.

[31] More broadly, *Robert Stefanicki*, Due professional diligence of a member of the management board of a capital company (Warsaw: Wolters Kluwer 2020) 81–114. Chapter II Requirements of loyalty of board members towards the company.

[32] Bartosz Jagura, *Role of the bodies of a capital company in the implementation of the compliance function* (Warsaw: Wolters Kluwer, 2017), 37.

of the discussion around the concept of the company's interest not changed significantly recently, and will the broadly understood social aspects change the perspectives of our perception in the future?

14. Conclusions

The impetus to change the approach to the company's interest status is not only seen in legislative interference. The problem concerns the readiness of the legal community and opinion-forming bodies to accept the change, to read its essence and the consequences of its introduction. It would not seek to strengthen a formalistic approach to law, but should aim at building its openness to the social context and values that company law is supposed to embody. Such openness is supported by the model of economical substantive regulation, setting goals and border points. Procedures are part of this framework. The emphasis on this aspect of private law is justified not only in the servitude of the rules of conduct against substantive law, but also from the perspective of its legitimacy. In the complex process of searching for an optimal model of company management, the starting point of the conducted analyses and legal discourse should be made an attempt to answer the question whether the legal framework, defined by the provisions of the Commercial Companies Code, constitutes an appropriate safeguard for the standards of corporate management set for the efficiency and reliability of intra-corporate relations. Legal standards cover not only the text of the law, its potential quality, but also the functional dimension of its application. Fundamental to modern theory and philosophy of law, discourse focuses on disputes over the interpretation of law and, consequently, the model of its reading.

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Social Enterprises, Cooperatives or Benefit Corporations? On Reconciling Profit and the Common Good in Doing Business from a Polish Perspective

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Keywords:
Sustainability-Driven Hybrid Business Model; sustainable business model; benefit corporation; social enterprise; cooperative

Abstract: The aim of the article is to demonstrate that economic, technological and social changes, also thanks to the principle of sustainable development, lead to the transformation of existing and the emergence of new hybrid forms of conducting business activity. On one hand, there is a noticeable expansion of social economy mechanisms that reflect an 'economic' approach to providing broadly defined goods and services in the public interest, and there is also resurgence of democratic member-based organizations (DMOs), such as cooperatives with their dual nature and social and economic dimensions. On the other hand, traditional forms of for-profit business are transforming into entities that integrate social and environmental goals into business, known as Sustainability-Driven Hybrid Business Models (SHBMs), and of which benefit corporations (like U.S. Benefit Corporation or Social Purpose Corporation, Italian *Società Benefit* or French *Société à mission*) are an example. The transformation and emergence of these qualitatively new organizations is an illustration of the process of creative destruction described by Joseph Schumpeter. The article presents advantages and disadvantages associated with the benefit corporations. The analysis is concluded with the open question of whether legislative intervention is needed in this area, in particular whether it would be expedient to introduce 'mission companies' in Poland.

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1. Introduction

The aim of the research is to demonstrate that economic, technological and social changes, also thanks to the principle of sustainable development, lead to the transformation of existing and the emergence of new hybrid forms of conducting business activity. On one hand, there is a noticeable expansion of social economy mechanisms that reflect an 'economic' approach to providing broadly defined goods and services in the public interest, and there is also resurgence of democratic member-based organizations (DMOs), such as cooperatives with their dual nature and social and economic dimensions. On the other hand, traditional forms of for-profit business are transforming into entities that integrate social and environmental goals into business, known as Sustainability-Driven Hybrid Business Models (SHBMs), and of which benefit corporations are an example. The transformation and emergence of these qualitatively new organizations is an illustration of the process of creative destruction described by Joseph Schumpeter. The article presents advantages and disadvantages associated with the benefit corporations. The analysis is concluded with the open question of whether legislative intervention is needed in this area, in particular whether it would be expedient to introduce 'mission companies' in Poland.

The paper goes beyond the traditional dogmatic (or 'black-letter law' in common law legal systems) approach of interpretation of law, accessed through court judgments and statutes with little or no reference to 'the world outside the law'[1]. Instead, the 'law in context' or socio-legal approach is used, and the starting point of the study is not law but social issues, where the law may be treated as a means of providing a solution or part of a solution to such problems. The comparative legal research is also applied to discuss traditional categories of law from the perspective of domestic, European and U.S. law.

[1] See Mike McConville and Wing Hong Chui, "Introduction and Overview" in *Research Methods for Law*, ed. Mike McConville and Wing Hong Chui (Edinburgh: Edinburgh University Press, 2007),11 et seq.

2. Social entrepreneurship

In recent years there has been a noticeable expansion of social economy mechanisms[2] that reflect an 'economic' approach to the provision of broadly defined goods and services in the social interest[3]. Social economy entities

[2] On social economy see in particular Kuba Wygnański and Piotr Frączak, "Ekonomia społeczna w Polsce – definicje, zastosowania, oczekiwania, wątpliwości," *Ekonomia Społeczna Teksty,* no. 1(2006): 1 et seq.; Anna Ciepielewska-Kowalik, Bartosz Pieliński, Marzena Starnawska and Aleksandra Szymańska, "Social Enterprise in Poland: Institutional and Historical Context," *ICSEM Working Papers*, no. 11(2015), accessed November 10, 2022, https://www.researchgate.net/publication/295073203_Social_Enterprise_in_Poland_Institutional_and_Historical_Context; Anna Ciepielewska-Kowalik, *European Commission. Social enterprises and their ecosystems in Europe. Updated country report: Poland* (Luxembourg: Publications Office of the European Union, 2020), accessed November 10, 2022, https://ec.europa.eu/social/BlobServlet?docId=22455&langId=en; European Commission, EC Directorate-General for Employment, Social Affairs and Inclusion, *A map of social enterprises and their ecosystems in Europe* (Luxembourg: Publications Office of the European Union, 2015), accessed November 10, 2022, https://ec.europa.eu/social/BlobServlet?docId=12987&langId=en; European Comission, EC Directorate-General for Internal Market and Services, *The Social Business Initiative of the European Commission* (2015), http://ec.europa.eu/DocsRoom/documents/14583; Social Economy Europe, *The Future of EU policies for the Social Economy: Towards a European Action Plan* (Brussels: SEE, 2019), accessed November 10, 2022, https://www.socialeconomy.eu.org/wp-content/uploads/2020/02/SEE-Action-Plan-for-Social-Economy.pdf.; OECD, *Social economy and the COVID-19 crisis: current and future roles* (2020), accessed November 10, 2022, https://read.oecd-ilibrary.org/view/?ref=135_135367–031kjiq7v4&title=Social-economy-and-the-COVID-19-crisis-current-and-future-roles. In light of the latest Act of August 5, 2022 on Social Economy (Journal of Laws 2022, item 1812, hereinafter: Act on Social Economy) which came into force on October 30, 2022, social economy is the activity of social economy entities for the benefit of the local community in the field of social and professional reintegration, creation of jobs for people at risk of social exclusion and provision of social services, implemented in the form of economic activity, public benefit activity and other activity for pecuniary interest. It is estimated that the social economy in Europe accounts for 8% of the EU GDP, represents 2.8 million entities and enterprises as well as over 13.6 million paid jobs, i.e. 6.3% of the working population – see Interreg Europe Policy Learning Platform on SME Competitiveness, *The social economy and support to social enterprises in the European Union. Policy brief* (2021), accessed November 10, 2022, https://euagenda.eu/upload/publications/the_social_economy_and_support_to_social_enterprises_in_the_european_union_policy_brief.pdf.pdf.

[3] This can be seen from the example of Italy, which introduced a regulation relating to social cooperatives in 1991, and by the end of 2004, there were already 7100 of such cooperatives creating 223,000 jobs.

operate in the area at the intersection of the business and nonprofit sectors. When referring to the Polish legal regulation, social economy organizations may include social cooperatives operating under the Act of April 27, 2006 on Social Cooperatives[4], labor cooperatives, including disabled cooperatives, operating under the Act of September 16, 1982 - Cooperative Law[5], certain non-governmental organizations referred to in Article 3, paragraph 2 of the Act of April 24, 2003 on Activities of Public Interest and Voluntary Work[6] and entities referred to in Article 3, paragraph 3, items 1, 2 and 4 of that Act, including corporations.

Social economy entities may obtain the status of a social enterprise[7], which, while carrying out economic activities (or other paid activities[8]), considers the services to members, employees or the community to be the primary purpose of its business activities (over economic goals) and not the profits, whose generation is only and as much as a means aimed at achieving certain social effects[9]. However, this activity has the characteristics of a typical business, carried out within a specific ownership structure corresponding to its mission[10], in an organized and continuous manner, and

4 Journal of Laws 2020, item 2085, as amended, hereinafter: the Act on Social Cooperatives.

5 Journal of Laws 2021, item 648, as amended, hereinafter: the Cooperative Law.

6 Journal of Laws 2022, item 1327, as amended, hereinafter: the Act on Activities of Public Interest and Voluntary Work.

7 Thus, a private, autonomous organization that provides products or services to the broader community, which is either founded or managed by a group of citizens and in which the scope of material benefits is subject to restrictions – see Wygnański, and Frączak, "Ekonomia społeczna," 19.

8 Therefore, paid public benefit activity (or 'paid mission-related activity' – see Ciepielewska-Kowalik, *Social enterprises*, 46) as referred to in Article 8(1) of the Act on Activities of Public Interest and Voluntary Work, business activity, as referred to in Article 3 of the Law of March 6, 2018 - Entrepreneurs Law (Journal of Laws 2021, item 162, as amended) or other activity for pecuniary interest.

9 Cf. Martyna Jedlińska, "Chapter XIV. Spółdzielnie socjalne," in *Prawo spółdzielcze, System Prawa Prywatnego,* volume 21, Issue 1, ed. Krzysztof Pietrzykowski (Warszawa: C. H. Beck, 2020),794.

10 See Ciepielewska-Kowalik, *Social enterprises*, 39 et seq; Carlo Borzaga, Giulia Galera, Barbara Franchini, Stefania Chiomento, Rocío Nogales and Chiara Carini, *European Commission. Social enterprises and their ecosystems in Europe. Comparative synthesis report* (Luxembourg: Publications Office of the European Union, 2020): 28, accessed November 10, 2022, https://ec.europa.eu/social/BlobServlet?docId=22304&langId=en.

based on economic instruments[11], involving economic risks[12]. The management of such an entity and the decision-making process of the enterprise are both autonomous and participatory[13].

Social cooperatives, which aim to run a joint venture based on the personal work of members and employees of the social cooperative for their social and professional reintegration[14], are some of the best examples of introducing market mechanisms to solve social issues, use social innovation, and generally respond to the challenges of supporting the goals of sustainable development[15]. However, all social enterprises have the same objective of searching for the solutions based on commercial experience to achieve social goals. In this sense, the social economy clearly appears as a result of the economization of the so-called third sector[16]. Social enterprises con-

11 See in particular Eleanor Shaw and Sara Carter, "Social entrepreneurship: Theoretical antecedents and empirical analysis of entrepreneurial processes and outcomes," *Journal of Small Business and Enterprise Developmen*t 14, no. 3 (2007): 418 et seq., https://doi.org/10.1108/14626000710773529 where Authors prove that while the contemporary practices of social enterprises share many similarities with their for-profit counterparts, significant differences can be found when comparing these practices with extant entrepreneurship research.

12 Cf. EMES European Research Network and United Nations Development Programme, *Social Enterprise: A new model for poverty reduction and employment generation. An examination of the concept and practice in Europe and the Commonwealth of Independent States* (2008), accessed November 10, 2022, http://www.undp.org/sites/g/files/zskgke326/files/publications/Social%20Enterprise-%20A%20New%20Model%20for%20Poverty%20Reduction%20and%20Employment%20Generation.pdf.

13 Companies operating not for profit are able to become social enterprise and the obligation to guarantee internal participation standards is ensured by Article 4(4) of the Act on Social Economy which specifies that the Supervisory Board or Audit Committee shall carry out the functions of the consulting and advisory body in the company.

14 Cf. Article 2 of the Act on Social Cooperatives.

15 Cf. Ryszard Praszkier, Agata Zabłocka-Bursa and Ewa Jozwik, "Social Enterprise, Social Innovation and Social Entrepreneurship in Poland: A National Report," *CSEM Working Papers* 11(2014): 1 et seq., accessed November 10, 2022, https://www.researchgate.net/publication/295073203_Social_Enterprise_in_Poland_Institutional_and_Historical_Context.

16 It is also important to recognize that social entrepreneurship is not limited to and is not only addressed to persons who, for various reasons, are not independent and require support, since - primarily in The United States and The United Kingdom - it is a mechanism for drawing persons with exceptional talents into creative solutions aimed at resolving social problems – as rightly pointed out by Wygnański and Frączak, "Ekonomia społeczna," 19. Cf. esp. *Ahsoka*, an organization that identifies and supports the world's leading social

stitute a "mechanism for regaining the sovereignty and subjectivity of individuals, institutions and communities", implement the assumptions of the 'new' social economy in the area of entrepreneurship, understood as "the willingness and ability to take responsibility for their own destiny"[17].

3. Cooperatives as democratic member-based organizations

Additionally, the phenomenon of reuse is prominent, just like the transformation and even creation of new hybrid entities that operate for profit but integrate social and environmental goals into economic activities.

The first example of such a successful combination are cooperatives or cooperative societies[18], whose structure allows, on the one hand, to achieve certain social goals, and on the other hand, to achieve economic effects[19]. **Cooperatives are autonomous associations of persons united to meet common economic, social, and cultural needs and aspirations through a jointly owned and democratically-controlled enterprise**[20]**.** At the normative level, they are designed to incorporate corporate social responsibility[21].

entrepreneurs, learns from the patterns in their innovations, and mobilizes a global community that embraces these new frameworks to build an "everyone a changemaker world." – cf. "About Ashoka,", Ashoka, accessed November 10, 2022, https://www.ashoka.org/en-us/about-ashoka.

17 Wygnański and Frączak, "Ekonomia społeczna," 20.

18 On the definition of cooperative see Stanisław Wojciechowski, *Kooperacja w rozwoju historycznym* (Warszawa: Wydawn. Wydz. Propagandy Zw. Pol. Stow. Spożywców, 1923), 96; Piotr Zakrzewski, "Pozaprawne ujęcie spółdzielni," *Roczniki Nauk Prawnych,* vol. XI, Issue 1 (2001): 165 et seq.

19 There are many forms, models and structures on which the co-operatives are based and the purposes they serve (including retail, social, consumer, worker, and business and employment co-operatives).

20 *The Statement on the Cooperative Identity (The Cooperative Charter)* adopted by the International Cooperative Alliance at its congress in Manchester in 1995, accessed November 10, 2022, https://www.ica.coop/en/cooperatives/cooperative-identity.

21 Cooperatives are based on the values of self-help, self-responsibility, democracy, equality, equity, and solidarity. In the tradition of their founders, cooperative members believe in the ethical values of honesty, openness, social responsibility and caring for others The cooperative principles are. 1. Voluntary and Open Membership, 2. Democratic Member Control, 3. Member Economic Participation, 4. Autonomy and Independence, 5. Education, Training, and Information, 6. Cooperation among Cooperatives and 7. Concern for Community – see The Statement on the Cooperative Identity. Cf. Tim Mazzarol, Richard A. Simmons and Elena Mamouni Limnios, "A Conceptual Framework for Research into

From the very beginning of the development of this form of business activity, cooperatives had had a huge impact on the socio-economic development of Poland, but after a period of glory, due to unfavorable conditions, they role significantly diminished. Now again, as when the "shortcomings of the economic and social relations prevailing at the time"[22] became the cause of the emergence of the cooperative movement, we are seeing an increase in interest in cooperatives as a tool for implementing the principle of equity in the economy[23]. Many cooperatives (including worker cooperatives, food cooperatives, horticultural and beekeeping cooperatives) could skillfully adapt to the new conditions of the economy by transforming themselves into modernly managed enterprises able to compete in the market. Within the framework of cooperatives and cooperative societies, members create their own jobs, providing income for themselves, their families[24] and con-

Co-Operative Enterprise," *Centre for Entrepreneurial Management and Innovation (CEMI) Discussion Paper Series* No. 1102 (December 9, 2011): 5 et seq., http://dx.doi.org/10.2139/ssrn.2015641 proving that there are three primary objectives for the co-op: the need to build identity; the need to build social capital and the need to build sustainability.

22 Piotr Zakrzewski, "Pozaprawne ujęcie spółdzielni," 162.

23 Cf. Kazimierz Boczar, *Spółdzielczość. Problematyka społeczna i ekonomiczna* (Warszawa: Państwowe Wydawn. Ekonomiczne, 1986), 176.

24 As a rule, cooperatives are for-profit entrepreneurs, within the meaning of Article 43^1 of the Law of April 23, 1964 – the Civil Code (consolidated text Journal of Laws 2022, item 1360, as amended) and Article 4 of the Entrepreneurs Law. They carry out business activities on the basis of economic calculation while providing benefits to cooperative members (Article 67 of the Cooperative Law). These benefits generally have an economic dimension, but not only. Cooperatives may obtain a balance sheet surplus (Article 75 of the Cooperative Law), whereas the rules for its distribution are determined - in addition to the Law - by the Articles of Association, which may provide for the distribution of the balance sheet surplus among the members of the cooperative and the payment of a share of the surplus (Article 18 § 2.5 of the Cooperative Law which is impossible in some types of cooperatives, such as housing cooperatives, which are entrepreneurs, yet, they conduct the so-called resultless enterprises. Although it is a non-profit activity in the sense that it does not translate into the payment of dividends, it is used to generate profits and it is subject to economic rules, the principles of rational (economic) management (see Articles 1(1), (3), (5) and (6), 6 of the Act of December 15, 2000 on Housing Cooperatives, consolidated text Journal of Laws 2021, item 1208, as amended). In addition, however, the non-income-generating nature of the activities of a housing cooperative should be referred only to that part of the activities of the cooperative that does not generate income, meaning, management of housing resources and incidentally conducted social, educational and cultural activities for

tractors[25], maintain relationships, learn new social roles, gain skills and experience, in a word, generate tangible economic benefits as well as establish and strengthen human capital[26].

Cooperatives face a daunting task; surviving and competing in a globalized market without sacrificing their own character can be demanding[27].

The management of a cooperative as a democratic member-based organization (DMO)[28], with its participatory structure, is problematic and it requires specific competences to assume board responsibility, in order to ensure effective governance[29].

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the benefit of cooperative members and their environment. The rules for the payment of profits to cooperative members may resemble those known under company law, and thus be based on a link between the value of the contributed share but may also be correlated with the value of turnover, labor contribution or membership seniority (cf. Articles 76, 77 of the Cooperative Law).

25 Cf. Qiao Liang and George Hendrikse, "Pooling and the yardstick effect of cooperatives," *Agricultural Systems,* vol. 143(2016): 97 et seq., https://doi.org/10.1016/j.agsy.2015.12.004.

26 Cf. Svenja Damberg, „Does creating perceived co-operative member value pay off? An empirical study in the German co-operative banking context," *Journal of Co-operative Organization and Management,* vol. 10, Issue 1(2022): 100170, https://doi.org/10.1016/j.jcom.2022.100170 about "co-operative member value" as an important predictor of sustainable satisfaction, next to corporate reputation.

27 Cf. especially Mazzarol, Simmons and Limnios, "A Conceptual Framework," 22, 30 et seq. writing about the need to build "resilience architecture" for co-op's; Ignacio Bretos and Carmen Marcuello, "Revisiting globalization challenges and opportunities in the development of cooperatives," *Annals of Public and Cooperative Economics,* vol. 88, Issue 1(March 2017): 47 et seq., https://doi.org/10.1111/apce.12145; with respect to new technologies Eduard Cristobal-Fransi, Yolanda Montegut-Salla, Berta Ferrer-Rosell and Natalia Daries, "Rural cooperatives in the digital age: An analysis of the Internet presence and degree of maturity of agri-food cooperatives' e-commerce," *Journal of Rural Studies* Volume 74(2020): 55 et seq., https://doi.org/10.1016/j.jrurstud.2019.11.011.

28 Also known as member-owned businesses (MOB's). Cf. especially Johnston Birchall, "The Comparative Advantages of Member-Owned Businesses," *Review of Social Economy* 70, no. 3(2012): 263 et seq., accessed November 10, 2022, https://www.jstor.org/stable/23257800 and Mazzarol, Simmons and Limnios, "A Conceptual Framework," 9 et seq.

29 Roger Spear, "Governance in Democratic Member-Based Organisations," *Annals of Public and Cooperative Economics* 75(2004): 33 et seq., https://doi.org/10.1111/j.1467–8292.2004.00242.x; The Working Group on Cooperatives, *Fostering cooperatives' potential to generate smart growth & jobs* (2015): 1–6, accessed November 10, 2022, https://ec.europa.eu/docsroom/documents/10450?locale=pl.

Like other organizations, they can only develop in a favorable institutional environment, in particular, with wider access to capital[30] and favorable normative environment[31]. However, studies conducted indicate that there is something to fight for[32]; membership in a cooperative positively affects the economic status, financial security of cooperative members and allows for additional benefits of a general social nature[33], triggering a kind of developmental chain reaction in the area of environment[34], investments,

30 Cooperatives have no or limited access to venture capital on the capital markets. They primarily depend on their own member capital as well as member and bank loan finance, in order to satisfy the specific member needs. There is a need for cooperatives to explore alternative forms of financing such as crowd-funding or the set-up of specific capital funds, in order to provide financing, which has been successfully developed in some EU countries like France or Italy – Cf. The Working Group on Cooperatives, *Fostering cooperatives' potential to generate smart growth & jobs*, 4.

31 The economic and social role of cooperative enterprises in Europe is of significant importance. There are 250,000 cooperatives in the EU, owned by 163 million citizens (one third of EU population) and employing 5.4 million people and that hold substantial market shares in agriculture, forestry, banking, insurance, housing, retail and pharmaceutical and health care – "Cooperatives", European Union, accessed November 10, 2022, https://single-market-economy.ec.europa.eu/sectors/proximity-and-social-economy/social-economy-eu/cooperatives_en.

32 Cf. The Working Group on Cooperatives, *Fostering cooperatives' potential to generate smart growth & jobs*, 3.

33 Por. OCDC's International Cooperative Research Group, *What Difference Do Cooperatives Make? Poland. A Pilot Study* (2019): 1–42 resulting from the project "What Difference Do Cooperatives Make?" (WDDCM), accessed November 10, 2022, https://www.ocdc.coop/wp-content/uploads/2018/08/What-Difference-Do-Cooperatives-Make.-Poland..pdf. and *What Difference Do Cooperatives Make? Global Outcomes Report Kenya, Peru, Philippines, and Poland* (2021): 1–15, accessed November 10, 2022, https://ocdc.coop/wp-content/uploads/2021/09/WDDCM_Global.pdf, that proves an existence of „cooperative difference", and therefore the impact that cooperatives have, economically, through income, and socially, as measured by well-being indicators.

34 Cf. i.a., Jiehong Zhou, Qing Liu and Qiao Liang, "Cooperative membership, social capital, and chemical input use: Evidence from China," *Land Use Policy,* vol. 70(January 2018): 394 et seq. https://doi.org/10.1016/j.landusepol.2017.11.001; Apurbo Sarkarab, Honhyu Wang, Airin Rahman, Lu Qian and Waqar Hussain Memon, "Evaluating the roles of the farmer's cooperative for fostering environmentally friendly production technologies-a case of kiwi-fruit farmers in Meixian, China," *Journal of Environmental Management,* vol. 301(1 January 2022): 113858, https://doi.org/10.1016/j.jenvman.2021.113858.

infrastructure or jobs[35]. Cooperatives around the world are undergoing an evolution, not for the first time, resulting in their modernized models being referred to as 'hybrid cooperative business models'[36]. Solutions are being sought to improve the governance mechanisms of cooperatives[37], support their development, internationalize them, provide with broader access to financing, harmoniously link the social and economic aspects of their activities or the possibility of creating group structures[38].

4. Benefit corporations

The so-called 'benefit corporations' ('flexible purpose corporations') are another example of entities that are equipped with a mechanism to

35 Cf. WDDCM, *What Difference Do Cooperatives Make? Global Outcomes Report Kenya, Peru, Philippines, and Poland* (2021):1–15, which confirms that they also play a significant role in women's lives, allowing them to gain or improve skills and experience, earn income, become independent, hence creating positive social impact for communities, including future generations.

36 Cf. John Rolfe, Delwar Akbar, Azad Rahman and Darshana Rajapaksa, "Can cooperative business models solve horizontal and vertical coordination challenges? A case study in the Australian pineapple industry," *Journal of Co-operative Organization and Management* Volume 10, Issue 2(2022): 100184, https://doi.org/10.1016/j.jcom.2022.100184, using the example of pineapple cooperatives in Australia, which use referral tools, information distribution, market forecasts, accountability mechanisms and other methods to support farmers, but which also raise the cost of operating such cooperatives and force them to be larger in size. See also "Copa and Cogeca position on sustainable crops protection Agricultural production,", Copa & Cogeca, Brussels, November 2019, accessed November 10, 2022, https://copa-cogeca.eu/Download.ashx?ID=3741437&fmt=pdf, where it is pointed out that farmers and agricultural cooperatives are already investing and using innovative solutions to maintain the competitiveness and sustainability of their businesses, better manage natural resources, provide goods and services to consumers, adapt to the effects of climate change and respond to social needs.

37 Cf. Darrell Hammond and John Luiz, "The co-operative model as a means of stakeholder management: an exploratory qualitative analysis," *South African Journal of Economic and Management Sciences* 19 (4)(2016): 630 et seq., DOI:10.17159/2222–3436/2016/v19n4a11.

38 Cf. Roger Spear, "Governance in Democratic Member-Based Organisations", *Annals of Public and Cooperative Economics,* 75(2004): 33 et seq., https://doi.org/10.1111/j.1467–8292.2004.00242.x. Social cooperatives may form cooperative consortia based on a contract to increase the economic and social potential of affiliated social cooperatives, jointly organize production, trade or service networks, organize joint promotion of cooperative or economic activities, or promote a common trademark (Article 15b of the Act on Social Cooperatives).

complement the business model with solutions that pursue social and environmental goals. These are modernized, hybrid versions of commercial companies, or, in other words, a special legal regime and associated special status that allows them to conduct business 'with a mission' (*société à mission*, mission-driven company)[39].

The first to introduce a law allowing the creation of benefit corporations was the US state of Maryland in 2010[40]. The Maryland Benefit Corporations shall have the purpose of creating a 'general public benefit'[41], which means "a material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits". In doing so, it should be emphasized that general public benefit 'may be a limitation' of the 'traditional purposes'

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[39] Also referred to as the "hybrid social ventures" – cf. Matthew Lee and Jason Jay, "Strategic Responses to Hybrid Social Ventures," *California Management Review*, *57*(3) (2015): 126 et seq., https://doi.org/10.1525/cmr.2015.57.3.126. Certified B Corporations are something different, i.e. the companies that achieved B Corp Certification granted by international nonprofit organization B Lab. B Corp Certification is a designation that a business is meeting high standards of verified performance, accountability, and transparency on factors from employee benefits and charitable giving to supply chain practices and input materials. In order to achieve certification, a company must demonstrate high social and environmental performance, make a legal commitment by changing their corporate governance structure to be accountable to all stakeholders, not just shareholders, and achieve benefit corporation status if available in their jurisdiction and exhibit transparency by allowing information about their performance. There are nearly 5,000 companies worldwide from 153 industries that have obtained B Corp Certification – see "About B Corp Certification", B Corp, accessed November 10, 2022, https://www.bcorporation.net/en-us/certification. However, the principles of their operation coincide with the benefit corporations, described here, hence, the conclusions derived from the analysis of their activities may be useful and applicable to the subject of the study – cf. i.a. Sabrina Tabares, "Certified B corporations: An approach to tensions of sustainable-driven hybrid business models in an emerging economy," *Journal of Cleaner Production,* vol. 317(1 October 2021): 128380, https://doi.org/10.1016/j.jclepro.2021.128380. It is worth noting that, like *Ashoka*, discussed below, the activities of this organization confirm the multicentricity of the legal system – cf. especially Ewa Łętowska, "Multicentryczność współczesnego systemu prawa i jej konsekwencje," *Państwo i Prawo,* no. 4(2005): 3.

[40] The Maryland Annotated Code, Corporations and Associations Article, Section 6-C-01–08.

[41] Cf. the Maryland Limited Liability Corporations, The Maryland Annotated Code, Corporations and Associations Article, Section 6-C-01–08. Sections 4A-1201 to 4A-1303.

of the corporation. In addition, the charter of a benefit corporation may identify as one of the purposes of the benefit corporation the creation of one or more specific public benefits, which includes: providing individuals or communities with beneficial products or services; promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; preserving the environment; improving human health; promoting the arts, sciences, or advancement of knowledge; increasing the flow of capital to entities with a public benefit purpose or the accomplishment of any other particular benefit for society or the environment.

A director of a benefit corporation, in performing the duties of a director, including the director's duties as a member of a committee, in determining what the director reasonably believes to be in the best interests of the benefit corporation, shall consider the effects of any action, or decision not to act, on the stockholders, the employees and workforce, the subsidiaries and suppliers, the interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit corporation, community and societal considerations and the local and global environment; and may consider any other pertinent factors or the interests of any other group that the director determines are appropriate to consider. A director of a benefit corporation, in the performance of duties in that capacity, does not have any duty to a person that is a beneficiary of the public benefit purposes of the benefit corporation. In the reasonable performance of duties in accordance with the standard provided in this subtitle, a director of a benefit corporation shall have the immunity from liability described in § 5–417 of the Courts Article.

Benefit corporation shall deliver[42] to each stockholder an annual[43] benefit report including: (a) A description of the ways in which the benefit corporation pursued a general public benefit during the year and the extent to which the general public benefit was created; the ways in which the benefit corporation pursued any specific public benefit that its charter

[42] A benefit corporation shall post its most recent benefit report on the public portion of its Web site or shall provide a copy of its most recent benefit report on demand and without charge to any person who requests a copy.

[43] Within 120 days following the end of each fiscal year.

states is the purpose of the benefit corporation to create and the extent to which that specific public benefit was created; and any circumstances that have hindered the creation by the benefit corporation of the public benefit; and b) An assessment of the societal and environmental performance of the benefit corporation prepared in accordance with a third-party standard[44] applied consistently with the prior year's benefit report or accompanied by an explanation of the reasons for any inconsistent application.

Washington's Social Purpose Corporations (SPCs)[45] just like benefit corporations, may pursue social and environmental goals alongside profit-driven operations. Any corporation may become or cease to be a social purpose corporation and if so, must be organized to carry out its business purpose in a manner intended to promote positive short-term or long-term effects of, or minimize adverse short-term or long-term effects of, the corporation's activities upon any or all of (1) the corporation's employees, suppliers, or customers; (2) the local, state, national, or world community; or (3) the environment. In addition to the general social purpose, every SPC may have one or more specific social purposes for which the corporation is organized. In addition to the matters required to be set forth in the articles of incorporation of the SPC, the articles of incorporation of a social purpose corporation must set forth i.a. a provision that states: "The mission of this social purpose corporation is not necessarily compatible with and may be contrary to maximizing profits and earnings for shareholders, or maximizing shareholder value in any sale, merger, acquisition, or other similar actions of the corporation"[46]. The articles of incorporation of a social purpose corporation may at the same time contain the provisions requiring i.a. the corporation's directors or officers -only- to consider the impacts of any corporate action or proposed corporate action

44 "Third-party standard" means a standard for defining, reporting, and assessing best practices in corporate social and environmental performance that is developed by a person or entity that is independent of the benefit corporation; and is transparent because the following information about the standard is publicly available or accessible: the factors considered when measuring the performance of a business; the relative weightings of those factors; and the identity of the persons who developed and control changes to the standard and the process by which those changes were made.

45 Chapter 23B.25 RCW "Social Purpose Corporations".

46 RCW 23B.25.040

upon one or more of the social purposes of the corporation; or requiring the corporation to furnish to the shareholders an assessment of the overall performance of the corporation with respect to its social purpose or purposes, prepared in accordance with a third-party standard.

Even the state of Delaware, where the majority of companies in the US are registered, introduced a similar regulation in 2013. Delaware Public Benefit Corporation is a for-profit corporation that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation. In the certificate of incorporation, a public benefit corporation shall identify within its statement of business or purpose pursuant to §102(a)(3) of title 8 one or more specific public benefits to be promoted by the corporation; and state within its heading that it is a public benefit corporation. 'Public benefit' means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature[47].

The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation[48].

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47 The Delaware Code, § 362. Cf. Michael R. Littenberg, Emily J. Oldshue, and Brittany N. Pifer, Ropes & Gray LLP, "Delaware Public Benefit Corporations—Recent Developments,", Harvard Law School Forum on Corporate Governance (Monday, August 31, 2020), accessed November 10, 2022, https://corpgov.law.harvard.edu/2020/08/31/delaware-public-benefit-corporations-recent-developments/.

48 The Delaware Code, § 365 b) and c) state that A director of a public benefit corporation shall not, by virtue of the public benefit provisions or § 362(a) of this title, have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the certificate of incorporation or on account of any interest materially affected

A public benefit corporation shall include in every notice of a meeting of stockholders a statement to the effect that it is a public benefit corporation formed pursuant to this subchapter. The corporations shall no less than biennially provide its stockholders with a statement as to the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation's conduct[49].

In total, at least 35 U.S. states and the District of Columbia have enacted regulations that allow the creation of companies which define their social purpose and require their management to take it into account in the company's management processes[50].

Benefit corporations are also present in Europe. As of January 1, 2016, it is possible in Italy to create the so-called *Società Benefit*.[51] A Società Benefit is a company which combines the goal of profit with the purpose of creating a positive impact for society and the environment and which operates in a transparent, responsible and sustainable way.

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by the corporation's conduct and, with respect to a decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve. A director's ownership of or other interest in the stock of the public benefit corporation shall not alone, for the purposes of this section, create a conflict of interest on the part of the director with respect to the director's decision implicating the balancing requirement in subsection (a) of this section, except to the extent that such ownership or interest would create a conflict of interest if the corporation were not a public benefit corporation. In the absence of a conflict of interest, no failure to satisfy that balancing requirement shall, for the purposes of § 102(b)(7) or § 145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty, unless the certificate of incorporation so provides.

49 The Delaware Code, § 366.

50 Among others, in New York State, where benefit corporations operate pursuing a 'general public benefit' and thus are created to generate a material positive impact on society and the environment" (Article 17 of the Business Corporation Law ("BCL"), §1702(b)).

51 Decreto Legge 1882 del 17 Aprile 2015 sulle Società Benefit. L. 28–12–2015 n. 208, Commi 376–384, Pubblicata in Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità 2016). Cf. Dario Carrera, Marco Meneguzzo and Alessandro Messina, "Solidarity-based Economy in Italy. Practices for Social Entrepreneurship and Local Development: The Experience of Rome," *Socioeco.org* (2007): 1–19, accessed November 10, 2022, https://base.socioeco.org/docs/solidarity-_based_economy_in_italy._dario_carrera_et_al.pdf.

This is not a new type of commercial company, but a specific legal status that any of the companies described in the Italian Civil Code (partnerships, corporations, but also cooperatives) may adopt to not only pursue the purpose of profit, but also the specific purpose(s) of common benefit that they have inserted in their articles of association for common good (*beneficio comune*).

The specific purposes shall be specifically identified within the benefit corporation's corporate purpose and shall be pursued through an administration finalized at balancing the interest of the shareholders and the interest of those that may be impacted by the company's business activity. The Italian law defines a common benefit as the creation of positive effects (or the reduction of negative ones) vis-à-vis individuals, communities, territories and the environment, cultural and social heritage, entities and associations as well as other stakeholders.

The directors of a *Società Benefit* are responsible for managing the company with the aim of pursuing the common benefit, taking into consideration both the interests of shareholders, and also the interest of all stakeholders, and have the obligation to identify one or more individuals to be appointed as impact manager with the specific tasks of pursuing the common benefit and reporting regarding the activities of the company in a complete and transparent way[52].

Società Benefit is required to produce and publish on the website an annual benefit report and to attach it to the annual financial statement. The annual benefit report includes the description of the specific objectives, modalities and actions implemented by the directors in order to pursue the aims of common benefit and the possible mitigating circumstances which have prevented, or slowed up, the achievement of the above aims; evaluation of the general impact of the company, using a third party evaluation and a specific section containing the description of the new objectives which the benefit corporation intends to pursue in the following fiscal year[53].

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52 Cf. Società Benefit, Legge 28 dicembre 2015, n. 208, accessed November 10, 2022, https://www.societabenefit.net/wp-content/uploads/2017/03/Italian-benefit-corporation-legislation-courtesy-translation-final.pdf.

53 There are currently about 1,400 *Società Benefit* companies operating in Italy.

French "Plan d'Action pour la Croissance et la Transformation des Entreprises" (the so-called *Loi Pacte*) of 2019 [54] introduced a number of mechanisms to facilitate business[55]. In particular, however, the purpose of this regulation was to promote corporate social responsibility. Thus, the amended Article 1835 of the Civil Code introduces the possibility of defining the company's purpose (*le raison d'être*), which is a set of principles that have been adopted by the company and which it intends to follow in its activities[56]. In addition, for the first time since 1804, Article 1833 CC was also amended and now stipulates that a company may be formed for a legally permissible purpose in the common interest of the partners, but at the same time, it shall be managed in its own interest, taking into account the social and environmental effects of its activities[57]. Therefore, the regulation (Article L225–35) of the *Code de commerce* has also been changed, which requires company managers to take into account the specific purpose of the company[58].

Loi Pacte also introduced the possibility of applying for the status of *Société à mission*[59] as long as the company: (1) incorporates into its articles

54 Le Plan d'action pour la croissance et la transformation des entreprises (PACTE), May 22, 2019.

55 Among other things, a special on-line portal has been developed, where it is possible to register any French company without submitting even a single paper document.

56 "Les statuts doivent être établis par écrit. Ils déterminent, outre les apports de chaque associé, la forme, l'objet, l'appellation, le siège social, le capital social, la durée de la société et les modalités de son fonctionnement. Les statuts peuvent préciser une raison d'être, constituée des principes dont la société se dote et pour le respect desquels elle entend affecter des moyens dans la réalisation de son activité.".

57 "Toute société doit avoir un objet licite et être constituée dans l'intérêt commun des associés. La société est gérée dans son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité". Cf. also Alain Pietrancosta, "Intérêt social et raison d'être. Considérations sur deux dispositions clés de la loi PACTE amendant le droit commun des sociétés," *Annales des Mines - Réalités industrielles,* 4(2019): 55, DOI:10.3917/rindu1.194.0055.

58 Cf. Aleksandra Szczęsna and Anne-Marie Weber, „Zrównoważony ład korporacyjny en français," *Przegląd Prawa Handlowego,* 7(2022): 20–21.

59 Articles L. 210–10 to L. 210–12 Code de Commerce. As at 3 October 2022, 751 sociétées à mission were registered – see *La plateforme de référence des sociétés à mission en France,* accessed November 10, 2022, https://www.observatoiredessocietesamission.com/. Cf. Blanche Segrestin, Kevin Levillain, Stéphane Vernac and Armand Hatchuel, *La <<Société à Objet Social Étendu>>, Un nouveau statut pour l'entreprise* (Paris: Presses des Mines, 2015): 15 et seq.

of association a specific objective; (2) incorporates into its articles of association specific social or environmental objectives it intends to achieve by conducting business activity; (3) describes the terms and conditions for evaluating (overseeing) its activities in the areas described, mandatorily invoking the so-called 'commitment committee', and (4) establishes rules for auditing the performance of the company's objectives by an independent third party.

5. Sustainability- Driven Hybrid Business Models

The reasons for the formation of the movement to broaden a company's purpose to include social and environmental factors, which led to the emergence of Sustainability-Driven Hybrid Business Models[60], also referred to as fourth sector, benefit corporations, L3C, Blended Value, ForBenefit, Values Driven, Mission Driven or Hybrid Organizations, are quite complex.

Never before has it been so obvious that growth may not be unlimited in a finite system[61]. This social attitude has changed consumer behavior[62], the labor market as well as beliefs about how business should be conducted, and promoted a new vision of capitalism, described as a green or hybrid economy[63], including the assumption that the basis for development is sus-

60 Cf. Nardia Haigh and Andrew J. Hoffman, "Hybrid Organizations: The Next Chapter of Sustainable Business," *Ross School of Business Paper* No. 1347, *Organizational Dynamics,* 41(2)(2012): 126 et seq., accessed November 10, 2022, https://ssrn.com/abstract=2933616 or http://dx.doi.org/10.2139/ssrn.2933616.

61 To paraphrase Massimo Mercati, CEO of Aboca. Cf. Joseph Stiglitz, "Growth with Exhaustible Natural Resources: Efficient and Optimal Growth Paths," *The Review of Economic Studies*, 41(1974): 123 et seq., https://doi.org/10.2307/2296377.

62 Cf. the research on socially conscious consumers LOHAS Market™ Report. It is estimated that in 2010. LOHAS in the U.S. was about $290 trillion; in 2022 it will be nearly $473 trillion. See also William H. Clark Jr. and Elizabeth K. Babson, "How Benefit Corporations Are Redefining the Purpose of Business Corporations," *William Mitchell Law Review* Vol. 38: Iss. 2, Article 8(2012): 817 et seq., accessed November 10, 2022, http://open.mitchellhamline.edu/wmlr/vol38/iss2/8.

63 The author of the term "the hybrid economy", which describes an economy that is the opposite of the capitalist, market, neoliberal economy, is Jon C. Altman, who came to his conclusions by conducting research in communities in Samoa and Australia – cf. Jon C. Altman, "Sustainable development options on Aboriginal land: The hybrid economy in the twenty-first century," *Centre for Aboriginal Economic Policy Research Publications*, Discussion Paper No. 226(2001): 4, accessed November 10, 2022, https://openresearch-repository.anu.

tainable economic growth and a high level of protection and improvement of environmental quality, and it all contributed to a growing awareness of corporate social responsibility, with an emphasis on responsibility understood as accountability for the actions taken and the impact the company has on society and the environment[64]. Therefore, I have an impression that, right on our doorstep, the debate about sustainability in corporate law is still taking place and initiatives are sprouting up like mushrooms after the rain to facilitate the harmonious linking of social and environmental goals with the value building and business profit generation. The idea is that economic activity should serve something greater than profit, meaning the well-being of society as a whole, the planet and future generations[65].

The hybrid business model is based on an approach that differs from the traditional one in three areas: addressing of the social and environmental issues in terms of the goals of the organization, relationships with suppliers, employees and customers, and integration with the market, competitors and industry institutions[66].

Benefit corporations are an attempt to respond to rising social inequalities, unfair distribution of wealth, and environmental degradation, for which corporations are blamed - largely rightly so. It may be said that

edu.au/bitstream/1885/40104/2/2001_DP226.pdf. Cf. also Ricardo Abramovay, *Beyond the Green Economy* (London: Routledge 2015); Geoff Buchanan, "From Samoa to CAEPR via Mumeka: The Hybrid Economy Comes of Age," in *Engaging Indigenous Economy: Debating Diverse Approaches*, ed. Will Sanders (Australian National University Press, Centre for Aboriginal Economic Policy Research (CAEPR), vol. 35(2016)), 15 et seq., accessed November 10, 2022, http://www.jstor.org/stable/j.ctt1d10hpt.8; Jeremy Rifkin, *Społeczeństwo zerowych kosztów krańcowych. Internet przedmiotów. Ekonomia współdzielenia. Zmierzch kapitalizmu* [*Zero Marginal Cost Society: The Internet of Things, the Collaborative Commons, and the Eclipse of Capitalism*], transl. Anna Dorota Kamińska (Warszawa: Studio Emka, 2016).

64 Cf. Edward R. Freeman, *Strategic Management: A Stakeholder Perspective* (Cambridge: Cambridge University Press, 1984, 2010) and proposed by the Author the concept of Company Stakeholder Responsibility.

65 Klaus Schwab and Peter Vanham, *Kapitalizm interesariuszy: Globalna gospodarka a postęp, ludzie i planeta* [*Stakeholder Capitalism: A Global Economy that Works for Progress, People and Planet*], transl. Michał Lipa (Warszawa: OnePress, 2022), 184.

66 Cf. Nardia Haigh and Andrew J. Hoffman, "Hybrid Organizations: The Next Chapter of Sustainable Business," 126 et seq.

they lost their social legitimacy at some point[67]. A feeling that corporations should not only produce money, but also create social values became firmly established in the public mind[68].

Convincing research, including empirical studies, confirms that corporate mainstreaming of social and environmental issues in its commercial activities and stakeholder relations[69], with management in the spirit of the triple bottom line (people, planet, and profits) is much more responsive to changing social needs[70] than value-based management, which recognizes shareholders as economic owners of the company (corporate ownership)[71],

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67 Cf. especially Joseph L. Bower, Herman B. Leonard and Lynn Paine Sharp, *Capitalism at Risk: Rethinking the Role of Business* (Boston: Harvard Business Review Press, 2011), 1 et seq.

68 Cf. David Millon, "Theories of the Corporation," *Duke Law Journal* 1990, no. 2(1990): 201 et seq., https://doi.org/10.2307/1372611; Joshua D. Margolis and James R. Walsh, "Misery Loves Companies: Rethinking Social Initiatives by Business," *Administrative Science Quarterly*, 48, no. 2(2003): 268 et seq., https://doi.org/10.2307/3556659. See also the study of researchers at Stanford and the University of California, Santa Barbara who polled 759 students graduating from Master of Business Administration (MBA) programs in both the U.S. and Europe about their job preferences. The researchers found that nearly 9 out of 10 students would take a pay cut if it meant they could work for a fair and ethical firm – see Nick Carbone, "Would You Sacrifice Pay to Work for An Ethical Company?," *Time*, May 22, 2011, accessed November 10, 2022, https://newsfeed.time.com/2011/05/22/would-you-sacrifice-pay-to-work-for-an-ethical-company/.

69 European Commission, *Green Paper: Promoting a European framework for Corporate Social Responsibility* (Brussels, 18 July 2001), accessed November 10, 2022, https://ec.europa.eu/commission/presscorner/detail/en/DOC_01_9.

70 Cf. i.a. Paddy Ireland, "Company Law and the Myth of Shareholder Ownership," *The Modern Law Review,* 62, no. 1(1999): 51, accessed November 10, 2022, http://www.jstor.org/stable/1097073; Paddy Ireland, "Shareholder Primacy and the Distribution of Wealth," *The Modern Law Review* 68, no. 1(2005): 49 et seq., accessed November 10, 2022, http://www.jstor.org/stable/3699112.

71 Cf. Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: The Macmillan Company, 1932). In Poland i.a. Michał Romanowski, "Znaczenie sporu o metodę odczytywania pojęcia <<interes spółki kapitałowej>>," *Przegląd Prawa Handlowego,* 7(2015): 10. See House of Lords, the Judgement of July 29, 1948, Short v. Treasury Commissioners [1948] 1 KB 116 122, where the court stated that "shareholders are not, in the eyes of the law, part owners of the company", see also The High Court Of Justice (King's Bench Division) Court Of Appeal, the Judgement of March 27, 1908, Gramophone & Typewriter Ltd v Stanley [1908] 2 KB 89 and more judgements referred by Lynn A. Stout, "The Shareholder Value Myth," *Cornell Law Faculty Publications*, Paper 771(2013):

residual creditors of the company[72], and draws on agency theory, and, most importantly, is oriented toward building shareholder value added (SVA[73]) in the short term ('short-terminism'[74]).

It is fair to agree, however, that corporate social responsibility is sometimes used to whitewash a company's reputation, and that high-sounding corporate commitments are sometimes part of a well-thought-out marketing and public relations effort, if not just plain green- or fair-washing.

It is also for this reason that many researchers are coming to the belief that corporations are not adapted to the realization of social goals, and in order to achieve real and valuable change, leaving aside the mechanisms of supervision and independent audit of corporate social activities, it is necessary to radically modify their organizational structure, including its purpose and management principles[75]. Therefore - in addition to the rebuilding of organizations from the so-called third sector, the reuse of DMOs - benefit corporations, new hybrid-type organizations are also being created, which are neither a social enterprise nor a non-profit organization, but rather an evolution of the concept of for-profit business to take on the challenges of the 21 century and bring about common benefits

1 et seq., accessed November 10, 2022, http://scholarship.law.cornell.edu/facpub/771, who rightly argues that what shareholders own is not the company but its shares only.

72 Especially Michael C. Jensen and William H. Meckling, in one of the most cited scholarly articles to this day, titled "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure," *Journal of Financial Economics*, vol. 3, Issue 4(October 1976): 305 et seq., https://doi.org/10.1016/0304–405X(76)90026-X.

73 The term seems to have been coined by Alfred Rappaport, *Creating Shareholder Value, A Guide for Managers and Investors* (New York: Free Press 1986, updated edition 1997).

74 The value of an enterprise in this context is the sum of the value of debt and equity, while shareholder value is the difference between the value of an enterprise and the value of its debt. Critical about shareholder value see i.a. Joseph L. Bower and Lynn Paine Sharp in their article entitled "The Error at the Heart of Corporate Leadership," *Harvard Business Review Magazine* (May-June 2017), accessed November 10, 2022, https://hbr.org/2017/05/the-error-at-the-heart-of-corporate-leadership.

75 Cf. Subhabrata Bobby Banerjee,"Corporate Social Responsibility: The Good, the Bad and the Ugly," *Critical Sociology 34*, vol. 1(2008): 51 et seq., https://doi.org/10.1177/0896920507084623; Blanche Segrestin, Kevin Levillain, Stéphane Vernac and Armand Hatchuel, *La "Société à Objet Social Étendu", Un nouveau statut pour l'entreprise* (Paris: Presses des Mines, 2015); Clark Jr., and Babson, "How Benefit Corporations Are Redefining the Purpose,": 817 et seq.

both for society and the environment. The emergence of these qualitatively new organizations is an illustration of the process of creative destruction described by J. Schumpeter[76].

6. Advantages and disadvantages associated with the benefit corporations

What benefits may the introduction of regulations on benefit corporations bring? Obtaining such status allows the principles of corporate social responsibility to be permanently embedded in the concept of an entrepreneur. The above, in turn, translates into the achievement of benefits in the form of a good reputation of the company, building or strengthening the competitive

[76] Cf. Joseph A. Schumpeter, *Kapitalizm. Socjalizm. Demokracja* [*Capitalism. Socialism. Democracy*], transl. Michał Rusiński (Warszawa: Wydawnictwo Naukowe PWN 1995, second edition 2009): 1 et seq.; Hugo Reinert and Erik S. Reinert, "Creative Destruction in Economics: Nietzsche, Sombart, Schumpeter," in *Friedrich Nietzsche (1844–1900)*, ed. Jürgen Backhaus and Wolfgang Drechsler, *The European Heritage in Economics and the Social Sciences*, vol 3. (Boston, MA: Springer, 2006), 55 et seq., https://doi.org/10.1007/978–0-387–32980–2_4, who argue that the term itself is first used by German economist Werner Sombart, but the idea of 'creative destruction' enters the social sciences by way of Friedrich Nietzsche. See also Richard Foster and Sarah Kaplan, *Creative Destruction: Why Companies That Are Built to Last Underperform the Market—and How to Successfully Transform Them* (New York: Currency/Doubleday, 2001)*, who* show the need to change at the pace and scale of capital markets as well as cultural barriers that make it hard to change corporate cultures even in the face of clear market threats and prove that redesigning the corporation to change at the pace and scale of the capital markets is inevitable for corporations to survive over the long haul. See also an equally interesting proposal for capturing the described process presented by Israel M. Kirzner, *Competition and Entrepreneurship* (Chicago: University of Chicago Press, 1973), 1 et seq. and other works of that Author i.a. *Discovery and the Capitalist Process* (Chicago: University of Chicago Press, 1985); "Uncertainty, Discovery, and Human Action," in *Discovery and the Capitalist Process* (Chicago: University of Chicago Press, 1985) and "Creativity and/or Alertness: A Reconsideration of the Schumpeterian Entrepreneur," *The Review of Austrian Economics,* vol. 11(1999): 5 et seq. https://doi.org/10.1023/A:1007719905868, where the Author proposes a concept different from Schumpeter's innovating entrepreneur, whom not only is responsible for creating disequilibrium, but recognizes a disequilibrium situation; it is so called "entrepreneurial alertness". It remains an open question for now whether Schumpeter was right when he predicted that it was through the growth of large corporations that the transformation of capitalism into socialism would occur.

position of the company, better use of resources[77], a decrease in business risk and the cost of both own and foreign capital of the company[78]. Examples of many hybrid companies show how they have developed commercially viable business models for creating positive social and environmental impact[79]. An additional advantage is the normative status of the company and, depending on the jurisdiction, the tax or, more broadly, public law benefits that such status may entail.

On a macro level, the use of such entities in the economy affects the perception of the market itself, the rules of doing business, the place and social role of corporations, and shatters the old belief that 'it may not be done otherwise'.

Benefit corporations are at the same time a response to the doubts that may arise from a deeper analysis of the activities of not-for-profit entities and the already mentioned social enterprises and cooperatives. Will they be able to fulfill their role by entering the market[80], will they lose their identity

77 Cf. Manuel Castelo Branco and Lúcia Lima Rodrigues. "Corporate Social Responsibility and Resource-Based Perspectives," *Journal of Business Ethics* 69, no. 2(2006): 111 et seq., accessed November 10, 2022, http://www.jstor.org/stable/25123942.

78 Cf. Sadok El Ghoul, Omrane Guedhami, Chuck C.Y. Kwok and Dev R. Mishra, "Does corporate social responsibility affect the cost of capital?," *Journal of Banking & Finance* 35, Issue 9(2011): 2388 et seq., accessed November 10, 2022, https://ssrn.com/abstract=1546755; Phillip Krüger, "Corporate Goodness and Shareholder Wealth," *Journal of Financial Economics (JFE),* Forthcoming (July 7, 2014): 1 et seq., accessed November 10, 2022, https://ssrn.com/abstract=2287089 or http://dx.doi.org/10.2139/ssrn.2287089.

79 Cf. Haigh, and Hoffman, "Hybrid Organizations," 127 et seq.; Nardia Haigh and Andrew J. Hoffman, "The New Heretics: Hybrid Organizations and the Challenges They Present to Corporate Sustainability," *Ross School of Business Paper* No. 1344, *Organization & Environment* 27, vol. 3(2014): 223 et seq., http://dx.doi.org/10.2139/ssrn.2932327.

80 Cf. Philip Selznick and Jonathan Simon (introduction), *TVA and the Grass Roots: A Study of Politics and Organization* (Quid Pro, LLC, 2011):1 et seq. Philip Selznick writes about TVA grass-roots policy (administration) which means incorporation of certain local and national interests into the organization, considers an organization as an adaptive social structure. What is especially interesting is the *coöptation* process described by the Author as the process of absorbing new elements into the organizational structure as a means of survival.

in doing so[81], how will they be able to compete in the market[82]? Although numerous operational shortcomings and barriers to the development of such organizations are recognized, the growing number of social enterprises and cooperatives worldwide gives hope that such a socio-economic marriage is possible and, moreover, brings the expected results[83].

Although there have been numerous conceptual, theoretical and empirical studies relating to stakeholder theory, proving the operation of firms in society is becoming more complex and it is apparent that a new framework is required to manage stakeholders' needs, very little has been done to integrate the theory into practical process models which could be effectively implemented by the corporations. Benefit corporations are thus supposed to introduce a mechanism for liberation from the mandate, sometimes enforced by law, sometimes by legal tradition, and sometimes simply by the approach of the judiciary, to manage in the spirit of short-term shareholder value maximization and move toward the long-term interests of the company - governance[84].

Nonetheless, this peculiar liberation of management from shareholders and their expectations as well as the threat that managers may not be held accountable for taking actions contrary to shareholders' interests raises concerns. Is it possible for such companies to persevere in a competitive

81 Cf. the case of Facebook, that as Mark Zuckerberg himself wrote, "(…) was not originally created to be a company", but "(…) was built to accomplish a social mission — to make the world more open and connected".

82 Cf. especially about microfinance Roy Mersland and Øystein R. Strøm, "Microfinance Mission Drift?," *World Development,* vol. 38(1)(2010): 28 et seq., https://doi.org/10.1016/j.worlddev.2009.05.006.

83 Cf. Francisca Castilla-Polo and M. Isabel Sánchez-Hernández, "International orientation: An antecedent-consequence model in Spanish agri-food cooperatives which are aware of the circular economy," *Journal of Business Research*, vol. 152(2022): 231 et seq. https://doi.org/10.1016/j.jbusres.2022.07.038.

84 Cf. the relevance in this regard of the B corp certification assumptions see "Benefit Corporations", B Corp, accessed November 10, 2022, https://usca.bcorporation.net/benefit-corporation/.

market "serving two masters"? [85] It is stressed that stakeholderism in its pure form may lead to a reduction in the accountability of the company's managers and negatively affect the company's financial performance, which may also harm its stakeholders[86]. Is the Sustainability-Driven Hybrid Business Model suitable for a company of any size and shareholding structure? There are also doubts as to whether the creation of companies with special status may cause a certain division of the companies in the eyes of the public into good, sustainable enterprises and bad enterprises that do not care about the environment, with such evaluation made solely on the basis of a certain legal status. However, such a solution allows for a fairly straightforward identification of companies respecting social responsibility standards, and the competition thus created may have positive effects, since it may also lead to changes in traditional corporations wishing to match the standards of companies with a mission.

Opponents of benefit corporations also point out that regulations pertaining to these "pseudo-social enterprises" are leaky, lack mechanisms to enforce the responsibilities of the management board of the company, and create room for abuse and green-washing[87].

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85 Cf. Haigh and Hoffman, "Hybrid Organizations," 131 et seq.

86 Cf. Lucian Ayre Bebchuk, "The Case for Increasing Shareholder Power," *Harvard Law Review* 118, no. 3(2005): 833 et seq., accessed November 10, 2022, http://www.jstor.org/stable/4093350. Martin Friedman in the 1970 essay in the *New York Times*, *September 13, 1970, 17* wrote that the great virtue of private competitive enterprise is that "it forces people to be responsible for their own actions and makes it difficult for them to 'exploit' other people for either selfish or unselfish purposes". About the definition of a "stakeholders" see Edward R. Freeman and David L. Reed, "Stockholders and Stakeholders: A new perspective on Corporate Governance," *California Management Review* 25(3)(1983): 88 et seq., DOI:10.2307/41165018 ("the groups without whose support the organization would cease to exist"). In "Strategic Management: A Stakeholder Perspective" (Pitman, 1984) Martin Friedman wrote that an individual or group qualifies as a stakeholder if it affects or is affected by the organization's objectives. Cf. also Thomas Donaldson and Lee E. Preston. "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications," *The Academy of Management Review* 20, no. 1(1995): 65 et seq., accessed November 10, 2022, https://www.jstor.org/stable/258887 adding there are persons or groups with *legitimate interests* participating in the activities of the organization.

87 Cf. Kennan El Khatib, "The Harms of the Benefit Corporation," *American University Law Review* 65, Issue 1 Article 3(2015): 154, accessed November 10, 2022, https://digitalcommons.wcl.american.edu/aulr/vol65/iss1/3.

7. Should benefit corporations be implemented in Poland?

Should benefit corporations be introduced in Poland? Certainly, the issue is worth considering.

On one hand, the answer is 'no', as there is no justification why only certain companies should be subject to changes based on the need for a more balanced approach to doing business. The overarching goal of every corporation (which is not to say - in the same way) should be to operate a legitimate, ethical, profitable and sustainable business to ensure its success and increase in value over the long term[88].

On the other hand, the answer might be 'yes', since the formula *c*ombines the pursuit of profit with the goal of making a positive impact on society and the environment. It forces operations to be conducted in a transparent, responsible and sustainable manner.

Or perhaps there is no need to do so, in the sense that the legal regulations already in force in Poland allow social and environmental factors to be woven into business activities. This applies in particular to the purpose and interest of the company, which should be defined in the context of the regulations pertaining to the company, including financial reporting, certain reporting standards[89], remuneration policy, and especially the system of uniform classification of sustainable activities, through which it would be possible to determine whether an investment is environmentally sustainable

[88] Cf. Martin Lipton, Steven A. Rosenblum, William Savitt and Karessa L. Cain, "On the purpose of the corporation," *Harvard Law School Forum on Corporate Governance* (May 26, 2020), accessed November 10, 2022, https://corpgov.law.harvard.edu/2020/05/27/on-the-purpose-of-the-corporation/. See also The World Economic Forum, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution,* accessed November10, 2022, https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/?DAG=3&gclid=EAIaIQobChMIs9DhrdSj-wIVkqkYCh0s8gEJEAAYASAAEgIY2PD_BwE*, proclaiming that* "The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities and society at large. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to policies and decisions that strengthen the long-term prosperity of a company".

[89] Directive 2014/95/EU of the European Parliament and of the Council of October 22, 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (OJ L 330, 15.11.2014, p. 1–9).

to redirect capital flows towards sustainable investments[90], confirming and creating at the same time a certain axiology of the entire Community commercial law[91].

Shareholder primacy is a choice of managers and not an obligation under the law[92]. In the United States, too, where managers are subject to 'fiduciary duties' and hence the obligation to act in the interests of

90 EU taxonomy for sustainable activities: Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, that complements non-financial disclosure by companies in accordance with the requirements of Directive 2014/95/EU and Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (Non-Financial Reporting Directive, NFRD) (OJ L 182, 29.6.2013, p. 19–76). The scope of entities obliged to non-financial disclosure will be substantially extended as soon as the Corporate Sustainability Reporting Directive, CSRD enters into force (see: Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, COM/2021/189 final, accessed November 10, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A52021PC0189.

91 Cf. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23.2.2022, COM(2022) 71 final, 2022/0051(COD), accessed November 10, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071. The Directive will set out a horizontal framework to foster the contribution of businesses operating in the single market to the respect of the human rights and environment in their own operations and through their value chains, by identifying, preventing, mitigating and accounting for their adverse human rights, and environmental impacts, and having adequate governance, management systems and measures in place to this end. The aim of the Directive is to, i.a., improve corporate governance practices to better integrate risk management and mitigation processes of human rights and environmental risks and impacts, including those stemming from value chains, into corporate strategies; avoid fragmentation of due diligence requirements in the single market and create legal certainty for businesses and stakeholders as regards expected behavior and liability; increase corporate accountability and improve access to remedies for those affected by adverse human rights and environmental impacts of corporate behavior.

92 Cf. Lynn A. Stout, "The Mythical Benefits of Shareholder Control," *Virginia Law Review* 93, no. 3(2007): 789 et seq. http://www.jstor.org/stable/25050361.

shareholders as trustees, beneficiaries of 'entrusted' assets[93], this is already being recognized. The jurisprudence of the state of Delaware, which is orthodox in this area, increasingly emphasizes the advantage of value creation in the long term over profits in the short term[94]. Most states have enacted regulations that allow the interests of the company's stakeholders (other constituencies) to be considered as part of the decision-making process by the management (constituency statutes)[95].

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93 See Maryland Annotated Code, Corporations and Associations Article, 2–405.1; John Armour, Henry Hansmann and Reinier Kraakman, in: Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe and Edward Rock, *The Anatomy of Corporate Law. A Comparative and Functional Approach* (Oxford: Oxford University Press, 2017), 29.

94 Cf. Court of Chancery of Delaware, Judgement of March 7, 2014, *In re Rural Metro Corp.*, 88 A.3d 54 (Del. Ch. 2014) "shareholder primacy does not prohibit directors from considering the interests of constituencies other than shareholders, but those other constituencies may be considered only instrumentally to advance [shareholders' best interests])".

95 Pennsylvania (in 1983) was the first US state to introduce above mentioned regulation. As of today 41 states have incorporated constituency statutes - cf. Kathleen Hale, "Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes," *Arizona Law Review*, 45(2003): 823 et seq., accessed November 10, 2022, https://arizonalawreview.org/pdf/45–3/45arizlrev823.pdf. In particular, constituency statutes have never been introduced in Delaware, although in 2018 r. the Certification of Adoption of Transparency and Sustainability Standards Act was implemented. It establishes a voluntary disclosure regime to foster dialogue around sustainability and responsibility among participating Delaware business entities and their various stakeholders. Cf. Court of Chancery of Delaware, Judgement of October 29, 2009, *eBAY Domestic Holdings, Inc. v. Newmark*, Civil Action No. 3705-CC (Del. Ch. Oct. 29, 2009) where the court pointed out that "rational judgments about how promoting non-stockholder interests — be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture — ultimately promote stockholder value". The trend is less visible in M&A transactions - cf. especially Supreme Court of Delaware, Judgement of September 9, 2010, Revlon, Inc. v. Macandrews & Forbes Holdings, Inc., 506 A.2d 173, 66 A.L.R.4 157, Fed. Sec. L. Rep. (CCH) P92,525 (Del. Mar. 13, 1986) (the Revlon rule). See also Leo Strine, "Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future," *U of Penn, Inst for Law & Econ Research Paper* No. 19–39, *Harvard John M. Olin Discussion Paper* No. 1018(2019): 1 et seq., accessed November 10, 2022, https://ssrn.com/abstract=3461924 or http://dx.doi.org/10.2139/ssrn.3461924.

Nevertheless, in the United States, but - paradoxically - also in France, Italy where, as in Poland, board members are not burdened with a fiduciary duty to maximize shareholder value[96], legislators have decided to regulate benefit corporations, *Società Benefit* and *société à mission. Although* taking into account the long-term sustainability goals of the corporation is justified from an economic point of view and may have a positive impact on the efficiency of the company's activities, resulting in an increase in corporate value[97], certain *solutions* are still being introduced to identify the managers of the company against any liability for decisions made contrary to the assumptions of 'shareholder value'.

Why is this the case? Again, it is crucial to point out the view, well-established in the doctrine[98] and jurisprudence, according to which the com-

[96] Cf. Michigan Supreme Court, Judgement of February 7, 1919, Dodge v. Ford Motor Co., 204 Mich. 459, I70 N. W. 668 (1919), which represents a kind of censorship marking the moment in the US when shareholder value became a binding legal doctrine ("a business corporation is organized and carried on primarily for the profit of the stock-holders" and the board members cannot according to law, "conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others"); U.S. Supreme Court, Judgement of February 28, 1927, Tyson v. Bant, 273 U. S. 4I8 (1927) and equally well-known, controversial U.S. Supreme Court, Judgement of June 30, 2014, Burwell v. Hobby Lobby Stores, Inc. No. 13–354, 723 F. 3d 1114, affirmed; No. 13–356, 724 F. 3d 377 („Modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not"). Cf. Lynn A. Stout, "Corporations Don't Have to Maximize Profits," *New York Times*, April 16, 2015, https://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/corporations-dont-have-to-maximize-profits.

[97] Cf. i.a. Alex Edmans, *Grow the Pie. How Great Companies Deliver Both Purpose and Profit* (Cambridge: *Cambridge University Press*, 2020); Angeloantonio Russo and Francesco Perrini, "Investigating Stakeholder Theory and Social Capital: CSR in Large Firms and SMEs," *Journal of Business Ethics* 91, no. 2(2010): 207 et seq., accessed November 10, 2022, http://www.jstor.org/stable/27749791; Nancy E. Landrum, "Stages of Corporate Sustainability: Integrating the Strong Sustainability Worldview," *Organization & Environment* 31(4) (2018): 287 et seq., https://doi.org/10.1177/1086026617717456.

[98] Cf. only some of the publications Przemysław Bryłowski and Andrzej Kidyba, "Kategoria interesu w kodeksie spółek handlowych," *Przegląd Prawa Handlowego* 10(2005): 4 et seq; Adam Opalski, "O pojęciu interesu spółki handlowej," *Przegląd Prawa Handlowego* 11(2008): 16 et seq.; Paweł Błaszczyk, "Pojęcie interesu spółki handlowej. Gloss to the decision of the Polish Supreme Court of November 5, 2009, I CSK 158/09," *Glosa* 3(2012): 29 et seq.; Aleksander Kappes, "Interes spółki a interes wspólników/akcjonariuszy" in *Prawo handlowe. Między teorią, praktyką a orzecznictwem. Księga jubileuszowa dedykowana Profesorowi Januszowi*

pany is perceived through its interests, which determine its actions and outlines the scope of responsibility of its managers. Following an analysis of the views in Polish literature and jurisprudence, the conclusion may be drawn that, so far, the prevailing opinion is that the interest of the company is the same as the interest of its shareholders, which could be brought down to participation in the company's profit and increase in the value of shares as well as to the idea that the inclusion of the interests of other entities in the company's activities may negatively affect its financial performance[99]. This assumption is supported by expectations from investors, especially institutional investors.

The interests of the company are affected by the liability of members of the bodies towards the company for non-performance of improper performance of their duties. This is especially clear in the context of the business judgment rule, which means, or at least should mean, that board members have no obligation to increase shareholder value only[100]. In Poland, the new regulation of the principle of business judgment[101] differs from the BJR in the US, where it consists in a presumption, including procedural

A. Strzępce, ed. Piotr Pinior, Paweł Relidzyński, Wojciech Wyrzykowski, Ewa Zielińska, Mateusz Żaba (Warszawa: C.H. Beck, 2019), 163 et seq.; Iwona Gębusia, *Interes spółki w prawie polskim i europejskim* (Warszawa: C.H. Beck, 2017) and the Polish Supreme Court, Judgment of 5 November 2009, Ref. No. I CSK 158/09, reported in: OSNC Journal 2010, No. 4, Pos. 63.

99 Cf. especially Lucian Arye Bebchuk, "The Case for Increasing Shareholder Power," 833 et seq. Apart from the fact that there is no such thing as a single common interest of shareholders, it is a misconception that these interests are limited to the desire to make a profit. Cf. Daniel J.H. Greenwood, "Fictional Shareholders: 'For Whom is the Corporation Managed,' Revisited," *Southern California Law Review*, vol. 69(1996): 1021 et seq., accessed November 10, 2022, https://ssrn.com/abstract=794745 or http://dx.doi.org/10.2139/ssrn.794745; Lynn A. Stout, "The Shareholder Value Myth," (2013), stressing that benefit to the members is a result of the success of the company rather than a measure of that success; Thomas Clarke, "The Contest on Corporate Purpose: Why Lynn Stout was Right and Milton Friedman was Wrong," *Accounting, Economics, and Law: A Convivium* 10, no. 3(2020): 20200145. https://doi.org/10.1515/ael-2020–0145.

100 Cf. the case-law of the Delaware Supreme Court cited by Kennan El Khatib, "The Harms of the Benefit Corporation," 154.

101 Cf. 483 § 3 of the Law of September 15, 2000 – the Commercial Companies Act (Journal of Laws 2022, item 1467, as amended) and the German regulation - § 93 ust. 1 zd. 2 AktG, § 93 ust. 2 zd. 2 AktG.

presumption, of acting lawfully and in the interests of the company, based on the assumption that liability may only be linked to real discretionary decision-making up to a certain degree. If the board members do not have a conflict of interest, have exercised due diligence and acted in good faith, their decisions may not be evaluated on their merits, let alone challenged in court. This includes actions that 'sacrifice' profit of shareholders for the sake of the interests of 'other constituencies', and thus the long-term interests of the company itself[102]. The above raises the additional question that even despite the adoption of the Integrative Corporate Purpose, the actions of board members undertaken in the long-term interest of the company will be open to challenge by Polish courts.

I have dedicated another publication[103] to the issue of the interest of the company and how it may be understood. Without repeating the arguments outlined therein, I will only say that the view that the interest of the company is an intra-corporate category[104] should be reconsidered[105], since the corporation as an economic institution also has a social function and is placed outside the company, in society[106].

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102 Cf. Kennan El Khatib, "The Harms of the Benefit Corporation," 154.

103 Justyna Dąbrowska, "Growth or development, welfare or well-being? Considerations on the corporate interest in the light of institutional economics," *Studia Prawa Prywatnego* (2022) (in the process of publication) and the literature cited therein.

104 Michał Romanowski, "Znaczenie sporu o metodę odczytywania pojęcia <<interes spółki kapitałowej>>," 10.

105 Cf. E. Merrick Dodd, Jr., "For Whom Are Corporate Managers Trustees?," *Harvard Law Review* 45, no. 7(1932): 1145 et seq. https://doi.org/10.2307/1331697; John L. Campbell, "Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility," *The Academy of Management Review* 32, no. 3(2007): 946 et seq., accessed November 10, 2022, https://www.jstor.org/stable/20159343; Daniel J.H. Greenwood, "Fictional Shareholders: 'For Whom is the Corporation Managed,' Revisited," 1021.

106 Cf. David Steingard and William Clark, "The Benefit Corporation as an Exemplar of Integrative Corporate Purpose (ICP): Delivering Maximal Social and Environmental Impact with a New Corporate Form," *Business & Professional Ethics Journal* 35, no. 1(2016): 73 et seq., accessed November 10, 2022, https://www.jstor.org/stable/44074870 in which Authors define benefit corporation as "ethically superior model for promoting the common good".

8. Conclusions

Is the regulatory interference, then, the only way to introduce modern corporate governance in Poland in the spirit of the triple bottom line? If so, would it be sufficient to impose an obligation, at the statutory level, to outline major assumptions of the company's activity setting its purpose, without reducing such purpose to the sole object of economic activity of the company and with defining the interest of the company that goes beyond the interest of the shareholders themselves? It is also worth considering the French concept, where, notwithstanding the possibility of adopting the société à mission status, the revised commercial legislation allows the purpose of the company to be defined and, additionally, requires the social and environmental effects of the company's activities to be considered by the management? Or should benefit corporations appear in Poland?

This calls for a deeper and broader debate, but it is basically a question of what this new *Unternehmergeist* is supposed to be, and whether capitalism will survive?[107] In my view, what is crucial in these considerations is to accept that "management is clearly a social process"[108], and then to understand social entrepreneurship (social or civic entrepreneurship) not so much as a mechanism for arranging anew the subjective architecture of business forms, but more as a principle of participation in the market, a type of attitude, an approach to social problems, so that old or new enterprises could be seen as expressions of socially accepted values.

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[107] Schumpeter, *Kapitalizm. Socjalizm. Demokracja*, 75.

[108] Wygnański and Frączak, "Ekonomia społeczna w Polsce," 4.

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The Principle of Reliability of Business Trading in the Context of Personal Changes in Partnerships

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Abstract: The article presents the issue of personal changes in partnerships from the perspective of dangers to the interests of partners of such partnerships and third parties. The analysis is carried out primarily in the context of the norms concerning the national court register, but also the relevant regulations of the Code of Civil Procedure. On this basis, the author evaluates the current regulations and concludes that they pose significant dangers to both partners of partnerships and creditors as third parties. These dangers arise mainly from the way the system of presumptions provided for in the provisions of the Act on the National Court Register is shaped. The author refers to the *de lege ferenda* postulates expressed in the past and selects the optimal solution from the perspective of implementation of the principle of reliability of business trading, and also presents his own *de lege ferenda* proposals. In the author's opinion, in order to secure the interests of a partner withdrawing from a partnership against the risk of attempts to hold him/her liable for obligations arising after his/her membership in the partnership has ceased, it would be sufficient to grant such a person the right to file an application to remove him/her from the register of entrepreneurs as a partner of the partnership. On the other hand, in order to safeguard the interests of third parties, it would be advisable to broaden the scope of application of the norm arising from Article 14 of the Act on the National Court Register and subject the former partner of a partnership

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to the rigors of this regulation. In addition, in order to ensure greater transparency of the data disclosed in the register, in the author's opinion, it is advisable to consider the possibility of introducing, within the framework of the register of entrepreneurs, an institution similar to that provided for on the grounds of land and mortgage register proceedings, concerning the obligation of the court to disclose *ex officio* an identified inconsistency of the actual state of affairs with the state of affairs disclosed in the register of entrepreneurs.

1. Introduction

The issue of personal changes in partnerships has been the subject of interest of the doctrine in the past[1]. In this regard, a number of *de lege ferenda* postulates have been expressed, but to date they have not been widely reflected in the provisions of the Commercial Companies Code[2]. The developed

[1] Marcin Asłanowicz, "Zmiany w składzie wspólników spółek partnerskich oraz pozostałych osobowych spółek handlowych," *Prawo spółek*, no. 1 (2000): 20–26; Józef Frąckowiak, "O niektórych zagrożeniach dla handlowych spółek osobowych – szczególnie spółki jawnej," *Przegląd Prawa Handlowego*, no. 9 (2012): 14–20; Grzegorz Gorczyński, "Kilka uwag o tzw. zbyciu członkostwa w handlowych spółkach osobowych," *Prawo spółek,* no. 7–8 (2001): 13–23; Jarosław Grykiel, "Ochronna funkcja rejestru przedsiębiorców na przykładzie wpisów dotyczących spółek handlowych," *Przegląd Prawa Handlowego*, no. 12 (2012): 43–52; Andrzej Herbet, "Odpowiedzialność wspólników za zobowiązania handlowych spółek osobowych – zagadnienia materialnoprawne," *Rejent*, no. 6/146 (June 2003): 62–63; Jakub Janeta and Wiktor P. Matysiak, "O potrzebie reformy prawa spółek w zakresie regulacji spółek osobowych," *Przegląd Prawa Handlowego,* no. 9 (2012): 53–58; Andrzej Kidyba, "Kilka uwag o potrzebie zmian przepisów regulujących półki osobowe," *Przegląd Prawa Handlowego,* no. 9 (2012): 21–25; Grzegorz Kozieł, "Zakres przedmiotowy i podmiotowy przeniesienia praw i obowiązków wspólnika handlowej spółki osobowej," *Przegląd Prawa Handlowego,* no. 12 (2003): 39–44; Sebastian Kowalski, "Odpowiedzialność wspólników spółki jawnej za zobowiązania spółki," *Prawo spółek*, no. 7–8 (2003): 40–48; Marcin Podleś, "Odpowiedzialność wspólnika spółki jawnej wobec osób trzecich po wystąpieniu ze spółki za zobowiązania ze stosunków ciągłych," *Przegląd Prawa Handlowego,* no. 9 (2017): 47–51; Andrzej Wiśniewski, "Kilka uwag w sprawie reformy prawa osobowych spółek handlowych," *Przegląd Prawa Handlowego,* no. 9 (2012): 26–30; Aleksander J. Witosz, "Wpis do rejestru a odpowiedzialność wspólnika spółki osobowej," *Prawo spółek*, no. 7–8 (2009): 13–22.

[2] Commercial Companies Code of 15.09.2000, consolidated text: Journal of Laws 2022, No. 1467.

views of jurisprudence also do not allow to solve the problems recognized in the doctrine. Issues related to personal changes in partnerships are therefore still relevant, and in addition, the practice of applying the Commercial Companies Code has revealed new problems that require discussion and formulation of possible directions for their solution.

The article presents the issue of personal changes in partnerships from the perspective of the principle of reliability of business trading, in particular on the basis of the Act on the National Court Register[3]. The article is primarily intended to provide an answer to the question of whether, in the event of personal changes in partnerships, the applicable regulations adequately protect the interests of participants of commercial relations, including both partners of the partnerships and third parties. This issue will be considered on the example of a general partnership, but the comments formulated will be fundamentally applicable to other partnerships as well. On this basis, the *de lege ferenda* postulates presented in the past on related issues will be evaluated, and in addition, new *de lege ferenda* postulates will be formulated.

2. Protection of the former partner

Personal changes in partnerships include, among others, the joining of a new partner or the withdrawal of an existing partner. Under general partnership regulations, in the first case the issue of liability is resolved in Article 32 of the Commercial Companies Code, which provides for the liability of the person joining the partnership for its obligations arising before the date of joining. However, in the case of a partner withdrawing from the company, pursuant to Article 22 § 2 of the Commercial Companies Code, it is generally accepted that the partner remains liable for obligations arising up to the time of withdrawal, but is not liable for obligations arising from that point on[4]. Such withdrawal may occur on various grounds, which include, for example, termination of the partnership by a partner (Article 61 § 1 of

[3] Act on the National Court Register of 20.08.1997, consolidated text: Journal of Laws 2022, No. 1683.

[4] Grzegorz Nita – Jagielski, "Commentary to art. 22 Commercial Companies Code," in *Kodeks spółek handlowych. Komentarz*, ed. Jacek Bieniak (Legalis, Warsaw: C. H. Beck, 2022), paragraph 30; Asłanowicz, „Zmiany," 15; Podleś, "Odpowiedzialność," 48; Polish Supreme Court, Judgement of 18.12.2008 r., Ref. No. III CZP 126/08, OSNC 2009,

the Commercial Companies Code) or a creditor (Article 62 § 2 of the Commercial Companies Code), as well as the transfer of all rights and obligations to another person (Article 10 of the Commercial Companies Code). In all of these cases, the occurrence of one of the substantive legal grounds is sufficient for a consequence of termination of membership in the partnership, and the entry in the register of entrepreneurs is of declaratory significance only[5]. The way of regulation of the liability of the withdrawing partner and the disclosure of such changes in the register of entrepreneurs creates a significant risk of violation of the interests of this person.

This risk results primarily from the principle of the presumption of the authenticity of entries in the register of entrepreneurs, formulated in Article 17 of the Act on the National Court Register. In the event of withdrawal from the partnership, a partner is no longer liable for obligations that have arisen since the legal basis for withdrawal occurred, but for a certain period of time this person still remains listed in the register of entrepreneurs. This creates a risk of attempts by the partnership's creditors to hold him/her liable for obligations arising after the withdrawal, i.e. at a time when he/she no longer had any influence on the partnership's contracting and performance of its obligations. Several possible courses of action can be considered to address this problem. First, consideration should be given to Article 14 of the Act on the National Court Register, which expresses the principle of substantive publicity of register of entrepreneurs in negative perspective. The purpose of this regulation is to motivate the entity obliged to file an application to do so as soon as possible[6], on pain of not being able to invoke against *bona fide* third parties any data that has not been entered in the register or has been deleted from the register. However, the entity entitled and at the same time obliged to file the application

No. 11, pos. 150; Appellate Court in Kraków, Judgement of 19.04.2018 r., Ref. No. I Aga 117/18, Legalis.

5 Grykiel, "Ochronna," 50; Witosz,"Wpis do rejestru," 13.

6 Paweł Popardowski, "Commentary to art. 14 of Act on National Court Register," in *Ustawa o Krajowym Rejestrze Sądowym. Komentarz*, ed. Konrad Osajda (Legalis, Warsaw: C. H. Beck, 2022), paragraph 4; Agnieszka Michnik, "Commentary to art. 14 of Act on National Court Register," in *Ustawa o Krajowym Rejestrze Sądowym. Komentarz*, ed. Agnieszka Michnik (Warsaw: Wolters Kluwer, 2013), paragraph 1.

is only the partnership, not the former partner[7]. From the perspective of Article 14 of the Act on the National Court Register, the partnership does not have sufficient motivation to file an application to update the data, since this change does not affect the liability of the partnership or the current partners in any way. It is only relevant to the former partner, who, however, cannot file an application to the register of entrepreneurs.

Secondly, it is also necessary to take into account the provision of Article 15 (3) of the Act on the National Court Register, which is one of the manifestations of the substantive openness of the entry in positive perspective, and which grants a third party the opportunity to rely on documents and data in respect of which the obligation to make an announcement has not yet been fulfilled, if the failure to make an announcement does not deprive them of legal effects[8]. The former partner should be treated as a third party in relation to the entity obliged to file for the announcement[9], which gives a chance to ensure an adequate protection of his/her interests. However, attention should be drawn to the resolution of the Polish Supreme Court of 05.12.2008, which considered the issue of validity of legal act performed by a former member of the management board of a limited liability company before his/her removal from the register of entrepreneurs[10]. In that ruling, the Supreme Court stated that Article 15 (3) of the Act on the National Court Register only allows to invoke the fact that a particular person joined the management board prior to publishing this information in the register of entrepreneurs. At the same time, however, it was emphasized that this provision does not give grounds for a third party to challenge the validity of an act performed by a person registered in the register of entrepreneurs

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7 Also: Witosz, "Wpis do rejestru," 18; Andrzej Nowacki, "Jawność materialna Krajowego Rejestru Sądowego," *Prawo Spółek,* no. 5 (2007): 36.

8 The doctrine has expressed the view that, contrary to the literal wording of the provision, this regulation concerns the obligation to file an aplication to the register, and not the announcement itself (Witosz, "Wpis do rejestru," 7–8; Monika Dębska, "Commentary to art. 15 of Act on National Court Register," in *Ustawa o Krajowym Rejestrze Sądowym. Komentarz*, ed. Monika Dębska (Warsaw: Lexis Nexis, 2013), paragraph 1).

9 Grykiel, "Ochronna," 48.

10 Polish Supreme Court, Resolution of 05.12.2008, Ref. No. III CZP 124/08, Legalis, with gloss of Zbigniew Kuniewicz (OSP 2010/1/1) and Aleksander Jerzy Witosz, (*Przegląd sądowy*, no. 10 (2009): 130–141). This ruling has partially lost its relevance, but not with respect to the issues raised in the article.

as a member of the management board of a limited liability company on the grounds that he/she was not removed from the register of entrepreneurs, despite his/her removal from office. According to the Supreme Court, this provision should be interpreted strictly and applied only to events that are the basis for entry in the period prior to entry, but the regulation does not apply to the reverse situation, involving the existence of grounds for removal from the register in the period prior to removal[11].

If the above view of the Supreme Court were to be adopted and applied to the situation at hand, it would have to be concluded that a former partner of a general partnership, despite the existence of a substantive legal basis for the cessation of his/her membership in the partnership, could not rely on this fact before removal from the register and the making of the announcement. Instead, it would have to be assumed that the presumption of Article 17 of the Act on the National Court Register, as to which a third party (partner) cannot prove that the entry in the register was not true, is upheld[12]. Such an interpretation seems difficult to accept, and as a result, the cited ruling of the Supreme Court has met with criticism in the doctrine, where attention has been drawn in particular to the argument that under Article 20 (4) of the Act on the National Court Register, the removal from a register shall also be deemed as the entry in the register, and there are no obstacles to rebutting the presumption of Article 17 of the Act on the National Court Register through available means of evidence[13]. However, this does not change the fact that the ruling was passed in the form of a resolution and was also reflected in subsequent case law[14]. Therefore,

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11 In doing so, the Supreme Court consistently refers to the moment of entry in the register of entrepreneurs, despite the fact that Article 15 (3) of the Act on National Court Register refers to the announcement of entry.

12 The justification for the resolution suggests that the Supreme Court considers the presumption in Article 17 of the Act on National Court Register to be an irrebuttable presumption.

13 Aleksander J. Witosz, "Glosa do uchwały SN z 05.12.2008 r., III CZP 124/08," *Przegląd Sądowy*, no. 10 (2009): 137–138; Agnieszka Michnik, "Commentary to art. 15 of Act on National Court Register," in *Ustawa o Krajowym Rejestrze Sądowym. Komentarz*, ed. Agnieszka Michnik (Warsaw: Wolters Kluwer, 2013), paragraph 5.

14 Appellate Court in Szczecin, Judgment of 04.10.2021, Ref. No. I ACa 363/21, Legalis; Polish Supreme Court, Judgement of 10.03.2021, Ref. No. V CSKP 64/21, Legalis, in which the Supreme Court approved the view expressed in resolution III CZP 124/08, although it ultimately did not apply it to the case at hand, but due to a difference in the factual status.

there is a certain probability that in the event of a dispute between a creditor of the partnership and a former partner not removed from the register, the court reviewing the case will adopt a view analogous to that presented by the Supreme Court in the cited ruling.

Another possible course of action to protect the former partner is to notify the registry court of the partnership's failure to file the required documents in order to prompt the court to take action under Article 24 (1) of the Act on the National Court Register and summon the partnership as the party obliged to file the relevant application under penalty of a fine (Article 24 (1), (1b) and (2) of the Act on the National Court Register). Practical experience shows, however, that such actions do not yield quick results. Leaving aside the time taken by the registry courts to process such applications, in the context of the potentially multi-stage nature of this procedure, there is a risk that a long time may elapse between the former partner's action and the final disclosure of withdrawal from the partnership.

It should also be noted that the provision of Article 18 (1) of the Act on the National Court Register provides for liability of the registered entity for damage caused by failure to submit data subject to mandatory registration, based on the principle of strict liability[15]. This provision may form the basis of the partnership's liability towards the former partner. The scope of compensation may include, among other things, the costs of legal assistance incurred for the defense before the claims of partnership's creditor. In the event of losing a lawsuit brought by a creditor of the partnership against a former partner, e.g. as a result of the adoption by the court recognizing the case of the view expressed in the resolution of the Supreme Court of 05.12.2008, the compensation of the former partner would also include the amount ordered from that partner to the creditor of the partnership. In practice, however, this solution does not provide sufficient protection for the former partner. Since the partnership's creditor has decided to pursue claim against the partner, enforcement against the partnership must have

To a certain extent, the resolution III CZP 124/08 is also referred to in the judgment of Polish Supreme Court of 12.01.2022, Ref. No. II CSKP 212/22, Legalis.

15 Paweł Popardowski, "Commentary to art. 18 of Act on National Court Register," in *Ustawa o Krajowym Rejestrze Sądowym. Komentarz*, ed. Konrad Osajda (Warsaw: C. H. Beck, 2022), paragraph 5.

had been ineffective and therefore the former partner will not be able to enforce his/her claim against the partnership either. Although Article 18 (2) of the Act on the National Court Register extends the scope of the liability in question to persons liable for the partnership's obligations with all their assets, and therefore in a general partnership - to all current partners, but also from this perspective the level of protection is not sufficient[16]. The former partner is still exposed to the need to participate in a lawsuit brought by a creditor of the partnership, as well as the risk of losing the lawsuit and bearing the enforcement proceedings, and in return he/she only receives a potential opportunity to claim damages from the current partners.

An additional risk for the former partner arises from Article 778^1 of the Code of Civil Procedure[17], which provides for the extended enforceability of an enforcement title issued against a partnership. This provision allows such a title to be appended with a writ of enforcement against a partner bearing liability without limitation with all his assets for the partnership's obligations, if enforcement against the partnership proves ineffective, as well as when it is obvious that enforcement will be ineffective. At the same time, an additional restriction has been introduced, according to which it is not possible to grant a writ of enforcement against a person who, at the time of the initiation of the proceedings in the case in which the enforcement title against the partnership was issued, was no longer a partner of the partnership[18]. The court reviewing the application for a writ of enforcement against the partner will therefore be required to verify the premise of ineffectiveness of enforcement against the partnership, as well as to determine whether the requested person is a partner[19]. The latter circum-

16 Aleksander J. Witosz comes to similar conclusions ("Wpis do rejestru," 19), considering the situation of a creditor who directs claims against a former partner who has not yet been removed from the register.

17 Code of Civil Procedure of 17.11.1964, consolidated text: Journal of Laws 2021, No. 1805.

18 This restriction was introduced as a result of a ruling by the Polish Constitutional Tribunal, which, in a judgment of 03.10.2017, Ref. No. SK 31/15 (OTK-A 2017, item 62) stated that Article 778^1 of the Code of Civil Procedure, to the extent that it allows the court to grant an enforcement title, issued against a general partnership, a writ of enforcement against a former partner of that partnership who is no longer a partner at the time of the initiation of proceedings in the case in which the enforcement title against the general partnership was issued, is inconsistent with Articles 45 (1) and 77 (2) of the Polish Constitution.

19 Kowalski, „Odpowiedzialność," 42.

stance will be examined with consideration of Article 786 of the Code of Civil Procedure, which regulates the burden of proof in the procedure for issuing the writ of enforcement and requires the applicant to provide evidence in the form of an official document or private document with an officially certified signature. Such a document will undoubtedly be an extract from the register of entrepreneurs. Given the presumption of Article 17 of the Act on the National Court Register, there is no basis for imposing an obligation on either the applicant or the court to verify in any other way whether the data disclosed in the register is up-to-date. However, in this situation, there is also a risk that the partnership has not yet fulfilled its obligation to file an application for removal of the former partner from the register of entrepreneurs. Thus, at the stage of the enforcement proceedings, the former partner has no possibility to defend himself, because in such a situation the rules of civil procedure do not provide for a hearing of the person against whom the writ is to be issued. The only defenses that can be considered subsequently are a complaint against the decision to grant the writ of enforcement (Article 795 of the Code of Civil Procedure) or an adverse action to enforcement (Article 840 of the Code of Civil Procedure). The admissibility of the latter for partners in the case of enforcement titles against a partnership has been ruled out by the Supreme Court[20]. What remains relevant, however, is the possibility of challenging the order granting a writ of enforcement on the grounds that one of the prerequisites indicated in Article 778[1] of the Code of Civil Procedure, concerning the fact of remaining a partner in a partnership, is not met[21]. However, it is likely that the former partner will obtain knowledge of the existence of the writ of enforcement and the possibility of filing a complaint only after the initiation of enforcement proceedings, which will expose him/her to additional

[20] Polish Supreme Court, Decision of 15.01.2021 r., Ref. No. II CSKP 4/21, Legalis; different position was presented by Paweł Grzegorczyk, "O związaniu wspólnika spółki jawnej wyrokiem zasądzającym świadczenie wydanym przeciwko spółce," *Polski proces cywilny*, no. 3 (2012): 500; see also: Paweł Popardowski, "Problematyka funkcjonowania spółek handlowych w obrocie gospodarczym na tle orzecznictwa Sądu Najwyższego z lat 2019–2021," *Glosa,* no. 2 (2021): 8–13.

[21] See also: Witosz, "Wpis do rejestru," 19; Dagmara Olczak – Dąbrowska, "Commentary to art. 778 (1) of Code of Civil Procedure," in *Kodeks postępowania cywilnego. Komentarz*, ed. Jerzy Szanciło (Legalis, Warsaw: C. H. Beck, 2019), paragraph 5.

costs and the need to participate in court proceedings. Also in this case, due to the previously cited Supreme Court resolution of 05.12.2008, the outcome of the proceedings is uncertain for the former partner.

It follows from the above remarks that the interest of a partner withdrawing from a partnership is significantly threatened, mainly due to the system of presumptions arising from the Act on the National Court Register. These regulations create the risk of holding a former partner liable for obligations that arose after his/her withdrawal from the partnership or, at the very least, exposing him/her to the risk of participating in lengthy litigation. In the past, *de lege ferenda* postulates have been formulated on the grounds of thematically related issues. Among them, there were two important proposals, the first of which concerned the introduction of a requirement of written form with an authenticated date for a contract transferring the rights and obligations in a partnership[22], and the second involved the introduction of either an obligation or a right for the withdrawing partner to file an application to remove him/her from the register of entrepreneurs[23]. However, as discussed in this article, the former concept does not provide a solution to the problem outlined, because the introduction of the requirement of written form with an authenticated date does not itself create sufficient motivation for the immediate disclosure of the change in the register of entrepreneurs and from the perspective of the reliability of business trading it is precisely this issue that is of the greatest importance. In addition, personal changes in partnerships also include situations other than the transfer of all the rights and obligations of a partner (e.g., unilateral termination of the partnership agreement). Therefore, the second of the referred solutions is more justified. In choosing between the two options presented, it should be concluded that, in order to safeguard the interests of the former partner, it would be sufficient to grant this

22 Kidyba, "Kilka uwag," 23; Janeta and Matysiak, "O potrzebie," 55.

23 Grykiel, "Ochronna," 51; Janeta and Matysiak, "O potrzebie," 55; Daniel Dąbrowski, "Forma umowy przeniesienia ogółu praw i obowiązków w handlowej spółce osobowej," in *Restrukturyzacja przedsiębiorcy i jego przedsiębiorstwa*, ed. Michał Kuźnik, Aleksander J. Witosz, (Warszawa: C. H. Beck, 2018), 193; Witosz, "Wpis do rejestru," 20; Gorczyński, "Kilka uwag," 17. Regardless, the introduction of a time limit for the liability of the withdrawing partner was considered (Podleś, "Odpowiedzialność," 49–50). The view was also expressed that the existing solution is sufficient (Asłanowicz, "Zmiany," 23).

person the right (without imposing an obligation) to file an application for removal from the register of entrepreneurs. In order to decide whether this solution should be extended in some way, it is necessary to analyze the issue at hand from the perspective of protecting the interests of a creditor of the partnership.

3. Protection of the creditor of the partnership

In the situation under analysis, the need to protect the creditor's interests arises primarily from the fact that, as a result of the withdrawal of a partner from the partnership, for a certain period of time there is an inconsistency between the real state of affairs and that disclosed in the register of entrepreneurs. As a result, the data entered in the register temporarily ceases to be true, resulting in a violation of the principle of reliability of business trading. In order to find a way to protect the creditor's interests, one may consider the application of the aforementioned Article 14 of the Act on the National Court Register. In this context, it should be determined whether sufficient protection is granted to the creditor by the restriction relating to the partnership as an entity obliged to file an application for entry in the business register, and concerning the impossibility of invoking against *bona fide* third parties data that has not been entered into the register of entrepreneurs. The answer to such a question should be negative. The norm arising from Article 14 of the Act on the National Court Register provides a sufficient protection of the creditor's interests with regard to those applications that directly concern the interests of the partnership as the entity obliged to file the application. However, the situation is different with regard to a former partner who is not obliged to file an application and whose interests are divergent from those of the partnership and the current partners[24]. Although the partnership is under a formal obligation to file an application within 7 days after the occurrence of any event justifying an amendment to the entry in the register (Article 22 of the Act on the National Court Register), and a breach of this obligation results in the possibility of liability for damage (Article 18 (1) and (2) of the Act on the National Court Register), but otherwise the partnership and the current partners have no direct interest in

[24] Also: Witosz, "Wpis do rejestru," 17–18.

removing the former partner from the register[25]. Such action is relevant only from the perspective of communicating the withdrawal of a given partner from the partnership and the associated lack of liability for the partnership's obligations that arose from the moment of withdrawal to third parties.

As a result, there is a risk that the partnership will not file the required application, and consequently the creditor will not be able to benefit from the solutions provided for in Article 14 of the Act on the National Court Register, since the former partner is not the entity required to file the application for removal from the register. If, in addition, one were to reject the view of the Supreme Court expressed in the resolution of 05.12.2008 and, in accordance with the doctrinal postulates, allow for the possibility of applying Article 15 (3) of the Act on the National Court Register in such a situation, the former partner would be able to invoke, without any limitation a circumstance not entered in the register, which in this case is the fact of the partner's withdrawal from the partnership and the consequent cessation of his/her liability. This would constitute a significant weakening of the position of the creditor, against whom a partnership in a similar situation would not be able to invoke data not entered in the register within the meaning of Article 14 of the Act on the National Court Register. Such a situation is not justified, since the need to protect the creditor in the manner provided for in Article 14 of the Act on the National Court Register in relations with the former partner is supported by the same arguments that are relevant in relations with the partnership as the party obliged to file an application. This is related first and foremost to the principle of reliability of business trading, the manifestation of which is the need to ensure the timeliness of the data disclosed in the register of entrepreneurs, with measures to force obliged entities to update the data as soon as possible and at the same time to protect third parties in the event of failure to fulfill these obligations. In the context of the postulate formulated in the previous part of the article concerning granting a former partner the right to file an application for his/her removal from the register of entrepreneurs, it should be stated that in order to secure the interests of the partnership's creditor as a third party, it is desirable to extend the restriction of Article 14 of the Act on the National Court Register to this former partner as well, e.g. by

[25] Similar position was expressed by Gorczyński, "Kilka uwag," 17.

changing the scope of application of the norm and extending it to the entity obliged or authorized to file an application. At the same time it would be necessary to determine that in such a situation the former partner is not considered a third party within the meaning of Article 15 (3) of the Act on the National Court Register.

In addition, consideration may be given to introducing a regulation modeled on Article 626^{13} of the Code of Civil Procedure, providing for the obligation of the court to make an *ex officio* warning about the discrepancy between the state disclosed in the land and mortgage register and the actual state of affairs. From the perspective of the issues considered in this article, this is important for the reason that even if a partner withdrew from the partnership, e.g. as a result of the termination of the agreement or the transfer of all rights and obligations to another person, and then filed an application for removal from the register of entrepreneurs as a partner (part 7 of section 1 of the register of entrepreneurs), this person still does not have the means to force the current partners to adjust the partnership agreement to the new situation (e.g. in terms of the partnership's name), as well as to unify all data in the register of entrepreneurs. The mere removal of information about being a partner, while maintaining other data that may indicate the status of a partner, may be misleading and create a risk for the interests of other trading participants. In order to safeguard them, it would be sufficient to introduce an obligation for the registry court to enter a warning about the inconsistency of the state disclosed in the register with the actual state. This would be a clear signal that not all the data are up-to-date, and with a full analysis of the excerpt from the register of entrepreneurs, it would give a third party the opportunity to obtain information about the circle of persons being the partners of the partnership.

4. Final conclusions

The analysis of the title issue in the context of protecting the interests of the former partner of a partnership and the creditors of such a partnership leads to the conclusion that in order to ensure the implementation of the principle of reliability of business trading to a higher degree, it is desirable to introduce two types of changes. On the one hand, in order to ensure the protection of the interests of the former partner, this person should be given the right to file an application for his/her removal from the register.

This would be of importance, in particular, in a situation in which the partnership fails to fulfill this obligation. On the other hand, in order to ensure the protection of the interests of the partnership's creditor, the scope of application of Article 14 of the Act on National Court Register should be extended by including the former partner of a partnership. With such a solution, a former partner would have to reckon with the fact that if he/she failed to file an application, this person would not be able to invoke his/her withdrawal from the partnership against its creditor. Such a solution would provide sufficient incentive for a partner to ensure that the data in the register of entrepreneurs is updated, which in turn would ensure more complete implementation of the principle of reliability of business trading. From the perspective of creditors, in turn, it would allow them to ensure that their interests are protected and that their claims can also be asserted against a partner who neglected to take steps to update the data.

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Procedural Flaws of Shareholders' Resolutions – a Comparative Approach

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Abstract: The paper discusses legal consequences of violations of law which may occur in the course of passing resolutions by shareholders or when convening the meeting. Such violations take the form of procedural infringements, as opposed to material defects which concern the subject matter of the resolution. Several jurisdictions were taken into account in order to demonstrate that illegality of the procedure does not need to imply nullity of resolutions. There are various instruments which, despite illegality, are intended to preserve the resolution. This is all about the balance of preferences: in company law there are definitely situations where legality should be less valued than stability and certainty.

1. Introduction

Shareholders pass resolutions which affect a great number of company matters which may range from the appointment of company directors[1] or other company officers[2] to the exclusion of shareholders from the company[3]. The decision made by shareholders does not need to be unanimous and if it isn't

1 E.g. Article 201 § 4 of the Polish Code of Commercial Companies and Partnerships of 2000 hereinafter referred to as 'CCC' (Journal of Laws of 2022, item 1467, 1488).
2 E.g. Article 215 § 1 CCC.
3 Article 418 CCC.

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it is still binding on all company members. Thus the nature of the resolution, at least in part, lies in that the will expressed by such resolution does not need to be the true will of all shareholders. In particular, it is certainly not the will of those who failed to attend the meeting, then those who voted against and those who abstained from voting. Nevertheless, what has been decided by resolution is deemed to be the will of all shareholders[4]. On one hand the decision making process in companies may not work differently as otherwise in some instances it could disrupt the expression by shareholders of their will and consequently hamper the company activity. On the other hand, since the will expressed in the resolution is deemed to be the will of all company members, rigorous rules laid down in statutory law must be complied with, i.e. rules that govern the process of passing resolutions. Those rules require the board of directors to take particular action before the resolution is to be made or they govern the course of shareholders' meeting, including the voting procedure. The first group of rules impose on the board the duty to summon the meeting prior to date of that meeting[5] or to make its agenda sufficiently detailed[6]. Other rules require that particular resolutions should be passed in a secret ballot[7] or provide that some shareholders are not entitled to vote[8]. Such rules may be called procedural or formal and consequently the defects which arise may be referred to as procedural (formal) flaws as opposed to defects which arise because of the violations of substantive law. However, the latter category of violations will not be discussed in this paper.

The violation of formal rules while convening the meeting or at the meeting renders the resolution passed imperfect. Such imperfection may lead to various consequences, which – considering various jurisdictions – range

4 Zbigniew Radwański, *System prawa prywatnego, Vol. II, Prawo cywilne – część ogólna* (Warsaw: C.H. Beck, 2008), 182; Piotr Antoszek, *Cywilnoprawny charakter uchwał wspólników spółek kapitałowych* (Warsaw: Wolters Kluwer, 2009), 279–280; Wojciech Popiołek, "Charakter prawny uchwał wspólników i organów spółek handlowych," *Przegląd Prawa Handlowego,* no. 9 (2014): 17; Józef Frąckowiak, "Charakter prawny uchwał organów spółek kapitałowych a ich zaskarżalność," *Przegląd Prawa Handlowego,* no. 9 (2014): 30–31.

5 E.g. Article 238 § 1 CCC.

6 E.g. Article 238 § 2 CCC.

7 E.g. Article 247 § 2 CCC.

8 E.g. Article 244 CCC.

from the possibility to annul the resolution to its absolute nullity or, in some instances, even non-existence of the resolution.

Defective resolutions may trigger a legal action where corporate relations are far from being perfect. In the case of conflicts between minority and majority shareholders or shareholders and members of the board even minor imperfections of the resolution may give rise to a court action being brought, e.g., by a minority shareholder against the company and the actual reason for such an action may be that the claimant desires to tease the company or the board rather than act in the best interests of the company. Hence, the significance of procedural defects of shareholders' resolutions is huge as is the way in which such violations are regarded in different jurisdictions. This paper seeks to explore how different company law systems handle formal violations committed while convening the meeting or at the meeting itself; it is also intended to examine the consequences of such violations. There are different instruments which may hamper shareholders or board members to bring the action against the company. Such instruments require thorough examination considering various approaches adopted in selected jurisdictions. Also, there are regulations that seem to encourage potential claimants to sue the company because of the violation of formal rules. They also demand a closer look.

2. Mechanisms which encourage shareholders to contest resolutions in a court of law

As for Polish law, the provisions of the Code of Commercial Companies and Partnerships, at least at first glance, seem to encourage shareholders to contest those resolutions that are formally defective, even in the case of minor defects. Pursuant to Article 252 (1) CCC and Article 425 (1) CCC all resolutions which violate the law, including formal rules, are null and void. Sticking to literal (textual) interpretation it must be concluded that minor and major flaws are equally significant: they both may lead to a successful court action and consequently a court decision declaring the nullity of the defective resolution. E.g., an unintended omission of the vote of a shareholder[9] whose voting power is just one per cent of the share capital is equally reprehensible as voting by a show of hands where secret ballot is the preferred

[9] Article 242 § 1 CCC.

option[10]. It goes without saying that the omission of one per cent of the share capital bears little effect on the final result of the vote, while voting openly in personal matters may exert huge influence on the ultimate result of the vote. Irrespective of such controversies the result of textual interpretation is clear and leaves little space for other conclusions. As a result, in both cases the resolution could be declared null and void[11].

Similarly encouraging seem to be time limits set for the court action for the declaration of nullity. They are pretty long, where the action is to be based on the violations of law. For instance, in the case of limited companies (*spółki z ograniczoną odpowiedzialnością*) shareholders may contest defective resolutions within six months from the date on which they learnt about the meeting (which is usually the same day as the date of the meeting) but the deadline can be even longer and amount to three years from the date of passing the resolution (Article 252 (3) CCC).

In other jurisdictions contesting resolutions on the basis of violations of law may seem even easier if we consider time limits and an open catalogue of persons entitled to file the court action. E.g., in Swiss law the declaration of nullity may occur with no time limit[12], while in Italian law the deadline fixed for the declaration of nullity is three years[13]. Under German

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10 Article 247 § 2 CCC.

11 As will be furtherly explained, conclusions arising from the court interpretation seem to contradict that view.

12 Dieter Dubs and Roland Truffer, "Commentary on Article 706b," in *Basler Kommentar Obligationenrecht II*, ed. Heinrich Honsell, Nedim Peter Vogt, and Rolf Watter (Basel: Helbing Lichtenhahn Verlag, 2016), 1063; Davide Jermini and Alex Domeniconi, "Commentary on Article 706b," in *Kurzkommentar Obligationenrecht*, ed. Heinrich Honsell (Basel: Helbing Lichtenhahn Verlag, 2014), 2243; Peter Böckli, *Schweizer Aktienrecht* (Basel: Schulthess, 2009), 2305; Peter Forstmoser, Arthur Meyer-Hayoz, and Peter Nobel, *Schweizerisches Aktienrecht* (Bern: Verlag Stämpfli, 1996), 266–267; Bertrand Schott, *Aktienrechtliche Anfechtbarkeit und Nichtigkeit von Generalversammlungsbeschlüssen wegen Verfahrensmängeln* (Zürich: Dike Verlag, 2009), 61; Brigitte Tanner, "Commentary on Article 706b," in *Handkommentar zum Schweizer Privatrecht*, ed. Roberto Vito and Hans Rudolf Trüeb (Zürich-Basel-Geneva: Schulthess, 2016), 755; Hans Michael Riemer, *Anfechtungs- und Nichtigkeitsklage im schweizerischen Gesellschaftsrecht (AG, GmbH, Genossenschaft, Verein, Stockwerkeigentümergemeinschaft)* (Bern: Stämpfli Verlag, 1998), 138–139.

13 Article 2379 (1) of the Italian Civil Code. There is no equivalent of the shorter 6 months' period specified in Article 252 § 3 CCC or Article 425 § 2 CCC. However, much shorter time limits concern resolutions on the increase of share capital, lowering the capital and

law time limits are virtually non-existent[14] as is the case in Spanish law in which the action for the declaration of nullity is subject to no time limits at all (Article 205 (1) of Spanish *Ley de Sociedades de Capital*).

As for those who may contest the resolution by the action for the declaration of nullity, Italian law provides that it may be brought by any person who has a legal interest in it (*la deliberazione può essere impugnata da chiunque vi abbia interesse*)[15], with a similar view being presented in Swiss law[16]. In Spain, each shareholder (*cualquier socio*) has the right to request the declaration of nullity as well as company director (*administrador*) or a third party (*tercero*)[17]. Under German law (§ 249 (1) *Aktiengesetz*) the declaration of nullity may occur on the application of each shareholder, member of the board or the board itself, however, unlike in Polish law, the shareholder's right is unconditional as he is under no obligation to prove any other further qualifications (such as, e.g., voting against the resolution or demanding that his objection against the resolution be recorded in the minutes of the meeting)[18].

Such provisions may seem to favour the shareholders or even encourage them to sue the company but it must be stressed that the possibility to bring the action by virtually everyone and with no time limits or where the periods for bringing the action are relatively long, is restricted to major defects which are either enumerated by law[19] or the interpretation of the

bond issuance (Article 2379-ter (1) of the Italian Civil Code). Even stricter time limits bind in public companies (Article 2379-ter (2) of the Italian Civil Code).

14 Martin Schwab, "Commentary on § 249," in *Aktiengesetz. Kommentar*, vol. 2, ed. Karsten Schmidt and Marcus Lutter (Köln: Verlag Dr. Otto Schmidt KG, 2015), Legalis 7; Erik Ehmann, "Commentary on § 249," in *Aktiengesetz. Kommentar*, ed. Hans Christoph Grigoleit (Munich: C.H. Beck 2013), Legalis 1. There are exceptions concerning merger resolutions, which was raised by Claudia Junker, Commentary on § 14 Umwandlungsgesetz in *Gesellschaftsrecht*, ed. Martin Henssler and Lutz Strohn (Munich: C.H. Beck, 2016), Legalis 1.

15 Article 2379 of the Italian Civil Code.

16 Dubs and Truffer, *Basler Kommentar*, 1063; Jermini and Domeniconi, *Kurzkommentar*, 2243; Böckli, *Schweizer Aktienrecht*, 2305; Forstmoser, Meyer-Hayoz and Nobel, *Schweizerisches Aktienrecht*, 266–267; Schott, *Aktienrechtliche Anfechtbarkeit*, 61; Tanner, *Handkommentar zum Schweizer Privatrecht*, 755; Riemer, *Anfechtungs- und Nichtigkeitsklage*, 138–139.

17 Article 206 (2) of the Spanish *Ley de Sociedades de Capital*.

18 Schwab, *Aktiengesetz*, Legalis 3, commentary on § 249.

19 The best example is Italian law; see Article 2379 of the Italian Civil Code.

law is such that it accepts only serious infringements of the procedure as grounds for nullity[20]. Thus it can be concluded that in the above mentioned jurisdictions it is relatively easy to bring the action for the declaration of nullity but reasons for nullity are scarce and limited.

3. Mechanisms for preserving shareholders' resolutions

We can proceed now to those instruments which have the potential of making shareholders less eager to contest resolutions. Time limits and a closed list of persons entitled to bring the action are the clearest example. This is true with many European jurisdictions but it is also worth mentioning that violations of statutory law in most cases are reasons for the annulment of the resolution rather than for the declaration of nullity. It means that shareholders are limited in their right to contest the resolution in the case of minor violations of law while serious infringements of the procedure (e.g. failure to call the meeting) are not subject to such limitations. The distinction between major and minor violations of law will be discussed later.

The so-called principle of significance is another example. In short, it means that violations of the procedure of making resolutions may lead to nullity only in those situations where such a violation could have had an impact on the contents of the resolution. Such a principle has not been laid down in Polish law since it regards all infringements of the procedure equally: e.g. under Article 252 § 1 CCC, if a resolution (including the procedure of making thereof) is contrary to the law, it is sufficient for the court to declare nullity provided that the action has been properly filed, irrespective of the gravity of the infringement. As a consequence, all violations of law may render the resolution invalid which could lead to unacceptable results because even minor flaws of the procedure might imply nullity of the resolution. This in turn renders shareholders' decisions very unstable and

[20] Swiss law seems to be a good example: under Article 706b of the Swiss *Obligationenrecht* „*Nichtig sind insbesondere [in particular] Beschlüsse der Generalversammlung, die (…)*". See also Dubs and Truffer, *Basler Kommentar*, 1062; Riemer, *Anfechtungs- und Nichtigkeitsklage*, 119. Nevertheless, nullity is considered an exceptional remedy; as a rule, especially in doubtful cases, defective resolutions should not be regarded as null and void but are subject to annullment by court action. See Forstmoser, Meyer-Hayoz and Nobel, *Schweizerisches Aktienrecht*, 260; Tanner, *Handkommentar*, 755. This topic will be more extensively discussed below.

remains in clear opposition to the need for certainty of corporate relations. Bearing that in mind one should ask if all infringements of procedural rules should lead to the nullity of the resolution or only those which could have had some effect on the result of the vote? Should the stability of resolutions be given priority over the legality of procedure in the situation where only minor violations occurred during the voting procedure or while convening the meeting. Most courts in Poland seem to agree with the view that where a violation of procedure could not have had any impact on the result of the vote the nullity of the resolution may not be declared[21], though there are authors who oppose this trend[22]. Violations which could have affected the result of the vote include the infringement of the principle that all 'personal' matters should be voted in a secret ballot[23], while most infringements belong to the category of those violations which, as a rule, should not imply the nullity of the resolution. Nevertheless, assessment should be made separately referring to individual cases rather than seeking to give a ready-made formula or solution[24].

Even clearer example of attempting to preserve defective resolutions rather than eliminating them may be found in those legislations where

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21 Polish Supreme Court, Judgement of 16 March 2005, Ref. No. III CK 477/04, unreported; Polish Supreme Court, Judgement of 12 October 2012, Ref. No. IV CSK 186/12, unreported; Polish Supreme Court, Judgement of 6 June 2018, Ref. No. III CSK 403/16, unreported; Roman Uliasz, *Nieważność uchwały zgromadzenia spółki kapitałowej* (Warsaw: C.H. Beck, 2018), 452–455; Jerzy Paweł Naworski, "Commentary on Article 425," in *Kodeks spółek handlowych. Komentarz*, vol. 3, ed. Radosław Potrzeszcz and Tomasz Siemiątkowski (Warsaw: Lexis Nexis, 2013), 1033–1034.

22 Małgorzata Dumkiewicz, "Glosa do wyroku SN z dnia 5 lipca 2007 r., II CSK 163/07," LEX/el. 2010; Katarzyna Bilewska, "Sprzeczność uchwały walnego zgromadzenia z ustawą jako przesłanka stwierdzenia jej nieważności na podstawie art. 425 § 1 KSH," *Palestra,* no. 3–4 (2008): 230–231.

23 Such as the election of members of the board.

24 This means that, e.g., preventing shareholders from participating in the meeting (failure to let them in the room in which the meeting took place), even if their share was irrelevant from the point of view of the result of the vote (e.g. 5 per cent while the resolution was passed by 75 per cent of the capital), may nevertheless lead to the nullity of the resolution because such shareholders may exert influence on the contents of the resolution not only through voting but also by means of asking questions or raising arguments for or against a given resolution. Their influence may be far more significant than that resulting from the percentage of their shareholding.

grounds for the declaration of nullity form a closed list and include the most serious infringements committed in the course of passing the resolution or while convening the meeting. For example, pursuant to Article 2379 of the Italian Civil Code the cases of nullity based on procedural infringements include the situation where the meeting has not been summoned (*mancata convocazione dell'assemblea*) and where the minutes of the meeting have not been taken (*mancanza del verbale*)[25]. It should be stressed that such serious violations of law may be taken into account by the judge *ex officio* (*l'invalidità può essere rilevata d'ufficio dal giudice*). In Italian law, the reasons for nullity of the resolution form a closed list (*numerus clausus*); any other cases in which the resolution is contrary to the law may give rise to the action for the annulment of the resolution. Consequently, the resolution is more difficult to contest in court and becomes more stable (e.g. shorter time limits for the court action).

Among jurisdictions which seem to make shareholders' resolutions more stable one should also mention Swiss legislation in which grounds for nullity are scarce and the preferred (default) instrument for deleting resolutions is the action for annulment rather than the action for the declaration of nullity. This principle plays a key role in doubtful cases in which it might be disputable whether declaration of nullity is permissible or maybe the action aimed at the annulment of the resolution is the sufficient instrument.

To approach this topic in detail it is worth emphasizing that Swiss law exemplifies cases of nullity but the list is open. Article 706b (1) of the Swiss *Obligationenrecht* provides that resolutions of the general meeting are null and void if they remove or restrict the right to participate in that meeting, the minimum voting right, the right to take legal action or other shareholder rights that are mandatory in law (*Nichtig sind insbesondere Beschlüsse der Generalversammlung, die das Recht auf Teilnahme an der Generalversammlung, das Mindeststimmrecht, die Klagerechte oder andere vom Gesetz zwingend gewährte Rechte des Aktionärs entziehen oder beschränken*). Pursuant to Article 706b (2) of the Swiss *Obligationenrecht* resolutions are null

[25] Article 2379 of the Italian Civil Code lists one more ground for nullity, namely the situation where the subject matter of the resolution is impossible or illegal (*impossibilità o illiceità dell'oggetto*). However, this is not a formal (procedural) defect since it concerns the substance (contents) of resolution.

and void if they restrict shareholders in their right to control the company beyond the degree that is legally permissible (*Nichtig sind insbesondere Beschlüsse der Generalversammlung, die Kontrollrechte von Aktionären über das gesetzlich zulässige Mass hinaus beschränken*). Under Article 706b (3) of the Swiss *Obligationenrecht* resolutions are null and void if they disregard the basic structures of the company limited by shares or the provisions on capital protection (*Nichtig sind insbesondere Beschlüsse der Generalversammlung, die die Grundstrukturen der Aktiengesellschaft missachten oder die Bestimmungen zum Kapitalschutz verletzen*).

Bearing that in mind, a few doubtful cases might arise. For instance, failure to notify shareholders of the meeting in due time is generally considered as a case for the annulment of the resolution rather than for nullity. However, if the failure was intentional and the delay was long, it may as well lead to nullity. Delays which do not exceed 10 per cent of the whole period are considered as grounds for the annulment but if the violation of shareholders' right to participate in the meeting was a major one, it may justify nullity[26].

A similar view is presented while discussing the case of passing a resolution which had not been put on the agenda. Though such resolution is generally subject to annulment, there are situations where it also could be null and void, in particular where failure to put it on the agenda was intentional or where the agenda consisted only of trivial resolutions and the intention was to discourage shareholders to attend the meeting in order to make such decisions (in their absence) they wouldn't have consented to if they had attended the meeting[27].

Gravity of the infringement is crucial in German law, too. Only serious and exceptional violations of law may cause nullity. The latter is not a typical consequence of illegality as is annullability of the resolution. Common violations of law committed in the process of passing the resolution or while convening the meeting include failure to convene the meeting or calling the meeting in a defective way, e.g. the meeting being called by an

[26] Böckli, *Schweizer Aktienrecht*, 2313, 1371; Forstmoser, Meyer-Hayoz and Nobel, *Schweizerisches Aktienrecht*, 261–262.

[27] Bertrand Schott, *Aktienrechtliche Anfechtbarkeit*, 160.

unauthorized body (§ 241 (1) of *Aktiengesellschaft*) or failure to take minutes of the meeting (§ 241 (2) of *Aktiengesellschaft*).

Another example of legislation which seeks to prioritize the stability of resolutions rather than allow for its contestation in court is Spanish law, though, unlike in German, Swiss or Italian law, not a single example of null resolutions is given. Instead, the Spanish *Ley de Sociedades de Capital* provides for the so-called *acuerdos nulos de pleno derecho* (resolutions which are null and void by operation of law) which include resolutions that are contrary to legal order (*acuerdos contrarios al orden público*). Where the resolution is in line with legal order it is considered effective though it may be annulled if the court action is brought in due time by those which have the right to do so.

4. Conclusions

Having said that, the following conclusions may be made: violations of law committed while convening the meeting or at a later stage (in the course of passing the resolution) may, but does not need to, lead to the nullity of shareholders' decisions. Illegality of the procedure resulting from the violation of formal rules does not need to imply nullity. Unlawfulness, at least procedural unlawfulness, may cause nullity but only certain cases of such unlawfulness suffer such a level of gravity that authorize the declaration of nullity, while minor contraventions generally leave the resolution untouched and stable. This is true irrespective of the source of this principle, be it statutory law as is the case of Swiss, German, Spanish or Italian legislations, or court decisions as in Polish law.

Bearing that in mind we can conclude that there is no absolute connection between illegality and nullity. Textual interpretation may lead to diverse conclusions, particularly if we take into account Article 58 § 1 of the Polish Civil Code which expressly provides that a juridical act contrary to the law is null and void. This regulation seems to combine illegality with nullity which seem to be tangled in a permanent bond. However, as was demonstrated above, nullity is not just a natural aftereffect of illegality. This observation is more theoretical in its character. In some cases, illegality, understood as failure to comply with the law, is simply consequenceless but from the point of view of company law it may be considered as an advantage. Corporate relations favour stability and certainty. Nullity, although

sometimes justified and necessary, is likely to endanger the trust and confidence which, in company law, is very much needed. This is all about the balance of preferences: in company law there are definitely situations where legality should be less valued than stability and certainty. Sometimes, being in line with the law must give way to other values which are even more desired.

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A Parent Company's Liability for Anti-Monopoly Damages to its Subsidiary's Creditors Considering the New Regulations of Corporate Groups

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Abstract: The operations of a corporate group managed by a parent and guided by a shared strategy and interests of the group may in some cases cause damage to a subsidiary's creditors. This study will in particular focus on the liability towards creditors for anti-monopoly damages caused by a breach of competition laws and not resulting from the binding orders of a parent company to its subsidiary. It is especially important to establish if and possibly how a parent's liability arises for anti-monopoly damages to its subsidiary's creditors where it's not related to a binding order, considering the special regulations of liability for damages caused by breaches of competition laws in the context of the new regulations of corporate groups.

1. Introduction

Dynamic changes in the economy force legislators to monitor real trends and to possibly regulate in the situations of risk to the stability and efficiency of the market, to the protection of its participants or consumers.

The formation of big international capital groups of complex structures is a clear trend in an open market economy. It can also be felt in the Polish internal market, since operation as part of a corporate group allows for a spreading of broadly-defined business risk, including tax optimisation,

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which is of benefit to a group as a whole[1]. Legal systems compete to offer good conditions for business in a given country, too, trying to create the friendliest possible legal environments and encourage entrepreneurs to invest their capitals in a given country.

Corporate groups, however, do run risks associated with the imbalanced interests of their members, the protection of minority holders and of creditors. The legislator[2] has therefore for some time now noted the need to regulate corporate groups[3] as private legal relations between a parent and its subsidiaries in order to address the interest of creditors, governing body members, and small partners (shareholders) in a subsidiary. In addition, the literature has voiced the fundamental postulate of sanctioning the interest of a capital group which could, in reasonable cases, replace the interest of a capital group member[4].

The work on framing and passing of the bill produced the Amendments to the Code of Commercial Companies ('the CCC') and Certain Other Acts of 9.02.2022[5], which became effective on 13.10.2022. As stated in the bill[6], the amendments are principally intended to regulate the corporate group laws (holding and concern legislation) by adding Chapter IV, entitled 'The Corporate Group' and including Articles 21^1 through 21^{16}, to the Code of Commercial Companies.

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1 According to Article1a Section 1 of the Corporate Income Tax Act of 15.02.1992, OJ of 2021, item 1800 as amended, the groups of at least two commercial companies having legal personalities and capital links ('tax capital groups') may also be taxpayers. For a tax capital group to be a taxpayer and derive benefits from this status, it must meet the requirements under Article 1a Section 2 of the Act and enter into an agreement to form a tax capital group.

2 Cf. e.g. a draft Amendment to the Code of Commercial Companies dated 28.07.2009, prepared by the Civil Law Codification Commission.

3 Paweł Błaszczyk, "Odpowiedzialność cywilna spółki dominującej w projekcie nowelizacji kodeksu spółek handlowych w zakresie grup spółek, cz. I," *Przegląd Prawa Handlowego* no. 2 (2010): 13–21.

4 Adam Opalski and Michał Romanowski, "O potrzebie zasadniczej reformy polskiego prawa spółek," *Przegląd Prawa Handlowego* no. 6 (2008): 4–11.

5 The Amendment to the Code of Commercial Companies and Certain Other Acts, OJ item 807.

6 The statement of reasons for the draft Amendment to the Code of Commercial Companies and Certain Other Acts, the Parliament of the 9 term, parliamentary form no. 1515, 2, accessed August 25, 2022, https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1515.

The drafter points out the regulation is incomplete on purpose and applies in particular to the so-called pure holding companies, whereas the intermediate holding companies (despite the repeal of the existing Article 7 of the CCC) continue to be allowed by virtue of the freedom of legal transactions under Article 353^1 of the Civil Code in conjunction with Article 2 of the CCC.

As defined in point 5^1 added to Article 4 §1 of the CCC, a corporate group is a parent company and its subsidiary or subsidiaries which are capital companies that, according to a resolution to join the corporate group, are guided by a shared strategy to realise their shared interest (of the corporate group), which substantiates the parent company uniformly managing its subsidiary or subsidiaries. Article 211 §1 indicates certain general assumptions different from the traditional perspective of the corporate law, whereby each company should be motivated by its own interest only, in that companies in a corporate group (both the parent and its subsidiaries) are motivated not only by an individual company's interest but also that of the group, insofar as it's not intended to harm a company's stakeholders, including its creditors.

The operations of a corporate group managed centrally by a parent and guided by a shared strategy and interests of the group may in some causes cause damage to a subsidiary's creditors. This study will in particular focus on the liability towards creditors for anti-monopoly damages caused by a breach of competition laws and not resulting from the binding orders of a parent company to its subsidiary as defined by Article 21^2 of the CCC. It is especially important to establish if and possibly how a parent's liability arises for anti-monopoly damages to its subsidiary's creditors where it's not related to a binding order, considering the special regulation of liability for damages caused by breaches of competition laws in the context of the new regulations of groups of companies.

2. The new tort a breach of competition law in private enforcement

Both the contemporary European Union law and the Polish legal order provide for a comprehensive model (system) of enforcing the competition law[7]

[7] Marian Kępiński, "Pojęcie i systematyka prawa konkurencji," in *System Prawa Prywatnego tom 15 Prawo konkurencji*, ed. Marian Kępiński (Warszawa: C.H. Beck i Instytut Nauk

which includes a public and private enforcement of the rules of competition. The public enforcement is pursued by the Office for Competition and Consumer Protection and courts handling appeals against the Office's decisions, while the private enforcement is implemented by individual entities harmed by the behaviour of other entities violating the competition law and filing their cases with courts.

The principal private law expected to facilitate seeking the rights of those harmed through the breaches of competition law in court is the Claims for Remedying of Damages Caused by the Breaches of Competition Law Act[8]. It introduces and defines some special principles of liability for anti-monopoly damages[9] and principles of actions for damages in civil proceedings. The Act's regulations implement the Directive 2014/104/EU of the European Parliament and of the Council[10].

Article 3 of the Damages Act is its substantive legal core, which states those responsible for infringements are bound to repair damages done to anyone through breaches of the competition law unless they are not in tort. This provision introduces a new form of tort to the Polish law – an infringement of the competition law. It also institutes independent grounds for the obligation to repair anti-monopoly damages, modifying the standard conditions of the liability in tort under Article 415 of the Civil Code for the purposes of this class of tort. These modifications, as Piotr Machnikowski points out, involve: (1) a limited group of those liable, (2) a special form of an act's illegality, (3) a reversed burden of proof (presumption of guilt), (4) a broadly defined group of those authorised to seek damages[11] – anyone can seek anti-monopoly damages to be repaired with a civil

Prawnych PAN, 2014), 11.

8 The Claims for Remedying of Damages Caused by the Breaches of Competition Law Act dated 21.07.2017, OJ item 1132, 'the Damages Act'.

9 Konrad Kohutek, *Szkoda antymonopolowa. Zasady odpowiedzialności oraz dochodzenia roszczeń odszkodowawczych* (Warszawa: Wolters Kluwer Polska, 2018), subsection 1.3., Lex/el.

10 Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (EU OJ L 349), 'the Damages Directive'.

11 Piotr Machnikowski, ''Komentarz do art. 3," in *Ustawa o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji. Komentarz,* ed. Katarzyna Lis-Zarias and Piotr Machnikowski (Warszawa: C.H. Beck, 2018), 84–86.

court, regardless of whether they are in a direct contractual relationship with those liable or not.

As part of private enforcement of claims for anti-monopoly damages, the following can be distinguished: (A) an action for consequential damages following on an anti-monopoly authority's decision finding an infringement of competition law – the so-called follow-on action; and (B) an action for stand-alone damages, without an authority's prior decision finding an infringement, that is, filed by a private claimant (victim) – the so-called stand-alone action[12]. To improve the efficiency and procedural effectiveness of follow-on actions and facilitate the pursuit of anti-monopoly damages, Article 30 of the Damages Act introduces the preliminary issue of administrative decisions by the Office for Competition and Consumer Protection. Such a decision (or a judgment by the Court for Competition and Consumer Protection concerning appeals against such decisions) binds on a civil court establishing the facts of an anti-monopoly tort[13]. This binding force applies to the person liable for damages (the recipient of an authority decision), therefore, the court may not establish any facts in this respect on its own. As far as stand-alone actions are concerned, on the other hand, a civil court determines the liability and the person responsible for anti-monopoly damages on an independent basis[14].

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12 Elżbieta Buczkowska and Marcin Trepka, "Brak przesłanek do zawieszenia postępowania przez sąd cywilny rozstrzygający sprawę o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji do czasu rozstrzygnięcia postępowania antymonopolowego lub odwoławczego od decyzji Prezesa Urzędu Ochrony Konkurencji i Konsumenta w przedmiocie tego samego naruszenia – uwagi na tle art. 177 § 1 k.p.c.," *internetowy Kwartalnik Antymonopolowy i Regulacyjny,* no. 4(10) (2021): 22.

13 Beata Wieczerzyńska, "Prejudycjalny charakter decyzji Prezesa Urzędu Ochrony Konkurencji i Konsumentów w kontekście odwrócenia ciężaru dowodu winy w sprawach prywatnego egzekwowania prawa konkurencji," in *Prawda w postępowaniu cywilnym. Quid est Veritas?,* ed. Monika Strus-Wołos and Mariusz Wieczorek (Radom: Wydawnictwo UTH Radom, 2021), 246.

14 Agnieszka Stefanowicz-Barańska, "Komentarz do art. 2," in *Ustawa o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji. Komentarz,* ed. Katarzyna Lis-Zarias and Piotr Machnikowski (Warszawa: C.H. Beck, 2018), 39–41.

3. The party liable for anti-monopoly damages

3.1. The party liable for anti-monopoly damages- entrepreneur in the functional sense

The Damages Act lays down the special rules of liability for damages caused by infringements of the competition law and points out, especially in Article 2 point 4 in conjunction with point 2, an entrepreneur under Article 4 point 1 of the Competition and Consumer Protection Act[15] who infringes on the competition law may be held liable for anti-monopoly damages. Article 2 point 1 of the Damages Act specifies an 'infringement of the competition law' means a breach of prohibitions set out in Article 101 or Article 102 of the Treaty on the Functioning of the European Union or those in Article 6 or Article 9 of the Competition and Consumer Protection Act (these prohibit agreements restricting competition or the abuses of a dominant status).

It is important in this connection to determine the range of entities capable of infringing on the competition law and thus becoming liable for anti-monopoly damages or to whom the liability for such damages can be attributed. It has already been noted only an entrepreneur under Article 4 point 1 of the CCPA, that is, defined for the purposes of the public anti-monopoly law, can be liable for anti-monopoly damages. Accordingly, (1) the entrepreneur defined by the Entrepreneurs Law; (2) individuals, legal entities and organisations without a legal personality but endowed with a capacity to enter into legal transactions by force of the Act that organise or provide public utility services which are not business activities under the Entrepreneurs Law; (3) private professionals operating in their own name and on their own account or carrying out business as part of their professions; (4) associations of entrepreneurs, namely, chambers, societies, and other organisations of entrepreneurs as well as the associations of such organisations are the entrepreneurs bound to follow the anti-monopoly law and its prohibitions against agreements restricting competition or against the abuses of a dominant status.

[15] The Competition and Consumer Protection Act of 16.02.2007, OJ of 2021, item 275, 'the CCPA'.

The literature notes the definition of entrepreneur under Article 4 Section 1 of the CCPA is designed not to define the entities treated as entrepreneurs but those capable of interfering with, restricting or eliminating competition and then to bind them with the prohibitions provided for by the Act. The term 'entrepreneur' as specified by the public law systemic definition under Article 4 of the Entrepreneurs Law[16] is used here and expanded with some entities that may affect competition although they are not clearly classified as entrepreneurs under the EL[17]. From the perspective of the competition law, the concept of entrepreneur needs therefore to be referred to any entities that, in a variety of their activities, take part in the market by offering goods and services and are thus capable of influencing the conditions of the market competition[18]. Article 4 point 1 of the CCPA defines 'the entrepreneur' broadly and focuses on its functional nature and an entity's activities rather than its legal and organisational status[19]. This means 'the entrepreneur' for the purposes of the competition law is treated functionally, as an entity in the economic sense[20].

3.2. The doctrine of a single economic body and its consequences for the competition and corporate laws

Since it is the characteristics of business activities in the market that decide the qualification of entities as entrepreneurs in the competition law, the same law lays down the definition of 'the capital group', a pioneering novelty in the Polish legal system contained already in the 2000 Act, that is, far earlier than in the current amendment to the corporate law. Article 4 Section 1 point 14 of the CCPA identifies a capital group as all entrepreneurs controlled, directly or indirectly, by a single entrepreneur, including the latter as well. The 'control' means, in line with Article 4 Section 1 point 4,

16 The Entrepreneurs Law of 6.03.2018, OJ of 2021, item 162 as amended – 'the EL'.

17 Maciej Etel, ''Kilka uwag o pojęciu „przedsiębiorca" w prawie ochrony konkurencji," *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 3(3) (2014): 80.

18 Grzegorz Materna, ''Komentarz do art. 4," in *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. Tadeusz Skoczny (Warszawa: C.H. Beck, 2014), 73.

19 Konrad Kohutek, *Glosa do postanowienia SN z dnia 24 września 2013 r., III SK 1/13* (Warszawa: Wolters Kluwer Polska, 2015), Section 1.3, Lex/el.

20 Cezary Banasiński and Monika Bychowska, „Pojęcie grupy kapitałowej na użytek polskiego i unijnego prawa konkurencji," *Przegląd Prawa Handlowego,* no. 12 (2011): 29.

that a group leader (the dominant entrepreneur) holds rights that allow for a decisive influence over another entrepreneur or other entrepreneurs (subsidiaries). The basic consequence of this separation of the capital group seems to be the assumption that the controlling (dominant) entrepreneur is responsible for actions undertaken by the controlled, subsidiary entrepreneurs[21]. This is close to the notion of the capital group understood as a single economic body which, though consisting of a number of separate legal beings, constitutes a single entity in economic terms[22].

This proceeding economisation of the application of competition has given rise, first in the United States, then in the European Union, and now in Poland as well, to a concept or perhaps already a doctrine of a single economic body or unit. Put simply, the theory assumes several formally independent entities are treated as one entrepreneur (undertaking in the EU meaning) if, in effect of their functional connections, they behave uniformly in the market and realise an identical economic purpose[23]. Thus, a capital group is a single organism, one economic entity.

The doctrine of a single economic body has at least two kinds of consequences for the anti-monopoly law. On the one hand, it allows for the exemption of agreements between members of a single economic unit from the prohibition stipulated by Article 6 of the CCPA (and Article 101 of the CJEU), since, guided by a shared strategy, mutual economic bonds, and a joint economic purpose, they are not independent entities in functional terms (while non-competition agreements can only be made between independent entities), they do not compete with each other and their cooperation has no effect on the conditions of market competition[24]. This exemp-

21 Michał Będkowski-Kozioł, „Komentarz do Artykułu 4. XIV Grupa kapitałowa," w *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. Tadeusz Skoczny (Warszawa: C.H. Beck, 2014), 196.

22 The Supreme Court's judgment of 21 December 2012, case V CSK 9/12, Lex No. 1311859. The court points out that, from the viewpoint of the anti-monopoly act, a capital group is treated as a single economic entity, while entrepreneurs in the same capital group are treated according to the doctrine of single economic unit.

23 Richard Wish and David Bailey, *Competition Law* (Oxford: Oxford Uniwersity Press, 2012), 92–94.

24 The President of the Office for Competition and Consumer Protection decision of 30.12.2014, case DOK-9/2014, 122–124, accessed August, 26, 2022, https://decyzje.uokik.gov.pl/bp/dec_prez.nsf/43104c28a7a1be23c1257eac006d8dd4/853b4211138c6d-

tion makes for the so-called safe harbour. It can be used by economic units where a subsidiary does not enjoy a real freedom of deciding its operations in the market, since its parent can issue orders and thus exercise a real control over its subsidiaries[25]. This will restrict the notion of entrepreneur and economic activities in relation to its literal and formal legal understanding.

On the other hand, and importantly for the subject matter under discussion, this doctrine expands the so-called boundaries of undertaking, whose economic motivation is aiming for synergies from the benefits of scale and scope arising from the economic integration of formerly independent entities[26] This in turn expands the subjective scope of anti-monopoly liability, assuming that an apparently independent entrepreneur in fact carries out the decisions made in the parent company's decision-making centre in the same economic unit, that whole unit should be legally liable for its actions[27]. Both the aspects of the doctrine of single economic unit are not directly grounded in law, but arise from and are developed as part of its application and analysed in literature.

The theory and concept of the single economic unit and the capital group, developed in the competition law, have been borrowed by the doctrine of

31c1257ec6007ba8f4/$FILE/Decyzja%20DOK%209_2014%20w%20sprawie%20porouzmienia%20%5BAgrotur-Marko-Texpol%20%5Dwersja%20BIP.pdf; a similar decision of the President of the Office for Competition and Consumer Protection dated 28.12.2017, case DOK-3/2017 151–152, accessed August, 26, 2022, https://decyzje.uokik.gov.pl/bp/dec_prez.nsf/43104c28a7a1be23c1257eac006d8dd4/86ddcc14923ba0e2c125823b004ae84b/$FILE/2017_12_28_DOK3_410_1_12_decyzja_DOK_3_2017%20wersja%20jawna.pdf [accessed: 26.08.2022].

25 Christopher Townley, "The Concept of an 'Undertaking': The Boundaries of the Corporation – A Discussion of Agency, Employees and Subsidiaries," in: *EC Competition Law: A Critical Assessment*, ed. Giuliano Amato & Claus-Dieter Ehlermann (Oxford: Hart Publishing, 2007), 17.

26 Zbigniew Jurczyk and Piotr Semeniuk, ''Koncepcja jednego organizmu gospodarczego w prawie ochrony konkurencji, Wydawnictwo Naukowe Wydziału Zarządzania UW, Warszawa 2015, 325," *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 5(5) (2016): 60–61.

27 Piotr Semeniuk, *Koncepcja jednego organizmu gospodarczego w prawie ochrony konkurencji* (Warszawa: Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2015), 34. The author seems to have conducted the most extensive analysis of the doctrine of the single economic body in the context of the competition in the specialist Polish literature.

corporate law. For instance, A. Szumański, addressing the issue of the holding company in corporate law, notes the holding company is a single economic body in economic terms and it's only from the legal viewpoint that it consists of entities that are independent from one another[28]. Likewise, A. Opalski and M. Romanowski identify the need to reform the Polish corporate law in relation to the corporate group, among other things, and say: 'The capital group is in fact a single economic body, though without a legal personality, as it is formed by legally separate capital companies that are organisationally subordinate to a parent company. The latter plays the role of <the brain> of an entire capital group, determining its strategy and the means to its implementation. … The effects of the capital group's economic integrity make one question some aspects of the civil law separation of the capital group members'[29].

It has already been noted that, in accordance with the Damages Act, anti-monopoly damages can be caused by entrepreneurs who infringe on the competition law. Since the doctrine of the single economic unit states a subsidiary entrepreneur (in a corporate group) cannot engage in independent market operations but must follow the guidelines (instructions) from the parent company, then, as indicated by C. Banasiński and E. Piątek, 'From the viewpoint of the Act [the CCPA], it doesn't matter whether actions contrary to the Act are undertaken by the dominant entrepreneur itself or via its daughter companies'[30]. In relation to corporate groups, the present amendment to the CCC reflects this view, since – contrary to the legislator's implied intention to create the interest of a corporate group as inherent in and balanced within a certain collective – the interest of a corporate group is in fact the interest of its majority shareholder, or parent company, which actually determines the group's strategy, issues instructions, usually informal, and subordinates the group members to its

[28] Andrzej Szumański, "Ograniczona regulacja prawa holdingowego (prawa grup spółek) w kodeksie spółek handlowych," *Państwo i Prawo*, no. 3 (2001): 20.

[29] Opalski, Romanowski, „O potrzebie zasadniczej reformy," 8.

[30] Cezary Banasiński and Eugeniusz Piontek, *Ustawa o ochronie konkurencji i konsumentów. Komentarz* (Warszawa: LexisNexis, 2009), 240.

own interest. The remaining members of the group (subsidiaries) are but instruments serving to realise the interest of the parent company[31].

3.3. The parent company's liability for anti-monopoly damages caused by its subsidiaries- the doctrine and the EU judicial decisions

To refer the foregoing observations to the key issue of determining the group of entities liable for an anti-monopoly loss, an answer should be attempted to the question whether liability for anti-monopoly damages can be attributed to a parent company operating in a corporate group which is a single economic body where damage is caused by the behaviour of its subsidiary.

It should first of all be noted the improved efficiency of seeking claims for anti-monopoly damages declared in connection with both the Damages Directive and the Polish Damages Act is impaired, since the EU regulations, and thus the Polish Act, fail to harmonise the rules of the parent's liability for damages, which is regarded as a regulatory gap in the Damages Directive that will cause great numbers of petitions for preliminary decisions to be filed with the Court of Justice[32]. This also gives rise to doubts in the literature.

The Polish doctrine, as voiced by P. Machnikowski[33] and D. Wolski[34], who are in agreement, points to the nature of the Polish Damages Act as a means of transposing the EU Directive, which means the CJEU is competent in determining the correct understanding of the notion of entrepreneur by interpreting the concept as it is used in Article 2 part 2 of the Damages Directive 2014/104/EU. The authors believe the subjective scope of 'the party liable for damages' in the Damages Act is sufficiently broad by reference to the meaning of an entrepreneur in the public competition law

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31 Aleksander Kappes, ''Rzekoma ochrona wspólników mniejszościowych w prawie holdingowym," *Przegląd Prawa Handlowego*, no. 8 (2022): 16.

32 Giorgio Monti, Chapter 3: "Liability issues not codified by the Damages Directive: how to fill such gaps?," in: *Private Enforcement of EU Competition Law. The Impact of the Damages Directive*, ed. Pier Luigi Parcu, Giorgio Monti and Marco Botta(Northampton: Edward Elgar Publishing, 2018), 49.

33 Machnikowski, "Komentarz do art. 3," 89.

34 Dominik Wolski, ''Komentarz do art. 3 pkt 2.1," in *Roszczenia o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji. Komentarz*, ed. Anna Piszcz and Aleksander Stawicki (Warszawa: Wolters Kluwer Polska, 2018) Lex/el.

and bringing the even more extensive concept of the single economic unit, born in the EU judicial decisions, to the field of private law relationships would be unreasonable. A certain dissonance can be felt here as, in this view, the CJEU is to interpret the meaning of entrepreneur (undertaking) in order to determine the subjective scope of the notion of the party liable for anti-monopoly damages, while the concept of the single economic unit, developed by the same court for the purposes of the interpretation, is to be ignored.

In objecting to and disputing the above view, reference must be made to judicial decisions, which instruct the view is to be respected. As Polish court decisions in anti-monopoly cases are still scant[35], the EU court rulings should be relied on, given in cases concerning the liability for anti-monopoly damages and making broader references to the decisions handed out in connection with the public application of competition laws.

In a desire not to incur the charge of non-obligatory application of the pro-EU interpretation in cases that don't affect the trade between the member states, it's useful to cite an apposite observation of the Supreme Court[36] that the public law of competition protection is not subject to the process of harmonisation, yet this doesn't exclude the possibility and rationality of using the *acquis communitaire* when interpreting the Polish anti-monopoly legislation (including the private enforcement), since, even given the absence of a formal obligation of a pro-Union interpretation, it can become a source of intellectual inspiration and an instance of legal reasoning and understanding of certain concepts that can prove useful to the interpretation of the Polish law[37]. This aspect will be utilised below.

It should also be noted the EU anti-monopoly law does not employ the term 'entrepreneur' (like the Polish law does) but 'undertaking' for

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35 Joanna Affre and Przemysław Rybicki, "Odpowiedzialność deliktowa uczestników kartelu – aspekty podmiotowe w świetle wybranego orzecznictwa," *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 3(9) (2020): 20. The authors point out that, until 2020, only the Regional Court in Gdańsk, out of all the regional courts in Poland, had heard four cases based on the Damages Act, with the suits admitted in two. The Regional Court in Warsaw, meanwhile, heard two actions against MasterCard and VISA concerning overcharging for interchange.

36 The Supreme Court's decision of 24 September 2013, case III SK 1/13, LEX No. 1380965.

37 The Supreme Court's judgment of 9 August 2006, case III SK 6/06, LEX No. 354144.

the entities bound to observe it. This term was not defined normatively before and its scope and interpretation were grounded in the decisions of EU courts. It now has its legal definition in Article 2 Section 1 point 10 of the so-called ECN+ Directive[38], which states 'an undertaking' under Articles 101 and 102 of the CJEU means any entity engaged in economic activities regardless of its legal status or a method of its financing. This definition is based on the so-called Höfner formula[39], developed and accepted by the EU judicial decisions. Like O. Odudu points out, the notion of undertaking serves to determine an entity a certain behaviour can be attributed to, among other purposes[40].

The EU court decisions arise, inter alia, from the latter assumption, declaring the question of determining which entity is bound to repair damages caused by an infringement of Article 101 of the CJEU is regulated directly in the EU law, since the writers of its treaties decided to use the term 'undertaking' as an autonomous notion in the EU law[41]. In connection with the subject matter discussed here, the concept should be understood to denote an economic unit even if, legally, it consists of several private individuals or legal entities[42]. This broad definition of undertaking did arise from the public legal application of the competition law (public enforcement), yet, as the Court has noted, actions for damages for infringing the rules of competition (private enforcement) are an integral part of the whole system serving to enforce those rules, therefore, the concept of 'undertaking' cannot have another conceptual scope in the context of public and another of

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38 Directive of the European Parliament and of the Council (EU) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, the so-called ECN+ Directive,accessed? August 27, 2022, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:32019L0001.

39 The CJEU judgment of 23 April 1991, case C-41/90 *Höfner and Elser v. Macrotron*, ECR [1991] I-1979, point 21. Cf. also the Court's judgment of 11 July 2006 in the case C–205/03 P FENIN v. the Commission, LEX No. 226721.

40 Okeoghene Odudu, "The Meaning of Undertaking within 81 EC," *Cambridge Yearbook of European Legal Studies,* no. 7 (2005): 211.

41 The CJEU judgment of 27 April 2017, case C-516/15 P *Akzo Nobel et alia v. the Commission,* EU:C:2017:314, point 46.

42 The CJEU judgment of 20 January 2011, case C-90/09 P *General Química et alia v. the Commission*, EU:C:2011:21, point 35.

the private enforcement[43]. W. Wurmnest sees this holistic approach as sensible, since the law is infringed upon by 'undertakings' defined in the light of the EU standards. The unit members of a given entity must be liable for damages as part of both the channels of the EU law enforcement system[44].

As a consequence and in line with the established decisions of the Court, the behaviour of a subsidiary that shows the features of a competition law infringement can be attributed to its parent where, in spite of its separate legal personality, such subsidiary does not determine its market behaviour autonomously but, in principle, implements the instructions from its parent, given in particular the economic, organisational, and legal bonds between these two legal entities. This is the case because, in the circumstances, the parent and the subsidiary are parts of the same economic unit and thus form a single undertaking as defined by the EU competition law[45]. Where the parent holds all or nearly all the capital of the subsidiary that has infringed upon the EU rules of competition, there is a challengeable presumption the parent does indeed have a decisive influence over its subsidiary[46]. The more recent court decisions stress it's not the holding of all or nearly all the capital of the subsidiary in itself but the degree of a parent's control over its subsidiary in connection with such capital holding that substantiates the presumption of a real decisive influence. In effect, a parent company holding all voting rights conferred by its shares in its subsidiary is in a situation parallel to that of a parent company holding all or nearly all the capital of a subsidiary, so that the parent is capable of determining the economic and commercial strategies of its subsidiary. A parent

43 The CJEU judgment of 14 March 2019, case C-724/17 *Vantaan v. Skanska Industrial Solutions Oy*, EU:C:219:2004, points 45–47.

44 Wolfgang Wurmnest, „Liability of "undertakings" in damages actions for breach of Articles 101, 102 TFEU: Skanska case C-724/17" *Common Market Law Review* Volume 57, Issue 3 (2020): 923, https://doi.org/10.54648/cola2020698.

45 The CJEU judgments of: 25 October 1983, case 107/82 *AEG-Telefunken v. the Commission*, EU:C:1983:293, points 49–53; 11 July 2013, case C-444/11 P *Team Relocations et alia v. the Commission*, EU:C:2013:464, point 157, and of 17 September 2015, case C-597/13 P *Total v. the Commission*, EU:C:2015:613, point 35.

46 The CJEU judgment of 10 September 2009, case C-97/08 P, *Akzo Nobel et alia v. the Commission*, LEX No. 513748; upheld by more recent decisions – the judgment of 27 January 2021, case C-595/18 P *The Goldman Sachs Group Inc. v. the Commission*, ECLI:EU:C:2021:73, point 32.

company holding all voting rights given by its shares in its subsidiary is capable, just like a parent company holding all or nearly all the capital of a subsidiary, of exerting a decisive influence over the behaviour of its subsidiary[47]. A parent company's liability is independent from its involvement in a cartel and even independent from the awareness of an infringement. In the light of the presumption identified above, evidence is sought not of a parent's participation in an infringement but only of its formally being part of an entity participating in an infringement. Any form of guilt on the part of a parent company is not necessary to impose a fine or provide grounds for fining a parent. It lets the Commission address its decision to impose a fine to a parent without the need to establish that parent's direct involvement in an infringement[48].

The above implies the liability of a parent company for the behaviour of its subsidiary, including the liability for anti-monopoly damages, is not subject to any doubts in the EU judicial decisions, which is fully understandable.

The Polish anti-monopoly legislation can also be said to include the subjective identity in the public and private enforcement[49]. This is corroborated in the Damages Act, where the definition of the party liable for damages refers, as mentioned before, to the notion of 'entrepreneur', regulated by the public competition law in the CCPA It will be reinforced after the implementation of the Directive 2019/1 – the so-called ECN+ Directive. Its motive 46 points out that 'to assure an effective and uniform application of Articles 101 and 102 of the CJEU, the concept of undertaking, included in Articles 101 and 102 of the CJEU and to be applied in accordance with the decisions of the Court of Justice of the European Union, shall

47 The judgment of 27 January 2021, case C-595/18 P *The Goldman Sachs Group Inc. v. the Commission*, ECLI:EU:C:2021:73, point 35.

48 The Court's judgment of 14.07.2011 in the case T190/06 *Total SA and Elf Aquitaine SA v. the Commission*, accessed August 28, 2022, https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:62006TJ0190_SUM&from=LV; and in more recent decisions – the judgment of 27 January 2021 in the case C-595/18 P *The Goldman Sachs Group Inc. v. the Commission*, ECLI:EU:C:2021:73, point 33.

49 Konrad Kohutek, "Odpowiedzialność odszkodowawcza przedsiębiorcy kontynuującego działalność gospodarczą sprawcy naruszenia prawa konkurencji. Glosa do wyroku TS z dnia 14 marca 2019 r., C-724/17," *Europejski Przegląd Sądowy*, no. 6 (2019): 40.

mean an economic unit even if the latter consists of several natural or legal entities.' As a result, national competition protection authorities should be able to apply the notion of undertaking in order to find a parent company liable and to punish it for practices exercised in any of its subsidiaries, where the parent and the subsidiary are part of a single economic unit. To prevent undertakings from avoiding liability for fines imposed for some infringements of Articles 101 and 102 of the CJEU by introducing some legal or organisational changes, national competition protection authorities should be able to trace legal or economic successors to a liable undertaking and to penalise such successors for the infringements of Articles 101 and 102 of the CJEU in line with the Court of Justice of the European Union's decisions. On foot of this postulate, Article 13 Section 5 of the Directive stipulates that the Member States ensure the application of the concept of undertaking for the purposes of penalising parent companies and legal and organisational successors to such an undertaking. This regulation does apply to public enforcement, however, the unity of the competition law enforcement system makes it applicable to private enforcement as well.

The draft Act Amending the Competition and Consumers Protection Act and Certain Other Acts of 14 January 2021 (UC69)[50] proposed by the President of the Office for Competition and Consumer Protection is an attempt at implementing the Directive. The statement of reasons for the draft indicates the implementation of the Directive requires regulation of the possibility of prosecuting a parent company, too, where a subsidiary infringes upon the Act by entering into a prohibited agreement or abusing their dominant status. With a view to legal certainty, such a possibility needs to be confirmed by legislation. Adding Articles 6aa and 9a to the Act is suggested, therefore. They state that where an entrepreneur infringes upon the prohibitions under Article 6 Section 1 or Article 9 of the CCPA, such infringements are also committed by entrepreneur or entrepreneurs with 'a decisive influence over such an entrepreneur'. This wording will let

[50] The draft and the statement of its reasons are available at the Council's website: accessed August, 28, 2022https://legislacja.rcl.gov.pl/projekt/12342403/katalog/12757060-#12757060. According to the minutes No. 40/2021 of the Council of Ministers meeting on 19 October 2021, the Council of Ministers decided that the President of the Office for Competition and Consumer Protection should make further consultations with ministers and only then would the draft continue to be handled.

the Office for Competition and Consumer Protection take action where not only a parent but also a 'grandparent' and other companies with a decisive influence over them are the entrepreneurs having this decisive influence.

The regulation can be said to allow for a determination of the subjective scope of liability for anti-monopoly infringements and thus for a definitive and indisputable establishment of liability for anti-monopoly damages, especially in follow-on actions.

The central line of the draft's provisions should be deemed reasonable and meeting the expectations of practical effectiveness (*effet utile)* of the prohibitions against non-competitive agreements and the abuses of dominant status. Serious objections, on the other hand, can be raised against the details, particularly the condition of a 'decisive influence' over a subsidiary for considering attribution of the liability for the latter's actions to a parent entrepreneur. 'Managing the actions of another entrepreneur' or even 'a uniform management of the actions of another entrepreneur' better express the relationship that should hold between these entrepreneur, which is voiced in some opinions about the draft[51]. In line with the postulate of a consistency of the conceptual network, this would accord with the current definition of the corporate group in Article 4 §1 point 5[1] of the CCC – a corporate group is a parent company and its subsidiaries subject to a uniform management of their parent. Therefore, Article 6aa Section 2 of the draft should be modified to indicate a uniform management of actions of another entrepreneur takes place where economic, legal and organisational links between entrepreneurs prevent an entrepreneur whose actions are centrally managed from determining their actions in the market on an independent basis and make them follow the instructions of the entrepreneur managing their actions in connection with an infringement. A reference to a subsidiary following the parent's 'instructions' will satisfy that conceptual consistency of the legal system with the Code of Commercial Companies.

[51] The opinion of the Competition Law Association concerning the draft Act Amending the Competition and Consumers Protection Act and Certain Other Acts of 14 January 2021 (UC69), accessed September 9, 2022, https://legislacja.rcl.gov.pl/projekt/12342403/katalog/12757018#12757018.

The ECN+ Directive, despite the deadline of 04 February 2021, has not been implemented to the Polish legal system yet, causing the Commission to instigate the infringement procedure No. 2021/0126 by force of Article 260 Section of 3 the CJEU.

4. Conclusion

An attempt at answering the question whether liability for anti-monopoly damages can be attributed to a parent company operating in a corporate group which is a single economic body where the damages are caused by the behaviour of its subsidiary is the key issue of this paper.

The doctrine of a single economic unit, developed in the context of the EU judicial decisions, expands the so-called boundaries of an undertaking and thus the subjective scope of anti-monopoly liability by treating several formally independent entities as a single entrepreneur (or undertaking in the EU meaning) if they behave uniformly in the market and pursue an identical economic objective due to their functional links.

The Polish doctrine is of the opinion the transposition of that expansive concept of the single economic unit to the private enforcement would be unreasonable.

A series of arguments are advanced against this view, supported with the statements of EU judicial decisions that provide a subsidiary's behaviour exhibiting the features of a competition law infringement can be attributed to a parent company where, in spite of a separate legal personality but given the economic, organisational, and legal bonds between both the legal entities, that subsidiary does not determine its market behaviour in an autonomous manner but, as a matter of principle, carries out the instructions given by its parent.

The implementation of the ECN+ Directive, where the EU legislator postulates that national competition protection authorities should be able to apply the notion of undertaking to find a liable parent company and penalise it for practices used in one of its subsidiaries, where the parent and subsidiary constitute a single economic unit, will be a legislative reinforcement of the view the parent company in a corporate group is liable for anti-monopoly damages caused by its subsidiaries which doesn't give rise to interpretative doubts. Such a clear public enforcement regulation

will translate into the private enforcement of the competition law, as both are the procedures of a single system of enforcing the rules of competition.

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Legal Aspects of the Supply Chain Cybersecurity in the Context of 5G Technology

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cybersecurity, supply chain, 5G, state security, national security

Abstract: The 5G networks are considered to be crucial for the digital transformation of the economy and society and therefore will be subject to the regulations concerning the supply chain cybersecurity. Numerous European documents point out cyberthreats relating the supply chain and oblige the Member States to introduce laws enabling risks assessment of suppliers, which, in accordance with the EU Toolbox, should cover technical and non-technical factors such as dependence of the supplier from third countries. So far, Poland has not introduced regulations in this respect and provisions on recognition of high-risk suppliers to be implemented in the Act on national cybersecurity system are still in the draft phase. The key criterion for the risk assessment will be a threat to the national security, which is vague and may in the future be difficult for interpretation due to the specifics of the proceedings (limited right to participate in the proceedings, limited access to information). As the effects of the proceedings are far-reaching (the obligation to withdraw the products), they may potentially raise some concerns with regard to the freedom of economic activity. The new cutting-edge technologies such as 5G, as well as the need to ensure cybersecurity along with the on-going political polarization in the world will increase the amount of legal regulations relating to the supply chain cybersecurity.

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1. Introduction

Cybersecurity has become a popular and widely discussed concept in recent decades, appearing regularly in the media in the context of the activities of criminals in cyberspace, which has been intensifying in recent years as a result of the pandemic[1], and offensive activities of hostile countries,[2] whereas the cyberspace is understood as a space for processing and exchanging information by ICT systems[3]. It has become a sign of our turbulent times, and ensuring cybersecurity of the supply chain has become another expression of the political polarization in the world, running along the West-Far East axis[4], confirmed in political declarations (see for example European Parliament resolution of 16 September 2021 on a new EU-China strategy (2021/2037(INI)) or Joint Declaration of Poland and the USA on 5G signed on 2 September 2019).[5]

The purpose of this article is to present the results of research on the legal aspects of cybersecurity related to the supply chain in the context of the introduction of a new 5G network technology to Poland. The research used the legal and dogmatic method, analyzing legal acts, official documents, jurisprudence and literature. The article describes European activities aimed at ensuring the security of the 5G network.

This article focuses on the legal aspects of cybersecurity related to the supply chain, discussing cybersecurity in the context of the introduction

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1 Agnieszka Gryszczyńska, "Oszustwa i oszustwa komputerowe – globalni i lokalni gracze," in *Internet. Global Games*, ed. Agnieszka Gryszczyńska, Grażyna Szpor and Wojciech Wiewiórowski (Warsaw: C.H. Beck, 2022), 194. Agnieszka Gryszczyńska, "Cyberprzestępczość podczas pandemii," in *Internet. Cyberpandemia*, ed. Agnieszka Gryszczyńska and Grażyna Szpor (Warsaw: C.H. Beck, 2020), 115–116.

2 Przemysław Roguski, "Przesłanki przypisania cyberoperacji państwu," in Internet. *Cyberpandemia*, ed. Agnieszka Gryszczyńska, Grażyna Szpor (Warsaw: C.H. Beck,2020), 91–101.

3 Grażyna Szpor, "Cybeprzestrzeń," in *Wielka Encyklopedia Prawa, Tom XXII, Prawo Informatyczne*, ed. Grażyna Szpor and Lucjan Grochowski (Warsaw: Fundacja „Ubi societas, ibi ius", 2022), 90–91.

4 See also Robert Siudak, *Cyberbezpieczeństwo w Polsce, Od dyskursów do polityk publicznych* (Kraków: Księgarnia Akademicka, 2022), 165–170; Eli Greenbaum, "5G standard setting and national security," *Harvard Law School National Security Journal*, accessed October 14, 2022, https://harvardnsj.org/2018/07/5g-standard-setting-and-national-security/.

5 Joint declaration of the USA and Poland on 5G, accessed October 14, 2022, https://www.gov.pl/web/premier/wspolna-deklaracja-usa-i-polski-na-temat-5g.

of a new 5G network technology to Poland. The article discusses European activities to ensure the security of 5G networks. Then, the shape of the planned regulation in Polish law is presented, paying attention to the subjective and objective scope, criteria and effects of the assessment, as well as the course of the procedure to be considered as a high-risk supplier, pointing to legal problems related to the restriction of the freedom of economic activity and openness of the procedure and the effects. The summary contains conclusions related to the legal nature of the regulation of the supply chain in the 5G network.

2. Key definitions

The terms "cybersecurity", "supply chain" and "5G technology" appear in many legal acts but have not been clearly defined in them. In European law, Art. 2 point 1 of the Regulation of 17 April 2019, the Cybersecurity Act, where cybersecurity means " activities necessary to protect network and information systems, the users of such systems, and other persons affected by cyber threats". This definition is also referred to by Art. 4 point 3 of the proposed Directive on measures for a high common level of cybersecurity in the territory of the European Union, repealing Directive (EU) 2016/1148 (the so-called NIS2 Directive). The definition of cybersecurity was introduced into Polish law as part of the implementation of the NIS Directive, which took place in the Act of 5 July 2018 on the national cybersecurity system. When implementing the Directive, the Polish legislator decided to introduce the concept of "cybersecurity" instead of "security of network and information systems", which is used by the NIS Directive[6]. Pursuant to Art. 2 point 4 of the Act, cybersecurity is "the resistance of information systems to activities violating the confidentiality, integrity, availability and authenticity of the processed data or related services offered by these systems." Thus, the Cybersecurity Act and the planned NIS 2 Directive understand the concept of cybersecurity of operations, while according to the Polish law, "cybersecurity" is the condition (resistance of information systems).

[6] See also Grażyna Szpor, "The evolution of cybersecurity regulation in the European Union law and its implementation in Poland," *Review of European and Comparative Law*, no. 3 (2021): 219–235.

In both European and Polish law, there is no definition of a "supply chain". Although the ordinance of the Minister of Digitization of 22 June 2020 on minimum technical and organizational measures (...) imposes obligations on entrepreneurs in the field of supplier control, requiring the identification of threats to the security of networks or services related to concluded contracts when concluding contracts with a significant impact on the operation of networks or services (§ 2 point 10).[7] It however does not explicitly use the concept of "supply chain". The Act of 17 December 2020 on the promotion of electricity generation in offshore wind farms, unrelated to the subject of cybersecurity, uses the term "supply chain", but does not define it. In European law, the concept of "supply chain" has so far mainly appeared in the context of the supply chain of agricultural products and certain minerals. In Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 establishing due diligence obligations in the supply chain of EU importers of tin, tantalum and tungsten, their ores and gold from conflict-affected and high-risk areas, "mineral supply chain" means "the system of activities, organisations, actors, technology, information, resources and services involved in moving and processing the minerals from the extraction site to their incorporation in the final product". It is assumed in the literature that "The supply chain is a network of organizations involved, through relationships with suppliers and customers, in various processes and activities that create value in the form of products and services provided to end consumers."[8]

There is no definition of the fifth generation (5G) network in Polish and European legislation. The above mentioned Regulation on the minimum technical and organizational measures (...) in the scope of understanding the concept of 5G networks refers to the ETSI Report TR 121 915 V.15.0.0. (2019–10), which defines the technical parameters of this network (§ 3).

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7 Ordinance of the Minister of Digitization of 22 June 2020 on the minimum technical and organizational measures and methods that telecommunications undertakings are required to use to ensure the security or integrity of networks or services, Journal of Laws of 2020, item 1130.

8 Sebastian Kot, Marta Starostka- Patyk, and Dariusz Krzywda. *Zarządzania łańcuchami dostaw* (Częstochowa: Politechnika Częstochowska, 2009), 4.

3. Policy concerning cybersecurity of 5G networks

The Commission recognized the 5G networks to be crucial for the digital transformation of the economy and society of the European Union. 5G networks will form the backbone for a wide range of services essential for the functioning of the internal market and the maintenance and operation of vital societal and economic functions and as such should be protected from unauthorised access to information (cyberespionage, be it for economic or political reasons) or from other malicious actions (cyberattacks aimed at disrupting or destroying systems and data).[9] At the same time, the technology is characterized by a significant degree of dependance on ta handful of suppliers which are capable of supplying telecommunications operators with the technology required i.e. Huawei, Ericsson and Nokia, ZTE, Samsung and Cisco whereas only two of them are headquartered in the EU (Ericsson and Nokia)[10].

The first EU document concerning 5G was the EC Communication "5G for Europe: An Action Plan" of 14.09.2016 which however did not concern the security of the suppliers' chain. On 26 May 2019 the European Commission released the Recommendation "Cybersecurity of 5G networks. The Recommendation pointed out that addressing cybersecurity risks in 5G networks should take into account both technical and other factors, including regulatory or other requirements imposed on suppliers of information and communications technologies.[11]

The Recommendation provided for the publication of a toolbox that will contain types of threats that may affect the security of the 5G network, and a set of possible remedies for each of them. Member States were, at the same time, obliged to carry out by 30 June 2019 a risk assessment of the 5G network infrastructure, including identifying the most sensitive

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9 Małgorzata Ganczar. *Administracyjno-prawne uwarunkowania prowadzenia działalności gospodarczej w warunkach społeczeństwa informacyjnego* (Lublin: Wydawnictwo KUL, 2018), 67–70; Commission Recommendation of 26.3.2019, Cybersecurity of 5G networks (L 88/42, 29 March 2019), 2–5.

10 EU Coordinated Risk Assessment published October 9, 2019, 10, accessed October 14,2022, https://digital-strategy.ec.europa.eu/en/news/eu-wide-coordinated-risk-assessment-5g-networks-security.

11 Commission Recommendation of 26.3.2019, Cybersecurity of 5G networks (L 88/42, 29 March 2019), 5.

elements where security breaches would have a significant negative impact as well as the security requirements and the risk management methods applicable at national level, to take into account cybersecurity threats that may arise from (i) technical factors, such as the specific technical characteristics of 5G networks, and (ii) other factors such as the legal and policy framework to which suppliers of information and communications technologies equipment may be subject in third countries.[12]

On the basis of the risk assessments carried out by the Member States, the EU coordinated risk assessment of the cybersecurity of 5G networks was published. The EU coordinated risk assessment indicated the role of suppliers in building and operating 5G networks, the complexity of the interlinkages between suppliers and operators, and the degree of dependency on individual suppliers as one of the major challenges related to the deployment of 5G networks. It pointed out risks related to risk profiles of the suppliers such as the likelihood of the supplier being subject to interference from a non-EU country (such as e.g.: a hostile state actor exercises pressure over a supplier under its jurisdiction to provide access to sensitive network assets through (either purposefully or unintentionally) embedded vulnerabilities), the supplier's ability to assure supply and the overall quality of products and cybersecurity practices of the suppliers.[13]

On 29 January 2020, based on the EU coordinated risk assessment, the toolbox, The Cybersecurity of 5G networks, EU Toolbox of risk mitigating measures, was published. The Toolbox presented technical and strategic measures to mitigate the identified risks. Strategic measures directly related to cybersecurity of the supply chain include identifying key assets which should be subject to particular protection, assessing the risk profile of suppliers and applying restrictions for suppliers considered to be high risks-including necessary exclusions to effectively mitigate risks- for key assets or controlling the use of Managed Service Providers (MSPs) and

12 Commission Recommendation of 26.3.2019, Cybersecurity of 5G networks (L 88/42, 29 March 2019), 6.

13 EU Coordinated Risk Assessment published October 9, 2019,20–23, accessed October 14, 2022, https://digital-strategy.ec.europa.eu/en/news/eu-wide-coordinated-risk-assessment-5g-networks-security.

equipment suppliers' third line support [14]. Technical measures include, inter alia, certificates[15]. It is up to the Member States to decide how to implement the measures[16]. On 24 July 2020, the European Commission, with the support of ENISA and EU Member States, published the 5G Toolbox Implementation Report describing progress in implementing the EU toolbox and strengthening 5G network security measures. The European Commission identified progress in the implementation. However, the European Court of auditors expressed in its Special Report 03/2022 expressed concerns with regard to delays in 5G roll-out and many security issues remaining still unresolved. Poland was listed as a country which, due to delays, may not achieve the 5G coverage in the required time due to the postponing the assignment of 5G spectrum caused by the need to wait for a law clarifying the security requirements for 5G networks.[17]

4. New provisions of law in Poland

The Polish legislator decided to implement the measure indicated in Toolbox 5G, assess the supplier's profile (SM03) by introducing new provisions to the Act on the national cybersecurity system. In October 2022, the eighth draft of the amendment act was published. The current draft of 3 October 2022[18], in terms of the regulation of risk related to suppliers, slightly differs from the previous versions.

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14 Cybersecurity of 5G networks - EU Toolbox of risk mitigating measures published on January 29, 2020, 21–22, accessed October 14,2022, https://digital-strategy.ec.europa.eu/en/library/cybersecurity-5g-networks-eu-toolbox-risk-mitigating-measures.

15 Cybersecurity of 5G networks - EU Toolbox of risk mitigating measures published on January 29, 2020, 26,accessed October 14,2022, https://digital-strategy.ec.europa.eu/en/library/cybersecurity-5g-networks-eu-toolbox-risk-mitigating-measures.

16 Cybersecurity of 5G networks - EU Toolbox of risk mitigating measures published on January 29, 2020, 5, accessed October 14,2022, https://digital-strategy.ec.europa.eu/en/library/cybersecurity-5g-networks-eu-toolbox-risk-mitigating-measures.

17 Special Report 03/2022: 5G roll-out in the EU, accessed October 14, 2022, https://www.eca.europa.eu/Lists/ECADocuments/SR22_03/SR_Security-5G-networks_EN.pdf.

18 Draft act amending the Act on the national cybersecurity system and some other acts, accessed on October 14, 2022, https://mc.bip.gov.pl/projekty-aktow-prawnych-mc/630873_projekt-ustawy-o-zmianie-ustawy-o-krajowym-systemie-cyberbezpieczenstwa-oraz-ustawy-prawo-zamowien-publicznych.html.

Pursuant to the draft act, the procedure for recognition as a high-risk supplier is initiated by the minister responsible for computerization ex officio or at the request of the chairman of the Council. The aim of the initiated proceedings is to protect the state security or the security of public order (Art. 66a).

a) Personal scope

The procedure concerns hardware or software used by entities of the national cybersecurity system, i.e. entrepreneurs providing essential services, digital service providers, electronic communication entrepreneurs, including telecommunications operators and the entire public sector, as well as the owners or holders of critical infrastructure facilities, installations or devices, referred to in Art. 5b sec. 7 point 1 of the Act of April 26, 2007 on crisis management. Thus, it concerns over 10,000 entities, with the largest group being telecommunications undertakings and public entities[19] According to the justification to the amendment to the act, the entities indicated in Art. 66a sec. 1 are particularly important for ensuring the socio-economic security of the state, therefore it is imperative that they use safe equipment while providing services to the state and citizens. It is worth noting that micro, small and medium-sized enterprises are treated in the same way as large ones, in particular they have not been excluded from the scope of the new provisions, as is the case for some micro, small and medium-sized enterprises in the NIS2 Directive (Art. 2 sec. 2 and 8a of the NIS Directive preamble). In the event of a decision recognizing the supplier to be a high-risk supplier, they will be required to remove the hardware or software to the extent indicated in the decision. The question arises as to the compliance of the provision with the approach adopted in Polish law, according to which micro, small and medium-sized enterprises are treated in a special way. The Act of 26 March 2018, Entrepreneurs' Law requires, in art. 68, in the event of an impact of a draft act on micro, small and medium-sized enterprises, the draft act should aimed at a proportional limitation of administrative

[19] Ocena skutków regulacji (OSR), 7–12, accessed October 14, 2022, https://mc.bip.gov.pl/projekty-aktow-prawnych-mc/630873_projekt-ustawy-o-zmianie-ustawy-o-krajowym-systemie-cyberbezpieczenstwa-oraz-ustawy-prawo-zamowien-publicznych.html.

obligations towards these entrepreneurs, or justification of the inability to apply such restrictions should be given.

b) Subjective scope

The procedure may apply to a supplier of ICT products, ICT services or ICT processes, the supplier being understood as a manufacturer, authorized representative, importer or distributor in accordance with Art. 2 points 3–6 of Regulation 765/2008. ICT products, services and processes have been defined in the Act, and the key element in the definition of the above is the information system, the ICT products of which constitute an element or group of elements (Art. 2 point 34), and in the case of the ICT service - a service consisting entirely or mainly in, storage, retrieval or processing of information via information systems (Art. 2 point 45). An ICT process is a set of activities performed to design, build, develop, deliver or maintain ICT products or ICT services (Art. 2 point 33). The information system is understood as the ICT system referred to in Art. 3 point 3 of the Act of February 17, 2005 on the computerization of the activities of entities performing public tasks, along with the data processed in it in electronic form (Art. 2 point 14 of the Act on the National Cybersecurity System).[20]

Although the impetus for the introduction of the supply chain regulations was to ensure cybersecurity of the 5G network, which also results directly from the content of the justification attached to the draft act, the proposed regulations do not use the concept of the 5G network. This is probably due to the principle of technological neutrality derived from European law and also binding in Polish law, which requires equal treatment of ICT technologies and creating conditions for their fair competition (Art. 3 point 19 of the Act on the computerization of entities performing public tasks, Art. 3 sec. 4 letter c and point 25 of the preamble to the Directive of 11 December 2018 establishing the European Electronic Communications Code). The principle sets forth an obligation to guarantee the technological neutrality of the adopted legal norms.[21] This is a reasonable approach,

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[20] Grażyna Szpor, "System informacyjny," and "System teleinformatyczny," in *Wielka Encyklopedia Prawa*, *Tom XXII, Prawo Informatyczne*, ed. Grażyna Szpor and Lucjan Grochowski (Warsaw: Fundacja "Ubi societas, ibi ius", 2022), 425–428.

[21] Stanisław Piątek, *Prawo telekomunikacyjne. Komentarz*, Art. 1(Legalis), 26.

considering that in time there will be another breakthrough technology and the need to control the supply chain to ensure security.

As a result of the proceedings, the minister responsible for computerization, by means of a decision, recognizes the supplier of hardware or software as a high-risk supplier, if this supplier poses a serious threat to defense, state security or public safety and order, or human life and health (Article 66 a sec. 13). The decision referred to in para. 13, contains in particular an indication of the types of ICT products, types of ICT services and specific ICT processes from the hardware or software supplier included in the procedure for recognition as a high-risk supplier (Article 66a sec. 14).

When issuing the decision, the minister seeks the opinion of the Council beforehand, which evaluates the supplier by carrying out an analysis from the point of view of the criteria indicated in the amendment (Art. 66a sec. 10). The Council is a consultative and advisory body, the opinions of which are not binding. It brings together the ministers of, inter alia, the minister for internal affairs, for computerization, the minister responsible for energy, the Minister of National Defense, the minister responsible for foreign affairs, the minister responsible for coordinating the activities of special services or a person authorized by him, and the Chairman of the Financial Supervision Authority, the Commander of the Cyberspace Defense Component and the Public Prosecutor General (Art. 66 sec. 4). The meetings of the college are closed to the public.[22]

In order to prepare the opinion, the chairman of the Council appoints a team to draft an opinion on the supplier's qualification as a high risk supplier, consisting of representatives of the members of the college appointed by the chairman of the college. Each member of the opinion-making team prepares a position within the scope of his competence, which he/she then passes to the team. The opinion-forming team presents the draft opinion to the chairman of the Council, and then the opinion is agreed at the meeting

[22] Iwona Szulc, "Art. 66," in *Ustawa o krajowym systemie cyberbezpieczeństwa*, *Komentarz*, ed. Agnieszka Besiekierska (Warsaw, C.H. Beck, 2019), 203–205; Grażyna Szpor, "Art. 66," in *Ustawa o krajowym systemie cyberbezpieczeństwa. Komentarz*, ed Grażyna Szpor, Agnieszka Gryszczyńska and Kamil Czaplicki (Warsaw: Wolters Kluwer Polska, 2019), 465–470. Agnieszka Brzostek, "Art. 66," in *Ustawa o krajowym systemie cyberbezpieczeństwa. Komentarz*, ed. Waldemar Kitler, Joanna Taczkowska-Olszewska, and Filip Radoniewicz, (Warsaw: C.H. Beck, 2019), 323–325.

of the Council. The agreed opinion is sent by the chairman of the Council to the minister responsible for computerization (Art. 66a sec. 12).

c) Supplier evaluation criteria

As in the case of EU Toolbox 5G, the evaluation criteria are technical and non-technical, including organizational, legal and political criteria. Among the non-technical criteria that are taken into account in the analysis for the purposes of issuing an opinion, the foreground is the political criterion indicated in the first point of the list, i.e. economic, intelligence and terrorist threats to national security and threats to the implementation of allied and European obligations provided by the supplier of hardware and software, including information on threats obtained from Member States or European Union and NATO bodies (Art. 66 a sec. 10 point 1).

There is no definition of "threat to national security" or "threat to state security" in Polish law, but the scope of this concept can be derived from the "Security Strategy of the Republic of Poland" of 2020. The Strategy indicates four pillars of the national security of the Republic of Poland, i.e. (1) Guarding the independence, territorial integrity, sovereignty and ensuring the security of the state and citizens, (2) Shaping the international order based on solidarity and respect for international law, guaranteeing the safe development of Poland (3) Strengthening the national identity and safeguarding the national heritage. (4) Provision of conditions for sustainable social and economic development and protection of the natural environment.[23] It can be assumed that actions aimed at the above-mentioned values, which are the basis of the pillars (i.e. independence, territorial inviolability, sovereignty, etc.), will constitute a "threat to national security". This understanding of the concept of "state security" is confirmed in the doctrine, where it is understood as "a state in which there are no threats to the existence of the state and its democratic system" (J. Karp), or more broadly as "the security of citizens" (B. Banaszak).[24] Nevertheless, due to

[23] Strategia Bezpieczeństwa Narodowego Rzeczypospolitej Polskiej, accessed October 14, 2022, ttps://www.bbn.gov.pl/ftp/dokumenty/Strategia_Bezpieczenstwa_Narodowego_RP_2020.pdf.

[24] Cited after Agnieszka Piskorz-Ryń, "Ocena dopuszczalnych ograniczeń jawności ze względu na wymagania konstytucyjne," in *Jawność i jej ograniczenia*, *Tom III, Skuteczność regulacji*, ed. Grażyna Szpor, and Zbigniew Kmieciak (Warsaw: C.H. Beck, 2013), 55.

the specificity of the procedure for the recognition as a high-risk supplier, characterized by a limited openness, described in the following parts of the article, it will be also in the future difficult to find practical guidance on the interpretation of the term "threat to national security".

The probability with which the hardware or software supplier is under the control of a country outside the European Union or NATO can be indicated as the legal and organizational criteria that the Council takes into account in its assessment. The assessment of probability takes into account the law of the supplier's country to the extent that this law regulates the relationship between the supplier of hardware or software, concerns the protection of personal data, in particular where there are no agreements on the protection of such data between the European Union and this country. In addition, the supplier's ownership structure is considered to determine whether and to what extent the supplier is subject to state control due to ownership dependency. Assuming that the supplier may show dependence on the state not related to the ownership structure, the ability of this state to interfere with the freedom of economic activity of the hardware or software supplier (Art. 66a sec.10 point 2) and possible relationships with entities carrying out cyberattacks, indicated in the Annex to Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures to combat cyberattacks threatening the Union or its Member States. (Art. 66a sec. 10 point 3).

In terms of organizational and technical criteria, the number and types of detected vulnerabilities and incidents related to products, services or processes provided by the hardware or software supplier as well as the method and time of their elimination (Art. 66a sec. 10 point 4)) are important for the supplier's assessment, as well as also the procedure and scope of the supplier's supervision over the process of manufacturing and delivering hardware or software to entities and the risks to the process of manufacturing and delivering hardware or software (Art. 66a (10) points 4 and 5). When making an assessment in this area, the Council also takes into account previous documents regarding the safety of individual products, such as recommendations previously issued by the Government Plenipotentiary for Cybersecurity regarding the vendor's hardware or software (Art. 66a sec. 10 point 6) and analyzes carried out by within the framework of the Computer Security Incident Response Teams (CSiRTs) regarding

the impact of specific ICT products, ICT services or ICT processes on the security of services. The analyzes of CSIRTs take into account information provided by the Member States or bodies of the European Union and the North Atlantic Treaty Organization and provided by the private sector (Art. 66a sec. 11 point 2).

Further, the Council takes into account certificates for ICT products, ICT services or ICT processes, issued or recognized in the Member States of the European Union or the North Atlantic Treaty Organization (Art. 66a sec. 11 point 1. The cybersecurity certification system is however still under development.

d) Consequences of issuing the decision

The effect of issuing a decision on recognition as a high-risk supplier is the prohibition of putting into use specific ICT products, ICT services and ICT processes provided by the high-risk supplier in the scope covered by the decision. Another obligation will be to withdraw from use the ranges of types of ICT products, types of ICT services and specific ICT processes in the scope covered by the decision, provided by the high-risk provider, but not later than 7 years from the date of publication of the information on the decision. On the other hand, telecommunications undertakings that own or use types of ICT products, types of ICT services, specific ICT processes indicated in the decision and specified in the list of categories of functions critical to the security of networks and services in Annex 3 to the Act, will have to withdraw them within 5 years from the announcement of the decision (Art. 66b sec. 1). The decision is announced by the minister in the Official Journal of the Republic of Poland "Monitor Polski" and made available in the Public Information Bulletin (Article 66a sec. 15). It is immediately enforceable (Art. 66a sec. 16).

The decision recognizing a high-risk supplier will have far-reaching consequences i.e. excluding the possibility of purchasing the indicated hardware or software from a specific vendor and forcing the purchase of hardware or software from a different vendor, and may affect approximately 10,000 entities indicated mentioned above. In addition, such a decision in a situation where there are few suppliers of a given technology, such as in the case of 5G networks, will have an impact on competition in the market, and by excluding the supplier, it will limit the supply side. In this context,

a question arises about the freedom to conduct a business, which is significantly restricted. The freedom to conduct a business is a systemic principle and was formulated in Art. 20 of the Polish Constitution.[25] However, this rule is not absolute. Pursuant to Art. 22 of the Constitution, restriction of the freedom of economic activity is permitted only by statute and only due to important public interest. The jurisprudence of the Constitutional Tribunal shows that economic activity may be subject to various types of restrictions to a greater extent than rights and freedoms of a personal or political nature. In particular, the state may introduce statutory provisions that will minimize the negative effects of free market mechanisms, if these effects are manifested in an area that cannot remain indifferent to the state due to the protection of universally recognized values.[26] In another ruling, the Tribunal noted that resignation from the necessary state control measures in some areas of the economy could lead to a threat to state security, public order as well as the state's legal and international obligations (Judgment of the Constitutional Tribunal of 10 October 10 2001 r., reference number K 28/01).[27] As is clear from the justification accompanying the proposed regulations, preventing the fulfillment of the risk associated with a given supplier, i.e. the need to protect an important state interest, justifies limiting the freedom of economic activity.

e) Proceedings on recognition as a high risk supplier

The provisions of the Administrative Procedure Code apply to the proceedings with the exception of those referred to in Art. 66a sec. 3 i.e. art. 28, art. 31, art. 51, art. 66a and art. 79 of the Code of Administrative Procedure. The exclusions are justified by the specificity of the procedure, i.e. the large number of entities that will potentially be affected by the decision (the effects will not be limited to the supplier, but will also include its current and potential customers), as well as the evaluation criteria that require information from secret services. Therefore, contrary to what is provided for in the excluded art. 28 of the Code of Administrative Procedure, according to

25 Leszek Garlicki, Marek Zubik, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Tom I, Art. 20, Lex- 14, 2016.

26 Judgment of the Constitutional Tribunal of 8 April 1998, Ref. No. K 10/97.

27 Judgment of the Constitutional Tribunal of 10 October 2001, Ref. No. K 28/01.

which the party is everyone, whose legal interest or obligation is related to the proceedings, or who requests the actions of the authority because of his legal interest or obligation, in this proceedings the only party to the proceedings is the one against whom proceedings have been initiated to recognize a high-risk supplier (Art. 66a sec. 3).

A telecommunications undertaking which, in the previous financial year, obtained income from conducting telecommunications activities in the amount of at least twenty thousand times the average wage in the national economy may join the proceedings (Art. 66a sec. 5). Thus, the possibility of joining was limited to entities that generated over PLN 100 million in revenue (PLN 113 million in 2021). As it follows from the justification, such a legal solution should ensure the efficiency of the proceedings.[28] On the other hand, however, it should be noted that it deprives a multitude of small and medium-sized enterprises of the opportunity to participate in a procedure that may be of key importance to their business, putting them back in a worse position.

The issue of notification of the initiation of the procedure was also regulated differently. In accordance with art. 66a sec. 7, the minister responsible for computerization notifies of the initiation of the procedure for the recognition of a high-risk supplier. The notification is also made available in the Public Information Bulletin on the website of the minister responsible for computerization, immediately after the confirmation of delivery of this notification is received by the minister responsible for computerization. Placing on the website has the effect of delivery after 14 days from placing, if the hardware or software supplier is a party not established in the territory of a Member State of the European Union, the Swiss Confederation or a Member State of the European Free Trade Association (EFTA) - party to the Agreement on the European Economic Area (Art. 66a sec. 8).

In the proceedings before the minister, the provisions significant from the point of view of the openness of the proceedings do not apply, i.e. Art. 66a of the Administrative Procedure Code, concerning the record of proceedings and Art. 79 of the Code of Administrative Procedure, giving

[28] Uzasadnienie projektu, 67, accessed October 14, 2022, https://mc.bip.gov.pl/projekty-aktow-prawnych-mc/630873_projekt-ustawy-o-zmianie-ustawy-o-krajowym-systemie-cyberbezpieczenstwa-oraz-ustawy-prawo-zamowien-publicznych.html.

the party the right to participate in the taking of evidence. Pursuant to Art. 61 sec. 3 of the Constitution, the principle of openness may be limited only due to the protection of freedoms and rights of other persons and business entities, as well as the protection of public order, security or important economic interest of the state, as specified in statutes.

According to the draft initiator's justification, the exclusion of the provisions results from the special relationship between the proceedings and issues of national security.[29] As part of the procedure for recognizing a supplier as a high-risk supplier, the analysis of the supplier and its products will be carried out. According to the justification to the law, the personal data of the persons carrying out these analyzes should not be disclosed due to possible pressure on the results of the analyzes and the status of these persons: many of them are officers whose identity, due to the tasks performed, must be protected.

The principle of openness in proceedings before administrative courts is expressed, apart from the openness of hearing a case, in the transparency of a court decision.[30] In the last indicated dimension, the principle has been limited. The whole judgment of the administrative court examining the complaint against the decision on recognition as a high-risk supplier is served only to the minister competent for computerization. The complainant is served with a copy of the judgment with the part of the justification that does not contain classified information within the meaning of the Act on the protection of classified information (Art. 66d sec. 2). Undoubtedly, this may significantly hinder lodging a cassation appeal. The current position of the Constitutional Tribunal is important here, as it has an informative value in the area of law-making as to the limits of interference with the principle of openness[31]. According to the draft initiator's opinion, the formulation of the provisions of Art. 66d sec. 2 is to be consistent with

[29] Uzasadnienie projektu, 67, accessed October 14, 2022, https://mc.bip.gov.pl/projekty-aktow-prawnych-mc/630873_projekt-ustawy-o-zmianie-ustawy-o-krajowym-systemie-cyberbezpieczenstwa-oraz-ustawy-prawo-zamowien-publicznych.html.

[30] Katarzyna Tomaszewska, "Zasada jawności w działalności sądów administracyjnych," in *Jawność i jej ograniczenia, Tom VIII Postępowanie sądowe*, ed. Grażyna Szpor and Jacek Gołaszewski (Warsaw: C.H. Beck, 2018), 69–89.

[31] Aleksandra Syryt, "Publicznoprawne ograniczenia jawności w świetle orzecznictwa Trybunału Konstytucyjnego – klasyfikacja, analiza, ocena," in *Jawność i jej ograniczenia, Tom IV*

the judgment of the Constitutional Tribunal of 23 May 2018, file ref. no. SK 8/14. which found the failure to deliver open elements of the administrative court judgment unconstitutional. Nevertheless, it cannot be ruled out that the legal assessment of the compliance with the Constitution of the planned provisions will be different, which will turn out after the planned provisions enter into force and in the course of their application.

5. Conclusion

The development of cutting-edge technologies such as 5G, as well as the need to ensure cybersecurity along with the on-going political polarization in the world will increase the amount of legal regulations relating to the supply chain cybersecurity. Such conclusion may also be drawn on the basis of the proposal for NIS2 Directive. In accordance with Art.5 sec. 2 lit a NIS2, as part of the national cybersecurity strategy, Member States shall adopt a policy addressing cybersecurity in the supply chain for ICT products and services. Further, point 45 of the preamble provides for further "supply chain risk assessments, with the aim of identifying per sector which are the critical ICT services, systems or products, relevant threats and vulnerabilities". A risk assessment 5G networks following Recommendation (EU) 2019/534 on Cybersecurity of 5G networks is given as an example of such assessment which should take into account "potential non-technical risk factors, such as undue influence by a third country on suppliers and service providers, in particular in the case of alternative models of governance, include concealed vulnerabilities or backdoors and potential systemic supply disruptions, in particular in case of technological lock-in or provider dependency" (Art. 19, point 45 and 46 of the preamble). This will mean a risk analysis based on the planned legal regulations, taking into account technical and non-technical criteria, including political ones, applied to 5G or any other emerging technology, important from the point of view of state security. The applied criteria will be assessed from the point of view of compliance with the main principles, such as, inter alia, freedom of economic activity or openness of the proceedings. On this point, it is worth noting that the issue of supply chain control in the latest legal regulations goes beyond traditional areas

Znaczenie orzecznictwa, ed. Grażyna Szpor and Małgorzata Jaśkowska (Warsaw: C.H. Beck, 2013), 274–304.

and covers such issues as, for example, environmental risks or human rights' protection e.g. the German Act of 16 July 2021 on due diligence of entrepreneurs in the field of supply chains, which enters into force next year.[32]

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Corruption and Human Rights in the Case Law of Inter-American Human Rights Treaty Bodies

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Abstract: The first attempts to combat corruption date back to ancient times and had mainly moral connotation. Despite being an old phenomena, nowadays it takes new shapes and becomes a more common feature of social life, especially in the Latin America region. Corruption is a complex, and multidimensional phenomenon that negatively impacts human rights on many levels. Therefore, serious effort have long been made at global, regional and state levels to combat corruption. The United Nations and regional organizations have adopted numerous non-binding and binding documents with a view to stifling this phenomenon but none of them refer to the issue of impact of corruption on human rights. But it should be stressed that it is very hard to establish a link between corruption and human rights violations. Some efforts has been made by the Inter-American Court of Human Rights (IACHR) and the Inter-American Commission on Human Rights (IAComHR). This article considers whether and how the IACHR and the IAComHR establish the link between corruption and violation of human rights in the inter-American system. It also determines which groups of people are, according the IACHR and the IAComHR, particularly affected by corruption, what measures should be taken to protect those exposed to acts of corruption, what obligations are incumbent on States with a view to preventing, combating and eradicating corruption.

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1. Introduction

Due to its multi-dimensional character, corruption is a complex phenomenon that not only affects the economic sphere, but also undermines the principle of rule of law, is a threat to social well-being, has negative impact on enjoyment of human rights[1]. Considering the nature of violation, it is even hard to prioritize, which human rights are the most affected by this phenomenon[2]. The awareness of importance and relevance of this problem is demonstrated by the fact that corruption was for the first time the theme of the 32 (2021) special session of the General Assembly held from 2 to 4 June[3]. This issue is not only recognized at the global level, but also at the regional level. When opening the Judicial Year 2022, the President of the IACHR pointed to corruption among the urgent problems facing the Court and stressed that States are responsible for combating corruption[4]. Furthermore, during the 9 Summit of the Americas in June 6–10, 2022, the participatnt heads of States and Government of Americas committed to fighting corruption, protect human rights defenders, environmental defenders, including journalists; anti-corruption reporting and oversight[5]. There are a few reasons why combating corruption, especially in Latin America, is a common goal of all States in region. First of all, it has negative impact on economy; secondly, fighting corruption is essential for the proper functioning of democratic institutions of the State and thirdly, it causes enormous social costs[6]. Therefore, there is no doubt that corruption has direct impact on human rights as it deprives people of their means of existence and erodes

1 See e.g.: Indira Carr, "Fighting Corruption Through Regional and International Conventions: A Satisfactory Solution?," *European Journal of Crime, Criminal Law and Criminal Justice* 15, no. 2 (2007): 131.

2 General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017.

3 A/RES/S-32/1, 7 June 2021, § 20.

4 "The President of the Inter American Court of Human Rights Judge, Ricardo C. Pérez Manrique in the Opening of the 2022 Inter-American Judicial Year," accessed November 7, 2022, https://www.corteidh.or.cr/mensaje_presidencia.cfm?lang=en.

5 See "Summit of the Americas," U.S. Department of State, accessed November 7, 2022, https://www.state.gov/summit-of-the-americas/.

6 Jorge Garcia-Gonzalez, "The OAS and the fight against corruption in the Americas," accessed November 7, 2022, https://www.oecd.org/corruption/ethics/2731127.pdf.

the democratic institutions of the states but corruption mostly has a devastating impact on judicial system[7].

The aim of this article is to examine the practice of the IACHR and the IAComHR in order to determine whether any of these bodies has found a direct or indirect link between corruption and human rights violations. This paper indicates that the IACHR and the IAComHR in their jurisprudence have consistently shown that there is a link between corruption and human rights. They analyze the impact of corruption on human rights trough the lens of vurneable groups i.e.: persons deprived of liberty, including children in foster care; children; indigenous people human rights defenders, including environmental defenders, journalists; personel of the justice system, but also moving persons, women, LGBTI persons, Afro-descendants, persons with disabilities and the elderly[8]. To this end, the article examines documents adopted in the inter-American system to combat corruption. Then, the phenomenon of corruption was characterized and classified. This paper presents also examples from the case law of the IACHR and IAComHR on how both bodies establish links between corruption and human rights.

2. Characteristics of corruption

One of the characteristic features of corruption is its very flexible nature so it is difficult to predict when and where it occurs[9]. According to IAComHR, the main factors that facilitate corruption are of an institutional weakness and cultural nature[10]. Due to its complexity and elastic characteristic, there is no uniform definition of corruption. It means different things for

7 Report of the Special Rapporteur on the independence of judges and lawyers, A/72/140, 25 July 2017, § 18–22.

8 Corrupción y derechos humanos: Estándares interamericanos, Comisión Interamericana de Derechos Humanos, OAS/Ser.L/V/II, Doc. 236, 6 diciembre 2019, Original: Español, § 432–438.

9 Donna M. Goldstein and Kristen Drybread, "The Social Life of Corruption in Latin America," *Culture, Theory and Critique* 59, no. 4 (2018): 300.

10 Corrupción y derechos, § 116.

different disciplines and cultures[11]. Corruption has many forms[12], actors – private or public, and consequences, which are devastating for both public or private sector[13].

The IAComHR characterized corruption as an abuse or detour of power, whether public or private, that displaces the public interest for private benefit (personal or a group one), undermines and weakens both administrative controlling and judicial review institutions, the rule of law and human rights[14]. In view of the above, corruption is closely intertwined with power, which is delegated to a public authority. What is more, an abusive use of authority is the main factor linking corruption with human rights. Another specific characteristic of corruption is placing private interests ahead of public interest. The benefits thus obtained have not only an economic dimension, but also a social and cultural one. Above all, corruption undermines the domestic institutions that allow for the efficient functioning of the state and as a consequence the rule of law and human rights[15].

Scholars classified corruption as "petty" or "street" corruption, when it affects people who interact with State officials when using public services. On the other hand, grand corruption is carried out by high-level government officials, presidents, ministers, etc., and involves a large amount of assets[16]. This is the most dangerous kind of corruption because it undermines the legitimacy of high level officials[17]. The scholars also distinguish further subtypes of corruption i.e.: political one, defined as a the abuse of

11 Kolawole Olaniyan, "The Implications of Corruption for Social Rights," in *Research Handbook on International Law and Social Rights,* ed. Christina Binder, Jane A. Hofbauer, Flávia Piovesan, and Amaya Úbeda de Torres (Cheltenham–Northampton: Edward Elgar Publishing, 2020), 356–357.

12 See for e.g. Łukasz Dawid Dąbrowski, "Typy przestępstw korupcyjnych w świetle dokumentów międzynarodowych," *Studia Prawnicze KUL* 60, no. 4 (2014): 45–75.

13 Corrupción y derechos, § 83–90.

14 See Corruption and Human Rights, Resolution 1/18, March 2, 2018.

15 Corrupción y derechos, § 90.

16 Claudio Nash Rojas, Pedro Aguiló Bascuñán, and María Luisa Bascur Campos, *Corrupción y Derechos Humanos: Una mirada desde la Jurisprudencia de la Corte Interamericana de Derechos Humanos* (Chile: Centro de Derechos Humanos Facultad de Derecho Universidad de Chile, 2014), 16–17.

17 Cecily Rose, "Corruption and Global Security," in *The International Global Security*, ed. Robin Geiβ and Nils Melzer (Oxford: Oxford University Press, 2021), 144.

common authority and power for the purpose of obtaining private benefits to the detriment of the collective and non-political one – the purpose of the violation of normative system is not the achievement of a goal of the political collectivity as a whole but the objective of a particular collectivity[18]. Unfortunately, all these definitions focus on passive than active side of these phenomena. It mainly encompasses conduct of public not private officials[19]. Some scholars distinguish personal (non-institutional) and institutional corruption. The former takes place outside institutional framework. The latter is characterized by the casual character and deliberate intention of the corruptor and corruption undermines to a non-negligible extent an institutional purpose, the corrupt action involves the corruptor and the person being corrupted[20]. Taking into account the place where corruption occurs, it is private or public sector. Another criteria include how it occurs: either by extortion or consent. Considering its intensity, it is high or low levels of intensity and given its prevalence – it involves isolated or systemic occurrences[21]. The IAComHR distinguished a situation when corruption can cause a direct violation of human rights – corruption constitutes or contributes to failure to comply with international obligations and such wrongdoing is attributable to State, and cases in which corruption only facilitate and/or encourage the violation of human rights[22].

As to Latin America, the key characteristic feature of corruption is that there may be cases of corruption that are unpunished, and there may be cases of false accusations of corruption that are also proceeded improperly[23]. Accusation of alleged corruption against officials is a very useful instrument to fight political rivals. The so-called "Latin America anti-corruption

18 Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción*, 17.

19 Rose, "Corruption," 142. See Terracino Julio Bacio, *The International Legal Framework agaist Corruption: States' Obligations to Prevent and Repress Corruption* (Cambridge–Antwerp–Portland: Intersentia, 2012), 82–88.

20 Seumas Miller, *Institutional Corruption: A Study in Applied Philosophy* (Cambridge: Cambridge University Press, 2017), 64–72.

21 Zoe Pearson, "An international human rights approach to corruption," in *Corruption and Anti-Corruption*, ed. Peter Larmour and Nick Wolanin (Canberra: ANU Press, 2013), 33.

22 Corrupción y derechos, § 137–138, 163–164.

23 Cecilia M. Baillet, *The Construction of the Customary Law of Peace: Latin America and Inter-American Court of Human Rights* (Chetelnham–Northampton: Edward Elgar Publishig, 2021), 69.

wave" put political leaders in prison or they face trials, and even some of them committed suicide[24]. The most spectacular corruption investigation is a Brazilian case known as Operation Car Wash (*Operação Lava Jato*) launched in 2014, concerning money laundering related to the state oil company Petrobras, which in 2018 led to the arresting of ex-president Luiz Inácio Lula da Silva[25]. Unfortunately, all these efforts did not eradicate corruption form public life and it occurs that prosecution and conviction is not a sufficient instrument to do that[26]. Latin America still lacks transparency and during the pandemic there was an outbreak of corruption and bribery as a common occurrence[27]. Unfortunately, human rights instruments neither *expressis verbis* refers to corruption neither it prohibits. The practice of the UN treaty bodies is also not helpful in this matter[28].

In a nutshell, corruption in the broad sense can be defined as an unpredictable, complex phenomenon, with various forms involving the use of power by public officials regardless of their position, and private persons as well, for private, political and non-political purposes, which has negative consequences for individuals, private entities and the functioning of the state.

3. Legal instruments

In the inter-American system is there were a lot of initiatives aiming at combating corruption. First of all, the General Assembly of the OAS adopted

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24 See Benjamin Russell, "Anti-Corruption: Legal Trouble for Latin American Presidents," accessed May 9, 2019, https://www.americasquarterly.org/article/legal-trouble-for-latin-american-presidents/.

25 Fernando Limongi, "From birth to agony: The political life of Operation Car Wash (Operação Lava Jato)," *University of Toronto Journal* 71, Suppl.: 1 (2021): 160–173.

26 Gaspard Estrada, "Opinion, Operation Car Wash Was No Magic Bullet: The largest anti-graft effort in the world couldn't stop endemic corruption in Brazil," *The New York Times*, accessed February 26, 2021, https://www.nytimes.com/2021/02/26/opinion/international-world/car-wash-operation-brazil-bolsonaro.html.

27 Benjamin N. Gedan and Santiago Canton, "Radical Transparency: The Last Hope for Fighting Corruption in Latin America," *Georgetown Journal of International Affairs*, accessed April 1, 2022, https://gjia.georgetown.edu/2022/04/01/radical-transparency-the-last-hope-for-fighting-corruption-in-latin-america%EF%BF%BC/.

28 Cecily Rose, "The Limitations of Human Rights Approach to Corruption," *International and Comparative Law Quarterly* 65, no. 2 (2016): 412–419.

resolution entitled "Corrupt International Trade Practices"[29], Declaration of Montrouis: A New Vision of the OAS[30], San José Declaration[31], Declaration on Security in Americas[32], Inter-American Democratic Charter[33], Declaration of Nuevo León[34], follow-up mechanism[35], Inter-American Program of Cooperation to Fight Corruption[36], Lima Commitment[37], and many others. It is also worthy to note the latest actions: The Joint Summit Working Group Action Plan 2019–2020[38], the task of which is to implement the Lima Commitment. The Summits of the Americas Secretariat, the School of Governance and the Department for Effective Public Management of the OAS developed an initiative for the implementation of the Inter-American Open Data Program to Prevent and Fight Corruption[39]. All these instruments and initiatives recognized negative impact of corruption on democratic governance and encouraged increased cooperation among states, international organizations, NGOs and society in order to combat corruption. The Organization also reiterated its commitment to fighting corruption[40]. Furthermore, the IAComHR adopted numerous documents on corruption and human rights[41] but since 2017 it has further developed the study on impact of corruption on human rights[42]. In 2019, the IAComHR issued very

29 AG/RES.1159 (XXII-0/92), 22 de mayo de 1992.

30 AG/DEC. 8 (XXV-O/95), June 7, 1995, § 21.

31 A/CONF.157/LACRM/15, A/CONF.157/PC/58, 11 February 1993, § 10.

32 OEA/Ser.K/XXXVIII, CES/DEC. 1/03 rev.1, 28 October 2003, Original: Spanish, § 4(m).

33 Lima, September 11, 2001, accessed November 7, 2022, https://www.oas.org/en/democratic-charter/pdf/demcharter_en.pdf.

34 Monterrey, Nuevo Leon, Mexico, January 13, 2004, accessed November 7, 2022, https://www.oas.org/xxxivga/english/reference_docs/CumbreAmericasMexico_DeclaracionLeon.pdf.

35 AG/RES. 1784 (XXXI-O/01), 5 junio 2001, Original: español.

36 AG/RES. 1477 (XXVII-O/97), 5 de junio de 1997.

37 OEA/Ser.E CA-VIII/doc.1/18, 14 April 2018 Original: Spanish.

38 OEA/Ser.E GTCC/doc.63/20 rev.2, 18 October 2021, Original: Spanish.

39 AG/RES. 2931 (XLIX-O/19), June 27, 2019. § vii.

40 Garcia-Gonzalez, "The OAS", 2.

41 See e.g.: Human Rights and the Fight Against Impunity and Corruption, Resolution 1/17, September 12, 2017; Resolution 1/18.

42 Claudio Nash Rojas, "Nuevos desarrollos sobre corrupción como violación de Derechos Humanos. El Informe "Derechos Humanos y Corrupción" de la Comisión Interamericana de Derechos Humanos", *Revista Mexicana de Derecho Constitucional*, no. 45 (Julio-Diciembre 2021): 207–208.

comprehensive report entitled "Corruption and human rights: Inter-American standards". But the so-called road map for collective actions against corruption is provided by the Inter-American Convention against Corruption adopted on 29 March 1996 in Caracas (IACC)[43]. It is the very first one anti-corruption treaty in the world[44], whose aims are twofold: promotion and strengthening of the development of the state mechanism to prevent, deter, punish and eradicate corruption as well as promotion and regulation of the cooperation among states in order to wipe out corruption from the public sphere (Article II). Furthermore, Member States of the OAS adopted treaties for legal and judicial cooperation[45].

The most important binding document on human rights adopted by the OAS is the American Convention on Human Rights signed on 22 November 1969 (ACHR). According to Article 1 of the ACHR, the State Parties are obliged to respect rights and freedoms enshrined in the Convention. This obligation must be fulfilled without any form of discrimination[46]. The obligation to respect means refraining from violation of human rights established in the ACHR (the negative obligation). On the other hand, the obligation to ensure (fulfil) is positive one and means that state is obliged to take all necessary action to guarantee full enjoyment of rights and freedoms recognized in the ACHR i.e.: to create institutional, organizational and procedural conditions for individuals subjected to the States's jurisdiction in order to comply with this duty[47]. Based on the provisions of the ACHR, the IACHR and IAComHR have examined how corruption affects the enjoyment of the rights guaranteed by the ACHR and have identified the obligations incumbent on the states-parties to the Convention.

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43 Conferencia Especializada sobre el proyecto de Conventión Contra Corrupción, Caracas, Venezuela, del 29 al. 29 de marzo de 1996, Acta Final, Secretaría General, Organziatión de los Estados Americanos, Washington, D.C. 20006, 1998.

44 Bacio Terracino, *The International,* 48–49.

45 See "Hemispheric Network for Legal Cooperation on Criminal Matters," accessed November 7, 2022, http://web.oas.org/mla/en/Pages/default.aspx.

46 See Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción*, 23–24.

47 Ann Peters, "Corruption as a Violation of International Human Rights," *European Journal of International Law* 29, no. 4 (2019): 1258–1259.

4. Case Law of the Inter- American Human Rights Treaty Bodies

In its case law, the IACHR and IAComHR have focused on analyzing the impact of corruption on the enjoyment of human rights guaranteed by documents adopted in the inter-American system with regard to persons particularly vulnerable to these violations, such as children, adolescents and adults deprived of their liberty; children in the context of adoption procedures, so-called street children, or indigenous peoples. Furthermore, the Court, as well as the Commission, analyzed in what way corruption affects the exercise of freedom of expression by those who report on acts of corruption such as journalists or human rights advocates. To what extent corruption affects the functioning of the judiciary, its independence and impartiality, as well as people on the move, women, LGBTI persons, Afro-descendants, persons with disabilities and the elderly.

4.1. Persons Deprived of Liberty

In its decisions, the Court has drawn attention to the poor conditions of detainees. In the case involving Daniel Tibi, who was detained at the Penitenciaría del Litoral in Ecuador, the IACHR noticed that cells are overcrowded, without proper ventilation and light, no food was provided and therefore inmates had to pay other prisoners to bring them something to eat[48]. Therefore, the IACHR established indirect link between corruption and the right to bodily integrity[49]. In its case law, the Court found also a violation of the right to humane treatment in detriment of the children and adolescents which were kept in prisons and centers for juveniles. First of all, the IACHR pointed out that the living conditions in the centres, in which children and adolescents were kept were inhumane and exposed them inter alia: both to violence, abuse, and corruption[50]. Both the IACHR and the IAComHR concluded that corruption and abuse of power was a widespread feature in the penitentiary system. Corruption has become the main source of the so-called prison self-government for e.g. in Brazil where inmates are

48 I/ACourt H.R., Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004, Series C, No. 114, § 90.46.

49 Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción*, 39.

50 I/ACourt H.R., Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004, Series C, No. 112, § 25, 170.

keeping order, have keys to entrance gates[51]. Another problem is the lack of transparency in the management of penitentiaries and misallocation of resources to the penitentiary system which led to corruption and weakens the system of social integration for persons deprived of liberty[52]. Forms of corruption include also disproportionate allocation of founds which could lead to malnutrition, like in Guatemala[53].

4.2. Children

Corruption affects also the child adoption process. In the case concerning alleged violation of the right to protect family, including biological daughter, due to transferring a child to a married couple by the mother without father's consent, the Court pointed out that the applicant (IAComHR) did not prove that a systematic practice of trafficking or sale of children exists in Argentin[54]. Nonetheless, in this case the IACHR says that corruption may directly affect human rights. The petitioners alleged also that the facts were part of a generalized context of corruption and child trafficking and that the trafficking of children used to occur. The Court noted also that there are important indications that M was surrendered by her mother in exchange for money[55]. What is more, irregularities in adoption proceedings and improper institutional oversight resulted in the creation of an organized crime group that profited from international adoptions[56]. In the case concerning adoption of two brothers Ramirez, the Court found particularly regrettable the failure of the State to examine whether the adoption brings illegitimate material advantages. In addition, adoption takes place in the context of weakness of State institutions, regulatory flexibility, which facilitated the formation of organized crime syndicates that profited from adoption. This illegal adoption not only took advantage of the institutional and legal weaknesses of the Guatemalan State, but also of the vulnerable situation of

51 Corrupción y derechos, § 434.

52 Ibidem, § 438, 442.

53 Ibidem, § 460–467.

54 I/ACourt H.R., Case of Fornerón and daughter v. Argentina. Merits, Reparations and Costs. Judgment of April 27, 2012, Series C, No. 242, § 18–19.

55 Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción*, 42–43.

56 I/A Court H.R., Case of Ramírez Escobar et al. v. Guatemala. Merits, Reparations and Costs. Judgment of March 9, 2018. Series C, No. 351, § 236–24.

mothers and children living in poverty in Guatemala[57]. In this regard, the Court emphasizes the negative consequences of corruption and the obstacles it represents for the effective enjoyment of human rights. Corruption not only affects the rights of individuals, but also has a negative impact on society as a whole[58]. In order to enhance its argument, the Court referred to both the binding regional instrument e.g. IACC and the instruments issued by the UN Human Rights Council and its Advisory Committee on the issue of negative impact of corruption on the enjoyment of human rights[59]. What is more, the IACHR identified positive obligations incumbent on States – adoption measures effectively preventing and eradicating corruption. In the adoption process, private and public actors have acted to enrich themselves rather than with the fundamental principle of child protection – acting in accordance with the best interests of the child. The entire adoption mechanism was designed to disadvantage poor people[60], preventing children and their biological parents from exercising their human rights[61]. Simplification of voluntary adoption procedures must not lead to turning the process into child trafficking[62]. Eventually, the Court ruled that Guatemala had failed to comply with its obligation to supervise and oversee institutions such as the Asociación Los Niños de Guatemala where the Ramírez brothers were staying. The IACHR also identifies measures, which State had to take in order to comply with judgment i.e.: to provide constant, periodic and updated training to State officials, as well as employees of private institutions to whom the children were entrusted; ensure that the National Adoption Council has the necessary economic and logistical resources to deal effectively with the new modalities in which trafficking and smuggling networks operate; guarantee, through periodic reviews, that the institutionalization of children does not lead to an abusive restriction of their liberty; implement progressive deinstitutionalization of the children and adolescents under their care and apply alternative measures for institutionalization[63]. In its judgments, the

57 Ibidem, § 237.
58 Ibidem, § 241.
59 Ibidem.
60 See Corrupción y derechos, § 97.
61 I/A Court H.R., Series C, No. 351, § 242.
62 Ibidem, § 244.
63 Ibidem, § 408.

Court also addressed the important issue of the trafficking of children for sexual exploitation[64]. Unfortunately, the IACHR did not consider that corruption constituted part of a structural violation of human rights[65]. Similar can be said with regard to so-called street children[66] were some children and young people were kidnapped, abducted and killed by police officers due to homicide, systematic harassment, persecution against street children. Authorities failed to carry out any investigation into the crimes of kidnapping and torture of marginalized children. The judicial authorities failed to comply with their duty to carry out a proper investigation and judicial process that would lead to the punishment of those responsible[67]. In this regard, the IAComHR stressed the importance of the right of children and adolescent to live in a family and stated that measures of protection implemented by States should be in accordance with international standards, including principle of the best interest of the child[68].

4.3. Indigenous peoples

The IACHR and the IAComHR also referred to the phenomenon of corruption concerning violations of the rights of indigenous peoples in regard to right to property, and a free, prior and informed consent[69]. It requires that consent from indigenous community must be obtained before authorizing a project concerning their territories[70]. In the opinion of the IAComHR, one

64 See for e.g.: Sheldon X. Zhang and Samuel L. Pineda, "Corruption as a Causal Factor in Human Trafficking," in *Organized Crime: Culture, Markets and Policies*, ed. Diana Siegel and Hans Nelen (New York: Springer, 2008), 45–52.

65 Nash Rojas,"Nuevos," 223–224.

66 Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción*, 44.

67 I/ACourt H.R., Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, Merits. Judgment of November 19, 1999, Series C, No. 63, § 189, 229–230.

68 Corrupción y derechos, § 467.

69 See Salvador Herencia Carrasco, "The rights of indigenos peoples in the jurisprudence of the American Court of Human Rights: A 'Third World Approaches to International Law' assesment to advance their protection in the Inter-American Human Rights System," in *Critical Indigenous Rights Studies,* ed. Giselle Corradi, Koen de Feyter, Ellen Desmet, and Katrijn Vanhees (London–New York: Routledge, 2018), 160–177.

70 Monica Yriart, "Jurisprudence in a Political Vortex: The Right of Indigenous Peoples to Give or Withhold Consent to Investment and Development Projects – The Implementation of Saramaka v. Suriname," in *The Inter-American Court of Human Rights: Theory and Practice,*

of the manners in which human rights of indigenous people are violated by corruption is ommission by States to adopt special measures in order to guarantee the rights of indigenous people in accordance with their cultural identity[71]. What is more, States not only fail to duly protect indigenous people rights but also legalize such violations e.g.: in the case of territory dispossesion. Indigenous communal property on their lands and territories needs to be protected because it constitutes the fundamental basis of their cultures, spiritual life, integrity and economic survival. The right to be consulted guarantees that indigenous communities participate in matters of their interest[72]. This right may be violated when it is not carried out or is unreasonably delayed[73]. The Court identified an unwarranted delay in the territorial claim process that the petitioning community had initiated under domestic law. According to the testimony of one of the experts, the land restitution system suffered from dishonest practices in the pricing and selection of land. Furthermore, dishonest practices were verified on the part of the company, which had fraudulently obtained the signatures from community members in order to discredit the restitution procedure[74]. Unfortunately, the IACHR did not refer to the consequences of deceitful practice affecting the community. On the other hand, it addressed private corruption more directly[75]. In a similar case, the State did not carry out any type of consultation with the Sarayaku people, in particular about construction of heliports, destruction of areas of great significance to their culture and self-identification[76]. The Court pointed to both the duty to consult and the

Present and Future, ed. Yves Haeck, Oswaldo Ruiz-Chiriboga, and Clara Burbano-Herrera (Cambridge–Antwerp–Portland: Intersentia, 2015), 477.

71 Corrupción y derechos, § 445–446.

72 See Dinah Shelton, "The Right of Indigenous People: Everything Old is New Again," in *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, ed. Andreas von Arnauld, Kerstin von der Decken, and Mart Susi (Cambridge: Cambridge University Press, 2020), 230–231.

73 I/ACourt H.R., Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs. Judgment of March 29, 2006, Series C, No. 146, § 120.

74 Ibidem, § 73 (31–34), 73 (74), 104–108, 112.

75 Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción*, 47–48.

76 I/ACourt H.R., Case of Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations. Judgment of June 27, 2012, Series C, No. 245, § 184.

duty to obtain consent without any further elaboration[77]. The IACHR clarified what it means to negotiate in good faith[78]. These malpractices on the part of an oil company were tolerated by the State by means of a military agreement with the oil companies to ensure the safety of the exploration infrastructure for the people working there[79]. The community was deprived of the right to be consulted on plans and programs of exploration and exploitation of non-renewable resources on their land[80]. In the case *Lhaka Honhat v. Argentina* the IACHR also referred to the right of consultation and stated that the Convention No. 169 could not be interpreted in a manner which prevents the State from carrying out, alone or through third parties, work in the indigenous territory[81]. In these judgments, the IACHR pointed out difficulties and limitations in exercising human rights by vulnerable groups[82] and the Court established only an immediate link between corruption and human rights of indigenous peoples[83]. In comparison to *Sawhoyamaxa* case, the IACHR has moved from the "duty to obtain consent" to duty "to refrain" from restricting indigenous communities' land rights, which could deprived them of the capacity to survive[84]. In all these cases, the common future is that all violations of human rights of indigenous peoples affects these communities as collectives[85].

77 Maria Victoria Cabrera Ormaza and Martin Oelz, "The State's Duty to Consult Indigenous Peoples: Where Do We Stand 30 Years after the Adoption of the ILO Indigenous and Tribal Peoples Convention No. 169?," *Max Planck Yearbook of United Nations Law Online* 23, (2019): 95.

78 I/ACourt H.R., Series C, No. 245, § 185–186, 203. In the literature this pehnomena is so-called "moral corruption of indigenous people," Goldstein and Drybread, "The Social,"303.

79 I/ACourt H.R., Series C, No. 245, § 192.

80 Ibidem, §195–197; Cabrera Ormaza and Oelz, "The State's," 72.

81 I/A Court H.R., Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020, Series C, No. 400, § 14, 95.

82 Herencia Carrasco, "The rights," 165.

83 Nash Rojas, Aguiló Bascuñán, and Bascur Campos, *Corrupción,* 38.

84 Cabrera Ormaza and Oelz, "The State's," 97.

85 Corrupción y derechos, § 451.

4.4. Whistleblowers

The main developments on corruption and human rights in the jurisprudence of the IACHR have been in the areas of freedom of expression, including protection of whistleblowers, i.e. persons who report acts of corruption, and access to information[86]. Freedom of expression is a core of democratic societies and its main function is to facilitate the social control of the government and other powers and that is why it plays a crucial role in denouncing acts of corruption[87]. It is undisputable that the freedom of expression is vital when journalists who try to shed a light on corruption and society are entitled to be informed about such facts[88]. The most hideous form of restriction of the freedom of expression is murder of a journalist[89]. In its jurisprudence the IACHR emphasized the connection between the right to life and freedom of expression. In the landmark advisory opinion concerning the compulsory membership in a journalist association in order to practice journalism, the Court described freedom of expression as a cornerstone of democratic existence[90]. The IACHR highlighted that freedom of expression and practice of professional journalist were closely interrelated. The work of journalists is to collect and present information, and their work embodies freedom of expression[91]. This right is a measure

86 Cuadernillo de jurisprudencia de la Corte Interamericana de Derechos Humanos Nº 23, Corruptión y Derechos Humanos, accessed November 7, 2022, https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo23.pdf, 25; Resolution 1/18, §1 (c)(d i–vii).

87 Corrupción y derechos, § 185.

88 "Go for Zero Corruption" Council of Europe, GRECO, accessed November 7, 2022, https://rm.coe.int/factsheet-human-rights-and-corruption/16808d9c83.

89 I/A Court H.R., Case of Carvajal Carvajal et al. v. Colombia. Merits, Reparations and Costs. Judgment of March 13, 2018, Series C, No. 352, § 175; I/A Court H.R., Case of Digna Ochoa et al. v. México, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2021, Series C, No. 447, § 46–47. See Committee to Protect Journalists, accessed November 7, 2022, https://cpj.org/data/killed/2022/?status=Killed&type%5B%5D=Journalist&start_year=2022&end_year=2022&group_by=location.

90 See I/ACourt H.R., Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile, Merits, Reparations and Costs. Judgment of February 5, 2001, Series C, No. 73, § 68.

91 I/ACourt H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, § 74.

of exchange ideas and information[92]. That is why the public order, which stipulates the obligation to be a member of a given professional association cannot be applied in the case of journalists, since it would mean depriving them of the exercise of their freedom of expression[93]. In its case law the IACHR pointed out core human rights of individuals and obligations incumbent on states: the right to receive information and the duty to protect the individuals' right to such information[94]; the obligation to ensure effective procedure to process requests for access to information[95]; the right to appeal in case of obstruction of access to information[96]; the duty to prevent and protect journalists[97]. What is more, in the case of violation of human rights, States are not allowed to resort to mechanism of official secret, confidentiality of information or public interest or national security in order to withhold certain information, which are indispensable during pending proceeding[98]. All cases of denial of access to information must be substantiated and the burden of proof is borne by the organ, which refuses to provide (hand over) information[99]. The Court clearly stated that free flow of information is a rule and denial of this right is an exception[100]. The IACHR and the IAComHR underlined the role played by the mass media and journalists with regard to full enjoyment of freedom of expression[101]. Considering that freedom of expression is not absolute right, the Court also

92 I/ACourt H.R., Case of Ivcher Bronstein v. Peru, Merits, Reparations and Costs. Judgment of February 6, 2001, Series C, No. 74, § 148.

93 I/A Court H.R., Series A, No. 5, § 76.

94 I/ACourt H.R., Case of Claude Reyes et al. v. Chile, Merits, Reparations and Costs. Judgment of September 19, 2006, Series C, No. 151, § 77.

95 I/A Court H.R., Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010, Series C, No. 219, § 231.

96 Ibidem.

97 I/A Court H.R., Series C, No. 352, § 162, 217.

98 I/ACourt H.R., Series C, No. 219, § 202.

99 Ibidem, § 230; I/ACourt H.R., Case of the Kaliña and Lokono Peoples v. Suriname, Merits, Reparations and Costs. Judgment of November 25, 2015, Series C No. 309, § 262.

100 Baccio Tarracino, *The International,* 134.

101 See Corrupción y derechos, § 414–421; Víctor Manuel Oropeza vs. Mexico, Report Nº 130/99, case 11.740, November 19, 1999, § 2.

defined the limit of this right[102]. According to the IACHR, journalists are obliged to verify received information on which they based their opinions and to act in good faith[103]. But they also have the right to confidentiality of their sources, which due to development of new technologies involves a risk of digital espionage and disclosure of source of information[104]. One of the anti-corruption preventive measures is a duty of the State to ensure transparency in public administration[105] and foremost to guarantee public access to information[106] but also raising awareness as to the threats posed by corruption[107]. Transparency is based on free flow of information and encompasses also access to documents and information[108]. In addition its essential condition is to promote public debate and accountability and responsibility in the fight against corruption as well[109].

Another group of whistleblowers are human rights defenders. The IAComHR defined them as "any person who in any way promotes or seeks to realizations human rights fundamental freedoms recognized at the national or international level", including justice operators, environmental defenders[110]. In order to protect human rights defenders, the IAComHR grants various precautionary measures but also has called for protection of them and creation of appropriate environment to carry out their work of

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102 I/A Court H.R., Case of Herrera Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004, Series C, No. 107, § 117, 120; Corrupción y derechos, § 186.

103 I/ACourt H.R., Case of Mémoli v. Argentina, Preliminary Objections, Merits, Reparations and Costs. Judgment of August 22, 2013, Series C, No. 265, § 122.

104 Corrupción y derechos, § 210–212.

105 See Leonie Hensgen, "Corruption and Human Rights – Making the Connection at the United Nations," *Max Planck Yearbook of United Nations Law* 17, (2013): 202.

106 See Promotion and protection of the right to freedom of opinion and expression, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/68/362 of 4 September 2013, § 3, 18, 20.

107 Bacio Terrracino, *The International,* 133–134.

108 Valentina Rossi, "Government Transparency and the Right of Access to Information: Evolving International and European Standards and Their Implementation in the Italian Legal System," *Italian Yearbook of International Law* 28, (2018): 182; Corrupción y derechos, § 220–221.

109 Corrupción y derechos, § 231.

110 Ibidem, § 397–401.

investigation and punishing acts of corruption[111]. In the case *Valle Jaramillo et al. v. Colombia*, which denounced the relationship between paramilitaries and state agents, the IACHR stated that the acts of defamation and harassment targeted at Jesús María Valle Jaramillo to prevent him from reporting posed a threat to his life[112]. In regard to state responsibility for the violation of human rights, the Court referred also to the obligation *erga omnes* and pointed out that states were not responsible for every violation of human rights. In order to be charged of such breach, the State must be aware of a situation of "real and imminent" risk[113]. The IACHR stressed that human rights defenders supplemented either the State and inter-American human rights system functions in promotion and protection of human rights[114]. That is way the IACHR sets out the obligation incumbent on States: to adopt all necessary measures in order to ensure full exercise of rights enshrined in the IACHR – the rights to life, personal liberty, personal integrity, provided that State, where aware of an imminent danger to the human rights defenders[115]. The IAComHR on 5 July 2021 filed the case of *Julio Rogelio Viteri Ungaretti and family v. Ecuador*[116], which concerns a military servicemember who in 2001 reported irregularities and acts of corruption in the army. The Commission stated that freedom of expression constituted "a means for reporting acts of corruption". According to the IAComHR, disciplinary sanctions failed to pass a three-stage test: of legitimacy, legality, proportionality, and the obligation of prior approval of speeches before publishing constitutes a form of censure. It also pointed out that violations of freedom of expression were aggravated due to the fact that there is no other instrument to report acts of corruption in armed forces[117]. The IAComHR stressed that persons reporting acts of corruption

111 Ibidem, § 404–410.

112 I/ACourt H.R., Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs. Judgment of November 27, 2008, Series C, No. 192, § 68.

113 Ibidem, § 78–79.

114 Ibidem, § 88.

115 Ibidem, § 90.

116 See Report No. 36/15, pettition 717–05, OEA/Ser.L/V/II.155, Doc. 15 July 22, 2015, Original: Spanish.

117 See for e.g.: Dimitrios Kafteranis, "The International Legal Framework on Whistle-Blowers: What More Should Be Done?," *Seattle Journal for Social Justice* 19, no. 3 (2021): 733–758.

were more likely to be subject to various repressive measures because of their activities such as criminal proceedings or unjustified dismissal[118]. The IACHR pointed out the State's obligation to protect individuals who are at risk due to their work to fight corruption[119]: to establish special measures, which guarantee adequate and effective protection. In order to be effective, those measures should be: implemented immediately after the risk becomes known; timely; and the person responsible for protecting the individual at danger should have adequate training and should be effective for as long as the danger lasts. In the view of the Court, a measure is adequate when: it is compatible with the functions of the person at risk, allows such person to carry out his/her current activities, and can be modified in the light of circumstance. Risk assessment must take into account gender[120]. In the case *Acosta et al. v. Nicaragua,* the Court analyzed in depth whether criminal proceedings constitute such adequate means of genuine search for the truth about depravation of life of the victim. The Court noted that not only investigation and proceeding should be conducted properly but due diligence must also be taken in determining the motives of homicide[121]. The IACHR paid special attention to victims of law enforcement officers (police officers)[122] and prison service abuses especially when such forces are involved among others in act of corruption[123].

4.5. Staff of the justice system

Corruption in the judiciary may be defined as a deviation from judicial functions by the judicial authority or other justice operators, to obtain a material or immaterial benefit[124]. If the judicial body is not sufficiently protected, it is impossible to combat corruption effectively. In such cases,

118 Corrupción y derechos, § 423–427.

119 Cuadernillo, 45.

120 I/ACourt H.R., Case of Human Rights Defender et al. v. Guatemala, Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014, Series C No. 283, § 157, 190–192.

121 See I/ACourt H.R., Case of Barbosa de Souza et al. v. Brazil, Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2021, Series C, No. 435, § 127.

122 Ibidem, § 105.

123 I/A Court H.R., Case of Lysias Fleury et al. v. Haiti, Merits and Reparations. Judgment of November 23, 2011, Series C, No. 236, § 75–76.

124 Corrupción y derechos, § 294.

the proceedings may not be launched at all, and documents relevant to the settlement of the case may be destroyed[125]. Furthermore, the witnesses may be intimidated and police officers bribed in order to discourage justice and state organs to take action to protect them[126]. The Court paid particular attention to the lack of due diligence on the part of the judicial authorities, which failed to see any connection between the arbitrary deprivation of life of the person who investigated a series of cases of corruption, smuggling, fraud, drug-trafficking among others[127]. Judges and prosecutors play an important role in enhancement and safeguarding the rule of law and the States are responsible for ensuring their independence and enable them to carry out their functions impartially[128]. In the inter-American practice, independence concerns both institutional independence, which refers to the independence of the administration of justice made up of judges, prosecutors, and functional independence[129]. Judicial independence and objectivity also means adequate process of appointment, irremovability and protection against external pressure[130]. All this guarantees encompasses also prosecutors[131]. Investigation authorities must be free from political pressure[132]. In the judgment concerning *Martínez Esquivia* the Court pointed out that the removal of prosecutors from their posts is possible only in certain limited cases i.e.: the occurrence of the conditions subsequent to which the appointment was subject and when prosecutor committed serious disciplinary offences or was proven incompetent[133]. The case was very characteristic because the prosecutor was removed from the post after having participated

125 Ibidem, § 295.

126 I/ACourt H.R., Case of Gutiérrez and family v. Argentina, Merits, Reparations and Costs. Judgment of November 25, 2013, Series C, No. 271, § 121–122.

127 Ibidem, § 122.

128 I/ACourt H.R., Case of Martínez Esquivia v. Colombia, Preliminary Objections, Merits and Reparations. Judgment of October 6, 2020, Series C, No. 412, § 68.

129 Corrupción y derechos, § 303–308.

130 I/A Court H.R., Series C, No. 412, § 85, 95. See I/A Court H.R., Case of Cuya Lavy et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs. Judgment of September 28, 2021, Series C, No. 438, § 123.

131 I/A Court H.R., Series C, No. 412, § 87–88; Corrupción y derechos, § 298.

132 I/A Court H.R., Series C, No. 412, § 92.

133 Ibidem, § 99.

in an investigation concerning alleged corruption of public officials and she rejected an order of her superiors to close the investigation[134].

The IACHR very rarely refers to corruption directly but one of such cases is *Luna López v. Honduras,* in which a public official was reported to relevant authorities and media about alleged acts of corruption, illegal exploitation of forests by private companies and establishment of so called „Phantom cooperatives" in order to allow unlawful forest exploatation[135]. In this regard, the Court pointed out that there is a link between protection of the enviroment and other human rights[136]. The IACHR stressed the obligation incumbent on States i.e.: to adopt all necessary measures to protect right to life of those indiviudals, who due to their occupation are in danger. In short, states are obliged to prevent human rights violations[137]. According to the Court, the State, through its organs (Office of the Prosecutor), ommited to assess the risk to life of the victim (a public official) and failed to exercise due dilligence[138]. The State is obliged to act with due dilligence in case of special risk and the State failed to implement timely and neccessary measures of protection. The prosecutor was aware of an imminent threat and did not take required steps to protect a person at risk, resulting in a breach of the obligation to protect the right to life[139].

The IACHR worked on standards which must be met during proceedings concerning persons accused of corruption[140]. In the eyes of the Court, the pressumption of innocence is the core of the right of fair trial and the burden of proof is borne by the prosecutor not the accused. It is essential for the enjoment of the right of defence[141]. The exercise of the right of defence guarantees that the two structural principles of fair trial: equality of arms

134 See "Yenina Esther Martínez Esquivia v. Colombia," *Open Society Foundation*, accessed November 7, 2022, https://www.justiceinitiative.org/litigation/yenina-esther-martinez-esquivia-v-colombia.

135 I/A Court H.R., Merits, Reparations and Costs. Judgment of October 10, 2013, Series C, No. 269, § 27.

136 Ibidem, § 123.

137 Ibidem, § 123–124.

138 Ibidem, § 137, 139.

139 Ibidem, § 137.

140 Cuadernillo, 67.

141 I/A Court H.R., Case of López Mendoza v. Venezuela, Merits, Reparations, and Costs. Judgment of September 1, 2011, Series C, No. 233, § 128.

and the right of contradiction are adequately adhered to[142]. Futhuremore, this right limits the scope of judge's discretion and the parties may make the requests they deem relevant and the judge is obliged to evaluate them[143]. What is more, a decision taken by a national authority which could affect enjoyment of human rights must be duly justified[144]. Due to the fact that corruption is a space of opacity, the requirement of adequate justification of decision results in more transparency, which allows for civil control[145]. Referring to the practice of the ECHR, the Court pointed out that fair trial requires that law should be adequately accessible, with sufficient preccision, foreseeable[146]. The IACHR found that uncertainty not always is equal to violation of the ACHR. Regulation with some degree of discretion still meets the requiment of foreseeability[147]. In relation to the reasonable time of proceeding, not only does it depend on its duration but also on complexity of the case. The Court pointed out that evidence of factors that contributed to the prolongation of the proceedings should be provided[148]. The right to fair trial is based on the principle of equality i.e.: both parties of the proceeding have equal footing and are subject to the same procedural rules and guarantees[149]. In this regard, the IACHR stressed that special care must be taken in cases involving public officals. In order to fight against corruption and to prosecute crimes against public administration, it is not desirable to subject politically active persons to an indefinite uncertain procedural situation with the aim of excluding them from the democratic political struggle. This special caution requires shortening the term that is usually considered

142 Corrupción y derechos, § 326.

143 Ibidem, § 329.

144 I/A Court H.R., Series C, No. 233, § 141.

145 Corrupción y derechos, § 332.

146 I/A Court H.R., Series C, No. 233, § 199.

147 Ibidem, § 202.

148 I/A Court H.R., Case of Andrade Salmón v. Bolivia, Merits, Reparations and Costs. Judgment of December 1, 2016, Series C, No. 330, § 159. See e.g. IACHR 2020, Case of Noguera et al. v. Paraguay, Merits, Reparations and Costs. Judgment of March 9, 2020, Series C, No. 401, § 80–85.

149 Helene Ruiz Fabri and Joshua Paine, "The Procedural Cross-Fertilization Pull," in *Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals,* ed. Chiara Giorgetti and Mark Pollack (Cambridge: Cambridge University Press, 2022), 70.

a reasonable time for the trial in order to defend and preserve rule of law[150]. Futhermore, the IACHR highlighted the requirement of judge impartality as one of elements of fair trial. Impartiality means that a member of the Court do not have direct interest, is not involved in the dispute, have no preference to either party of the case. The principle is presumption of subjective impartiality unless proven otherwise. The objective impartiality concerned the case where the judge has offered a proof which raised reasonable concern about his partiality[151]. In this regard, the IACHR pointed out that objective aspect of impartiality concerned a situation in which an objective observer has doubts as to impartiality of judge in a given case for e.g.: suspension of the hearing without justification; the plaintiff's lawyer was not allowed to be assisted by another lawyer; the victim was denied to take part in the process of selecting the jury; passing to the judge a bag and sheets of papers from the accused person, the state omitted to investigate alleged bribery[152]. On the other hand, in the eyes of the Court proces fair trial is still preserved even if the person has no opportunity to prove their innocence in a corruption scheme when such case is unrelated to other (criminal) proceeding[153]. The IAComHR proposed additional measures in order to restrict the scope of corruption in the administration of justice: to establish a system of accountability, including a follow-up system[154]. The jurisprudence of both organs indicate that also a person accused of an act of corruption enjoy the fundamental human right of fair trial and proceedings in corruption-related matters must comply with the principle of legality[155]. Corruption is also present in political life and the most frequent forms of corruption in regard to political rights are found in the political-electoral sphere and consist of fraudulent financing of politicians, vote buying and political clientelism. Therefore, it is indispensable to have an independent,

150 I/A Court H.R., Series C, No. 330, § 178.

151 I/A Court H.R., Case of V.R.P., V.P.C. et al. v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs. Judgment of March 8, 2018, Series C, No. 350, § 239.

152 Ibidem, § 241, 244, 250, 253.

153 I/A Court H.R., Case of Villaseñor Velarde et al. v. Guatemala, Merits, Reparations and Costs. Judgment of February 5, 2019, Series C, No. 374, § 138.

154 Corrupción y derechos, § 339–342.

155 Ibidem, § 354–356; 362–365.

impartial and legitimate system for the administration of justice and electoral control, as well as technical capacity to carry out such control[156].

4.6. Other vulnerable groups

The IAComHR pointed out that another group vulnerable to corruption were persons in mobility, including asylum seekers[157]. There are different ways in which corruption affects such vulnerable people for. e.g. in reception process where a migrant must pay a bribe in order to be let into the State's territory or to gain access to social benefits. In case of human trafficking in conditions of slavery, the Commission states that there is a direct connection between corruption and violation of human rights due to the fact that the authorities of the country of destination are involved in such business or they knew about such practices and omitted to prevent and stop them. Another threat is the facilitation by State agencies of cross-border criminal activities such as drug traffic or money laundering. Furthermore, the State bears aggravated responsibility in case if State officials are involved in or even in charge of such criminal activities[158]. A similar case is women, LGBTI persons, Afro-descendants, persons with disabilities and the elderly[159]. All of these groups are direct or indirect victims of corruption. The IAComHR pointed out that women and LGBTI persons are affected by various forms of violence, which is aggravated by the act of corruption, especially in case of sex workers. The Afro-descendants population rights such as: the rights to life, health, education are affected by corruption through inappropriate allocation of resources for the implementation of their policy. Another form of corruption is payment of a bribe in order to avoid discrimination by law enforcement authorities. The Commission is also concerned about persons with disabilities due to the fact that corruption have an impact on exercise of their rights, such as the civil legal capacity of persons with disabilities. Sometimes such persons have to pay bribes in order to carry out legal or commercial transactions. In case of the elderly, corruption in public contracting

156 Ibidem, § 370; 386.

157 Resolution 1/18, § 3(b).

158 Corrupción y derechos, § 452–459.

159 See Khulekani Moyo, "Corruption as a Human Right Violation," in *Research Handbook on Human Rights and Poverty,* eds. Martha F. Davis, Morten Kjaerum, and Amanda Lyons (Chetelnham–Northampton: Edward Elgar Publishing, 2021), 509.

has negative impact on e.g. assistance programs for elderly people, access for social security[160]. The case law of the IACHR and the IAComHR shows that there is a link between corruption and the material status of the victim. People who are in worse living conditions are more likely to be victims of corruption[161]. In Latin America and the Caribbean almost one-third of the population live in poverty including approximately 10% in extreme poverty, which leads to structural inequalities and corruption[162].

5. Conlusions

The phenomen of corruption is not limited by culture, borders, tradition, religion or geography – it is just universal[163]. In Latin America, corruption is a cultural product that begins with 75% of the population being convinced that there is no equality before law. However, some changes are noticeable. Statistical data indicates that perception of corruption decreased from the rate of 62% in 2016 to 57 % in 2020. But in some countries of the region this rate of perception is still high i.e.: in Chile – 73%, in Venezuela – 75%, Parguay and Peru per 70% and only in five states of Latin America less than half population think that corruption grows – El Salvador, Uruguay, Nicaragua, Mexico and Guatemala[164]. High-ranking public officials are the most susceptible of being corrupt i.e.: the president (58%), the parliament (55%), the police (50), judges (47%)[165].

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160 Corrupción y derechos, § 468–484.

161 Moyo, "Corruption", 510.

162 Verónica Gómez, "Structural Challanges to Access to Justice in the Americas: An Overview of Standards Promoted in the Inter-American System," in *Equal Access to Justce for All and Goal 16 of Sustainable Development Agenda: Challenges for Latin America and Europe*, ed. Helen Ahrens, Horst Fischer, Verónica Gómez, and Manfred Nowak (Zürich: LIT Verlag GmbH and Co. KG Wien, 2019), 189, 202.

163 See The United Nations Convention against Corruption, Reasource Guide on Good Practices in the Protection of Reporting Persons, United Nations Office of Drugs and Crimes, Vienna 2015, 1, accessed November 7, 2022, https://www.unodc.org/documents/corruption/Publications/2015/15–04741_Person_Guide_eBook.pdf.

164 "Informe Latinobarómetro 2021," (Santiago, Chile), accessed November 7, 2022, https://www.latinobarometro.org/lat.jsp, 81–82.

165 Ibidem, 83–84. See "Americas Barometer," accessed November 7, 2022, https://public.tableau.com/app/profile/lapop.central/viz/LAPOPV3_2/Combination?publish=yes.

Neither documents regulating the fight against corruption nor documents on human rights protection refer to the issue of impact of corruption on human rights and perhaps this is the main reason why it is so difficult to establish a direct causal link between corruption and human rights violations[166]. But the key element which connects corruption and human rights is misuse of power[167]. The case law of the IACHR and the IAComHR prove that in fact all human rights can be affected by corrupt action: civil, political, economic, social and cultural rights[168]. Both human rights treaty bodies treated corruption rather as a means of violation of already recognized human rights than of a brand new right[169]. In its practice, the IACHR pointed out that in many cases corruption may have led to violation of human rights but was not their violation in itself[170]. In such cases, corruption is a *sine qua non* factor which, in effect, led to a breach of human rights[171]. Futhuremore, corruption affects human rights in regard to the limitation of State's capacity to fulfil obligations to respect, protect and implement human rights[172]. The Commission eleborated those obligations, i.e.: 1) the obligation of States under the ACHR: obligation to guarantee full enjoyment of human rights; obligation to adopt measures to prevent the infringement of rights linked to acts of corruption; obligation to investigate acts of corruption; obligation to guarantee the exercise of rights based on equal and non-discriminatory conditions; obligation to make reparations to the victims of corruption; 2) obligation under the American Declaration of the Rights and Duties of Man: obligation to respect and ensure the rights set

166 See Kolawole Olaniyan, "Towards a Human Rights Approach to Corruption," in *The Cambridge,* 532.

167 Corrupción y derechos, § 90.

168 Julio Bacio-Terracino, "Linking Corruption and Human Rights," *Proceedings of the Annual Meeting* 104, (2010): 243.

169 Cf. Andrew Spalding, "Anti-Corruption: Recaptured and Reframed," in *The Cambridge*, 523–524.

170 See Bacio-Terracino, "Linking," 243.

171 Jimena Reyes, "Symposium on New Directions in Anticorruptional Law: State Capture Through Corruption: Can Human Rights Hep?,"*AJIL Unbound* 113, (2019): 331–332.

172 Joel M. Ngugi, "Making the Link Between Corruption and Human Rights: Promises and Perils," *Proceedings of the Annual Meeting* 104, (2010): 246.

forth in the Declaration; obligation to act with due dilligence in response to human rights violations, among other things[173].

The Commission's and the Court's practice shows one thing when dealing with a phenomenon as complex as corruption, the context must always be taken into account when determining its impact on human rights[174]. But it is very doubtful whether corruption can constitute a human rights violation that generates international responsibility of the States before inter-American human rights treaty bodies[175]. In order to do that, it is indispensabe to establish that the wrongful act has the capacity to infringe an international obligation of the State in the area of human rights and is attributabel to the State[176]. Unfortunately, in a corruption case it is hard to estabilish the chain of events which led to the act of corruption[177]. Some scholars conclude that the attribution of responsibility in cases of international wrongdoing, based on acts or situations of corruption, is determined by the failure of relevant authorities to comply with the general obligations of the State within the scope of their competence. When there is international responsibility in place, the responsible State is obliged to make full reparation for the injury caused by an internationally wrongful act[178]. The practice of the IACHR and the IAComHR indicates that corruption is not a victimless violation. The groups that are most vulnerable to acts of corruption are the poorest ones. It should also be borne in mind that violations of human rights can be both a cause and an effect of corruption[179].

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173 Corrupción y derechos, § 249–283.

174 See Kevin E. Davis, "Corruption as a Violation of International Human Rights: A Reply to Anne Peters," *European Journal of Inernational Law* 29, vol. 4 (2019): 1291,

175 See Nash Rojas, "Nuevos", 206–207.

176 See Michał Balcerzak, "Korupcja jako zagrożenie dla społeczności międzynarodowej i praw człowieka," in *Świat wobec współczesnych wyzwań i zagrożeń*, ed. Janusz Symonides (Warsaw: Wydawnictwo Naukowe Scholar 2010), 536–538.

177 Responsibility of States for Internationally Wrongful Acts 2001, Article 2, *Yearbook of the International Law Commission* 2, part 2 (2001): 34–36; Aloysius P. Llamzon, "State Responsibility for Corruption: A return to Regular Order," *European Yearbook of International Economic Law* 11, (2020): 111, 119–123; Tim Wood, "State Responsibility for the Acts of Corrupt Officials: Applying the 'Reasonable Foreign Investor' Standard," *Journal of International Arbitration* 35, no. 1 (2018): 108–110.

178 Nash Rojas, "Nuevos," 219–220.

179 Balcerzak, "Korupcja," 546.

The case law of the IACHR and IAComHR illustrates that human rights, democracy and rule of law go hand in hand and that corruption has a direct impact on citizen's confidence in democratic institutions and undermines the whole idea of State's apparatus. As A. Gutteres said "there can be no sustainable prosperity unless everyone can benefit from it. There can be no lasting peace without justice and without respect for human rights"[180].

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[180] António Gutteres, "Inauguration of the 40th Anniversary Commemorations, July 16, 2018, Inaugural Adresses", in *Dialogue between Regional Human Rights Courts*, Inter-American Court of Human Rights (San José, 2020), 21, 26.

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National Self-Governments in Hungary and Serbia in the Context of Public Power Decentralising Solutions

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Keywords:
decentralization, national minority self-governments, national cultural autonomy, special self-government

Abstract: The aim of the paper is to verify a thesis according to which countries which are considered to be the most representative examples of implementing the national cultural autonomy concept (Hungary and Serbia) in fact use the construct of national minority self-government, which, according to administrative law commentaries, is classified as non-territorial, or special self-government. In order to fulfill this task two decentralisation solutions which are aimed at pursuing national and ethnic minorities' ambitions to maintain and enhance their cultural identity: national minority self-governments and national cultural autonomy has been presented. These legal constructs are not equivalent, although in international literature on the subject they are often treated as synonyms. In this context Serbian and Hungarian regulations has been presented and assessed.

1. Introduction

The objective of the paper is to verify a thesis according to which countries which are considered to be the most representative examples of implementing the national cultural autonomy concept (Hungary and Serbia) in fact use the construct of national minority self-government, which, according to administrative law theory, is classified as non-territorial, or special

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self-government[1]. These countries deserve special attention. According to David J. Smith the Hungarian legislation after 1993 offers the best-known and most-fully developed system of minority non-territorial autonomy in post-communist central and eastern Europe[2]. More than 1 000 cultural self-governments were created there during the decade after 1993, over half of them by the Roma[3]. Hungary has widely been considered, in international comparative terms, a trailblazer in granting extended minority rights and non-territorial cultural autonomy[4]. As for the Serbian 2009 minority law, in Smith's opinion it offers the most substantive provisions for autonomy of any country in the region outside Hungary[5]. Both non-territorial arrangements are entrenched in public law[6].

In order to fulfil the objective of this study, it is necessary to make a number of initial determinations. The corporate aspect of the definition of self-government indicates a social foundation of this legal construct, and the possibility for its creation on the basis of various criteria. It does not need to be residence in a given territory, it may be a specific type of bonds between people, such as a shared profession, belonging to the same national community, or practising the same religion. As regards the concept of national cultural autonomy, proposed by the representatives of Austro-Marxism, Karl Renner and Otto Bauer, emphasis should be placed on

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1 Markku Suksi, "Non-Territorial Autonomy: The Meaning of '(Non-)Territoriality," in *Minority Accommodation through Territorial and Non-territorial Autonomy*, ed. Tove H. Malloy and Francesco Palermo (Oxford: Oxford University Press, 2015), 92; writes that "institutional solutions that could be characterized as national cultural autonomies are found in several countries, like Hungary, Latvia, and the Russian Federation, as well as Serbia, Estonia, and Finland."

2 David J. Smith, "Challenges of Non-Territorial Autonomy in Contemporary Central and Eastern Europe," in *The Challenge of Non-Territorial Autonomy. Theory and Practice,* ed. Ephraim Nimni, Alexander Osipov and David J. Smith (Oxford – Bern – Berlin – Bruxelles – Frankfurt am Main – New York – Wien: Peter Lang, 2013), 121.

3 Smith, "Challenges," 122.

4 Balázs Dobos, "With or without you: integrating migrants into the minority protection regime in Hungary," *Migration Letters,* vol. 13 no. 2 (2016): 245.

5 Smith, "Challenges," 123.

6 Levente Salat, "Conclusion," in *Minority Accommodation through Territorial and Non-territorial Autonomy*, ed. Tove H. Malloy and Francesco Palermo (Oxford: Oxford University Press, 2015),253.

its legal and state system aspects. In this context Serbian and Hungarian regulations will be presented and assessed.

2. The essence and objectives of self-government

In Polish literature on administrative law, decentralisation is understood as "an administration system where administrative entities enjoy independence from central authorities" which is equal to the abolishment of hierarchic subordination. In this context, self-government is only a certain type of decentralisation[7]. The success of this public authority organisation concept is expressed in the statement that it is "a prerequisite to the proper functioning of a democratic state which applies the principles of political and social pluralism in practice."[8] The legislator decides on the limits of decentralisation. They may change, depending on the adopted concept of state system or socio-economic transformations[9]. In line with the principle of subsidiarity, public authorities should perform their tasks as close to their citizens as possible, following an in-depth assessment of socio-economic circumstances. Decentralisation-related legal solutions may range between constructs limited to the elimination of hierarchical subordination, through public undertakings, to subjective forms of decentralisation[10]. From the territorial perspective, contemporary forms of decentralisation can be manifested in basic self-government units (communes, single level self-governance), two-level

7 Tadeusz Bigo, *Związki publiczno-prawne w świetle ustawodawstwa polskiego* (Warszawa: Przemiany, 1928), and also Wacław Komarnicki, *Polskie prawo polityczne* (Warszawa: Księgarnia F. Hoesicka, 1922), 367, and Henryk Dembiński, *Osobowość polityczno-prawna samorządu w świetle metody dogmatycznej i socjologicznej (*Wilno: Skład Główny w Księgarni Św. Wojciecha, 1934), 68, as cited in Ewa Nowacka, *Samorząd terytorialny w systemie administracji publicznej w Polsce. Studium politycznoprawne* (Warszawa: LexisNexis, 1993), 19; Zbigniew Leoński, *Zarys prawa administracyjnego* (Warszawa: LexisNexis, 2001), 68.

8 Krzysztof Łokucijewski,"Decentralizacja," in: *Leksykon prawa administracyjnego. 100 podstawowych pojęć*, ed. Eugeniusz Bojanowski and Krzysztof Żukowski (Warszawa: C.H. Beck, 2009), 43.

9 Magdalena Kisała, "Granice decentralizacji," in *Decentralizacja i centralizacja administracji publicznej. Współczesny wymiar w teorii i praktyce*, ed. Barbara Jaworska-Dębska, Ewa Olejniczak-Szałowska and Rafał Budzisz (Warszawa – Łódź: WoltersKluwer, 2019), 65.

10 Piotr Lisowski, "Samodzielność w administrowaniu," in *Decentralizacja i centralizacja administracji publicznej. Współczesny wymiar w teorii i praktyce*, ed. Barbara Jaworska-Dębska, Ewa Olejniczak-Szałowska and Rafał Budzisz (Warszawa – Łódź: WoltersKluwer, 2019), 91.

self-governance, regional self-governance (three-level self-governments), in autonomous decentralisation characterised by the division of the entire territory of a state into autonomous regions - at the same time maintaining a self-governance system in lower-rank entities, and, finally, in federalism[11]. However, the decentralisation of state authorities does not necessarily need to have only a territorial dimension, and might include a wider range of bodies which were granted public powers as a result of implementing this rule[12].

In recent definitions of self-government the corporate aspect of the self-government is underlined[13]. Marek Wierzbowski and Aleksandra Wiktorowska noted that the most commonly accepted definition of self-government is as follows: "self-government is administration performed by legal persons (corporations) which are separate from the state."[14] I concur with the views expressed by Ewa Nowacka who stated that self-government was different from other administration entities due to the legal personality of its units. Only corporately organised social groups are able to manage their affairs independently, as they establish bodies exercising administration tasks directly pursuant to organisational norms[15].

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11 Marek Domagała, "Z zagadnień decentralizacji w państwie współczesnym," in *Oblicza decentralizmu*, ed. Jan Iwanek (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 1996), 10.

12 Michał Chmielnicki and Krzysztof Lewandowski, "Zasada udziału samorządu terytorialnego w sprawowaniu władzy publicznej na podstawie orzecznictwa Trybunału Konstytucyjnego," *Studia z zakresu prawa, administracji i zarządzania UKW* no. 13 (2013): 103.

13 See, for instance, Antoni Agopszowicz and Zyta Gilowska, *Ustawa o samorządzie terytorialnym. Komentarz* (Warszawa: C.H. Beck, 1997), 117; Michał Kulesza, "Słowo wstępne," in Aleksandra Wiktorowska, *Polska bibliografia prawnicza samorządu terytorialnego* (Warszawa: Zakład Narodowy im. Ossolińskich, 1986), 12; Zbigniew Leoński, "Ustrój i zadania samorządu terytorialnego," in *Samorząd w Polsce,* ed. Stanisław Wykrętowicz (Poznań: Wydawnictwo Wyższej Szkoły Bankowej w Poznaniu, 1998), 65–66; Hubert Izdebski nad Michał Kulesza, *Administracja publiczna. Zagadnienia ogólne* (Warszawa: Liber, 2004), 136; Zygmunt Niewiadomski, "Pojęcie samorządu terytorialnego," in *System prawa administracyjnego. Podmioty administrujące. Tom VI*, ed. Roman Hauser, Zygmunt Niewiadomski and Andrzej Wróbel (Warszawa: C.H.Beck, 2011), 105; Bogdan Dolnicki, *Samorząd terytorialny* (Warszawa: WoltersKluwer, 2012), 17.

14 Marek Wierzbowski and Aleksandra Wiktorowska, "Podstawowe pojęcia teoretyczne w nauce prawa administracyjnego," in *Polskie prawo administracyjne*, ed. Jerzy Służewski (Warszawa: Wydawnictwo Naukowe PWN 1995), 37.

15 Nowacka, *Samorząd*, 20.

In the literature on the subject, it is stressed that "the objectives of self-government are most of all to allow the civic society to take part in public administration and to juxtapose the representation of society with central government authorities, to allow due insight into the actual relationships in the life of the society, and to improve the way the demands voiced by certain social, professional, ethnic and cultural groups are satisfied, or to meet specific individual economic goals."[16] Profound ethnic and cultural differences in certain territories of the country might also contribute to the establishment of self-government institutions[17]. In general, self-government is aimed at improving the material and spiritual culture of population[18]. Voluntary-membership associations may serve the same purpose but such properties as mandatory membership, administrative powers, independence of actions, performance of public tasks, own sources of income (tangible assets obtained by way of mandatory collection) create a distinction between special self-government and private law associations[19].

The independence of self-government is not only related to formal responsibilities and powers vested in it, but also to providing the material grounds for exercising such powers. In the literature on territorial self-government, it is pointed out the financial independence is one of the immanent properties of budgets of self-government units. Without such independence they would cease to be budgets of separate public entities,

16 Zbigniew Grelowski, *Samorząd specjalny: gospodarczy, zawodowy, wyznaniowy według obowiązujących ustaw w Polsce* (Łódź: Społem, 1947), 44.

17 Jerzy Panejko, *Geneza i podstawy samorządu terytorialnego* (Paryż, 1926), 98–99. Péter Kovács rightly states that "self-government is also conceivable in the framework of the organisation of public administration and not necessarily in the human rights framework", "The Legal Status of Minorities in Hungary," *Acta Juridica Hungarica* vol. 43 no. 3–4 (2002): 209.

18 Maurycy Jaroszyński, *Rozważania ideologiczne i programowe na temat samorządu* (Warszawa: Wydawnictwo Przemiany, 1936), 18. As Balázs Szabolcs Gerencsér writes in "The Law of Coexisting Languages Examining the Quartet of Language Policy Fields," *Foreign Policy Review* no. 2 (2021): 97: "if the community can conduct their local affairs in its own language (e.g. chairing board meetings, making decisions), it can also serve social integration and political stability".

19 Jaroszyński, *Rozważania*, 19.

and they would no longer be self-governing authorities[20]. The analysis of self-government rights in respect of the income part of their budgets (income decentralisation) and the entitlements in the sphere of redistributing the income as part of such budgets (expense decentralisation) allows the assessment of the actual overall degree and range of decentralisation[21]. There are no reasons why the above findings cannot be applied to special self-government.

3. Types of self-government and the notion of autonomy

In addition to territorial (local and regional) authorities (*Gebietskörperschaften*), German law also knew non-territorial authorities (*Genossenschaften*), appointed to perform special tasks, with no direct relationship to a certain specified territory, such as for example bar associations or commerce and industry chambers[22]. Non-territorial self-government is a well-established legal construct in German and Austrian law[23]. The construct of special self-government is widely accepted by contemporary Polish administrative law science[24], although a view is voiced that in the current legal status, there

20 Teresa Dębowska-Romanowska, "Wydatki na zadania własne gminy – granice prawne," in *Samorządowy poradnik budżetowy na 1996 r.,* ed. Wiesława Miemiec and Bogdan Cybulski (Warszawa: Municipium, 1996), 210; Piotr Chadała, "Samodzielność finansowa jednostek samorządu terytorialnego," *Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia Sectio H,* vol. XXXVI (2002): 227.

21 Elżbieta Kornberger-Sokołowska, "Realizacja zasady adekwatności w procesach decentralizacji finansów publicznych," *Samorząd Terytorialny,* no. 5 (2001): 5–6.

22 Grelowski, *Samorząd*, 56; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Zweiter Band. Staatsrechtslehre und Verwaltungswissenschaft 1800–1914* (München: C.H.Beck, 1992), 239; *Geschichte des öffentlichen Rechts in Deutschland. Dritter Band. Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914–1945* (München: C.H.Beck, 2002), 44; Wiesław Hładkiewicz and Adam Ilciów, "Idea samorządności w świetle rozważań o państwie Georga Jellinka," in *20 lat samorządu terytorialnego w Polsce. Sukcesy, porażki, perspektywy*, ed. Katarzyna Mieczkowska-Czerniak and Katarzyna Radzik-Maruszak (Lublin: Wydawnictwo UMCS, 2012), 102.

23 Steffen Detterbeck, *Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht* (München: C.H. Beck, 2008), 57 et seq.; Arno Kahl and Karl Weber, *Allgemeines Verwaltungsrecht* (Wien: Facultas, 2011), 94–95, 156 et seq., 205 et seq.

24 Leoński, *Zarys*, 70; Wierzbowski and Wiktorowska, *Podstawowe*, 38; Piotr Przybysz, *Instytucje prawa administracyjnego* (Warszawa: Wolters Kluwer, 2020), 196; Eugeniusz Ochendowski, *Prawo administracyjne. Część ogólna* (Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa "Dom Organizatora", 2006), 245; Lubomira Wegner, "Samorząd," in

are no legal grounds for the existence of national-minority and religious self-governments[25].

Special self-government includes public law associations of a mandatory nature whose jurisdiction covers a specified area of activities (professional, economic, cultural, religious, and national minority spheres) of a certain category of legal persons who are responsible for a decentralised part of state administration on a par with territorial self-government bodies[26]. The self-government is aimed at catering for specified interests of a closed circle of persons. In this case, emphasis is placed on the practising of specified professions or belonging to a certain social group with separate objectives and interests, e.g., a national minority or religious group, while territory constitutes a supplementary criterion which provides grounds for belonging to a given group only in conjunction with other defined factual conditions[27]. Although special self-government entities are public law associations which are mandatory by law, the change of a profession, economic activities, or religion are to a large extent dependent on the will of individuals, and provide grounds for leaving a specific self-government association, and avoiding subjection to the powers of their authorities[28].The existence of such self-governments is a form of material decentralisation[29].

According to the views of Polish legal academics and commentators, it is widely agreed that self-government is a uniform construct, which means that special self-government units should enjoy the same implied

Leksykon prawa administracyjnego. 100 podstawowych pojęć, ed. Eugeniusz Bojanowski and Krzysztof Żukowski (Warszawa: C.H. Beck, 2009), 356.

25 Mateusz Błachucki," Przemiany ustrojowe samorządu specjalnego w polskim prawie administracyjnym," in *Prace Studialne Warszawskiego Seminarium Aksjologii Administracji. Szkice z zakresu procedury administracyjnej t. III,* ed. Krzysztof Wąsowski and Katarzyna Zalasińska (Kraków: Wydawnictwo WIT, 2014), 15–35, at 28 et seq.

26 Panejko, *Geneza*, 5; Robert Kmieciak, "Wielowymiarowość pojęcia samorządu – od związków terytorialnych do specjalnych," *Środkowoeuropejskie Studia Polityczne,* no. 4 (2015): 59 (with references made to Kazimierz Kumaniecki who, as the author points out, introduced the notion of special self-government to the Polish legal language); Grelowski, *Samorząd*, 48.

27 Grelowski, *Samorząd*, 48; Stefan Zamoyski, *Samorząd rolniczy* (Kraków 1931), 57.

28 Grelowski, *Samorząd*, 48; Panejko, *Geneza*, 111–112.

29 Wierzbowski and Wiktorowska, *Podstawowe*, 35 et seq.

independence and judicial protection as territorial self-government units[30]. From the legal point of view, it is not important whether the boundaries of operation of local-government associations will be territorial, factual, or personal[31], as long as they are vested in statutory public powers to perform a specified domain of public administration tasks. In legal terms, the difference between common and special self-government is of a purely technical nature[32].

Autonomy is a term which is broader than the notion of self-government. While "self-government" refers only to administrative issues, "autonomy" does not only cover the administration sphere, but also legislative powers[33]. An independent commune is not an autonomous entity within the above meaning. It is a "self-governing" entity, authorised, i.a. to adopt legal acts under a specific statutory norm[34]. However, a close interrelation with the state is maintained. The state may influence the operations of self-governments through its bodies, although only within the strictly defined statutory limits. Such interference usually has the form of supervisory influence[35]. The above remarks can also be directly applied to self-government entities other than communes.

30 Maria Karcz-Kaczmarek and Mariusz Maciejewski, "Samorządy zawodowe i zakres ich samodzielności w świetle doktryny oraz orzecznictwa," *Studia Prawno-Ekonomiczne,* vol. XCV (2015): 72.

31 As per the terminology devised by Jerzy Panejko, factual self-government includes economic self-government, while personal self-government is professional self-government (Panejko, *Geneza*, 111).

32 Zamoyski, *Samorząd*, 58; Wilhelm Szczęsny Wachholz, *Istota i prawo związków publicznych (publiczne osoby związkowe*) (Warszawa: Gazeta Administracji i Policji Państwowej, 1928), 55.

33 Krzysztof Skotnicki, "Pojęcie autonomii w teorii prawa państwowego," *Studia Prawno-Ekonomiczne,* vol. XXXVI (1986): 76. Similarly in the literature on national cultural autonomy, for example in Stefan Wolff and Marc Weller, "Self-Determination and Autonomy: A Conceptual Introduction," in *Autonomy, Self-Governance, and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies*, ed. Marc Weller and Stefan Wolff (London: Routledge 2005), 13.

34 Bogdan Dolnicki, *Samorząd terytorialny* (Warszawa: WoltersKluwer, 2012), 29.

35 Dolnicki, *Samorząd*, 30.

4. National cultural autonomy

Decentralisation in the form of delegating public powers to entities at the regional and local levels is widely applied for the purpose of protecting national and ethnic minorities. In such case, a minority, centred around a given geographical area, exercises the powers vested in regional and local authorities to promote and protect their culture[36]. The drawbacks of such solution result in the fact that in today's world it is possible to observe a growing significance of the concept of national cultural autonomy developed by Karl Renner and Otto Bauer, prominent politicians of Austrian Social Democracy who were searching for ways to rescue the Austro-Hungarian Empire from its fall[37]. Renner was not only an outstanding thinker and renowned constitutional law specialist, but was also engaged in political life, serving as the Chancellor of Austria (1918–1929 and 1945) and the President of Austria (1945–1950). Otto Bauer was a leader of Social Democracy, and a famous Marxist intellectual. He was a minister in Karl Renner's government. After 1933, he was considered the intellectual leader of Austrian Social Democracy[38].

Bauer and Renner rejected the concept of nation-state which always leads to the formation of a ruling majority constituting a dominant nation and national and ethnic minorities devoid of any influence on the government, and instead proposed to include the nations of the Empire into non-territorial public law corporations vested in comprehensive powers[39]. They rejected the possibility to rank the idea of self-determination of nations as an axiom, all the more so that it could lead to secession, as opposed to the right to self-government, endowed with broad powers and

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36 Bruce de Villiers, "Community Government for Minority Groups – Revisiting the Ideas of Bauer and Renner Towards Developing a Model of Self-Government by Minority Groups Under Public Law," *Die Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* no. 76 (2016):919.

37 See Barbara Stoczewska, "Autonomia narodowościowa jako koncepcja rozwiązania problemu mniejszości narodowych w europejskiej (głównie polskiej) myśli politycznej XIX i XX wieku," *Krakowskie Studia z Historii Państwa i Prawa,* no. 3 (2010): 357–375.

38 de Villiers, "Community," 923.

39 Ephraim Nimni, "National Multiculturalism in Late Imperial Austria as a Critique of Contemporary Liberalism: The Case of Bauer and Renner," *Journal of Political Ideologies,* vol. 4, no. 3 (1999): 4, as cited in Markku Suksi, "Non-Territorial," 85.

guaranteed constitutionally[40]. National communities should not be forced to adopt the culture of the majority, but should have the opportunity to develop their own cultural identity via their own national organisations, spanning the entire territory of their state, and having the status of a legal person governed by public law[41].

According to Bauer and Renner, nationality was defined through language, culture and traditions, while the state was defined through its territory. The territorial element was not significant for a nation[42]. In line with the presented concept, persons belonging to a minority, although they live on a territory where the majority of the population belong to another national group, should not be subject to the laws of the state in which they hold the citizen status in the scope of the internal affairs of their communities[43]. The law enacted by the law-making bodies of such non-territorial communities was to apply to all their members, notwithstanding their place of residence[44]. They should exercise their rights in the sphere of own culture, language and traditions, religion, private and family law, etc.[45].

Although a given national minority was territorially dispersed, it could receive a certain degree of autonomy. Renner and Bauer made the assumption that, through guaranteeing minorities the freedom of cultural development, the conglomerate of struggling national communities of the Austro-Hungarian Empire would transform into a democratic confederation of nations[46]. As regards the axiological dimension, centralist-atomistic liberal view of the Nation State would be replaced by an "organic conception,"

40 Ramón Maiz and Maria Pereira, "Otto Bauer: the Idea of Nation as a Plural Community and the Question of Territorial and Non-territorial Autonomy," *Philosophy and Society,* vol. 31, no. 3 (2020): 297.

41 Nimni, "National," 11; de Villiers, "Community," 929.

42 Suksi, "Non-Territorial," 98.

43 Robert A. Kann, "Karl Renner (December 14, 1870-December 31, 1950)," *Journal of Modern History,* vol. 23 no. 4 (1951): 244.

44 de Villiers, "Community," 935.

45 de Villiers, "Community," 913, 946.

46 Ephraim Nimni, "National-Cultural Autonomy as an Alternative to Minority Territorial Nationalism," in: *Cultural Autonomy in Contemporary Europe*, eds. David J. Smith and Karl Cordell (London – New York: Routledge 2008), 34.

that is, by the sovereignty shared among various nations, organised in the form of legal persons governed by public law[47].

The nations of the Empire were to be equal in status, regardless of their differences in numerical size, as it was the existence of a nationality that gave rise to certain political rights, not the numerical size of a community[48]. The source of legal personality under public law should be derived from constitutions or laws, and national communities should be recognised as international law entities[49]. As regards the internal structure of each national community, a special organisation that would hold cultural assemblies would function in each region, with a general cultural assembly for the whole country. The funding of the operations of such entities would be ensured by their entitlement to raise taxes on its members, or by state's allocation of a proportion of its overall budget to each of them[50]. Each community was to function in accordance with democratic principles of representation, accountability and judicial oversight[51]. Each adult individual could, and was obliged to, indicate his/her belonging to one of national communities. Once such a choice was made, it was final[52].

Such established national communities constituted the links of a confederation dealing with administrative, economic, tax-system, and military affairs[53]. Individual constituents of a confederated state - nationalities - were to cooperate at the local, regional and national levels to make decisions over matters that concerned all of the nationalities[54].

The discussed concept is consistent with the trend of public power decentralisation. Renner and Bauer argued that public powers might be delegated not only to entities operating across a given territory but also to corporations of individuals, e.g. national minorities, which could function

47 Maiz, Pereira, "Otto Bauer," 295.
48 de Villiers, "Community," 924, 935.
49 de Villiers, "Community," 935.
50 de Villiers, "Community," 944.
51 de Villiers, "Community," 948.
52 de Villiers, "Community," 930.
53 Ewa Czerwińska, *Filozof i demokrata. Studium myśli społeczno-politycznej Otto Bauera (1881–1938)* (Poznań: Wydawnictwo Fundacji Humaniora 1998), 192.
54 de Villiers, "Community," 935.

similar to the way in which regional or local governments do[55]. They did not reject territory for purposes of self-government by nationalities, but they did not see control over an own territory as a sine qua non condition for a nationality to acquire a juristic identity for self-government, and opened up to wider possibilities arising from the category of special self-government[56]. The essence of their proposals consisted in shifting the focus from territorial autonomy to cultural autonomy[57]. Contrary to decentralisation entailing the establishment of a self-government corporation, national communities were not only to self-administer their affairs, but also decide on economic, educational, linguistic, official and even some military matters (*Selbstgesetzgebung und Selbstverwaltung* - "self-legislation and self-admini-stration")[58]. In this case, the use of the word "autonomy" to define the position of individual national communities is fully justified, because a national community, as a legal person governed by public law, would be vested in legislative powers.

5. The institutional dimension of protecting national minorities in Serbia and Hungary

The primary source of law which constituted the basis for minority self-government in Hungary is Act No. 179 of 2011 on the Rights of National Minorities (further referred to as "the Hungarian Act 2011"), although a number of legal provisions on the protection of minorities are included in the Constitution of 18 April 2011. The Constitution of 2011 recognizes in Article xxix, para. 1 the 'nationalities' as "constituent parts of the State", and also grants them, in the second paragraph of the same stipulation, the "right

55 de Villiers, "Community," 911.

56 de Villiers, "Community," 938.

57 Registration of a public law legal person for each nationality was seen as an *"indispensable prerequisite*" (de Villiers, "Community," 944; Giovanni Mateo Quer and Sara Memo, "Releasing minorities from the "nationalist trap": from territorial to personal autonomy in a "multiple demoi Europe," *Cuadernos Europeos de Deusto,* no. 47 (2012): 163).

58 Maiz and Pereira, "Otto Bauer," 297. This was also noted by, e.g., Jan Erk, "Non-Territorial Millets in Ottoman History," in: Malloy and Palermo, "Minority," 126, who wrote that" "The nations would then be given exclusive powers in a number of policy areas (mostly education and culture) where they would have their own legislative, administrative, and executive institutions" (underlined by the author – A.A.).

to establish local and national self-governments"[59]. The new Act retained the essential elements of the existing system for the protection of minority rights[60]. National minority self-governments still constitute the organisational grounds for cultural autonomy. For that reason, under the Act, such self-governments are awarded a status of public law entities, authorised to perform public tasks. Annex No. 1 to the Act lists 13 nationalities vested in collective rights (Bulgarian, Roma, Greek, Croatian, Poles, Germans, Armenian, Romanian, Ruthenian, Serbs, Slovakian, Slovenian, and Ukrainian)[61]. It should be noted that the Hungarian Act 2011 is an organic law what means that its adoption and amendment requires the support of two-thirds majority of votes of members of parliament present[62].

Serbia has introduced its own form of minority diversity management based mainly on two legislative pillars, the Law on the Protection of the Rights and Freedoms of National Minorities (2002) and the Law on National Councils of National Minorities of 31 August 2009 (further referred to as "the Serbian Act 2009") which is a necessary supplement for the proper implementation of the Act of 2002. The construct of national minority self-government in the form of national minority councils is directly set out in the Constitution of the Republic of Serbia of 30 September 2006. As per Article 75 (2) of the Constitution, "persons belonging to national minorities, exercising their collective rights, acting in line with statutory provisions, shall participate in decision-making procedures or make independent decisions in any matters concerning culture, education, information, and the use of their language and script in official matters. As

59 Athanasios Yupsanis, "Cultural Autonomy for Minorities in Hungary: A Model to be Followed or a Futile Promise," *International Journal on Minority and Group Rights,* vol. 26 (2019): 32.

60 As Balázs Vizi writes "Hungary has often been seen as an exception among post-socialist countries, offering a new model to diversity management, by including a clear formulation of collective minority rights and minority self-government in the 1989 Constitution and by adopting a specific law on minority rights in 1993" ("Minority Self-Governments in Hungary – a Special Model of NTA?," in Tove H. Malloy, Alexander Osipov and Balázs Vizi, *Managing Diversity Through Non-Territorial Autonomy. Assessing Advantages, Deficiencies, and Risks* (Oxford: Oxford University Press 2015), 31).

61 Vizi, "Minority," 37, 45, 50.

62 Balázs Dobos, "The Minority Self-Governments in Hungary," Online Compendium *Autonomy Arrangements in the World*,(2016), 14, accessed 2.11.2022 www.world-autonomies.info.

part of exercising their rights to self-governance in the sphere of culture, education, information and the use of their language and script in official matters, and acting pursuant to the laws, persons belonging to national minorities may elect national minority councils." Until October 2014, 19 national minorities established their national councils, and exercised their collective minority rights to self-governance[63]. At present there are 22 national minority councils and the Federation of Jewish Communities which has a status of the national minority council.

The Hungarian Act includes a number of legal definitions allowing a distinction between cultural autonomy and national minority self-government. The former notion is more comprehensive than the latter, as it covers multiple minority collective rights, including the establishment of a national minority self-government[64]. It is a representative body of a national minority and an administrative law construct, aimed at the implementation of its autonomy[65]. As per Article 2(2) of the Hungarian Act, national minority self-government means an organisation established on the basis of the Act by way of democratic elections that has legal personality, operates as a collegial body and performs national minority public services defined in the Act, and is established to assert the rights of national minority communities, protect and represent the interests of national minorities and to administer, at local, regional or national level, national minority public affairs falling within its functions and powers independently.

According to Article 2 of the Serbian Act 2009 "in order to accomplish their rights to self-government in culture, education, information and official use of language and script, the members of national minorities in the Republic of Serbia may elect their national councils". The Law defines the councils as representative organs of the respective minorities in the fields of culture, education, information in the language of the minorities as well as in the official use of language and script, and endows them with the powers

63 Tamás Korhecz, "National Minority Councils in Serbia," in Malloy, Osipov and Vizi, *Managing*, 71.

64 Under Article 2(3) of the Hungarian Act, national minority cultural autonomy means a collective national minority right that is embodied in the independence of the entirety of institutions and of the self-organisations of national minorities under this Act through their operation by national minority communities by means of self-governance.

65 Vizi, "Minority," 46.

to participate in the decision making processes or decide on the issues related to these fields and establish educational institutions[66], cultural institutions[67], institutions to perform the activities of newspaper-publishing and radio-television broadcasting, printing and reproduction of the recorded media[68], associations, funds, business companies and other organisations in the aforementioned areas[69]. Article 30 stipulates that "elections of national councils shall be based on the principles of freedom of choice, equality of voting rights, periodicity of elections and principle of secret ballot. The elections shall be especially based on voluntariness, proportionality and democracy". In Serbian official documents, the councils are defined as cultural autonomy institutions of national minorities in Serbia[70].

As far as the structure of self-government goes, it is more complicated in Hungary than in Serbia. National minorities in Hungary may establish, by way of direct elections, a) settlement national minority self-governments in villages, towns and capital districts; and regional national minority self-governments in the capital and in the counties (named jointly in the Hungarian Act 2011 as "local national minority self-governments"), and b) national self-governments of national minorities[71]. National minority self-government operates within basic territorial state division units[72]. There is no hierarchical relationship between national minority self-governments[73] nor such a relationship exists between local governments and national minority self-governments[74].

In Serbia, one national minority may elect one representative body (council) to exercise collective right to self-governance in the matters of

66 Article 11 (1) of the Law on National Councils of National Minorities of 31 August 2009, Official Gazette of the Republic of Serbia 2009, No. 72, as amended. Act on the State of Emergency of 21 June 2002, Journal of Laws 2014, No. 111, as amended.

67 Article 16 (1) of the Serbian Act 2009.

68 Article 19 (1) of the Serbian Act 2009.

69 Articles 2(2), 10(6) of the Serbian Act 2009.

70 Korhecz, "National," 70.

71 Article 50 of the Act CLXXIX of 19 December 2011 on the Rights of National Minorities, Official Gazette 2011, no. 154, as amended.

72 Vizi, "Minority," 46.

73 Article 76 (4) of the Hungarian Act 2011.

74 Article 76 (5) of the Hungarian Act 2011.

culture, education, information and the official use of language and script[75]. A national council of a given minority operates at the central level[76]. The Serbian Act may establish mandatory functions and powers for national minority self-governments, which entails simultaneous allocation of appropriate resources and measures for the performance of those mandatory functions and powers by the National Assembly.

The Hungarian national minority self-governments are legal persons. The representative body is an agency of local national minority self-governments while the general assembly functions in regional and national self-governments of national minorities[77]. In the course of administering national minority public affairs, national minority self-governments may, within their functions and powers, adopt decisions, administrate affairs independently, proceed in the capacity of owner in respect of their properties, determine their budgets and carry out budgetary management based on their budgets[78]. Similar regulation is provided in the Serbian Act 2009 linking the acquisition of the status of legal entity by a national council with registering itself with a register kept by the ministry in charge of human and minority rights, which signifies that a national council may acquire and dispose of movable and immovable property, and based on a decision of a competent authority, it may also be a beneficiary of public property, in accordance with the law[79].

The fundamental duty of national minority self-governments in Hungary is the protection and representation of the interests of national minorities, by exercising the functions and powers of national minority self-governments[80]. The lawful exercise of them falls under the protection of the Constitutional Court and courts[81]. According to Article 115 of the Hungarian Act the most important mandatory public tasks of local national minority self-governments cover: 1) tasks related to the maintenance of institutions that perform national minority duties (e.g. schools or cultural

75 Article 75 (3) of the Serbian Constitution. See Beretka, "National,"183.
76 Beretka, "National," 185.
77 Article 76 (3) of the Hungarian Act 2011.
78 Article 78 (3) of the Serbian Act 2009.
79 Suksi, "Non-Territorial," 93.
80 Article 86 (1) of the Hungarian Act 2011.
81 Article 10 (2) of the Hungarian Act 2011.

institutions), among them also transferred institutions and those taken over from other organisations, 2) tasks related to carrying out the interest representation of the community represented by them, in particular the tasks of local governments related to the enforcement of national minority rights, 3) exercising the powers of decision-making and co-decision concerning the operation of institutions operated by the state, local government or other organs in the area of territorial competence of the national minority self-government. Besides this the local national minority self-governments support community self-organisation in their activities, initiate the measures required for preserving the cultural goods associated with the national minority community in the territorial competence of the national minority self-government, participate in the preparation of development plans and assess the demand for education and training in national minority languages. They can also fulfil voluntary tasks in particular in the field of nationality education, culture, social inclusion, public employment, social, youth, and cultural administration.

National self-governments in Hungary, i.e. these self-governments with nationwide competence, have been granted the right of consultation or the right of agreement on different policy issues in relation to public education and cultural self-government affecting the nationality concerned[82]. They perform the duties of interest representation and interest protection of a given minority on national level and in those settlements where there is no local national minority self-government. As institutions functioning on the central level they maintain network of proper national minority arrangements. They should be also consulted on bilateral and multilateral international agreements related to the protection of nationalities and on issues concerning the educational self-administration of people belonging to proper nationality.

In two areas of minority self-governments activities we can discern stronger competences. The first one deals with situations when local governments need the explicit consent of the nationality self-government for any decision which would affect the nationality population in the field of public education, language use, media, culture, social inclusion policies, and social services (art 81(1)). The second is their right to take over public institutions

[82] Articles 27 and 33–49 of the Hungarian Act 2011.

from the state or from the local government, for example, minority schools or other state-financed minority institutions (a theatre, etc.)[83].

As far as Serbia is concerned following Tamás Korhecz typology we can divide all competences of national councils into three groups: 1) powers to express opinions regarding almost all administrative decisions in conjunction with culture, education, information, and language use of national minorities; 2) consent and proposing powers; 3) autonomous decision-making powers.

The first group is the most representative because the concept of the law was not to delegate (mainly administrative) decision-making powers to national councils, but to involve them in the decision-making process of central, provincial, or local authorities. Most often this involvement is in the form of giving opinions which is a weak form of participation in administrative proceedings[84]. Notwithstanding this, the Serbian Act 2009 guarantees that almost no decision of central administrative authorities or the authorities of an autonomous province and local self-government involving matters of a national minority can be made without the participation of its national council. Legal acts in the fields of education, culture, media and official use of language and script issued without national councils participation are null and void. This provision imposes sanctions on all the potential activities of state bodies and other authorities not respecting the rights and powers of national councils and opens the way toward lawsuits if competencies are violated[85].

In many other cases the involvement of national councils is more effective, such as when national councils are solely empowered to propose a draft decision or they have consent (veto) power concerning a decision. A national council can establish proposals of national symbols, emblems and holidays of national minority as well as appoint a member of the management board of an institution founded by the state or self-governmental bodies which was declared by the national council of particular importance

83 Vizi, "Minority," 50–51.

84 Korhecz, *National*, 81; Beretka, *National*, 190 is of the opinion that "national minority councils (…) have no real opportunity to impact on legal decision-making".

85 Tamás Korhecz, "Non-Territorial Autonomy in Practice: the Hungarian National Council in Serbia," in: *Autonomies in Europe: Solutions and Challenges,* ed. Zoltán Kántor (Budapest: Research Institute for Hungarian Communities Abroad, 2014), 155.

for a given minority. Besides this, the councils are authorised by law to protect minority rights in general by initiating a review of a law's constitutionality or by commencing criminal and administrative proceedings[86].

In a few cases, national councils are empowered to decide autonomously in matters related to the identity of the national minority (e.g. they determine the traditional names of settlements and other geographic names in the language of the national minority if the minority language is in official use in that area and decide on the official use of language and script as well as other areas of importance for the preservation of a national minorities' identity). They can manage their cultural and educational institutions and media outlets and claim the right to take from the government of the Republic of Serbia, the Assembly of the Autonomous Province or the local self-government units: 1) educational institutions where classes are held exclusively in the language of a national minority, 2) cultural institutions whose main activity is to preserve and develop the culture of a national minority, 3) institutions broadcasting public information exclusively in the language of a national minority[87]. In this context special importance has article 24 of the Serbian Act 2009. This provision stipulates that the founding rights of the most important state, provincial and local self-governmental public institutions serving the preservation of the specific identity of the respective national minority have to be (partly or completely) transferred to the national council in case if the national council requests so. It is also guaranteed that in the case of such transfer of the founding rights budgetary subsidies of these institutions transferred to the national councils cannot diminished. In case of reluctance to transfer a national council may pursue its claim before an administrative court[88].

The Serbian national councils also have explicit avenues for conducting cross-border and international affairs[89]. According to Article 27 of the Act a national council shall, in accordance with the law, co-operate with international and regional organisations, organisations and institutions in

86 Beretka, *National,* 191.

87 Beretka, *National,* 191.

88 For example 17 lawsuits launched by the Hungarian National Council against the municipality of Senta in 2011 which ended positively for the council (Korhecz, "Non-Territorial," 159).

89 Suksi, "Non-Territorial," 103.

its native countries, as well as with national councils or similar bodies of national minorities in other countries. The representatives of a national council may participate in negotiations, or be consulted during negotiations, on the conclusion of bilateral agreements with native countries in the part directly related to the rights of national minorities.

As far as financial aspects are concerned the elected representative bodies in Hungary depend on local authorities in this regard. One of the strongest elements of cultural autonomy – the right to take over from the state or the local government minority serving public institutions – is undermined by the serious financial risks incurred[90]. Activities of national councils in Serbia are financed in similar way, i.e. by the budget of the Republic, the budget of the autonomous province, the budget of local self-governments, donations, and other incomes[91]. Despite the legally regulated duty of multi-ethnic municipalities to contribute to the financing of councils that represent a national minority living in their territory, this contribution depends on how municipalities and minority councils actually co-operate[92].

Being self-government entities the minority cultural councils are supervised by government authorities. In Hungary the capital or local government office shall supervise the legality of national minority self-governments under the same terms and in the same ways applicable to the supervision of the legality of local governments, with the exception of substituting decisions that the national minority self-government failed to adopt[93]. The National Assembly acting on proposals submitted by the Government shall dissolve those national minority self-government bodies, the operation of which is contrary to the Fundamental Law[94].

In Serbia the legality of actions and acts of national councils shall be monitored by the Ministry in accordance with the Constitution and the Law[95]. The competent ministry shall initiate the proceedings before the Constitutional Court for the assessment of the constitutionality and legality

90 Salat, "Conclusion," 262; Vizi, "Minority," 51.
91 Article 114 of the Serbian Act 2009. See Korhecz, "National," 81.
92 Beretka, "National," 194.
93 Article 146 (2) of the Hungarian Act 2011.
94 Article 150 of the Hungarian Act 2011.
95 Article 120 of the Serbian Act 2009.

of a national council's statute, regulation and any other general act, if it considers that such an act is not in accordance with the Constitution, Law or another national regulation. The same steps are to be taken by the Autonomous Province authorities if they consider that such an act is not in accordance with provincial regulations[96]. The Ministry can suspend the implementation of any act of a national council which is not compliant with the Constitution, Law or another regulation. The suspension is to be terminated if the Ministry fails to initiate the proceedings before the Constitutional Court[97].

6. Conclusions

The national minority councils in Serbia and Hungary are without doubt forms of decentralization of public power but deviate from the concept of Otto Bauer and Karl Renner in that they are not entitled to exercise legislative power, nor members of minorities are exempted from the application of general national legislation[98]. They do not have any law-making nor tax-raising capabilities and sufficient financial backing[99]. In its current form these institutional arrangements should not be located in the context of the national cultural autonomy idea formulated by Otto Bauer and Karl Renner.

The competences of minority self-governments in Hungary and Serbia has been described by Lavente Salat as "symbolic competences with strong legal bases"[100]. The lists of these competences are long and comprehensive, although generally they have only consultative character. I agree with assessment that national councils exercise low level of public authority[101]. A proposal to equalize the status and position of national councils and units of local self-government seems to be rational taking into consideration the fact that they are both tools for decentralization of state

96 Article 121 of the Serbian Act 2009.

97 Article 122 of the Serbian Act 2009.

98 Athanasios Yupsanis, "Minority Cultural Autonomy in Slovenia, Croatia and Serbia: A Real Opportunity for Cultural Survival or a Right Void of Substance?," 12 (1–2) *Europäisches Journal für Minderheitenfragen,* (2019): 112.

99 Yupsanis, "Minority," 104.

100 Salat, "Conclusion," 260.

101 Suksi, "Non-Territorial," 114.

powers and democratically elected bodies with competences[102]. Minority self-governments are devoid of tax-raising capabilities so the effectiveness of their activity depends on the cooperation with local and central authorities. Without constant cooperation and "good will" between the minorities' self-government bodies and various public authorities (ministries, provincial authorities, municipal authorities) proper functioning of the system is impossible[103]. At the same time "the overly-detailed regulation of nationality self-governments' operation and supervision, as well as the sometimes unclear provisions regulating specific areas, may lead to undue restriction of the free exercise by the minorities of their rights and by nationality self-governments of their competences"[104].

These facts notwithstanding in my view the legal status of national self-governments should not be interpreted outside notion of special self-government as explained at the beginning of the paper. They perform public tasks, possess legal personality and are formally independent from other authorities being only supervised by state agencies. They have some decision-making competences for example in the area of the management of those public institutions, mainly cultural and educational, which were created by the respective council or which have been taken over from other public entities.

As we have noted the legislator decides on the limits of decentralisation. The protection of minorities shall be complete only when a community gets an opportunity to protect the language and culture by local normative decision-making and implementation[105]. Such a high level of decentralization does not exist in case of minorities' self-government in Serbia and Hungary but first level of subsidiarity is discernible here which occurs when the state creates a legal and institutional framework in which the factual

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102 Korhecz, "National," 90.

103 Gwyneth E. Edwards, "Hungarian National Minorities: Recent Developments and Perspectives," *International Journal on Minority and Group Rights,* no. 5 (1998): 351; Korhecz, "Non-Territorial," 162; 351.

104 Opinion No. 671/2012 on the Act on the Rights of Nationalities of Hungary, adopted by the Venice Commission at its 91 Plenary Session (Venice, 15–16 June 2012), cdl-ad(2012)011, Strasbourg, 19 June 2012, para. 33.

105 Balázs Szabolcs Gerencsér, "Protection of Local Indigenous Communities in the Scope of Governance," *Iustum Aequum Salutare,* vol. IX no. 2 (2013), 93.

implementation belongs to the minority[106]. Self-determination appears in implementation of rights within a central regulation framework.

The national minority councils in Serbia and Hungary are interesting examples of using one of the decentralisation model created in XIXth century European administrative thought for maintaining the cultural identity of national minorities.

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[106] Gerencsér, "Protection," 88.

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Land-Sea Interactions in Realisation of Ecosystem Approach in the Marine Spatial Planning in the Baltic Sea Region – Polish Perspective

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Abstract: Maritime spatial planning has become on of the fundamental instruments of managing human activity at the sea. It is mostly due to the rising competition for marine space, which is a consequence of rising number and variety of uses of the sea. Among the principles of marine spatial planning ecosystem approach as well as the taking into account the interaction between land and sea seem to play the most important role. First one is more general and axiological in it's nature, while the second functions more as technical guide for planners. Together they can be called guiding principles of marine spatial planning. Ecosystem approach is a concept closely related to ecosystem services. It's main aim is to sustain the productivity of ecosystems in the field of ecosystem services, what is often connotated with the health of the marine ecosystem. Multiple correlations between land and sea can be easily seen in the managerial goals of the marine ecosystem. Trophic relations seems to be reflected in legal regulations, but the question remains if the marine spatial planning regime really reflects the interactions between land and the sea.

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1. The concept of planning and spatial development of sea areas and its normative implementation

Planned spatial management seems to be a natural component of the functioning of organized societies, the origins of which are believed to be in settlement, which entails: the creation of permanent human clusters (constituting the prototypes of later cities), the construction of roads-routes connecting these clusters and infrastructure for defense purposes. The degree of intensity of activities consisting in establishing the principles, methods and conditions of spatial development was and is also the result of limited resources, such as areas located in urbanized areas. Also, for some time now, these principles, methods and conditions of spatial management have been given a normative form. Until recently, spatial planning and accompanying legal regulations applied almost exclusively to land areas. However, when the apparent vastness of seas and oceans has become today the subject of unprecedented exploitation of many areas of the economy and satisfying various social needs, the planned management of sea areas has now become a necessity. It should be noted that the traditional use of sea areas for transport, fishing and military purposes, dominant until the 20 century, has now been significantly extended to new fields of exploitation. Currently, the maritime space is not only economically attractive transport routes or an area of fishing activity, but at the same time a space for dynamically developing aquaculture, installation and operation of transmission infrastructure devices, a place for obtaining renewable energy sources and marine genetic resources, an area of activity in the mining industry, and finally a place practicing various sports, leisure and recreation. It cannot be ignored that sea areas are a space of interdisciplinary scientific and research activity and a space with numerous documented cultural goods under legal protection.

Thus, it is clearly visible that the significantly expanding sphere of the fields of sea exploitation makes the sea areas similar in this respect to land areas, and just like on land, also at sea, problems arise and conflicts arise related to the use and use of space. On land, the basic instrument for solving these problems and conflicts are the arrangements for spatial development plans. Therefore, it does not seem unusual that the multiplicity of forms of using sea areas, which also contributes to the increase in the scale and intensity of this use, prompts the use of legal and planning instruments

conducive to the rationalization of spatial management, proven in land territories.

The phenomena and processes mentioned above became a material impulse for discussion in national and international forums, and then for the commencement of works on spatial development plans at the beginning of the 21 century, which took the form of pilot plans. It should be noted, however, that the first act of maritime spatial planning is the Australian Great Barrier Reef Zone Plan adopted at the beginning of the 1980s, although it was not a spatial development plan in the strict sense, but rather an area management plan with significant ecological values.

Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 has become the formal and legal imperative of drawing up maritime spatial development plans for the Member States of the European Union that have access to the sea, establishing a framework for maritime spatial planning (hereinafter: Directive 2014/89/EU) which entered into force on 17 September 2014. Directive 2014/89/EU requires Member States with access to the sea to prepare maritime development plans as soon as possible, indicating 31 March 2021 as the final date for the implementation of this obligation. Directive 2014/89/EU also adopted the date of 18 September 2016, specifying the deadline for introducing or modifying the existing national regulations specifying the principles, methods and procedure for the preparation and establishment of maritime spatial development plans, consistent with its guidelines and necessary for its implementation.

The first regulations concerning maritime spatial planning were introduced into the Polish system by the Act of 27 March 2003 on spatial planning and development. However, this matter was not included together with the provisions regulating the principles and procedure of shaping the spatial order on land, but was included in the Act of March 21, 1991 on the maritime areas of the Republic of Poland and maritime administration. [Marine Areas of the Republic of Poland and Maritime Administration Act], amended by the Act on spatial planning and development. The regulation of maritime spatial planning at that time was extremely laconic and boiled down to two articles, which entrusted the public administration bodies mentioned therein with the powers to take appropriate planning activities and included an authorization for the competent minister to define, by way of a regulation, the required scope of spatial development plans for

Polish sea areas. Therefore, in the light of the requirements of Directive 2014/89 / EU, the existing, one might say trace regulation should have been developed, which was achieved (although far from systemic regulation - in the sense of a complete one) thanks to another amendment to the Act made in 2015.

2. Principles of maritime spatial planning

The conditions laid down in Directive 2014/89 / EU, as its title itself indicates, are of a general nature. Hence, its content has been dominated by general principles that relate to maritime spatial planning and the planning acts themselves, including the procedure for their preparation and adoption. Therefore, on the basis of the provisions of Directive 2014/89/EU and the recitals preceding them, it is possible to reconstruct, beyond the status of program standards, the principles of: 1) completeness and continuity of maritime planning; 2) planning independence of the Member States; 3) cooperation in the planning process; 4) the ecosystem approach; and 5) taking into account the interaction between land and sea.

The principle of completeness and continuity of maritime planning applies to both the spatial extent of the adopted plans and the completeness of the planning process. The normative source of this principle are the provisions of Art. 2 clause 4 of Directive 2014/89/EU and its 18 recital. In art. 2 clause 4 in the second sentence says that the application of the above directive does not affect the designation and delimitation of maritime borders by the Member States in accordance with the relevant provisions of UNCLOS. This in turn means, especially taking into account Art. 4 sec. 1 of Directive 2014/89/EU, according to which each Member State establishes and implements maritime spatial planning, covering by spatial planning acts all maritime areas under the jurisdiction of a Member State of the European Union. In turn, in the first part of recital 18 of Directive 2014/89/EU, it is indicated that: "Maritime spatial planning should cover the entire cycle of problem and opportunity identification, information gathering, planning, decision making, implementation, review or updating and monitoring of implementation" According to this maritime spatial planning does not end with the adoption of relevant planning acts, but is a continuous process. This is further confirmed in Art. 6 sec. 3 of the Directive, stipulating that:

"Maritime spatial plans are subject to reviews by the Member States, in the manner specified by these countries, but at least every ten years."

The principle of planning independence of the Member States is shaped by the provisions of Art. 2 sec. 4, art. 4 sec. 3 and art. 5 sec. 3 of Directive 2014/89/EU. It follows from them that the Member States retain sovereign rights and jurisdiction over sea waters. The provisions of Directive 2014/89 do not affect the competence of the Member States to plan and determine the form and content of that plan or plans. The directive does not affect the competence of the Member States to decide how to achieve the objectives set out therein, including how these objectives will be reflected in the established maritime spatial development plan or plans. Also, the adopted institutional solutions aimed at achieving the objectives of the directive are the responsibility of individual states.

Referring to the normative sources of the principle of cooperation in the process of planning maritime areas, it is necessary to indicate in particular recitals 20, 21 and 24 as well as Articles 6, 9, 10 sec. 1, as well as in art. 11, 12 and 14 of Directive 2014/89/EU. It follows from them that the authorities of the Member States, equipped by national law with the competence to undertake and conduct activities in the field of maritime spatial planning, are obliged to cooperate with the competent entities of other Member States and third countries and with national authorities, institutions and entities interested in the arrangements drawn up and adopted spatial development plans for sea areas.

The ecosystem approach (the essence, genesis and development of which will be presented later in this study) appears in the context of the legal principle of maritime spatial planning as a key way to achieve the goals of maritime spatial planning, and thus a basic condition for the transposition of Directive 2014/89/EU. According to Art. 5 sec. 1 of Directive 2014/89, "When establishing and implementing maritime spatial planning, Member States shall take into account economic, social and environmental aspects to support sustainable development and growth in the maritime sector, applying an ecosystem approach and supporting the coexistence of appropriate activities and uses." The cited provision shows that the general goal of maritime spatial planning is to support sustainable development and growth in the maritime sector, and the indicated way to achieve this goal is to use the ecosystem approach.

It should be noted here that there are reservations in the literature as to the recognition of the ecosystem approach as a legal principle[1], justified by its non-legal origin[2]. In connection with these reservations, at least two arguments in favor of the (also) juridical nature of this principle: The first is the very use of the formula of the ecosystem approach in the content of base-creating normative acts, which include Directive 2014/89 / EU, but not only. The approach to the management of human activities in ecosystem-based marine strategies aimed at achieving and maintaining good ecological status of the marine environment is also mentioned in Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)[3]. According to Art. 1 sec. 3 of the Directive cited above: "Marine strategies apply an ecosystem-based approach to the management of human activities, ensuring that the collective pressure exerted by such activities is maintained at a level that allows for the achievement of good ecological status of the environment and that the capacity of marine *ecosystems* to respond to changes caused by humans are not endangered, while allowing the sustainable use of marine resources and services by present and future generations."

The second argument in favor of the juridical character of the principle of the ecosystem approach is its relation to the principle of sustainable development. Well, the principle of sustainable development, considered a legal principle in the sense of a directive[4] of a general nature, included in the acts situated at the highest levels in the hierarchy of the legal system[5],

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1 See e.g. Dorota Pyć, "Podejście ekosystemowe do morskiego planowania przestrzennego jako praktyka w zarządzaniu działalnością człowieka," in *Europeizacja prawa morskiego,* ed. Magdalena Adamowicz, Justyna Nawrot (Gdańsk:Wydawnictwo Uniwersytetu Gdańskiego 2016), 20–21.

2 cf. Dorota Pyć, "Podejście ekosystemowe," 17 et seq. See also Aantonia Zervaki, "Introducing Maritime Spatial Planning Legislation in the EU: Fishing in Troubled Waters?," *Maritime Safety and Security Law Journal,* no. 1 (2015): 99 and further.

3 Journal Of EU L 164 of June 25, 2008, as amended, 19.

4 Zbigniew Bukowski, *Zrównoważony rozwój w systemie prawa* (Toruń:TNOiK, 2009), 43–45.

5 The principle of sustainable development in the system of Polish law has acquired the rank of a constitutional principle. According to Art. 5 of the Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws No. 78, item 483, as amended): "The Republic of

due to its wide content capacity, is at the same time a source of reconstruction of detailed rules. One of them, resulting precisely from the principle of sustainable development, is the principle of the ecosystem approach. Therefore, since the principle of the ecosystem approach results from the legal principle of sustainable development, it should not raise any doubts that it should also be recognized as a legal principle.

The following provisions of Directive 2014/89/EU are the normative source of the last of the above-mentioned principles of maritime spatial planning, namely the principle of taking into account the interaction between land and sea: 1) Art. 1 sec. 2, in which it was assumed that the establishment and implementation by the Member States of maritime spatial planning, which is a means of achieving the objectives set out in Art. 5, takes place, inter alia, taking into account the interaction of land and sea; 2) art. 4 sec. 2, which shows that the Member States, when establishing and implementing maritime spatial planning, do so taking into account the interaction of land and sea; 3) art. 4 sec. 5, according to which: "When establishing maritime spatial planning, Member States shall take due account of the specificity of maritime regions and the relevant existing and future activities and uses of these areas, their impact on the environment and natural resources, as well as the interaction of land and the sea"; 4) art. 6 sec. 2, specifying the minimum requirements for maritime spatial planning, among which taking into account the interaction of land and sea in the first place. Also recitals 9, 16 and 18 of Directive 2014/89/EU indicate that the maritime spatial plan(s) resulting from the planning process should take account of the interaction between land and sea.

From the perspective of the legal orders of the European Union Member States, which are obliged to develop spatial development plans for maritime areas under their jurisdiction, the above-mentioned principles contained in Directive 2014/89/EU are not the only principles relating to the legal aspects of maritime spatial planning. For if the provisions of the plans were to be of a regulatory (normative) nature, as is the case, inter alia, in the case of spatial development plans for Polish maritime areas, then both

Poland guards the independence and inviolability of its territory, ensures the freedoms and rights of people and citizens, and the safety of citizens, protects the heritage national and ensures environmental protection, guided by the principle of sustainable development. "

these plans and the entire planning process should comply with the constitutional principles that apply to the entire domestic legal order. Moreover, national regulations concerning maritime spatial planning, in particular those of statutory rank, also usually contain norms-principles influencing the process of applying and interpreting other norms[6].

3. Correlation of the principles of the ecosystem approach and taking into account the interaction between land and sea, and the particular importance of these principles in maritime spatial planning

Against the background of the above catalog of legal principles of maritime spatial planning, reconstructed on the basis of the provisions of Directive 2014/89 / EU, one should notice a special distinction that characterizes the principles of the ecosystem approach and taking into account the interactions between land and sea[7] in relation to other principles that could be describe as "technical" rules". Without diminishing this definition of the importance and prominence of the intentions of the EU legislator, which were the basis of these other principles, it should be admitted that the first of them - the principle of completeness and continuity of maritime planning, founded on praxeological premises, is to guarantee the validity of planning arrangements in all maritime areas under the jurisdiction of the Member States of the European Union. On the other hand, the principle of planning independence of the Member States should be seen as an obvious consequence of the treaty principle of granting[8]. On the other hand, the principle of cooperation in the planning process is an expression of the democratization of the decision-making process and the broad participation of interested parties in formulating solutions that will become legally binding for them in the future. At the same time, their aim is to guarantee reaching legally and socially significant decisions in a conciliatory manner.

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6 cf.: Tomasz Bąkowski, *Planowanie i zagospodarowanie przestrzenne polskich obszarów morskich. Problematyka administracyjnoprawna* (Gdańsk:Wydawnictwo Uniwersytetu Gdańskiego, 2018), 114–137.

7 The special importance of these principles is also emphasized by, inter alia, Dorota Pyć, "The Polish Legal Regime on Marine Spatial Plannig," *Maritime Law*, vol. XXXIII (2017):108.

8 See art. 5 of the Treaty on European Union. Consolidated version *OJ C 326, 26.10.2012, 18–18.*

Therefore, renouncing any depreciation of the above-mentioned principles and the accompanying goals and values, it should be stated that the principles of the ecosystem approach and taking into account the interactions between land and sea, from the perspective of the assumptions of Directive 2014/89 / EU, which are echoed both in the recitals and in its essential content, deserve to be called the guiding principles of maritime spatial planning.

The first of them - the principle of the ecosystem approach determines the axiological conditions for achieving the main goals set out in Directive 2014/89 / EU, which are supporting sustainable development and growth in the maritime sector.

The second - the principle of taking into account the interactions between land and sea, and indicates a method of effectively achieving the above-mentioned goals using the ecosystem approach. Therefore, taking into account land-sea discharge should be seen as an objective imperative for the effectiveness of the ecosystem approach[9], and hence also for the achievement of all the goals of marine spatial planning for which the ecosystem approach is the way to achieve them. This means, inter alia, that these two priority principles should specifically determine the work on plans and the very content of the plans. This, in turn, largely depends on national legislation, which should enable the implementation of these principles.

Referring in this matter to the regulations in force in the Polish legal order, it is necessary to point out certain solutions that may cause difficulties in implementing the above-mentioned principles, including in particular the principle of taking into account the interaction between land and sea. Well, as mentioned above, the basic foundations of the legal regulation of spatial planning and spatial development of land territories and sea areas are contained in two separate acts. Basic provisions relating to the planning and spatial development of land territories have been included in the Act on Spatial Planning and Development (hereinafter: "u.p.z.p."), and the regulations on the principles, methods and procedure of maritime spatial planning in chapter 9 of chapter II of the Act on maritime areas of the Republic of Poland and maritime administration (hereinafter: "u.o.m."). It

[9] Also Maciej Nyka "The concept of ecosystem services in regulation of human activity on the sea," *Prawo Morskie,* vol. XXXIII (2017): 98.

should be noted that the editorial distribution of maritime spatial planning regulations in the act regulating the issues of maritime areas (from the perspective of the subject of the study) does not raise any objections. On the other hand, justified doubts arise due to the fact that there is no clear link between the above-mentioned acts, e.g. in the form included in the u.o.m. references to the appropriate application of the provisions of the u.p.z.p. in matters not regulated in Chapter 9, section II of the u.o.m.. On the contrary, instead of using the reference mentioned above in Art. 4 sec. 1a of the u.p.z.p.it was clearly and categorically indicated that in relation to sea areas, the intended use of the land, the distribution of public-purpose investments and the manner of land development and planning conditions are determined on the basis of the provisions of the u.o.m. It is true that in Art. 37c u.o.m. it is mentioned that the maritime administration authorities cooperate with the local governments of provinces and seaside municipalities in order to ensure the coherence of this plan with the studies of the conditions and directions of spatial development of municipalities, local spatial development plans and spatial development plans of Voivodship. However, the formal and legal separation of both regulations, for example, excludes the possibility of harmonizing the statutory general principles, which are rudimentary for the correct interpretation of the regulations, and in the event of the so-called gaps in the law, they serve to fill them. This state of affairs negatively affects, above all, the legal regulation of maritime spatial planning, which is limited in terms of content.

In the absence of formal and legal communication between the regulation of land and sea spatial planning, the reasons for potential terminological doubts should also be sought. An example of this can be used in u.o.m. key term for maritime spatial planning, the concept of "public purpose investment", which has not been explained in the provisions of the u.o.m., but has a statutory definition in the u.p.z.p. However, the provisions of u.o.m. do not refer to this definition. Appropriate application of the provisions of the u.p.z.p. for maritime spatial planning could successfully eliminate these and other problems in the application of the provisions on land and sea spatial planning, thus giving a wider normative scope for the implementation of the principle of taking into account the interaction between land and sea in spatial planning.

4. The ecosystem approach

In the 1930s, Tansley, in his publication on terminology related to the study of vegetation, noted that the determinants of habitat function constitute a system that can be viewed as the basic unit of the environment. He also recognized that ecosystems are constantly interacting and that they are also constantly changing[10]. In his concept of the ecosystem, he pointed to the interactions between biotic and abiotic elements taking place within the ecosystem[11]. Already the first researchers using the concept of the ecosystem indicated the continuity of the ecosystem[12], at the same time pointing to the processes of energy and substance circulation constantly taking place within them.[13]. Modern research supports these early hypotheses that characterize ecosystems[14]. They indicate the fact that one of the basic functions of the ecosystem is the supply and transformation of energy and matter as part of basic biological, chemical and physical processes, such as photosynthesis, processes related to the nitrogen cycle, as well as nitrification and denitrification processes. The ecosystem itself is defined as a complex of organisms occurring together in a specific territory along with the abiotic environment associated with their occurrence, remaining in constant interaction with each other through the processes of energy circulation necessary to build biotic structures and cycles of matter being the subject of this circulation[15].

The concept of ecosystem services is closely related to the concept of ecosystem. The circulation of energy and substances in the environment, as well as the very persistence of the ecosystem, observed by researchers involved in the analysis of the functioning of ecosystems, provides humans with specific benefits, which are called ecosystem services[16]. One of the first definitions of ecosystem services was formulated in 1997 by Constanza and

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10 Arthur Tansley, "The Use and Abuse of Vegetation Concepts and Terms," *Ecology,* vol 16, no. 3 (1935): 300.

11 Arthur Tansley, "The Use and," 303.

12 Kurt Jax, "Function," and "Functioning," in "Ecology: What does it Mean?," *Oikos,* vol. 111 (2005): 641.

13 Raymond Lindemann, "The trophic-dynamic aspect of ecology," *Ecology,* vol. 23 (1942):400.

14 John Blair, Scott Collins, Alan Knapp "Ecosystems as functional units in nature," *Natural Resources & Environment*, vol. 14, no. 3 (2000):150–155.

15 Ibidem.

16 Robert Costanza, Ralph d'Arge, Rudolf de Groot, Stephen Farber, Monica Grasso, Bruce Hannon, Karin Limburg, Shahid Naeem, Robert V. O'Neill, Jose Paruelo, Robert G. Raskin,

his team, stating that environmental goods and services consist of the flow of matter, energy and information from natural resources, which together with man-made goods and services contribute to building human well-being[17]. Under the concept of ecosystem services, Wilson understands the biosphere to provide matter, energy and information needed for the life of society[18]. In Poland, Mizgajski and Stępniewska, using the concept of ecosystem services to describe ecosystem services, define them as the entirety of benefits achieved by society from the metabolism of ecosystems[19].

Poskrobko defines ecosystem services as *values, forces and natural processes, as well as the effects of their existence and functioning, providing non-material "values" necessary for the life and development of humanity and contributing to the course of economic production processes, but physically not participating in these processes*[20]. He identifies two perspectives for the analysis of ecosystem services - biological-ecological and socio-economic [21]. The first one accepts the functioning of natural processes as ecosystem services, which provide a habitat of a quality that enables human life and development. The second perspective narrows the concept of ecosystem services to the phenomena and manifestations of the life of ecosystems important in the management process, such as pollination of plants or CO_2 sequestration by plants[22].

Paul Sutton & Marjan van den Belt, "The Value of the World's Ecosystem Services and Natural Capital," *Nature,* vol. 387 (1997): 255.

17 Costanza, d'Arge, de Groot, Farber, Grasso, Hannon, Limburg, Naeem, O'Neill, Paruelo, Raskin, Sutton, van den Belt "The Value of the World's Ecosystem Services and Natural Capital," 256.

18 Edvard Wilson, *Przyszłość życia* (Poznań:Zysk i Spólka 2003), 140.

19 Andrzej Mizgajski, Małgorzata Stępniewska, "Koncepcja świadczeń ekosystemów a wdrażanie zrównoważonego rozwoju," in *Ekologiczne problemy zrównoważonego rozwoju,* ed. Dariusz Kiełczewski, Borzena Dobrzańska (Białystok:Wydawnictwo Wyższej Szkoły Ekonomicznej w Białymstoku 2009), 12 et seq.

20 Bazyli Poskrobko, "Usługi środowiska jako kategoria ekonomii zrównoważonego rozwoju," *Ekonomia i Środowisko*, no. 1(37) (2010): 20.

21 Poskrobko, "Usługi środowiska," 22.

22 Ibidem.

The ecosystem approach has not received a single, universal definition on the basis of international law [23], and the way of understanding this concept may depend on the regulatory context in which the concept is used, it is assumed that the ecosystem approach is based on three basic assumptions. The first is the need for a holistic approach to managing human activity in the environment[24]. Secondly, this activity must be based on the best available knowledge of the components, structure and dynamics of ecosystems. Third, and finally, this activity must be carried out in a way that does not compromise the integrity and health of the ecosystem[25].

The first attempt to define the ecosystem approach was made for the purposes of the Convention on Biological Diversity. At the fifth meeting of the Conference of the Parties to the Convention on Biological Diversity in May 2000, it was agreed that the ecosystem approach is a strategy for the integrated management of land, water and living environmental resources that promotes the conservation and sustainable use of these resources[26].

For the purposes of analyzing the use of the ecosystem approach to protect the possibility of using ecosystem services, the definition of the International Council for the Exploration of the Sea seems to be more useful, which defines the concept of the ecosystem approach by referring to the possibility of using ecosystem services, stating that the ecosystem approach is a comprehensive, integrated management of human activity based on o the best available scientific belief in ecosystems and their dynamics, undertaken to identify and act on impacts relevant to the health of ecosystems, thereby achieving the sustainable use of ecosystem goods and services and maintaining the integrity of ecosystems[27]. The quality of ecosystem services

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23 *Ronán* Long, *Marine Resource Law.* (Dublin:Thompson 2007), 4–51*; Ronán* Long "Legal aspects of Ecosystm-Based Marine Management in Europe," *Ocean Yearbook* 26 (2012): 417–484.

24 Owen McIntyre "The Emergence of an "Ecosystem Approach" to the protection of International Watercourses under International Law," *RECIEL* 13, vol. 1 (2004): 6 et seq.

25 Arie Trouwborst, "The Precautionary Principle and the Ecosystem Approach in International Law: Differences, Similarities and Linkages," *Review of European Community & International Environmental Law* 18, no. 1 (2008):29.

26 Report of the fifth meeting of the Conference of Parties to the Convention on Bological Diversity 15–26 May 2000 Nairobi. UNEP/CBD/COP/5/23.

27 Guidance and the Application of the Ecosystem Approach to Management of Human Activities in the European Marine Environment. ICES Cooperative Research Report no. 273, accessed November 10, 2022, http://www.ices.dk/sites/pub/Publication%20

therefore depends directly on the application of the ecosystem approach, and one of the goals of the ecosystem approach is to guarantee the availability of ecosystem services. According to the United Nations Department of Maritime Affairs and Law (DOALOS), the ecosystem approach means managing human activity based on the best understanding of ecological interactions and processes, so as to ensure that ecosystem structures and functions are preserved for the benefit of present and future generations[28].

5. Ecosystem approach in the system of Polish maritime spatial planning

The basic instrument of maritime spatial planning in Poland is the maritime spatial development plan. This document, prepared by the minister responsible for maritime economy together with the minister responsible for construction after consultation with other ministers, is of fundamental importance for the regulation of the use of sea space. It resolves on:

1) the intended use, including primary functions, of internal sea areas, territorial sea and the exclusive economic zone;
2) prohibitions or restrictions on the use of these areas, taking into account the requirements of nature protection;
3) deployment of public purpose investments;
4) directions of development of transport and technical infrastructure;
5) areas and conditions of:
   a) protection of the environment and cultural heritage,
   b) practicing fishery and aquaculture,
   c) obtaining renewable energy,
   d) exploration, recognition of mineral deposits and extraction of minerals from deposits [29].

Reports/Cooperative%20Research%20Report%20(CRR)/crr273/crr273.pdf (18.10.2022); see also Wojciech Radecki, *Podstawy teoretyczne zintegrowanej ochrony prawnej środowiska* (Wrocław: Biuro Doradztwa Ekonomicznego Sp. Z o.o. 2010),105.

28 DOALOS *Developing and Implementing an Ecosystem Approach to Oecan-related Activities.* New York 2008, accessed November 10,2022, http://www.un.org/depts/los/ecosystem_approaches/ecosystem_approaches.htm.

29 Art. 37a sec. 2 of the Act on maritime areas of the Republic of Poland. Pyć "The Polish legal regime on marine spatial planning,"114.

The plan preparation process is carried out by territorially competent directors of maritime offices[30]. From the point of view of operating in sea areas, it is extremely important that the draft plan is prepared using a relatively new approach in Polish law, namely the ecosystem approach[31]. According to the definition contained in the act, it means that the following conditions will be met jointly in the management of human activity:

1) the impact on the ecosystem of the planned human activities will be maintained at a level that enables the achievement and maintenance of a good ecological state of the environment;
2) both the ability for the proper functioning of the ecosystem and resistance to environmental changes caused by human activity will be preserved;
3) the simultaneous, sustainable and sustainable use of ecosystem resources and services by present and future generations will be possible.

Thus, the proper functioning of ecosystems, their resilience and good ecological status of the marine environment become the key factors influencing the planning process in the framework of maritime spatial planning. Functions are assigned to various bodies of water. Pursuant to the Act, each body of water may be assigned only one basic function and theoretically any number of permissible functions. Permissible site functions mean possible uses of the site, the coexistence of which will not adversely affect the sustainable development of the site. The condition is, however, that the permissible functions must not interfere with the implementation of the basic functions. The location of the mining plant will therefore be within the primary purpose areas. Exploration, recognition of mineral deposits and extraction of minerals from deposits[32], or, less likely, such designation will result from permissible functions. It is also impossible to remember about the conditions of the protection of the marine environment. In this regard, from the content of Art. 37b of the Act on Sea Areas gives a clear

30 Art. 37b of the Act on the maritime areas of the Republic of Poland

31 Nyka "The concept of ecosystem," 101.

32 Annex 2 to the Regulation of the Minister of Maritime Economy and Inland Navigation and the Minister of Infrastructure and Construction of May 17, 2017 on the required scope of spatial development plans for internal sea waters, territorial sea and the exclusive economic zone of May 26, 2017, item 1025.

preference to the requirements of environmental protection in determining the functions of water bodies.

6. The objectives of the management of transitional and coastal waters from the perspective of land-sea interactions

6.1. Keeping the ecological balance

Maintaining the ecological balance is a concept to which the most important legal acts regulating the issues of the protection of the marine environment refer. This may be due to the fact that the restoration / maintenance of the ecological balance of the Baltic Sea, i.e. the homeostasis of the Baltic marine ecosystem, will mean the restoration of the Baltic's ability to self-regulate. The ability of ecological systems to self-regulate is important for several reasons. It consists of the balance in terms of the circulation of organic matter and energy in the ecosystem[33], sustainable use of energy from the reserves of the ecological system, maintaining the diversity and structure of the biocenosis, which controls and stabilizes the processes taking place in the biotope, durability of the ecosystem over time and, finally, the ability of the ecosystem to spontaneously restore balance in the event of the so-called environmental stresses. Such stresses, currently of an anthropogenic origin and resulting, inter alia, from the use of marine ecosystem services, do not pose a significant threat as long as their intensity or nature does not exceed the ecosystem's ability to self-regulate[34]. No wonder then that preserving the ecological balance has become one of the central concepts in the international legal protection of the marine environment.

The United Nations Convention on the Law of the Sea, defining in art. 4 the concept of pollution does not do so by referring directly to ecological balance. However, it mentions the effects of pollution, which are, inter alia, harmful effects on living resources and marine life, threat to human life or health and impediments to the use of marine ecosystem services, including all permitted forms of water use, including leisure[35]. Also, the definition

33 Antoni Skowroński, ''Utrzymanie dynamicznej równowagi ekosystemów Ziemi: (przyrodnicze i antropogeniczne mechanizmy)," *Studia Ecologiae et Bioethicae,* 2 (2004): 490.

34 Arthur Tansley, *The Use and Abuse of Vegetation Concepts and Terms*, 303.

35 United Nations Convention on the Law of the Sea of 10 December 1982.

of pollution included in the Helsinki Convention for the Protection of the Marine Environment of the Baltic Sea Area does not refer directly to the violation of the ecological balance, but describes the consequences of pollution in a descriptive manner, mentioning, among other things, the destruction of living resources and marine ecosystems and impediments to the use of marine ecosystem services[36]. The Polish Water Law Act defines the pollution of sea waters in a similar way[37]. Limiting pollution from land and sea sources is to restore the balance of the Baltic Sea ecosystem, including its biodiversity[38].

Ecological balance, after the changes introduced in 1992, has been recognized as one of the goals of the Helsinki Convention on the protection of the marine environment of the Baltic Sea area. The Convention mentions the will to maintain the ecological balance of the Baltic Sea both in the preamble, where it is mentioned as one of the objectives of the "ecological restoration" of the Baltic Sea, and in the further part of the Convention. In Article 3, the main objective of the obligations arising from the Convention is to promote the ecological restoration of the Baltic Sea area and to maintain its ecological balance[39]. It is worth pointing out that the implementation of the Convention's goals is undergoing some kind of evolution. Starting from protecting the environment against pollution from point sources, through increasing emphasis on the elimination of threats from diffuse sources, to efforts aimed at achieving ecological balance using the concepts of an ecosystem approach, adaptive management and ecosystem services[40] – concepts that try to balance the protection of the Baltic marine environment with the needs for the use of its resources by the multi-million

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36 Cf. art. 2 point 1 and art. 3 sec. 2 of the Helsinki Convention.

37 Pt. 75.

38 J. Ciechanowicz-McLean, *Międzynarodowe prawo ochrony środowiska* (Warszawa: Polskie Wydawnictwo Naukowe, 1999), 123.

39 Art. 3 sec. 1.*The Contracting Parties shall individually or jointly take all appropriate legislative, administrative and other appropriate pollution prevention and elimination measures to promote the ecological restoration of the Baltic Sea Area and the maintenance of its ecological balance.*

40 Hermanni Becker, Joseph DiMento, Alexis Hickman, "Baltic Sea," in *Environmental Governance of the Great Seas. Law and Effect,* ed. Joseph DiMento, Alexis Hickman (Cheltencham:Edward Elgar 2012), 40.

population directly subsisting on it and an even larger population living in its catchment area.

It is impossible not to notice that, both among the norms of European Union law and in contemporary documents adopted within the Helsinki Commission, references to ecological balance are becoming less frequent. This does not mean, however, that the concept has disappeared from the list of priorities for the protection of the marine environment in the Baltic Sea area. Ecological balance has become an element of the definition of good condition of the marine environment. This definition shows a comprehensive approach aimed at achieving the homeostasis of the marine environment. In particular, the issues of balance and stabilization of natural processes, which are relevant to the concept of homeostasis, come to the fore. References to the functioning of the Baltic Sea ecosystems modernize the objectives of the protection of the Baltic marine environment by linking them with the achievements of the Convention on Biological Diversity. This document, through references to the concept of ecosystem, introduces environmental protection onto a new track, giving conservation activities a broader perspective and enabling the implementation of new concepts in the protection of the Baltic marine environment, such as the recently gaining popularity concept of the ecosystem approach to the protection of the Baltic marine environment.

6.2. Correct (normal) functioning of the ecosystem

The proper (normal) functioning of marine ecosystems is one of the main objectives of the protection of the marine environment. It is identified both in the Marine Strategy Framework Directive[41], and the Water Law Act[42]. From the point of view of the proper functioning of ecosystems, the Water Law assesses the good environmental condition of marine waters, stating that it is the condition of the marine waters environment, *in which marine waters are clean, healthy and fertile in relation to the prevailing conditions, while the use of the marine environment takes place at a sustainable level that*

41 Establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)

42 The Act of July 20, 2017, Water Law, Journal Of Laws of 2017, item 1566 as amended.

guarantees the possibility of human use and activity, the achievement of which is undertaken by activities based on an ecosystem approach and in which:

a) the structure, functions and processes of the marine ecosystems that make up the sea, and the associated physiographic, geographic, geological and climatic factors, enable marine ecosystems to function properly and maintain resilience to human-induced environmental changes, and to protect species and habitats occurring in marine waters and prevents the disappearance of natural biodiversity as a result of human activity, and the balance of the functioning of various biological components is maintained,

b) hydromorphological, physical and chemical properties of marine ecosystems, including properties resulting from human activity in marine waters, enable the proper functioning of these ecosystems, substances and energy, including marine noise, discharged into the environment of marine waters as a result of human activities do not pollute marine waters.

c) substances and energy, including marine noise, released into the marine environment by human activities do not pollute marine waters;

The Marine Strategy Framework Directive also uses the concept of normal ecosystem functioning to define the concept of good environmental status.

The criteria for assessing the good environmental status of marine waters are specified with the help of additional indicators (descriptors), appearing both under the Framework Directive[43], and under the Regulation to the Water Law Act[44]. Eleven features were listed among the indicators of good environmental status. In addition, while not explicitly listed among the indicators, the doctrine also points to the need for a well-maintained marine environment to provide ecosystem services and other social benefits. Also, among the ecological goals mentioned in the Baltic Sea Action

[43] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) L 164/19

[44] Regulation of the Minister of the Environment of 23 May 2016 on the adoption of a set of properties typical of a good environmental status of marine waters, Journal of Laws No. 2016 item 813

Plan (BSAP)[45] there are references to the proper functioning of ecosystems. In the BSAP biodiversity and nature protection segment, the ecological goal is to restore and maintain the condition of the seabed at a level that secures the functioning of ecosystems. In the same segment, the functioning of ecosystems is also a target and indicator for determining water quality. Protection of the integrity of the seabed at the level enabling the protection of the structure and functions of ecosystems is also mentioned as one of the measures to improve the condition of the marine environment and protect the sea shore in the Maritime Policy of the Republic of Poland until 2020 (with a perspective until 2030)[46].

Based on the definition of good status of the marine environment, it can be concluded that one of the basic features of properly functioning ecosystems is their productivity. The proper functioning of ecosystems is to enable the use of marine ecosystem services. This use, in turn, must be in keeping with the ecological balance, in a way that enables the use of ecosystem services for both modern and future generations. Functioning in Polish, EU and regional law relating to the protection of the marine environment, the principle of sustainable development has two basic elements. Firstly, integration, i.e. combining ecological, economic, social and political reasons, which constitute the holistic nature of sustainable development. Secondly, intra- and intergenerational justice - fairness in access to environmental services, but also in the division of burdens related to the protection of the marine environment[47].

45 HELCOM Baltic Sea Action Plan accessed October 10,2022, https://helcom.fi/media/documents/BSAP_Final.pdf.

46 Inter-ministerial team for maritime policy of the Republic of Poland *Polityka morska Rzeczpospolitej Polskiej do roku 2020 (z perspektywą do 2030).* Warszawa 2015, accessed November 10, 2022, https://balticcluster.pl/wp-content/uploads/2014/01/Polityka_morska-Uchwala_RM_33_2015-z-dnia-17-marca-2015.pdf.

47 Janina Ciechanowicz-McLean and Maciej Nyka, "Podstawowe założenia środowiskowej gospodarki morskiej," *Prawo Morskie,* XXX (2014): 60.

6.3. Sustainable provision of ecosystem services

Environmental protection, including the marine environment of the Baltic Sea, is currently anthropocentric[48]. This means that it takes place with the maximum consideration of the interests of the population, while recognizing that the proper functioning of ecosystems and maintaining the ecological balance is in the interest of humanity understood as an inter and intragenerative community. The undoubted practical interest of the population living in the Baltic Sea basin is access to the ecosystem services offered by this sea.

The circulation of energy and substances in the environment, as well as the very persistence of the ecosystem, observed by researchers involved in the analysis of the functioning of ecosystems, provides humans with specific benefits, which are called ecosystem services. There are many different definitions of ecosystem services in the doctrine. One of the first was formulated in 1997 by Constanza and his team, stating that environmental goods and services consist of the flow of matter, energy and information from natural resources, which together with man-made goods and services contribute to building his well-being[49]. A little later, Wilson understood the concept of ecosystem services to provide the biosphere of matter, energy and information needed for the life of society[50].

Millennium Ecosystem Assessment - a study carried out at the request of the UN Secretary General Koffi Annan included in the Report of the UN Secretary General We the Peoples: The Role of the United Nations in the 21 Century defines ecosystem services as benefits that people achieve in connection with the functioning of ecosystems[51]. It emphasizes the role of ecosystems and ecosystem services, stating that man is fully dependent on ecosystems and the services that these ecosystems provide[52]. Similarly,

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48 Janina Ciechanowicz-McLean and Maciej Nyka, "Human Rights and Environment,". *Przegląd Prawa Ochrony Środowiska,* vol. 3 (2012): 87.

49 Costanza, d'Arge, de Groot, Farber, Grasso, Hannon, Limburg, Naeem, O'Neill, Paruelo, Raskin, Sutton, van den Belt "The Value of the World's Ecosystem Services and Natural Capital," 255–256.

50 Edvard Wilson, *Przyszłość życia (*Poznań: 2003), 140.

51 Millenium Ecosystem Assessment *Ecosystems and Human Well-Being. Synthesis. A Report of the Millennium Ecosystem Assessment* Washington 2005, p. v.

52 Ibidem, 49

the World Wildlife Fund states that humanity is completely dependent on the proper functioning of ecosystem supply services, many of which, if lost, could not be replaced by technological solutions[53].

Ecosystem services, being a very interesting subject of research, have received many different classifications. Among those identified by the Millennium Ecosystem Assessment, provisioning services; regulating services, supporting services, and cultural services[54] can be distinguished. Representatives of economic sciences present a slightly different division. For example, Kośmicki distinguishes raw material, production and transformation services, regulatory and utilization services, services for creating space for anthropogenic use, information services[55]. Michałowski, in turn, identifies material environmental services, energy environmental services, information environmental services, spatial environmental services and stabilizing environmental services[56]. In 2009, the European Environment Agency adopted the Common International Classification of Environmental Services. The extensive classification consists of five classification levels. It breaks down environmental services into 3 sections dividing services into delivery, regulatory and cultural services, respectively[57].

In 2003–2007, HELCOM carried out an analysis of the Baltic Sea ecosystems. It showed a significant negative impact of human marine activity

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53 World Wildlife Fund *Living Planet Report 2012: Biodiversity, biocapacity and better choices* (2012): 70, accessed October 18, 2022, https://www.worldwildlife.org/publications/living-planet-report-2012-biodiversity-biocapacity-and-better-choices.

54 directly dependent on human perception and indicating environmental values that are not related to the direct acquisition of material goods, e.g. aesthetic landscape values, recreational values, resources of cultural and spiritual significance, didactic and scientific and cognitive values Paweł Sudra, "Usługi ekosystemowe na tle wybranych koncepcji ekologii miasta," *Człowiek i Środowisko,* vol. 39 no. 1 (2015): 66.

55 Eugeniusz Kośmicki, ''Zrównoważony rozwój w warunkach globalnych zagrożeń I integracji europejskiej,'' in *Ekologiczne problemy zrównoważonego rozwoju,* ed. Dariusz Kiełczewski and Borzena Dobrzańska (Białystok:Wydawnictwo Wyższej Szkoły Ekonomicznej w Białymstoku, 2009),12–16.

56 Artur Michałowski, ''Efektywność gospodarowania w świetle usług środowiska," *Optimum. Studia Ekonomiczne* 55, no. 1 (2012): 99–118, Artur Michałowski, „Usługi Środowiska w Badaniach Ekonomiczno-Ekologicznych," *Ekonomia i Środowisko*, vol. 44, no. 1 (2013): 31–32.

57 European Environment Agency *CICES. Towards a common classification of ecosystem services,* accessed October 20, 2022, *https://cices.eu/cices-structure/.*

on the ecosystems of the Baltic Sea[58]. 24 types of ecosystem services provided by the Baltic Sea ecosystem have been identified. Only 10 types of services operate at levels that do not indicate a negative human impact on their availability. As many as 7 types of ecosystem services have been identified as highly endangered by human activity in a way that prevents the full use of the potential of these ecosystem services

7. An ecosystem approach to the management of transitional waters

Transitional waters, due to their geographic location, relatively easy access, and biological and morphological features, constitute extremely diverse ecosystems of major importance for the provision of ecosystem services. Their use is associated with the very beginning of human existence and goes back to the Paleolithic[59]. Also today, ecosystem services of transitional waters constitute an important factor stimulating the development of the use of these areas.

In relation to Poland, but also many other countries of the Baltic and the world, the management of transitional waters is an additional challenge also due to the fact that often the jurisdiction over these waters is shared by different countries. This fact additionally emphasizes the role of inter-state cooperation in the field of this management, its legal instruments, but also the values and visions related to the use of these waters by various states.

Legal aspects of the management of transitional waters, constituting a continuum of freshwater, coastal waters and marine waters[60] arise from the legal norms regulating both the management of inland waters and marine waters. In both cases, the instruments used in this process refer functionally or directly to the concept of ecosystem services.

The International Council for the Exploration of the Sea defines the ecosystem approach by referring to the possibility of using ecosystem services, stating that the ecosystem approach is a comprehensive, integrated management of human activities based on the best available scientific

58 HELCOM Ecosystem Health of the Baltic Sea 2003–2007 HELCOM Initial Holistic Assessment Baltic Sea Environment Proceedings No. 122 HELCOM 2010.

59 Davide Tagliapietra, Ramunas Pavilanskas, Arturas Razinkovas-Baziukas and Julius Taminskas, "Emerald Growth: A New Framework Concept for Managing Ecological Quality and Ecosystem Services of Transitional Waters," *Water,*12 (2020): 894.

60 Art. 2 point 6 of the Water Framework Directive.

knowledge about ecosystems and their dynamics, undertaken to identify and act on impacts health-relevant ecosystems, thereby achieving the sustainable use of ecosystem goods and services and maintaining the integrity of ecosystems[61]. The quality of ecosystem services therefore depends directly on the application of the ecosystem approach, and one of the goals of the ecosystem approach is to guarantee the availability of ecosystem services. According to the United Nations Department of Maritime Affairs and Law (DOALOS), the ecosystem approach means managing human activity based on the best understanding of ecological interactions and processes, so as to ensure that ecosystem structures and functions are preserved for the benefit of present and future generations[62].

For over a decade, the ecosystem approach has become the leading approach in the protection of the marine environment of the Baltic Sea. It derives from international law and its implementation of this approach in the protection of the Baltic Sea began when HELCOM - the Helsinki Commission decided to abandon the existing sectoral approach to the protection of the Baltic Sea environment in favor of a more holistic approach that addresses the subject of protection of the sea as a comprehensive ecosystem. The ecosystem approach adopted for the protection of the marine environment of the Baltic Sea is to protect, by means of preventive measures (and even a precautionary approach), against pollution harmful to the "permitted use of the sea", which in fact boils down to using the ecosystem services of this reservoir.

In 2007, the Baltic Sea Action Plan was adopted in Krakow. It is recognized in the doctrine as the first attempt to incorporate the ecosystem approach to the protection of the marine environment by the Regional Sea Convention. This specific innovation corresponds to the ambitious goal set by the regimes regulating the protection of the Baltic marine environment

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61 Guidance and the Application of the Ecosystem Approach to Management of Human Activities in the European Marine Environment, ICES Cooperative Research Report No. 273, accessed November 10, 2022, http://www.ices.dk/sites/pub/Publication%20Reports/Cooperative%20Research%20Report%20(CRR)/crr273/crr273.pdf (dostęp: 18.10.2022 r.); see also Radecki, "Podstawy teoretyczne zintegrowanej ochrony prawnej Środowiska," 105.

62 DOALOS, Developing and Implementing an Ecosystem Approach to Ocean-related Activities, New York 2008, accessed October 18, 2022, http://www.un.org/depts/los/ecosystem_approaches/ecosystem_approaches.htm.

by the Baltic Sea Action Plan, i.e. the goal of treating the Baltic Sea as a specific example in the area of marine environment regulation. The application of the ecosystem approach, the aim and effect of which is to be the sustainable use of ecosystem goods and services, is expected to result in the achievement of a good state of the Baltic marine environment by 2021.

In the law of the European Union, the application of the ecosystem approach has become an obvious consequence of the principle of integration mentioned in Art. 11 TFEU. The significant development of instruments applying the ecosystem approach took place at the beginning of the 21 century with the growing awareness of the need to include the instruments of integrated management in the framework of marine resource management into the regulatory practice. The European Union has decided to implement the ecosystem approach to the protection of the marine environment through a system of regional sea conventions, including the above-mentioned Helsinki Convention. The emphasis on maintaining the availability of ecosystem services is also placed in the Framework Directive on the Marine Strategy, as well as in EU standards regulating marine spatial planning.

In Polish law, the availability of ecosystem services is directly a criterion for assessing the good environmental status of marine waters[63]. Supportive services are indirectly a criterion for assessing the good ecological status of transitional and coastal waters[64]. Thus, it can be concluded that the availability of individual categories of ecosystem services translates, from a formal and functional point of view, into the achievement of the objectives of water management, including transitional waters.

8. Conclusions

Land-sea interactions are gaining attention in situation of growing competition for sea space induced by the rise and changes in characteristics of sea uses. Problems of competition for space which on land has been solved by various forms of spatial planning now require adaptive usage of tools known

63 Art. 16 (13) of the Water Law.

64 Art. 16, point 9 of the Water Law; Annex I to the ordinance of the minister of maritime economy and inland navigation of October 11, 2019, on the classification of ecological status, ecological potential and chemical status and the method of classification of the state of surface water bodies, as well as environmental quality standards for priority substances.

from land space management. Implementation of planning procedures on the sea makes processes of issuing individual decisions more transparent and allows for better implementation of EU's economic freedoms.

From all the principles of maritime spatial planning principle of ecosystem approach together with principle of taking into account the interactions between land and the sea seems to take specific place as axiological foundations of maritime spatial planning. They might be called guiding principles of the MSP. First of them stresses the need of supporting sustainable development and growth of maritime sector. Second shows permanent and multifaceted interactions between maritime and land areas including in the sphere of nature or, more broadly, the environment, which underlie the concept of integrated maritime spatial planning. Taking into account the interactions between land and the sea principle, should be seen as an objective imperative for the effectiveness of ecosystem approach.

In Polish legal system the basic foundations of the legal regulation of spatial planning and spatial development of land territories and sea areas are contained in two separate acts. Basic provisions relating to the planning and spatial development of land territories have been included in the u.p.z.p., and the regulations on the principles, methods and procedure of maritime spatial planning in chapter 9 of chapter II of the u.o.m.. Potential confusion has been solved by direct reefing to u.o.m in relation to spatial planning of maritime areas in the u.p.z.p. Apart from that the only systemic link between procedures of planning on land and sea are through vogue obligation of cooperation between maritime administration and local government in executing their spatial planning competences.

The fact that Polish law seems not to identify the linkages and interaction between land and sea does not mean that such interactions do not exist. They are easily seen in the objectives of management of transitional and costal waters – so the waterparts which are most important from the perspective of provision of ecosystem services which are consumed on land. Among those objectives one can indicate: keeping ecological balance in the ecosystems; ensuring normal functioning of the ecosystem and ensuring sustainable provision of ecosystem services.

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Gloss to the Supreme Court's decision of 15 June 2022, II CSKP 509/22

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Abstract: This paper is an attempt at a polemic with the position of the Supreme Court expressed in the cassation case II CSKP 509/22. The subject matter discussed in the paper is of great importance, particularly from a practical point of view, and concerns the issue of the (im)possibility of establishing the date of a will in a situation where doubts arise as to the relation of this will to another will which is dated. The considerations take into account not only the achievements of Polish doctrine, but also - for the sake of comparison and in order to find the best possible model for proceedings in this type of case - the solutions functioning in foreign legal systems (mainly German and French).

"The absence of the date of a handwritten will does not entail the document's invalidity where doubts arise as to the interrelationship of several wills in view of their content. In particular, such a situation occurs if, the testator mentions another will in one of two wills drawn up (e.g., by revoking it). It is also possible to imagine a case where in a will the testator refers to facts which are generally known and which are known to have taken place. In none of these situations could the court who is hearing the case have such doubt as to the date of the will which the said court would have to dispel by way of taking evidence in court proceedings."[1] The thesis cited here was the basis for the Supreme Court's dismissal of the participant's cassation appeal

[1] LEX nr 3409495.

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against the decision of the District Court in S. of 8 November 2019 on the ascertainment of the inheritance acquisition.

My objective is to attempt a polemic with the position of the Supreme Court, expressed on the grounds of the case in question, and to present arguments opposing the statement of reasons for this decision. Beforehand, however, it is necessary to briefly outline the facts of the case and the legal considerations of the Supreme Court carried out on their basis.

By decision of 18 June 2018, the District Court in S. declared that the inheritance after I. E. K., who died on 21 August 2017 in S., on the basis of a notarial will dated 30 July 2008, was acquired in full with the benefit of inventory by her granddaughter W. D. The court of first instance established that I. K. was a widow at the time of her death and had two sons, T. K. and G. D. The testator drew up a notarial will of 30 July 2008 in which she appointed her granddaughter W. D. as her heir. The participant T. K. submitted to the Court the original of handwritten will, which contained the following contents: "After my death, I mother K. I., bequeath to her sons: to T. K., all the furnishings in the flat, i.e., furniture, electronic equipment, and the sale of the entire flat and the division of 50% each, whereas G. D. is to get 5,000 zlotys more because he lent me to buy out the flat; that is my wish. Your loving mother." The court of first instance found that the inheritance was acquired on the basis of the notarial will, considering that the handwritten original does not meet the formal requirement of Article 949 of the Civil Code, as it lacks a date. In turn, this lack raises doubts as to the mutual relationship between the handwritten will and the notarized will, rendering it impossible to determine which of the invoked wills was drawn up first. The District Court accepted that, although it is accepted in case law that doubts as to the order in which the wills were drawn up can be removed by any available means of evidence, the clarification of such doubts cannot be reduced to proving the date on which the will was drawn up. Thus, the court considered it inadmissible to hear witnesses and parties on this circumstance.

By decision of 8 November 2019, the District Court in S. dismissed the appeal of T. K. against the order of the Court of first instance on the ascertainment of the inheritance acquisition. The District Court expressed its opinion on the inadmissibility of taking evidence in court proceedings pertaining to the date when the will was drawn up. It held that in the case

at hand, without the need to take evidence in court proceedings, it was clear that the absence of a date raised doubts as to the mutual relationship between the notarized will and the handwritten will, rendering the latter invalid. In addition, the Court of second instance pointed out that the taking evidence in court proceedings to establish the date of the notarial will was excluded because T. K. had not shown timely evidentiary initiative in this regard.

The decision of the District Court was appealed against in its entirety by the participant in the proceedings T. K., alleging violation of Articles 949(1 and 2) of the Civil Code and Article 958 of the Civil Code. The substance of the allegations boiled down to challenging the thesis that the handwritten will was invalid due to the impossibility of establishing the relationship of that will to the notarized will, whereas it was permissible to take evidence in court proceedings pertaining to the date on which the handwritten will was drawn up.

In assessing the merits of the cassation appeal filed, the Supreme Court observed that the appellant's objections factually related to a single issue – the admissibility of taking evidence in court proceedings pertaining to the date of a handwritten will in a situation where doubts exist as to its relation to the other will. Without denying the fact that, in the circumstances of the case at hand, the participant had not placed any requests for evidence at the stage of proceedings before the Court of first instance, and the requests contained in the appeal had been disregarded as belated, the Supreme Court agreed with the position adopted by the Courts of both instances. In the statement of reasons for the decision under review in this gloss, the Court stated that: „linking the absence of a date, i.e., a certain feature of a will, to the arising doubts means that the focus should be on the will itself (or wills where, as in the present case, the relationship of several wills to each other is potentially doubtful) and not on the entirety of the accompanying circumstances. If it had been the legislator's intention to refer to a wider range of facts, the legislator would have used a formulation that is neutral from the point of view of the source of potential doubt, e.g., 'if no doubts arise' or 'if, in the light of the circumstances, no doubts arise'. Moreover, a linguistic interpretation of the regulation leads to the conclusion that the legislator refers explicitly to the mere arising (emergence) of doubts and not to the possibility of removing doubts that have already arisen. If doubts

arise (emerge), this entails the invalidity of the will, whether or not the doubts are removable. The regulation does not provide, for example, that a will is valid if the absence of a date does not create doubts that cannot be removed. For this reason, the taking of evidence in court proceedings, e.g., as to the determination of the mutual relationship of several wills, is to be regarded as irrelevant. Evidence in court proceedings is taken when doubts exist (have arisen) and not when the factual situation is beyond doubt. If, on the other hand, doubts have arisen, the will is invalid regardless of the hypothetical results of proceedings to take evidence."[2]

In its considerations, the Supreme Court also decided that "the results of the grammatical interpretation of Article 949(2) of the Civil Code are not inconsistent with the conclusions emerging from the application of other methods of interpretation. In its resolution of 19 May 1992, III CZP 47/92, the Supreme Court held that '[i]t is permissible to establish the date of a handwritten will by any means of evidence if the date's absence gives rise to doubts as to the relation of that will to another will,' using as the basis for such a conclusion a historical interpretation based on a comparison of Article 949(2) of the Civil Code with Article 79(2) of the Decree of 8 October 1946, which was in force in the previous legal standing – Inheritance Law. The latter provision stated that 'the absence of a date in a will does not render the will invalid if the date can be determined based on the contents of the will or if it can be ascertained by other means of evidence.' Comparing the two provisions, the Supreme Court assumed that the legislator's aim was to relax the strict formal requirements of the will. This conclusion is not convincing. On the one hand, the cited provision of the Inheritance Law was indeed stricter, as it mandated that the missing date of a shall be established in every case, and not only when it could raise doubts about the capacity to make the will, its content or to make out the relationship among several wills. On the other hand, however, the former regulation expressly permitted the use of evidence other than the will to establish the date of the will, which is lacking now. The assumption that the legislator's aim was to mitigate strictness is therefore arbitrary; moreover, it is also rejected by the Supreme Court in the statement of reasons for Resolution

[2] The statement of reasons for the Supreme Court's decision of 15 June 2022, II CSKP 509/22, LEX No. 3409495.

of 23 October 1992, III CZP 90/92. In contrast to Article 79(2) of the Inheritance Law, which concerned demonstrating with evidence a missing formal element in the will, under the current regulation the legislator does not mandate proving anything, but exempts from the obligation to adhere to one of the formal requirements in those cases where the necessity to do so would serve no purpose. Indeed, there should be no doubt that the necessity to date a will is stipulated precisely in order to eliminate potential doubts as to the testator's capacity to draw up a will, the content of a will or the reciprocal relationship among several wills."[3]

The Supreme Court prefaced its conclusion by stating that "arguments relating to expediency also do not support, or at least do not unequivocally support, the admissibility of taking evidence in court proceedings to eliminate doubts arising from a will without a date. On the one hand, it cannot be ruled out that such a possibility would in certain situations lead to a more complete execution of the testator's will, but on the other hand, one must also bear in mind that the increased formalism in drawing up a shall ultimately also serve that same purpose. After the testator's death, deciphering his or her true intentions is particularly vulnerable to manipulation by his or her survivors. The reconstruction of the date when the will was drawn up through any means of evidence might also afford a potential for such abuse. What may also hold some weight is the argument put forward in the literature on the subject that allowing the removal of doubts referred to in Article 949(2) of the Civil Code through any means of evidence would render the very requirement to date the will a statutory *superfluum* (...). Ultimately, this translates into adopting the conclusion that the absence of a date on a handwritten will does not entail the will's invalidity when the emergence of doubts as to the interrelationship of several wills is ruled out on account of their content."[4]

An attempt at a polemic with the position of the Supreme Court should be preceded by a few remarks, systemic in their nature. It is also worth noting foreign legal solutions regarding the consequences of the lack of a date

[3] This is how the Supreme Court argues in the statement of reasons for the decision under review in the present gloss.

[4] The statement of reasons for the Supreme Court's decision of 15 June 2022, II CSKP 509/22, LEX No. 3409495.

on a will, in order to select the best possible arguments when evaluating the issue in question. Apart from this, the considerations presented below should be of a more general (abstract) nature, due to the fact that, against the background of the case in question, the participant in the proceedings has not demonstrated the appropriate evidentiary initiative for this type of court proceedings.

Firstly, it must be stated that the dating of a will is important for several fundamental reasons. This is because such an action makes it possible: to indicate when the will ended; to ascertain the provisions in force at the time the will was made and to assess whether these requirements have been met; to examine whether the testator had testamentary capacity at the time of making the declaration of the last will[5]; and to establish the interrelationship among several wills.[6] Naturally though, it is beyond dispute that in order for the date of drawing up a will to fulfil the functions attributed to it, it must be true. If a will is dated falsely, it must be treated as if it had not been dated. This rigor shall not apply where there is an obvious clerical error in the date (e.g., the year 1012 is given instead of 2022). In such circumstances, however, it shall be necessary to demonstrate that the testator indicated the wrong date inadvertently and that the actual moment when the will was drawn up can be determined from the surrounding facts. In such a case, a will which bears an erroneous date shall be treated as a dated will.[7]

Given the handwritten form of the dispositions in the will, it is assumed that the date on the will in question should be handwritten by the testator him- or herself. If the date is put on the will mechanically or by computer, it will be treated as if the will had not been dated. By way of comparison, there is a difference in this respect in the German system of inheritance law, which may be worth pointing out; namely the date in a handwritten will does not need to be in the testator's own handwriting and can be effectively

5 Broader on the subject, Maciej Rzewuski, "Zdolność testowania – uwagi de lege lata i de lege ferenda," *Przegląd Sądowy*, no. 6 (2012): 93–97.

6 Elżbieta Skowrońska, *Forma testamentu w prawie polskim* (Warszawa: Wydawnictwa Uniwersytetu Warszawskiego, 1991), 57–58; Sylwester Wójcik, *Podstawy prawa cywilnego. Prawo spadkowe (*Warszawa: C.H. Beck, 2002), 54.

7 Jan Gwiazdomorski, *Prawo spadkowe w zarysie* (Warsaw: Państwowe Wydawnictwo Naukowe, 1985), 99; Maciej Rzewuski, *Podpis spadkodawcy na testamencie własnoręcznym* (Warsaw: Wolters Kluwer, 2014),78.

put in with a typewriter or imprinted with a date stamp. It is only important – and this is a condition for a will to be treated as dated – that it remains relevant to the written declaration of the last will.[8]

The provision of Article 949(1) of the Civil Code does not enumerate the specific elements of which the date on a will should consist.[9] The regulation in force differs from the previously binding provision of Article 79(1) of the Inheritance Law,[10] in which the legislator listed the following components among the obligatory elements of the date: the day, month and year when the will was made.[11] Literature on the subject seems to regard the Polish legislator's departure from the previous regulation of inheritance law as a sign of new leniency with regard to the formal requirements concerning the date on a will and, consequently, as a manifestation of the intended liberalization of inheritance law.[12]

Representatives of the doctrine also agree that the date on a handwritten will may be stated descriptively, e.g., "on my 50 birthday," "on the day my brother passed away," etc. In most cases, such descriptions will make it possible to establish the time when the will was drawn up and should generally be treated as the date indicating the pertinent day, month and year. Sometimes, however, it may be the case that the precise date of making the will cannot be clearly established on the basis of the above indications (e.g., when the testator had several brothers and they are all deceased). In such a case, the will should be treated as one that is

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8 Broader on the subject, Gerhard Schlichting, *Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 9, Erbrecht. § 1922–2385, § 27–35 BeurkG* (Munich: Verlag C.H. Beck, 2004), 1437–1438; Jarosław Turłukowski, *Sporządzenie testamentu w praktyce (*Warsaw: LexisNexis, 2009), 48; Rzewuski, *Podpis spadkodawcy,* 78.

9 The date does not necessarily identify the place where the will was drawn up.

10 Decree of 8 October 1946. - Inheritance Law, Journal of Laws 1946 no. 60 item 328.

11 Interestingly, this date format is still required in many existing European (e.g., Article 602 of the Italian Civil Code, Article 688 of the Spanish Civil Code) and American (e.g., California) legislations. See Lanfranco Ferroni, *Codice civile. Annotato con la giurisprudenza. vol.I,II: Libri I–IV (artt.1–2059). Libri V–VI (artt.2060–2969)* (Milano: Co-curatori Valerio Donato. Geremia Romano, 2006), 738–741; Gail Boreman Bird, "Sleight of Handwriting. The Holographic Will in California," *The Hastings Law Journal*, vol. 32 (1980–1981): 612–613.

12 Broader on the subject, Jacek Ignaczewski, "Prawo spadkowe. Art. 922–1088," *KC. Komentarz* (Warsaw: C.H. Beck,2004), 129; Skowrońska, *Forma testamentu,* 58; Rzewuski, *Podpis spadkodawcy,* 79.

not dated. Instead, it is considered sufficient to date the will in the form of the month or season and the year in which the will was made (e.g., August 2021, summer 2022). The validity of a will dated in this way will be determined by the absence of doubt as to the circumstances listed in the wording of Article 949 of the Civil Code.[13]

As a general rule, both the absence of a date as well as the inclusion of a false date result in the will being declared invalid (Article 959 of the Civil Code). However, there are exceptions to this code sanction. The failure to indicate the date on a will shall not render the will invalid if it does not raise doubts as to: the testator's capacity to draw up the will; the content of the will; the reciprocal relationship among several wills (Article 949(2) of the Civil Code). In other words, when the absence of a date gives rise to doubts as to the testator's testamentary capacity, the content of the will or the interrelationship among several wills, it will render the will invalid. However, literature on the subject presents an increasing number of opinions admitting the possibility to determine the date of the will by any means of evidence (e.g., by examining the content of the will or through the testimony from persons present at the making of the will). For this reason, inter alia, the failure to date a will should not result in the will being immediately rendered invalid if: the testator has never been incapacitated; the court has not appointed an interim counsel for him or her; there is no doubt as to the content of the will; it is apparent from the content of the will or extrinsic circumstances that the testator made the will after he or she had reached the age of majority, leaving no other wills or leaving such wills which are reconcilable with each other.[14]

Bearing all of the above in mind, I believe that the possibility of establishing the date on a handwritten will by any available means of evidence should be approved. "After all, it must be remembered that the legislator aims at liberalization and not at 'stiffening' the legal order that was previously in force. Interesting solutions to the issue under consideration exist in French practice, where each element (i.e., the day, month and year) is considered as a separate, independent component of the date and is analyzed accordingly by the court deciding *in casu*. In addition, any deficiencies

13 Skowrońska, *Forma testamentu,* 58–59; Rzewuski, *Podpis spadkodawcy*, 79–80.

14 Rzewuski, *Podpis spadkodawcy,* 81. Cf. Skowrońska, *Forma testamentu*, 58–59.

in the date can be rectified by the French courts if the need arises and the judicial rectification harmonizes with the content of the will. (...) [B]y way of exception, inadequacies in the date may be remedied on the basis of circumstances other than the content of the dispositions in the will (e.g., when the testator provides a date consisting only of the day and the month when the will was made, without mentioning the year, the testator's death certificate or the opinion of an expert of the relevant specialization is generally taken into account).[15] The admissibility of establishing a date by means of various types of evidence in Polish law is supported by the previous legal regulation (Article 79(2) of the Polish Civil Code), in the light of which each individual case when a date was missing obliged the court to establish it, while possible ambiguities resulting from the content of Article 949(2) of the Civil Code were irrelevant for the assessment of the validity of a specific dispositions in the will. There were thus two possibilities, i.e., if it was possible to determine the date of the legal act – the will was valid, if not – the dispositions in the will were declared invalid. At the same time, during this period, a view began to prevail that the absence of a precise date did not give rise to doubts as to the validity of the will, it was sufficient to indicate the approximate moment at which the dispositions in the will were made."[16]

I believe that "the question of assessing which of the described legal regulations should be regarded as stricter is not straightforward. On the one hand, the legislator currently stipulates that the absence of a date or the impossibility of establishing a date does not always mean that the will is invalid; on the other hand, the possibility of establishing a date in doubtful situations is not expressly permitted in the Civil Code. This circumstance could demonstrate the need for restrictive treatment of similar omissions. It should be noted, however, that the lack of a relevant reference by the legislator in the text of Article 949(2) of the Civil Code to the possibility of establishing a date by means of various types of evidence in no way precludes

15 Georges Wiedegkehr, Xavier Henry, Alice Tisserand, Gay Venandet, François Jacob, *Code Civil* (Paris: Dalloz, 2004), 830.

16 As in Rzewuski, *Podpis spadkodawcy,* 81–82. Cf. Elżbieta Skowrońska-Bocian, *Testament w prawie polskim (*Warsaw: LexisNexis, 2004),80–81.

such an action. Indeed, as silent on the matter, the legislator cannot be presumed to view such an opportunity critically."[17]

Until the time of the decision under review in the present gloss, the Supreme Court seemed to unequivocally share this view in its earlier decisions. By way of example, it is worth noting the following case law statements:

- "(1) A declaration by the testator which does not have the characteristics of a will and does not correspond in its form to a revocation of a will, but which indicates the one among several wills made on the same day that constitutes the last will, may be considered sufficient to remove any doubt as to the several wills' sequence. (2) The appointment of the same heir in several wills made on the same day shall be valid notwithstanding the impossibility of ascertaining their sequence and the difference in bequests.";[18]
- "The absence of a date in a handwritten will entails its invalidity only if the court proceedings fail to remove the doubts referred to in Article 949(2) of the Civil Code. In removing them, the court shall also take into account evidence indicating the date on which the will has been drawn up."[19]

The cited case law statements of the Supreme Court prove that the previous jurisprudence allowed for, and sometimes even required, the external circumstances accompanying the will to be taken into account in the process of verifying the validity of a handwritten will. Significantly, the above-mentioned Supreme Court decisions reflected the spirit underlying a significant part of Polish doctrine,[20] with only a few authors indicating – in

17 Rzewuski, *Podpis spadkodawcy,* 82.

18 Resolution of the Supreme Court of 30 September 1971, III CZP 56/71, OSNC 1972, no. 3, item 47.

19 Resolution of the Supreme Court (7) of 23 October 1992, III CZP 90/92, OSNC 1993, nos. 1–2, item 4.

20 Paweł Księżak, *Prawo spadkowe (*Warsaw: Wolters Kluwer Polska, 2017), 197; Konrad Osajda, "Rozrządzenia na wypadek śmierci," in *Kodeks cywilny. Komentarz*, vol. IV A. Spadki, ed. Konrad Osajda (Warsaw: C.H. Beck, 2019), art. 949, 442; Maksymilian Pazdan, "Rozrządzenia na wypadek śmierci," in *Kodeks cywilny. Tom II. Komentarz Art. 450–1088*, ed. Krzysztof Pietrzykowski (Warsaw: C.H. Beck, 2020), art. 949, 7; Joanna Kuźmicka-Sulikowska, "Rozrządzenia na wypadek śmierci," in *Kodeks cywilny. Komentarz*, ed. Edward Gniewek, Piotr Machnikowski (Warsaw: C.H. Beck, 2021*)*, art. 949, 1923.

preference to a strict interpretation of the provisions of inheritance law – that an undated will would always remain invalid, even if its date could be otherwise established.[21]

In conclusion, the position expressed with regard to Case II CSKP 509/22 cannot be accepted uncritically. The considerations carried out above prove the opposite of the conclusion articulated by the Supreme Court in the statement of reasons for the decision under review in the present gloss. Thus, it should be acknowledged that the absence of a date on a will shall cause the will's invalidity only if the doubts referred to in Article 949(2) of the Civil Code cannot be removed in court proceedings when the court takes into account not only the content of the will, but also other evidence indicating the date on which the will was drawn up.

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[21] Jan Gwiazdomorski, *Prawo spadkowe* (Warsaw: Państwowe Wydawnictwo Naukowe, 1990), 106; Sylwester Wójcik, Fryderyk Zoll, "Rozrządzenia testamentowe," in *System prawa prywatnego. Tom. 10. Prawo*, ed. Bogudar Kordasiewicz (Warsaw: C.H. Beck, 2015), 371.

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