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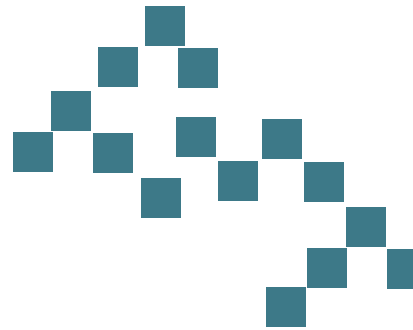

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Copyright Protection for Works Created by AI Technology under the EU Law and Vietnamese Law

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Abstract: The legislation of the European Union increasingly focuses on expanding the scope of works protected by intellectual property rights, including literary works, music, films, and phonograms. The breakthrough in artificial intelligence (AI) has contributed significantly to creating works of art with little or no human intervention. The article examines the current situation of EU copyright law and Vietnamese law regarding AI-generated works. The article concludes that EU law governs copyright for these works based on the extent of human contribution to the creation of the work. Meanwhile, Vietnamese law still needs to resolve the issue of intellectual property rights for works created by AI.

1. Introduction

In May 2016, the European Parliament recommended that

> Robotics and AI have become one of the most prominent technological trends of our century. The fast increase of their use and development brings new and difficult challenges to our society. [...] It is crucial that regulation provides predictable and sufficiently clear conditions to incentivise European innovation in the area of robotics and AI.[1]

[1] European Parliament (2016), "Committee on Legal Affairs, Draft report with recommendations to the Commission on Civil Law Rules on Robotics, 2015/2103(INL)", p. 20, accessed February 25, 2023, https://www.europarl.europa.eu/doceo/document/JURI-PR-582443_EN.pdf.

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In their Resolution of 16 February 2017, the Members of the European Parliament called for a resolution to whether existing intellectual property law should be applied and how it should be changed to conform to advances in artificial intelligence. "Humankind stands on the threshold of an era when ever more sophisticated robots, bots, androids and other manifestations of artificial intelligence ('AI') seem poised to unleash a new industrial revolution."[2] Parliament declares that it is a "calling". The Commission supports a horizontal and technology-neutral approach to intellectual property applied to different fields.[3]

Thus, copyright protection for works created by AI is one of the new challenges that need to be discussed and solved worldwide in general and in the European Union.

In Vietnam, the law on intellectual property does not regulate these issues. This will be a considerable challenge, affecting the development of AI research and application in Vietnam in the coming time.

2. AI and Problems for Copyright Law

AI was officially born in the 1950s when researchers first began understanding how machines could simulate aspects of human intelligence. The most crucial moment starts with Alan Turing's "Computing Machinery and Intelligence,"[4] which explores many of the fundamentals of AI, including how intelligence can be tested and how machines can be programmed to self-learning.[5]

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2 European Parliament (2017), "European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics. Procedure reference: 2015/2103(INL)", Document reference: P8_TA-PROV(2017)0051, p. 1, accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0051&rid=1.

3 European Parliament (2017), "European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics. Procedure reference: 2015/2103(INL)", Document reference: P8_TA-PROV(2017)0051, p. 9, accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX-:52017IP0051&rid=1.

4 Alan M. Turing, "Computing Machinery and Intelligence," *Mind* 59, no. 236 (October 1950), in Helene Margrethe Bøhler, "EU Copyright Protection of Works Created by Artificial Intelligence Systems" (master's thesis, The University of Bergen, 2017), 7.

5 Peter Stone et al., "Artificial Intelligence and Life in 2030: One Hundred Year Study on Artificial Intelligence: Report of the 2015–2016 Study Panel," Stanford University, 2016, p. 50.

AI is a field of science and a collection of computing technologies inspired by how humans use the nervous system and body to sense, learn, reason, grasp, and act.[6] AI research aims to simulate human intelligence so that computer programs can act and reason correctly, independently, and automatically. A system is considered independent when it can independently perform the assigned task without human guidance.

Even so, there has yet to be a general concept for AI. However, according to one of the widely accepted definitions of Nils J. Nilsson, "artificial intelligence is the activity aimed at making machines intelligent, and intelligence is the quality that enables an entity to become intelligent. Operating appropriately and foresight in its environment."[7]

Early AI systems could only create programs that fit a narrow range of functions, meaning that machines were programmed to act like humans, and programmers could directly control the outputs of the machine. Meanwhile, today's AI system can already foster innovative thinking and logical reasoning ability in the AI computer. It can be said that today's AI system can make a machine "think" for itself. Randomness and autonomy are integrated into AI systems and growing strongly, making the connection between humans and AI outputs increasingly declining. This development has made AI a matter of profound social impact. All major universities have departments dedicated to AI, and technology companies such as Apple, Facebook, Alphabet, IBM, and Microsoft are also boldly investing in exploring the application of AI.[8] Several events can illustrate the advancement of AI. For example, IBM's Watson program beat human competitors to win the *Jeopardy Challenge* 2011.[9] The Watson program was later successfully applied as a medical diagnosis tool. The AlphaGo program

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6 Ibid., 4.

7 Nils J. Nilsson, *The Quest for Artificial Intelligence: A History of Ideas and Achievements* (New York: Cambridge University Press, 2010), 13.

8 European Parliament (2017), "European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics. Procedure reference: 2015/2103(INL)", Document reference: P8_TA-PROV(2017)0051, p. 6, accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX-:52017IP0051&rid=1.

9 David A. Ferrucci, "Introduction to 'This is Watson,'" *IBM Journal of Research and Development* 56, no. 3.4 (2012): 1:1–1:15.

defeated a chess champion in Go, one of the most complex and intellectually demanding games.[10]

AI continues to advance in the field of creativity. For example, Watson has collaborated with the Institute of Culinary Education to produce a cookbook titled *Get Cooking with Chef Watson*.[11] AI can also create a literary work; for example, in Japan, a short novel co-written by an AI program entered the literary competition and passed the first elimination round.[12] This proves that AI technology has come a long way in creating the content of literary works. The question is whether an AI-generated work deserves copyright protection.

3. EU Copyright Law Framework and Legal Precedents

3.1. EU Copyright Law Framework

The European Parliament has repeatedly mentioned the relevance of AI and copyright. The European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Code Rules for Robots states: "There is no legal provision specifically possible for robotics, but… existing doctrines and legal regimes can easily be applied to robotics, although some aspects seem to require specific consideration."[13] A study by the European Parliament's Committee on Legal Affairs also highlighted in the October 2016 report: "the question that European policymakers might want to consider relates to the status of a robot's own creations. (…) Can an autonomous robot be deemed the author of an intellectual work, entitling it to copyright

10 David Silver, "Mastering the Game of Go with Deep Neural Networks and Tree Search," *Nature*, no. 529 (2016), 484–9, accessed February 25, 2023, http://www.nature.com/nature/journal/v529/n7587/full/nature16961.html.

11 Richard Brandt, "Chef Watson Has Arrived and Is Ready to Help You Cook," 2016, accessed February 25, 2023, https://www.ibm.com/blogs/watson/2016/01/chef-watson-has-arrived-and- is ready-to-help-you-cook/.

12 Michael Schaub, "Is the Future Award-Winning Novelist a Writing Robot?," *Los Angeles Times*, March 22, 2016, accessed February 25, 2023, https://www.latimes.com/books/jacketcopy/la-et-jc-novel-computer-writing-japan-20160322-story.html.

13 European Parliament (2017), "European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics. Procedure reference: 2015/2103(INL)", Document reference: P8_TA-PROV(2017)0051, p. 9, accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0051&rid=1.

protection?"[14] Thus, the reports acknowledge the relevance and importance of copyright issues for AI-generated works. However, they need to provide an answer as to whether the current EU law is valid. Protect works created by AI. The answer will lie in looking at the EU's legal framework regarding copyright protection.

The EU's legal framework for copyright includes directives applicable to all Member States to harmonise the rights of authors, performers, producers, and broadcasters. These directives reflect the obligations of Member States to comply with the Berne Convention, the Rome Convention, the TRIPS Agreement, the WCT, and the WPPT. Necessary directives in this area include Information Society Directive 29/2001/EC (InfoSoc),[15] Software Directive 2009/24/EC (Software Directive),[16] Database Directive 96/9/EC,[17] and the Copyright Term Directive 2006/116/EC.[18]

The above directives highlight two issues in the EU's copyright legal framework as follows. First, Europe recognises the role of copyright protection in the traditional approach. The traditional approach accepts intellectual property rights to promote and encourage cultural and

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14 European Parliament, Policy Department C for Citizens' Rights and Constitutional Affairs (2016), *European Civil Law Rules in Robotics*, PE 571.379, accessed February 25, 2023, https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571379/IPOL_STU(2016)571379_EN.pdf.

15 European Parliament (2001), "Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society," accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029.

16 European Parliament (2009), "Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs," accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX-%3A32009L0024.

17 European Parliament (1996), "Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases," accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31996L0009.

18 European Parliament (2006), "Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights," accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0116&qid=1677478100672.

technological development.[19] Essentially, exclusive rights provide the author with a financial return to compensate for the author's investment in creating the work.[20] Without copyright protection, others can freely benefit from the creator's efforts and thus stifle the development of the authors. Accordingly, a flawed copyright regime would discourage future investment in artistic and creative works.[21] These considerations are outlined in the InfoSoc Directive 2001/29/EC preamble: "The investment required to produce [innovative] products… is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment."

Besides the financial aspect, copyright also aims to reward creativity, stimulating investment in the creative sector.[22] The preamble to the Infosoc Directive 2001/29/EC defines:

> [a] harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

Thus, the EU's copyright policy is the traditional one aimed at maintaining the economic engine for expressing valuable ideas and promoting scientific and cultural development. Study the arts, and at the same time,

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19 This is emphasized in the preamble to Infosoc Directive 2001/29/EC and in the preamble to the WIPO Copyright Treaty.

20 Annette Kur and Thomas Dreier, *European Intellectual Property Law* (Publishing House. Oxford, 2013), 241–2.

21 OECD (2015), "Enquiries into Intellectual Property's Economic Impact," 217, accessed February 25, 2023, https://web-archive.oecd.org/2016-03-21/369774-intellectual-property-economic-impact.htm.

22 European Commission (2016), "Copyright", accessed February 25, 2023, https://ec.europa.eu/digital-single-market/en/copyright.

ensure the right of society to access knowledge.[23] This formed the basis for today's European copyright framework.

Second, Europe recognises standards for copyright protection of work based on compliance with the Berne Convention. The Berne Convention requires that a work to be protected must be "original" and "creative."[24] The EU legislature addresses the requirement for originality and inventiveness in three directives: Article 1 (3) and Article 3 (1) of the Software Directive 91/250/EC, the Database Directive 96/9/EC, and Article 6 of the Copyright Term Directive 2006/116/EC. All three of these directives require that to be protected, a work must be original because it is "the author's own intellectual creation."

The above legal framework shows that the consideration of whether an AI-generated work is protected by copyright in the EU will be made based on the EU's approach to copyright and according to the standards of the EU. These criteria are illustrated in CJEU precedents.

3.2. Concept of a Work According to EU Law

The concept of a "work" has been recognised by the CJEU as an autonomous and harmonised concept of EU law, which must be interpreted and applied uniformly and requires two conditions to be met: (1) it must be "original". "Original" means that it reflects the author's personality as an expression of the author's free and creative choices. Suppose the topic is dictated by technical considerations, rules, or other constraints, with no room for creative freedom. In that case, the case will not be considered "original"; (2) it must be determined with sufficient accuracy and objectivity.[25]

This may have certain complications in representing the author's free and creative choice if AI powers the work. What types of options are considered relevant in generating AI-powered outcomes? And so can the uniqueness requirement be met when considering the role of AI systems in creating

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23 Timothy Butler, "Can a Computer be an Author – Copyright Aspects of Artificial Intelligence," *Hastings Communications and Entertainment Law Journal* 4, no. 4 (1981): 735.

24 World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, 2nd ed. (Geneva, Switzerland: World Intellectual Property Organization, 2004), para. 5.171, https://tind.wipo.int/record/28661.

25 CJEU Judgment of 12 September 2019, Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV, Case C-683/17, paras. 29–32.

AI-powered products. Whether and to what extent an AI-generated work qualifies as a copyrighted work.

3.3. CJEU's Precedents

The first precedent is the dispute involving Infopaq. Infopaq is a company that collects data from various Danish articles, then compiles abstracts of articles and sends them by e-mail to its customers. Disputes arose around whether Infopaq needed the consent of the owners of the articles before copying them to be sent to customers.

Statement of the CJEU regarding the interpretation of Article 2(a), Infosoc Directive 2001/29/EC. Article 2(a) provides that authors have the exclusive right to permit or prohibit the reproduction of their "works." The CJEU considers that the interpretation of a "work" should be made by Article 2 of the Berne Convention. In addition to the reference to Article 1(3) of the Software Directive 91/250/EC, Article 3(1) of the Database Directive 96/9/EC, and Article 6 of the Copyright Term Directive 2006/116/ EC, the CJEU states that Article 2(a) of the Infosoc Directive 2001/29/EC provides that a work is protected by copyright when it is original, "the author's own intellectual creation."[26] The CJEU has fully harmonised the requirement for originality at the EU level. Besides, the CJEU attaches great importance to the intellectual act of selecting and arranging text passages.

> Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation.[27]

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[26] CJEU Judgment of 16 July 2009, Infopaq International v. Danske Dagblades Forening, Case C-5/08, ECR I-6569, para. 37, accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62008CJ0005.

[27] CJEU Judgment of 16 July 2009, Infopaq International v. Danske Dagblades Forening, Case C-5/08, ECR I-6569, para. 45, accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62008CJ0005.

Thus, the creators of the articles have made a series of creative choices that render the original texts in the sense that they are "the author's own intellectual creation." Thus, Infopaq needs the consent of the article owners before copying them to send to customers.

The second precedent was the Painter dispute.[28] One of the questions was whether a photograph could be published in magazines and on the Internet without the owner's consent. In particular, the Court clarified whether the "original" photograph standard in Article 6 of the Copyright Term Directive 2006/116/EC includes portraits. The Court has clearly stated that the criterion for judging whether a work is considered an "author's own intellectual creation" lies in the fact that the author can "make free and creative choices in several ways and at various points in its production." Furthermore, by making these different choices, the author of a portrait can put his or her stamp on the work created. The Court then illustrated such creative choices:

> In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.[29]

Thus, according to CJEU, a portrait photo is protected by copyright.

In the third precedent, the creative criterion was made more evident in the Murphy dispute,[30] in which the CJEU looked at whether copyright issues were raised in sporting events. In this regard, the CJEU clarifies that

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28 CJEU Judgment of 12 April 2011, Painter v. Standard VerlagsGmBH and Others, Case 145/10, ECR I-0000, para. 88, accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CC0145&qid=1677413626381.

29 CJEU Judgment of 12 April 2011, Painter v. Standard VerlagsGmBH and Others, Case 145/10, ECR I-0000, para. 91, accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CC0145&qid=1677413626381.

30 CJEU Judgment of 4 October 2011, Football Association Premier League Ltd and Others v. QC Leisure and Others, and Karen Murphy v. Media Protection Services Ltd, Cases C-403/08 and C-429/08, ECR I-10909, para. 98, accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CJ0403&qid=1677413726129.

about the process of "author's own intellectual creation," there must be "creative freedom for the purposes of copyright." The Court concluded that since football matches are subject to the game's rules, they have no room for such creative freedom and cannot be copyrighted. The statement implies that a work is considered original only if it results from creative freedom. Game rules in sporting events are not credited to the author's creative freedom or protection.

The decision in the Infopaq, Painter, and Murphy disputes clarified and developed the EU's concept of originality and inventiveness. The "author's own intellectual creation" is the criterion for the claim of originality. The author has made a "free and creative choice" and expresses a personal impact on the creative process.[31]

Even so, the EU legal framework and CJEU precedents have yet to adequately explain whether an AI-generated work meets the requirements of originality and inventiveness for protection.

4. Ability to Protect AI-Generated Works under EU Copyright Law

The creative process associated with AI works fundamentally differs from the creative process that traditional copyright intends to protect. In the traditional creative process, people contribute and connect with the work. In the creative process of AI, human contribution and connection to the work do not always happen. Whether an AI-generated work is eligible for copyright protection under applicable EU law is decided based on distinctions in the following cases of creation: (1) works created by humans in collaboration with AI, and (2) a work created by AI but based on human selection to approve a final version before being released to the public, and (3) a work completely AI-generated and with little or no human intervention.

4.1. Works Created by Humans in Collaboration with AI

In this case, humans can use AI as a tool in the process of creating a work. Even if AI plays a vital role in creating a work, human input will subject the work to copyright rules, including originality and inventiveness.[32] As

31 Eleonora Rosati, *Originality in EU Copyright: Full Harmonization through Case Law* (Cheltenham, Northampton: Edward Elgar Publishing, 2013), 187.

32 Bøhler, "EU Copyright Protection," 7.

analysed above, "his computer is just a tool to translate inner creativity or ideas into an external embodiment."[33] Thus, AI generation is used as a tool in the human creative process and is acceptable for copyright. In this case, the work will be protected by copyright under EU copyright regulations.

4.2. Artwork Created by AI, Based on Human Choice

In this case, even though the AI generates the work, the human has an essential contribution in choosing which part/work among the generated works is valuable and worthy of publication. Examples of AI creating works by human choice can be found in the music industry.[34] So far, the algorithms need to be more accurate; therefore, the AI cannot judge how attractive each piece of music is. This often requires the AI to manipulate composition many times to create a successful composition. In this process, people must evaluate the pieces generated to determine which parts are valuable and worthy of distribution and which should not be kept. The essential human contribution lies simply in choice. The question is whether this mere choice gives humans copyright over AI-generated work. In other words, does the behaviour of human choice have any meaning in creating a copyright? "It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation." This quote demonstrates that the CJEU considers the act of selection and placement to be intellectual, reflecting the creativity required by the Copyright Term Directive 2006/116/EC. The human choice in deciding whether to keep the AI-generated work constitutes an intellectual act on the work. In this case, the person making the selection decision will have the intellectual property rights to the work.

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33 Burkhard Schafer et al., "A Fourth Law of Robotics? Copyright and the Law and Ethics of Machine Co-production," *Artificial Intelligence and Law* 23, no. 3 (2015): 223.

34 The Flow Machines research project, funded by the European Research Council (ERC) and coordinated by François Pachet (Sony CSL Paris - UMPC), accessed February 25, 2023, http://www.flow-machines.com/.

4.3. Works Created and Selected by AI

AI technology has grown so much that AI can write short news stories or produce music clips. An automated AI system can generate hundreds or even millions of works for a single request, and the system selects the works it deems appropriate. This removed the link between AI and humans in the creative process.[35] The role of the user of the AI program has been reduced to the point of being only the person who initiates the AI system, for example, by entering the word "compose" in a composer or word "processor." In the absence of any human intervention regarding the creativity of the output work, the question arises as to whether copyright is applicable under current EU regulations. It can be seen that according to the CJEU precedents, the concept of "author's own intellectual creation" does not lie in the work created but in the process of creating the work. Thus, the whole process must be considered as to whether a work is creative. The CJEU's assertion in the precedents may suggest that it is necessary to establish the existence of freedom in the production process to consider a piece original under EU copyright law. A product created entirely by AI that does not involve conscious human choices will not be eligible for protection under applicable EU law. The assessment of whether a work is protected will be based on the process leading up to the work rather than on the final work.

This conclusion is also consistent with the EU copyright law framework in general. The basis of EU copyright law will be based on the author's identity. For example, Article 1 of the Copyright Term Directive 2006/116/EC defines the term protection based on the author's death[36] (also Article 7.1 of the Berne Convention). These terms are based on the assumption that the "author" is a person likely to die, implying that an artificial entity cannot be considered an author of a work from the copyright perspective.[37]

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35 Schafer et al., "A Fourth Law of Robotics?," 225.

36 Article 7.1 of the Berne Convention provides that the term of protection granted by this Convention shall be for the author's lifetime and fifty years after the author's death. Article 1 of the directive provides that the author's rights of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall be for the author's life and seventy years after the author's death.

37 Ralph D. Clifford, "Intellectual Property in the Era of the Creative Computer Program: Will the True Creator Please Stand Up?," *Tulane Law Review*, no. 71 (1675): 1683.

5. Vietnamese Law on Copyright Protection for Works Created by AI

5.1. Overview of Vietnam's Copyright Legal System

In Vietnam, AI has begun to be developed and applied in many different fields and is seen as an essential driving force for the direction of socio-economic development. For example, research works, products and entities associated with AI appear increasingly. The government has identified AI as a disruptive technology in the next ten years. At the same time, it is determined that this will be a "spike" that needs to be researched to take advantage of the opportunities brought by the Fourth Industrial Revolution. The government has also developed a national strategy for Industry 4.0, prioritising AI development through multiple policy groups. In particular, human resources are prioritised, such as university-level AI training, supporting the AI application business sector, and prioritising investment in AI through funds and innovation centres.

However, similar to many countries, the legal system still needs a straightforward approach to AI in addition to AI development policies. In other words, no specific regulation defines AI's legal status when participating in social relations regulated by law.

Civil law in Vietnam stipulates that the subject must be an individual or an organisation (COL, 2015). However, it has yet to identify the subject as a machine or computer program, so it will be impossible to determine the legal status. The logic of AI is subject to the law.

The Law on Intellectual Property of Vietnam (latest revised in 2022) also does not have regulations on artificial intelligence. Article 13 of the Law on Intellectual Property provides for copyright holders, including:

> Vietnamese organizations and individuals; a foreign organization or individual whose work is published for the first time in Vietnam but has not been published in any other country or is simultaneously published in Vietnam within thirty days from the date on which the work is published that is published for the first time in another country; foreign organizations and individuals whose works are protected in Vietnam under the international copyright convention to which Vietnam is a contracting party[38].

[38] The 2005 Intellectual Property Law (amended and supplemented in 2009, 2019, and 2022).

Realising the importance of promoting artificial intelligence, on January 26, 2021, the Prime Minister issued Decision No. 127/QD-TTg promulgating the National Strategy for Research and Development of Artificial Intelligence Applications by 2030. Combined with the 2008 High Technology Law, this strategy has become a legal framework to help Vietnam promote AI development. However, current Vietnamese intellectual property laws still cannot resolve the issue of copyright for works created by AI (including Intellectual Property Law No. 50/2005/QH11 in effect from July 1, 2006; Law No. 36/2009/QH12 of the National Assembly amending and supplementing several articles of the Intellectual Property Law effective from January 1, 2010; Law No. 42/2019/QH14 of the National Assembly amending and supplementing several articles of the Law on Insurance Business and the Law on Intellectual Property, effective from November 1, 2019; Law No. 07/2022/QH15 of the National Assembly amending, supplementing several articles of the Intellectual Property Law, effective from January 1, 2023).

5.2. Definition of Author and Works

Article 12a of the 2005 Intellectual Property Law (amended and supplemented in 2009, 2019, and 2022) stipulates authors and co-authors as follows:

1. The author is the person who directly creates the work. In cases where two or more people now make a work with the intention that their contributions are combined into a complete whole, they are co-authors.
2. A person who supports, comments, or provides materials for others to create a work is not the author or co-author.
3. The co-authors must agree upon the exercise of moral and property rights for works with co-authors, except in cases where the work has separate parts that can be separated and used independently without making any changes. Prejudicial to the shares of other co-authors or other laws have different provisions.

This regulation shows that the author of a work must generally be a natural "person," a biological person. In addition, this regulation also excludes the possibility of considering both humans and AI as "co-authors" of the work. This comes from the fact that co-authors must have "intentional" contributions to combine into a complete whole of the work.

The "intention" requirement is intended to affirm a person's will. AI systems are essentially just the operation of machines, so they cannot have an "intention."

The 2005 Intellectual Property Law (amended and supplemented in 2009, 2019, and 2022) stipulates that copyright comprises personal and property rights. Among them, moral rights include the following rights:

1. Right to name the work. The author has the right to transfer the right to name the work to the organisation or individual receiving the transfer of property rights according to the provisions of the Intellectual Property Law;
2. The right to put your real name or pseudonym on the work; to give the author's real name or pseudonym when the work is published or used;
3. The right to publish the work or allow others to publish the work;
4. The right to protect the integrity of the work to prevent others from distorting it; not allowing others to modify or deface the work in any form that harms the author's good name and reputation.

The Intellectual Property Law does not define what the word "personal" means. However, Article 5 of the 2014 Law on Civil Status stipulates that one of the principles of civil status registration is to "respect and ensure personal rights" and "all civil status events of an individual must be fully registered." In case of not meeting the conditions for civil status registration according to the provisions of law, the head of the civil status registration agency shall refuse in writing and clearly state the reason. Clause 2, Article 9 of the Law on Civil Status also stipulates:

> When carrying out civil status registration procedures and issuing copies of civil status extracts from the civil status database, individuals present documents proving their identity to the civil status agency, Civil registration office. Suppose the application is sent through the postal system. In that case, it must be accompanied by a certified copy of identification documents.

These regulations show that the "personality" factor is an element describing a natural person. AI is a mechanical system, not a natural human being, so it cannot have the element of "personality."

Article 8 of the 2005 Intellectual Property Law (amended and supplemented in 2009, 2019, and 2022) stipulates the state's policy on intellectual property as follows:

1. Recognising and protecting intellectual property rights of organisations and individuals to ensure a balance between the interests of intellectual property rights holders and public goods; Not protecting intellectual property objects contrary to social ethics, public order, or harmful to national defence and security.
2. Encouraging and promoting creative activities and exploiting intellectual property to contribute to socio-economic development and improve the material and spiritual life of the people.
3. Financial support for transferring and exploiting intellectual property rights to serve public interests; encouraging domestic and foreign organisations and individuals to sponsor creative activities and protect intellectual property rights.
4. Prioritising investment in training and fostering a team of officials, civil servants, public employees, and related subjects working to protect intellectual property rights and research and apply science and technology to protect intellectual property rights.
5. Mobilising social resources to invest in improving the capacity of the intellectual property rights protection system, meeting the requirements of socio-economic development and international economic integration.

Regulations on the state's policy on intellectual property rights for works do not directly affirm that the author must be a natural "human." However, set goals such as "encouraging," "promoting creativity," "financial support," and "mobilising resources" are incentives provided to people. AI systems are machines not suitable to achieve these goals and receive incentives. Only natural people are compatible with spiritual and material reasons.

In addition, the regulations on transferring intellectual property rights in the Intellectual Property Law show that only a natural person can carry out transfer activities. These activities can only be carried out by entering into and implementing contracts. A mechanical system lacking

the freedom of will, unity between choice and will expression, cannot be a party to the transfer of copyright.

5.3. The Protection Conditions and Duration of Protection of Works

Clause 1, Article 6 of Intellectual Property Law (amended and supplemented in 2009, 2019, and 2022) stipulates the basis for arising and establishing intellectual property rights as follows: copyright rights derive from the date the work is created and expressed in a particular material form, regardless of content, quality, condition, medium, language, published or unpublished, registered or not registered. Thus, the Intellectual Property Law requirements show that a work must first be "created" for it to be protected.

However, the Intellectual Property Law and the guiding documents do not have specific instructions on what constitutes "creativity." Therefore, it will be tough to determine whether works created by AI are "creative" or not.

Meanwhile, Article 13 of Intellectual Property Law (amended and supplemented in 2009, 2019, and 2022) stipulates that an author is a person who directly creates part or all of a literary, artistic or scientific work. This regulation shows that if AI creates a work, any other entity (such as the owner of the AI system, programmer, or user...) cannot be the work's author because these subjects are not the ones who "directly" created part or all of the work.

Clause 7, Article 4 of the Vietnam Intellectual Property Law (amended and supplemented in 2009, 2019, and 2022) stipulates that a "work" is a "creative product in the fields of literature, art and science expressed in any means or form." Clause 3, Article 14 stipulates that protected works "must be directly created by the author using his or her own intellectual labour and not copied from the works of others." This regulation also excludes protection for works created by AI because this work is not "directly" made by humans.

Regarding the term of protection, Article 27 of Intellectual Property Law (amended and supplemented in 2009, 2019 and 2022) stipulates as follows:

1. The following moral rights are protected indefinitely, including (i) naming the work; (ii) putting your real name or pseudonym on the work; being given your real name or pseudonym when the work is

published or used; (ii) protecting the integrity of the work, not allowing others to edit, deface or distort the work in any form that is harmful to the author's good name and reputation.

2. The right to publish works or allow others to publish results and property rights are protected for a period as follows:
   (i) For cinematography, photography, or applied arts, anonymous works have a protection period of seventy-five years from when the work is first published. For works of cinematography, photography, or using skills that have not been published for twenty-five years from when the work was fixed, the term of protection is one hundred years from when the work was created;
   (ii) Works that do not fall into the categories specified above have a term of protection that is the entire life of the author and fifty years following the year of the author's death. In case a work has a co-author, the term of protection ends in the fiftieth year after the year the last co-author dies.

The provisions on the term of protection do not directly address the issue of whether a work created by AI is eligible for protection. However, the representation of security is based on "the author's lifetime" and a period from the author's death or the last author's death (in the case of co-authors), indicating that only the work created by humans qualifies for protection because only natural humans can die. An AI system does not have its own life, just as an AI system cannot die. This implicitly shows that this term of protection does not apply to works created by AI.

Thus, the current law stipulates that only organisations and individuals can be copyright holders; objects such as computers, robots, or AI cannot yet be granted copyright. Besides, up to now, the copyright registration agency has not received any copyright registration applications for works created by AI. Therefore, in Vietnam, there has not been any ruling by a competent People's Court related to resolving disputes over the protection of works created by AI.

It can be seen that Vietnam is not ready to protect work created by AI, regardless of the level of AI's contribution. To solve this problem, lawmakers need to reevaluate based on compatibility with Vietnam's social environment. Suppose the current legal framework for copyright protection

remains the same, specifically tailored to the author as a human being. In that case, AI-generated outputs will not be eligible for copyright protection.

6. Conclusions

Based on the EU copyright law system and CJEU precedents, copyright cannot be claimed in work created entirely by AI. As such, without a human being involved in the creative process, copyright will not protect the work.[39] Whether copyright can be claimed on AI-generated works depends on the extent of human contribution to the final product. Specifically, in the assessment of copyright under current regulations, there is a distinction between an AI user who is a real author and an AI user who creatively influences its output or selection.[40]

This conclusion is also consistent with the statement of the European Parliament that "existing legal regimes and doctrines can be readily applied to robotics, although some aspects appear to call for specific consideration."[41] The statement implies that the applicable copyright policy may, in most cases, be applied to AI-generated works, as subdivided according to the above cases.

Even so, this view is likely to change in the future. The Commission on Civil Law Rules on Robotics also emphasised that it is essential to encourage European innovation in robotics and AI:

> the European industry could benefit from an efficient, coherent and transparent approach to regulation at Union level, providing predictable and sufficiently clear conditions under which enterprises could develop applications and plan their business models on a European scale while ensuring that the Union and its Member States maintain control over the regulatory standards to be set, so as not to be forced to adopt and live with standards set by others, that

39 Bøhler, "EU copyright protection," 7.

40 James Grimmelmann, "There is No Such Thing as a Computer-Authored Work – And It is a Good Thing, Too," *Columbia Journal of Law & the Arts* 39, no. 403 (2015): 410.

41 European Parliament (2017), "European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics. Procedure reference: 2015/2103(INL)", Document reference: P8_TA-PROV(2017)0051, p. 9, accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017IP0051.

is to say the third countries which are also at the forefront of the development of robotics and AI.[42]

Based on this, in the future, there may be an adjustment in copyright law at the EU level to ensure adaptation to the changes brought about by AI.

Although AI has not been attractive for a long time, with the available potential, AI will inevitably develop very quickly in Vietnam. It will bring enormous technological, economic, and social impacts. However, at the same time, it also entails new problems and legal challenges that require the legal system to be perfected. However, it can be affirmed that according to Vietnam's current intellectual property laws, it is difficult to claim protection for a work created by AI, regardless of the level of AI's contribution.

WIPO believes that by excluding AI-generated works from eligibility for copyright protection, the copyright system will be a tool to encourage and promote the dignity of human creativity. Human creativity versus machine creativity. Still, according to WIPO, if copyright protection is applied to works created by AI, the copyright system will be seen as a tool that facilitates large quantities of creative works and places equal value on humans and machines. However, in recent years, many countries have been making efforts to research and discuss issues and legal questions related to the use of AI to take advantage of the advantages brought by AI to the development of the economy. Economy. Therefore, it is required that legislators study and clearly define the legal status and nature of AI towards building a legal framework regulating legal relationships related to AI.

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[42] European Parliament (2017), "European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics. Procedure reference: 2015/2103(INL)", Document reference: P8_TA-PROV(2017)0051, pp. 3–4, accessed February 25, 2023, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0024.

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Interconnecting Land Registers at the European Level: Technological Progress and Harmonization Aspects

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Abstract: Characterized by a substantial diversity and falling within the property law domain, land registration systems have been excluded from the European Union harmonization process. At the same time, however, cross-border access to land registry information is critical for the development of the internal market. Therefore, several ambitious strategies are being pursued at the European level to interconnect national land registers by fully exploiting the possibilities offered by the latest technological advances. This article investigates the effect of transnational cooperation initiatives aimed at interconnecting electronic land registers within the European e-Justice program for the enhancement of the integration of the real estate markets in Member States. In this respect, legal challenges connected with the standardization of land information are addressed from comparative and harmonization perspectives.

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1. Introduction

The formation of a functional legal, organizational, and technical framework for land registration constitutes one of the prerequisites for the development of national economies because of the vital role land registers play in ensuring the legal security of real estate transactions as well as in providing appropriate conditions for mortgage lending. The present stage of the evolution of land registration systems is distinguished by a considerable impact of innovative information and communication technologies, which are expected to ensure better efficiency.

Issues related to land registers and transnational conveyancing are also strongly reflected in the actions taken at the European level with a view to enhancing cross-border cooperation among land registration authorities and encouraging the growth of the real estate market Europe-wide. This refers particularly to the adoption of measures aimed at giving effect to the European Union internal market freedoms, especially the free movement of capital, as well as at further developing the area of freedom, security and justice. Nowadays, it is the progress in informatization processes that provides a special incentive to propose new strategies for creating a collaborative environment in the field of land registration and real estate transactions. Currently implemented integration initiatives are focused primarily on facilitating cross-border access to land information by interconnecting the Member States' electronic land registers, which forms part of the EU e-Justice Strategy. Parallel to carrying out the ICT-based cooperation projects is an ongoing legal scholarship debate on potential solutions to effectively stimulate the harmonization of land registers in Europe.

In this regard, it should be emphasized that land registration systems adopted in particular European countries, similarly to real estate transfer rules and respective legal terminology, show substantial divergences that are believed to hinder the achievement of the harmonization objectives. This derives from the fact that land registration, the purpose of which is to record the transfer of ownership and the creation of interests in land,[1] is inextricably connected with property law, and perceived as deeply rooted in national legal orders. Added to this are doubts concerning the legitimacy

[1] United Nations Economic Commission for Europe, *Land Administration Guidelines: With Special Reference to Countries in Transition* (New York–Geneva: United Nations, 1996), 11.

of the EU's interference in the Member States' property law systems, arising against the background of the provisions of the Treaties. For that reason, property law issues, in particular concerning immovables, have been constantly excluded from the EU's direct harmonization activity. At the same time, though, it is an attribute of the process of land registration itself that it is quite technical, which could be regarded as conducive to the European interconnection of land registers.

Given the aforementioned determinants, the question arises whether or not technological advancements in the field of land registration that are widely observed at the national level, together with the latest innovative proposals by the European Union and cooperating international organizations, appear to disruptively contribute to deepening the integration process and to intensifying transnational real estate transactions, thus allowing the harmonization difficulties faced so far to be overcome. This article aims to discuss the premises underlying the European implementation projects related to the interconnection of land registers, as well as to provide a critical appraisal of the outcomes achieved to date. The relevant considerations will be preceded by general remarks on the diversity of legal solutions in the field of land registration and the progress of the informatization processes, with particular focus on its significance for the accessibility of land registers' content. In this respect, reference will be made to both the EU Member States and non-EU countries.[2] Because of the limited scope of the contribution, issues pertinent to cadastral registration, relating to the physical status of land, shall be omitted.

2. Land Registers in Europe: An Outline

2.1. Differentiation of Types of Land Registers

The specificity of land registration systems existing in Europe reflects the historical influence of different legal traditions on the evolution of both substantive and organizational rules of the functioning of land registers. Particularly remarkable differences in this respect can be noticed between civil law and common law countries. However, this dissimilarity goes even further than the classic division into main European legal families.

[2] The comparative outline provided covers, i.a., the United Kingdom and its parts, irrespective of its withdrawal from the European Union in 2020.

As the issues regarding the categories of land registers in the comparative perspective have been comprehensively covered in the legal doctrine,[3] this article will provide only a general overview of selected divergences among them.

One of the primary differentiation criteria of land registers relates to the subject of registration, being either titles or deeds, and this is closely associated with the effectiveness attributed to the content of the register. The characteristics of the registration of titles system, also known as the presumption of accuracy system, lie within the fact that it is rights to land (interests) that are registered. The legality of information presented is examined by the registrar and the inscription is authorized provided it does not contradict a right already inscribed in the register without the prior authorization by the title-holder. Moreover, registration is carried out based on the immovable properties, which is referred to as real *folium*. Consequently, only one person can appear in the register as the owner at any given point in time. The above system prevails in Europe and is in force, e.g., in Poland, Austria, Croatia, Denmark, England and Wales, Estonia, Germany, Hungary, Lithuania, Slovenia, Spain, and Sweden.

In respect to the registration of deeds system, also called the opposability system, the subject of registration are documents pertaining to rights

[3] See, e.g.: Gerhard Larsson, *Land Registration and Cadastral System: Tools for Land Information Management* (Harlow–New York: Wiley, 1991); Jaap Zevenbergen, *Systems of Land Registration: Aspects and Effects* (Delft: Netherlands Geodetic Commission, 2002); Sergio Cámara Lapuente, "Registration of Interests as a Formality of Contracts: Comparative Remarks on Land Registers within the Frame of European Private Law," *European Review of Private Law* 13, no. 6 (2005): 797–839; Christoph U. Schmid, Christian Hertel, and Hartmut Wicke, *Real Property Law and Procedure in the European Union: General Report* (European University Institute, 2005): 27–46, accessed June 25, 2023, http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/GeneralReport.pdf; Agostina Lodde, "The European Systems of Real Estate Registration: An Overview," *Territorio Italia* 16, no. 1 (2016): 23–42; *Das Grundbuch im Europa des 21. Jahrhunderts*, ed. Arkadiusz Wudarski (Berlin: Duncker & Humblot, 2016); Luz M. Martínez Velencoso, "The Land Register in European Law: A Comparative and Economic Analysis," in *Transfer of Immovables in European Private Law*, eds. Luz M. Martínez Velencoso, Saki Bailey, and Andrea Pradi (Cambridge: Cambridge University Press, 2017), 3–19; Paweł Blajer, *Rejestry nieruchomości. Studium prawnoporównawcze* (Warsaw: Wydawnictwo C.H. Beck, 2018); Flora Vern, "Land Registration Systems & Discourses of Property," *European Review of Private Law* 29, no. 6 (2021): 835–52.

to land, and the register is ordered by persons (personal *folium*). It also should be noted that in practice land registers of this type are equipped with additional indices which assist in searching for ownership. The underlying deeds are not examined before being registered; instead, they only have to comply with formal requirements. It means that there is no identification of the certain and final owner, but a group of possible title-holders is defined. According to these premises, only persons who have already registered their rights are entitled to enforce their position before others. Registers of deeds function, e.g., in Belgium, Bulgaria, France, Italy, and the Netherlands.[4]

Land registers vary also depending on the legal effect of registration which may be of either a constitutive or a declaratory character. Constitutive registration is necessary and decisive for creating or transferring a right on real estate, and this is the case, e.g., in Germany. When it comes to declaratory registration, its aim is only to disclose the legal status of real estate and make the transfer of a right opposable to third parties – this rule applies, e.g., in France. Yet, there also are jurisdictions, including Poland and Italy, where registration of the transfer of ownership is declaratory, but at the same time, constitutive registration is required to create limited real rights on immovables.[5]

Another differentiating criterion, correlated with the previous one, refers to the protection of persons acting in trust for the content of the land register. Good faith in the register is protected in most countries with constitutive land registration (e.g. in Austria, England and Wales, Germany, Hungary) and in some legal orders stipulating a declaratory effect of land registration (e.g. in Poland, Denmark, Spain, and Sweden). Conversely, in other countries where registration is declaratory, such as Belgium and France, the protection of good faith is not guaranteed.[6]

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4 Zevenbergen, *Systems*, 48ff.; Cámara Lapuente, "Registration," 832–34; Schmid, Hertel, and Wicke, *Real Property*, 32; Elizabeth Cooke, *New Law of Land Registration* (Oxford–Portland, Oregon: Hart Publishing, 2003), 2ff.

5 Schmid, Hertel, and Wicke, *Real Property*, 34. See further: Blajer, "The Effect of Registration in the Land Register in the Framework of Real Estate Sale (Comparative Study)," *European Property Law Journal* 11, no. 1–2 (2022): 29–61.

6 Schmid, Hertel, and Wicke, *Real Property*, 34.

Furthermore, different solutions have been adopted in specific European countries in terms of the publicity of land registers. In most cases, free access to land registers is ensured and everyone can consult them. This applies, e.g., to Poland, Croatia, Denmark, Ireland, the Netherlands, and Sweden. By contrast, countries such as Belgium, Germany, and Spain impose some restrictions, and the content of land registers is accessible only upon demonstration of legitimate or legal interest, except for some public entities which are provided with broader access to the register. In this context, it is worth noting that, as a general rule, the way land registers can be consulted is influenced by adopting one of the aforementioned formats of registration, i.e. real *folium* or personal *folium*.[7]

Besides the differences among national land registers, examples of which were briefly described above, what additionally increases the diversity in this respect is that in some jurisdictions there is a dualism of land registration systems due to historical reasons or systemic reforms. Distinct co-existing types of land registers can be found in France, Italy, Ireland, Northern Ireland, Scotland, and Greece. Moreover, local systems function in German federal states, exercising competences in the field of land registration.[8]

2.2. Informatization Trends and Implications

When it comes to the widespread phenomenon of the application of new technologies in land registration, the levels of technological advancement differ from one country to another. Nevertheless, some common trends in this area can be identified. They can be analyzed, i.a., in the following terms: the progress in converting paper-based land registers into digital databases,

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7 Ibid., 44; Blajer, *Rejestry*, 257–75; Blajer, "The Principle of Formal Publicity of the Land Register in a Comparative Perspective," *European Property Law Journal* 11, no. 1–2 (2022): 5–28; Arkadiusz Wudarski, "Jawność ksiąg wieczystych. Analiza prawnoporównawcza w kontekście europejskim," in *Rozprawy z prawa prywatnego oraz notarialnego. Księga pamiątkowa dedykowana profesorowi Maksymilianowi Pazdanowi*, eds. Anna Dańko-Roesler, Aleksander Oleszko, and Radosław Pastuszko (Warsaw: Stowarzyszenie Notariuszy RP, 2014), 444–68.

8 Blajer, "'Deeds recordation' a 'title registration'. Rozwiązania modelowe w zakresie rejestrów nieruchomości w systemie 'common law'," *Zeszyty Prawnicze* 13, no. 4 (2013): 82ff.; Schmid, Hertel, and Wicke, *Real Property*, 28, 40–1.

new possibilities for access to electronic land registers, and the informatization of land registration proceedings. More innovative solutions include the development of electronic conveyancing systems and the use of blockchain technology for land registration.[9]

Following the process of migration, i.e. the transfer of the content of traditional land registers to electronic ones, in most European countries land registers operating in the paper form have been replaced by databases kept in the information and communication technology system, which was done, e.g., in Poland, Austria, Estonia, France, Hungary, Italy, Lithuania, Portugal, Slovenia, Sweden, and the United Kingdom. Because of ongoing reforms, some other national land registers are kept in both paper and electronic forms. This is the case, e.g., in Bulgaria, Germany, and Luxembourg.[10]

The transformation of land registers into electronic databases has brought about new methods of accessing the information contained in them. As mentioned above, public access to land registers is a dominant rule in national legislations across Europe. Still, although being prevalently kept in the digital format, land registers are not commonly available on the Internet, which results from general restrictions provided for in particular legal orders, a subject-based differentiation of the online access scope, or some requirements of a technical nature. Free online access to the full content of land registers is ensured, i.a., in Poland. The only requirement to be met to consult a land register through a special browser provided by the Ministry of Justice is knowing the number of the land register kept for a particular immovable property. However, the users who access land registers in this manner cannot search for land registers. This is because only public entities (such as courts, public prosecutor's offices, fiscal control authorities, court executive officers, and notaries) are entitled to request the consent of the Minister of Justice for multiple and unlimited

9 See further: Maria Kaczorowska, "Postępy informatyzacji rejestrów nieruchomości w krajach Unii Europejskiej. Analiza prawnoporównawcza," in *Informatyzacja ksiąg wieczystych i postępowania wieczystoksięgowego*, ed. Jacek Gołaczyński (Warsaw: Wydawnictwo C.H. Beck, 2020), 149ff.; Kaczorowska, "Informatisation of Land Registers in Poland and Other Member States of the European Union: A Comparative Overview," *Law and Forensic Science* 17, no. 1 (2019): 30ff.

10 Kaczorowska, "Informatisation," 35–6; Blajer, *Rejestry*, 387ff.

searching for land registers in the database in order to perform their statutory tasks. In such cases, both objective and subjective searching criteria (concerning the real estate and the title-holders, respectively) can be used. Other examples of electronic land registers that are open to the public, in some cases upon payment, can be found in Croatia, Denmark, Estonia, Ireland, Latvia, the Netherlands, Portugal, and Slovakia. Different rules have been adopted in countries such as the Czech Republic, England and Wales, Finland, Hungary, or Italy, where it is envisaged that registered users, particularly professionals, and other authorized (public) entities can consult the full content of land registers, and they are provided with online search services, based either on objective or subjective searching criteria. Citizens who are not registered, meanwhile, can only access some basic information about a particular real estate. Furthermore, in respect to common online access to land registers, searching criteria may be restricted to the objective ones, which is the case, e.g., in Denmark, Latvia, Portugal, Slovenia, and Sweden.

The process of informatization has not affected the rules applying in some other countries in which land registers are available provided a legitimate or legal interest is demonstrated. As regards Germany, the possibility to view the land register on the Internet is offered mainly to the title-holders and entities authorized by them, such as banks, as well as to enforcement authorities. Unrestricted online access is provided to courts, government offices, notaries, and land surveyors who also are entitled to unlimited searching. Limitations apply in Belgium and Spain as well. It is not possible to access and consult land registers directly on the Internet because land information is made available by the registrars upon request that may be submitted electronically. Similar solutions have been adopted in France (except for the Alsace-Moselle region where land registers are accessible online). As far as other access methods are concerned, in most European countries copies and certificates from land registers can be obtained in both traditional and electronic forms.[11]

Noteworthy achievements in modernizing land registration proceedings should also be mentioned. This refers particularly to the electronic submission of official application forms (stylesheets) or documents, including

[11] Kaczorowska, "Informatisation," 37–8; Blajer, "The Principle of Formal Publicity," 18ff.

notarial deeds, to the land registry, with the use of electronic signatures and mechanisms of automated data processing. Innovative tools and services have been introduced primarily for professionals engaged in real estate transactions and registration proceedings – notaries, public officers, and conveyancers, whereas applicants, acting individually, can take advantage of traditional ways of submitting requests for registration. Methods of digital communication to start land registration proceedings are used, e.g., in Poland, Austria, Denmark, England and Wales, Estonia, France, Hungary, Ireland, Italy, Lithuania, the Netherlands, and Spain.[12]

In addition to the above reforms in the area of land registration, several European jurisdictions have developed or are developing systems of electronic conveyancing through which it is possible not only to initiate the registration proceedings but also to dispose of the ownership of land electronically. An example of a fully operational e-conveyancing system is the Finnish one. The process of implementing digital conveyancing services is also advanced, i.a., in England and Wales, Denmark, Ireland, and Scotland.[13]

Currently, an ever-increasing role in land registration is being played by blockchain, which is a type of Distributed Ledger Technology (DLT). With the features of a decentralized, globally shared database that utilizes cryptographic techniques, blockchain is expected to ensure security, transparency, and efficiency in recording land transactions. For this reason, blockchain-based land registers are now being tested or implemented in several countries, including, e.g., the Republic of Georgia, Sweden, Estonia, the Netherlands, and the United Kingdom.[14]

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12 Kaczorowska, "Informatisation," 38–9.

13 See, e.g.: Barbara Bogusz, "Bringing Land Registration into the Twenty-First Century: The Land Registration Act 2002," *The Modern Law Review* 65, no. 4 (2002): 556–67; Cooke, "E-Conveyancing in England: Enthusiasms and Reluctance," in *Torrens in the Twenty-First Century*, ed. David Grinlinton (Wellington: LexisNexis, 2003), 277–93; Judith Bray, *Unlocking Land Law* (Abingdon, Oxon: Routledge, 2015), 115ff.; Gabriel Brennan, *The Impact of eConveyancing on Title Registration: A Risk Assessment* (Cham: Springer, 2015); Matti Illmari Niemi, "Electronic Conveyancing of Real Property in Europe: Two Models. The English and the Finnish One," in *Transfer*, eds. Martínez Velencoso, Bailey, and Pradi (Cambridge: Cambridge University Press, 2017), 20–53.

14 See, e.g.: Nicolás Nogueroles Peiró and Eduardo J. Martinez García, "Blockchain and Land Registration Systems," *European Property Law Journal* 6, no. 3 (2017): 296–320; Paweł

When assessing the impact of the application of ICT on the way land registers function across Europe, it can be stated that, in general, informatization processes have helped to facilitate access to land information and to enhance the possibilities to search land registry databases. What should be emphasized in this respect is that both objective and subjective searching criteria can be used, regardless of the format of registration adopted in a particular system, the result being that the traditional distinction between the real *folium* and the personal *folium* seems to become less evident.[15] At the same time, however, greater publicity of land registers entails a risk of processing the land registry data in a manner contrary to the purpose for which they were collected, which may imply a violation of the right to privacy and personal data protection.[16] This is manifested, e.g., by the ongoing discussion in the Polish legal scholarship, regarding possible limitations of online access to the content of land registers.[17] The above problems have

Opitek, "Zastosowanie technologii blockchain na rynku nieruchomości," *Nieruchomości@* 1, no. 1 (2019): 97–110; Kaczorowska, "Blockchain-Based Land Registration: Possibilities and Challenges," *Masaryk University Journal of Law and Technology* 13, no. 2 (2019): 339–60; *Disruptive Technology, Legal Innovation, and the Future of Real Estate*, eds. Amnon Lehavi and Ronit Levine-Schnur (Cham: Springer, 2020); John Quinn and Barry Connolly, "Distributed Ledger Technology and Property Registers: Displacement or Status Quo," *Law, Innovation and Technology* 13, no. 2 (2021): 337–97; Cristina Argelich Comelles, "Smart Property and Smart Contracts under Spanish Law in the European Context," *European Review of Private Law* 30, no. 2 (2022): 215–34; Vincent Ooi, Soh Kian Peng and Jerrold Soh, "Blockchain Land Transfers: Technology, Promises, and Perils," *Computer Law & Security Review* 45 (2022): 1–13.

15 Martínez Velencoso, "The Land Register," 17.

16 See further: Anna Berlee, *Access to Personal Data in Public Land Registers: Balancing Publicity of Property Rights with the Rights to Privacy and Data Protection* (The Hague: Eleven International Publishing, 2018).

17 See, e.g.: Agnieszka Gryszczyńska, "Jawność formalna ksiąg wieczystych w Polsce," in *Rejestry publiczne. Jawność i interoperacyjność*, ed. Agnieszka Gryszczyńska (Warsaw: Wydawnictwo C.H. Beck, 2016), 261ff.; Jacek Gołaczyński, "Wnioski *de lege ferenda* dotyczące jawności formalnej ksiąg wieczystych," in *Informatyzacja*, ed. Gołaczyński (Warsaw: Wydawnictwo C.H. Beck, 2020), 395–405; Kaczorowska, "Realizacja zasady jawności ksiąg wieczystych w prawie polskim w dobie informatyzacji. Zarys problematyki," in *Informatyzacja*, ed. Gołaczyński (Warsaw: Wydawnictwo C.H. Beck, 2020), 88ff.; Kaczorowska, "Jawność formalna elektronicznych ksiąg wieczystych a ochrona danych osobowych i prywatności. Wybrane zagadnienia," *Przegląd Ustawodawstwa Gospodarczego* 7 (2022): 31–42 and the literature cited there.

become of particular importance since the General Data Protection Regulation entered into application in 2018.[18] The digital transformation in the area of land registration leads also to streamlining the land registration procedures, thus improving legal certainty and ensuring up-to-date land information. This, in turn, provides a basis for further modernization of land registration systems by way of introducing e-conveyancing systems and implementing blockchain-based automation mechanisms.[19]

3. The European Union's Regulatory Competences with Respect to Land Registers in the Context of the Harmonization of Property Law

As mentioned above, land registration issues, being to a large extent governed by property law rules, have not been directly subject to the European Union law-making process so far. Among the fields of private law, property law remains one of the least susceptible to harmonization (Europeanization). This process is referred to in a broad sense, taking its two-fold nature into account. The first form of harmonization, by which some common standards are introduced throughout the EU, is identified as "positive".

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18 Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L119, 4 May, 2016). See further: Berlee, *Access*, 205ff.

19 See further, e.g.: *Land Registration and Title Security in the Digital Age: New Horizons for Torrens*, eds. David Grinlinton and Rod Thomas (Abingdon, Oxon: Informa Law from Routledge, 2020); Kaczorowska, "Innovations in Land Registration and Their Impact on Cross-Border Conveyancing in Europe," in *Property Law Perspectives VII*, eds. Jill Robbie and Bram Akkermans (The Hague: Eleven International Publishing, 2021), 103, 117–18. For more on the effects of informatization of the Polish land registration system, and on recommendations for its optimization, see, e.g.: Gołaczyński and Kaczorowska, "Ewolucja systemu ksiąg wieczystych pod wpływem informatyzacji. Wybrane problemy prawne i praktyczne," *Rejent* 6 (2022): 9–37; Kaczorowska, *Istniejące i przyszłe rozwiązania IT w postępowaniu wieczystoksięgowym przy zachowaniu podstawowych zasad postępowania i ustroju ksiąg wieczystych – analiza prawnoporównawcza* (Instytut Wymiaru Sprawiedliwości: Warsaw, 2022); Marek Leśniak, "Koncepcja dalszej informatyzacji elektronicznego postępowania wieczystoksięgowego (ze szczególnym uwzględnieniem udziału notariuszy w tym postępowaniu)," in *Informatyzacja*, ed. Gołaczyński (Warsaw: Wydawnictwo C.H. Beck, 2020), 407–26; Blajer, *Rejestry*, 875ff.; Piotr Siciński, "Polskie koncepcje modernizacji ksiąg wieczystych a europejska koncepcja integracji rejestrów," part 1, *Nieruchomości* 5 (2022): 4–8; part 2, *Nieruchomości* 7 (2022): 22–8.

It encompasses approximation by way of directives (which are binding as to the results to be achieved, and are transposed into the national legal framework), and unification, whose instruments are regulations (which are binding in their integrity and are applied in all Member States). Moreover, the EU's activity consists in the elaboration of non-binding model rules (so-called soft law). The second aspect of harmonization, referred to as "negative", relates to the removal of national rules contrary to the four Treaty freedoms by the Court of Justice of the European Union's (CJEU) case law, which has, therefore, a deregulatory character.[20]

The reason for the exclusion of property law from the Europeanization process is that it is characterized by a significant diversity of national regulations in question, which are based on specific theoretical concepts that have evolved through history, and that it is traditionally deemed to be closely connected with individual states, particularly as regards rights on immovables.[21] The autonomy of domestic legislators in the sphere of property law is enhanced by the *lex rei sitae* rule, which is almost universally accepted in private international law systems as an expression of territorial sovereignty.[22] In line with this rule, in cases of an international scope, matters relating to ownership and other property rights shall be governed by the law of the state in which the property is located. This is especially crucial when dealing with immovable property, owing to its link with the territory of a particular country. The *lex rei sitae* rule is also used to determine the law that applies to the registration of property rights regarding immovables (*lex registrationis*) as well as their effects against third parties.[23] The relevance of

20 Kathleen Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (Oxford: Oxford University Press, 2014), 25ff., 62ff.

21 Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Westport, Connecticut: Greenwood Press, 2000), 7ff.; Michele Graziadei, "The Structure of Property Ownership and the Common Law/Civil Law Divide," in *Comparative Property Law: Global Perspectives*, eds. Michele Graziadei and Lionel Smith (Cheltenham–Northampton: Edward Elgar Publishing, 2017), 71ff.

22 See further: Bram Akkermans, "*Lex Rei Sitae* and the EU Internal Market: Towards Mutual Recognition of Property Relations," *European Property Law Journal* 7, no. 3 (2018): 246–66.

23 Dieter Martiny, "*Lex Rei Sitae* as a Connecting Factor in EU Private International Law," *Praxis des Internationalen Privat- und Verfahrensrechts* 32, no. 2 (2012): 119–33; Sjef van Erp, "*Lex Rei Sitae*: The Territorial Side of Classical Property Law," in *Regulatory Property Rights: The Transforming Notion of Property in Transnational Business Regulation*, ed. Christine

the *lex rei sitae* and the *lex registrationis* rules is additionally highlighted by the fact that issues regarding ownership and other property rights as well as land registers are excluded from the substantive scope of application of the EU legal acts in the field of private international law and international civil procedure.[24]

What also prevents the European Union legislator from directly interfering in national property laws is the uncertainty as to whether property law issues fall within the scope of the EU's competences. Controversies arise against the background of Article 345 of the Treaty on the Functioning of the European Union (TFEU),[25] which stipulates that the Treaties shall in no way prejudice the rules that govern the system of property ownership in individual Member States. Its meaning as well as the scope of its application have been subject to extensive debate in the legal scholarship and still remain unclear. According to a literal interpretation, exclusive competence to regulate ownership in private law terms shall be vested in the Member States. As far as a systemic interpretation is concerned, in turn, one can conclude that Article 345 TFEU, found in the part of the Treaty which contains general and final provisions, has merely a declarative meaning, and therefore it determines the scope of neither the EU's competences, nor those of the Member States. Finally, when interpreted historically, the provision in question refers to the neutrality of the Treaty only with respect to the ownership of undertakings. This is because Article 345 TFEU (formerly Article 295 of the Treaty establishing the European Community[26] and

Godt (Leiden–Boston: Brill Nijhoff, 2016), 59–81; Gołaczyński, *Prawo prywatne międzynarodowe* (Warsaw: Wydawnictwo C.H. Beck, 2017), 295ff.; Piotr Rodziewicz, "The Law Applicable to Property Rights and Possession," in *Private International Law in Poland*, ed. Gołaczyński (Warsaw: Wydawnictwo C.H. Beck, 2019), 181–92.

24 See, e.g.: Art. 1 para. 1 letters k and l of the Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L201, 27 July, 2012) (hereinafter: Regulation 650/2012); Art. 24 points 1 and 4 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L351, 20 December, 2012).

25 Consolidated Version (OJ C202, 7 June, 2016).

26 Consolidated Version (OJ C321E, 29 December, 2006).

before that Article 222 of the Treaty establishing the European Economic Community)[27] was worded on the basis of the so-called Schuman's Declaration, i.e. a speech delivered by the French foreign minister Robert Schuman on 9 May 1950 in which he proposed creating the European Coal and Steel Community to coordinate the production of coal and steel. According to the terms used in the Declaration, "the institution of the High Authority will in no way prejudge the methods of ownership of enterprises."[28] Such a restrictive interpretation has been also adopted in the CJEU's judicature, as reflected in the judgment of the Grand Chamber of 2013 in joined cases Staat der Nederlanden v. Essent NV and Others.[29] According to the view taken by the CJEU, Article 345 TFEU is an expression of the principle of the neutrality of the Treaties to the rules governing the system of property ownership applicable in Member States. In that regard, the Treaties preclude, as a general rule, neither the nationalization of undertakings nor their privatization. However, Article 345 TFEU does not mean that rules governing the systems of property ownership applicable in the Member States are not subject to the fundamental rules of the TFEU, which include the prohibition of discrimination, freedom of establishment, and the free movement of capital. Therefore, as follows from the abovementioned position of the CJEU, Article 345 TFEU does not exclude any activity of the EU institutions in the field of property law, which nevertheless does not provide grounds to assume that the EU has a general legislative power in this regard (the same applies to private law as a whole).[30] Without elaborat-

27 Accessed June 29, 2023, https://eur-lex.europa.eu/eli/treaty/teec/sign.

28 Akkermans and Eveline Ramaekers, "Article 345 TFEU (ex. 295 EC), Its Meanings and Interpretations," *European Law Journal* 16, no. 3 (2010): 292–314; Maciej Mataczyński, "What Did the European Community Founders Actually Mean by Saying that the Treaties Shall in No Way Prejudice the Rules in Member States Governing the System of Property Ownership?: Analysis of Article 345 TFEU," *Adam Mickiewicz University Law Review* 4 (2014): 39ff. See also: van Erp, "European Property Law: Competence, Integration, and Effectiveness," in *Measuring the Effectiveness of Real Estate Regulation: Interdisciplinary Perspectives*, ed. Levine-Schnur (Cham: Springer Nature, 2020), 205–18.

29 CJEU Judgment of 22 October 2013, Staat der Nederlanden v. Essent NV and Others, Joined cases C-105–107/12, ECLI:EU:C:2013:677.

30 See: van Erp, "A Comparative Analysis of Mortgage Law: Searching for Principles," in *Land Law in Comparative Perspective*, eds. María Elena Sánchez Jordán and Antonio Gambaro (The Hague–New York–London: Kluwer Law International, 2002), 84; Cámara Lapuente,

ing on this issue, reference should be made to the fundamental principle of conferral, which is laid down in Article 5 of the Treaty on European Union.[31] According to this principle, the European Union acts only within the limits of the competences that EU countries have conferred upon it in the Treaties. Furthermore, the principles of subsidiarity and proportionality apply here, given that both the internal market and the area of freedom, security and justice, with which cross-border land transactions and land registration are closely connected, fall within the scope of policies subject to shared competences between the EU and the Member States (Article 4 paragraph 2 TFEU).[32]

For the above reasons, matters pertinent to property law are covered only to a minor extent by the European Union legal acts and case law, with legal relations regarding immovables being in principle omitted.[33] Certain aspects of property law issues, which indirectly affect the functioning of land registers, have been regulated in legislation dealing with other areas of law.[34] In general, the CJEU's judicature has a similarly inconsiderable impact on the national property law systems, yet account should be taken

"Registration", 801–4. In this context, see also: CJEU Judgment of 5 October 2000, Federal Republic of Germany v. European Parliament and Council of the European Union, Case C-376/98, ECLI:EU:C:2000:544.

31 Consolidated Version (OJ C202, 7 June, 2016).

32 See further: Rafał Mańko, *EU Competence in Private Law: The Treaty Framework for a European Private Law and Challenges for Coherence* (Brussels: European Parliamentary Research Service, 2015); Akkermans et al., *Who Does What?: On the Allocation of Competences in European Private Law* (Cambridge–Antwerp: Intersentia, 2015).

33 Peter Sparkes, "European Contract Law: How to Exclude Land?," in *The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?*, eds. James Devenney and Mel Kenny (Cambridge: Cambridge University Press, 2013), 78–99. See also: Cámara Lapuente, "Registration," 800; Schmid, "European Influences on Real Property Law" (EULIS Seminar on Conveyancing Practices, 2003), accessed June 29, 2023, https://www.oicrf.org/-/european-influences-on-real-property-law; van Erp and Katja Zimmermann, "The Impact of Recent EU Conflicts of Law Regulations on Land Registration," in *Transformative Property Law: Festschrift in Honour of AJ van der Walt*, eds. Gustav Muller et al. (Cape Town: Juta, 2018), 318-40.

34 See, e.g.: Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements (O.J.E.C. L168, 27 June, 2002); Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions (recast) (OJ L48, 23 February, 2011).

of examples of cases involving property rights on immovables that have been decided on by the Court.[35] Significantly, property law matters concerning immovable property, and, consequently, land registers, are not addressed in the academic proposals for common European rules and principles in the area of private law, i.e. the European Civil Code[36] and the Draft Common Frame of Reference.[37] The plans to introduce the Eurohypothec, a pan-European security right on immovables, have not been implemented, either.[38] Although some recommendations concerning land registers were formulated in the "Basic Guidelines for a Eurohypothec" published in 2005,[39] they were drawn up in general terms and without regard to the material differences among the land registration systems existing in individual EU Member States.[40]

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35 See, e.g.: CJEU Judgment of 11 October 2007, Möllendorf and Möllendorf-Niehuus, Case C-117/06, ECLI:EU:C:2007:596; CJEU Judgment of 12 October 2017, Kubicka, Case C-218/16, ECLI:EU:C:2017:755.

36 See, e.g.: *Towards a European Civil Code*, eds. Arthur S. Hartkamp et al. (Nijmegen: Kluwer Law International, 2011).

37 *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Interim Outline Edition*, eds. Christian von Bar et al. (Munich: Sellier, 2008); *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Full Edition*, eds. von Bar and Eric Clive (Munich: Sellier, 2009).

38 Works on a proposal for a common European mortgage have been carried out since the 1960s by several groups of scholars and practitioners with the support of the European Community and then the EU. See, e.g.: Otmar Stöcker, "The Eurohypothec," in *The Future of European Property Law*, eds. van Erp, Arthur Salomons, and Akkermans (Munich: Sellier European Law Publishers, 2012), 65ff.; Sergio Nasarre-Aznar, "The Integration of the Mortgage Markets in Europe," part 1, *Silesian Journal of Legal Studies* 3 (2011): 39ff.; Kamil Zaradkiewicz, "Przyszłość koncepcji „eurohipoteki". Część I: Rozwiązania w wybranych państwach europejskich," *Nieruchomości@* 1, no. 1 (2023): 9ff.; Kaczorowska, *Koncepcja eurohipoteki na tle praw zastawniczych na nieruchomościach w Europie* (Wrocław: Wydawnictwo i Drukarnia Świętego Krzyża, 2016), 77ff.; Kaczorowska, "Accessoriness of Mortgage and the Development of a European Mortgage Market: Considerations from the Perspective of Polish Law in View of the Proposal of a Non-Accessory Eurohypothec," *Transformacje Prawa Prywatnego* 1 (2017): 75ff.

39 "Working Paper 'Basic Guidelines for a Eurohypothec'," in *Basic Guidelines for a Eurohypothec: Outcome of the Eurohypothec Workshop. November 2004/April 2005*, ed. Agnieszka Drewicz-Tułodziecka, *Mortgage Bulletin* 21 (2005): 11–22.

40 Blajer, *Rejestry*, 826.

4. European Cooperation Activities in the Field of Land Registration

4.1. Interconnection of Land Registers as Part of the European e-Justice Strategy

Arguments for enhancing cross-border access to land registers and thus stimulating the development of the internal market have been advanced by the European Commission for years. In 2005, the Green Paper on Mortgage Credit in the EU[41] was published. According to that document, an understanding of the contents and operation of land registers, as well as easy access to them, are crucial for cross-border mortgage credit activity of any kind. In recognition of that fact, the Commission provided funding for the pilot phase of the "European Land Information Service" (EULIS) project, whose aim was to enhance cooperation between owners and controllers of registers and to facilitate cross-border access to them.[42] The above document was followed by the White Paper on the Integration of EU Mortgage Credit Markets of 2007.[43] It specified the directions for reforms of land registration systems to be recommended by the Commission to the Member States, such as ensuring that land registers are available online as well as introducing more transparency and reliability into the land registers, in particular with regard to hidden charges. The Member States were also invited to adhere to the EULIS project.[44]

Further improvement of accessibility of land registers is also covered by the EU e-Justice Strategy which aims to encourage the use and development of ICT at the service of the Member States' judicial systems, especially in cross-border situations, to enable better access to justice and judicial information to citizens, businesses and legal practitioners, and to facilitate cooperation between judicial authorities of the Member States. Emphasis on promoting the interconnection of national registers containing information relevant to the area of justice, including land registers, was placed in the draft strategy on European e-Justice of 2013,[45] which was given specific expression in the Multiannual European e-Justice Action Plan 2014–2018, adopted by the European Council in 2014.[46] In line with its provisions,

41 COM(2005) 327.
42 Ibid., 16.
43 COM(2007) 807.
44 Ibid., 10.
45 2013/C 376/06.
46 2014/C 182/02.

the European e-Justice Portal, hosted and operated by the Commission in line with the Council guidelines, shall be key to the delivery of e-justice at the European level. The portal should also provide a single access point via interconnections to the information in national registers with relevance in the area of justice managed by national public or professional bodies facilitating the administration of and access to justice, provided that the necessary technical and legal preconditions for such interconnections exist in the Member States.[47]

One of the projects considered for implementation which was given priority, as set out in the Annex, concerned carrying out of a feasibility study on the interconnection of land registers by the Commission. The outcome was a report presenting the results of a business and technical study as preliminary work towards building a land register interconnection in the European e-Justice Portal.[48] On that basis, in 2015, at the Commission's initiative, the "Land Registers Interconnection" (LRI) project was started. The project is supposed to address the current issues of discrepancy, complexity, and multitude of land registration systems among Member States by providing a single access point within the European e-Justice Portal to the land registers of participating EU countries. In this way, citizens and professionals will be able to use a single, adaptive, multi-lingual interface to query and retrieve relevant information, in compliance with the national legal and technical capabilities.[49] The implementation of the LRI project

47 Ibid., 4.

48 Rudolf De Schipper et al., *Land Registers Interconnection Feasibility and Implementation Analysis* (Luxembourg: Publications Office of the European Union, 2014), accessed June 29, 2023, https://op.europa.eu/o/opportal-service/download-handler?identifier=831afdff-311c-4177-8d53-1d8d634b1d10&format=pdf&language=en&productionSystem=cellar&part=.

49 Lodde, "The Interconnection of the European Registers of Real Property: The Comparison of the Italian and Spanish Cases," *Territorio Italia* 17, no. 1 (2017): 77–8; Jan Moerkerke, "Efforts, on a European Level, in Order to Facilitate Cross-Border Transfers of Real Estate," *8th ELRA Annual Publication* (2018): 14–5, accessed June 29, 2023, https://www.elra.eu/wp-content/uploads/2019/01/Speech-GranadaJan-Moerkerke.pdf; Rik Wouters, "Online Portals Support European Interconnection of Land Registers" (World Bank Conference on Land and Poverty, 2018), 3ff., accessed June 29, 2023, https://www.oicrf.org/documents/40950/0/593_07-11-Wouters-258_paper.pdf/9455cffc-4350-4bc0-68ea-fe34bf850fa9?t=1583501179874; Gabriel Sima, "Land Registers Interconnection," accessed

is based on the previously achieved results of the EULIS project as well as the activity of the European Land Registry Association (ELRA) within the "Interoperability Model for Land Registers" (IMOLA) project, which will be discussed in more detail in the next section.

Between 2018 and 2019, the EU-funded "LRI Member State Connection" project was carried out with the participation of Austria and Estonia. Its purpose was to implement the national web services required to establish the connection between the Austrian and Estonian land registers and the LRI platform at the European e-Justice Portal. The project involved the adaptation of the national authentication portal for court professionals in Austria and Estonia so that the LRI platform at the e-Justice Portal could authenticate those users and check their professional capacity with the help of their national authentication portal, based on mutual recognition of the properly authenticated and authorized legal professionals.[50] Moreover, a demo site for the prospective central LRI service has been presented as a result of the project.[51]

Under the subsequent 2019–2023 European e-Justice Action Plan,[52] it is foreseen that further measures to be undertaken within the LRI project should encompass connecting the national land registers to the LRI application on the e-Justice Portal including authentication and authorization of court professionals who may use privileged functions, and implementing an e-Payment solution for the payment of fees linked with LRI.[53] A follow-up "LRI MS Connection 2" project ran in the years 2020–2021, with an expanded group of countries being involved. Its objectives included the continuation of the analysis regarding the integration of additional services to the LRI platform of the European Commission, such as integrating a payment solution, a future authentication solution, or any other

June 30, 2023, https://www.elra.eu/wp-content/uploads/2020/05/LRI-state-of-play-and-holistic-vision-by-Gabriel-Sima.pdf.

50 "Interconnecting Land Registers," EU Project, accessed June 30, 2023, https://lri-ms.eu/node/19.

51 "Land Registers Interconnection (LRI)," European Commission, accessed June 30, 2023, https://dg-justice-portal-demo.eurodyn.com/ejusticeportal/content_land_registers_interconnection_lri-36276-en.do.

52 2019/C 96/05.

53 Ibid., 11.

necessary adjustments for making the LRI service available to the public. The project resulted in Latvia connecting its land register to the LRI service platform. Moreover, Hungary, Portugal, and Spain conducted a thorough analysis to gain a full understanding of the country-specific conditions to be met before launching the development of the national LRI connection.[54] From the conclusions of the "LRI MS Connection 2" closing conference "Land Register Interconnection – United in Diversity", held on 6 and 7 October 2021 in Madrid, it appears that since the interconnection of registers in the domain of justice consistently remains a high priority for the European Commission, the project partners will be seeking opportunities to continue the work conducted so far.[55]

4.2. Underlying and Complementary Projects

4.2.1. EULIS

The output of the abovementioned EULIS project has laid the foundations for further development initiatives in the field of extending access to land information throughout Europe and underpinning cross-border land transactions. The project was carried out from 2002 to 2004 within the European Commission's eContent Programme by a consortium of land registration authorities from England and Wales, Ireland, Lithuania, the Netherlands, Sweden, Austria, Finland, and Scotland. It resulted in an initial proof of concept and a business case for developing an operational service. The EULIS portal was officially launched in 2006, enabling professional users to retrieve information contained in the national land registers of the countries involved in the network: England and Wales, Ireland, Lithuania, the Netherlands, Sweden, and Norway as one of new EULIS members.

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54 "Connecting Land Registers to e-Justice Portal," EU Project, accessed June 30, 2023, https://lri-ms.eu/node/41; Registradores de España, "The Mid-Term Review of the Project," accessed June 30, 2023, https://lri-ms.eu/node/49.

55 Katri Tammsaar, "Conference Presentations Published," accessed June 30, 2023, https://lri-ms.eu/node/54. As set out in a European Commission's Communication of 2020, the land registers interconnection is being piloted by a small number of Member States, and therefore to exploit its full potential it should extend EU-wide, with full participation of Member States being expected by 2024. See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Digitalisation of Justice in the European Union: A Toolbox of Opportunities" (COM/2020/710 final), 13–15.

Additionally, the service offered reference information regarding particular systems of land transactions and land law, as well as a multilingual glossary providing a translation of expressions from one national language to another. The glossary also consisted of definitions in English of identified common concepts in land administration and registration.[56] In the period 2010–2012, the "Land Information for Europe" (LINE) project, funded by the EC-Directorate General Justice, was implemented with the purpose of facilitating compliance with the requirements of the European e-Justice programme in the area of land registration. The project's main deliverable was the next generation EULIS 2.0 platform through which land registry organizations could provide cross-border services.[57] As of 2011, EULIS was owned and governed by a European Economic Interest Group, with 22 participating countries of different status. Among them, however, only a few (i.e. Austria, Ireland, Lithuania, the Netherlands, Spain, and Sweden) cooperated in full partnership.[58]

Following the commencement of the LRI project, EULIS was intended to be incorporated within the European e-Justice Portal. Consequently, in 2017 the EULIS website was closed. It is envisaged that the EULIS's architecture, technical solutions, and web services, designed to exchange stylesheets and deeds in cross-border transactions as well as information enquiries, will be reused, to the greatest extent possible, within the LRI project.[59]

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56 Hendrik Ploeger and Bastiaan van Loenen, "EULIS: At the Beginning of the Road to Harmonization of Land Registry in Europe," *European Review of Private Law* 12, no. 3 (2004): 379–87; Esa Tiainen, "The EULIS Glossary: Standardising Land and Property Information Technology," *GIM International* 18, no. 10 (2004): 34–7; Stefan Gustafsson and Agnieszka Drewniak, "EULIS: Cross-Border Land Information in Europe" (FIG Working Week, 2008), accessed June 30, 2023, http://www.fig.net/resources/proceedings/fig_proceedings/fig2008/papers/ts05a/ts05a_03_gustafsson_drewniak_2939.pdf.

57 Bengt Kjellson, "EULIS (European Land Information Service)" (WPLA Session Geneva, 2011), accessed June 30, 2023, https://unece.org/fileadmin/DAM/hlm/wpla/sessions/7th_session/item7_01.B.Kjellson.EULIS.pdf.

58 "About European Land Information Service – EULIS," European Commission, accessed June 30, 2023, https://joinup.ec.europa.eu/collection/egovernment/solution/european-land-information-service-eulis/about; Gustafsson, "EULIS: European Land Information Service. Co-Operation between Eight National Agencies," *GIM International* 17, no. 8 (2003): 45–7.

59 "About European Land Information Service"; Wouters, "Online Portals," 3.

4.2.2. IMOLA

Institutional efforts of the EU to unite national land registers within a common network are accompanied by initiatives by ELRA, an international non-profit organization that groups 29 official land registry organizations from 25 European countries.[60] With its aims of providing interoperability solutions to increase the accessibility and transparency of land information and to facilitate the registration of cross-border documents, the IMOLA project makes a significant contribution to the development of a European real estate and mortgage market. The project, subsidized within the framework of the European Commission's Civil Justice Programme, has been carried out by ELRA together with EULIS, the Spanish Colegio de Registradores, and the Dutch Kadaster. The starting point of the project has been the premise that, despite the differences in national legislation and the practice of land registration, it is possible to define a structure of key information shared by most land registration systems. Based on comparative research on different types of property rights and registration methods, the main deliverable of the first phase of the project (IMOLA I), which was concluded in 2015, is a template of a European Land Registry Document (ELRD). It is a semantic model for standardized land registry outputs, developed using an XML schema with an "ABC" structure of the information (relating, respectively, to property, ownership, mortgages, and other encumbrances).[61] As emphasized, ELRD represents a "bottom-up" approach and legal neutrality as the imposition of any existing land registration model in Europe is ruled out. This is because the template is a result of mutual understanding among land registers experts appointed by the participating organizations who perform the function of Contact Points of the European Land Registry

60 "About Us," European Land Registry Association, accessed June 30, 2023, https://www.elra.eu/about-us/.

61 "IMOLA," European Land Registry Association, accessed June 30, 2023, https://www.elra.eu/imola/; Costas Simatos, "New Validation Services for the ELRD v3.1 Provided by the Interoperability Test Bed," accessed June 30, 2023, https://joinup.ec.europa.eu/collection/interoperability-test-bed-repository/solution/interoperability-test-bed/news/itb-supports-elrd-v31; Pedro Pernas, "The Role of the European Land Registries in the Shaping of the Single Market," 18ff., accessed June 30, 2023, https://www.elra.eu/wp-content/uploads/2023/02/The-role-of-the-European-Land-Registries-in-the-shaping-of-the-Single-Market.pdf.

Network (ELRN),[62] set up by the ELRA members.[63] The adopted principle of respect to national land registration systems' legal rules shall be expressed by the fact that the value of ELRD will be determined by competent domestic authorities.[64] It is highlighted that, although the European document seems easier to implement in the registration of titles systems, the deed registration systems can adapt information of the personal *folium* to the ELRD requirements by relating deeds which it involves.[65]

Follow-up actions were undertaken within the IMOLA II project, aimed at providing an interoperability platform that would enable the exchange of information based on the ELRD common structure.[66] The scope of the project, implemented between 2017 and 2019, covered the creation of a shared semantic knowledge repository integrated into the e-Justice Portal as a controlled vocabulary (Thesaurus) composed of agreed abstract definitions of concepts listed as "pivot terms."[67] Based on the metadata derived from the ELRN Contact Points' feedback, the repository is expected to enrich national land registry information with the techniques and

62 "IMOLA Summary," European Land Registry Association, 3, accessed June 30, 2023, https://www.elra.eu/wp-content/uploads/2017/02/2.-Summary-of-the-IMOLA-Project.pdf.

63 Each participating organization has appointed a land registry officer expert in property rights and land registration as its contact point for the Network. See: "European Land Registry Network," European Land Registry Association, accessed June 30, 2023, https://www.elra.eu/european-land-registry-network/.

64 Gabriel Alonso, "IMOLA: Building an International Land Registration Terminology," in *IMOLA II Project: The European Land Register Document (ELRD). A Common Semantic Model for Land Registers Interconnection*, eds. Anabel Fraga, Elena Ioriatti, and van Erp (Brussels: European Land Registry Association, 2019), 120–1.

65 "IMOLA Summary," 3; Jorge López, "ELRD as a Tool to Organize Registry Information of Any Land Register System," in *IMOLA II Project*, eds. Fraga, Ioriatti, and van Erp (Brussels: European Land Registry Association, 2019), 98ff. Cf. Moerkerke, "The Use of the IMOLA Template in Deed Systems," *7th ELRA Annual Publication* (2017): 13–4, accessed June 30, 2023, https://www.elra.eu/wp-content/uploads/2017/02/4.-Jan-Moerkerke-The-use-of-the-Imola-template-in-deed-systems.pdf.

66 "IMOLA II," European Land Registry Association, accessed June 30, 2023, https://www.elra.eu/imola-ii/.

67 Alonso, "IMOLA," 126ff.

languages of the semantic web, and in this way, to fit with the underlying assumption of the LRI project.[68]

Efforts to promote and achieve an effective model of reference information as a means to facilitate the creation of a semantic common area of justice in civil and commercial matters, consolidating and extending the previous IMOLA I and II results, were continued in the years 2020–2022 under the IMOLA III project. Its objective was to get the interoperability of metadata related to the juridical information supplied by ELRD through the consolidation of the semantic model for LRI. The main results of the project are: IMOLA Knowledge Organisation System (I-KOS) extended Corpus semantic Land Registers Core vocabulary, ELRD as a semantic and interoperable artifact, and IMOLA multiuser web platform and web services.[69]

5. Harmonization Approaches Developed by the Legal Doctrine

Together with the above tendencies at the EU level, calls to overcome barriers resulting from the differences among national land registration systems by way of adopting some common solutions to foster cross-border real estate transactions have been advanced in the scholarship.

An example of this is the idea of a European land register that has been put forward in the discussion accompanying the preparatory works on the Eurohypothec. As was argued, based on the outcomes of the EULIS project, a common register would play an important complementary role to the European mortgage for the purposes of increasing transnational conveyancing as well as the registration of land charges.[70] The harmonization or even integration of national land registries within the EU in

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68 Jesús Camy and Fraga, "IMOLA II Overall Management Vision," in *IMOLA II Project*, eds. Fraga, Ioriatti, and van Erp (Brussels: European Land Registry Association, 2019), 56ff.

69 "IMOLA III," European Land Registry Association, accessed June 30, 2023, https://www.elra.eu/imola-iii/; "Closing Conference," European Land Registry Association, accessed June 30, 2023, https://www.elra.eu/imola-iii/closing-conference/. See further: Camy and Fraga, "IMOLA III Overall Management Vision, Results, and Future: A Summary Based on Images (Results on ANNEX I)," in *IMOLA III Project: The European Land Register Document (ELRD). A common Semantic Model for Land Registers Interconnection*, eds. Fraga and Ioriatti (Brussels: European Land Registry Association, 2022), 60–70.

70 Nasarre-Aznar, "The Integration," 49.

a single European land registry has been regarded as the natural next step after implementing the EULIS project. According to those precepts, the future portal should provide one uniform interface to present data stored in the individual national systems, thus ensuring international accessibility of land information. At the same time, an important challenge from the legal and organizational points of view would be to decide on whether to adopt the registration of titles or the registration of deeds model.[71]

In line with other recommendations formulated in the doctrine, a European land register should take the form of electronic books and should be organized by real estate properties, not by documents; moreover, the *prior in tempore potior in iure* principle should apply; the registrar should analyze the legality of the documents; the registered rights should belong to their holder in the manner shown by the land register (presumption *iuris tantum*), and third parties acting in good faith should be protected.[72] The above selection of common rules, viewed in the context of property law harmonization, has been complemented by a proposal envisaging that constitutive creation and transmission of property rights should be based on English law; the operations should be conducted electronically (e-conveyancing, at that time being supposed to be implemented shortly in English law), and the person in charge of the register could be a notary, a judge, a land registrar, or a public servant.[73]

Similar arguments underlie the idea of developing a framework for an autonomous property law system, including a European registry for the registration of European property rights, in the form of an optional instrument.[74] However, contrary to the solutions referred to above, it has been assumed that the common register could function not only as a register of

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71 Cf. Ploeger and van Loenen, "EULIS," 387.

72 Pedro de Pablo Contreras, María Isabel de la Iglesia Monje and Francisco Javier Orduña Moreno, "La Convergencia de los Sistemas Registrales Europeos: Una Propuesta de Armonización," in *Los Sistemas de Transmisión de la Propiedad Inmobiliaria en el Derecho Europeo*, eds. Francisco Javier Orduña Moreno and Fernando de la Puente Alfaro (Navarra: Civitas, 2009), 633.

73 Héctor Simón Moreno, "Towards a European System of Property Law," *European Review of Private Law* 19, no. 5 (2011): 602–3 and the literature cited there.

74 Ramaekers, *European Union Property Law: From Fragments to a System* (Cambridge–Antwerp–Portland: Intersentia, 2013), 254ff.

titles, but also as a register of deeds, or even a mere notice-filing system.[75] The proposed rules have been drawn on the example of the International Registry set up under the Cape Town Convention on International Interests in Mobile Equipment of 2001.[76]

In the course of the debate on the Eurohypothec, it also has been suggested that a common method of land registration, called the EuroTitle, could be introduced in Europe as an alternative to the national land registration systems, to ensure transparency and certainty of land information. Following the registration of titles model, the EuroTitle could be issued by a national land registry within its jurisdiction; hence there would be no need for a European land register.[77]

Based on the guidelines and recommendations elaborated in the recent decades by European and international institutions, such as the United Nations Economic Commission for Europe, the European Commission, and the World Bank, eight principles to be considered in the process of harmonization of land registration systems have been specified:

1) the real *folium* model appears optimal in terms of the economic effectiveness of the registration system, particularly given that it has been adopted in most European countries, including those of Central and Eastern Europe, where systemic reforms were implemented after the break-up of the Soviet Union;
2) access to land register information should be guaranteed to any citizen, not only for the national land register, but also for others, with full respect for any possible constraints due to data protection legislation;
3) in order to ensure that land information is intelligible, the system should be transparent and continually updated;
4) only registered rights should be opposable against third parties;

75 Ibid., 261ff.

76 See, e.g.: van Erp, "The Cape Town Convention: A Model for a European System of Security Interests Registration?," *European Review of Private Law* 12, no. 1 (2004): 91–110.

77 Ploeger, Nasarre-Aznar and van Loenen, "EuroTitle: Paving the Road to a Common Real Estate Market" (Ius Commune Conference, 2005), accessed June 30, 2023, http://www.bastiaanvanloenen.nl/pubs/2005_HDP_SNA_BVL_IUSCOMMUNE.pdf.

5) completeness of information should be ensured, which can be achieved through the use of land graphic bases in accordance with the INSPIRE Directive;[78]
6) transparency in the land register should be improved in a way to prevent distortion of the principle of priority;
7) the third-party acquirer who trusts in the accuracy of the land register should be protected (acquisition in good faith);
8) full control of the documentation inscribed in the land register is required so that any claim to modify the contents of the rights published according to the legal system is reviewed.[79]

6. Feasibility of the Harmonization of Land Registers in the Digital Transformation Era: An Attempt at Appraisal

Unarguably, more extensive use of ICT in land registration offers new opportunities to improve the performance of land registers' functions, and in this way to stimulate the transnational cooperation initiatives that contribute to enhancing the access to justice within the EU. At the same time, in light of the experiences so far in harmonization and interconnection of the European countries' land registers, it can be concluded that, as yet, the advancements in reforms pursuing the implementation of innovative solutions for the purposes of land registration seem not to suffice to compensate for the shortcomings of the real estate markets' integration caused by the identified legal and political limitations. This is primarily because, notwithstanding some common development tendencies, as shown by the brief overview presented in section 2.2, technological progress has not given rise to changes affecting the core premises underlying the national land registration systems. Consequently, remarkable divergences among them – in terms of the way registration is performed and registers are made accessible – continue to exist. Concerns are also raised in respect of the methods of cooperation among national land registration authorities employed so

78 Directive 2007/2/EC of the European Parliament and of the Council establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) (OJ L108, 25 April, 2007).

79 Martínez Velencoso, "The Land Register," 16–9.

far. Moreover, practical difficulties in implementing harmonization projects have become manifest.

A notable illustration of such problems is the course of works within the EULIS project, which ultimately has proved unsuccessful, particularly considering that only a limited number of countries participated in that initiative. The reasons for this include the restrictions in access to land registers foreseen in several legal orders, not conforming with the very idea under EULIS. What is more, already at the beginning of the implementation of the project, the actual relevance of EULIS was put into question in the legal literature, the main concern being that the proposed solutions have not had regard to the specific juridical context in which rules on land registration are placed in particular jurisdictions. The above factor has been reasonably deemed determinative of the failure of the tools offered within the EULIS portal to effectively encourage the parties to enter into cross-border real estate transactions, for it would still be indispensable to resort to professional legal services.[80] Persistent differences among national land registration systems concerning the scope of available land information and methods of access thereto have been identified as significant difficulties as well.[81] Similar views were expressed in 2014 by the Council of the Notariats of the European Union (CNUE) in its position on the Multiannual European e-Justice Action Plan 2014–2018.[82] Consideration was also given to potential risks for the protection of personal data arising from common transnational access to land registers.[83]

Against this background, it appears that the standardization and enhancement of the exchange of information from land registers, which are

80 Schmid, Hertel, and Wicke, *Real Property*, 46; Cámara Lapuente, "Registration," 820; Kaczorowska, "Perspectives for the Creation of a European Network of Land Registers," in *Party Autonomy in European Private (and) International Law*, vol. 2, eds. Maria Elena De Maestri and Stefano Dominelli (Roma: Aracne Editrice, 2015), 99–100.

81 Ploeger and van Loenen, "EULIS," 386.

82 Position of the Council of the Notariats of the European Union Concerning the e-Justice Action Plan 2014–2018 (2014), 4–5, accessed June 30, 2023, www.notaries-of-europe.eu/files/position-papers/2014/e-Justice-06–06–14-final-en.pdf.

83 Cf. Schmid, Hertel, and Wicke, *Real Property*, 46; Zevenbergen, "Registration of Property Rights: A System Approach. Similar Tasks, but Different Roles," *Notarius International* 8, no. 1–2 (2003): 137; Cámara Lapuente, "Registration," 820; Ploeger and van Loenen, "EULIS," 386.

the key objectives of the IMOLA project, could bring some possibilities of fostering cross-border land transactions. Such a view relies on the assumption that the ELRD template, based on a mutual understanding or so-called legal minimum shared by the ELRA members as well as respect to principles enshrined in particular legal orders, shall be useful for both the registration of titles and the registration of deeds systems. In this sense, the concept of ELRD corresponds to some extent to the scholarship proposal for a European land register that could follow the registration of titles as well as the registration of deeds. Nevertheless, there are grounds for doubts regarding the functionality of the adopted "ABC" schema, which the users representing the latter model are not familiar with, and therefore may find it difficult to categorize the information provided.[84] The above argument seems to find confirmation in the fact that the group of countries involved in the LRI MS Connection project was composed of those whose systems are based on the registration of titles.

There are also other issues of a legal nature that should be considered as diminishing the possibilities to accomplish the idea of a common European real estate market. Among them are, e.g., the differences in respect of legal effects to be attributed to ELRD, which – according to the project's precepts – shall depend on the national authorities. Questions of ensuring the accuracy of the standardized land registry information and the responsibility for possible errors may be problematic, too. Moreover, again, discrepancies in the rules of publicity of national land registers, as well as privacy aspects, still need to be faced, even despite the blurring of the division between real *folium* and personal *folium* as a result of the application of ICT. What should be taken into account is not only that access restrictions envisaged in a number of jurisdictions remain valid, but that calls for limiting the online availability of land registers are being raised in some others because of the increased risk of data protection breach.

It will be possible to properly assess the LRI and IMOLA projects' actual effects only at a later stage, after the practical implementation of the elaborated solutions. In general terms, the main potential of the current initiatives seems to lie in a large-scale semantic interoperability approach, aimed at ensuring that the specific legal and practical meaning of national

[84] Moerkerke, "The Use of IMOLA," 14; Kaczorowska, "Innovations in Land Registration," 127.

property rights and land registration proceedings is properly conveyed and understandable. Moreover, such bottom-up-oriented cooperation actions may contribute to improving the implementation of the European Judicial Space in Civil and Commercial Matters, by complementing the hitherto top-down measures related to cross-border real estate transactions, introduced in the EU. This refers particularly to the international land registration terminology, explanatory material, and assistance tools developed under the IMOLA project, in connection with the ICT-based instruments offered by the European e-Justice Portal, which provide a useful apparatus to potentially increase the efficiency of application of the EU regulations covering private international law issues, such as the Regulation 650/2012 (whose scope, as mentioned above, does not extend to real property and its publicity).[85] By contrast, the recommendations put forward by scholars opting for the registration of titles system, as preferable to the registration of deeds system, and all the more so the concepts of a uniform European land register, prove not to be consistent with the bottom-up perspective and the legal neutrality requirements. As such, they shall be considered not to be likely to be followed through.

More broadly, when estimating the chances for the harmonization of land registration systems by exploiting the technological potential existing today, one should take into account the impact of further evolution of traditional land registers under the influence of emerging technologies, such as blockchain, and the increasing role of automation processes. This, on the one hand, offers new possibilities to extend the functions land registers perform, but, on the other hand, poses significant legal challenges.

7. Conclusion

In the current harmonization context, given the exclusion of land registration issues from the scope of the EU legislative activity, and following

[85] For more on this issue, see: Guillermo Palao, "The European Land Registry Document Common Semantic Model as a Necessary Tool for the Efficient Implementation of the European Union Regulations in the Field of Civil Justice," in *IMOLA II Project*, eds. Fraga, Ioriatti, and van Erp (Brussels: European Land Registry Association, 2019), 179ff.; Paula Pott, "The Use of ELRD as a Complementary Tool when Assessing an Application for the European Certificate of Succession (Art. 66.5 of the Regulation 2012/650)," in *IMOLA II Project*, eds. Fraga, Ioriatti, and van Erp (Brussels: European Land Registry Association, 2019), 201ff.

the failure of integration initiatives developed at the academic level, efforts being now undertaken to interconnect land registers are focused on an extensive application of innovative technologies, with the European e-Justice Portal playing a central role. Nevertheless, a successful enhancement of cross-border land information exchange requires that both the technological and legal aspects be addressed. What should be emphasized is the autonomy enjoyed by individual states in shaping their land registration systems, developed throughout history as a part of their national legal heritage. This naturally results in a multitude of approaches to how land registers are organized within specific domestic legal frameworks. The same applies to the peculiarities of the concepts and terminology related to property law. From the perspective of transnational access to land information, it is therefore of crucial significance to provide conditions for an adequate understanding of foreign legal terms which shall be embedded in the national legal context, and thus to safeguard the legal certainty, whilst respecting the diversity in the field of land registration.

As evidenced by the present-day tendencies in cooperation among national land registration authorities in Europe, an attempt has been made to fulfil the above criteria by combining the cross-border electronic access to land registers and the use of semantic web technologies under the LRI and IMOLA projects. Indeed, it can be assumed that the proposed solutions, underpinned by the legal neutrality principle, will have an indirect harmonization effect in the area of land transactions, which shall be manifested in developing electronic justice tools for citizens, of a soft law character. At the same time, the complexity and difficulty of interconnecting land registers cannot be overlooked. This is confirmed by numerous challenges to be confronted, particularly those presented by personal data and privacy protection requirements.

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Evidence Limitations on the Part of the Entrepreneur in the Economic Process

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Abstract: This article addresses an issue that is highly debatable both in the theory of civil procedural law and in the practice of jurisprudence, namely the entrepreneur's right to a court and, consequently, the possibility of respecting the principle of material truth in a separate proceeding in commercial cases in the context of evidentiary limitations introduced by the legislator under the Act of 4 July 2019 amending the Code of Civil Procedure. Due to the fact that eponymous matters are complex and multifaceted, the present article shall describe and signal selected specific issues, which seem to raise the most doubts among representatives of the world of science and practitioners who apply civil law daily.

1. Introduction

Professionalism in the activity conducted by entrepreneurs contributed to the legislator's reinstatement of separate proceedings in commercial lawsuits under the Act of 4 July 2019 amending the Code of Civil Procedure and certain other acts.[1] The main purpose of this amendment was to ensure more efficient adjudication of cases involving entrepreneurs and to achieve a quicker result in the form of a ruling ending a court litigation.

It is worth remembering that the introduction of separate proceedings in commercial lawsuits did not constitute any novelty for the Polish civil

[1] Journal of Laws 2019, item 1469.

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procedure, as the relevant legal solutions in this respect had been functioning since 1 October 1989[2] until the entry into force of the Act of 16 September 2011 amending the Act – the Code of Civil Procedure and certain other acts.[3] However, in deciding to reanimate the commercial procedure, the legislator aptly pointed out that it must not amount to automatic reinstatement of the previous legal regulations given of the change in the legal state that had taken place over the previous several years as well as manifold developments in the social and economic spheres. For this reason, some solutions were reinstated, some others were suitably modified and others were abandoned altogether. For example, the following prohibitions were not reinstated: inadmissibility of suspending the proceedings at the unanimous request of the parties, inadmissibility of giving instructions to the litigants by the commercial court, inadmissibility of the court to examine the evidence obtained by hearing the litigant's *ex officio*.[4]

Primarily, significant changes were introduced in the sphere of evidence in separate proceedings in commercial lawsuits. This refers in particular to the introduced evidentiary limitations, which in practice pose serious problems for entrepreneurs, creating a real risk of losing a civil case. Before proceeding to the analysis of selected specific issues related to the eponymous subject matter, it is worth making a few remarks of a general, systemic nature.

2. The Notion of a Commercial Lawsuit

Under the provision of Article 458^2 § 2 of the Code of Civil Procedure, commercial lawsuits are, in particular, lawsuits in civil relations between entrepreneurs within the scope of their business activity, even if any of the parties has ceased to conduct such activity. This means that a given case will have a commercial character if the following three prerequisites are met jointly: the lawsuit concerns civil law relations, these relations are between

2 Separate proceedings in commercial lawsuits were introduced into the Code of Civil Procedure by the Act of 24 May 1989 on the hearing of commercial cases by the courts (Journal of Laws 1989, item 175, as amended).

3 Journal of Laws 2011, item 1381.

4 Broader on the subject: Maciej Rzewuski, *Nowa procedura gospodarcza – reforma KPC* [*New Commercial Proceedings. The Reform of the Code of Civil Procedure*], LEX/el. 2019.

entrepreneurs, and the case arose within the scope of business activity conducted by entrepreneurs.

The legislator also included the following in the category of commercial cases: lawsuits arising from the company relationship and concerning the claims referred to in Articles 21^{12}–21^{14}, Articles 291–300 and Articles 479–490 of the Code of Commercial Companies;[5] lawsuits against entrepreneurs for the cessation of environmental infringement and restoration to the previous state of affairs or for the repair of damage related thereto, and for the prohibition or restriction of activities that threaten the environment; lawsuits against persons liable for the entrepreneur's debt, be it as an alternative or joint and several debtor, by operation of law or deed; lawsuits between bodies of a state-owned enterprise; lawsuits between a state-owned enterprise or its bodies and its founding or supervisory authority; lawsuits related to bankruptcy and restructuring law; lawsuits for granting a collection title which is a final or immediately enforceable decision of a commercial court or a settlement concluded before that court; and lawsuits for deprivation of enforceability of a collection title based on a final or immediately enforceable decision of a commercial court or a settlement concluded before that court.

Eventually, all lawsuits arising from construction contracts[6] and contracts related to the construction process for the performance of construction work, from leasing contracts, and against persons liable for an entrepreneur's debt, be it as an alternative or joint and several debtors, by operation of law or deed were deemed to be commercial cases. This extension constituted a significant broadening of the concept of commercial proceedings compared to the legal status prevailing before 3 May 2012.

By Article 458^2 § 2 of the Code of Civil Procedure, the legislator excluded from the category of commercial lawsuit cases concerning the division of joint property of partners of a civil partnership after its termination,

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5 Act of 15 September 2000 – The Code of Commercial Companies and Partnerships (Journal of Laws 2020, item 1526, as amended).

6 Cognizance of the case to be commercial therefore depends only on the subject matter of the legal relationship in question. If the claimant's asserted claim has its source in a contract referred to in Article 647 of the Civil Code, the case is subject to cognizance in separate proceedings in commercial proceedings, even if none of the parties to the lawsuit is an entrepreneur within the meaning of the substantive law.

and a claim purchased from a person who is not an entrepreneur, unless the claim arose from a legal relationship within the scope of economic activity conducted by all its parties. This solution expressed an endorsement of the line of jurisprudence developed under the previous legislation, according to which a lawsuit between an entrepreneur who acquired a claim by way of an assignment in the course of their business activity and a debtor for the satisfaction of this claim constitutes a commercial case as long as the claim falls within the scope of the debtor's business activity, even if the original creditor is not an entrepreneur.

3. Evidence Limitation – Time Limits in Citing Claims and Submitting Evidence

The issue of evidence limitation is closely related and, in a way, results from the obligation to concentrate procedural material in civil proceedings.[7] As the Supreme Court rightly emphasized in the judgment of 9 August 2019, II CSK 353/18:

> the purpose of the concentration regulations is to induce the parties to present the necessary statements, claims and evidence at the earliest possible stage of the proceedings to settle the case as soon as possible, and in order to enable the court, by providing it with access to the complete procedural material, to issue a correct decision. The risk of the court disregarding late statements, claims, or evidence is intended to encourage the parties to duly fulfill the burden of supporting the proceedings (Article 6 § 2 of the Code of Civil Procedure) and thus contribute to the achievement of the indicated objectives. If the court disregards claims, statements, or evidence as late, assuming that there were no premises justifying the inclusion of these claims, statements, or evidence, the review of the application of the concentration provisions is justified by the fact that it is about assessing whether a party has not been unjustifiably deprived of its right to invoke assertions or evidence, that is, in essence, its right to be heard. Sanctioning the incorrect disregard of claims, statements or

[7] Andrzej Jakubecki, in *Praktyka wobec nowelizacji postępowania cywilnego. Konsekwencje zmian* [*Practice Towards the Amendment of Civil Procedure. Consequences of Changes*], eds. Marcin Dziurda and Tadeusz Zembrzuski (Warsaw: Wolters Kluwer, 2021), nt 1; Ewa Stefańska, "Commentary on Article 205(3)," in *Kodeks postępowania cywilnego. Komentarz. Tom I. Art. 1–477(16)* [*Code of Civil Procedure. Commentary. Vol. I Articles 1–477(16)*], ed. Małgorzata Manowska (Warsaw: Wolters Kluwer, 2021), nt 8.

> evidence serves to restitute a party's violated right to be heard. Consideration of the speed of the proceedings must then give way.[8]

The above-mentioned provision of Article 6 § 2 of the Code of Civil Procedure formulates

> the burden of supporting the proceedings, the scope of which includes citations affecting the acceptance or dismissal of the claim. It establishes the need to present the procedural material 'without delay', i.e. in such a way that the proceedings can be conducted efficiently and quickly. The quantifier "without delay" should be interpreted compatibly with the notion of 'late' claims, statements and evidence.[9]

In the model of evidence limitation, the effect is in the form of the inability to take into account facts or evidence not submitted on time results *ex lege*. Therefore, the act specifies a specific time limit, or rather a stage of the proceedings, by which the parties may effectively submit the procedural material to the court. Facts and evidence cited later are disregarded by law.[10]

It is beyond dispute that the essence of the evidence limitation is related to the problem of distribution of the burden of proof in civil law cases. The view of the Supreme Court is worth noting here, according to which:

> presentation by a party of evidence to prove certain assertions about the facts of the case, from which it draws beneficial effects, is not its right or procedural obligation, but a procedural burden resulting from and guaranteed by law, primarily in its interest. It is in the interest of the party, which is to win the trial, which requires it to take all possible procedural steps in order to prove the presented statements about facts; the party cannot be compelled to take them (…). What a party should prove in a particular trial is determined primarily by: the subject of the dispute, substantive law regulating specific legal relations, and procedural law regulating the rules of evidence.[11]

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8 OSNC 2020/6/51.

9 Tadeusz Zembrzuski, "Commentary on Article 205(3)," in *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian* [*Code of Civil Procedure. Court costs in civil cases. Pursuing claims in group proceedings. Transitional provisions. Comment on amendments*], vol. 1, ed. Tadeusz Zembrzuski (Warsaw: Wolters Kluwer, 2020), nt 37.

10 Likewise Jakubecki, in *Praktyka wobec nowelizacji postępowania cywilnego*, nt 1.

11 Polish Supreme Court, Judgment of 17 June 2009, Ref. No. IV CSK 71/09, LEX no. 737288.

In practice, the perception of evidence limitation and its role in the fair conduct of a civil law trial is significantly influenced by the way this institution is treated by the court on the merits. As an example, it is worth noting that in the judgment of 10 July 2008, III CSK 65/08, the Supreme Court stated that:

> whether there was a need to submit evidence later, circumstances and conditions related to the course of a specific case decide, and the laws on evidence limitation cannot be applied in a formalistic manner at the expense of the possibility of substantive examination of the case. Therefore, the court should conduct an in-depth analysis of the evidence submitted in the lawsuit in connection with the content of the submitted request, and only on its basis should it determine whether the evidence submitted later was at least implicitly offered within the preclusion period laid down by the Act.[12]

The issues raised will be described in more detail later in this chapter.

The basis for the application of the rules of evidence limitation in separate proceedings in commercial cases is the provision of Article 458^5 § 1 of the Code of Civil Procedure. According to it, the plaintiff in the lawsuit and the defendant in the statement of defense are obliged to cite all claims, statements, and evidence to support their positions. Moreover, by delivering the instructions referred to in Article 458^4 § 1 of the Code of Civil Proceedings, the presiding judge calls on the party to present all the claims, statements, and evidence within the prescribed period, not shorter than one week, however, depending on the circumstances of the case, the presiding judge may specify a period longer than one week. Statements/claims and evidence invoked in violation of § 1–3 of the regulation are disregarded unless the party substantiates that it was not possible to invoke them or that the need to invoke them arose later. In such a case, further statements, claims, and evidence should be cited within two weeks from the date on which their invoking became possible or the need to invoke them arose.[13]

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12 LEX no. 448045.

13 Maciej Rzewuski, "Zarzut naruszenia reguł prekluzji dowodowej [Allegation of Violating the Rules of Evidentiary Exclusion]," in *Środki obrony pozwanego w postępowaniu przed sądem I instancji* [*Defence Measures of the Defendant in Proceedings Before the Court of First Instance*], ed. Maciej Rzewuski (Warsaw: Wolters Kluwer, 2022), 233–234; see also: Tomasz Szanciło, "Commentary on Article 458(4)," in *Kodeks postępowania cywilnego.*

> It seems that under Article 458^5 § 4 of the Code of Civil Procedure
>
> no so-called contingency rule has been introduced (…). The proponents of this concept therefore assume that the need for a given party to invoke new statements, and claims and evidence may result, in particular, from the position of the opposing party in the trial. With regard to, for example, the plaintiff, the evidence limitation applies primarily to statements, claims, and evidence directly related to the demand contained in the lawsuit, and not to the statements, claims, and evidence that could be presented in the hypothetical assumption of the defendant's possible defense (...). This line of reasoning also includes the view that the plaintiff does not have to anticipate the defendant's possible allegations, even if it seems obvious that they will be raised, for example in the case of a pre-trial deduction. The lawsuit is supposed to concern the demand contained therein, and not the possible allegations of the defendant.[14]

Without denying the accuracy of the above reasoning, there is no doubt that the limitation rigors, which is a separate process in commercial cases were demanding compared to the ordinary process, constitute a significant impediment to the exercise of the constitutional right to court by the entrepreneur. In most cases, the delay of the person authorized in citing the relevant statement, claim, or submitting evidence will be equated with failure to meet the procedural burdens resulting from Article 6 of the Civil Code and Article 232 of the Code of Civil Procedure, and as a consequence may lead the "latecomer" to lose the entire case.

Komentarz do Art. 1–505(39) [*Code of Civil Procedure. Commentary to Articles 1–505(39)*], vol. 1, ed. Tomasz Szanciło (Warsaw: C.H. Beck, 2019), 1570 et seq.; Radosław Flejszar, *Postępowanie w sprawach gospodarczych. Komentarz* [*Proceedings in Commercial Cases. Commentary*] (Warsaw: C.H. Beck, 2007), 165 et seq.

14 Tadeusz Wiśniewski, "Commentary on Article 458(4)," in *Kodeks postępowania cywilnego. Komentarz. Tom. II. Artykuły 367–505(39)* [*Code of Civil Procedure. Comment. Volume II. Articles 367–505(39)*], ed. Tadeusz Wiśniewski (Warsaw: C.H. Beck, 2021), nt 9. Compare with the Polish Supreme Court, Judgment of 18 April 2008, Ref No. II CSK 667/07, Legalis; Jacek Gudowski, "Commentary on Article 458(5)," in *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian* [*Code of Civil Procedure. Court Costs in Civil Cases. Pursuing claims in group proceedings. Transitional provisions. Commentary on amendments*], vol. 2, ed. Tadeusz Zembrzuski (Warsaw: C.H. Beck, 2020), 1119.

4. Primacy of Documentary Evidence – Limitations on the Use of Personal Evidence

Another limitation of the entrepreneur in the exercise of his right to court at the stage of examination proceedings before the commercial court are statutory regulations that limit the possibility of providing evidence using witness statements or hearings of the parties. Specifically, these are two legal solutions that were added to the Code of Civil Procedure by the amendment of 4 July 2019.

The former of the provisions cited in Article 458^{10} of the Code of Civil Procedure, according to which the court may admit evidence from the testimonies of witnesses only when, after exhausting other means of evidence or in their absence, unexplained facts relevant to the resolution of the case remain. Although the above-mentioned regulation does not completely eliminate the possibility of taking evidence from the hearing of the parties in separate proceedings in commercial cases on the terms set out in Article 299 of the Code of Civil Procedure, however, such evidence may be taken only when it turns out that the other evidence will not lead to clarification of facts relevant to the resolution of the case. A situation is admitted in the literature that if the evidence thesis of the application for the hearing of a witness shows that such testimony will not explain the disputed circumstances of the case, because only the parties have relevant knowledge in this regard, the commercial court may disregard the evidence from the witness testimonies, and in its place take evidence from the cross-examination of the parties.[15]

Further still in limiting the possibility of using personal evidence in commercial proceedings goes the provision of Article 458^{11} of the Code of Civil Procedure. This regulation provides that an act of a party, in particular a declaration of will or knowledge, which in the law is connected with an acquisition, loss, or change of the party's entitlement in the scope of a given legal relationship, may be demonstrated only by a document

[15] Małgorzata Manowska, "Commentary on Article 458(10)," in *Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom I. Art. 1–477(16)* [*Code of Civil Procedure. Updated Commentary. Vol. I. Articles 1–477(16)*], ed. Małgorzata Manowska (Warsaw: Wolters Kluwer, 2022), nt 2.

referred to in Article 77^3 of the Civil Code,[16] unless the party proves that it is unable to present the document for reasons beyond its control. It needs to be emphasized that the possibility of taking evidence other than a document will always depend on the prior demonstration (and not just substantiation) of the party's inability to present the adequate document. The party requesting the taking of evidence from the testimony of a witness or evidence from the hearing of the parties should therefore, in advance, in the manner provided for by the procedural law, prove, for example, that the relevant document was, for example, destroyed or lost.

The objective scope of the analyzed provision covers every activity of a party that is in the law connected to the acquisition, loss, or change of the right, and as a rule, it will be about the conclusion, change, or termination of a contract or agreement. It is worth noting that this provision concerns the right, i.e. the content of a specific legal relationship, and does not apply to actual actions related to the exercise of these rights, e.g. fulfillment of a non-cash benefit or a request for payment.[17]

In conclusion, it is worth recalling the thesis of the judgment of the Court of Appeal in Poznań of 29 September 2022, I AGa 334/21, according to which "evidence from the testimonies of witnesses in commercial cases is to be admitted on a subsidiary basis, i.e. only when, after exhausting other means of evidence, or in the absence thereof, facts relevant to the resolution of the case remain unexplained."[18] For the reasons described above and due to the capacious wording of Article 458^{11} of the Code of Civil Procedure this thesis remains valid also in relation to the possibility of taking evidence from the hearing of the parties in commercial proceedings.

16 Within the meaning of Article 773 of the Civil Code, a document should be perceived as any information carrier that makes it possible to familiarise oneself with its content. Thus, it may be any object or device that allows the content of the statement contained in the document to be recorded and subsequently reproduced.

17 Manowska, "Commentary on Article 458(11)," in *Kodeks postępowania cywilnego*, nt 2, 4; See: Gudowski, "Commentary on Article 458(5)," nt 3.

18 LEX no. 3435717.

5. Evidence Agreement – Essence, Goals, and Legal Effects

A novelty in the Polish civil procedure was the introduction to the Code of Civil Procedure of the institution of the evidence agreement.[19] The main motive justifying the implementation of this mechanism was the high level of professionalism achieved in recent years in commercial transactions.

Although the introduction of another factor influencing the course of the proceedings carries an undoubted risk of complication in the conduct of court cases in which this factor will appear as indicated by the drafters:

> there should be no doubt that the parties should have the right to limit the scope of proceedings to take evidence by the exclusion of certain types of evidence. This will emphasize the principle that the parties are the hosts of the proceedings and may contribute to a more efficient resolution of the dispute – and that is the reason, not just for the sake of conducting itself, why proceedings to take evidence are conducted. The proportions between the possible benefits and losses seem to prevail in favor of the former, especially in commercial cases, where the professionalism of the parties and the extensive use of professional legal assistance, also in out-of-court transactions, allow minimizing the risk of problems related to the evidence agreement.[20]

In other words, the primary purpose of the evidence agreement, as intended by the legislator, was to ensure faster and more efficient examination of commercial cases. As practice shows, this goal has not been fully achieved, and there are many reasons for this state of affairs.

In the theory of procedural law, the very essence of the evidence agreement raises serious doubts. As such an agreement contains both substantive and procedural elements, the mutual relations between these two components become unclear. The legislator did not resolve this problem directly

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19 On procedural agreements, refer to Władysław Siedlecki, "Czynności procesowe" [Process Activities], *Państwo i Prawo*, vol. 11 (1951): 709 et seq.; Siedlecki, "Ciężar dowodu w polskim procesie cywilnym [The Burden of Proof in Polish Civil Proceedings]," *Państwo i Prawo*, vol. 7 (1953): 73; Jerzy Jodłowski, *Z zagadnień polskiego procesu cywilnego* [*From the Themes of the Polish Civil Process*] (Warsaw: Państwowe Wydawnictwo Naukowe, 1961), 63; Kamil Stefko, "Postępowanie dowodowe w polskim procesie cywilnym [Proceedings of Evidence in Polish Civil Proceedings]," *Przegląd Notarialny*, no. 1–3 (1951): 15.

20 Justification of the government bill amending the Act – Code of Civil Procedure and some other acts, Sejm Paper No. 3137, p. 107.

in the content of the Code of Civil Procedure, and this omission caused significant practical problems.

The representatives of the doctrine rightly point out that:

> the normative location of the provision on the evidence agreement does not determine whether it is a purely procedural agreement or an agreement in which procedural elements predominate. In many cases, the aspects of the validity and effectiveness of the said agreement will require a thorough analysis of several of provisions of substantive law, e.g. Articles 5, 56, 58 of the Civil Code, etc. On the other hand, one cannot ignore the fact that both the content and the form of the evidence agreement have been specified in the procedural regulations, and the fact that it is the commercial court that controls the validity and effectiveness of the concluded agreement as part of the ongoing proceedings. The indicated circumstances seem to support the thesis of a double – substantive and procedural nature of the analyzed agreement.[21]

As regards the formal requirements of the evidence agreement, the legislator decided that it requires a written form under pain of nullity, or an oral form – limited to declarations of the will of the parties submitted at the hearing for the record. In case of doubt, the subsequent evidence agreement shall be deemed to maintain those provisions of the earlier agreement which can be reconciled with it. An evidence agreement concluded on condition or subject to a deadline is invalid (Article 458^9(2) and (3) of the Code of Civil Procedure).

Taking into account the wording of the above-mentioned regulation, one can seriously doubt the effective conclusion of the eponymous agreement.

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[21] Maciej Rzewuski, "Umowa dowodowa w postępowaniu gospodarczym – między teorią a praktyką [Evidence Agreement in Commercial Proceedings – Between Theory and Practice]," *Dyskurs Prawniczy i Administracyjny*, no. 1 (2021): 86–7. See: Łukasz Błaszczak, "Umowa dowodowa jako przykład nowej instytucji w Kodeksie postępowania cywilnego (art. 458(9) k.p.c.) [Evidence Agreement as an Example of a New Institution in the Code of Civil Procedure (Art. 458(9) of the Code of Civil Procedure]," *Palestra*, no. 11–2 (2019): 128 et seq.; Aneta Arkuszewska, "Commentary on Article 458(9)," in *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.07.2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz innych ustaw* [*Code of Civil Procedure. Commentary to the Act of 4 July 2019 Amending the Act – Code of Civil Procedure and Other Acts*], ed. Jacek Gołaczyński and Dariusz Szostak (Warsaw: C.H. Beck, 2019), 338.

As indicated in the literature:

> first, justified interpretation doubts may be raised by the very phrase "the evidence agreement is concluded in writing under pain of nullity or orally before the court," used in Article 458^9 § 2 of the Code of Civil Procedure. It is not clear whether in the course of the proceedings, the parties can continue using the written form of the agreement, or whether – due to the fact of the pending proceedings – they are limited in form to submitting oral statements for the record. Some authors assume that due to the lack of clear temporal limitations in the Code, both forms of evidence agreement are acceptable in this case.[22] Others argue that during the ongoing court proceedings, only the oral form of the agreement may be considered.[23] Secondly, due to the ambiguity of the wording of Article 458^9 § 2 of the Code of Civil Procedure, a doubt arises whether an evidence agreement may be concluded at the stage of appeal proceedings and whether it is permissible to refer to such an agreement only in the course of the appeal (…). Thirdly, the legislator did not directly regulate the issue of whether the evidence agreement concluded before the court in the course of the trial may concern only what is the subject of the pending proceedings, or whether the subject matter may go much further, and include, for example, court disputes pending in parallel between them or that may arise in the future from the marked legal relationship. Also in this respect, there is no unanimous position of the doctrine, although due to the lack of relevant statutory prohibitions in this matter – the view allowing for a broad redaction of the subject aspect of the analyzed agreement seems more convincing.[24]

It seems that the above-mentioned basic problems in the practical use of the evidence agreement effectively discourage entrepreneurs from concluding this type of agreement, and then from using contractual provisions to prevent, or at least make it difficult for, the other party to the proceedings to prove its case before the commercial court.

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22 Ibid., nt 9.

23 Broadly in: Błaszczak, "Umowa dowodowa jako przykład nowej instytucji," 128 et seq.

24 Likewise: Rzewuski, "Umowa dowodowa w postępowaniu gospodarczym," 92. See: Szanciło, "Commentary on Article 458(4)," nt 13.

6. Conclusions

The research carried out shows that procedural law theory often seems to diverge from practice. The attempt to achieve one objective (e.g. expediting the adjudication of commercial cases) may lead to the limitation of other procedural principles (e.g. the principle of material truth).

The reanimation of separate proceedings in commercial cases, and in particular the introduction of specific legal institutions such as evidence limitation, the primacy of documentary evidence, or the evidence agreement, have complicated the entrepreneur's path to the exercise of their rights by using state coercion.

Undoubtedly, one may disagree with the originator, who, when deciding to introduce the new solutions, was guided by the overriding and socially desirable goal of streamlining the recognition of commercial cases. It is difficult to argue with the accuracy of this postulate. Unfortunately, practice reveals further weaknesses of the recent amendments to the Code of Civil Procedure, which seem to effectively discourage entrepreneurs from using the new institutions of separate proceedings and indirectly restrict them in their right to a court and their pursuit of the material truth, whose qualities as such cannot be overestimated.

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Court of Justice of the European Union and Ukrainian Legal Order: Some Pre-accession Considerations

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Abstract: As the European Union candidate country (hereinafter the EU), Ukraine is one step away from becoming an EU Member State. From this point on, the country will be subject to the influence of EU institutions, including the Court of Justice of the European Union (hereinafter the CJEU). It is suggested that upon the accession of Ukraine, the CJEU's impact will be comparable to the influence on legal orders of other EU Members States provided necessary preparatory steps, such as training for judges, are taken. It is established that the main functions of the CJEU are to interpret and ensure the uniform application of EU law in each EU Member State, to ensure compliance with EU law by EU countries and institutions, to ensure respect for the rights and freedoms of individuals, to provide clarifications to national courts, and to promote "positive integration" and "negative integration" of EU Member States. With respect to the above-mentioned functions, it is argued that the CJEU will become an effective tool for Ukraine after it accedes to the EU. It will facilitate the harmonization of national legislation with EU standards through the application of precedents by national courts, influence the activities of legislative bodies, and help prevent future complaints by becoming

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an additional "quasi-supervisory" body in Ukraine. It will also provide interpretation of the EU law at the request of national courts through the preliminary rulings and procedures, protecting human rights and freedoms by enabling individuals to apply to the CJEU for protection. At the same time, arguably, Ukraine will also impact the functioning of the CJEU by increasing the caseload and appointing judges from Ukraine as well as potentially Advocate-General. Given these potential implications, certain preparatory actions, like preparing a cadre reserve, may be considered at the present moment. Finally, the authors argue that even before Ukraine's accession, the CJEU has an indirect impact on the Ukrainian legal order. It is suggested that constitutional amendments, as well as certain institutional changes like the establishment of an impartial judicial system and empowering a Ukrainian state body with powers to execute CJEU decisions, will need to take place prior to the accession, which is a demonstration of the CJEU's indirect influence.

1. Introduction

Since gaining independence in 1991, Ukraine has been fighting for its status as a European country. On September 1, 2017, a major milestone was reached – the EU-Ukraine Association Agreement entered into force, confirming the country's European course. Since June 23, 2022, Ukraine has been granted the status of an EU candidate country. Thus, Ukraine should pass the last milestone to obtain the deserved status of an EU Member State. In such circumstances, it is important to examine the role of EU legal institutions and their impact on the legislation, relations, and development of EU Member States. Given the leading role of such an EU institution as the CJEU, the jurisprudence of which is already mentioned in the EU-Ukraine Association Agreement and will only increase over time, this paper focuses on the role of the CJEU in Ukraine's legal order in the case of Ukraine's accession. This paper suggests that even before Ukraine's accession, the CJEU as an institution already impacts the Ukrainian legal order, and such impact will culminate in the influence it has towards other EU Members States. At the same time, arguably, Ukraine will also impact the functioning of the CJEU.

Although Ukrainian and foreign scholars, such as O. Shpakovych, V. Muravyov, T. Komarova, I. Kaminska, I. Yakoviuk, L. Hrytsaienko, R. Manko, C. Riehle, J. Honan, B. Lasserre, J. Krommendijk, and others paid sufficient attention to the functions of the CJEU, its impact on the law of the Member States and the creation of European law, and its place in the system of judicial institutions, the issue of the impact of the CJEU on the Ukrainian legal order in the case of Ukraine's accession has not been studied in much detail yet.

It is suggested that upon the accession of Ukraine, the CJEU's impact will be comparable to the influence on legal orders of other EU Member States, provided necessary preparatory steps by Ukraine are made during the accession stage. To substantiate this hypothesis, the authors analyse the history of the CJEU's establishment, its key functions, its jurisprudence and the ways through which the CJEU will influence the Ukrainian legal order once Ukraine becomes a Member State. This issue is covered in the first chapter.

In the second chapter, the authors suggest that Ukraine will impact the structure, composition and functioning of the CJEU by increasing the caseload and appointing judges from Ukraine, as well as potentially Advocate-General. The authors analyse the rules and procedures of CJEU judges and Advocate-General selection and appointment, as well as the statistical data as to the caseload.

In the third chapter, it is argued that the CJEU already has an indirect impact on the Ukrainian legal order by "necessitating" certain legal reforms to be made. To substantiate this hypothesis, the authors analyse potential legal reforms which are necessary to be completed by Ukraine prior to the accession to the EU.

This article consists of three chapters: the first one analyses the impact of the CJEU on the Ukrainian legal order by reviewing the history of the CJEU and its present role in the EU from the standpoint of the future EU Member State and elucidates four directions of such impact: facilitation of the law harmonization, preliminary rulings as an instrument of cooperation with national judicial institutions, protection and monitoring of human rights compliance, as well as addressing modern challenges. The second chapter will mirror the central idea that Ukraine as a future Member State will also influence the CJEU as an EU institution by delegating new

judges, potentially a new Advocate-General, as well as increasing the caseload. In the third chapter, it is suggested that Ukraine will have to establish an efficient system of the CJEU decision enforcement, which may arguably include amending the Constitution of Ukraine and existing laws and defining the responsible authority, which demonstrates an indirect impact of the CJEU.

2. Impact of the CJEU on the Ukrainian Legal Order

2.1. History and the Role of the CJEU in the EU

To comprehend the very nature of the CJEU and its impact on the legal order of EU Member States, a brief historical overview should be conducted. The establishment of the CJEU dates back to the conclusion of the 1952 Treaty on the European Coal and Steel Community in its status as the Court of Justice of the European Coal and Steel Community.[1] However, after the conclusion of the Lisbon Treaty, it changed to the current status of the "Court of Justice of the European Union". According to Article 19 of the Treaty on European Union (hereinafter the TEU),[2] the CJEU consists of the Court of Justice, the General Court and specialized courts. The Court of Justice's *ratione materiae* applies to requests for preliminary rulings from national courts, appeals, and actions for annulment, etc.[3] The jurisdiction of the General Court extends to actions by the Member States, natural or legal persons against the institutions of the EU, disputes regarding consideration of compensation for damage caused by the EU or disputes between the EU institutions and their staff concerning employment relations, etc.[4]

We share the opinion of authors pointing out that given such a wide range of powers, the CJEU performs the functions of a constitutional (e.g. reviews the legality of acts of the EU institutions under Articles 263 and 265 of the Treaty on the Functioning of the European Union (hereinafter

1 Cornelia Riehle, "70th Anniversary of EU Court of Justice," EUCRIM, December 15, 2022, accessed June 10, 2023, https://eucrim.eu/news/70th-anniversary-of-eu-court-of-justice/.

2 Consolidated Version of the Treaty on European Union [2012] OJ C 326/27.

3 Klaus-Dieter Borchardt, *The ABC of Community Law* (Office for Official Publications of the European Communities, 2017), 80.

4 Ibid., 82–3.

the TFEU)[5], civil (e.g. gives opinions on arbitration clauses contained in a contract concluded by or on behalf of the EU pursuant to Article 272 TFEU), administrative (e.g. solves the disputes between the EU and its officials under Article 270 TFEU) and international court (e.g. settles the disputes between Member States according to Article 273 TFEU).[6] Although, an important note should be made. We consider the role of the CJEU quasi-constitutional in order not to confuse with the national constitutional courts, which in many cases face an important question on the compatibility of the EU law with national constitutions. These are definitely difficult questions, as they touch upon the issue of national sovereignty, and a very delicate balance must be reached between compliance with the EU law and compliance with national constitutions. This is an issue for a separate research, although this paper will slightly touch upon it.

Thus, given the nature of the CJEU's jurisdiction, it has a multifaceted impact on the legal order of Member States, in particular by promoting "positive integration" by strengthening EU power through the creation and strengthening of EU institutions, including the CJEU,[7] and "negative integration" by removing barriers between EU Member States through the joint opening of borders and abolition of tariffs.[8]

Considering the multifunctional nature of the CJEU and its contribution to the positive and negative integration of Member States into the EU, the following arguments will emphasize the importance of the CJEU as an instrument of Ukraine's post-integration into the EU in four areas. Notably, by analysing CJEU jurisprudence, it can be concluded that the CJEU will influence the Ukrainian legal order to the same extent it affects legal orders of other EU Member States, particularly by facilitating harmonization

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5 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

6 Oleh Solonenko ta inshi, "Tema 5. Status Yevropeiskoi Rady ta inshykh orhaniv YeS [Topic 5. The Status of the European Council and Other EU Bodies]," *Multymediinyi navchalnyi posibnyk "Pravo Yevropeiskoho Soiuzu"* [*Multimedia Training Manual "Law of the European Union"*], accessed October 15, 2023, https://arm.naiau.kiev.ua/books/eulaw/info/lec5.html.

7 Jessica Honan, "The European Court of Justice as a Tool of European Integration," *ANU Undergraduate Research Journal* 12, no. 1 (2023): 53, accessed October 15, 2023, https://studentjournals.anu.edu.au/index.php/aurj/article/view/730.

8 Ibid.

with the EU law, encouraging national courts to cooperate via the instrument of preliminary rulings, and ensuring better human rights compliance and serving as an additional forum for addressing modern challenges, including ones related to Ukraine.

2.2. CJEU Decisions as an Instrument of Harmonization of National Laws with the EU Law

One of the key tasks of the CJEU is to interpret the provisions of EU legislation, which in many cases leads to developing the rules of law. First and foremost, the CJEU established the concept of autonomy of the EU's legal order, independent from international and national legal systems, confirming its *sui generis* nature.[9] In the case *Flaminio Costa v. E.N.E.L.*, the Court explicitly emphasized that the Treaty establishing the European Economic Community (hereinafter the EEC Treaty) formed its own legal system of the EU.[10]

Moreover, in the aforementioned case, as well as in further practice, in particular, in *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, the CJEU substantiated the principle of the precedence of EU law, or the supremacy of EU law, over the national legislation of the Member States.[11] According to the principle, the domestic contradictory provisions are not only inapplicable but eliminate the possibility of the national authorities adopting new legislative measures incompatible with the EU provisions.[12] By this practice, the CJEU did not acknowledge that the provisions of national legislation that contradict the autonomous legal system of the EU are annulled but confirms that these provisions are not subject to application in practice.[13] Therefore, the principle of harmonization plays a crucial role in

9 Tetiana Komarova, "Sud Yevropeiskoho Soiuzu ta mizhnarodnyi pravoporiadok [The Court of Justice of the European Union and the international legal order]," (2012) (Vyp. 108, (ch. 1)) *Aktualni problemy mizhnarodnykh vidnosyn*, 219, p. 223.

10 CJEU Judgment of 15 July 1964, Flaminio Costa v. E.N.E.L., Case 6/64, ECLI:EU:C:1964:66; Rafał Mańko, *The EU as a Community of Law: Overview of the Role of Law in the Union* (Briefing, European Parliamentary Research service, 2017), 1.

11 CJEU Judgment of 9 March 1978, Amministrazione delle finanze dello Stato v. Simmenthal, Case 106/77, ECLI:EU:C:1978:49, para. 17.

12 Mańko, *The EU as a Community of Law*, 4.

13 Tetiana Komarova, "Vplyv Sudu YeS na konstytutsionalizatsiiu prava Yevropeiskoho soiuzu [The influence of the Court of Justice of the European Union on the constitutionalisation of

the EU's activities, which aims to bring the legislation of all Member States as close as possible to the European legally binding standards.[14]

One of the harmonization tools used by the EU is directives,[15] which set the minimum and maximum standards to force Member States to meet a directive's threshold using their own tools.[16] In its judgments, the CJEU also establishes the degree of compliance of a Member State's legislation with EU acts. In the case *Commission of the European Communities v. French Republic*,[17] the Court found that France had breached its obligations under Directive 85/374, in particular by prescribing in its Civil Code liability for less than EUR 500 in damages, which is contrary to the Directive.[18] Moreover, the CJEU emphasized that the limits of the Member State's margin of appreciation in establishing legislative provisions are determined in the directive itself and should be derived from its purpose and structure, which will ensure harmonization of producers' liability for damage and avoid inequality in the levels of consumer protection in different Member States.[19] These principles established by the CJEU will contribute to positive and negative European integration by preventing the Member State from interpreting legislation contrary to the EU's position and encouraging it to bring its position closer to the EU"s.[20]

European Union law"], *Yevropeiske pravo*, no. 1 (2012): 199.

14 Alexander Türk, "Harmonisation | Legal Guidance | LexisNexis," LexisNexis | Legal and Professional Solutions and Products, July 28, 2020, accessed June 9, 2023, https://www.lexisnexis.co.uk/legal/guidance/harmonisation-01; Vitalii Humeniuk, "Harmonizatsiia ta unifikatsiia zakonodavstva Ukrainy vidpovidno do standartiv Yevropeiskoho Soiuzu [Harmonisation and unification of Ukrainian legislation in line with EU standards]," *Pravove zhyttia suchasnoi Ukrainy: u 3 t.* (Helvetyka 2020), 74.

15 Article 288 TFEU.

16 Publications Office of the European Union, "Summarised document: 12016E288 (European Union directives)," EUR-Lex – Access to European Union Law, accessed June 10, 2023, https://eur-lex.europa.eu/EN/legal-content/summary/european-union-directives.html; Mańko, *The EU as a Community of Law*, 3–4.

17 CJEU Judgment of 25 April 2002, Commission of the European Communities v. French Republic, Case C-52/00, ECLI:EU:C:2002:252.

18 Ibid., paras. 26, 49.

19 Ibid., paras. 16–20.

20 Bruno Lasserre, "National Courts and the Construction of Europe: United in Diversity," *RED* 2, no. 3 (2021): 53, accessed June 25, 2023, https://www.cairn-int.info/article.php?ID_ARTICLE=E_RED_003_0056.

In this regard, since the signing of the Association Agreement with the EU in 2014, Ukraine has committed itself to gradually aligning its existing laws and future legislation with the EU acquis[21], and the CJEU will have a leading role in such harmonization by influencing judicial, law-making and executive branches of powers. Given that the CJEU judgments are fundamental for subsequent cases at the European level, such decisions should be applied by Ukrainian courts at all levels. Furthermore, judges should be familiar with the cases, actively follow new judgments, and apply them on their merits, taking into account the actual circumstances of the particular case. As already mentioned, there will be an impact on law-making and executive branches of power. Ukrainian legislators and Ukrainians are actively bringing the State legislation in line with the European standards. However, this also means that legislators should actively monitor the evolutionary decisions of the CJEU, which are developing the Court's case law, and take into account the recent interpretations or prohibitions provided by the CJEU.

Ukrainian authorities, taking into account previous case law and opinions granted by the CJEU, can take a proactive approach to prevent future applications or to correct potential gaps in the legislation. Thus, they effectively will be "predicting" future decisions.

Finally, it is crucial to define the overall status of the CJEU in the Ukrainian legal system. It is suggested that due to its overreaching powers and competencies, the CJEU will play the role of a "quasi-supervisory" body, which is unpredictable and unfamiliar for Ukraine, given that no international institution has ever exercized such supervision and control by issuing decisions binding to courts, executive as well as legislative bodies. It needs to be pointed out that, indeed, the impact of the European Court of Human Rights on Ukrainian legal order is considerable, and its decisions are the source of law in Ukraine under the special law. However, it is suggested that due to the preliminary rulings instrument and a wider range of issues on which the CJEU can decide, the impact of the CJEU will be even more significant and much more profound.

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[21] Preamble of Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, May 29, 2014, OJ L 161.

Such a multifunctional impact of the CJEU in the context of promoting harmonization will also develop Ukraine's European integration and keep the State *pari passu* to the other EU Member States.

2.3. Preliminary Rulings as an Instrument of Cooperation with National Judicial Institutions

This subchapter suggests that preliminary rulings can serve as an efficient instrument of cooperation between the CJEU and national judicial institutions, provided such national courts are ready to use this instrument appropriately, as such courts cooperate with national courts of other EU Member States in order to gain experience.

In its practice, the CJEU, in particular the Court of Justice, will have jurisdiction to give preliminary rulings on treaty interpretation.[22] According to the CJEU Annual Report for 2022, during this year, 546 cases out of the 806 brought before the Court of Justice concerned the requests for preliminary rulings.[23] Therefore, statistics show that there are no hierarchical relations between the Court of Justice and national courts but rather collaborative relations to render a fair judgment.[24] However, it is essential to take into account that the CJEU is not a court of appeal: it does not interfere with the jurisdiction of national courts of the Member States and does not assess the circumstances of the case but only aims to "reply on request" in accordance with the EU standards. National courts may request a preliminary ruling regarding the interpretation or validity of EU law in a particular case.

To exercise the right to preliminary rulings under Article 267 TFEU, the procedure and the requirements concerning the subject of the request, the object of the request, timeline, form and contents, as well as procedural requirements, will be met. It is suggested that the object of the request would probably be the most problematic area for national Ukrainian

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22 Jasper Krommendijk, *National Courts and Preliminary References to the Court of Justice* (Edward Elgar Publishing, 2021), 9, accessed June 25, 2023, https://www.elgaronline.com/monobook-oa/9781800374164.xml.

23 The Court of Justice of the European Union, "Annual Report 2022: The Year in Review," 27, accessed October 15, 2023, https://curia.europa.eu/panorama/2022/en/.

24 José Luís Da Cruz Vilaça, "Preliminary ruling (Article 267 TFEU)," Concurrences, accessed July 9, 2023, www.concurrences.com/en/dictionary/preliminary-rulings-art-267-tfue#auteur.

courts, as it would require knowledge of the constantly changing body of the EU law.

Subject of the request. Only a court or tribunal of a Member State may refer a matter to the CJEU for a preliminary ruling. To determine whether the referring authority is a court or tribunal, the CJEU takes into account several factors, such as whether (1) the authority is established by law, (2) it is permanent, (3) its jurisdiction is compulsory, (4) its procedure is *inter partes*, (5) it applies rules of law, (6) it is independent, etc.[25] Provided Ukraine completes the reforms briefly described in the second chapter, this requirement is likely to be satisfied. Object of the request. The request for a preliminary ruling must concern the interpretation or validity of EU law and not the national law or questions of fact raised in the main proceedings.[26] Taking into account the already complex and constantly changing body of the EU law, it would be an arduous task for Ukrainian judges to define the object of the request, which necessitates pre-accession training for judges. Timeline of the request. A national court or tribunal may submit a request for a preliminary ruling to the CJEU at any stage of the proceedings once it has established that it needs to interpret or apply EU law to render a judgment.[27] Moreover, according to the ILO Report on the Preliminary Rulings Procedures 2017 (hereinafter the 2017 Report), requests for preliminary rulings in the field of labor law could be referred to the CJEU not only by the Supreme Court but also by first-instance and second-instance courts (e.g. Belgium, Hungary, Norway, Slovenia, Spain).[28] This can form an additional challenge for Ukrainian courts since each and every general court will need to have an understanding of the EU law. Form and content of the request. Since the preliminary ruling will be of importance to all EU Member States, such a request should be translated into all official languages of the European Union and contain a clear, concise and detailed

25 Recommendations Court of Justice of the European Union 2019/C 380/01 of 8 November 2019 regarding the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, OJ C 380/1, para. 4.

26 Ibid., para. 8.

27 Ibid., paras. 12–3.

28 Gerhard Kuras, "Preliminary Ruling Procedures," International Labour Organisation, accessed October 15, 2023, www.ilo.org/global/about-the-ilo/how-the-ilo-works/organigramme/governance/labour-law/judges/WCMS_719393/lang--en/index.htm.

description of the necessary factual circumstances of the case, national provisions, the context of the request for a preliminary ruling, the grounds for applying to the CJEU, the relationship between the challenged provisions of EU law and national law.[29] Submission of the application to the Court. The application for a preliminary ruling must be dated and signed and then sent to the Registry of the CJEU electronically, by post or the e-Curia application.[30] Results. The Registry will liaise with the national court or tribunal and send copies of all procedural documents, requests for information, etc. After the judgment is rendered or the order to close the proceedings is signed, the Registry will also send the necessary information, decisions, etc., to the court or tribunal.[31] All the listed requirements suggest that national courts will be gaining this experience over time and will be slowly developing the expertise in situations when it is necessary and critical to refer cases to the CJEU.

However, despite a preliminary ruling of the CJEU in a particular case is legally binding only for the national court that requested it, as it was established in the case *SpA International Chemical Corporation v. Amministrazione delle finanze dello Stato*, in the event of the invalidity of an EU act within the meaning of Article 267 TFEU (ex Article 177 of the EEC Treaty), national courts which faced such an illegitimate act have the opportunity to directly refer to the decision of the Court on invalidity.[32]

Given these standards, Ukraine, as a Member State, will also be able to cooperate with the CJEU by requesting a preliminary ruling under Article 267 TFEU. However, the national courts, including the Ukrainian ones, should be aware of the procedure for filing a request with the CJEU to ensure its quick and successful application in practice. The aforementioned 2017 Report raised the question of whether every judge should be trained on the procedure for referring a case to the CJEU for a preliminary ruling,

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29 Recommendations Court of Justice of the European Union 2019/C 380/01 of 8 November 2019 regarding the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, OJ C 380/1, paras. 14–6.

30 Ibid., para. 23.

31 Ibid., paras. 30, 32.

32 CJEU Judgment of 13 May 1981, SpA International Chemical Corporation v. Amministrazione delle finanze dello Stato, Case R-66/80, ECLI:EU:C:1981:102, paras. 13–4.

particularly in the field of labor law.[33] Accordingly, the national courts of such EU Member States as Germany, Ireland, Sweden, Spain and Slovenia do not impose any obligation for such training. In contrast, since the level of awareness of Ukrainian courts of the cooperation procedure with the CJEU could be a vulnerable factor, the experience of Finland (training on this issue could be included in courses organized for judges by the Ministry of Justice), Norway (general induction courses for newly appointed judges in the general courts in a country, which is not the EU Member State), Italy (the Judicial Training Centre regularly organizes seminars, and participation is strongly encouraged), and Hungary (the National Office for the Judiciary organizes numerous training courses on EU law and preliminary procedures, enables Hungarian judges to apply for European training programmes, encourages the use of a network of judicial advisers on European law who conduct training courses, provide advice and fill the Hungarian judiciary's websites with materials on the European Union obtained through a competition),[34] will be valuable for Ukraine.

From our perspective, given the need for effective assistance to Ukrainian courts in the proper application of EU law, it is suggested starting from today to provide comprehensive courses on EU case law for judges, maybe at some point even mandatory, including the procedure for applying for preliminary rulings. Moreover, the State should encourage further study of this area by judges voluntarily and appoint responsible authorities to monitor compliance with the requirements. It is also vital to create an internal standard for citing and referring to the case law of the CJEU as well as apply it analytically in accordance with the specific circumstances of avoiding 'boilerplate" citations, as it happened with the European Court of Human Rights practice.[35] This can be a task for the Ministry of Justice of Ukraine or for the Government Office for Coordination on European and Euro-Atlantic Integration. Thus, upon Ukraine's accession, Ukrainian courts, by virtue

33 Kuras, "Preliminary Ruling Procedures."

34 Ibid.

35 Yaroslav Bielykh ta inshi, *Zvit za rezultatamy hromadskoho monitorynhu zastosuvannia Verkhovnym Sudom praktyky Yevropeiskoho sudu z prav liudyny* [*Report on the results of public monitoring of the Supreme Court's application of the European Court of Human Rights case law*] (USAID, Prohrama USAID «Nove pravosuddia», HO «Instytut prykladnykh humanitarnykh doslidzhen», 2019).

of a kind of "jurisdictional subsidiarity,"[36] will be able to issue judgments regarding the case law of the CJEU relevant to specific disputes, contributing to the consistent development of the legal system.

In light of this, it is necessary to remember that applying for a preliminary ruling can be a key tool for Ukrainian courts to cooperate with the CJEU, which will prevent misinterpretation of EU law by Ukrainian courts and reduce the risk of further litigation and appeals, and therefore, the level of usage of this "preventive approach" must be impeccable.

At the same time, it is indicated that cooperation between the national courts of Ukraine and the national courts of other EU Member States with respect to the peculiarities of the preliminary ruling application can be a very fruitful exercise as well. Courts of EU Member States may share their experience, which may lead to better structuring of this process in Ukraine and avoiding situations where the preliminary ruling can be used as a tool for prolonging court proceedings, i.e. abusing the right to the preliminary ruling. It would also be an interesting exercise since approaches of national courts in the EU Member States may vary. An important note is that such cooperation may be launched even before the accession since it will help Ukrainian judges to better understand the EU legal system.

2.4. Protection and Monitoring of Human Rights Compliance

One of the foundations of the EU institutions, including the CJEU, is the fulfilment of the objectives set out in Article 2 TEU, such as "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights". Moreover, under Article 6 TEU, the EU Member States are obliged to protect and respect the principles as well as recognized rights and freedoms enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union. Indeed, the CJEU in *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* highly emphasized the value of fundamental rights protection, which

[36] Lasserre, "National Courts and the Construction of Europe," 52; see also: Julie Dupont-Lassalle, "La «subsidiarité juridictionnelle», instrument de l'intégration communautaire?," *Droit et Société* 80, no. 1 (2012): 47, accessed June 25, 2023, https://www.cairn.info/revue-droit-et-societe1-2012-1-page-47.htm?ref=doi.

should be considered as "an integral part of the general principles of law" which should be followed by the Member States.[37]

In this area, the CJEU also reviews whether EU standards and State measures constitute a proportionate interference with human rights. For example, in accordance with Article 8(3)(e) of Directive 2013/33,[38] which sets out the standards for the reception of persons seeking international protection, an applicant may be detained when the protection of national security or public order requires it. Moreover, in *J. N. v. Staatssecretaris van Veiligheid en Justitie*, the CJEU concluded that the EU, in adopting the above provision, had achieved a fair balance between the individual's right to liberty and the requirements for the protection of national security and public order.[39] However, such intervention will be proportionate only if the competent national authorities verify the level of threat posed by specific individuals.[40]

Additionally, the case of *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* is also worth mentioning as the CJEU emphasized the State's liability for loss and damage caused to individuals as a result of the State's violation of the EU law.[41]

In this context, it is worth mentioning that even though international law is not characterized by the principle of a direct effect of legal norms,[42] in its practice, the CJEU did develop the possibility for individuals and legal entities to directly refer to the provisions of EU acts before national courts, even without the provisions' implementation in national legislation.[43]

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37 CJEU Judgment of 14 May 1974, J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities, Case 4–73, ECLI:EU:C:1974:51, para. 13.

38 European Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, accessed June 10, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033.

39 CJEU Judgment of 15 February 2016, J. N. v. Staatssecretaris voor Veiligheid en Justitie, Case C-601/15, ECLI:EU:C:2016:84, para. 67.

40 Ibid., para. 69.

41 CJEU Judgment of 19 November 1991, Andrea Francovich and Danila Bonifaci and others v. Italian Republic, Case C-6/90 and C-9/90, ECLI:EU:C:1991:428, paras. 36–7.

42 Tetiana Komarova, "Vplyv Sudu YeS na konstytutsionalizatsiiu prava Yevropeiskoho soiuzu," 199.

43 CJEU Judgment of 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, Case 26–62, ECLI:EU:C:1963:1;

The CJEU established this principle in the case of *Van Gend en Loos v. Nederlandse Administratie der Belastingen.* In this case, the transport company had to pay customs duties established by national legislation when importing goods; however, the CJEU, applying the principle of direct effect of legal norms, found that such payment of duties was illegal under Article 12 of the EEC Treaty and guaranteed the transport company protection under European law.

In view of this, even if the legislation of Ukraine as a future EU Member State contains incompatible provisions that differ from the requirements of the EU legal framework, individuals and legal entities may apply to national courts to restore the guarantees they have been given based on the doctrine of direct effect of norms introduced by the CJEU. Moreover, because of this practice, Ukraine will be obliged to strictly comply with the provisions of the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, as the CJEU has opened up the possibility of individuals to sue the State itself for damages for non-compliance with the guarantees set out in the EU norms. However, it is worth noting that this approach requires a significant time resource, and thus, during the negotiations, Ukraine should emphasize the necessity for long transition periods for obligations that it may not be able to fulfil objectively, in particular due to the consequences of the war.

2.5. CJEU Decisions as an Effective Response to Challenges

In addition to the development of classical industries, the CJEU does not ignore the current challenges. In 2022, the Court received 1710 cases covering sensitive areas requiring special attention.[44] These include cases related to the healthcare crisis or the war in Ukraine. Indeed, recently, the CJEU delivered a judgment in the case of *Robert Roos and Others v. Parliament*,[45] which concerns the legality of restrictions imposed by the EU institutions

Donna Starr-Deelen and Bart Deelen, "The European Court of Justice as a Federator," *Publius: The Journal of Federalism* 26, no. 4 (1996): 84, accessed June 25, 2023, https://academic.oup.com/publius/article-abstract/26/4/81/1884830?redirectedFrom=fulltext.

44 The Court of Justice of the European Union, "Annual Report 2022: The Year in Review," 5.

45 CJEU Judgment of 27 April 2022, Robert Roos and Others v. Parliament, Case T-710/21 and T-722/21, ECLI:EU:T:2022:262.

to protect the health of their employees due to Covid-19, which the Court found necessary, sufficient and proportionate.

Moreover, the CJEU did not avoid the tragedy of the military aggression launched against Ukraine by the Russian Federation on February 24, 2022. In *RT France v. Council*[46] of 27 July 2022, it was established that the EU reacted to the invasion, inter alia, by imposing sanctions on the Russian Federation, including the prohibition of media outlets (e.g. RT France) promoting Russian propaganda. The General Court established that since RT France was funded from the Russian state budget, the lawful and proportionate restriction of the channel's activities is aimed at protecting public order and security in the EU, which are threatened by the systematic propaganda campaign launched by Russia, as well as at protecting the values, interests and security of the EU, consolidating and supporting democracy, peace, etc.[47]

Therefore, this approach of the CJEU, even before Ukraine accedes to the EU, will form a safe "pillow" for the future practice of the Member States, aimed to protect them from unlawful interference. For Ukraine, after its accession, it will be a powerful tool that will speed up the recovery and post-war legal reconstruction.

3. Ukraine's Effect on the CJEU

Last but not least, it is necessary to emphasize that Ukraine's accession to the EU will revive the concept of a "wider Europe" and the idea of a European political community to address issues of common interest on which the European Council held a strategic discussion in 2022.[48] However,

46 CJEU Judgment of 27 July 2022, RT France v. Council of the European Union, Case T-125/22, ECLI:EU:T:2022:483.

47 Ibid., paras. 49, 59, 239.

48 European Council, "Conclusions on Wider Europe, Ukraine, the Membership Applications of Ukraine, the Republic of Moldova and Georgia, Western Balkans, Economic Issues, the Conference on the Future of Europe and External Relations," EUCO 24/22, 2022, accessed October 15, 2023, https://www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf; Barbara Lippert, "The EU and the Second Large-Scale Eastern Enlargement – Déjà Vu and Innovations," in *Ukraine's Possible EU Accession and Its Consequences*, ed. Nicolai von Ondarza (German Institute for International and Security Affairs (SWP), 2022), accessed October 15, 2023, https://www.swp-berlin.org/en/publication/ukraines-possible-eu-accession-and-its-consequences#table-of-contents.

it will put an additional burden on the EU structure and institutions. Indeed, Ukraine, after it accedes to the EU, will have a significant impact on the CJEU from a variety of perspectives.

3.1. Number of Judges

As stated in Article 19(2) TEU, the Court of Justice consists of one judge from each Member State,[49] forming a total of 27 judges. In Article 48(c) of the Statute of the Court of Justice of the EU, it is established that the General Court consists of two judges from each Member State.[50] However, Member States may not manage to appoint judges immediately: for example, after the expiry of the term of Marko Ilešič, the General Court judge from Slovenia, the State was unable to elect new representatives for several years.[51] Therefore, Ukraine, as an EU Member State, after consultation with the body responsible for giving an opinion on the suitability of potential candidates to perform the relevant functions,[52] will be able to appoint one judge to the Court of Justice and two judges to the General Court. This issue may be addressed and mediated starting today by preparing a reserve of cadres ready to fulfil necessary positions.

3.2. Advocate-General

According to Article 252 TFEU, the role of the Advocate-General, who is acting with complete impartiality and independence, is to make reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the EU, require the Advocate-General's involvement.[53] There-

49 Consolidated Version of the Treaty on European Union [2012], OJ C 326/27.

50 Article 48(c) of the Protocol (No. 3) to the TFEU on the Statute of the Court of Justice of the European Union [2016], OJ C 202/220; Court of Justice of the European Union, "Court of Justice of the European Union: Ensuring the Protection of EU Law, Publications and Electronic Media Unit, 2023, accessed October 15, 2023, https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cour_garante_qd-03-20-178-en-n.pdf.

51 Camille Frati and Lex Kleren, "Slovenian Enigma at the Court of Justice of the EU," Lëtzebuerger Journal, November 24, 2022, accessed August 9, 2023, https://journal.lu/en/slovenian-enigma-court-justice-eu.

52 Council of the EU, "EU Court of Justice: Nine Judges of the General Court Appointed," Press release 997/21.

53 Consolidated Version of the Treaty on the functioning of the European Union [2012], OJ C 326/47.

fore, the Court of Justice is assisted by eleven Advocates-General[54] and on the Court's request, the number of Advocates-General may be increased. The largest Member States (based on the population) have permanent Advocates-General, and the remaining posts are rotated among the other Member States based on alphabetical order.[55] Since 2020, after the United Kingdom's withdrawal from the EU, Germany, France, Italy, Spain, and Poland have had permanent Advocates-General. Therefore, if Ukraine, upon accession, has a population comparable to the population of Poland, it will become one the largest Member States, which are allowed to have a permanent Advocates-General in the CJEU. In any case, this issue will definitely be a matter of negotiations, even though the presence of such an Advocate-General would allow the EU to better "absorb" Ukraine.

3.3. Caseload from Ukraine

The hypothesis is that in the first years after Ukraine's accession to the EU, the CJEU will receive a record number of cases. There will be several reasons for this influx of cases, which are as follows. Firstly, the CJEU practice covers many areas of law, thus using the procedure of preliminary rulings, Ukrainian national courts will want to receive the Court's opinions for further application and development of national practice. Secondly, already in 2022, there are cases concerning the war in Ukraine,[56] and therefore, we should continue to expect an increase in applications relating to it, both from Ukraine and other Member States. Thirdly, according to statistics, the largest number of references for a preliminary ruling by Member State (2018–2022)[57] come from the most populated and largest EU countries (Germany, Spain,

54 Declaration on Article 252 of the TFEU regarding the number of Advocates-General in the Court of Justice in Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 [2016], OJ C 202/335.

55 Rafał Mańko, *Role of Advocates General at the CJEU* (Briefing, European Parliamentary Research service 2019), 2–3; Joint Declaration on Article 31 of the Decision adjusting the instruments concerning the accession of the new Member States to the European Union [1995] OJ L1, 221.

56 The Court of Justice of the European Union, Annual Report 2022: The Year in Review, 56.

57 "General Activity of the Court of Justice (2018–2022)," CURIA, 2023, accessed August 9, 2023, https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/stats_cour_2022_en.pdf.

Italy, etc.), thus considering the total area and population of Ukraine, it will also be among the leaders in applications. Fourthly, the largest number of cases filed to the European Court of Human Rights in 2022 were against Ukraine. European Court of Human Rights issued 144 judgments in cases against Ukraine, 141 of which recognized at least one violation.[58] Consequently, given the negative impact of the war and human rights violations, as well as the overall level of development of the State, there will be more cases from Ukraine compared to the founding members of the EU.

4. Ukraine's Steps towards the Development of an Independent Judicial System Eligible for the Further Implementation of CJEU Decisions

An indirect impact of the CJEU can be noted in judicial reform conducted by Ukraine as well as other steps which Ukraine will take before the accession. Particularly, Ukraine will have to establish an efficient system of the CJEU decision enforcement, which may arguably include amending the Constitution of Ukraine and existing laws, including the Law of Ukraine on the Constitutional Court of Ukraine, adoption of special legislation, defining the responsible authority, and providing efficient cooperation with the EU.

It is argued that the Constitution of Ukraine most probably would need to be amended, potentially providing for the direct effect of the EU law as well as certain institutional changes like the establishment of an impartial judicial system and empowering certain administrative bodies with powers to execute CJEU decisions. Such changes arguably will need to take place before the accession, and in this way, the CJEU has influenced the Ukrainian legal order so far. However, the exact form and shape of such changes certainly will be a matter of political and diplomatic consensus. For this purpose, we consider the following steps which Ukraine may potentially take.

1. Potential amendment of the Constitution of Ukraine and current laws, particularly in the area of Ukraine Constitutional Court and national court's functioning. As the recent national cases of the EU Member

[58] "Violations by Article and by State in 2022," European Court of Human Rights, 2023, accessed August 9, 2023, www.echr.coe.int/documents/d/echr/Stats_violation_2022_ENG.

States show, constitutional courts tend to support the idea of constitutional primacy, which can be considered by the EU institutions as a way of not complying with CJEU decisions and Community law.[59] Indeed, the Constitutional Court of Romania, in its Decision No. 390/2021, retreated from the position that the priority of the Constitution is a limitation of the rule of EU law and developed the doctrine of "national constitutional identity".[60] Analysing a similar decision of the Hungarian Constitutional Court in 2016, Gábor Halmai concluded that there is a tendency for the State to "abuse" constitutional identity for merely national purposes, leading to evasion of its obligations under European law.[61]

Member States could also establish a rather strict framework for the EU's influence on them. For instance, the conservative interpretation of the Estonian Constitution requires mandatory amendments and a referendum if Estonia decides to join political, economic, and military associations of states, in particular, to protect the sovereignty of the State.[62] Therefore, for reasons of further clarity, a number of experts recommend including provisions on the direct applicability of the EU law.[63]

Considering the Ukrainian constitutional approach is as strong as the Estonian one, conducting the accession procedure with the most legitimate and transitional means is recommended. In our opinion, after joining the EU, Ukraine should take measures to prevent abuses of the "national constitutional identity" concept at the same time allowing for the demonstration of the will of the Ukrainian people via constitutional supremacy.

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59 Renáta Uitz, "National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades," Verfassungsblog, 11 November 2016, accessed October 13, 2023, https://verfassungsblog.de/national-constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/.

60 Constitutional Court of Romania, 08 June 2021, 390/2021 (Romania), accessed October 15, 2023, https://www.ccr.ro/wp-content/uploads/2021/07/Decizie_390_2021_EN.pdf.

61 Gábor Halmai, "National(ist) Constitutional Identity?: Hungary's Road to Abuse Constitutional Pluralism," *EUI Department of Law Research Paper*, no. 8 (2017), accessed October 13, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2962969.

62 Anneli Albi, "Estonia's Constitution and the EU: How and to What Extent to Amend It?," (2002) VII *Juridica International*, no. 7 (2002): 42, accessed October 15, 2023, www.juridicainternational.eu/article_full.php?uri=2002_VII%20_39_estonias-constitution-and-the-eu-how-and-to-what-extent-to-amend-it.

63 Ibid., 48.

To achieve this, it is necessary not only to harmonize national legislation with European one but also to amend the Constitution of Ukraine and laws clearly enshrining the primacy of EU law. Such an approach would make it impossible to make political decisions that would be justified by the supremacy of the national constitution and abuse the goals and interests of the EU as a whole. Moreover, the establishment of the short-term transitional period after Ukraine's accession will enable the Constitutional Court of Ukraine to review the national legislation for compliance with EU standards and provide explanatory opinions for this approach. As soon as Ukrainian judges reach a sufficient level of knowledge, national courts themselves will be able to apply the primacy of EU law and not apply provisions of national legislation that contradict it.

2. Adoption of the specific law. In order to ensure qualified legislation to regulate the relations with the CJEU based on the example of the Law of Ukraine on the Fulfilment of Decisions and Application of Practice of the European Court of Human Rights, a special law could be adopted to regulate relations arising from the State's obligation starting with the procedure of the Court's preliminary rulings into Ukrainian legal proceedings and ending with the description of the mechanism of the CJEU's judgments execution.[64]

Referring to the aforementioned Law of Ukraine on the Fulfilment of Decisions and Application of Practice of the European Court of Human Rights, the obligation to enforce ECHR judgments is entrusted to the Division of Enforcement of Judgments of the Department of State Enforcement Service of the Ministry of Justice of Ukraine. This body or a similar one may also be obliged to implement and execute the CJEU's decisions and guidelines. In this regard, it is important to establish a special body tasked with tracking compliance by courts with the requirements set out in the CJEU's decisions, preparing reports on the application of the practice and monitoring the implementation of the EU court decision. The latter function could be performed in cooperation with European representatives. For this

64 Pro vykonannia rishen ta zastosuvannia praktyky Yevropeiskoho sudu z prav liudyny [On the Fulfilment of Decisions and Application of Practice of the European Court of Human Rights]: Zakon Ukrainy [Law of Ukraine] vid 2 hrudnia 2012 r., No. 3477-IV, accessed August 9, 2023, https://zakon.rada.gov.ua/laws/show/3477-15#Text.

purpose, it is advisable to enshrine the provisions on exchanging information with EU experts, seeking advice and sending implementation reports.

3. Ensuring a highly independent and impartial judicial system. Due to the dual role of national courts, which are called upon not only to resolve disputes under national law but also to apply EU law, they must always be independent, as required by Article 19(1) TEU.[65] It is worth mentioning Ukraine is on the way to fulfilling this obligation: in 2014, Ukraine launched a judicial reform to bring its judicial system in line with European standards and ensure the protection of human rights through the settlement of legal disputes based on the rule of law. Since then, several independent judicial bodies have been established, including the High Council of Justice, which submits proposals for the appointment or dismissal of judges; the Ethics Council, which reviews all candidates to the High Council of Justice for compliance with the criteria of professional ethics and integrity; the High Qualification Commission of Judges which provides mandatory qualification assessment of judges, etc. At the end of June 2023, the European Commission noted Ukraine's positive steps in judicial reform and recommended that Ukraine should focus on continuing the reform of the Constitutional Court of Ukraine.[66] According to the Presidential Strategy for the Development of the Justice System and Constitutional Justice for 2021–2023, Ukraine still has a number of goals, including reorganization of local courts, development of the anti-corruption control system, development of alternative and pre-trial dispute resolution, establishment of the High Court of Intellectual Property, etc.[67] Still, Ukrainian and European experts believe

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65 Sacha Prechal, "Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?," in *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1*, eds. Matteo Bonelli, Mariolina Eliantonio and Giulia Gentile (Hart Publishing, 2022), accessed October 15, 2023, https://www.bloomsburycollections.com/monograph-detail?docid=b-9781509947973&tocid=b-9781509947973-chapter1.

66 European Pravda, "European Commission Acknowledges Ukraine's Progress in Implementing 'Candidate' Recommendations," June 22, 2023, accessed October 15, 2023, www.eurointegration.com.ua/eng/news/2023/06/22/7164201/.

67 Pro Stratehiiu rozvytku systemy pravosuddia ta konstytutsiinoho sudochynstva na 2021–2023 roky [On the Strategy for the Development of the Justice System and Constitutional Justice for 2021–2023], Ukaz Prezydenta Ukrainy [Decree of the President of Ukraine], vid 11.06.2021, no. 231/2021, accessed October 15, 2023, https://zakon.rada.gov.ua/laws/show/231/2021#Text.

that these goals are realistic even in the context of the war with Russia.[68] Ukraine is obliged to promptly complete the judicial reform in order to fulfil European Commission requirements and further develop Ukrainian judicial institutions as independent and impartial bodies.

5. Conclusions

Summing up the above-mentioned information, it is essential to emphasize that prior to Ukraine's accession, the CJEU as an institution already has an impact on the Ukrainian legal order, and such impact will increase upon the start of the negotiations culminating in the influence it has on other EU Member States.

The CJEU is an efficient and effective EU institution. After Ukraine's accession to the EU, it will be the Court's case law that will help the State to harmonize its legislation and bring it in line with EU standards through the application of precedents by national courts and legislative bodies, as well as the Court's de facto status of an additional supervisory body in Ukraine.

In addition, the CJEU will actively cooperate with national courts by providing preliminary rulings on the interpretation or application of EU law upon request. In this context, it is Ukraine's responsibility to familiarize judges with the peculiarities of this procedure through training programmes and ensure that judges will actively apply the CJEU's case law in their decisions, as well as to ensure the implementation of the Court's decisions at the national level by adopting the relevant legislative framework and designating a responsible authority.

Moreover, having developed the concept of the direct effect of legal norms, the CJEU guaranteed the possibility for individuals and legal entities to apply directly to the courts on the basis of EU acts, and thus, the CJEU will stand for the protection of human rights and fundamental freedoms, allowing citizens to protect and restore their violated rights.

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68 Hromadske, "'Chymalo vyklykiv'. Yak v Ukraini prosuvaietsia sudova reforma ['A Lot of Challenges'. How Judicial Reform Is Progressing in Ukraine]," August 10, 2023, accessed October 15, 2023, https://hromadske.ua/posts/chimalo-viklikiv-yak-v-ukrayini-prosuvayetsya-sudova-reforma.

Furthermore, the Court's case law, applied by Ukrainian courts in their judgments, will become a valuable instrument for the broad development of various branches of law, in particular, in the context of the CJEU's rapid response to the current challenges caused by Russia's war against Ukraine and its consequences. Moreover, the CJEU will set standards for both current and future practices for all Member States regarding the war in Ukraine, which will become a powerful tool for the post-war reconstruction of Ukraine and define its status in the European arena.

Ukraine, in turn, as an EU Member State, will have an impact on the work of the Court through Ukrainian judges and Advocates-General who will be involved in the activities of the CJEU, increasing the number of cases considered by the Court after Ukraine's accession.

An indirect impact of the CJEU on the Ukrainian legal order can be seen via judicial reform implemented by Ukraine as well as other steps which Ukraine will take before the accession. Particularly, Ukraine will have to establish an efficient system of CJEU decision enforcement, which may arguably include amending the Constitution of Ukraine and existing laws, designating the responsible authority for the execution of CJEU judgments, as well as for cooperation with the EU.

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Beneficial Ownership – Demand for Transparency, Threat to Privacy

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Keywords:
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Abstract: The basic idea behind establishing the register of beneficial owners is to increase the transparency and accessibility of data on beneficial ownership of companies and other legal entities with the aim of ensuring the public availability of data on domestic and foreign natural and legal persons. However, the possibility of the data being accessible to the general public instead of to persons or organizations that can demonstrate a legitimate interest raised the issue of violating the principles of respect for private or family life and the protection of personal data. Consequently, this raises the question of drawing the line between contributing to the common good and fighting against money laundering and terrorist financing, on the one hand, and protecting personal data, with the possibility of their misuse, on the other. A balance as well as a response to the possibility of setting soft limits of legitimate interest that would result in the achievement of all set goals was sought in the practice of the European Court of Justice. One of the legislative solutions regarding the extent of access to data on beneficial owners for the entire public, along with the establishment of different types of registers in order to prevent money laundering and terrorist financing, is described using the example of Croatia.

1. Introduction

In order to achieve effective prevention of money laundering and terrorist financing (hereafter: ML/TF), every obliged entity shall adopt

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policies, controls, and procedures for managing and mitigating the risk of ML/TF. Their application is realized as a measure of the due diligence procedure. One of the essential measures of due diligence is to identify the beneficial owner as well as to verify the person's identity, including legal persons, trusts, companies, foundations, and similar legal arrangements, taking the necessary steps to understand the ownership and control structure of the customer.

Since the adoption of Directive (EU) 2015/849,[1] a range of data on the founders of companies and other legal entities have been available from the court register. When registering, it is mandatory to provide data on the founders of a public company, limited partnership, economic interest association, joint-stock company, limited liability company, or European company, inter alia. Despite the volume of data mandatory during the registration, it was evident that the amount of data collected was not sufficient for beneficial owner identification or prevention of their misuse for ML/TF purposes. In particular, corporations, trusts, foundations, limited partnerships and hybrid business forms, such as limited liability partnerships (LLPs) and limited liability companies (LLCs), are the corporate vehicles most commonly associated with the misuse,[2] which made the request for obtaining additional data even more significant.

With the aim of greater transparency and availability of data on beneficial ownership, Directive (EU) 2015/849 highlights the requirement to establish the register, thus ensuring the availability of data on a domestic and foreign natural and legal person(s) necessary for due diligence and detection of networks of beneficial owners or ultimate beneficiaries of legal entities or legal arrangements. The identification process is necessary,

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1 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L141, June 5, 2015).

2 Erik P.M. Vermeulen, "Beneficial Ownership and Control: A Comparative Study – Disclosure, Information and Enforcement," *OECD Corporate Governance Working Papers*, no. 7 (2013): 39, accessed March 28, 2023, https://www.oecd-ilibrary.org/docserver/5k4dkhwckbzv-en.pdf?expires=1682345213&id=id&accname=guest&checksum=A7E39B2A0AF7BEB1079DD80ED29325CB.

in addition to the prevention of ML/TF, for the general trust of the public and investors in the financial markets, which prompts the demand for the availability of data that ensures transparency regarding beneficial ownership and control structures of companies.

Transparency of data concerning tax evasion and tax fraud was achieved as well, through various mechanisms of efficient administrative cooperation between Member States, allowing tax authorities access to information, procedures, and beneficial owners' documents.

However, it is precisely the extent of the due diligence measures that raises the issue of satisfying the public's interest in relation to the set goal of preventing ML/TF and, on the other hand, the fundamental rights of customers governed by regulations related to the protection of personal data.

2. Beneficial Ownership and Establishment of the Register

Although the term "beneficial owner" was introduced by Directive 2005/60/EC,[3] to comprehensively convey its complex nature the definition from Directive 2015/849 (Article 3(6)) is cited:

> beneficial owner means any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted and includes at least:
>
> a) in the case of corporate entities:
>
> (i) the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity, including through bearer shareholdings, or through control via other means, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information (…);
>
> (ii) if, after having exhausted all possible means and provided there are no grounds for suspicion, no person under point (i) is identified, or if there is any doubt that the person(s) identified are the beneficial owner(s), the natural person(s) who hold the position of senior managing official(s); the obliged

[3] Directive (EU) 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L309, November 25, 2005).

entities shall keep records of the actions taken in order to identify the beneficial ownership under point (i) and this point;

b) in the case of trusts: (i) the settlor; (ii) the trustee(s); (iii) the protector; (iv) the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; (v) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means;

c) in the case of legal entities such as foundations, and legal arrangements similar to trusts, the natural person(s) holding equivalent or similar positions to those referred to in point (b).

Considering the complexity and breadth of the beneficial ownership concept, information is expected to be obscured using shell companies, complex ownership, and control structures involving many layers of shares registered in the name of other legal persons, bearer shares and bearer share warrants, unrestricted use of legal persons as directors, formal nominee shareholders and directors where the identity of the nominator is undisclosed, informal nominee shareholders and directors, such as close associates and family. Legal and beneficial ownership information can assist competent authorities, particularly law enforcement authorities and financial intelligence units (hereafter: FIUs), by identifying those natural persons who may be responsible for the underlying activity causing concern or who may have relevant information to further an investigation.[4] Corresponding information will be stored in the register of beneficial owners with the main goal of preventing the misuse of legal entities for the purpose of ML/TF and related predicate criminal offenses – such as corruption, fraud, tax crimes – and strengthening the transparency and availability of data on beneficial ownership.

The Financial Action Task Force (hereafter: FATF) has long indicated the threats of such abuses and, consequently, the need for transparency of beneficial ownership. From this perspective, Recommendations 24 and 25 require countries to provide access to adequate, accurate and up-to-date

4 FATF, "Beneficial Ownership of Legal Persons," Paris, France, 2023, p. 4, accessed April 24, 2023, https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html.

information on beneficial ownership and control of legal persons and arrangements.

Despite the highlighted threats associates with the misuse of legal entities for ML/TF in the period following the revision of the FATF Recommendations (under the Fourth evaluation), the FATF found that a small number of countries had achieved a substantial level of effectiveness in preventing the misuse of legal persons and arrangements. Some specific problems were identified, including:

a) insufficient accuracy and accessibility of basic information relating to company registration;
b) less rigorous implementation of due diligence measures by key gatekeepers such as company formation agents, lawyers, and trust-and-company-service providers;
c) lack of sanctions against companies that fail to update information held by national company registries, or to keep information about their shareholders or members up-to-date;
d) obstacles to information sharing such as data protection and privacy laws, which impede gaining timely access to adequate, accurate and up-to-date basic and beneficial ownership information by competent authorities.[5]

It can be considered that adequacy and accessibility of core information relating to company registration form the basis of the demand for the establishment of the register of beneficial owners while the other established issues represent challenges in the field of application: risk assessment, bearer shares, nominee shareholder arrangements, fines and sanctions, and international co-operation.[6]

The issue of a complex network of beneficial owners can be even more intricate considering the fact that proportionality between corporate ownership and control implies that each shareholder owns the same fraction of

5 FATF, "FATF Report to the G20 Beneficial Ownership," Paris, France, 2016, p. 3, accessed April 18, 2023, https://www.fatf-gafi.org/en/publications/Mutualevaluations/Report-g20-beneficial-ownership-2016.html.

6 FATF, "Best Practices on Beneficial Ownership for Legal Persons," Paris, France, 2019, p. 8, accessed April 24, 2023, https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Methodsandtrends/Best-practices-beneficial-ownership-legal-persons.html.

cash flow rights and voting rights. Security-voting structures that deviate from the principle of proportionality have sometimes caused concern: firstly, discrepancies between ownership and control may exacerbate the misalignment of the incentives for controlling and non-controlling shareholders; secondly, a separation of voting and cash flow rights may compromise the efficiency of markets for corporate ownership and control.[7]

On the issue of control, it is important to note the difference between legal ownership and beneficial ownership over a legal person. A natural person may be considered a beneficial owner due to the fact that is the ultimate owner/controller of a legal person, either through ownership interests or through the exercise of ultimate effective control by other means. While legal ownership and beneficial ownership can overlap, the legal title or controlling shareholding of a company may be in the name of an individual or a legal person other than the beneficial owner who ultimately controls the entity, directly or indirectly. Accordingly, individuals who exercise ultimate control over a legal person should be identified as beneficial owners, regardless of whether they own shares above any specified minimum ownership threshold.[8]

With regard to the primary objective of achieving accuracy, access by competent authorities and timeliness of information on beneficial ownership, Directive (EU) 2015/849 lays down comprehensive provisions for obtaining information on beneficial owners, as well as details on the ownership interests they hold. The information must be accurate and up-to-date, while ensuring its availability to competent authorities and FIUs without any restrictions, to obliged entities within the due diligence, and to the general public. The same requirement applies to trusts and other types of legal arrangements, such as *fiducie*, certain types of *Treuhand* or *fideicomiso*,

7 OECD, "Lack of Proportionality Between Ownership and Control: Overview and Issues for Discussion," OECD Steering Group on Corporate Governance, OECD, Paris, France, 2007, p. 4, accessed May 8, 2023, https://www.oecd.org/daf/ca/40038351.pdf.

8 FATF, "Beneficial Ownership of Legal Persons," Paris, France, 2023, p. 16, accessed April 24, 2023, https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html.

funds, foundations and other legal arrangements (life insurance contracts, *escrow* agreements and *nominees*.[9]

3. Demand for Greater Data Transparency

Tax evasion is one of the predicate offenses with an increasing threat from ML/TF. Within the value-added tax system, a remarkably generous *carousel fraud* appears as one of the subtypes of missing trader intra-community fraud (MTIC fraud). The effects of tax evasion on national budgets and the budget of the European Union (hereafter: EU) could be described by the estimate of direct damage caused annually by carousel fraud per 100 billion euros,[10] while the Resolution of the European Parliament (2016/2033 INI)[11] estimates its damage at 45–53 billion euros per year (the total loss of VAT revenue caused by fraud is around 170 billion euros per year).

Although value-added tax evasion has significant financial effects on the budget, other forms, which also imply concealing illegal activities and true identities, are also not negligible. Following the *Lux Leaks* and *Panama Papers* scandals, in which the perpetrators used front or shell companies for illegal purposes, the EU is taking more intensive steps to ensure the transparency of beneficial ownership through Directive (EU) 2016/2258[12] amending Directive 2011/16/EU[13] as regards access to anti-money laundering information by tax authorities, and Directive (EU)

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9 European Commission, "Report from the Commission to the European Parliament and the Council assessing whether Member States have duly identified and made subject to the obligations of Directive (EU) 2015/849 all trusts and similar legal arrangements governed under their laws," Brussels, Belgium, 16 September 2020, COM(2020) 560 final, p. 9–10, accessed April 27, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0560.

10 Denis Buterin, Nikolina Blašković, and Aidone Eda Ribarić, "Suzbijanje kružnih prijevara u cilju zaštite javnih financija Hrvatske," *Zbornik Veleučilišta u Rijeci* 2, no. 1 (2014): 91.

11 European Parliament resolution of 24 November 2016 on towards a definitive VAT system and fighting VAT fraud (2016/2033(INI)) (OJ C224, June 27, 2018).

12 Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (OJ L342, December 16, 2016).

13 Council Directive (EU) 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L64, March 11, 2011).

2018/843[14] amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of ML/FT.

Given the above, Directive 2011/16/EU reinforced the foundations for preventing tax evasion and increased tax transparency by including incomes generated from performing activities via digital platforms in multiple jurisdictions. Directive 2018/822[15] amended Directive 2011/16/EU concerning the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, while Directive (EU) 2016/2258, prescribing measures for efficient administrative cooperation between Member States and their effective monitoring, takes further steps to prevent tax evasion and fraud on a global level.

According to the provisions of Directive (EU) 2016/2258, the tax authority must have free access to all mechanisms, procedures, documents, and information of entities that carry out due diligence, information about the beneficial owner(s), as well as about protection, records, and statistical data on transactions. The same availability of information applies to direct access to the data found in the register of beneficial owners. The aforementioned changes indicate that by strengthening the provision of administrative cooperation, the efficiency of tax authorities is sought to be increased, with a positive effect on tax security.

Directive (EU) 2018/843 recognizes the specific role of tax authorities in cooperation, coordination, access, and exchange of information at the national level to develop and implement policies and activities to combat ML/TF, especially the detection, assessment, understanding, and mitigation of the risk of ML/TF.

Intending to achieve effective implementation of the above, Directive (EU) 2018/843 ensures that Member States report on the institutional structure and general procedures within their ML/TF prevention regime, including on tax authorities; ensure that tax authorities have timely and

14 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (OJ L156, June 19, 2018).

15 Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. (OJ L139, June 5, 2018).

unrestricted access to all information kept in the central register, access to information on beneficial ownership of trusts; provide effective mechanisms that enable them to cooperate and coordinate at national level regarding the development and implementation of policies and activities to combat ML/TF; do not prohibit or impose unreasonable or unduly restrictive conditions on the exchange of information or assistance between competent authorities; and, in particular, that competent authorities do not refuse a request for assistance due to the fact that it is considered to involve tax matters.

4. European Court of Justice – Two Steps Forward, One Step Back

Efficient due diligence procedures are an essential step for any entity obliged to implement ML/TF prevention measures. Pioneering efforts to achieve this goal are manifested in the first two EU Directives (91/308/EEC[16] and 2001/97/EC[17]), reducing such procedures to customer identification and verification of collected data.

Directive 2005/60/EC contains more detailed provisions initiated by the need to identify the beneficial owner. The identification includes trusts and other legal arrangements and is based on the principle of risk assessment and other appropriate measures necessary to understand the ownership and control structure of the customer.

Even then, it was doubtful that the procedure for determining beneficial ownership is very complex due to the complex structure of business relationships and business ventures within the company itself. The difficulties of tracing ultimate beneficial ownership and, even more importantly, control, make it onerous for minority investors and other stakeholders to discover and curtail self-dealing, such as asset stripping, related party transactions and share dilutions by the ultimate controlling beneficial owners.[18]

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16 Council Directive (EU) 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L166, June 28, 1991).

17 Council Directive (EU) 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (OJ L344, December 28, 2001).

18 Erik P.M. Vermeulen, "Beneficial Ownership and Control: A Comparative Study – Disclosure, Information and Enforcement," *OECD Corporate Governance Working Papers*,

Aiming to increase transparency and prevent abuse of legal entities and tax evasion, Directive 2015/849 requires the consolidation of data on beneficial owners within the register. Directive (EU) 2018/843 goes a step further and proposes the interconnection of registers, allowing access to the collected information to all Member States. Beyond any doubt, the interconnection of Member States' central registers holding beneficial ownership information through the European Central Platform established by Directive (EU) 2017/1132[19] necessitates the coordination of national systems which have varying technical characteristics.

Regardless of the stated efforts to prevent ML/TF in the context of companies and other legal entities, as well as trusts and similar legal arrangements, additional consideration should be given to personal data protection. This matter is regulated by Regulation (EU) 2016/679[20] on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and Directive (EU) 2016/680,[21] applied to the processing of personal data within the register of beneficial owners. Only personal data that is up-to-date and relates to beneficial owners should be made available, while beneficial owners should be informed of their rights in accordance with the current EU legal data protection framework.

In this respect, Directive (EU) 2018/843 expresses the attitude that, in order to ensure a proportionate approach and to guarantee the rights to private life and personal data protection, Member States should have the possibility to provide for exemptions to the disclosure through the registers

no. 7 (2013): 16, accessed March 28, 2023, https://www.oecd-ilibrary.org/docserver/5k4dkhwckbzv-en.pdf?expires=1682345213&id=id&accname=guest&checksum=A7E39B2A0AF7BEB1079DD80ED29325CB.

19 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L169, June 30, 2017).

20 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L119, May 4, 2016).

21 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L119, May 4, 2016).

of beneficial ownership information and to access to such information, in exceptional circumstances, where that information would expose the beneficial owner to a disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation.

4.1. Legitimate Interest v General Public

The European Court of Justice (hereafter: ECJ) expressed its position in the judgment on the joined cases C-37/20 C-601/20, WM (C-37/20), Sovim SA (C-601/20) v Luxembourg Business Registers.[22] In particular, the ECJ evaluated the validity of Article 1(15)(c) of Directive (EU) 2018/843, in so far as Article 1(15)(c) amended point (c) of the first subparagraph of Article 30(5) of Directive (EU) 2015/849, and the interpretation of Article 30(9) of Directive 2015/849, and of Article 5(1)(a) to (c) and (f), Article 25(2) and Articles 44 to 50 of Regulation (EU) 2016/679.

One of the disputed points considered by the judgment refers to the availability of information from the Register. Namely, amendments to Article 30 of Directive (EU) 2015/849 indicate that Directive (EU) 2018/843 intends to expand the scope of available information about the beneficial owner, binding Member States to ensure the accessibility of information in all cases to competent authorities and FIUs, without any restriction, to obliged entities, within the framework of due diligence, and any member of the general public.

Before the amendment, the aforementioned provision in Directive (EU) 2015/849 allowed access to information to any person or organization that could demonstrate a legitimate interest. The lack of a uniform definition of the term "legitimate interest" had given rise to practical difficulties, thus the European Commission considered removal of this condition as an appropriate solution. This is because, if a definition of "legitimate interest" had been proposed, it could have been expected to be applied differently in the Member States, which would have consequently lead to arbitrary decisions. Consequently, Directive (EU) 2018/843 allowed access to information about the beneficial owner to any member of the general public.

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22 CJEU Judgment of 22 November 2022, WM, Sovim SA v. Luxembourg Business Registers, Cases C-37/20 and C-601/20, ECLI: ECLI:EU:C:2022:912.

The scope of information available to the general public included the name, the month and year of birth, country of residence, and nationality of the beneficial owner as well as the nature and extent of the beneficial interest held. Directive (EU) 2018/843 went a step further and stipulated that Member States can provide access to additional information, including at least the date of birth or contact details, in accordance with data protection rules. There is another crucial amendment to Directive (EU) 2015/849 which states that in exceptional circumstances to be laid down in national law, where the access referred to in points (b) and (c) of the first subparagraph of paragraph 5 would expose the beneficial owner to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the beneficial owner is a minor or otherwise legally incapable, Member States may provide for an exemption from such access to all or part of the information on the beneficial ownership on a case-by-case basis. Member States shall ensure that these exemptions are granted upon a detailed evaluation of the exceptional nature of the circumstances.

4.2. Transparency v Personal Data Protection

In this regard, the ECJ was asked to interpret the justification of access by the entire public (with no requirement for a legitimate interest) to the data contained in the register of beneficial owners from Article 30(5) of the amended Directive 2015/849, as well as the terms "exceptional circumstances," "risk" and "disproportionate risk" as stated in Article 30(9) of the same Directive.

According to the above, the aforementioned amendments to Directive (EU) 2015/849 collide with Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (hereafter: Charter) and Article 8 of the European Convention on Human Rights, which guarantee respect for private and family life, home and communication, and protection of personal data. Under the Charter, such data must be processed fairly, for specified purposes, and based on the consent of the person concerned or on some other legitimate basis established by law.

The ECJ points out that the access by any member of the general public to the established data concerning the identity of beneficial owners effects the fundamental right to respect for private life, guaranteed by Article 7

of the Charter, it being irrelevant in this respect that the data concerned may relate to activities of a professional nature. In addition, making such data available to the general public in this manner constitutes the processing of personal data falling under Article 8 of the Charter. It should also be noted that making personal data available to third parties constitutes an interference with the fundamental rights, irrespective of the subsequent use of the information communicated. In that connection, it does not matter whether the private life-related information in question is sensitive or whether the persons concerned have been inconvenienced in any way on account of that interference.

Thereby, an unlimited number of people have the opportunity to create a profile on the material and financial situation of the beneficial owner that refers to certain personal identification data, property status, and their investments. The data can be collected, stored and distributed for any purpose, consequently creating a possibility of their misuse.

Improving the overall transparency of the economic and financial environment in the EU is conducive to the prevention of the use of the EU financial system for ML/TF. However, the proportionality of measures resulting from interference with the right to the protection of private and family life and the right to the protection of personal data requires compliance not only with the requirements of appropriateness and necessity, but also the proportionality of these measures in relation to the given purpose.

In an effort to satisfy the proportionality requirement, the ECJ considered that the access of the general public to information about beneficial owners is appropriate to contribute to the prevention of ML/TF, due to the fact that the public nature of the access and the increased transparency contribute to the establishment of an environment which is less likely to be used for the stated purposes. However, the difficulties in precise definition of the cases and conditions under which the public can access information about beneficial owners (the existence of legitimate interest), cannot justify the fact that the EU legislator foresees the access of the general public to this information.

Difficulties arise due to the exception from Article 1(15)(c) of Directive (EU) 2018/843, which allows the general public access to at least information on the name, the month and year of birth, country of residence and nationality of the beneficial owner, as well as the nature and extent of

the beneficial interest held. The ECJ considers it apparent from the use of the expression "at least" that those provisions allow for data to be made available to the public which are not sufficiently defined and identifiable. Therefore, the substantive rules governing interference with the rights guaranteed in Articles 7 and 8 of the Charter do not meet the stated requirement of clarity and precision.

Apropos the matter of concern, it can be concluded that Directive (EU) 2018/843 went one step too far. By providing access to data on real owners to the entire public, the Directive violated the principle of respect for private and family life and the protection of personal data guaranteed by the Charter and the Convention for the Protection of Human Rights and Fundamental Freedoms. However, one can only speculate about the consequences of the opinion stated by the ECJ on increasing data transparency as a basis for protecting legal entities from their abuse, as the basic mantra of Directive (EU) 2018/843.

5. Registers of Beneficial Owners in the Republic of Croatia

The Republic of Croatia imposed the obligation to establish a Register of Beneficial Owners (hereafter: Register) under the new Anti-Money Laundering and Terrorist Financing Law (2017)[23] (hereafter: AML/FT Law). The Register is a central electronic database that contains data on the beneficial owners of legal entities established on the territory of the Republic of Croatia (companies, branches of foreign companies, associations, foundations, and institutions), as well as trusts and entities equal to them, incorporated under foreign law. The Republic of Croatia or a local and regional self-government unit must not be the only founder of the aforementioned legal entities. Data from the Register are available to authorized officers of the Anti-Money Laundering Office, authorized persons in the state authorities referred to in Article 120 of the AML/FT Law, the authorized person (and deputy) of the obliged entity, as well as domestic or foreign natural and legal persons.

[23] Anti-Money Laundering and Terrorist Financing Law of 8 November 2017, Journal of Laws of 2017, item 2488.

The Ordinance on the Register of Beneficial Owners (hereafter: the Ordinance)[24] stipulates that data on the beneficial owner shall include the personal identification number of a natural person; name and surname; day, month, and year of birth; country of residence, citizenship; data on the nature and extent of beneficial ownership. Of the above data, only the name and surname, country of residence, month and year of birth, citizenship, and the nature and extent of beneficial ownership are available to the entire public (over the *e-Građani*).[25]

With regard to data availability, it is also important to point out that, under exceptional circumstances, upon the justified and substantiated requirement of a legal entity or competent authority, it is possible to restrict access to data or to a part of data on beneficial ownership if access to such data would expose the beneficial owner to a disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, abuse, violence or intimidation, or if the beneficial owner is underage or has been deprived of their business capacity.

5.1. Connection Between the Register and Risk Assessment

The importance of the Register is described by the risk assessment procedure, including an assessment of the risk factors of a country or geographical area. In accordance with the Ordinance on the process for assessing the risk of ML/TF and the method of implementing measures of simplified and enhanced due diligence,[26] one of the risk factors that the obliged entity is required to consider relates to the establishment of reliable and accessible registers of beneficial ownership.

The Register is also connected with the application of enhanced due diligence. The obliged entity should take appropriate measures regarding the higher risk associated with the business relationship. When the risk is notably high, or the obliged entity suspects that the funds do not come

[24] Ordinance on the Register of Beneficial Owners of 24 May 2019, Journal of Laws of 2019, item 1016.

[25] Ordinance on the Register of Beneficial Owners of 2 January 2020, Journal of Laws of 2020, item 11, as amended.

[26] Ordinance on the process for assessing the risk of money laundering and terrorist financing and the method of implementing measures of simplified and enhanced due diligence of 6 November 2019, Journal of Laws of 2019, item 2121.

from a legal source, the best approach to reduce the established risk is a comprehensive source analysis. The results can be verified, inter alia, by searching the company registers online to confirm the company's sales data. Enhanced due diligence measures may include analyzing all parties during the transaction, including parties that participate indirectly, and the transaction itself. Intending to analyze all parties involved in the transaction, a better understanding of their ownership structure is also necessary, particularly when their country of residence is associated with a higher risk of ML/TF or dealing with high-risk goods. The required information can be obtained from registers of beneficial owners or by searching other sources available to the public.

5.2. Peculiarities of Registers Intended for the Non-Financial Sector

In addition to the growing demand for monitoring and registering information on the beneficial ownership of companies, branches of foreign companies, associations, foundations, institutions, as well as trusts and similar legal arrangements, the Republic of Croatia has decided to respond to the need to register certain entities of the non-financial sector. The new amendments to the AML/TF Law stipulates the obligation to register and maintain its data in the Register of legal and natural persons engaged in the provision of services related to trusts and trading companies and the trade of precious metals and precious stones. Information on registration in the mentioned Register is published on the website of the Ministry of Finance, where the Register is located.

Another novelty is the Register of virtual asset service providers. A legal entity or a craftsman based in the Republic of Croatia who intends to perform some of the activities related to the provision of virtual property services must, before starting to perform these activities, be entered in the Register of virtual asset service providers maintained by the Croatian Financial Services Supervisory Agency (HANFA). The legal entity should first enter the register, whereupon the activity related to the provision of virtual property services can be registered in the Court register and the craftsman in the Crafts register.

One of the conditions for registration in the above registers is the fulfillment of the *good reputation* condition, which is one of the significant

innovations brought by the latest amendments to the AML/TF Law (2022)[27] and intends to fulfill the requirements of the *fit and proper* regime. Good reputation refers to a natural person against whom no criminal proceedings are being conducted and who has not been convicted of the criminal offenses listed in Article 9(e) of the AML/TF Law; against whom no criminal proceedings are being conducted and who has not been convicted of any of the criminal offenses under the laws of other Member States and third countries which correspond to those criminal offenses; who, as a legal representative, has not seriously or systematically violated the provisions of the AML/TF Law; and who is not an associate of a person convicted of the offence of ML/FT. If the above conditions are not met, the competent authority will reject the request for registration.

6. Conclusion

The concept of beneficial ownership as a significant factor in the fight against ML/TF is complex. It improves in parallel with the development of the ML/TF prevention system, with numerous possibilities for providing accuracy, adequacy, and accessibility of core information relating to company registration. In addition to the undoubted advantages of access to the required information in order to conduct due diligence, there is the need to limit their availability to a specific audience of the general public.

The judgment of the ECJ in the joined cases WM and Sovim SA v. Luxembourg Business Registers testifies that unrestricted access by the general public is neither a necessary measure to prevent ML/TF nor a proportionate one. Therefore, it cannot justify a serious interference with the right to respect for private life and the protection of personal data. In other words, any exceptional provision of access to information on beneficial ownership to the general public raises the question of harmony between, on the one hand, the requirements for data transparency in the general interest and, on the other hand, the protection of fundamental human rights and personal data from the risk of abuse. Therefore, the advantages of the beneficial owners' register, in an unlimited form, will primarily benefit the public authorities and credit or financial institutions, which are essential for

[27] Anti-Money Laundering and Terrorist Financing Law of 22 December 2022, Journal of Laws of 2022, item 2335.

preventing illegal activities – money laundering, terrorist financing, and other forms of financial fraud.

Although the register opened a Pandora's box of violations of certain principles whereon the Community acquis rests, Croatia welcomed its establishment with long-awaited longing. Particularly significant is the provision that defines the criteria of *good reputation* as a condition for inclusion in the register of beneficial owners, as well as in the new types of registers introduced by the latest amendments to the Croatian legislation, with the aim to fulfill the role of Gatekeeper of their credibility.

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Energy Exchange, Association Agreement with the European Union and Legal Challenges for the Georgian Energy Law

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Abstract: Georgia signed an Association Agreement with the European Union in 2014, and this launched a process of approximation and harmonization with EU law. Energy law is one of the most important areas, which has to be developed and modified in accordance with the EU directives, regulations and rules of the Energy Community. Georgia took responsibility for establishing the energy exchange system and reorganizing the Georgian electricity market on a new model. In fact, these issues have not been studied, as they require, on the one hand, a very in-depth, practical knowledge of the issue and, on the other hand, erudition in the issues of legal approximation and information about the obligations assumed by the association agreement. The purpose of the article is to review the legislative regulations on the Georgian electricity market, the legal framework that defines the main principles of the market, the basis of operation, and sociopolitical and legal mechanisms of market stability. In the article, special attention will be paid to the status of the energy exchange in Georgia, its concept, its legal basis, problematic issues related to its implementation, and the future perspective. As a result of the analysis of the issues, based on the evaluation of the existing problems, the necessary legal ways of the development of energy law and the mechanisms promoting harmonization with the laws of the European Union are determined.

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1. Introduction

A turning point in the development of Georgian law was played by the 2014 Association Agreement with the European Union, by which the state undertook legal obligations both in the direction of reforming the legal system in general and in particular fields of law.[1] Of course, the process of approximation is quite long and time-consuming. There are many sources of EU law to be considered, and the domestic legislation of Georgia needs to be brought into compliance with them. In this area, special importance was given to the direction of energy law, which is not only a strategically important field for the state and the European Union (both from the economic and security point of view, especially due to the current Russo-Ukrainian war and the significant dependence of Georgia's electric energy on Russia[2]) but also directly derives from the package of the association agreement, from the agreement with the European Atomic Energy Community and their member states. The mentioned agreement provided for Georgia's membership in the Energy Community and, accordingly, the implementation of the directives within the framework of the negotiations on the membership of the Energy Community, and in case of failure of the negotiations, within the time limits agreed with the Association Council.[3] It is worth noting the reference to energy-related issues in the association agreement that, in case of conflict, the provisions of the Energy Community Treaty or the provisions incorporated into EU law by virtue of the Energy Community Treaty.[4] Taking this into account, the ongoing and planned reform of energy law enjoys special attention and status in the process of harmonization with EU law.

Georgia has enjoyed the status of "observer" in the European Energy Union since 2007. Although it has always strived to join the European

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1 See: Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (OJ L 261/4, 30 August 2014).

2 See: "Georgia's Economic Dependence on Russia: Impact of the Russia-Ukraine War," February 22, 2023, accessed September 25, 2023, https://transparency.ge/en/post/georgias-economic-dependence-russia-impact-russia-ukraine-war-1.

3 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (OJ L261/4, 30 August 2014), Annex XXV.

4 Ibid., Article 218.

family, this was facilitated by the interest expressed by the European Union itself in the Southern Energy Corridor, which made it possible for Georgia to be granted an exception after Georgia's official application to join the Energy Union in 2013. On October 14, 2016, the Protocol Concerning the Accession of Georgia to the Treaty Establishing the Energy Community was signed at the European Energy Union held in Sarajevo at the ministerial meeting, and Georgia became a member of the European Energy Union.[5] Regardless of political aspirations, due to its geographical location, Georgia remains isolated from the union market and does not have the opportunity to create a unified regulatory system with neighboring states. Therefore, Georgia cannot fully benefit from certain provisions of the Energy Community Agreement, which is why Georgia was allowed certain exceptions from the agreement.[6]

The protocol takes into account the directive on the common rules for the internal electricity market, which establishes the main principles regarding the formation of a competitive market, unhindered access to the network, unbundling, rights and duties of the regulator and market participants.[7] It is also necessary to take into account the European regulations, which establish the minimum requirements regarding the generation, transportation and consumption of electricity, which must be available to market participants, and also prohibit manipulations that affect the wholesale energy markets and ensure the proper functioning of these markets.[8]

Considering the specifics of energy law, the legal characteristics of approximation and the practical implementation of legislative changes as a result of the assumed obligations are related to a number of practical problems. One of the most important of these obligations is the establishment

5 Protocol Concerning the Accession of Georgia to the Treaty Establishing the Energy Community, 14 October 2016.

6 Ibid.

7 Directive of the European Parliament and of the Commission No. 2009/72/EC concerning Common Rules for the Internal Market in Electricity and Repealing Directive 2003/54/EC (OJ L 211/55, 14 August 2009).

8 Commission Regulation (EU) No. 543/2013 on Submission and Publication of Data in Electricity Markets and Amending Annex I to Regulation (EC) 714/2009 (OJ L 163/1, 15 June 2013); Regulation (EU) of the European Parliament and of the Commission No. 1227/2011 on Wholesale Energy Market Integrity and Transparency (OJ L 326/1, 8 December 2011).

of the energy exchange system and the reorganization of the Georgian electricity market on a new model. In fact, these issues have not been studied, as they require, on the one hand, a very in-depth, practical knowledge of the issue and, on the other hand, erudition in the issues of legal approximation and information about the obligations assumed by the association agreement. The purpose of the article is to review the legislative regulations on the Georgian electricity market, the legal framework that defines the main principles of the market, the basis of operation, and sociopolitical and legal mechanisms of market stability. In the article, special attention will be paid to the status of the energy exchange in Georgia, its concept, its legal basis, problematic issues related to its implementation, and the future perspective. As a result of the analysis of the issues, based on the evaluation of the existing problems, the necessary legal ways of the development of energy law and the mechanisms promoting harmonization with the law of the European Union are determined.

2. Georgian Electricity Market

The basis for the formation of the Georgian electricity market was the Law of 27 June 1997 on Electricity and Natural Gas of Georgia and the Electricity (Capacity) Market Rules approved on the basis of this law,[9] which provided regulations for both electricity retail and wholesale trade.[10] However, the mentioned regulation was essentially different from the European market model and required the formation of a new market model.[11] In accordance with the European model, the energy exchange is a certain trading area, a platform where offers are collected and compared in the short term (day-ahead and intraday trading[12]).[13] The "target model" for the EC is a day-ahead market on the exchange: to allocate capacity between trading zones in

9 Order N77 of 30 August 2006 of the Minister of Energy of Georgia.

10 The Electricity (Capacity) Market Rules, Chapter II (Adopted by Order N77 of 30 August 2006 of the Minister of Energy of Georgia).

11 Akaki Gatserelia, "Legislative Tendencies of Europeanisation of the Georgian Electricity Market," *Journal of Law*, no. 1 (2020): 30.

12 Regulation of the European Commission No. 2015/1222 on Establishing a Guideline on Capacity Allocation and Congestion Management (OJ L 197/24, 24 July, 2015).

13 Tim Schittekatte, Valerie Reif, and Leonardo Meeus, *The EU Electricity Network Codes* (Florence: European University Institute, 2020), 27.

the short term through auctions and to complement the market in a kind of forward long-term bilateral contracts insofar as they allow for adjustments from a generation or user perspective.[14] Trading based on bilateral agreements (OTC market) is different from trading on the exchange – the parties to the contract usually agree on a long-term period to buy and sell electricity at a fixed price under certain conditions.[15] For example, Germany trades through long-term bilateral agreements, unlike other European countries that prefer an organized market (exchange).[16] Market participants have no obligation to buy or sell electricity on the exchange, and in many cases, market participants trade on the exchange to adjust the volumes stipulated in the power contracts, as it is difficult to predict in advance the volume of electricity they will need in a particular period.

Market liquidity is determined by the ability to trade quickly (buy/sell) without significantly affecting prices.[17] The market of bilateral contracts in Europe is characterized by low liquidity.[18] In turn, market operators in national or regional markets, in cooperation with the transmission system operator (TSO), provide day-ahead and intraday trading, pairing of market participants. Their task is to receive nominations, publish prices according to the results[19] and settle the contracts concluded as a result of trade.[20] A reference price is formed on the exchange, which, in many cases, determines the price of long-term contracts.[21]

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14 Ibid., 26.

15 Fred Espen Benth, Jūratė Šaltytė Benth, and Steen Koekebakker, *Stochastic Modelling of Electricity and Related Markets* (Singapore: World Scientific Publishing, 2008), 8–11.

16 *An Electricity Market for Germany's Energy Transition*, White Paper by the Federal Ministry for Economic Affairs and Energy (Berlin: Federal Ministry for Economic Affairs and Energy (BMWi), 2015), 44–5.

17 Nathan Foley-Fisher, Stefan Gissler, and Stéphane Verani, *Over-the-Counter Market Liquidity and Securities Lending* (Washington, D.C.: Board of Governors of the Federal Reserve System (U.S.), 2019), 2–3.

18 Ibid.

19 Regulation (EU) of the European Parliament and of the Council No. 1227/2011 on Wholesale Energy Market Integrity and Transparency (OJ L326/1, 25 October 2011).

20 Regulation of the European Commission No. 2015/1222 on Establishing a Guideline on Capacity Allocation and Congestion Management (OJ L197/24, 24 July 2015), Article 7.

21 Tobias Paulun, "The Reference Prices Established by the Exchange Increase Transparency in the Energy Markets and Strengthen the Participants' Confidence in the Trading Process," accessed September 25, 2023, https://www.eex.com/en/markets/trading-ressources/indices.

The situation in the energy market was radically changed by the Russo-Ukrainian war, which caused a sharp rise in prices.[22] Regulated exchanges operating in wholesale energy markets ensure price stability and meet energy demand.[23] Access to transparent liquidity and price flexibility, which the energy exchange provides, is especially important in a crisis. Investors are interested in whether the market price established on the exchange is sufficient for the return on the investment.[24] This is crucial for existing investors in Georgia, especially for wind and solar plants that do not have a guaranteed power purchase agreement with the state.[25] In order to attract investors, it is recommended the state does not artificially intervene and determine the price of electricity. It is important from the state side to offer an effective mechanism to support the development of renewable energy sources.[26]

3. Creation of the Energy Exchange of Georgia

3.1. Agreement Approximation and Legislative Changes

The reform of the electricity market in Georgia has been implemented since 2019.[27] The legislation of Georgia establishes the general legal framework for the generation, transmission, distribution, supply and trade in the electricity sector with a view to promoting the establishment, opening, development

22 "Russia's War on Ukraine Fuels Energy Crisis," accessed September 25, 2023, https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733643/EPRS_BRI(2022)733643_EN.pdf; "Impact of Russia's Invasion of Ukraine on the Markets: EU response," accessed September 25, 2023, https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/impact-of-russia-s-invasion-of-ukraine-on-the-markets-eu-response/#energy.

23 See: Michael Pollitt, Nils-Henrik von der Fehr, Catherine Banet, and Bert Willems, *The European Wholesale Electricity Market: From Crisis to Net Zero* (Centre on Regulation in Europe Report, 2022).

24 *Legal Frameworks for Renewable Energy*, Policy Analysis for Development and Emerging Countries (Hochheim am Main: W.B. Druckerei GmbH, 2012), 20.

25 "Power Purchase Agreements (PPAs) and Energy Purchase Agreements (EPAs)," accessed September 25, 2023, https://ppp.worldbank.org/public-private-partnership/sector/energy/energy-power-agreements/power-purchase-agreements.

26 Georgian Law No. 5652-რს of 20 December 2019 on Promoting the Generation and Consumption of Energy from Renewable Sources.

27 Started with Order No. 1–1/605 of 24 December 2018 of the Minister of Economics and Sustainable Development of Georgia; Georgian Law No. 5646-რს on Energy and Water Supply of 20 December 2019.

and integration of a proper, transparent and competitive electricity market.[28] It also establishes the legal basis for further implementation of EU directives and regulations. In addition, the Law of Georgia on Competition establishes the principles for protecting free and fair competition from unlawful restrictions in order to create a basis for the development of free trade and a competitive market, as well as defines the actions unlawfully restricting free trade and competition and the legal basis for the prevention and elimination of the distortion of free trade and competition.[29] One of the main components of the Law on Energy and Water Supply is the concept of a new model of the electricity market, which defines the general principles of the organization and operation of the wholesale electricity market,[30] approved in 2020.[31] The establishment of organized electricity markets includes competitive electricity markets, such as a day-ahead market, intraday market, balancing and auxiliary markets,[32] as well as the market of bilateral agreements,[33] which is not a segment of the organized market in Georgia.[34] Trade in the organized market is regulated by the Electricity Market Rules and includes both the day-ahead and intraday electricity market rules, as well as the rules of the electricity balancing and auxiliary services market, which are approved by the Georgian National Energy and Water Supply Regulatory Commission upon submission by the relevant market operator.[35] The electricity market rules define the basic rules and procedures of wholesale trade, as well as detail trading on regulated day-ahead and intraday markets and financial settlements of these segments.[36] The day-ahead market and the balancing and ancillary services markets significantly change the rules of the game in the wholesale market and are likely to have a major impact

28 Georgian Law No. 5646-რს on Energy and Water Supply of 20 December 2019, Article 1.

29 Georgian Law No. 2159 of 21 March 2014 on Competition, Article 1(1)(2).

30 Ordinance No. 246 of 16 April 2020 of the Government of Georgia, Article 1.

31 Ibid.

32 Gatserelia, "Legislative Tendencies," 40–1.

33 Ibid., 46–7; Georgian Law No. 5646-რს on Energy and Water Supply of 20 December 2019, Article 3(3).

34 Mariam Machavariani, "Formation of the Georgian Electricity Market in Accordance with the EU Standards" (PhD diss., Georgian Technical University, 2021), 100.

35 Ordinance No. 46 of 11 August 2020 of the Georgian National Energy and Water Supply Regulatory Commission.

36 Ibid.

on market pricing. The operator of day-ahead and intraday markets is JSC Georgian Energy Exchange, whose equal share owners are JSC Georgian State Electrosystem and JSC Electricity System Commercial Operator.[37] The owner of the licence for operating the market of balancing and auxiliary services is JSC Georgian State Electrosystem.[38] Relevant rules regulate participation in the balancing and auxiliary services market.[39] As for the market of bilateral agreements, it is one of the segments of the wholesale market, where electricity is traded between market participants on the basis of bilateral agreements concluded by them, and the rules approved by the Commission determine the general framework of the bilateral agreement market.[40] Retail market rules regulate the relations between market participants and retail end-users in the supply, distribution and/or consumption of electricity in the retail market.[41] It is worth noting that new players have appeared in electricity trading in both the wholesale and retail markets, such as the supplier of the last alternative and the universal service provider, the trader.[42]

The concept of the market model establishes the guiding principles of the organization and functioning of the electricity market, including the general outline of the rights and obligations of the market participants and the market structure. The concept defines the general outline of the organization of public services and the stages of market opening.[43] The Wholesale Public Service Organization (WPSO) is an enterprise selected by the

37 "GENEX", accessed September 25, 2023, https://genex.ge/ka/page/senbi; "Extract from the Registry of Entrepreneurs and Non-entrepreneurial (Non-commercial) Legal Entities No. 404589432," registered on 4 December, 2019, accessed September 25, 2023, https://bs.napr.gov.ge/GetBlob?pid=400&bid=boVlyOwlsX3qmYsntmLmFLYZmXp3]0lfKxbFOksPW3CLfX7ttWM8m9[n3Eq0F]3A.

38 "Balancing Market," accessed September 25, 2023, https://www.gse.com.ge/sabalanso-bazari.

39 Ordinance No. 46 of 11 August 2020 of the Georgian National Energy and Water Supply Regulatory Commission.

40 Ibid.

41 Ordinance No. 47 of 13 August 2020 of the Georgian National Energy and Water Supply Regulatory Commission.

42 Eva Bochorishvili and Mariam Chakhvashvili, *Review of the Electricity Market* (Tbilisi: Galt & Taggart, 2019), 10.

43 Ordinance No. 246 of 16 April 2020 of the Government of Georgia.

Government of Georgia, whose public service obligations are: support of producers participating in renewable energy and guaranteed power purchase agreements and promotion of integration of their produced electricity into the organized market; support of the universal service provider by providing stable price of electricity for purchase and promoting integration into the organized market and security of supply to customers in the occupied territory of Georgia (Autonomous Republic of Abkhazia) by purchasing electricity in the organized market.[44]

3.2. Georgian Model of Energy Exchange

The main essence of the electricity market reform lies in the separation of monopolistic and competitive activities, and its ultimate goal is to have more than one supplier in the market so the regulatory commission no longer determines the final consumer tariff.[45] The concept of an organized electricity market envisages the establishment of several competitive markets where participants can buy and sell electricity at a price agreed upon the day before (day-ahead market) and/or on the same trading day (intraday market).[46] However, the market for balancing and auxiliary services consists of services that ensure the security of supply.[47] In the bilateral contract market, the parties are free to negotiate the price.[48] It is important to develop competition in these markets and establish a competitive price, which will make the market more liquid.[49] For the effective and sustainable functioning of the market, it is necessary to introduce financial mechanisms that will encourage renewable energy generation facilities in Georgia to become buyers

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44 Concept of Electricity Market Model, Article 10(1) (Adopted by Ordinance No. 246 of 16 April 2020 of the Government of Georgia).

45 "Policy Guidelines by the Energy Community Secretariat on Increasing Competition and Liquidity of Wholesale Electricity Markets, Including Power Exchanges," PG 01/2019 (Energy Community, 8 May 2019).

46 Ordinance No. 246 of 16 April 2020 of the Government of Georgia.

47 Electricity Balancing and Ancillary Services Market Rules (Adopted by Ordinance No. 46 of 11 August 2020 of the Georgian National Energy and Water Supply Regulatory Commission).

48 Ibid.

49 "Electricity Market Functions, Short Overview and Description Online Capacity-Building Material" (Energy Community, EU4Energy, March 2020), 6.

and sellers of electricity[50] and develop related businesses, such as solar panel manufacturing. The reform should qualitatively change the existing market model and establish such a market model that will set a reasonable and competitive price for both investors and consumers and promote the development of the green economy and the availability of green financing.

The concept of the market model creates the basis for the first time in the history of Georgia to determine the price of electricity in free, competitive market conditions. According to the concept, some of the generation objects are obliged to trade in a mandatory manner, and some – voluntarily.[51] Day-ahead and intraday markets operate through a trading platform, the main advantage of which is the minimization of manipulations by market participants.[52] All market participants are on equal terms, and the price of electricity must be determined in a fair and non-discriminatory manner. The transparent price is a prerequisite for the construction of infrastructure connecting Europe and, accordingly, the possibility of trading on European markets.

The implementation of the support mechanism for the development of renewable energy sources is related to the implementation of the organized electricity market; in particular, the Georgian government offers the investor to add to the wholesale price fixed for the relevant hour in the organized market for each kilowatt. The amount of USD 0.015 per hour of electricity, if the wholesale (equilibrium) price recorded for 1 kWh of electricity generated by the station in a given hour during the support period and sold on the organized electricity market, is less than USD 0.055.[53] The mentioned scheme has existed since 2020 and is one of the mechanisms for determining the price of electricity for the investor. However, it is not effective since the organized market has not been implemented yet, which is confusing for the investor and prevents the inflow of investments. How good

50 "Policy Guidelines by the Energy Community Secretariat."

51 "Recommendation of the Energy Community Regulatory Board on Regulatory Measures Supporting Early Implementation of Day-ahead Market Coupling in the Energy Community Contracting Parties," ECRB, 2019.

52 Anne Kirkegaard, "Would Power Exchanges Be Exempt from Competition Regulations," *European Energy Journal* 4, no. 2 (2014): 64–5.

53 Support Scheme for the Production and Use of Energy from Renewable Sources, Article 5 (Adopted by Ordinance No. 403 of 2 July 2020 of the Government of Georgia).

the mechanism is and whether it will be attractive to the investor is also difficult to say. However, setting the upper limit (USD 0.055) for investors may not be attractive enough, and additional support mechanisms from the state may be required; some categories may be given different support mechanisms to encourage the development of renewable energy sources.

The concept of the market model includes a number of innovations. However, one of the critical issues for the development of renewable energy sources and for investors remains the so-called determination of the base price (reference price), which is significant for market segments.[54] Each participant must have a qualified sales representative who has the relevant knowledge, i.e. has been granted certification.[55] However, how ready they will be to trade in the market and act on a specific manipulation can only be assessed after the launch of the exchange. The energy exchange has been operating in test mode since July 1, 2020.[56] The delay in full implementation has led to a delay in investment and a significant reduction in the pace of development of renewable energy sources. Persons interested in the construction of a new generation facility, including wind and solar plants, as well as existing generation facilities that have not entered into a power purchase agreement with the state, have difficulty predicting the price of electricity: whether the price will be competitive and whether they will be able to recover their investments.[57]

The concept of the market model provides for another significant innovation, self-dispatching, which implies the determination of hourly schedules of electricity production and consumption, as well as means of electricity production/consumption and their load by the persons responsible

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54 Zorana Božić et al., "Power Exchange Prices: Comparison of Volatility in European Markets," *Energies* 13, no. 21 (2020): 3–15; "Methodology on Calculation of Reference Price for Energy Generated from RES," Methodology ERO/NO. 01/2020, Pristina, 2020.

55 Day-ahead and Intraday Market Trading Rules, Article 14(1) (Adopter by Ordinance No. 46 of 11 August 2020 of the Georgian National Energy and Water Supply Regulatory Commission).

56 "Test Mode for Day-Ahead Market," July 13, 2020, accessed September 25, 2023, https://genex.ge/ka/News/energetikuli_birjis_momavali_sakartveloshi.

57 "Interview with Irina Milorava," November 21, 2021, accessed September 25, 2023, https://bm.ge/ka/article/energetikuli-birja-rogorc-investiciebis-mozidvis-meqanizmi--ra-quotshishebiquot-aqvt-investorebs/95900.

for their planning.[58] In accordance with the rules of day-ahead and intraday market trading, only a person who is a member of the balancing group and registered as a participant will be able to trade on the exchange.[59] Imbalance liability is particularly relevant for renewable energy sources, for which it is impossible to predict the forecast of the electricity generated by them with pinpoint accuracy.[60] They are required to join a balancing group; otherwise, they cannot be traded on the exchange.[61] A market participant must register as a person responsible for balancing or join a balancing group whose balancing responsibility will be taken by another person.[62] Renewable energy sources such as solar, wind and hydroelectric power stations working on the flow of the river have variable generation, thus making it difficult to predict their electricity generation with high accuracy days in advance.[63] They have a high risk of being out of balance with actual output, which increases cost and reduces revenue. If this cost is high, they may be less competitive with traditional energy sources, and investment may be reduced. Government support for the development of renewable energy sources is vital, but the interest of the consumer must also be taken into account. The state should develop a fair mechanism, taking into account how appropriate it is to reflect the imbalance cost in the customer's tariff. According to the Energy Union report, there are different approaches in individual contracting states.[64] For example, in Ukraine, all market participants are responsible for balancing and have the option to join a balancing group to reduce their financial liability.[65] In Albania, all existing renewable power plants were exempted from balancing responsibility until 2022 or

[58] Electricity Balancing and Ancillary Services Market Rules, Article 3(1)(ϙ) (Adopted by Ordinance No. 46 of 11 August 2020 of the Georgian National Energy and Water Supply Regulatory Commission).

[59] Ibid., Article 11.

[60] Božić et al., "Power Exchange Prices," 3–15.

[61] Reinhard Madlener and Markus Kaufmann, *Power Exchange Spot Market Trading in Europe: Theoretical Considerations and Empirical Evidence* (OSCOGEN Discussion Paper no. 5, 2002), 6–7.

[62] Ibid.

[63] *Advanced Forecasting of Variable Renewable Power Generation Innovation Landscape Brief* (Abu Dhabi: International Renewable Energy Agency, 2020), 6–7.

[64] "Annual Implementation Report," Energy Community Secretariat, November 1, 2021.

[65] Ibid.

until the launch of the balancing market, and balancing costs were reflected in the distribution tariff.[66] In Serbia, all market participants are responsible for balancing.[67]

The fourth energy package obliges member states to develop a unified approach to regulating the balancing liability of renewable power plants and to impose imbalance liability on all power plants.[68] It should be noted that in countries where the renewable power plant is not responsible for its own imbalance, this responsibility is assigned to the transmission or distribution system operator (Germany, France),[69] to the market operator (Slovenia, Slovakia)[70] or to the special company/person responsible for balancing (Greece, Austria).[71] In such a case, the imbalance costs are reflected in the green energy component of the consumer tariff.[72] It is important for the state to propose a fair mechanism of responsibility for the imbalance. In the first stage of the exchange's implementation, it should be possible to be exempted from liability for imbalance with a fair margin.

It is recommended that the issue of granting an imbalance benefit to wind and solar should be decided individually by the state, and in case of such a decision, JSC Electricity System Commercial Operator should be responsible for the imbalance. The country should make it a priority to increase the share of renewable energy in the energy sector to a certain level annually. In pursuing a consistent state policy, priority should be given to the sale of electricity obtained from renewable energy sources, and the purchase of electricity from other stations should be made only in case of necessity. The mentioned mechanism will encourage the development of renewable energy sources, and the thermal power stations will be in

66 Ibid.

67 Ibid.

68 Regulation (EU) of the European Parliament and of the Council No. 2019/943 on the Internal Market for Electricity (OJ L158/54 14 June 2019), Article 5.

69 Jour Mois Annee, "Roadmap on French Electricity Balancing," 2017, accessed September 25, 2023, https://eepublicdownloads.entsoe.eu/clean-documents/mc-documents/balancing_ancillary/2017–12–07/20171207_French_Roadmap_on_Electricity_Balancing_3.pdf.

70 Božić et al., "Power Exchange Prices," 4.

71 Ibid.

72 Jaquelin Cochran et al., *Integrating Variable Renewable Energy in Electric Power Markets: Best Practices from International Experience, Summary for Policymakers* (U.S. Department of Energy Office of Scientific and Technical Information, April 2012).

guaranteed capacity (reserve capacity) mode.[73] The promotion of renewable energy by the state will reduce the investor's economic risk and help to effectively recover capital costs, as well as the maximum production of electricity from renewable energy sources and its sale.

3.3. Creation of JSC "Georgian Energy Exchange" and Its Functions

In 2019, JSC Georgian Energy Exchange was established in order to fulfill the commitment made by Georgia to the Energy Community,[74] which in 2020 received a licence by the decision of the Georgian National Energy and Water Supply Regulatory Commission to operate the electricity market,[75] and it is a licensed operator of the day-ahead and intraday market. The main functions of JSC Georgian Energy Exchange are the operation of the day-ahead market, operation of the intraday market, operation of the bilateral contracts market and management of the settlement system for the day-ahead and intraday markets.[76] The mission of the energy exchange is "to ensure transparent and competitive markets and to provide accurate price signals to existing and potential market participants through efficient operation of the electricity markets".[77] The principles of electricity trading are hourly trading and the responsibility of market participants for the imbalance caused by them in each hour, as well as self-dispatch[78] and wholesale public service.[79]

The concept of the electricity market also defines the stages of transition to the target model, the transition period and the stage of development

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73 Maka Partsvania, "Guaranteed Capacity," in *Lado Chanturia 55*, ed. Dimitry Gegenava (Tbilisi: Prince David Institute for Law Publishing, 2018), 142–55.

74 "Extract from the Registry of Entrepreneurs and Non-entrepreneurial (Non-commercial) Legal Entities No. 404589432," registered on December 4, 2019, accessed September 25, 2023, https://bs.napr.gov.ge/GetBlob?pid=400&bid=boVlyOwlsX3qmYsntmLmFLYZmXp3]0lfKxbFOksPW3CLfX7ttWM8m9[n3Eq0F]3A.

75 Decision No. 39/2 of 28 May 2020 of the Georgian National Energy and Water Supply Regulatory Commission.

76 "Report of the Georgian Energy Exchange," Tbilisi, 2020, 3.

77 Ibid.

78 Concept of Electricity Market Model, Article 2 (Adopted by Ordinance No. 246 of 16 April 2020 of the Government of Georgia).

79 Ibid., Article 10.

of the competitive market.[80] Exchange trading rules include day-ahead and intraday market rules and balancing and ancillary services market rules adopted by the Georgian National Energy and Water Supply Regulatory Commission and establish all important provisions for trading on the exchange, including admission to the exchange, application placement, pricing, financial Settlement, etc.[81] The price determined by the exchange is significant for both the investor and the electricity buyer, therefore, this price should be transparent and economically justified. Considering this importance, according to the market rules, the regulatory commission took into account that the participant who trades on the exchange is obliged to pass the qualification test: the right to trade on the exchange is granted to the trading representative of the market participant who has successfully passed the test organized by the exchange operator and which is organized by the energy exchange systematically, with the periodicity determined by market rules.[82]

4. From Commitments to Execution

4.1. Difficulty of Launching the Exchange

The energy exchange, which was supposed to be launched on July 1, 2023,[83] was postponed for one year, namely, until July 1, 2024.[84] This was preceded by the postponement of what was planned for September 1, 2022[85] until March 31, 2023.[86] Before that, the launch of the exchange was postponed twice: initially, it was supposed to start functioning on July 1, 2021,[87] then this period was extended until January 1, 2022,[88] later – until March 1,

80 Ibid., Articles 16–19.

81 Ordinance No. 46 of 11 August 2020 of the Georgian National Energy and Water Supply Regulatory Commission.

82 Day-ahead and Intraday Market Trading Rules, Article 14 (Adopted by Ordinance No. 46 of 11 August 2020 of the Georgian National Energy and Water Supply Regulatory Commission).

83 Ordinance No. 126 of 28 March 2023 of the Government of Georgia.

84 Ordinance No. 239 of 29 June 2023 of the Government of Georgia.

85 Ordinance No. 89 of 28 February 2022 of the Government of Georgia

86 Ordinance No. 438 of 29 August 2022 of the Government of Georgia.

87 Ordinance No. 246 of 16 April 2020 of the Government of Georgia (Redaction of 21.04.2020–31.05.2021).

88 Ordinance No. 244 of 31 May 2021 of the Government of Georgia.

2022,[89] and subsequently – until September 1, 2022.[90] Each delay had certain reasons. Initially, this was related to the balancing and axillary services market, which is also a novelty and should be launched together with the exchange. Testing these two markets revealed some flaws.[91] It was also important to develop the necessary skills for trading on the exchange, as the exchange offers market participants electricity day-ahead and intraday trading. The reason for the second postponement was the lack of readiness of the market participants and certain technical flaws within the test regime. However, other components of the reform implementation, including the entry of additional large companies to the free market, were not postponed.[92] However, the testing, in turn, covers not only trading on the exchange but also on other markets, such as the bilateral contracts market and the market of balancing and auxiliary services, so an additional six months for the test regime was considered appropriate.[93] The reason for the subsequent postponement was again the reduced willingness of the market participants and the fear of the market participants' responsibility for the imbalance related to hourly trading, which involves accounting, forecasting the next day's consumption and generation.[94]

The draft law was prepared by the National Regulatory Commission on Imbalance Issues, according to which the government is authorized to make a different decision regarding the imbalance responsibilities for specific groups, in particular, certain generation facilities, such as small stations, solar and wind stations, are temporarily exempted from liability within the limit.[95] Imbalance refers to a situation where the power plant generated and delivered to the system less than the amount of electricity sold on the exchange and within the framework of the bilateral agreement,

89 Ordinance No. 547 of 24 November 2021 of the Government of Georgia.

90 Ordinance No. 89 of 28 February 2022 of the Government of Georgia.

91 "Is Energy Exchange Ready to Start Trading on January 1?," November 13, 2021, accessed September 25, 2023, https://bm.ge/ka/article/mzad-aris-tu-ara-energetikuli-birja-1-ianvridan-vachrobis-dasawyebad/95378.

92 "Why Was the Launch of the Energy Exchange Delayed?," May 26, 2021, accessed September 25, 2023, https://businessformula.ge/News/2935.

93 Ibid.; Bochorishvili and Chakhvashvili, *Review of the Electricity Market*, 8.

94 "Is Energy Exchange Ready."

95 Ibid.

and the difference must be filled with reserve capacities provided by the Georgian State Electrosystem, and the amount of electricity must be paid by the operator responsible for supplying a specific capacity.[96] Responsibility for imbalances, which are related to making hourly forecasts, is a novelty of the new market model and a challenge for market participants. Under the old legislation, accountability for imbalances is the responsibility of the Georgian State Electrosystem, as monthly trading does not oblige market participants to make hourly forecasts, and therefore, they are also not responsible for incorrect forecasts.[97] With the exception provided for the first stage, renewable energy plants, including wind, solar, small hydropower plants and hydropower plants located on melioration canals, will enjoy benefits for a certain time. However, this does not mean that they are exempted from forecasting – they will forecast normally, but they will be exempted from responsibility due to imbalance. However, it is advisable to set a high limit of imbalance, a percentage, at the initial stage, slowly reducing this percentage until reaching the final goal, within which it will be possible to be released from responsibility for imbalance. Another major challenge market participants face with the new model is arranging accounting.[98] In the current model, the market operator receives data on a monthly basis, while in the new model, the counters should be read hourly, and the relevant information should be transferred to the balance market operator.[99] Accounting turned out to be particularly painful for some new market participants, whose accounting node did not meet the standard required by law: Regulated hydropower plants and thermal power plants, as well as HPPs, which have signed agreements for the guaranteed power purchase, have an obligation to trade on the energy exchange.[100] They are obliged to organize the accounting node in accordance

96 Electricity Balancing and Ancillary Services Market Rules, Article 6 (Adopted by Ordinance No. 46 of 11 August 2020 of the Georgian National Energy and Water Supply Regulatory Commission).

97 "Part of the Business Once Again Asks to Postpone the Launch of the Energy Exchange," January 20, 2022, accessed September 25, 2023, https://businessformula.ge/News/6599.

98 Electricity Distribution Network Rules, Article 17 (Adopted by Ordinance No. 19 of 28 June 2021 of the Georgian National Energy and Water Supply Regulatory Commission).

99 Ibid., Article 61.

100 Ordinance No. 246 of 16 April 2020 of the Government of Georgia.

with the current legislation, which is associated with a significant financial cost on their part.

On the exchange platform, market participants will have the opportunity to trade on an hourly basis, which creates a high probability that the cost of electricity will be higher during the day and lower at night.[101] Surely, for the transition to a new model, technical readiness and the presence of a corresponding accounting node are crucial so that the exchange can work at full capacity and relevant information can be provided to the balance market operator. The exchange could not be launched on September 1, because the regulatory framework needed to operate the exchange still needs to be refined. A premature or unprepared launch is inadvisable under the conditions of this large-scale reform. It is worth mentioning the fact that due to the scale of the reform, it is essential that the market participants and citizens are ready for these changes. It is for this purpose that the simulation mode has been running since 2020. The energy exchange has purchased new software for EUR 1,149,000 (GEL 4,230,273), with which day-ahead and intraday energy deals will be concluded.[102] The reform is truly unprecedented, and there was no such market in Georgia or the entire region (except for the Turkish market, which is quite developed in terms of the energy market[103]). It is vital that the reform is carried out successfully and that the preparatory period is adequate to the challenges.

It is interesting to see how ready the enterprises are, trading on the exchange and the energy exchange itself, to launch the platform. As mentioned, the energy exchange purchased new software from the company Nord Pool, which is a trading system established by electricity transmission companies in Scandinavia and the Baltics[104] and operates in 16 European

101 Steven Braithwaite, "Residential TOU Price Response in the Presence of Interactive Communication Equipment," in *Pricing in Competitive Electricity Market*, eds. Ahmad Faruqui and Kelly Eakin (Boston, London: Kluwer Academic Publishers, 2000), 360–2.

102 "Energy Exchange Buys Software for a Million Euros," September 2, 2021, accessed September 25, 2023, https://bm.ge/ka/article/energetikuli-birja-milioni-evros-programul-uzrunvelyofas-yidulobs/90079/.

103 See: Selahattin Murat Sirin and Berna N. Yilmaz, "The Impact of Variable Renewable Energy Technologies on Electricity Markets: An Analysis of the Turkish Balancing Market," *Energy Policy*, no. 151 (2021).

104 *Electricity Market Reform in Norway*, eds. Eivind Magnus and Atle Midttun (London: Macmillan Press, 2000), 54–5.

countries.[105] What is more, 360 companies from 20 countries trade on the Nord Pool market, including the Northern European and Baltic regions, Great Britain, Central and Western Europe (Austria, Belgium, France, Germany, Luxembourg and the Netherlands) and Poland.[106] Its market has a European pricing algorithm, which is used to calculate the price in most European countries.[107] However, this does not exclude the risks of manipulation, which is especially dangerous for a small market and which market participants expect and fear, although the risk of manipulation is also a problem of the European market.[108] The risk of manipulation will be more sensitive for the small Georgian market, as a seemingly insignificant event may change the market price, and one of the monitoring tools is to check the market on an hourly basis and react immediately if necessary.[109] Despite the rather expensive and reputable program, it is vital to minimise the possible manipulation risks, which should be eliminated by immediate intervention and response.

The Georgian National Energy and Water Supply Regulatory Commission has established the service fee for JSC Georgian Energy Exchange of the operator of day-ahead and intraday markets, as well as for JSC Georgian State Electrosystem, the tariff of the operator of the electricity balancing and auxiliary services market, therefore, in case of activation of these markets, they will be able to perform their functions.[110] Another important market participant is the Electricity System Commercial Operator (ESCO), which trades exclusively in balancing electricity and guaranteed capacity according to seasonal needs, imports and exports electricity, inspects wholesale metering nodes and guarantees the purchase of electricity produced by newly built power plants.[111] Within the framework of the new model, for

105 "Nord Pool: About Us," accessed September 25, 2023, https://www.nordpoolgroup.com/en/About-us/.

106 Ibid.

107 *Electricity Market Reform in Norway*, 58–9.

108 Regulation (EU) of the European Parliament and of the Council No. 1227/2011 on Wholesale Energy Market Integrity and Transparency (OJ L326/1, 25 October 2011).

109 Ibid.

110 Ordinance No. 33 of 4 December 2008 of the Georgian National Energy and Water Supply Regulatory Commission, Article 5^1 and Article 5^2.

111 "Electricity Market Operator (ESCO): About Us," accessed September 25, 2023, https://esco.ge/ka/chvens-shesakheb.

ESCO to fully develop its functions, it is crucial to create the wholesale public service implementation rules, the organization's operating rules, the special fund calculation methodology, and the commission to prepare the wholesale public service fee calculation methodology and determine the fee. A challenge for the state electrosystem remains the lack of reserves, i.e. certain capacities reserved for the reliability of the system, which is caused by the increase in consumption and also by the slowing pace of construction of power plants.[112] Reserves are especially important during the winter, when electricity prices are high, and the supply of Abkhazia is added to this, which is also a big challenge for the state electrosystem.[113] Within the framework of the new model, the primary task is to maintain the reliability of the system and to implement technical measures to solve this challenge, which is possible by purchasing quick regulation reserves and arranging an automatic generation control system at certain stations in addition to Enguri, at another regulating station, as a result of which the supply sources of reserves will increase. It is also essential to have an appropriate agreement with the neighboring systems, in case of a shortage or an aggravated regime, regarding the detection of an emergency or other types of mutual assistance from their side.[114]

The launch of the energy exchange was postponed several times in order to finally eliminate the flaws and surprises revealed during the simulation. According to the last change, the exchange should be launched on July 1, 2024, despite the fact that, technically, the system is ready for opening and the basic rules have been established. However, due to the geopolitical situation, in particular, Russia's invasion of Ukraine, as well as the sharp increase in electricity prices on the Turkish market, it was considered appropriate to postpone the launch of the exchange. Added to this is the deficit in the autumn-winter period, when expensive imports are carried out in the country, and the price of energy in the market is

112 "Is the Market Ready for Energy Exchange Trading?," July 20, 2022, accessed September 25, 2023, https://commersant.ge/ge/post/ratom-gadaido-energetikuli-birjis-amoqmedeba-da-ramdenad-mzad-xvdeba-bazari.

113 Ibid.

114 Ibid.

high.[115] The increased price in the world has caused an energy crisis[116] and the state has had to introduce subsidies even in countries where the exchange operates.[117] The energy crisis was considered a risky period for the operation of the exchange, although there was an opinion that March was a better period because, at this time, the export of electricity begins, and the Engurhesi reservoir is filled for pre-export and, therefore, the price is relatively low.[118]

4.2. Perspective and Legal Challenge

The energy exchange is a prerequisite for the establishment of a competitive market for European countries. However, despite many years of experience, there are also problems.[119] On the one hand, the state needs to be less involved in the process, but for the reform to succeed, it is crucial for market participants to conduct training and develop trading skills. Regarding the energy exchange, the role of Engur HPP is interesting. As it is also an important participant in the market, and compared to other stations in the country, the electricity generated by it is cheap.[120] Engurhesi is the most potent

115 "Why Was the Launch of the Energy Exchange Postponed? – Narmania's Explanation," October 2022, accessed September 25, 2023, https://bm.ge/ka/article/ratom-gadavadda-energetikuli-birjis-amoqmedeba---narmanias-ganmarteba/118021/.

116 "Will Europe's Sanctions on Russian Diesel Cause a Bang or a Whimper," January 27, 2023, accessed September 25, 2023, https://www.bloomberg.com/graphics/europe-energy-crisis-updates/?leadSource=uverify%20wall.

117 "European Governments Splurging €500bn to Cushion Energy Crisis: Report," September 22, 2022, accessed September 25, 2023, https://www.euractiv.com/section/energy/news/european-governments-splurging-e500bn-to-cushion-energy-crisis-report/.

118 "I Think March Is a Better Period for Launching the Energy Exchange – Mariam Chakhvashvili," September 1, 2022, accessed September 25, 2023, https://bm.ge/ka/article/quotvfiqrob-energetikuli-birjis-asamoqmedeblad-marti-uketesi-periodiaquot---mariam-chaxvashvili/115753/.

119 Directive of the European Parliament and of the Council No. 2009/72/EC on Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 2003/54/EC (OJ L211/55, 14 July 2009).

120 Ordinance No. 33 of 4 December 2008 of the Georgian National Energy and Water Supply Regulatory Commission, Article 3.

power plant[121] owned by the state[122] and has an obligation to trade on the exchange with bona fide commercial interests.[123] It needs to be considered what impact the cheap energy will have on the exchange and whether it will reduce the final price set on the exchange to such an extent that trading there may no longer be attractive for them.

Import of electricity and thermal power plants is also a challenge for the new market. Imports are carried out from all four neighboring states through respective cross-border lines.[124] Imports carry political risks, and this has been well demonstrated by recent events. However, from an economic point of view, the price of imported electricity may be low enough to replace local generation or vice versa. It is essential that the mentioned risks are also taken into account in the market rules. After the launch of the exchange, there is a danger that the prices will increase while the electricity and gas tariffs are subsidised.[125] Maybe for the operation of the thermal power plants that consume the so-called social gas,[126] in the conditions of shortage, it will be necessary to purchase gas at a commercial price, which, naturally, will increase the price of electricity generated by them and then taking it to the exchange at an increased price will cause some changes. It will be possible to determine the market price for gas after the gas market is launched[127], and only then should the gas market price be taken into account in the energy sector.

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121 "Engurhesi: The Operation," accessed September 25, 2023, https://www.engurhesi.ge/en/page/25-The-Operation.

122 "Extract from the Registry of Entrepreneurs and Non-entrepreneurial (Non-commercial) Legal Entities No. 251716371," registered on October 6, 1999, accessed September 25, 2023, https://bs.napr.gov.ge/GetBlob?pid=400&bid=boVlyOwlsX3qmYsntmLmFBt5V7i7fzvRShob2DyBOYPS5oeKiBl0nakZC8LNNS4L.

123 Day-ahead and Intraday Market Trading Rules, Article 7(6) (Adopted by Ordinance No. 46 of 11 August 2020 of the Georgian National Energy and Water Supply Regulatory Commission).

124 "Activity Report of 2020 of the Georgian National Energy and Water Supply Regulatory Commission," Tbilisi, 2021, 38.

125 See: Murman Margvelashvili et al., *Energy Market Reform and Protection of Vulnerable Consumers* (Tbilisi: World Experience for Georgia, 2020).

126 *2021 Energy Transparency Index*, 2nd International Edition (Tbilisi: DiXi Group, 2021), 18.

127 Ordinance No. 447 of 2 September 2021 of the Government of Georgia.

It is significant that JSC Georgian Energy Exchange continues testing with potential participants of both the market platform and the platform of bilateral agreements. For the success of the reform, JSC Georgian State Electrosystem should provide testing of the balancing market platform with potential participants in a simulation mode. For the functioning of the market, it is necessary to produce a unified accounting base. It is recommended that JSC Electricity System Commercial Operator (ESCO) develop the necessary tools for the organization of wholesale public services and continue testing with potential participants and market operators in a simulation mode.

5. Conclusion

Georgia's aspiration to integrate into the European energy community cannot happen without a modern, competitive energy market. The new model of the energy market will allow each family and business to make economical and effective decisions and thereby control costs. The reform must be carried out correctly, which is a prerequisite for the further development of the market and which should ensure a stable and reliable electricity supply from its own clean and renewable energy sources, which, in turn, will reduce the dependence on imports. An intraday market and hourly pricing are an incentive for investors and will encourage the construction of new generation facilities, which will reduce electricity shortages. A competitive market should create an attractive environment for investors and provide new employment opportunities and continuous development of the energy sector. For the development of economically attractive and clean green energy projects in the energy sector, it is necessary for the state to offer appropriate mechanisms to attract investments. Considering the Georgian reality, the electricity market cannot be similar to the markets in the EU countries since the challenges and the state of the existing energy resources are completely different. From this point of view, the state cannot be completely distanced from the market, and legal acts should ensure its function as a policymaker and investor motivator. This is particularly important in terms of legal foreseeability and the predictive function of law.

On the way of legal approximation, it is essential to take into account the energy security challenges of Georgia, the occupied region of Abkhazia and Engurhesi, as one of the main generators of renewable energy in

Georgia during legislative changes. In order to create a valid model of the energy exchange, it is necessary to have appropriate legal guarantees, which concern not only the principles of the exchange itself, the structure and the manner of its activity, but also the provision of the possibility of competition in the electricity market, and in the case of such a physical impossibility, the establishment of appropriate state regulation of natural monopolists, the main purpose of which will be to protect consumers from unjustifiably high prices. Only after that it will be possible for the first time in the history of Georgia to determine the price of electricity, taking into account free, competitive market conditions.

The energy exchange is a licensed day-ahead and intraday market operator; its main purpose is to provide a transparent and competitive environment. Therefore, without its implementation, it is practically impossible to successfully complete the reform in the field of energy law. The importance and complexity of the issue are emphasized by the repeated postponement of the energy exchange and the fact that it has not been implemented yet. In order to activate the energy exchange of Georgia, it is necessary to introduce legislative changes and consider the best European practices relevant to Georgia; retrain the main actors of the exchange and conduct training in preparation for the practical operation of the exchange; implement appropriate software program and minimise the risks; stimulate the growth of the number of players, encouraging them with legal incentives and creating legal guarantees for the existence of a real competitive environment; otherwise, the entire energy law reform will be formal and, along with natural monopolies, will also create economic monopolies, at the expense of consumer rights. The first victim of the non-competitive environment will be the consumer, who will be completely defenceless when faced with the challenge of high prices. The legal status of Engurhesi and its role in the reformed electricity market must be determined; otherwise, its monopoly status will never allow the development of the electricity market and the competition in this market will be only formal. It is noteworthy that ESCO should establish the necessary tools for the organization of wholesale public services, with appropriate legal mechanisms, and continue testing.

If the exchange is completely deregulated, it will not be completely transparent, and its essence and meaning will be lost. However, on the other hand, a transparent and deregulated exchange creates certain dangers

in our region, which is why the exchange is not activated. On the other hand, the launch of the exchange is essential and crucial for the investor. However, the managed exchange will not be attractive for the investor, and it is an unnecessary expense and administrative resource for the existing generation facilities and the customer. It is likely that the opening of the exchange will increase the price of electricity, and the state will not be able to control it. Also, in the conditions of the Russo-Ukrainian war and the geographical situation of Georgia, at this stage, it may be necessary for the country to better prepare for the challenges associated with the launch of the exchange, and the exchange should be launched fully deregulated and transparent in line with European values.

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Long-Term and Institutional Care: A Global Perspective and Imperative

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Abstract: This study provides an overview of the legal aspects of long-term care (LTC) and institutional care for the elderly. It investigates whether LTC services for seniors could be recognized as a distinct human right, possibly through a United Nations convention. The study explores the existence and core components of the right to LTC and examines the minimum standards for its investigation, implementation, and enforcement. Additionally, it analyzes the specific rights of seniors that contribute to the right to care for dependent persons while also considering the intersectionality of this right and its relationship with other human rights. The study investigates the legal frameworks for protecting the right to LTC in various countries and assesses legal solutions derived from general legal instruments and special standards, particularly those concerning individuals with disabilities. Furthermore, it discusses proposed laws aimed at preserving the dignity of seniors and preventing unnecessary examinations and abuse. The study ultimately

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evaluates whether the right to LTC is an independent right or an extension of the rights to healthcare and social security.

1. Introduction

In the process of codifying standards in the field of public health law, the international community cannot ignore the increasing prevalence of ageing societies and the growing demand for care services for the elderly. Collecting and placing in one document the minimum legal standards in the field of long-term and institutional care will strengthen the legal position of individuals in the public health law system, allowing them to influence the state's actions and obtain legal mechanisms for pursuing claims.[1] As a special group, the elderly have many unmet needs.[2] While it is recognized that they are vulnerable and in need of long-term and institutional medical treatment, there is no legally binding instrument addressing these critical issues. From a global perspective, long-term care (LTC) covers a wide range of services and circumstances ranging from at-home help with basic daily activities like bathing, dressing up and meals, as well as more complex healthcare services, including daycare centres and institutional care.[3] Due to the increasing life expectancy and the growth in the number of the elderly, the incidence of mental health diseases continues to rise,[4] further increasing demand for long-term care.

The international community has made clear it should be important to establish for the elderly a distinct right to dignity and autonomy in

1 Allyn L. Taylor, "International Law and Public Health Policy," in *International Encyclopedia of Public Health*, 1st ed., eds. Stella R. Quah and Kristian Heggenhougen (Elsevier, 2008), 667.

2 Krzysztof Orzeszyna, Michał Skwarzyński, and Robert Tabaszewski, *International Human Rights Law* (Warsaw: C.H. Beck, 2023), 50–1.

3 Pamela Doty, "Long-Term Care in International Perspective," *Health Care Financing Review*, Spec No(Suppl) (1988): 145–6, accessed May 3, 2023, https://pubmed.ncbi.nlm.nih.gov/10312969; UN Ageing Group, "Report 2015," accessed May 3, 2023, https://social.un.org/ageing-working-group.

4 Carlos A. Mendonça de Lima, "Mental Health and Mental Health Services," in *Legal, Ethical and Social Implications of Ageing: Towards an International Legal Framework to Advance the Human Rights and Health of Older Persons*, eds. Allyn Taylor and Patricia C. Kuszler (NY: Edward Elgar, 2021); Beata Ziębińska, "Uwarunkowania globalizacyjne a systemy opieki długoterminowej [Globalization and Long Term Care Systems]," *Studia Humanistyczno-Społeczne*, no. 18 (2017): 240–5.

care, including the right to long-term care, the right to palliative care and the freedom from maltreatment, unnecessary examinations, treatments, hospitalizations and admissions to intensive care.[5] The first international convention specifically concerning the care for older persons was the European Social Charter.[6] It obliges the Member States to ensure that older people living in institutions are adequately supported while respecting their privacy and participation in decisions about their living conditions in the institution. Nonetheless, a much more detailed UN regulation on this matter is necessary.[7] This chapter aims to provide information that may help with this task. It provides recommendations for health policy and decision-makers on how the proposed UN treaty on the human rights of older persons can be developed and improved.[8]

2. Global Context

In the 21st century, we are witnessing a process of demographic ageing, which means an increase in the share of older people (over 65) with a small share of younger people in a given society. The phenomenon of demographic ageing is forcing society to turn to older people and provide them with ongoing care when they become helpless or suffer from chronic illnesses.[9] This problem applies to most countries around the world. Ageing is a process that cannot be stopped or reversed, but it can be delayed. This is

5 WHO Europe, "Report 2005," accessed May 3, 2023. http://www.euro.who.int/en/health-topics/Life-stages/healthy-ageing/healthy-ageing; Hildegard Theobald and Kristine Kern, "The Introduction of Long-Term Care Policy Schemes: Policy Development, Policy Transfer and Policy Change," *Policy and Politics* 39, no. 3 (2011): 338–9, https://doi.org/10.1332/030557310X520252.

6 Council of Europe, European Social Charter, Turin, October 18, 1961, art. 23, accessed May 3, 2023, https://rm.coe.int/168006b642.

7 UNDESA, "The Growing Need for Long-Term Care: Assumptions and Realities," September 12, 2016, accessed May 3, 2023, https://www.un.org/esa/socdev/ageing/documents/un-ageing_briefing-paper_Long-term-care.pdf.

8 Israel Issi Doron and Benny Spanier, "International Convention on Rights of Older Persons: Where We Were, Where We Are, and Where Are We Going?," *IFA Global Ageing* 8, no. 1 (2012): 7–15.

9 Åke Blomqvist and Colin Busby, "Long-Term Care for the Elderly: Challenges and Policy Options," *C.D. Howe Institute Commentary*, no. 367 (2012): 2–32, accessed May 3, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2182774.

possible thanks to the comprehensive actions taken by national authorities, which include ensuring that every older person has access to long-term care and medical institutions. Yet, the efforts of national authorities should be complemented by international organizations. These play a substantial role due to the competencies vested in them by states; they exert a notable influence on the substance and structure of medical law regulations and some, like the European Union, even establish regulations directly applicable to states.[10] From a formal and legal standpoint, the most comprehensive protection for elderly individuals outside the European human rights systems is provided by the Organization of American States.[11]

It is important to pay attention to the needs of the older population because, from a global perspective, national systems of geriatric healthcare and support aimed at older people are ineffective and unprepared for rapid demographic changes and an increased number of the oldest citizens. Actions taken by individual countries in this area remain insufficient, inconsistent and ineffective.[12] Some pressing problems of national healthcare systems include an insufficient number of geriatric specialists, geriatric wards and new geriatric clinics, the lack of new methods of diagnosing dementia, as well as the lack of an appropriate funding system and support instruments for carers of the elderly. Moreover, existing international law instruments are incapable of meeting new challenges related to coordinated, holistic and long-term medical care for older people.[13]

According to the OECD, "long-term and institutional care" should be construed not only as services but also as long-term financial benefits for people aged 65 and up who need help with basic day-to-day activities or complex living activities. LTC services should be distinguished from

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10 Agata Wnukiewicz-Kozłowska, "Spory medyczne," in *Spory medyczne przed sądami międzynarodowymi*, ed. Agata Wnukiewicz-Kozłowska (Wrocław: Uniwersytet Wrocławski, 2021), 147.

11 Barbara Mikołajczyk, "Older Persons' Right to Health – A Challenge to International Law," *Ageing and Society* 39, no. 8 (2018): 18, https://doi.org/10.1017/S0144686X18000156.

12 Geeta Anand, "How Not to Grow Old in America," *New York Times*, August 29, 2019, accessed May 3, 2023, https://www.nytimes.com/2019/08/29/opinion/sunday/dementia-assisted-living.html.

13 UN Ageing Group, "Report 2015," accessed May 3, 2023, https://social.un.org/ageing-working-group.

long-term support, which is a broader concept that obliges national authorities to conduct an intersectional state policy favouring independence and activity while respecting the autonomy and dignity of seniors.[14] According to WHO classification, long-term and institutional care includes two categories of actions: activities of daily living (ADL) and instrumental activities of daily living (IADL).[15] The first category includes basic medical care, nursing care, preventive care and physical therapy provided to older people. In contrast, IADL consists in providing at-home help or assisting the elderly with handling administrative matters.[16] A special type of right included in the range of services offered to older people is the right to palliative care.[17] Such care aims to improve the quality of life and is supposed to prevent or relieve pain and other somatic symptoms, as well as to alleviate mental, spiritual and social suffering at the end of life.[18]

3. Older Persons and Human Rights in LTC

The human right to long-term care has not been formulated yet and access to long-term care services for the elderly is not directly addressed in any treaty – so far, it is only declaratory. Article 25 of UDHR proclaims the right of everyone to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of

14 Barbara Mikołajczyk, "International Law and Ageism," *Polish Yearbook of International Law* 34, (2014): 90, accessed May 3, 2023, https://ssrn.com/abstract=2811745.

15 Ziębińska, "Uwarunkowania globalizacyjne a systemy opieki długoterminowej," 243; Tomasz Sroka, "Opieka długoterminowa," in *System Prawa Medycznego*, vol. 2, eds. by Leszek Bosek and Agata Wnukiewicz-Kozłowska(Warsaw: C.H. Beck), 972.

16 WHO Europe, "Report 2005," accessed May 3, 2023, http://www.euro.who.int/en/health-topics/Life-stages/healthy-ageing/healthy-ageing.

17 Anand, "How Not to Grow Old in America," *New York Times*, August 29, 2019, accessed May 3, 2023, https://www.nytimes.com/2019/08/29/opinion/sunday/dementia-assisted-living.html.

18 Patricia Kuszler, "End of Life and Access to Pain Medicine," in *Legal, Ethical and Social Implications of Ageing: Towards an International Legal Framework to Advance the Human Rights and Health of Older Persons*, eds. Allyn Taylor and Patricia C. Kuszler (NY: Edward Elgar, 2021).

livelihood in circumstances beyond his control.[19] This provision imposes on UN member states numerous positive obligations aimed at older people. It means that the elderly are first and foremost entitled to any necessary medical measures used to maintain their quality of life or at least to maintain their current state of health without deterioration, if possible.

The right to use LTC includes access to medical services and access to nursing care, which can also be provided outside a medical facility[20.] This category of benefits also includes services provided by licensed or certified nurses and therapists specializing in physical, speech, or occupational therapy. Other health-related services like bathing, dressing, eating, toileting, mobility, day or night sitting services can be provided in a medical facility, at the patient's home or in any other place where older people are residing.[21] Nurses help bedridden and chronically ill patients for as long as is required, depending on a given person's health.

UDHR also includes other long-term and institutional care services which the state is obliged to provide.[22] Even though these services are not directly related to healthcare, the WHO considers them necessary to ensure an adequate quality of life for the elderly. It includes sheltered living arrangements (i.e. small-group shared housing for the elderly, foster care); subsidized housing for the disabled elderly; delivering food and preparing meals (shopping, cooking, meals delivered to the elderly person's home);

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19 Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948), G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

20 Doty, "Long-Term Care in International Perspective," *Health Care Financing Review*, Spec No(Suppl) (1988): 150–1, accessed May 3, 2023, https://pubmed.ncbi.nlm.nih.gov/10312969; UN Ageing Group, "Report 2015," accessed May 3, 2023, https://social.un.org/ageing-working-group; Ziębińska, "Uwarunkowania globalizacyjne a systemy opieki długoterminowej," 235–7; Charlene M. Kampfe, *Counseling Older People Opportunities and Challenges* (Alexandria: Wiley, 2015), 225–47.

21 Doty, "Long-Term Care in International Perspective," *Health Care Financing Review*, Spec No(Suppl) (1988): 145–7, 150–1, accessed May 3, 2023, https://pubmed.ncbi.nlm.nih.gov/10312969; Natalie D. Pope and Jane E. Riley, "Keep Dignity Intact: Exploring Desires for Quality Long-Term Care Among Midlife Women," *Journal of Gerontological Social Work* 56, no. 8 (2013): 694–5, https://doi.org/10.1080/01634372.2013.840351.

22 Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948), G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); WHO Europe, "Report 2005," accessed May 3, 2023, http://www.euro.who.int/en/health-topics/Life-stages/healthy-ageing/healthy-ageing.

homemaker or chore services (i.e. help with cleaning, laundry, errands and chores at home). Support in this regard can be provided by professional caregivers or family members.[23]

4. The Use of Long-Term Care Service Systems by the Elderly

The WHO classification distinguishes several types of long-term and institutional care systems: Scandinavian, Continental, British, Mediterranean, traditional, and mixed.[24] In many European countries and the Americas, the responsibility for organising the basics of long-term care rests with local and regional authorities; however, in developing countries, a model of dispersed responsibility prevails. The Scandinavian system, used in Denmark, Finland, Norway, and Sweden, is considered to provide the most comprehensive care. It is based on public, caregiving and universal services, which are usually provided by local authorities, with lower participation of non-governmental organizations and private sector entities.[25] In these countries, state participation in long-term and institutional care services is over two times higher than in other developed countries. In developing economies, LTC is a priority for families and local communities, not for central governments, and in post-communist countries, relatives are legally obliged to care for elderly family members (maintenance obligation). For this reason, the latter countries are better prepared to provide informal long-term care than high-income countries.[26]

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23 Doty, "Long-Term Care in International Perspective," *Health Care Financing Review*, Spec No(Suppl) (1988): 151, accessed May 3, 2023. https://pubmed.ncbi.nlm.nih.gov/10312969; Pamela Doty, Korbin Liu, and Joshua Wiener, "An Overview of Long-Term Care," *Health Care Financing Review* 6, no. 1 (1985): 69–78, accessed May 3, 2023, https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/HealthCareFinancingReview/Downloads/CMS1191904dl.pdf; WHO Europe, "Report 2005"; Ziębińska, "Uwarunkowania globalizacyjne a systemy opieki długoterminowej," 235–7.

24 Ibid.

25 Doty, "Long-Term Care in International Perspective," *Health Care Financing Review*, Spec No(Suppl) (1988): 147–150, 152–3, accessed May 3, 2023, https://pubmed.ncbi.nlm.nih.gov/10312969; Doty, Liu, and Wiener, "An Overview of Long-Term Care," 69–78; Ziębińska, "Uwarunkowania globalizacyjne a systemy opieki długoterminowej," 235–7; WHO Europe, "Report 2005."

26 Robert Tabaszewski, "The Role of Local and Regional Authorities in Prevention and Control of NCDs: The Case of Poland," *BMC International Health and Human Rights* 20,

Other healthcare systems also guarantee access to long-term and institutional care services, but the range of these services is more limited than in the Scandinavian model. In the continental model, LTC is funded by the state but the direct service suppliers are non-governmental organizations. Still other mechanisms are at work in the British model, which is based on private caregiving services. In the Mediterranean system, LTC services are provided to older people mainly by their family members, friends, or other private individuals, with support from non-governmental and church organizations. In post-communist countries, which adopted a mix of the Mediterranean and continental systems, older people rarely obtain institutionalized care and rely on the help and care provided by their family members[27]. In less- and medium-developed countries, "responsibility for LTC often falls between different line ministries or is delegated to local government, thus reducing its profile and policy priority." Local authorities base their policies on the traditional multi-generational family model and the intergenerational solidarity principle. In developing countries, families increasingly use informal paid caregivers who often lack specialist training and are therefore not recognized and paid by the government.[28]

An analysis of LTC system models shows that they are much more varied than classic social care systems, educational systems, and pension schemes. In most countries around the world, LTC services are provided by the public sector, non-governmental sector, and informal sector.[29] Due to the profound demographic changes currently underway in many developed countries, national authorities are increasingly striving to establish a deinstitutionalized care model, develop a preventive care system that would address the risk of prematurely losing one's independence, and

no. 17 (2020): 1–9, https://doi.org/10.1186/s12914-020-00238-8; Peter Lloyd-Sherlock, "Beyond Neglect: Long-Term Care Research in Low and Middle Income Countries," *International Journal of Gerontology* 8, no. 2 (2014): 66–9.

27 Ziębińska, "Uwarunkowania globalizacyjne a systemy opieki długoterminowej," 235–7.

28 Lloyd-Sherlock, "Beyond Neglect," 4.

29 Council of Europe, "Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the Promotion of Human Rights of Older Persons," February 19, 2014, accessed May 3, 2023, https://www.coe.int/en/web/commissioner/-/the-right-of-older-persons-to-dignity-and-autonomy-in-care; Ziębińska, "Uwarunkowania globalizacyjne a systemy opieki długoterminowej," 235–7.

combine funding from multiple sources.[30] All this makes it harder to develop one global model of guaranteed benefits for older people. Due to disparities in economic growth and limited national budgetary resources that can be allocated to LTC, more and more countries are opting to use mixed solutions.[31] Yet, LTC is provided by informal caregivers, often migrants, even in the most developed countries. In contrast, developing countries struggle with the grey economy and assistance there is typically provided by the youngest family members who do not receive any support on this account.

In the European Union, the need to establish a new social welfare mix model is coming up more and more. Such a system would make it possible to ensure a common minimum standard of services for older people.[32] The basic rules on caring for the elderly were developed by regional human rights organizations, including the Council of Europe, which devised such things as the European Social Charter (revised) and the 2014 Recommendation by the Committee of Ministers on the promotion of human rights of older persons.[33] The issue of accessibility of LTC services for older people was also addressed by the European Convention on Human Rights and the Commissioner for Human Rights. These authorities consider such services to be a part of the right to a decent life. This results directly from Article 11(1) of The International Covenant on Economic, Social and Cultural Rights (ICESCR) and is dictated by the need to ensure the protection of the life and health of the elderly. However, it may be problematic to monitor medical services in nursing homes.[34] Hence, it is also necessary to introduce institutional and legal frameworks laying down minimum standards for the protection of the elderly at a universal level.

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30 WHO Europe, "Report 2005"; Ziębińska, "Uwarunkowania globalizacyjne a systemy opieki długoterminowej," 236.

31 Doty, "Long-Term Care in International Perspective," *Health Care Financing Review*, Spec No(Suppl) (1988): 148–9, accessed May 3, 2023, https://pubmed.ncbi.nlm.nih.gov/10312969; Ziębińska, "Uwarunkowania globalizacyjne a systemy opieki długoterminowej," 245.

32 Ibid., 240–2.

33 H.S. Aasen, "The Right to Health Protection for the Elderly: Key Elements and State Obligations," in *Health and Human Rights in Europe*, eds. Brigit Toebes et al. (Cambridge: Intersentia, 2012), 292–6.

34 Theobald and Kern, "The Introduction of Long-Term Care Policy Schemes," 336–8.

Another aspect of the right to long-term care (LTC) is the degree to which national governments participate in funding the services in nursing homes for the elderly. Significant financial resources should be allocated to long-term care for the elderly and their family members if their needs cannot be met. This is also because, in most cases, running a nursing home is not a non-profit activity.[35] Running 24-hour care facilities entails addressing the social assistance needs of the elderly and implementing the human right to health on the one hand, while also purposefully and rationally assessing the costs and expenses on the other.[36] Therefore, due to the increasing costs that the elderly will have to bear, as well as the growing number of economically inactive people, developed countries should consider introducing the Japanese model of elderly care.[37] It involves the introduction of a universal long-term care insurance system. In Japan, nursing home stays are co-financed by employers and employees from individual premiums paid by each insured person over 40. The remainder is paid by the state. Similarly, state subsidies cover assisted living and daycare for the elderly.[38] In the future, however, institutionalized care will still prevail in many countries, hence it seems reasonable to consider a model based on the system of universal social insurance.

35 Council of Europe, "Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the Promotion of Human Rights of Older Persons," February 19, 2014, accessed May 3, 2023, https://www.coe.int/en/web/commissioner/-/the-right-of-older-persons-to-dignity-and-autonomy-in-care.

36 Ziębińska, "Uwarunkowania globalizacyjne a systemy opieki długoterminowej," 235–43.

37 Anand, "How Not to Grow Old in America," *New York Times*, August 29, 2019, accessed May 3, 2023, https://www.nytimes.com/2019/08/29/opinion/sunday/dementia-assisted-living.html; John C. Campbell, "Japan's Long-Term Care Insurance System," in *Eldercare Policies in Japan and Scandinavia*, eds. John C. Campbell et al. (NY: Palgrave Macmillan, 2014), 9–30, https://doi.org/10.1057/9781137402639_2; Theobald and Kern, "The Introduction of Long-Term Care Policy Schemes," 333–4.

38 Anand, "How Not to Grow Old in America," *New York Times*, August 29, 2019, accessed May 3, 2023, https://www.nytimes.com/2019/08/29/opinion/sunday/dementia-assisted-living.html; Campbell, "Japan's Long-Term Care Insurance System," 9–30; Ziębińska, "Uwarunkowania globalizacyjne a systemy opieki długoterminowej," 235–7.

5. The Right of Older Persons to Dignity and Autonomy in Long-Term Care

Long-term care may be provided by various entities that render health services directly or indirectly. Such services need to be carried out with respect for the senior's will and dignity.[39] The first group of entities that support the elderly includes medically-oriented residential facilities: chronic-care hospitals, geriatric wings of acute care hospitals, nursing homes, and rehabilitation hospitals. The second group includes nonmedical residential facilities, such as homes for the aged, frail ambulant homes, personal care homes, and board and care homes. In this group, one can distinguish the so-called institutionalized care, which includes facilities run by state entities – fully financed by or subordinate to national authorities (e.g. residential care homes) – and private facilities.[40] The range of services included in long-term and institutional care is determined not only by varying cultural traditions and models of interpersonal relations but mostly by the affluence of a given society and the national budgetary resources of a given country.

Today, organizations dealing with the protection of the elderly increasingly support the idea of moving away from institutionalized care and transitioning to well-coordinated home care, which guarantees dignity and

39 UNDESA, "The Growing Need for Long-Term Care: Assumptions and Realities," 2, September 12, 2016, accessed May 3, 2023, https://www.un.org/esa/socdev/ageing/documents/un-ageing_briefing-paper_Long-term-care.pdf; Lise-Lotte Franklin, Britt-Marie Ternestedt, and Lennart Nordenfelt, "Views on Dignity of Elderly Nursing Home Residents," *Nursing Ethics* 13, no. 2 (2006): 137–41, accessed May 3, 2023, https://journals.sagepub.com/doi/10.1191/0969733006ne851oa; Ann Gallagher et al., "Dignity in the Care of Older People - A Review of the Theoretical and Empirical Literature," *BMC Nurs* 7, no. 11 (2008): 2, accessed May 3, 2023, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2483981; Robert Tabaszewski, "Health as a Value in the Integration Policies of European and East Asian Countries. A Historical and Legal Perspective," *Journal of European Integration* 25, no. 1 (2019): 105, https://doi.org/10.5771/0947-9511-2019-1-99.

40 Doty, "Long-Term Care in International Perspective," *Health Care Financing Review*, Spec No(Suppl) (1988): 145–6, accessed May 3, 2023, https://pubmed.ncbi.nlm.nih.gov/10312969; Franklin, Britt-Marie Ternestedt, and Lennart Nordenfelt, "Views on Dignity of Elderly Nursing Home Residents," 130–1, 139–41; Gallagher et al., "Dignity in the Care of Older People," 7–9.

respects the privacy of older people.[41] The most important features of this model are informality and turning to family care, as well as maintaining a common family budget. Supporters of this model also emphasize that it gives more opportunities to protect the traditional family, with a patriarchal division of roles, which is identified as the source of an individual's prosperity. Family care is also seen as a way to relieve the burden on the public sector to fund, organize, and manage long-term and institutional care services. For a deinstitutionalized care system to function properly, all involved entities providing long-term and institutional care services must agree to this type of care; this applies not only to older people but also to other household members and entities which provide funding.

Some problems highlighted by human rights advocates in developing countries include the underdeveloped network of long-term and institutional care facilities, long waiting times for admission to such facilities, the poor quality of services provided in both public and private facilities, as well as instances of human rights violations (i.e. maltreatment, inhuman and degrading treatment), especially in long-term and institutional care facilities operating in less developed countries[42]. Fees in state-run care homes have led to an increased interest in private care homes, which are more affordable. It is therefore necessary to develop a uniform funding model based on the principle of non-discrimination to combat ageism and stigma.[43] Due to human rights obligations, national authorities must provide special social and medical care to people who are unable to function independently due to their age and cannot receive help from their relatives. It is

41 UNDESA, "The Growing Need for Long-Term Care: Assumptions and Realities," 2, September 12, 2016, accessed May 3, 2023, https://www.un.org/esa/socdev/ageing/documents/un-ageing_briefing-paper_Long-term-care.pdf; Gallagher et al., "Dignity in the Care of Older People," 7–10; Jennifer Kane and Kay de Vries, "Dignity in Long-Term Care: An Application of Nordenfelt's Work," *Nursing Ethics* 24, no. 6 (2017): 3–4, https://doi.org/10.1177/0969733015624487.

42 Manfred Nowak, "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," July 28, 2008, accessed May 3, 2023, https://www.refworld.org/docid/48db99e82.html; Adrian O'Dowd, "Basic Human Rights of Older People Are Abused in Home Care," *BMJ*, no. 343 (2011), https://doi.org/10.1136/bmj.d7678.

43 Mikołajczyk, "International Law and Ageism," 102–3.

the responsibility of each state to provide long-term and institutional care, whether at the request of the elderly person or upon notification from their friends, local communities or social organizations.

However, branches and representatives of the state government cannot provide long-term and institutional care in isolation from the principle of respect for the autonomy and will of the elderly.[44] This means that the basis for providing care to the elderly is their informed and voluntary consent, which should, as a rule, be given in writing or through a care provider. The obligation to respect the will of the elderly should be implemented at all stages of long-term and institutional care and should apply to things like assistance in daily matters and delivering medical and care services, and should commence at the stage of admission to a nursing home[45]. During long-term and institutional care, public authorities should ensure that older people have the right to manage their own lives and that their freedom and independence are respected.

The most frequently cited problems in the doctrine of international human rights law in the area of exercising the rights of the elderly are related to the alignment of the needs of seniors with those of their families and household members, as well as relationships in nursing homes, and especially those between elderly people, their carers, healthcare personnel and other nursing home residents.[46] In particular, the requirement to respect autonomy somewhat correlates with the duty to satisfy the needs of older people, especially those who are dependent, impaired, or disabled. Special responsibilities should be incumbent on medical staff, volunteers and social workers who are obliged to always bear in mind the free will and independence of the elderly when providing services. The attitude of

44 Doty, "Long-Term Care in International Perspective," *Health Care Financing Review*, Spec No(Suppl) (1988): 150–4, accessed May 3, 2023, https://pubmed.ncbi.nlm.nih.gov/10312969.

45 Kane and de Vries, "Dignity in Long-Term Care Aasen," 3–4, 11; "The Right to Health Protection for the Elderly," 283.

46 Anand, "How Not to Grow Old in America," *New York Times*, August 29, 2019, accessed May 3, 2023, https://www.nytimes.com/2019/08/29/opinion/sunday/dementia-assisted-living.html; Council of Europe, "Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the Promotion of Human Rights of Older Persons," February 19, 2014, accessed May 3, 2023, https://www.coe.int/en/web/commissioner/-/the-right-of-older-persons-to-dignity-and-autonomy-in-care; Blomqvist and Busby, "Long-Term Care for the Elderly."

care home staff is crucial since they sometimes undermine the credibility of older people who strongly protest against violations of their dignity and autonomy. In many cases, carers of the elderly deserve to be called human rights advocates, because they are the first link in the chain of contact between elderly people and public institutions who are obliged to protect and fulfil the right to long-term and institutional care.[47]

6. LTC and Human Rights Perspective

Apart from these obligations concerning institutional care, it is also worth discussing the potential tensions and synergies in the public health approach to long-term care. The most sensitive issues at the juncture of human rights and the need to implement long-term and institutional care for the elderly as human beings are as follows: freedom from torture, inhuman and degrading treatment and punishment; the right to liberty and security; the freedom of movement; privacy rights; and freedom from discrimination.[48] Some issues of contention include the amount of state resources that should be allocated to the elderly; the degree to which the elderly are free to decide about their affairs in the event of danger to life and limb in a nursing home; the issue of relieving pain and suffering, of euthanasia on request, and a model of monitoring the degree of implementation of seniors' rights, including the appointment of impartial and independent inspectors in places where the elderly are staying.

Ill-treatment, i.e. a practice that is at odds with basic human rights standards, including Article 7 of the ICCPR and Article 3 of the ECHR, may occur in some places where long-term and institutional care is provided. Any treatment intended to make the elderly feel inferior, fearful and humiliated should be deemed inappropriate.[49] In nursing homes, corporal

47 UNDESA, "The Growing Need for Long-Term Care: Assumptions and Realities," 2–7, September 12, 2016, accessed May 3, 2023, https://www.un.org/esa/socdev/ageing/documents/un-ageing_briefing-paper_Long-term-care.pdf.

48 Kane and Kay de Vries, "Dignity in Long-Term Care," 2, 4, 7, 11; Kerry Brydon, "The Rights of Older People? Reflections on One Institutional Response to Ageing," *Reflective Practice* 15, no. 2 (2014): 122–8, https://doi.org/10.1080/14623943.2013.868791; O'Dowd, "Basic Human Rights of Older People Are Abused in Home Care."

49 Aasen, "The Right to Health Protection for the Elderly," 281–2; ECtHR Judgment of January 17, 2012, Stanev v. Bulgaria, application no. 36760/06, hudoc.int.

punishment, cold baths, starvation, excessive use of disciplinary measures, unjustified administration of sedative and psychotropic drugs, covert administration of medicines hidden in food, or with the help of a security guard, should be deemed inhumane treatment. Ill-treatment of the elderly also includes raising one's voice, verbal aggression, pushing, performing procedures in the presence of other people, or lack of privacy during hygiene care. The reasons for ill-treatment may range from the absence of empathy for older people to acceptance of incidents of repeated violence to disregard for the will and autonomy of seniors when providing them with medical services.[50]

The freedom of movement of long-term and institutional care recipients can be infringed in various ways: by prolonged isolation at home or in a specific room; by overcrowding in the nursing home; by insufficient equipment and number of carers to allow free movement; and by depriving the elderly person of pharmaceuticals to support physical capacity. Most often, however, it is infringed by additional physical barriers, as was the case in Stanve v. Bulgaria in 2012.[51] In the case in question, the care home was housed in three separate buildings enclosed by a high metal fence, its residents had limited ability to communicate with each other, and toilets were located in the garden outside the building. Other issues like restrictions on the freedom of contact with family, relatives and medical staff, confining the elderly to their rooms, prohibiting them from gathering in rooms, restricting access to traditional means of communication like phones and post, and modern forms of communication such as e-mail or mobile phones, also represent serious violations of the human rights of an elderly person living in a nursing home.[52]

Ensuring the privacy of older people while they receive care and medical treatment is another area that requires protection by human

50 Nowak, "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment"; Silvia Perel-Levin, "Elder Abuse and Violence Against Older Persons," in *Legal, Ethical and Social Implications of Ageing: Towards an International Legal Framework to Advance the Human Rights and Health of Older Persons*, eds. Allyn Taylor and Patricia C. Kuszler (NY: Edward Elgar, 2021).

51 ECtHR Judgment of January 17, 2012, Stanev v. Bulgaria, application no. 36760/06, hudoc.int.

52 Ibid.

rights standards.[53] Treatment without the consent of the elderly, and under coercion from household members and families, should be restricted to life-threatening situations. Emphasis should be placed on increasing the number of qualified long-term and institutional care service workers, which should be done through better training, instruction, and the improvement of pay and working conditions in care homes. When it comes to private facilities, it is necessary to establish minimum standards of medical service delivery to protect seniors.[54] Older people should have additional guarantees regarding the right to own and dispose of their belongings, including financial resources, the right to own and care for small animals, and the right to access non-life-threatening tobacco and alcohol products.[55]

Any cases of intimidation of older people and irregularities related to long-term and institutional care for them should be reported to the appropriate authorities. Nevertheless, practice shows that due to few complaints about abuse in care facilities for the elderly, detecting irregularities is much more difficult. Continuous monitoring of long-term and institutional care by state authorities is thus recommended; however, it is hampered when traditional measures are used that do not fully adapt to the specificities of older people's rights. When it comes to elderly care, discrimination and related human rights violations may well be disguised as actions for their benefit or the good of the general elderly population.[56]

In the case of the elderly population, the violations are not obvious: they most often involve a failure to respect the wishes of the elderly when providing a particular service. It is also difficult to prove abuse based on the subjective beliefs of older people, some of whom suffer from dementia-related disorders, rather than direct reports of victims or credible, evidence-based third-party accounts.[57] Often, there are also no witnesses or people whose testimony would be trustworthy and verifiable; this is due to

53 O'Dowd, "Basic Human Rights of Older People Are Abused in Home Care."

54 Doty, "Long-Term Care in International Perspective," *Health Care Financing Review*, Spec No(Suppl) (1988): 151, accessed May 3, 2023, https://pubmed.ncbi.nlm.nih.gov/10312969.

55 O'Dowd, "Basic Human Rights of Older People Are Abused in Home Care."

56 Blomqvist and Busby, "Long-Term Care for the Elderly."

57 Ziębińska, "Uwarunkowania globalizacyjne a systemy opieki długoterminowej," 242.

age, health condition, possible cognitive impairment, as well as the actual dependence of older people on long-term and institutional care staff.[58]

7. Long-Term and Institutional Care For Older Persons and a New International Legal Instrument

Given the importance of the rights of older people, there is an urgent need for a legally binding document cataloguing the rights and freedoms of older people, together with a separate right of access to long-term and institutional care. The catalogue of already existing rights and freedoms of seniors should be presented in a new context that takes into account the global demographic changes, the stakes and benefits of seniors themselves, their family members, local communities, and entire societies affected by ageing. The new document, which would be legally binding, should comprise both social and health welfare rights guaranteeing access to coordinated care at home or institutionalized state care that would respect the dignity and privacy of older people, as well as rights ensuring freedoms and privileges related to physical integrity based on respect for autonomy, physical integrity and personal, mental and sexual security.

The draft document should list the basic obligations of the state which ensure access to care services and long-term care. These include 1) respect for the autonomy and the will of older people making independent decisions on at-home or long-term care; 2) supporting seniors and their families in the implementation of at-home care using financial and non-financial support; 3) providing long-term care if at-home care and daycare are insufficient; 4) providing palliative care.[59] In terms of welfare, this means guaranteeing a minimum standard of care services for the elderly, as well as providing specific financial and other support to their families.[60] Access to services and care facilities for the elderly should be guaranteed, including access to nursing and geriatric care in terms of availability, accessibility, affordability, and quality.

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58 Doty, "Long-Term Care in International Perspective," *Health Care Financing Review*, Spec No(Suppl) (1988): 145–54, accessed May 3, 2023, https://pubmed.ncbi.nlm.nih.gov/10312969; Doty, Korbin Liu, and Joshua Wiener, "An Overview of Long-Term Care," 69–78.

59 Kuszler, "End of Life and Access to Pain Medicine."

60 Xenia Scheil-Adlung, "Long-Term Care Protection: A Review of Coverage Deficits in 46 Countries," *ESS Paper Series (ILO)*, no. 50 (2015): 16, 31–9.

The second chapter of the new convention should enumerate the state's basic legislative, educational, administrative, and judicial obligations regarding the fullest implementation of elderly care. The convention should draw from the experiences of the Inter-American Convention on Protecting the Human Rights of Older Persons, which came into force on January 11, 2017, and to a lesser extent from the more general provisions included in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, adopted at the African Union forum on January 31, 2016.[61] Legal requirements include legal safeguards for care to enable an improved quality of life, together with the prevention and alleviation of pain and other somatic symptoms and the mitigation of physical, mental, spiritual, pastoral, and social suffering.[62] In educational terms, training medical and social assistance staff, as well as educating the elderly, is a duty. Administrative responsibilities include ensuring supervision over institutional care and monitoring the long-term and institutional care system. Judicial obligations pertain to the possibility of judicial redress for counteracting discrimination in private long-term and institutional care and the introduction of a legal procedure to file complaints and claims about any system irregularities.

The third chapter of the convention should establish a control mechanism in the form of an elderly rights committee. It would be a body supervising the implementation of obligations regarding the exercise of the right to long-term and institutional care by seniors. The committee could receive complaints from older people, as well as their families, carers, friends, and acquaintances, as well as NGOs. The committee would enable effective redress and prevent secondary victimization of seniors deprived of family and institutional care. Victimized seniors would be allowed to file complaints if state measures were insufficient. It is also vital for the committee to have the right to issue periodic guidelines and general comments on the exercise of the rights of older people, regardless of whether they are in nursing homes or seek at-home care.

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61 Mikołajczyk, "Older Persons' Right to Health," 18–9.

62 Robert Tabaszewski, "Právo pacienta na pastorační péči ve světle předpisů mezinárodního práva [Patients' Right to Pastoral Care in Light of International Law]," *Revue Církevního Práva* [*Church Law Review*] 69, no. 4 (2017): 45–56.

8. Draft Articles of the New Treaty

The new instrument should be workable and should comprise a preamble and a legally binding part. The operative part should include both general principles establishing a minimum level of obligations to ensure that older people can live reasonably independent lives, as well as LTC provisions supporting the traditional family model of care, assuming a holistic state policy towards care recipients and carers. The provisions on the right to LTC should be compatible with existing treaty obligations, in particular with the Convention on the Rights of Persons with Disabilities. In this light, we propose new provisions for the Convention, emphasizing the need for a comprehensive and workable framework that caters to the diverse needs of our senior citizens.

Preamble

The States Parties to the present Convention:
a. Having in mind the principles proclaimed in the Charter of the UN which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice, and peace in the world;
b. Recognizing that the United Nations, in the UDHR and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind;
c. Recognizing also that discrimination against any older person is a violation of the inherent dignity and worth of the human person;
d. Recognizing further the diversity of older persons and their special needs, including long-term care and palliative care;
e. Recognizing the need to promote and protect the human rights of all older persons, including those who require more intensive support until the end of their lives;
f. Recognizing the importance for older persons of their autonomy and independence, including the freedom to make their own choices […].

General principle: (1) Non-discrimination

1. Older persons shall be entitled to their human rights and freedoms, including the right to long-term care without any discrimination on any grounds.
2. States Parties shall take appropriate measures to ensure that:
a. long-term care services shall be available for older persons without any discrimination;
b. long-term care programmes shall be affordable for older persons;
c. long-term care services shall be in place to assist older persons with covering their costs, whether in full or in part, with no discrimination;
d. palliative care shall be served without undue delay, including at home and in long-term care settings.

General principle: (2) Protecting dignity

1. Older persons shall have the right to respect for their inherent dignity.
2. States Parties undertake to adopt immediate, effective, and appropriate measures:
a. to foster respect for the rights and dignity of older persons in long-term care;
b. to raise awareness throughout society, including at the family level and among medical personnel, regarding older persons;
c. to guarantee the protection of the inherent dignity in palliative care in all circumstances, including mental disorders, disability, disease, and end-of-life situations;
d. to protect older persons from maltreatment and inhuman and degrading treatment in long-term and palliative care.

General principle: (3) Protecting autonomy

1. Older persons shall have the right to lead their lives independently, in a self-determined and autonomous manner.
2. States Parties shall take appropriate measures to ensure:
a. that older persons shall only be placed in residential or institutional care upon their free and informed consent;
b. that individual constraints for an older person may only be implemented with the free and informed consent of that person;
c. sufficient and adequate residential services for those older persons who are no longer able or do not wish to reside in their own homes;

d. freedom from any maltreatment, unnecessary examinations, treatments, long-term care hospitalizations and admissions to intensive care;
e. the right to freedom of movement for older persons in institutional care, including life-sustaining treatment.

Substantive regulations
Right to health care

1. States Parties recognize that older persons shall have the right to enjoy the highest attainable standard of health […] including the right to access long-term care services […].

General – Right to long-term care

1. Every older person shall have the right to receive assistance in everyday personal, administrative, medical and home activities. To assess and fulfil the needs of older persons, States Parties shall:
a. provide food, domestic help, basic health care, mediation in exercising rights and educational, sports, cultural, and entertainment activities;
b. ensure that home care, daycare, residential care, nursing homes, and palliative and institutional care long-term care services are available and affordable for all older persons;
c. ensure that long-term care programmes are in place to assist older persons, where necessary, by reimbursing care costs in full or in part;
d. ensure sufficient training and support for long-term care providers;
e. ensure monitoring of the long-term and institutional care system.

9. Conclusions

The proposed draft provides for the right to LTC to be set forth in separate regulations. The right to LTC is different from the right to healthcare, and it should not be equated with the right to social welfare and charity. Perhaps the convention's provisions should be supplemented with additional mechanisms for the protection of elderly people and their caregivers in a pandemic. In 2020, in fear of contracting the virus, many seniors across the world consciously gave up their LTC rights, staying at home and relying solely on the help of their families, friends and neighbours. All this also contributed to the financial crisis and the bankruptcy of many LTC

providers. One prospective solution involves establishing a legal framework for the increased use of robots, telemedicine, e-commerce, and services tailored to elderly individuals, potentially serving as alternatives to human caregivers. Further considerations include privacy and data protection, as well as reinforcing local monitoring and reporting systems. Given the growing prevalence of Alzheimer's and dementia, there is an urgent requirement for a distinct convention that leverages existing legal precedents to institute comprehensive guidelines safeguarding the autonomy of those impacted by such conditions.

The COVID-19 crisis has directly affected seniors, their families, caregivers and LTC care providers, undermining their right to personal safety. In the spring of 2020, news broke around the world of a huge number of COVID-19 deaths in long-term care facilities, including in the Italian province of Bergamo. In the spring and autumn of 2020, access to caregivers, nurses, gerontologists and elderly carers decreased sharply. Many seniors were deprived of opportunities to socialize, participate in community life, and in many cases, even to carry out daily activities. When establishing the minimum obligations for the convention's signatories, it should also be taken into account that the staff and financial shortages faced by many countries even before 2020 are still prevalent in care and treatment institutions, social welfare homes, and at-home care under the pandemic restrictions. In shaping the gerontological policy, it is crucial to find the right balance between the legitimate needs and rights of elderly people, the duties and rights of caregivers, and the state's financial resources.

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The German Supply Chain Act – A Sustainable Regulatory Framework for Internationally Active Market Players?

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Global Value Chains, Corporate Sustainability, German Supply Chain Act

Abstract: On January 1, 2023, the German Act on Corporate Due Diligence in Supply Chains (LkSG) entered into force. It is the most important step taken so far by the German legislature in terms of promoting corporate sustainability and protecting human rights in globalized supply chains. Unfortunately, however, it did not make use of the opportunity to take on a pioneering role in the broader comparative context. The authors conduct a critical analysis of the sustainability concept of the Act, as well as its provisions on scope and enforcement. In both aspects, the Act falls short of expectations; it does not introduce a comprehensive concept of sustainability, small and medium-sized enterprises are excluded from the scope of application, and comprehensive due diligence along the supply chain is not achieved. On the enforcement level, the main weakness of the LkSG lies in its exclusion of civil liability.

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1. Introduction

On July 16, 2021, after a long political struggle, the German legislature enacted the Act on Corporate Due Diligence in Supply Chains (Lieferkettensorgfaltspflichtengesetz, LkSG).[1] Affected companies have had little time to align their business activities with the new requirements, as the majority of the LkSG came into force on January 1, 2023. While the legislative process was met with fierce criticism, especially from German business associations, reactions to the finally passed regulations were quite positive. In any case, the overriding objective of the Act is finding ever broader global approval in research and practice; demands for sustainable businesses and financial markets, as well as the need for more sustainable economic activity in general, have become increasingly urgent.[2] Therefore, the German LkSG is not only to be seen in the context of a comprehensive transformation of German business law towards increasing sustainability, but at the same time, it is part of a regulatory development that is taking place globally and on multiple levels. German requirements stand alongside related legislative activities, notably those of other EU member states, and will soon have to be brought into line with a corresponding European regulation.[3]

The article examines critically how sustainability as a scientific and policy concept has been implemented in the German LkSG, and which scope and enforcement mechanisms have been chosen by the legislator, taking

1 Act on Corporate Due Diligence in Supply Chains (LkSG) of 16 July 2021, BGBl. I 2021, p. 2959. [Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (Lieferkettensorgfaltspflichtengesetz)].

2 The promotion of sustainable development in corporate law has its origins at the international level; in particular since the adoption of the UN Guiding Principles on Business and Human Rights on March 21, 2011 (UN Doc A/HRC/17/31), a large number of international initiatives and regulations for the implementation of the stipulated goals can be observed, for a comprehensive overview see: Lise Smit et al., "Study on Due Diligence Requirements through the Supply Chain: Final Report," European Commission, 2020, 156 and 158ss. In Germany in particular for instance: Holger Fleischer, "Corporate Social Responsibility, Vermessung eines Forschungsfeldes aus rechtlicher Sicht," *Die Aktiengesellschaft* 62, no. 15 (2017): 509, 510f.; Mathias Habersack, "Gemeinwohlbindung und Unternehmensrecht," *Archiv für die civilistische Praxis* 220, no. 4/5 (2020): 594, 603ss.; also Anne-Christin Mittwoch, *Nachhaltigkeit und Unternehmensrecht* (Mohr Siebeck, 2022), chapter 2.

3 Proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final of 23 February 2022.

into account the broader comparative context. To this end, the LkSG's core regulation of human rights and environmental due diligence is first placed in the context of the general discussion on sustainability in corporate law (2). Based on this, the provisions of the LkSG on their scope and enforcement will be examined (3), to finally make assessments and recommendations for further development of the regulation of corporate sustainability (4).

2. Human Rights and Environmental Due Diligence in the Context of Corporate Sustainability

The LkSG is currently the German legislature's most important initiative to promote corporate sustainability. Its innovative core content can be found in section 3 para. 1, which obliges companies to observe human rights and environmental due diligence duties in their supply chains in an appropriate manner (so-called due diligence). However, the LkSG forms part of a whole bouquet of regulatory initiatives, primarily of a European nature, the goal of which is to oblige companies to take ecological and social concerns into account. These initiatives translate into the implementation of an overarching principle of sustainability in the legal systems,[4] which is gaining importance worldwide. Company law is particularly suitable in that respect, as it directly addresses companies as the main actors in markets. Since developments are both transdisciplinary and transnational, it is of particular importance to first take a look at the concept of sustainability and its significance for the regulatory concept of a Supply Chain Act. For this purpose, the most important current regulatory initiatives have to be considered.

2.1. Current Regulatory Initiatives

Although many regulatory initiatives take up the concept of sustainability, they fail to address what exactly sustainability means and how this concept can be operated in law.[5] Terms such as "social and ecological concerns" or

4 Public as well as Private Law.

5 An important exception marks the EU Taxonomy Regulation in the area of sustainable finance. 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, OJ L 198/13 of 22 June 2020.

"ESG factors" are often used; legal scholars mainly take the consideration of the "public good" or "common good" concerns as the starting point for the topic, especially in German corporate law. Considering the "common good" through the traditional discussion of a corporation's public interest is established in the practice of German corporate law; it has been used, with varying degrees of strength, throughout the entire history of the German Aktiengesellschaft (stock corporation).[6] In accounting law, sustainability concerns have been established since the implementation of the directive on non-financial reporting as opposed to financial reporting.[7] This unfortunate dichotomy will, however, be replaced in the future by more far-reaching sustainability reporting; a corresponding directive on corporate sustainability reporting, which is intended to considerably expand the scope and depth of the directive on non-financial reporting, was enacted recently.[8] The discussion of corporate social responsibility in transnational supply chains focuses mostly on the protection of human rights, especially labor rights.[9] Conversely, the EU's Sustainable Finance Strategy concentrates on environmental sustainability and explicitly does not treat social aspects with the same intensity.[10] The EU Action Plan on Financing Sustainable Growth

6 On this Habersack, "Gemeinwohlbindung und Unternehmensrecht," 594, 603–14; for the current sustainability discourse Mittwoch, *Nachhaltigkeit und Unternehmensrecht*, Section 3, chapter 9.

7 In Germany, the directive has been transposed with the CSR-Richtlinie-Umsetzungsgesetz of 11 April 2017, BGBl. I 2017, p. 802.

8 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

9 This is applicable to the LkSG. After a long discussion, environmental concerns were included. Besides, the LkSG refers only to a few agreements to this effect, see section 2 para. 1, s. 7, para. 3, s. 2 LkSG, and for more details Annette Schmidt-Räntsch, "Sorgfaltspflichten von Unternehmen – Von der Idee über den politischen Prozess bis zum Regelwerk," *Zeitschrift für Umweltrecht* (2021): 387–8, 393.

10 Commission Action Plan, Financing Sustainable Growth, COM(2018) 97 final on 8 March 2018; EU Taxonomy Regulation, 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, OJ L 198/13 of 22 June 2020, recital 6; also: Florian Möslein and Karsten Engsig Sørensen, "The Commission's Action Plan for Financing Sustainable Growth and its Corporate Governance Implications," *Nordic & European Company Law Working Paper*, no. 18–17 (2018): 221–2, 227s.

explicitly declares environmental sustainability to be the core regulatory objective and even specifies the problem of climate change; the social dimension of sustainability is recognized as its defining element, but its legal regulation is postponed to a later point in time.[11]

The use of different terminologies results in incoherence and raises questions about the application and interpretation of the respective provisions. The lack of coherence that comes from inconsistent terminology is obvious with regard to different regulatory projects; at least as far as different regulators are at work. It is not only the German legislature that has dedicated itself to the regulation of transnational supply chains; in France and the United Kingdom, the Loi de Vigilance[12] and the Modern Slavery Act[13] have been in place for a number of years. Recently there has been a similar law in Switzerland[14] as well as in Norway.[15] The Netherlands has introduced a new proposal on top of the already-adopted Wet Zorgpflicht for Kinderarbeid.[16] In Austria, there are proposals for a supply chain law

11 EU-Action plan for Financing Sustainable Growth, p. 14s; see now "Platform on Sustainable Finance's Report on Social Taxonomy," European Commission, accessed January 8, 2024, https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/280222-sustainable-finance-platform-finance-report-social-taxonomy.pdf.

12 Loi n° 2017–399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre; for a first judgment, cf. CA Versailles, 10 October 2020, D. 2021, n° 1, 5.

13 "Modern Slavery Act 2015," The National Archives, accessed January 8, 2024, www.legislation.gov.uk/ukpga/2015/30/contents/enacted.

14 In Switzerland the "Concern-Responsibility-Initiative," Eidgenössische Volksinitiative "Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt," BBl 2017, 6335, available at www.bk.admin.ch/ch/d/pore/vi/vis462t.html (22.03.2022), accessed January 8, 2024, was rejected – decided and pronounced was the counterproposal of the Council of States (*Ständerat*), accessed January 8, 2024, www.parlament.ch/centers/eparl/curia/2016/20160077/S2–8%20D.pdf (22.03.2022); more in detail Nicolas Bueno and Christine Kaufmann, "The Swiss Human Rights Due Diligence Legislation: Between Law and Politics," *Business and Human Rights Journal*, no. 6 (2021): 542, 544.

15 In Norway the *Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold*, short *åpenhetsloven*, has become effective on July 1, 2022, see: https://lovdata.no/dokument/NL/lov/2021-06-18-99, accessed January 8, 2024.

16 Wet Zorgplicht Kinderarbeid, see https://zoek.officielebekendmakingen.nl/stb-2019-401.html, accessed January 8, 2024; now there are ambitions for a cross-topic supply chain Act: www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35761 (22.03.2022). cf. summary Anneloes Hoff, "A Bill for

or at least a so-called social responsibility law.[17] However, even the various EU initiatives are not always comprehensively coordinated and the intensity with which they are developed may vary. While the implementation of the Sustainable Finance Initiative has been advancing in leaps and bounds since the publication of the Action Plan for Financing Sustainable Growth in 2018, the Commission postponed the publication of a proposal for a directive on sustainable corporate governance three times before finally disclosing it in February 2022.[18]

The common feature of all these initiatives is that they aim to improve the integration of sustainability concerns into corporate activities. Therefore, due to the diversity of approaches, it is of fundamental importance to define the term and concept of sustainability.

2.2. The Principle of Sustainability

The modern definition of sustainability, which has become the focus of various academic disciplines at the international level, originates from the work of the United Nations conducted since the 1980s. The Brundtland Commission of the United Nations coined its initial concept when it described sustainable development in 1987 as "meeting the needs of the present without compromising the ability of future generations to meet their own needs."[19] This expresses, in particular, an orientation towards the future in the sense of intergenerational justice. The international orientation as a premise is self-evident, given that the idea originated from the UN. In the following years, this definition was refined to reflect a three-dimensional approach encompassing ecological, economic, and social sustainability.[20] In recent years, the UN has repeatedly emphasized the equal value of these three

Better Business: Dissecting the new Dutch Mandatory Human Rights Due Diligence Initiative," Völkerrechtsblog - International Law & International Legal Thought, May 5, 2021, accessed January 8, 2024, https://voelkerrechtsblog.org/a-bill-for-better-business/.

17 Resolution motion No. 1454/A (E) of 25 March 2021, p. 8 (Supply chain law); Resolution motion No. 579/A of 28 May 2021 (Social responsibility law).

18 See n. 3.

19 UN-General Assembly, Report of the World Commission on Environment and Development, 11 December 1987, UN-Doc. A/RES/42/187 respectively WCED, our Common future, 43.

20 In detail Katja Gehne, *Nachhaltige Entwicklung als Rechtsprinzip* (Mohr Siebeck, 2011), 34ss.

dimensions, most recently with the announcement of the Sustainable Development Goals (SDGs) in 2015.[21]

In order to deal with the inherent contradictions resulting from the equal value of the economic, ecological, and social dimension, the idea of strong sustainability has been further spelled out in the natural sciences. The concept of planetary boundaries significantly improves the operability of the sustainability concept by modelling a framework for economic behavior within which the stability of the Holocene state can be maintained.[22] To achieve the goal of maintaining the Holocene state, the concept of planetary boundaries defines a "safe operating space for humanity with respect to the Earth system and are associated with planet's bio-physical subsystems or processes."[23] This framework is constituted by nine subsystems, each with its own thresholds, such as climate change, ocean acidification, air pollution, and biodiversity loss.[24] The understanding of planetary boundaries is dynamic and has been updated in 2015 and 2023.[25] The individual components are subject to continuous development, which must lead to adjustments based on scientific research as soon as the complex

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21 United Nations, Resolution adopted by the General Assembly on 25 September 2015 (A/RES/70/1), accessed January 8, 2024, www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf, 1 (Preamble) and 3; based on the UN Millennium Declaration of 2000, accessed January 8, 2024, www.un-kampagne.de/fileadmin/downloads/erklaerung/erklaerung_englisch.pdf; also recital 2 of the EU Taxonomy Regulation.

22 Johan Rockström et al., "Planetary Boundaries: Exploring the Safe Operating Space for Humanity," *Ecology and Society* 14, no. 2 (2009): 32; Johan Rockström et al., "A Safe Operating Space for Humanity," *Nature* 461, (2009): 472; Will Steffen et al., "Planetary Boundaries: Guiding Human Development on a Changing Planet," *Science* 347, no. 6223 (2015): 1259855; from a legal perspective esp. Beate Sjåfjell and Christopher M. Bruner, "Corporations and Sustainability," in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, eds. Beate Sjåfjell and Christopher M. Bruner (Cambridge University Press, 2020), 3, 7ss.

23 Rockström et al., "A Safe Operating Space for Humanity," 472.

24 The other five boundaries are the consumption of fresh water, the depletion of the ozone layer, chemical contamination, surface corrosion, and the nitrogen and phosphorus strain, Rockström et al., "Planetary Boundaries: Exploring the Safe Operating Space for Humanity," 32, 37ss.

25 See: "Planetary Boundaries," Stockholm Resilience Centre, accessed January 8, 2024, https://www.stockholmresilience.org/research/planetary-boundaries.html.

interactions and feedback mechanisms between the individual ecological subsystems are better understood and new knowledge becomes available.[26]

The social dimension of sustainability can then be integrated into the model of planetary boundaries as the foundation for all human behavior; this would allow a corridor to emerge that would model the so-called "safe and just operating space for humanity" as an extension of the concept of planetary boundaries.[27] Of course, compliance with fundamental and human rights, as expressed in the 1948 Universal Declaration of Human Rights of the United Nations, is pivotal to securing this social foundation. These include, in particular, the right to life, liberty, and security of the person, the prohibition of slavery and servitude, the right to work, just and satisfactory working conditions, equal pay for equal work, and remuneration that ensures an existence for the individual and his or her family with due respect for their human dignity. The German LkSG takes up all these aspects by leveraging central international agreements as the point of reference for national obligations in section 2 para. 1, para. 3, along with the conventions listed in the annex.

2.3. The Sectoral Approach of the LkSG

Yet, the LkSG does not explicitly use the term sustainability and does not propose a general definition of it. Instead, it obliges companies to observe human rights and environmental due diligence obligations (section 3 para. 1 LkSG). This set of obligations relates to economic, ecological, and social aspects, which represent the three dimensions of sustainability. Accordingly, the explanatory memorandum to the Act emphasizes that it is in line with the Federal Government's National Sustainability Strategy.[28] The German

[26] Tiina Häyhäa, Paul L. Lucas, Detlef P. van Vuuren, Sarah E. Cornell, and Holger Hoff, "From Planetary Boundaries to national fair shares of the global safe operating space – How can the scales be bridged?," *Global Environmental Change* 40, (2016): 60.

[27] Melissa Leach, Kate Raworth, and Johan Rockström, "Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity," in *World Social Science Report. Changing Global Environments* (UNESCO ISSC, 2013), 84; Kate Raworth, "A Safe and Just Space for Humanity: Can We Live within the Doughnut?," *Oxfam Discussion Papers* (2012): 9; Kate Raworth, *Doughnut Economics* (London: Random House Business Books, 2017), Chapter 1 et passim. Cf. David Griggs et al., "Sustainable Development Goals for People and Planet," *Nature* 495, (2013): 305–6.

[28] See also Government draft, BT-Drs. 19/28649, p. 24 and already BR-Drs. 239/21, p. 22.

Government is using the National Sustainability Strategy to link the International and European sustainability strategy with German policy, implementing it step by step in the form of national regulations in all policy areas. The National Sustainability Strategy recognizes the equivalence of the SDGs in terms of the comprehensive international sustainability concept.[29]

Consequently, it would have been a step forward to include the principle of sustainability as an overarching concept in the LkSG and to offer a general definition of what this concept entails.[30] Despite the formal declarations of intent of the provisions, this has not happened. Instead, the LkSG pursues a sectoral approach; while the primary purpose of the law is to improve the international human rights situation through the responsible design of the supply chains of German companies, it does not provide equivalent protection for ecological concerns. To the contrary, environmental aspects are only indirectly protected, and then only if they have a retroactive effect on human rights concerns; otherwise, environmental aspects are only protected if the LkSG explicitly refers to international environmental agreements.[31] Thus, the LkSG only includes environmental rights if they are related to human rights, e.g. in the case of poisoned drinking water. Furthermore, explicit reference to environmental agreements is not made comprehensively; the LkSG obliges companies to comply with only three international environmental agreements, namely the Minamata Convention on Mercury,[32] the Stockholm Convention on Persistent Organic Pollutants,[33]

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29 In view of the LkSG lately the 16th Development Policy Report of the Federal Government of 20 October 2021, BT-Drs. 19/32715, p. 185ss.

30 The European proposal for a directive on corporate sustainability due diligence COM(2022) 71 final does include the principle of sustainability and mentions the term 50 times, however fails to provide a definition in this respect.

31 Government draft, BT-Drs. 19/28649, p. 24; and Schmidt-Räntsch, "Sorgfaltspflichten von Unternehmen," 387, 393.

32 Minamata Convention on Mercury from 10. October 2013, BGBl. II (2017), p. 610–1, implemented through the EU-Mercury-Regulation, Regulation (EU) 2017/852 of the European Parliament and of the Council of 17 May 2017 on mercury, and repealing Regulation (EC) No 1102/2008.

33 Stockholm Convention about persistent organic pollutants of 23 May 2001, BGBl. II (2002), p. 803–4 (POPs-Convention); last amended through the resolution of 6 May 2005, BGBl. II (2009), p. 1060–1.

and the Basel Convention on Hazardous Waste[34] (section 2 para. 3 LkSG). Moreover, these three agreements do not generate any protected legal positions within the meaning of section 2 para. 1 LkSG; only the human rights-related agreements to which the LkSG refers do so. Hence, the LkSG fails to effectively protect ecological concerns from the environmentally damaging influences of entrepreneurial activity in the supply chain.

As mentioned, protecting ecological concerns from entrepreneurial damages in a comprehensive manner is not even the intention of the LkSG. It does not introduce general protection obligations. Instead, it lists the international agreements from which the respective concerns are derived in an annex. This convention-based approach is also applied to human rights due diligence, albeit a stricter standard of protection is achieved here thanks to the significantly higher number of conventions referred to at this point.[35] The referral technique may have its advantages, but it does not achieve a precise implementation of the UN Guiding Principles. In view of the current and future developments, a coherent approach based on the UN's comprehensive international sustainability concept, in conjunction with the concept of planetary boundaries and the introduction of an abstract and general obligation, would have been preferable. Current developments at the EU level suggest that the implementation of sustainability in economic and financial market law will gain momentum in the future. The approaches here are still predominantly sector-specific too; in particular, the EU Action Plan for Financing Sustainable Growth and its implementing acts focus strongly on the environmental dimension of sustainability. However, the further development of non-financial reporting towards sustainability reporting,[36] as well as the proposal for a direc-

[34] Basel Convention about the control of the cross-border transfer of hazardous wastes and their disposal of 22 March 1989, BGBl. II (1994), p. 2703–4.

[35] There are 11 human rights agreements of 1966 including, in particular, the "Internationale Covenant on Civil and Political Rights" (BGBl. II (1973), p. 1533–4) or the "International Labour Organization Convention for the Protection of Workers," e.g. Convention No. 29 about Compulsory Labour of 1930 (BGBl. II (1956), p. 640–1) with protocol of 2014 (BGBl. II (2019), p. 437–8); more in detail Schmidt-Räntsch, "Sorgfaltspflichten von Unternehmen," 387, 393.

[36] See already Action Plan of the Commission on Financing Sustainable Growth COM(2018) 97 final of 18 March 2018, p. 12s., and based on this European Securities and Markets Authority (ESMA), "Final Report: ESMA'S technical advice to the European Commission

tive on corporate sustainability due diligence[37] show efforts of coherence and consolidation in the sense of a comprehensive sustainability principle. The latter introduces a much more comprehensive approach than the German LkSG.[38] At least with regard to the promotion of the principle of sustainability through the LkSG, the German legislature has not taken the opportunity to play a pioneering role.

3. Scope and Enforcement of the Duty of Care

Considering the scope and enforcement of the due diligence duties in the LkSG, the legislature has not come up with a comprehensive approach either.

Under section 3 para. 1 LkSG, companies must set up a risk management system intended to prevent human rights and environmental risks through regular risk analyses, provide for remedial measures, and ensure the establishment of an internal complaints system. Furthermore, according to section 6 para. 2 LkSG, the management must issue a policy statement on its human rights strategy. However, these obligations are not absolute. Firstly, they are not spelled out as a duty to succeed or even a strict liability in such a way that every violation of human rights or environmental concerns in supply chains is stopped and compensated for, but rather are designed as so-called "duties of effort," a concept that German law is not familiar with.[39] Limits are also found with regard to both the scope of companies covered and the concept of the supply chain as such. Moreover, the LkSG enforces the due diligence obligation exclusively by means of administrative law, excluding the civil liability stemming from the breach

on integrating sustainability risks and factors in MIFID II" from 30 April 2019, *ESMA 35–43–1737*, and now 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 from 21 April 2021.

37 See n. 3.

38 Cf. n. 3 and more details immediately.

39 Government Explanatory Memorandum, BT-Drs. 19/28649, p. 2, 41; Patricia Sarah Stöbener de Mora and Paul Noll, "Grenzenlose Sorgfalt? – Das Lieferkettensorgfaltspflichtengesetz," *Neue Zeitschrift für Gesellschaftsrecht*, no. 28 (2021): 1237, 1240; on the concept of "duties of effort": Eric Wagner and Marc Ruttloff, "Das Lieferkettensorgfaltspflichtengesetz – eine erste Einordnung," *Neue Juristische Wochenschrift*, no. 30 (2021): 2145, 2145s.

of the Act. Overall, the Act shows considerable weaknesses with regard to the intended improvement of the protection of human rights and environmental concerns along the supply chain.

3.1. Material Scope of Application: Concept of the Supply Chain

One weakness is already evident from the material scope of application and the extent of the due diligence duties. Although the concept of the supply chain in the LkSG is rather broad, the extent of the due diligence duties is limited.

Pursuant to section 3 para. 1 s. 1 LkSG, the due diligence obligations extend to the supply chain of the companies covered. Section 2 para. 5 LkSG defines the term supply chain as "all steps in Germany and abroad that are necessary for the production of goods and the provision of services, starting with the extraction of raw materials and ending with the delivery to the end customer." This includes, for example, the transport or intermediate storage of the goods as well as the granting of a loan to finance the production by a supplier.[40] In addition to the actions of the company in its own business area, the actions of direct and indirect suppliers are also included. Overall, the term "supply chain" is to be understood broadly; it covers the entire value creation process. This had already provoked considerable criticism at the drafting stage. In particular, it was feared that large German companies with many direct suppliers would not be able to fully oversee their entire supply chain, including indirect suppliers.[41]

However, the LkSG does not impose such an obligation on them. Rather, on closer examination, the due diligence duties along the supply chain

[40] Cf. for examples Government Explanatory Memorandum, BT-Drs. 19/28649, p. 40; more in detail on the expression "supply chain" in the LkSG Robert Grabosch, "§ 2 – Grundlagen, Prinzipien und Begriffe," in *Das neue Lieferkettensorgfaltspflichtengesetz*, ed. Robert Grabosch (Nomos, 2021), 21, 36ss.

[41] Committees Corporate Social Responsibility and Compliance, Mercantile Law and Human Rights of the German Bar Association, "Stellungnahme zum Regierungsentwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten," *NZG* (2021), 546–9 (see paras. 2 and 16–20); against this with a differing view: Eva-Maria Kieninger, "Keine Angst vor einem Lieferkettengesetz," *Frankfurter Allgemeine Zeitung*, no. 211 (2020); in detail also: Veronika Thalhammer, "Das umstrittene Lieferkettensorgfaltspflichtengesetz – Ein juristischer Blick auf Kritik aus Zivilgesellschaft, Wirtschaft und Politik," *Die Öffentliche Verwaltung*, no. 18 (2021): 825, 826ss.

are limited; the duties of care mentioned in section 3 para. 1 LkSG only apply to a company's own business area and its direct suppliers. Indirect suppliers are only covered by section 9 para. 3 LkSG if a company obtains substantiated knowledge based on factual indications that such a company may be violating human rights or environmental obligations.[42] Such a narrowing of the due diligence obligations to direct suppliers considerably relativizes the goal of protecting human rights and environmental concerns in the supply chain. This is because violations, human rights violations in particular, often do not take place within German companies or their direct suppliers but tend to be observed at the beginning of the value chain.[43]

This approach is also not in line with the UN Guiding Principles on Business and Human Rights. Principle 19 states that for the complex situation of the indirect supplier relationship, the determining factors should be the severity of the abuse and the company's ability to exert influence over the organization in question. It should also be considered how crucial the relationship is for the company and whether its termination would in turn have adverse human rights consequences.[44] Such a differentiated approach is preferable to largely cutting back responsibility for indirect suppliers from the outset. The supply chain concept of the LkSG also lags behind its planned counterpart at the EU level; the Commission proposal on Corporate Sustainability Due Diligence extends the sustainability due diligence obligations to the entire supply chain without differentiating between indirect and direct suppliers, as long as there is an established business relationship.[45]

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42 There is some discussion on the interpretation of the term "substantiated knowledge"; see for instance: Erik Ehmann and Daniel F. Berg, "Das Lieferkettensorgfaltspflichtengesetz (LkSG): ein erster Überblick," *Gesellschafts- und Wirtschaftsrecht*, no. 15 (2021): 287, 290.

43 This was criticized already in the draft stage of the LkSG the Supply Chain Act Initiative, "Statement on the draft bill," 4, accessed January 8, 2024, lieferkettengesetz.de/wp-content/uploads/2021/03/Initiative-Lieferkettengesetz_Stellungnahme-zum-Gesetzentwurf.pdf, and Germanwatch, "Statement on the draft bill," 1, accessed January 8, 2024, germanwatch.org/sites/default/files/Stellungnahme_Germanwatch_Ref.Entwurf_Sorgfaltspflichtengesetz.pdf, both quoted by Thalhammer, "Das umstrittene Lieferkettensorgfaltspflichtengesetz," 825, 834 (n. 168s).

44 UN Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework, 2011, p. 21s.

45 Cf. already n. 3.

3.2. Personal Scope of Application: Large German Companies

The personal scope of application of the LkSG has not been developed comprehensively either. The Act only applies to companies, regardless of their legal form, which have their head office, main branch, or registered office in Germany. With regard to size, the law provides for a staggered application in two phases, beginning on January 1, 2023. In the first year, the application was limited to companies with more than 3,000 employees, which means that only about 700 German companies will be included.[46] The LkSG thus exempts most German companies from human rights and environmental due diligence and potential liability. In the second phase, which began on January 1, 2024, the threshold was lowered to 1,000 employees, increasing the number of companies affected to about 3,000.[47] The employees of all affiliated companies in a group must be included in the calculation of the number of employees of the parent company, even if an affiliated company has its registered office abroad or has its head office or principal place of business there. This is to ensure that, particularly in the case of groups, the parent companies fall within the scope of application of the Act, irrespective of whether the workers are employed by the parent or the subsidiary. In addition, section 2 para. 6 s. 3 of the LkSG stipulates that in affiliated companies, the parent company's area of business also includes an affiliated company if the parent company exercises a decisive influence. Non-German companies can be affected if they have a branch in Germany (section 1 para. 1 s.1).

The fact that the LkSG is aimed exclusively at large companies is of particular importance for its effectiveness. After concerns were repeatedly expressed at the drafting stage that a broad supply chain concept combined with a rather general duty of care could disproportionately burden SMEs,

[46] See also section 1 para. 1 s. 1 no. 2 LkSG; with information on the number of involved companies Christian Gehling, Nicolas Ott, and Cäcilie Lüneborg, "Das neue Lieferkettensorgfaltspflichtengesetz – Umsetzung in der Unternehmenspraxis," *CCZ-Corporate Compliance*, no. 5 (2021): 230–1; also Wagner and Ruttloff, "Das Lieferkettensorgfaltspflichtengesetz," 2145; Ehmann and Berg, "Das Lieferkettensorgfaltspflichtengesetz (LkSG)," 287; Stöbener de Mora and Noll, "Grenzenlose Sorgfalt? – Das Lieferkettensorgfaltspflichtengesetz," 1237, 1239; Hans-Georg Kamann and Philipp Irmscher, "Das Sorgfaltspflichtengesetz – Ein neues Sanktionsrecht für Menschenrechts- und Umweltverstöße in Lieferketten," *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, (2021): 249–50.

[47] See section 1 para. 1 s. 2 LkSG; for information about the number of involved companies cf. the previous footnote.

these as well as micro-enterprises were ultimately excluded from the scope of application of the LkSG.[48] Regulators in other member states have gone much further in this regard. For example, the Norwegian Transparency Act provides for significantly lower thresholds despite a shorter transition period:[49] Norwegian companies that fall within the scope of the act's application may have a minimum number of 50 employees, as long as certain turnover and profit thresholds are also exceeded.[50] The current Dutch legislative initiative[51] also includes significantly lower thresholds, namely a net profit of at least 40 million euros or a minimum number of 250 employees.[52] Originally, a similar approach was preferred at the EU level. In its recommendation, the European Parliament opted for linking the personal scope of application to the existence of risk factors, thereby including SMEs and even micro-enterprises.[53] Such an approach makes sense given that SMEs form the backbone not only of the German economy but also of the European internal market.[54] Unfortunately, the recent proposal by

48 Government Explanatory Memorandum, BT-Drs. 19/28649, p. 3 and p. 32; they can however be affected indirectly, if the directly addressed enterprises pass these legal obligations on to them, cf. Wagner and Ruttloff, "Das Lieferkettensorgfaltspflichtengesetz," 2145. An evaluation of the personal scope of application should take place by June 30, 2024; see: Government Explanatory Memorandum, BT-Drs. 19/28649, p. 32.

49 Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (*Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven)*, Lovvedtak 176 (2020–2021)). Unofficial translation by the Ministry for Children and Families, accessed January 8, 2024, https://lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=The%20Act%20shall%20promote%20enterprises,fundamental%20human%20rights%20and%20decent.

50 Comparative legal analysis for Germany and Norway: Marcus Krajewski, Kristel Tonstad, and Franziska Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?," *Business and Human Rights Journal* 6, no. 3 (2021): 550, esp. 554ss.

51 Proposal for an Act about a responsible and sustainable international conduct of duty care in production chains ("Wet verantwoord en duurzaam internationaal ondernemen"), accessed January 8, 2024, https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35761.

52 For a summary see: Hoff, "A Bill for Better Business."

53 See: Art. 2 para. 2 of the European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability.

54 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions an SME Strategy

the Commission again makes the personal scope of application dependent on the number of employees, as well as the net worldwide turnover; with thresholds falling between the German and Dutch ones, the Commission's proposal generally excludes SMEs from the due diligence obligations.[55] Therefore, the Act once again addresses only the tip of the iceberg and does not introduce sustainability due diligence at the core of business activities as a general rule.

3.3. Enforcement of the Duties of Care Under the LkSG

The efficiency of the enforcement mechanisms is important for the actual effectiveness of the duties of the LkSG in promoting sustainability in supply chains. A comparative overview illustrates the existing different approaches of national lawmakers and helps to assess the different measures.

3.3.1. Possible Enforcement Mechanisms and Comparative Overview

A purely voluntary approach to implementing the UN Guiding Principles on Business and Human Rights, on which the National Action Plan in Germany was based, did not produce the desired effect in Germany and led to the drafting of the LkSG.[56] For the enforcement of binding obligations, public enforcement via administrative measures and regulatory fines, private enforcement via civil liability mechanisms, and criminal sanctions can in principle be considered. The active national regulators have so far chosen different approaches; a combination of public and private enforcement is proposed for the European Directive,[57] and the rejected Swiss corporate responsibility initiative has also envisaged a civil law liability provision with

for a sustainable and digital Europe, COM(2020) 103 final of 10 March 2020, p. 1; recent monograph Alexander Stöhr, *Kleine Unternehmen – Schutz und Interessenausgleich im Machtgefüge zwischen Arbeitnehmern, Verbrauchern und Großunternehmen* (2019); Michael F. Müller, *Kleinere und mittlere Unternehmen im Privatrecht – Auf dem Weg zu einem Sonderprivatrecht?* (2021).

55 Art. 2 Commission Proposal (n. 3) with explanation on p. 14 of the Proposal.

56 Government Explanatory Memorandum, BT-Drs. 19/28649, p. 1s; for instance Thomas Helck, "Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, Worauf sich Unternehmen zukünftig vorbereiten müssen," *Betriebs-Berater*, (2021): 1603; to the restricted impact on voluntary standards in the international context also: Smit et al., "Study on Due Diligence Requirements through the Supply Chain: Final Report," 218s.

57 See n. 3, Art. 16ss and Art. 22; among others Smit et al., "Study on Due Diligence Requirements through the Supply Chain: Final Report," 209–13, 257–60.

an exculpation solution.[58] The Dutch initiative for a law on responsible and sustainable international trade (*Wet verantwoord en duurzaam internationaal ondernemen*)[59] wants to introduce the full range of enforcement mechanisms: criminal sanctions and civil liability, in addition to public enforcement.[60] The French Loi de Vigilance's core enforcement mechanism is a civil liability rule according to which, in the event of a breach of duty, the French general clause in tort applies.[61] As further enforcement instruments, the Loi de Vigilance also provides for the threat of coercive measures such as a court order to perform duties ("injunction")[62] and sanctioning with fines. The fine regulation has, however, been declared unconstitutional by the French Conseil Constitutionnel.[63]

The introduction of criminal sanctions for the enforcement of companies' duties in Germany faces obstacles similar to the criminal prosecution of competition law violations; criminal liability of companies as such is alien to German law because of the principle of culpability (*Schuldprinzip*). Accordingly, criminal sanctions can, in principle, only be linked to the (culpable) conduct of individuals.[64] In addition, if criminal and

58 Swiss people initiative "For responsible enterprises – to protect people and environment," BBl 2017, 6335, 6335, accessed January 8, 2024, www.bk.admin.ch/ch/d/pore/vi/vis462t.html. For further references see supra n. 23.

59 "Wet verantwoord en duurzaam internationaal ondernemen," Tweedekamer.nl, accessed January 8, 2024, https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35761.

60 Summary of the proposal Hoff, "A Bill for Better Business."

61 Art. L225–102–5 Code de Commerce; detailed on the French Regulation: L. Nasse, "Devoir de Vigilance," *Zeitschrift für Europäisches Privatrecht*, (2019): 771, 774; G. Rühl, "Die Haftung von Unternehmen für Menschenrechtsverletzungen: Die französische *Loi de vigilance* als Vorbild für ein deutsches Wertschöpfungsgesetz?," in *Festschrift für Christine Windbichler zum 70. Geburtstag am 8. Dezember 2020*, eds. Gregor Bachmann, Stefan Grundmann, Anja Mengel, and Kasper Krolop (De Gruyter, 2020), 1413, 1427–30; Stéphane Brabant and Elsa Savourey, "A Closer Look at the Penalties Faced by Companies," *Revue Internationale de la Compliance et de l'Éthique des Affaires*, no. 50 (2017): 1–3.

62 Art. L225–102–4 II. C. Code de Commerce; in detail: Stéphane Brabant and Elsa Savourey, "Le champ de la loi – Les sociétés soumises aux obligations de vigilance," *Revue Internationale de la Compliance et de l'Éthique des Affaires,* (2017): 92, 18–25.

63 Conseil Consitutionnel, Décision n° 2017–750 DC of 23 March 2017.

64 German Constitutional Court (BVerfG) Decision of 25 October 1966, Case 2 BvR 506/63, BVerfGE 20, 323; see with further references: Martin Heger, "Vorbemerkung § 13 StGB," in *Strafgesetzbuch*, eds. Karl Lackner and Kristian Kühl (C.H. Beck, 2018), para 22. Even under

administrative sanctions coexist, there is a risk of conflicts of competence between the authority responsible under administrative law and the public prosecutor's office.[65] Therefore, a combined solution of official control and civil liability was initially considered for the enforcement of the due diligence duty under the LkSG.[66] Ultimately, the legislature opted for purely public enforcement and expressly excluded separate civil liability in section 3 para. 3 LkSG. The control and enforcement of the duties of care now consist of competent authorities (sections 12 and 13) reviewing the reports and official control measures under a risk-based approach (sections 4 to 18). The sanctions are listed in sections 5 and 6: In the case of violations and infringements, the competent authority can issue sanctions by ordering coercive fines under the Administrative Enforcement Act (VwVG) (section 23 LkSG) or regulatory fines under the Act on Regulatory Offences (OWiG) (section 24 LkSG) and, in serious cases, exclude the company from the award of public contracts under section 22 LkSG.

The initial response in the literature to the envisaged enforcement mechanisms was mixed. While some call it a "toothless paper tiger,"[67] others believe that the LkSG is "equipped with a particularly strong enforcement

the Draft for an Association Sanctions Act (Verbandssanktionengesetz) of 16 June 2020, no real corporate penalty would be introduced, but rather a tightening of the catalogue of fines and regulation of a special association procedure.

65 For Competition law see: Carsten König and Fernanda Luisa Bremenkamp, "Competition Law Sanctions in Germany, under 22.4.2.4," in *The Cambridge Handbook of Competition Law Sanctions*, ed. Tihamer Tóth (Cambridge University Press, 2022).

66 Draft by the Ministry of Economic Cooperation and Development (BMZ) of 1. February 2019, accessed January 8, 2024, media.business-humanrights.org/media/documents/files/documents/SorgfaltGesetzentwurf_0.pdf; also: Habersack, "Gemeinwohlbindung und Unternehmensrecht," 594, 643. On the first drafts see also: Saskia Wilks and Johannes Blankenbach, "Will Germany Become a Leader in the Drive for Corporate Due Diligence on Human Rights?," Business & Human Rights Resource Centre Blog, February 20, 2019, accessed January 8, 2024, www.business-humanrights.org/en/blog/will-germany-become-a-leader-in-the-drive-for-corporate-due-diligence-on-human-rights/.

67 On the Government draft: Eva-Maria Kieninger, "Miniatur: Lieferkettengesetz – dem deutschen Papiertiger fehlen die Zähne," *Die Zeitschrift für die gesamte Privatwissenschaft*, no. 2 (2021): 252; Thalhammer, "Das umstrittene Lieferkettensorgfaltspflichtengesetz," 825; Jessica Schmidt, "Lieferkettengesetzgebung: Sorgfalt!," *Europäische Zeitschrift für Wirtschaftsrecht*, no. 7 (2021): 273.

mechanism under economic administration and public procurement law"[68] or even express concerns about the "extraordinarily harsh sanctions."[69]

3.3.2. Monitoring by BAFA

The Federal Office of Economics and Export Control (BAFA) is responsible for monitoring and sanctions according to sections 19 para. 1, 24 para. 5 LkSG. BAFA was not previously entrusted with responsibilities in this area. A new responsibility had been created for the purpose of implementing the EU Conflict Minerals Regulation, yet again with a different authority (not BAFA).[70] Even if the due diligence obligations according to the Conflict Minerals Regulation are specifically tailored to the risks of raw material procurement from conflict and high-risk areas, and special expertise is certainly advantageous, it is still questionable whether the public enforcement of sustainability concerns in German companies should not have been better bundled under one roof, in light of greater coherence and consistency in the enforcement of sustainability concerns.

In addition to reviewing the records under sections 12 and 13 LkSG, BAFA acts either ex officio or upon application of an interested party (section 14 para. 1 LkSG). Actual violation of human rights or environmental concerns is not a necessary prerequisite for BAFA to intervene. Rather, the authority can act at its own discretion to monitor compliance with due diligence obligations, including taking preventive action (section 14 para. 1 no. 1 lit. a LkSG). This is part of a risk-based approach under sections 14 para. 2, 19 para. 2 LkSG, which does not rely on random sampling,

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68 Christoph Engel and Daniel Schönfelder, "§ 6 Öffentlich-rechtliche Durchsetzung," in Robert Grabosch, *Das neue Lieferkettensorgfaltspflichtengesetz* (Nomos, 2021), 171–2; Erik Ehmann, "Der Regierungsentwurf für das Lieferkettengesetz: Erläuterung und erste Hinweise zur Anwendung," *Zeitschrift für Vertriebsrecht*, no. 3 (2021): 141, 151 views the sanction system as "convincing."

69 Michael Nietsch and Michael Wiedmann, "Der Regierungsentwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in der Lieferkette," *CCZ-Corporate Compliance,* (2021): 101, 109; Gehling, Ott, and Lüneborg, "Das neue Lieferkettensorgfaltspflichtengesetz," 230, 240 denote the sanction as "draconic"; as "rigid": Sebastian Lutz-Bachmann, Kristin Vorbeck, and Lenard Wengenroth, "Menschenrechte und Umweltschutz in Lieferketten – der Regierungsentwurf eines Sorgfaltspflichtengesetzes," *Betriebs-Berater,* (2021): 906, 912ss.

70 Sections 2, 3 MinRohSorgG ("Mineral-Resources-Duty-of-Care-Act"); web presence of DEKSOR, accessed January 8, 2024, www.bgr.bund.de/DE/Gemeinsames/UeberUns/DEKSOR/DEKSOR_node.html.

but instead provides for inspections independent of concrete indications, based on substantiated indications from third parties and on special risk profiles of the companies or sectors concerned,[71] such as the textile industry.[72] BAFA can therefore prioritize within its discretion depending on the level of the risk.[73]

If a permissible and sufficiently substantiated application is filed, the authority must, however, take action according to section 14 para. 1 no. 2 LkSG. An interested party can file an application if it appears possible that the violation of a duty of care by the company will result in the violation of a protected legal position of the person filing the application or that such a violation is imminent. The prerequisite is therefore the possibility of personal involvement, which is typical in German administrative law. This can be the case directly, as with employees of the company concerned or one of its suppliers, or indirectly, if the company is affected by the violation of environmental concerns in the supply chain.[74]

3.3.3. Regulatory Measures and Sanctions

3.3.3.1. Regulatory Measures

In monitoring and enforcing compliance with the duties under the LkSG, BAFA can issue orders and take measures in accordance with sections 15 to 17 LkSG.

Section 15 s. 1 LkSG is a general clause, according to which BAFA can take the "appropriate and necessary orders and measures to detect, eliminate and prevent violations of the obligations under sections 3 to 10 para. 1." The possibility to summon persons (No. 1), to impose a remedial plan on the enterprise (No. 2), and to impose concrete actions on the enterprise to make it fulfil its obligations (No. 3) are mentioned as standard

71 Government Explanatory Memorandum, BT-Drs. 19/28649, p. 56.

72 Here human rights abuses in supply chains have received special attention over the last years, see among others Gerhard Wagner, "Haftung für Menschenrechtsverletzungen in der Lieferkette," *Zeitschrift für Wirtschaftsrecht*, no. 21 (2021): 718, 720; Markus Kaltenborn and Johannes Norpoth, "Globale Standards für soziale Unternehmensverantwortung," *Recht der internationalen Wirtschaft,* (2014): 402, 409; Wolfgang Kaleck and Miriam Saage-Maaß, *Unternehmen vor Gericht. Globale Kämpfe für Menschenrechte* (Politik bei Wagenbach 2016), 99ss.

73 Engel and Schönfelder, "§ 6 Öffentlich-rechtliche Durchsetzung," 171, 176.

74 E.g. as a resident. See: Government Explanatory Memorandum, BT-Drs. 19/28649, p. 54.

examples in section 15 s. 2. Pursuant to section 16 LkSG, BAFA has special rights of access to company premises and business documents and records. Furthermore, the enterprises must provide BAFA with information and evidence relevant to the monitoring of compliance with the due diligence obligations. These obligations are limited by a right to refuse to testify under section 17 para. 3 LkSG, which follows from the *nemo-tenetur principle:*[75] The statement may be refused if it would otherwise put the person concerned or a relative in danger of prosecution under the Code of Criminal Procedure or the OWiG. Finally, section 18 LkSG provides for duties of cooperation and acquiescence of the parties that go beyond what is customary in regular administrative proceedings; enterprises must not only tolerate the measures described above but also cooperate in their implementation.

To enforce these measures, BAFA may use the means of administrative enforcement under the German VwVG. In doing so, it must observe the general enforcement requirements, in particular, warning and official setting of a coercive measure before its enactment under sections 13 and 14 VwVG. However, the maximum penalty under the new LkSG is double the amount set by the VwVG.

3.3.3.2. Sanctions Regime

Section 24 LkSG contains several regulatory offences for the negligent or intentional breach of certain duties of care provided for in sections 4 to 9 LkSG. There is criticism over the lack of specificity of these regulatory offences since they refer back to legal concepts that need to be interpreted,[76] at times with reference to the decision of the French Conseil Constitutionnel for the fining rules of the Loi de Vigilance.[77] The need for interpretation does not, however automatically imply a violation of the constitutional principle of definiteness (Article 103 para. 2 of the German Constitution), so long as the meaning is specifiable.[78]

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75 On the right to refuse testimony in Economic Administrative Law: Moritz Gabriel, "Das Auskunftsverweigerungsrecht im Wirtschaftsverwaltungsrecht," *Neue Zeitschrift für Verwaltungsrecht* (2020): 19.

76 Kamann and Philipp Irmscher, "Das Sorgfaltspflichtengesetz," 153, 249; Lutz-Bachmann, Vorbeck, and Wengenroth, "Menschenrechte und Umweltschutz in Lieferketten," 906, 912.

77 Already at 3.3.1. Constitutional court, Décision no. 2017–750 DC of 23 March 2017.

78 See also: Engel and Schönfelder, "§ 6 Öffentlich-rechtliche Durchsetzung," 171, 193.

Pursuant to section 46 OwiG, which applies to the fining proceedings, the prosecuting authority has some of the investigative powers of the Code of Criminal Procedure (StPO); in particular, it can conduct searches and seize evidence under sections 102 and 94 et seq. StPO. Regarding the initiation of the fine proceedings and the amount of the sanction, BAFA has discretionary powers within the framework of section 24 LkSG.

Regulatory fines have three functions in German regulatory offences law: they have a repressive, preventive, and profit-absorbing effect. The repressive effect of regulatory fines is, however, less severe than that of penalties under the Criminal Code. Regulatory fines are understood as an "emphatic reminder of obligations"[79] and, for example, are not entered in the Federal Central Register like the criminal fine. The central function of the regulatory fines is thus prevention, both in the form of individual prevention and of general deterrent effect.[80] This goal is ultimately also served by the absorption of economic advantages gained from the offence. Pursuant to section 17 para. 4 s. 1 OWiG, the fine should exceed the economic advantage (even beyond the statutory maximum) that the offender has derived from the administrative offence. The fine can be up to 8 million euros in the case of legal persons, up to 2 percent of the average annual turnover in the case of legal persons with an average annual turnover of more than 400 million euros, and up to 800,000 euros in the case of natural persons, pursuant to sections 24 para. 2 s. 2 LkSG and 30 para. 2 s. 3 OWiG.[81]

Under section 24 para. 4 s. 1 of the LkSG, the assessment of the fine for legal persons and associations of persons is based on the significance of the regulatory offence; the criteria for this are, for instance, the weight, extent, and duration (no. 3) of the regulatory offence, as well as its effects (no. 5). The economic circumstances of the legal person are also considered (no. 2). Efforts on the part of the company to uncover the offence, as well as efforts to make amends, for example within the framework of proceedings for amicable settlement according to section 8 para. 1 s. 5 LkSG, can

79 BVerfG, Decision of 16 July 1969, Case 2 BvL 2/69, BVerfGE 27, 18.

80 Kai Sackreuther, "OWiG § 17," in *Ordnungswidrigkeitengesetz OWiG*, ed. Jürgen Peter Graf, 32 ed. (C.H. Beck, 2021), marginal no. 6ss.

81 Critical on using the average annual turnover as a reference for the calculation of the fine Lutz-Bachmann, Vorbeck, and Wengenroth, "Menschenrechte und Umweltschutz in Lieferketten," 906, 913.

reduce the fine.[82] In the case of a negligent offence, according to section 17 para. 2 OWiG, the amount of the fine is capped at half of the statutory maximum amount. The practice of the authorities should be defined by guidelines, as they are known from cartel law under Section 81d para. 4 GWB.[83] Section 22 LkSG provides that the sanctioning effect of the fine is reinforced in serious cases by the exclusion from public tendering.

3.3.4. Missing Civil Liability and Conclusion

Civil liability directly stemming from the breach of the Act is expressly excluded under section 3 para. 3 LkSG. There is a controversy within the German legal community as to how and if the breach of the due diligence duties can nevertheless lead to civil liability under general contract law and, in particular, tort law.[84] The developments in antitrust law have shown that civil liability can have a beneficial effect on the effectiveness of sanctions.[85] This might be particularly true for the German LkSG, since the department responsible for the enforcement of its sanctions system is still in the process of being set up and it is doubtful that its staffing will be sufficient to ensure effective enforcement.[86] Overall, the regulatory measures applicable as well as the sanctions provided for by the LkSG are quite strong and may explain why some believe that the LkSG is "equipped with a particularly strong enforcement mechanism under economic administration and public

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82 Cf. Government Explanatory Memorandum, BT-Drs. 19/28649, p. 49.

83 Bundeskartellamt, "Guidelines for the Setting of Fines in Cartel Administrative Offence Proceedings," October 11, 2021, accessed January 8, 2024, www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines_setting_fines_Oct_2021.html?nn=3591462.

84 Discussing a liability under Contract law e.g. Chris Thomale and Marina Murko, "Unternehmerische Haftung für Menschenrechtsverletzungen in transnationalen Lieferketten," *Europäische Zeitschrift für Arbeitsrecht*, no. 1 (2021): 40, 50s.; Björn Schneider, "Menschenrechtsbezogene Verkehrspflichten in der Lieferkette und ihr problematisches Verhältnis zu vertraglichen Haftungsgrundlagen," *Neue Zeitschrift für Gesellschaftsrecht*, no. 35 (2019): 1375 ss, 1372 ss. Discussing liability under Tort Law e.g.: Anna Beckers, "Globale Wertschöpfungsketten: Theorie und Dogmatik unternehmensbezogener Pflichten," *Zeitschrift für die gesamte Privatrechtswissenschaft,* (2021): 220, 248; Wagner, "Haftung für Menschenrechtsverletzungen in der Lieferkette," 1095, 1103; Marc-Phillippe Weller and Chris Thomale, "Menschenrechtsklagen gegen deutsche Unternehmen," *Zeitschrift für Unternehmens- und Gesellschaftsrecht,* (2017): 509, 521s.

85 See on this: König and Bremenkamp, "Competition Law Sanctions," 189, 401.

86 This has been criticized also by others, cf.: Engel and Schönfelder, "§ 6 Öffentlich-rechtliche Durchsetzung," 171–2.

procurement law."[87] However, this view does not sufficiently take into account the importance of how these measures and sanctions will be applied in practice.

4. Summary Assessment and Outlook

To date, the German LkSG is the German legislatures' most important initiative in promoting corporate sustainability. To this end, it obliges companies to observe human rights and environmental due diligence duties in their business operations and supply chains in an appropriate manner. The LkSG is one of a multitude of regulatory initiatives, applied at the European level, all of which pursue the goal of obliging companies to take sustainability concerns more seriously. Yet, on closer examination of the provisions of the LkSG in the light of the concept of sustainability and the broader comparative context, the German legislature hardly assumes a pioneering role: The LkSG does not contain a comprehensive concept of sustainability, as the United Nations, in particular, has shaped at the international level. This is regrettable, especially since the German government has been explicitly striving for the implementation of the UN's sustainability approach at the national level for some time. Instead, the LkSG follows a purely sectoral approach, protecting first and foremost human rights concerns, with environmental aspects playing only a secondary role. Moreover, the LkSG models the concrete obligation of companies concerning various international agreements. Instead of establishing an abstract obligation to consider sustainability concerns in general, this referencing technique makes the application of the law considerably more difficult. For such a commitment, the concept of planetary boundaries combined with the social foundation would have been an adept concretization of the sustainability principle. This approach has not only received a lot of support from the scientific community but is also increasingly being taken up at the political level.

Regarding the scope and enforcement of corporate due diligence, the German legislature also fails to achieve a comprehensive approach. On the one hand, the LkSG leaves out small and medium-sized enterprises. This does not bring the intended relief but conversely leads to legal uncertainties

[87] Ibid.; Ehmann, "Der Regierungsentwurf für das Lieferkettengesetz," 141, 151 views the sanction system as "convincing."

to the detriment of SMEs, which form the backbone of the German and European economy, as they play a central role in the transition to a sustainable economy. On the other hand, the LkSG fails to bind companies comprehensively to their obligations along the supply chain. Although its supply chain concept is broadly defined in principle, the concrete due diligence obligations mostly concern the company's own business operations and direct suppliers. Indirect suppliers are only affected in exceptional cases. Such a regulatory approach not only fundamentally questions the effectiveness of the law, but also contradicts parallel approaches in the UN Guiding Principles on Business and Human Rights, in other member states and at the EU level.

As far as enforcement is concerned, the main weakness of the LkSG is its failure to provide for civil liability. Regardless of whether the official monitoring and sanctions now introduced can effectively enforce corporate due diligence, the legislature has failed to clarify numerous core civil law issues: What role will the principle of trust under tort law play in the supply chain in the future? How can the breakthroughs of the principle of separation under company law, which courts in various jurisdictions have already assumed several times, be categorized and depicted normatively? These important questions still await an answer. It appears that the German legislature will have to address these issues under EU Law in the future.

If company law is to be used effectively as a vehicle for the transition to a sustainable economy, this project requires more than a mere consideration of environmental and social concerns in various individual company law norms; it requires a coherent, cross-jurisdictional approach that is capable of meaningfully integrating a uniform and comprehensive understanding of sustainability into corporate law.[88] Due to the complexity of the subject matter in the multi-level legal system, the corresponding design of relevant legal rules places growing demands on the active regulators. The importance of the project can hardly be underestimated since it is about nothing

[88] This attempt undertakes the French legislator with new regulations in the Commercial Code (Code de Commerce) through the Loi de Vigilance and in the Code Civil by the Loi Pacte. More critical of the latter: M. Didier Poracchia, "De l'interêt social à la raison d'être des sociétés," *Bulletin Joly Sociétés*, no. 6 (2019): 40; Dominique Schmidt, "La loi Pacte et l'interêt social," *Recueil Dalloz,* (2019): 633.

less than providing a new regulatory framework for the behavior of nationally and internationally active market players. The LkSG may be a first step in this direction. However, a lot is still to be done in the field of corporate sustainability.

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Implementation of the Istanbul Convention into the National Criminal Legislation in Poland

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Abstract: The Council of Europe Convention on preventing and combatting violence against women and domestic violence (further: Istanbul Convention) became part of the Polish legal system on August 1, 2015. The ratification process of the Istanbul Convention was marked with difficulties from its very opening for signature. The provisions of the Convention have caused – and continue to arouse – a range of extreme emotions and doubts. The fierce dispute that has emerged over the implementation of the Convention in Poland at some point even led to action being taken for termination. As things have been to date, Poland has not terminated of the Istanbul Convention. Five years following ratification of the Convention, in March 2020, Poland submitted a report on the implementation of measures giving effect to its provisions into the Polish legal system, as required under the monitoring mechanism. Poland's report was considered by GREVIO, with an assessment made of Polish legislation in this regard and an evaluation report issued in June 2021. Notwithstanding the comments that Poland made to the GREVIO report, the key conclusions of the assessment should be highlighted as regards compliance of Polish criminal legislation with the standard of protection of women against violence, including domestic violence, under the Convention. Since the Convention was opened for signature, and in particular since its ratification, the Polish legislator has introduced a range of amendments to the Criminal Code aimed at raising the standard of protection for victims of domestic violence

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and of effective prosecution of offenders. This text highlights the most important of these changes and presents the current state of implementation of the Istanbul Convention into Polish criminal law.

1. Introduction

The Council of Europe Convention on preventing and combating violence against women and domestic violence was opened for signature on May 11, 2011 in Istanbul (the "Convention") as one of the latest human rights treaties in international law. It mandates action to be taken by state parties to combat all forms of violence against women and domestic violence. It is the first-ever piece of international law to have made it clear that violence against women and domestic violence cannot be considered a private affair.[1] Its origins can be traced back to 2002, the year of adoption of the Recommendation of the Committee of Ministers to Member States on the protection of women against violence,[2] being the early seed of the future Convention then plausibly ideated at the Council of Europe Summit held in Warsaw in 2005. However, official work began only in December 2008, with the creation of an ad hoc expert committee tasked with drafting the text of the Convention.[3] A significant breakthrough that accelerated the drafting work came with the 2009 judgment of the European Court of Human Rights in the case of Opuz v. Turkey,[4] which clearly pointed to state authorities' responsibility for the general and discriminatory judicial passivity conducive

1 See: Ewa Kowalewska-Borys and Emilia Truskolaska, "Konwencja Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej z 2011 r. – zagadnienia wybrane," *Białostockie Studia Prawnicze,* no. 15 (2014): 96.

2 Recommendation Rec (2002)5 of the Committee of Ministers to the Member States on the protection of women against violence of 30 April 2002, accessed April 30, 2023, https://www.coe.int.

3 See Ad Hoc Committee for preventing and combating violence against women and domestic violence (CAHVIO), accessed April 30, 2023, https://www.coe.int/en/web/istanbul-convention/cahvio.

4 ECHR Judgment of 9 June 2009, Case Opuz v. Turkey, application no. 33401/02, hudoc.echr.coe.int.

to domestic violence.[5] The judgement has since become a cornerstone of the fight against domestic violence and a key milestone on the way to ensuring the actual observance and respect for the rights of women victims of domestic violence.

The ratification process of the Istanbul Convention was marked with difficulties from its very opening for signature. The condition for entry into force of the Convention was acceptance by at least ten signatories (Article 75(3)), which was accomplished with the ratification by Andorra in April 2014.[6] As a result, the Convention entered into force on August 1, 2014, more than three years after its presentation. That more than half of the signatories submitted reservations or other declarations to the Convention also shows the ratification difficulties.[7] Currently, 38 states and the European Union are parties to the Convention, plus seven states that have signed but not yet ratified the Convention.[8]

2. Ratification of the Istanbul Convention in Poland

Poland signed the Convention on December 18, 2012 and also made use of the option provided for in Article 78(2) and (3) to submit four reservations and two declarations.[9] Its ratification process, however, only concluded

5 For more, see: Bonita Meyersfeld, "Opuz v Turkey: Confirming the State Obligation to Combat Domestic Violence," *European Human Rights Law Review,* no. 5 (2009): 684–93; Elżbieta and Hanna Morawska, "Odpowiedzialność państwa za bierność wobec przemocy domowej i dyskryminację jej ofiar – glosa do wyroku ETPCz z 9.06.2009 r. w sprawie Opuz v. Turcja," *Europejski Przegląd Sądowy*, no. 2 (2011): 45–52.

6 See: Wojciech Burek and Katarzyna Sękowska-Kozłowska, "Pięć lat obowiązywania Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej w Polsce: stan gry," *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, no. XVIII (2020): 246.

7 For more, see: Wojciech Burek, "Reservations and Declarations under the Istanbul Convention," in *International Law and Violence Against Women. Europe and the Istanbul Convention*, eds. Johanna Niemi, Lourdes Peroni, and Vladislava Stoyanova (Abington: Routledge, 2020), 277–95.

8 See: "Chart of signatures and ratifications of Treaty 210," Council of Europe, accessed April 30, 2023, https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=210.

9 For more, see: Wojciech Burek, "Zastrzeżenia i deklaracja interpretacyjna zgłoszone przez Polskę przy podpisywaniu Konwencji o zapobieganiu i zwalczaniu przemocy wobec kobiet

in 2015.[10] The provisions of the Convention have caused – and continue to arouse – a range of extreme emotions and doubts. The most controversial points in the debate have touched on the ideological foundations of the Convention, as it was based on concepts and definitions that reimagined social attitudes and functions related to the understanding of gender, domestic violence and interpersonal relations in marriage and family. The impact of the Convention on educational curricula and materials designed for children and youth has also raised concerns. Article 14 of the Convention provides for the obligation on state parties to include teaching materials on issues of "non-stereotyped gender roles" (e.g. same-sex couples or civil unions). Concerns have been voiced that this article, which uses language that is broad in meaning (similar to other parts of the text of the Convention), is very general and vague, which may result in it becoming a tool for redefining related concepts in their traditional sense. For supporters of the Convention, the extensive framing of such concepts makes it a specific and specialized tool for changing attitudes and stereotypes to effectively prevent and combat all forms of violence against women, understood as a violation of fundamental human rights. A thorough discussion of the arguments for and against the full implementation of the Istanbul Convention in Poland is beyond the scope of this paper; I would therefore recommend that the reader refer to relevant literature.[11]

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i przemocy domowej – w świetle prawa międzynarodowego," *Europejski Przegląd Sądowy*, no. 11 (2014): 4–13.

10 See Convention on preventing and combating violence against women and domestic violence, signed in Istanbul on 11 May 2011, ratified by Poland on 6 February 2015, Journal of Laws Laws of 2015, item 961, came into force on 1 August 2015.

11 For more, see: Karolina Pawłowska and Tymoteusz Zych, eds., *Dlaczego Polska powinna wypowiedzieć Konwencję stambulską?* (Warsaw: Instytut na rzecz Kultury Prawnej Ordo Iuris, 2020), 150; Joanna Banasiuk, ed., *Czy Polska powinna ratyfikować Konwencję Rady Europy o zapobieganiu i przeciwdziałaniu przemocy wobec kobiet i przemocy domowej?* (Warsaw: Instytut na rzecz Kultury Prawnej Ordo Iuris, 2014), 112; Paweł Czubik, "Recenzja: K. Pawłowska, I. Zych (red.), Dlaczego Polska powinna wypowiedzieć Konwencję Stambulską?," *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, no. 18 (2020): 315–26; Katarzyna Sękowska-Kozłowska, "The Istanbul Convention in Poland: Between the 'War on Gender' and Legal Reform," in *International Law and Violence Against Women. Europe and the Istanbul Convention*, eds. Johanna Niemi, Lourdes Peroni, and Vladislava Stoyanova (London–New York: 2020), 259–76; Łukasz Stefaniak, "Zarys sporu o ratyfikację Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy

The fierce dispute that has emerged over the implementation of the Convention in Poland at some point even led to action being taken for termination. In late July 2020, the Ministry of Justice filed a formal request with the Ministry of Family, Labour and Social Policy (responsible for the application of the Convention in Poland) to undertake work aimed at terminating it. As things have been to date, Poland has not terminated the Istanbul Convention. Still, due to the passage of time, in view of the clause contained in Article 79(1), which in principle sets a five-year period of validity of any reservations made, the Prime Minister presented to the Sejm of the Republic of Poland, on December 8, 2020, a bill on changing the scope of application of the Convention, which resulted in the adoption of the relevant law.[12] Under Article 1(4) of the law, Poland withdrew, among others, its reservation to Article 58 of the Convention, which opened the way to amendments in Polish criminal legislation in respect of the offences defined under the Convention, i.e. its Article 36 (sexual violence, including rape), Article 37 (forced marriage), Article 38 (female genital mutilation) and Article 39 (forced abortion or sterilization). Under Article 58 of the Convention, Poland must take the necessary legislative and other measures to ensure that the statute of limitation for initiating any legal proceedings with regard to these offences will continue for a period of time that is sufficient and commensurate with the gravity of the offence in question, to allow for the efficient initiation of proceedings after the victim has reached the age of majority.

3. The Istanbul Convention Monitoring Mechanism

Any changes to have been or be made in Polish criminal law under the Istanbul Convention are not associated solely with Poland's withdrawal from the above reservations. The implementation process is also influenced by

wobec kobiet i przemocy domowej," *Roczniki Nauk Prawnych*, no. 3 (2014): 66–73; Burek and Sękowska-Kozłowska, "Pięć lat obowiązywania Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej w Polsce: stan gry," 256–62; Kowalewska-Borys and Truskolaska, "Konwencja Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej z 2011 r. – zagadnienia wybrane," 93–8.

12 Act of 20 January 2021 amending the scope of the Council of Europe Convention on preventing and combating violence against women and domestic violence, drawn up in Istanbul on 11 May 2011, Journal Laws of 2021, item 149.

the mechanism provided for in the Convention to monitor the implementation of its provisions into the legal systems of the state parties. It is based primarily on the Group of experts on action against violence against women and domestic violence (GREVIO), appointed under Article 66.[13] Further, under Article 68(1), Poland is required to submit a report on legislative and other measures giving effect to the provisions of the Convention. The report is then to be considered by GREVIO to assess compliance with the Convention-laid standard of protection for victims of domestic violence in Poland (Article 68(2)).

The Istanbul Convention is an elaborate document with an extensive preamble and an appendix governing the scope of privileges and immunities enjoyed by members of the monitoring mechanism. The part of the Convention most relevant to these considerations is Chapter V, "Substantive law." Its provisions are intended to help create a uniform legal framework, covering all state parties to the Convention, as necessary to prevent violence against women, protect them against revictimization and ensure real and effective prosecution of such offences. They cover both civil lawsuits and remedies (Articles 29–32), including compensation and civil consequences of forced marriages, as well as criminal-law measures (Articles 33–47), among others, the obligation to criminalize psychological violence, forced marriage, forced abortion and sterilization, as well as sexual violence, including rape. The Chapter is complemented with provisions on the recognition of sentences passed by other state parties (Article 47) and the prohibition of mandatory alternative dispute resolution processes (Article 48). Next, Chapter VI governs issues related to investigation and other procedural aspects, including those related to the application of protective measures (Articles 49–58).

The remainder of the Convention covers matters related to migration and international protection, including references to obligations under the principle of *non-refoulement*[14] and lays down the principles and scope

[13] For more, see: Wojciech Burek, "Grupa Ekspertów ds. Przeciwdziałania Przemocy Wobec Kobiet i Przemocy Domowej – GREVIO," in *Pozasądowe mechanizmy praw człowieka i podstawowych wolności Rady Europy*, eds. Elżbieta H. Morawska and Katarzyna Gałka (Lublin: Wydawnictwo Episteme, 2021), 273–308.

[14] This principle states that a person who has been refused refugee status must not be deported to a country where he or she would be at risk of persecution. For more, see: Anna

of international cooperation in this regard. Thererefore, the Convention provides for a range of instruments of various natures to clearly identify violence against women as a violation of human rights and a form of discrimination. Due to the limited scope of this paper, the analysis presented here only covers changes made to Polish substantive criminal law as triggered by the Convention and follow-up action taken by GREVIO under the monitoring mechanism towards Poland.

4. GREVIO Report on the Assessment of Polish Criminal Legislation

Five years following the ratification of the Convention, in March 2020, Poland submitted a report on the implementation of measures giving effect to its provisions into the Polish legal system, as required under the monitoring mechanism.[15] Noteworthy, in June 2020, the Polish Commissioner for Human Rights filed an alternative report with GREVIO.[16] Poland's report was considered by GREVIO, with an assessment made of Polish legislation in this regard and an evaluation report issued in June 2021.[17] Notwithstanding the comments that Poland made to the GREVIO report,[18] the key con-

Chodorowska and Anna Trylińska, "Pojęcie zasady non-refoulement w prawie uchodźczym," *Dyskurs Prawniczy i Administracyjny*, no. 2 (2022): 7–23; Olga Łachacz, "Zasada non-refoulement w międzynarodowym prawie uchodźczym – zwyczaj międzynarodowy czy też peremptoryjna norma prawa międzynarodowego?," *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, no. 15 (2017): 134–42.

15 See: "Report submitted by Poland pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report)," GREVIO/Inf(2020)8, received by GREVIO on 26 March 2020, accessed April 30, 2023, https://rm.coe.int/grevio-inf-2020-8-eng/pdfa/16809e5394.

16 See: "Submission of the Commissioner for Human of Rights of the Republic of Poland to the Group of Experts on Action against Violence against Women and Domestic Violence on the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence in the Republic of Poland," Commissioner for Human Rights, accessed April 30, 2023, https://rm.coe.int/chr-poland-submission-30-06-2020/16809eed4b.

17 See: "GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) POLAND," GREVIO/Inf(2021)5, adopted by GREVIO on 23 June 2021, published on 16 September 2021, accessed April 30, 2023, https://rm.coe.int/grevio-baseline-report-on-poland/1680a3d20b.

18 See: "Comments submitted by Poland on GREVIO's final report on the implementation of the Council of Europe Convention on preventing and combating violence against

clusions of the assessment should be highlighted as regards compliance of Polish criminal legislation with the standard of protection of women against violence, including domestic violence, under the Convention.

The core review conclusion of the report was favourable for Poland. GREVIO found that the Polish Criminal Code (the "PCC")[19] contains provisions to criminalize the forms of behaviour covered by Articles 33–40 of the Convention (Section 196 of the Report). However, it pointed out that, with the exception of stalking (Article 190a PCC) and abuse (Article 207 PCC), these are general criminal provisions rather than specific offences referred to in the Convention. Thus, GREVIO concluded that they do not adequately cover all forms of violence against women and that some examples of criminalization are inadequate. Various forms of violence against women are hidden and absent from general offences. At the same time, it recognized that while the Convention does not set out an obligation to introduce specific criminal offences for each of the forms of violence covered, the current approach to criminal legislation, in GREVIO's view, may reduce women's access to justice (Section 197 of the Report).

GREVIO raised such concerns primarily as regards combating psychological violence (Article 33 of the Convention), assuming that criminal offences such as threat (Article 190 PCC) and coercion (Article 191 PCC) are designed mainly to punish single acts carried out in isolation and do not take into account abusive patterns of behaviour. Such acts, taken separately, would not necessarily reach the threshold applied by judges for these criminal offences (Section 200 of the Report). Ultimately, GREVIO did not recommend legislative changes in this regard but pointed out (as in many instances in the Report) that training is necessary to increase the understanding among law enforcement agencies, prosecution services and the judiciary as to the serious nature of psychological violence and its potential for escalation.

women and domestic violence (Baseline Report)," received by GREVIO on 8 September 2021, GREVIO/Inf(2021)10, published on 16 September 2021, accessed April 30, 2023, https://rm.coe.int/grevio-inf-2021-10-eng-final-comments-gov-poland/1680a3d208.

19 Act of 6 June 1997, Criminal Code, consolidated text, Journal Laws of 2022, item 1138 as amended, hereinafter referred to as the PCC.

Poland's compliance with the requirements for combating stalking (Article 34 of the Convention) was assessed favourably. An emphasis was made that the criminalization of the specific crime of stalking should be commended as it entails not only an offline dimension but also criminalizes some important online manifestations of such behaviour. Polish criminal legislation was also given a positive assessment over the recognition of the serious impact which stalking may have on victims, including suicide, and the introduction of an aggravating circumstance to that extent; further, an acknowledgement was made of the increase in penalties for the offence under the 2020 amendment to the PCC as the right path to follow (Section 202 of the Report).

While assessing the criminalization of physical violence (Article 35 of the Convention), GREVIO noted that the application of Article 207 PCC (abuse) is limited to children, vulnerable people, "immediate family members" and "persons who are temporarily or permanently dependent" on the offender and therefore does not apply to ex-spouses or ex-partners as they are not considered to be a "closest person" within the meaning of Article 115 § 11 PCC, with the exception of persons "in a relationship of dependence." Moreover, Article 207 does not apply to non-married partners unless they fall under the legal definition of "persons living together" (Section 209 of the Report). Therefore, in GREVIO's opinion, the scope of application of Article 207 PCC does not cover dating violence or a wide range of cases affecting former and/or non-cohabitating intimate partners. In view of the above, GREVIO urged the Polish authorities to ensure that Article 207 PCC is applied in relation to all forms of intimate partner violence, including violence among non-cohabiting partners, and in particular former partners and spouses (Section 212 of the Report).

Another problem identified for combating violence against women under Article 207 PCC is the fact that the offence forms part of Chapter XXVI PCC, covering offences against the family and custody. Therefore, according to GREVIO, domestic violence is criminalized as an offence against the family and not against an individual. While recognizing the importance of families as central units of society, GREVIO recalled the fundamental human right of all members of the family, including women, to live free from violence. It indicated clearly that the Convention places their rights and needs at the centre. In GREVIO's opinion, it is of fundamental

importance to ensure criminal justice for women who experience violence against them in their families as a bearer of individual rights (Section 208 of the Report).[20]

A key component of the GREVIO Report, one which causes considerable controversy in the criminal law literature,[21] are recommendations regarding the standard for combating sexual violence against women. Notwithstanding the positive assessment of the criminalization of sexual crimes, it was pointed out that none of the prohibited acts contained in Chapter XXV PCC (Articles 197-200 PCC) is based exclusively on the "lack of consent," which is the central element of the way the Convention frames sexual violence. As a consequence, according to GREVIO, not all forms of sexual violence identified in the Convention are criminalized as required by the Convention under Polish law, as it requires higher thresholds of evidentiary standards of physical resistance and a shifting of the focus onto the victim's behaviour from the accused's action (Section 215 of the Report).

GREVIO criticized the missing criminalization of causing another person to engage in non-consensual acts of a sexual nature with a third person, which is covered by Article 36(1)(c) of the Convention. This provision covers scenarios in which the offender is not the person who performs the sexual act but who causes the victim to engage in sexual activity with a third person, for example, as part of the control and abuse in intimate partner violence. The scope of criminal intent is wider than that under the crime of aiding and abetting. It would not only cover the intent to help the commission of an offence, for example, a rape, and the intent of the rape as such but would also extend to the intent of causing both. In other words, the intentional conduct covered by Article 36(1)(c) aims at capturing more

[20] GREVIO bases this view on the belief that the legislator and judges attach greater importance to the protection of family values, which is at the expense of the victims' right to life and to live free from violence. In this regard, he refers to scientific publications and information obtained during visits and meetings with experts and representatives of social organizations, see, e.g. Magdalena Grzyb, "'We Condemn Abusing Violence against Women'. The Criminalization of Domestic Violence in Poland," *Archiwum Kryminologii*, no. 1 (2020): 163–83.

[21] See: Marika Jarocka, "Definicja zgwałcenia jako jabłko niezgody w polskim systemie prawnym," *Studia Iuridica Toruniensa*, no. 28 (2021): 45–63; Monika Płatek, "Zgwałcenie. Gdy termin nabiera nowej treści. Pozorny brak zmian i jego skutki," *Archiwum Kryminologii*, no. 40 (2018): 263–325.

than the instigation or facilitating of a crime by including the malevolent behaviour of abrogating a woman's sexual self-determination (Section 219 of the Report).

Similarly, criticism was also made of the missing criminalization of forced marriage and the associated act of luring a woman abroad (Article 37 of the Convention). GREVIO pointed out that although the offence is covered under the general crime of coercion (Article 191 PCC), its construction is not sufficient, especially since the act of luring a woman abroad with the aim of forcing her into marriage could, at best, only be covered by the act of aiding or abetting unlawful coercion to perform a particular act aiding and abetting or complicity in forcing certain conduct, which solution, according to GREVIO, is inadequate (Section 222 of the Report). The conclusion of this part of the Report explicitly indicated the need to introduce into Polish law a specific criminal offence of forced marriage and to criminalize the intentional conduct of luring another person to the territory of another state with the purpose of forcing this person into a marriage (Section 226 of the Report).

GREVIO's criticism further covered the lack of separate criminalization of female genital mutilation (Section 227 of the Report). It was pointed out that the acts of mutilation described in Article 38(a) of the Convention may be prosecuted under the two health offences set out in Articles 156 and 157 PCC. Still, in GREVIO's opinion, the conduct of coercing, procuring or inciting to undergo female genital mutilation as described in Article 38(b) and (c) of the Convention remains outside the scope of any of the health offences but is captured only under Article 191 PCC, which is inadequate. Moreover, the acts of neither procuring nor inciting a woman to undergo the procedure (e.g. self-mutilation) appear to be criminalized. The acts of aiding or abetting a woman or girl to perform the act of female genital mutilation upon herself cannot be considered compliant with Articles 38(b) and (c) of the Convention. Further, Article 38(c) of the Convention requires the criminalization of behaviour that involves the intentional exertion of influence on a woman who herself does not harbour the intention of undergoing female genital mutilation. The requirement to criminalize aiding or abetting the commission of female genital mutilation also stems

from Article 41 of the Convention.[22] These offences differ from Article 38(c) both in terms of the constituent element of the crime and the scope of intent. The aim of the latter is to ensure that criminal liability occurs, for example, where relatives or community members incite, coerce or procure a woman to undergo female genital mutilation but do not take an active part in ensuring the procedure is carried out (Section 228 of the Report). GREVIO explicitly pointed out the need to supplement Polish criminal legislation in this regard (Section 230 of the Report).

GREVIO gave a favourable assessment of the standard of criminalization of acts specified in Article 39 of the Convention, i.e. forced abortion and sterilization.

Article 40 of the Convention imposes the obligation on state parties to take the necessary measures to ensure that sexual harassment, being any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction. GREVIO noted, however, that in the Polish legislative framework, acts of sexual harassment are regulated primarily by the Labour Code[23] and the Act on Equal Treatment.[24] Even if it welcomed the definition of the conduct, it criticized the Polish system in this respect, as the provisions in question capture sexual harassment only in a limited context of labour relations (Section 233 of the Report). GREVIO stressed that a specific criminal offence of sexual harassment does not exist, but several provisions of the Criminal Code are applicable in principle, which are of a general nature and thus do not capture the essence and characteristics of the phenomenon[25] (Section 234

22 The provision of Article 41 imposes a separate obligation on the parties to the Convention to criminalize cooperation, including inciting, aiding and abetting and attempting the crimes provided for therein.

23 See Article 183a of the Act of 26 June 1974, Labour Code (consolidated text, Journal of Laws of 2023, item 1465).

24 See Act of 3 December 2010 on the implementation of certain European Union provisions in the field of equal treatment (consolidated text, Journal of Laws of 2023, item 970).

25 For example, Article 216 PCC. In addition, research was cited which shows that the lack of criminalization of sexual harassment is the main obstacle for victims of this form of violence to take legal action before the situation develops into other forms of violence punishable under the Criminal Code, such as harassment, see: Dagmara Woźniakowska-Fajst, *Stalking*

of the Report). Therefore, GREVIO strongly recommends that the Polish authorities ensure that sexual harassment experienced in all areas of life is subject to criminal or other legal sanctions (Section 236 of the Report).

The GREVIO Report also contained an analysis of criminal sanctions and measures and aggravating circumstances provided for in Polish criminal legislation as aimed at combating violence against women, as well as their actual application by criminal courts. The remarks given are intended to support the implementation of Poland's obligations set out in Articles 45 and 46 of the Convention. In principle, GREVIO welcomed the fact that, for the most part, Polish criminal law foresees adequate sanctions for acts of violence against women. However, it pointed out that there is a wide discrepancy between the available sanctions under the law and those that are imposed in practice by courts. GREVIO concluded that sentences are frequently mitigated or suspended, in particular where convictions under Article 207 PCC, the domestic violence offence, are concerned. Moreover, in cases concerning rape and sexual offences, appeal courts seem to reduce sentences based on the characteristics of the victim and her behaviour, thereby diminishing the criminal liability of the offender (Section 237 of the Report).

GREVIO also noted that in the Polish Criminal Code, some of the aggravating circumstances required by Article 46 of the Convention form part of the elements of the crime. However, in the absence of supporting measures, such as guidelines or other orientation for judges to support their interpretation of aggravating circumstances in light of the requirements of the Convention, it is unclear to what extent the full range of aggravating circumstances are effectively applied, in particular for offences committed against a former or current spouse or partner, by a family member and persons cohabiting with the victim, or in the presence of a child (Section 239 of the Report). It was noted that judges do not always consider the factors surrounding a case of domestic violence on the basis of a gendered understanding or on the other principles of the Convention. Instead, they appear to be guided by stereotypical gender roles and respect for the family as the fundamental unit of society.

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i inne formy przemocy emeocjonalnej. Studium Kryminologiczne (Warsaw: Wydawnictwa Uniwersytetu Warszawskiego, 2019), 337–49.

5. Amendment of Polish Criminal Legislation under the Istanbul Convention

Since the Convention was opened for signature, and in particular since its ratification, the Polish legislator has introduced a range of amendments to the Criminal Code aimed at raising the standard of protection for victims of domestic violence and of effective prosecution of offenders. However, the dispute over the Convention makes it difficult to clearly determine which of these were actually passed under the influence of the Convention and which were determined by the criminal policy objectives pursued by the Polish authorities.[26] There may be opposing opinions in this regard, which both parties to the dispute take advantage of in their arguments. Supporters of the full adoption of the Convention allege that the Polish legislator is reluctant to refer to its text but instead expediently uses its provisions to hail the successes of its criminal policy.[27] Sceptics point out, in turn, that the solutions proposed and passed – in line with the Convention's standard – are the result of unrelated efforts, as demonstrated by the facts of the legislative process.[28] The fact is that references to the Istanbul Convention as a motive for legislative initiatives can be tracked in explanatory notes to relevant bills in a few instances only. Still, there are also some in which the legislator explicitly notes this motive. Whether it is this way or the other way round, in the opinion of the author of this paper, does not matter too much since the overriding end in this regard comes from the question of how Polish criminal law meets the standard of protection for victims of domestic violence set out in the Convention and whether it is actually effective in combating the unwanted phenomenon. The answer to this question allows us to determine the extent to which the standard laid down

[26] An example of such changes, made before Poland ratified the Convention, was the introduction of an ex officio prosecution procedure for the crime of rape. Pursuant to the Act of 13 June 2013 amending the Criminal Code (Journal of Laws of 2013, item 849), on 27 January 2014, Article 205 PCC, which provided for the prosecution of crimes under Articles 197, 198 and 199 § 1 PCC. The modification in the procedure for prosecuting these crimes was to be guided by the provisions of Article 55 of the Convention, which obliges states parties to ensure the prosecution of sexual violence and other forms of violence against women *ex officio*.

[27] See: Burek and Sękowska-Kozłowska, "Pięć lat obowiązywania Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet," 255–6.

[28] See: Czubik, "Recenzja: K. Pawłowska, I. Zych (red.), Dlaczego Polska powinna wypowiedzieć Konwencję Stambulską?," 320.

in the Convention has actually been implemented into the Polish criminal law system, regardless of whether it is under the influence of the Convention or not. A complete analysis of related legislative amendments is beyond the scope of this paper; a limited discussion of the key recent updates to the Polish Criminal Code, in particular in the context of the remarks made by GREVIO, is presented instead.

Since the publication of the GREVIO Report (16 September 2021), several laws amending the Criminal Code have been passed. Two introduced significant changes to ensure a more complete implementation of the Convention into Polish criminal legislation. The first one was adopted on July 7, 2022 (the "July amendment")[29] and the other one on January 13, 2023 (the "January amendment").[30] The latter, in particular, was designed to provide for a comprehensive implementation of the Convention, as with it, the legislator not only introduced new solutions in criminal law but also adapted civil and administrative law, including in its procedural part, to the standard under the Convention.

The July amendment mainly improved criminal sanctions and measures to combat sexual violence and the statute of limitations for related offences. In the first place, it raised the standard under Article 53 of the Convention by establishing a new mandatory basis for a court to order, at the request of the victim, a restraining order prohibiting the offender from staying in specific environments or places, contacting specific people, approaching specific people or leaving a specific place of residence without the court's consent, as well as an eviction order to temporarily vacate the premises shared with the victim, after conviction for an offence against sexual freedom or morality (Article 41a § 1a sentence 1 PCC). The restraining or eviction order may be combined with the obligation to report to the police or other designated authority at specified intervals, and compliance with the prohibition of approaching the victim may also be monitored in the electronic surveillance system (Article 41a § 1a sentence 2 PCC). The July amendment also limited the mandatory application of such restraining or eviction

[29] See Article 1 Act of 7 July 2022 amending the Criminal Code and certain other acts (Journal of Laws of 2022, item 2600).

[30] See Article 5 (4) of the Act of 13 January 2023 amending the Code of Civil Procedure and certain other acts (Journal of Laws Laws of 2023, item 289).

orders where a sentence is issued for imprisonment without conditional suspension for an offence against sexual freedom or morality (Article 41a § 2 sentence 1 PCC). It also specified, by introducing a separate provision, the content of the prohibition of contacting a specific person, which is to cover all activities in an attempt to establish contact with the protected person, including those undertaken by the convict through another person or via an ICT network (Article 41a § 6 PCC).

The amendment considerably expanded the catalogue of offences committed against minors, for which the statute of limitations cannot expire before the victim reaches the age of 40 years. This change was clearly designed to bring Polish measures in line with Article 58 of the Convention. It captures, among others, all sexual offences against a minor (Chapter XXV PCC), with the exception of sexual offences for which the statute of limitations is excluded (Article 105(3) to (6) PCC) or conduct in which pornographic content involves the participation of a minor. The above exclusion of the statute of limitations was also put in place under the amendment. The change consists in expanding the catalogue of crimes contained in Article 105 PCC with aggravated rape and sexual homicide, where the victim is a child under 15 years of age or where the offender acted with particular cruelty, caused severe bodily injury or death of the victim (Article 197 § 4 and 5 PCC).

More extensive changes came with the January amendment, which, as indicated by the legislator in explanatory notes,[31] was intended to ensure compliance of Polish regulations with the Istanbul Convention, in particular after the withdrawal of reservations to Article 58.

The first essential change was made in response to GREVIO's concern over the lack of separate criminalization of female genital mutilation (Section 227 of the Report), as well as the inadequate criminalization of the acts of procuring or inciting a woman to undergo self-mutilation (Section 228 of the Report), which is required under Article 38 of the Convention. Therefore, the legislator decided to supplement Article 156 § 2 PCC with paragraph 3 by specifying that circumcision, infibulation or any other permanent and significant female genital mutilation is a punishable health

[31] See Form No. 2615, Sejm of the 9th term, text: https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=2615, accessed April 30, 2023.

offence. Thus, using the provision as used in the Convention, it extended the catalogue of acts causing severe bodily injury in this respect. It also concurred with GREVIO that no offence existed in Polish criminal legislation as referred to in Article 38(c) of the Convention for inciting, coercing or procuring another person to self-inflict severe bodily injury.[32] Therefore, the Polish legislator decided to identify, in Article 156a PCC, a new offence of inciting or procuring another person to self-inflict severe bodily injury as referred to in Article 156 § 1 (3) PCC, as well as coercing the victim, by violence or unlawful threat, to self-inflict such injuries.

Another significant change introduced by the January amendment was a response to criticism over the missing criminalization of forced marriage and the related act of luring a woman abroad (Article 37 of the Convention). The Polish legislator accepted these remarks and agreed that Article 191 PCC, which criminalizes coercion to perform a particular act, had not exhausted all the elements of the offence under Article 37 of the Convention. The Criminal Code had not provided for a separate offence of luring an adult or a child to the territory of a party or state other than the one they reside in with the purpose of forcing this adult or child to enter into a marriage. To fill this gap, the Polish legislator decided to identify a new offence that contained all the elements of the offence under Article 37 of the Convention. Hence, Article 191b § 1 PCC criminalizes the use of violence, unlawful threat or abuse of a relationship of dependence, or taking advantage of a critical situation and causing another person to enter into a marriage or a union that corresponds to a marriage in the offender's religious or cultural environment. Furthermore, Article 191b § 2 PCC criminalizes the conduct where the offender, with a view to committing the offence specified in § 1, uses deception or abuses a relationship of dependence or takes advantage of a critical situation to incite or procure another person to leave the territory of Poland.

Noteworthy, for the new types of offences under Article 156a PCC and Article 191b PCC, the legislator also accommodated the statute of

[32] It should be emphasized that the provision in question is about persuading the injured party, not inciting the perpetrator. This applies to the incitement of the perpetrator. Article 41 of the Convention.

limitations requirement (Article 58 of the Convention) and added it to the catalogue included in Article 101 in § 4 (3) PCC.

As indicated above, the January amendment, in addition to the provisions of the Criminal Code, introduced changes to many other laws and regulations of various natures. Some of those are closely linked to the changes in substantive criminal law. The instrument intended to provide immediate, and therefore more effective, protection for a person affected by domestic violence was to give the police[33] and the military police,[34] within their respective competences, the powers to issue an eviction order to immediately vacate the premises shared with the victim and immediate surroundings, or a restraining order to prohibit the offender from approaching the premises and immediate surroundings controlled by the court. Failure to comply with an issued eviction or restraining order or a court ruling in this regard[35] is treated as a prohibited act, i.e. a petty offence under Article 66b of the Polish Petty Offences Code,[36] as further clarified by the January amendment.

6. Summary

There is no doubt that, in principle, the objectives of the Istanbul Convention converge with the objectives of Polish criminal legislation on the prevention and combating of violence against women and domestic violence, both in terms of the essence and the forms of counteraction. The level of protection in place in this respect in Poland should be considered adequate to the standards laid down under the Convention, their ideological references aside. The Istanbul Convention, being a relatively new act operative in the Polish legal framework, has contributed to accelerating its inevitable modifications, the most important of which include primarily changes designed to speed up response to violence, i.e. by introducing a procedure for

33 See Article 15aa–15ak of the Act of 6 April 1990 on the Police (Journal of Laws Laws of 2023, item 171).

34 See Article 18a–18k of the Act on the Military Police and Military Law Enforcement Bodies (Journal of Laws Laws of 2023, item 1266).

35 It concerns Article 11aa (4) of the Act of 29 July 2005 on counteracting domestic violence (Journal of Laws of 2021, item 1249).

36 See Act of 20 May 1971, Code of Petty Offences (Journal of Laws Laws of 2022, item 2151).

ex officio prosecution of sexual offences or enabling an immediate eviction order against offenders.

Still, the latest amendment to Article 156 § 1 (3) PCC raises the question of whether the use of specific terms of a casuistic and medical nature ("circumcision, infibulation or any other permanent and significant female genital mutilation"), as they are used in the Convention, is the right legislative solution. First, the offence is conceptually captured under that provision in its hitherto wording, while its description is incomprehensible both to the addressees of the standard and to those who are to apply it. However, it cannot be ignored that the Polish legislator, most likely having recognized the inexpediency of excessive detail in a legal act at a code level, conservatively stopped halfway in its implementation of Article 38 of the Convention *expressis verbis* (under which "Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: excising, infibulating or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris").

Any similar proposals for amending Article 197 PCC citing the need to adapt its wording to the requirements of Article 36 (1) of the Convention, under which "Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; b) engaging in other non-consensual acts of a sexual nature with a person; c) causing another person to engage in non-consensual acts of a sexual nature with a third person," should be therefore considered redundant to the solutions adopted in Polish criminal legislation. Apart from the above-demonstrated lack of any justification for changing the description of the conduct as regards the manner of commission, it should be emphasized that the construction of Article 197 PCC is well-established in jurisprudence and defines the lack of consent on the part of the victim as a *sine qua non* condition for establishing the commission of an offence since the essence of the offence under Article 197 PCC is causing another person to have sexual intercourse without their consent, even implied.

Therefore, the implementation of the Convention into substantive criminal law entails significant difficulties, resulting in particular from

the specific nature of the provisions of the Convention and its high level of detail that can hardly be reasonably explained. The Convention undoubtedly promotes a casuistic approach to legal norm-making, which in principle is at odds with Polish criminal legislative practice; moreover, what can be observed in modern criminal law-making is a shift from this methodology in favour of laying down universal principles. To adopt the concept proposed by the framers of the Convention and abandon the existing legislative practice would consequently lead to considerable dents in the systemic coherence of the body of criminal law. As demonstrated above, most of the necessary legislative solutions postulated under the Convention had existed before in Polish criminal law, while others have only been made clear and specific. Still, it remains an open question whether the Polish legislator decides to depart from the current approach to laying down criminal laws based on refrainment from excessive casuistry in favour of setting interpretative directions, which seems to be more aligned with both the tradition developed by the Polish criminal legal doctrine and the criminal law-making approach dominant in contemporary legal cultures.

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Israel – In Search of Constitutional Common Sense

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Abstract: The Israeli radical judicial overhaul program, aiming to seriously weaken the judiciary, has led the country to the brink of chaos and violence, with hundreds of thousands of demonstrators in the streets, society tearing itself apart and numerous sectors of society, such as medical service or reservists of IDF, announcing a suspension of their service to a nation they fear will no longer be a democracy. Despite the strong social protest, Knesset – representing an extremely right-wing coalition – adopted on the July 24, 2023 the amendment to *Basic Law: The Judiciary* to bar the judiciary from striking down decisions of the government and its ministers on the grounds of such decisions being unreasonable. The measure known as the reasonableness clause (standard) is rooted in English and American case law and it is frequently used in Israel to control administrative activity. It allows the courts to strike down governmental and administrative decisions and their regulations seen as having not taken into account all the relevant considerations of a particular issue, or not given the correct weight to those considerations – even if they do not violate any particular law or administrative rulings. The current right-wing coalition, led by Benjamin Netanyahu, argues that the clause as it stands gives too much power to the judiciary, especially the Supreme Court sitting as a High Court of Justice, to interfere with the actions of the executive, and that the powers of judges, who are not elected by the public, remain out of control in this procedure. Opponents of the government's amendment argue that this standard is crucial in helping to protect civil rights that

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are not fully defined in Israeli law. Eliminating the standard of reasonableness will be another step towards giving the government unlimited power. It violates not only the separation of powers principle and the rule of law but it also harms the right to good administration. Irrespective of the Supreme Court's decision on the constitutionality of the government's amendment, the struggle to maintain the democratic principles of the Israeli system will continue.

1. Introduction

Israel is currently experiencing the most serious constitutional crisis since the country was founded in 1948. For eight months, thousands of people were protesting against the far-right political revolution pushed by the government of Benjamin Netanyahu, weakening the courts, especially the Supreme Court, destroying the principle of separation of powers, the rule of law and guarantees of human rights. The protesters represent more than half of Israeli society[1] and include most of the world of science, important NGOs and such sensitive segments of society as highly qualified IDF reservists, doctors, financial sector employees, and entrepreneurs, not to mention the prosecutor general, former judges and lawyers. The government's plan to "reform" the judiciary threatens to politicize it and is already having a negative impact on Israel's economy, as does the prospect of implementing a state budget that openly polarizes society by financially privileging the electorate of religious (Orthodox) and extreme nationalist parties.

In such an atmosphere, on July 24, 2023, the Knesset, regardless of the constitutional nature of the provisions being adopted – in an accelerated procedure – adopted an amendment to the Basic Law: Judiciary, in a wording that expressly prohibits all courts, including the Supreme Court, from examining and resolving complaints (petitions) against governmental and other administrative decisions, including appointments, based on the judicial standard of reasonableness, sometimes also translated

[1] The Israel Democracy Institute frequently publishes and discusses the Israeli Voice Index, which provides detailed analysis of public opinion polls on current state policies. See: Tamar Hermann and Or Anabi, "Overhauling the Judicial System – What Do Israelis Think?," IDI, February 3, 2023, accessed September 12, 2023, https://en.idi.org.il/articles/47607.

as rationality. Just a few hours after the adoption of this amendment (by a majority of 64 to 0 due to the opposition's boycott of the vote), several complaints were submitted to the Supreme Court accusing this change of unconstitutionality – inconsistency with the constitutional act of the Basic Law: Human Dignity and Freedom, which defined Israel as an equally Jewish and democratic state and with the basic political values resulting from the Declaration of Independence. The complainants considered that this principle was relatively unchangeable and therefore the Knesset, even in its constitutional mode, was not competent to adopt an unconstitutional constitutional amendment[2] Extremely quickly, the Supreme Court declared the complaints admissible, at the same time setting the date of the first hearing for September 2023 and, equally importantly, issued the so-called injunction indefinitely suspending the implementation of the adopted change. Meanwhile, Prime Minister Netanyahu declared that this was "the only minor correction of the justice system and a foretaste of further 'democratic' changes in the judiciary." Opponents of the government's plan, in turn, stated that it was the first step towards eliminating democracy in Israel and establishing a system of government modelled on Hungary and Poland. As a result, demonstrations and other forms of opposition to these political changes are becoming more intense and police actions are becoming more brutal.

Observers of the described events may be surprised by the size of the protests and wonder what the reasons are for the long-standing dispute over the judicial reasonableness clause (or its lack – unreasonableness), with the removal of which the government began the package of political changes. The explanation for the great wave of public revolt against Netanyahu's government's policies is simple – although somewhat surprising.

[2] It should be explained that the objection to the adoption of the constitution more fully, after the creation of the state, led to the so-called Harrari compromise, according to which the Knesset, acting as a constitutional body, adopts the so-called fundamental laws Basic laws, which form part of the constitution. Despite the lack of procedural differences in the adoption of ordinary laws, it was recognized over time, mainly thanks to the position of the Supreme Court, that fundamental laws are higher in the hierarchy of sources of written law than other acts. On unconstitutional constitutional amendments, cf. Yaniv Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers* (Oxford University Press, 2019).

It turned out that, despite the initial fears of the low level of involvement of an average Israeli citizen in the defense of their individual and collective freedoms and rights,[3] spontaneous and unprecedented mass social opposition has accompanied the government's plans from the very beginning. This is the result of the high level of general education, the functioning of the inhabitants of Israel in a liberal democracy for over 40 years and the dissemination by the Supreme Court – especially during the term of office of A. Barak, an outstanding judge and humanist – of the catalog of human rights, judicial guarantees and values and democratic principles such as the rule of law and the separation of powers.[4]

The severity of the current conflict between the government and Israeli civil society also results from the protesters' awareness of the further politicization of the judiciary. From the winter of 2022, it is common knowledge that subsequent laws will concern the possibility for the Knesset to annul judgments of the Supreme Court, acting mainly as the HCJ in cases of violation of fundamental rights, by a majority of 61 votes (out of 120), abolishing the competences shaped by court decisions and consisting in repealing

[3] According to Assaf Meydani, who pointed out this problem in 2013, Israeli citizens rather expect NGOs to act in matters related to human rights violations, and if they react on their own, it is only during the implementation phase of state policy and not at the stage of its preparation; Assaf Meydani, *Anatomy of Human Rights in Israel* (Cambridge University Press, 2014), 29–38, 66–80.

[4] The effort to democratize the principles of functioning of the State of Israel and create a civil society is rightly attributed to A. Barak and his judicial and scientific community. His work is continued by a large number of outstanding and influential academicians, among whom worth mentioning are Suzie Navot, Yuval Shany, Amir Fuchs, Tamar Hostovsky–Brandes, Jeremy Sharon, Adam Shinar, Yaniv Roznai and many others. Working dynamically within IDI and similar NGOs, they constantly explain and comment on political events in publications and actively participate in numerous demonstrations; Jeremy Sharon, "A Time for Reason: Will the High Court Strike Down Government's Reasonableness Law?," *Times of Israel*, July 26, 2023, accessed July 16, 2023, https://www.timesofisrael.com/a-time-for-reason-will-the-high-court-strike-down-governments-reasonableness-law; Yaniv Roznai and Okubasu Munabi, "Stability of Constitutional Structures and Identity Amidst 'Political Settlement': Lessons from Kenya and Israel," *Comparative Constitutional Studies* 1, no. 1 (2023): 101–23; Yaniv Roznai, Rosalind Dixon, and David Landau, "Judicial Reform or Abusive Constitutionalism in Israel," *Israel Law Review. Forthcoming*, *UNSW Law Research Paper*, no. 23–55, accessed September 4, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4556656&fbclid=IwAR2ZamiVnyGfXYlRD58VQGKNicRTYGaTZKOH0mvlj2ux2bBf3AJsk-_JM2k.

certain provisions of the constitution, introducing the principle of filling the positions of government legal advisers by political nominations, changing the composition of the Selection Committee for judicial positions so that the majority of its members also come from political appointments.[5]

2. Searching for Reasonableness

Before moving on to examining the reasons for and against using the unreasonableness clause to a specific extent, or even questioning it completely, a few remarks should be made. This clause (also referred to as a doctrine, standard, criterion, or condition) has a long history and extensive literature.[6] The judicial standard for assessing the operation of public administration from the point of view of reasonableness and rationality is part of the achievements of British common law and has been adopted primarily,

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5 See constantly updated calendar of the government's plan for changes in the judiciary published by Israeli Policy Forum, Judicial Legislation Tracker, accessed September 11, 2023, https://israelpolicyforum.org/judicial-legislation-tracker; see also: Suzie Navot, "The Reasonableness Issue Requires Serious, Informed, and Consensual Discussion," IDI, July 14, 2023, accessed July 16, 2023, https://en.idi.org.il/articles/50172. This author clearly and convincingly warns about the effects of judicial "reforms": "the government wants unlimited power to be able to do whatever it wants and appoint whomever it wants to the highest positions. To achieve this, the government needs to overturn Supreme Court rulings to gain a kind of immunity and act without control". In turn, Y. Shany, presenting numerous negative effects of the government's package of changes in the judiciary, draws attention to the specificity of the Israeli governance system – problems with corruption at the highest levels of government and the so-called non-governability; see also: Meydani, *Anatomy of Human Rights*, 6–8, 40–4; Yuval Shany, "Eliminating the Standard of Reasonableness Would be Another Step towards Giving the Government Unlimited Power," IDI, July 6, 2023, accessed July 7, 2023, https://en.idi.org.il/articles/50104.

6 See for example Robert Alexy, "Reasonableness of the Law," in *Reasonableness and Law*, eds. Giorgio Bongiovanni, Giovanni Sartor, and Chiara Valentini (Springer, 2009): 3–15; Jerry Mashaw, *Reasoned Administration and Democracy Legitimacy* (Cambridge University Press, 2018), 40–76; David Zaring, "Rule by reasonableness," *Administrative Law Review* 63, no. 3 (2011): 525–60; Colin S. Diver, "Israeli Administrative Law from American Perspective," Mishpat Umimshal, *Haifa University Law and Government Review* 4 (1997); Yitzhak Zamir, "Unreasonableness, Balance of Interests and Proportionality," *Tel Aviv University Studies in Law* 11, (1992): 131–6; Ariel Bendor, "Are There Any Limits to Justiciability," *Indiana International Law and Comparative Law Review* 7, no. 2 (1997); Daphne Barak-Erez, "Israeli Administrative Law at the Crossroads: Between the English and American Model," *Israeli Law Review* 40, no. 1 (2008) and literature indicated in these publications.

but not only, in countries with a legal system based on the so-called judge-made-law and is currently one of the guarantees of good administration and the human right to it. The adoption in Israel of the basic institutions of the British legal system from the British Mandate period, i.e. the time before the establishment of the State of Israel, naturally influenced the adoption of the unreasonableness clause into the Israeli legal order as customary law created by the courts.[7]

From its very birth, this principle had an undefined character. The criterion of reasonable action by the administration was primarily understood as "action that any reasonable authority would take." Over time, it began to be pointed out that unreasonable activity of the administration is, among other things, the result of "caprice, arbitrariness, obvious injustice, bad faith," etc.[8] The essence of unreasonable action was finally recognized by the Supreme Court of Israel as an action (decision) that reflects an improper balancing of circumstances considered by the administrative body in the decision-making process.[9] The Israeli reasonableness (or unreasonableness) clause, however, differs from the British or American originals, which

7 The judicial creation of law in the so-called mixed legal system of Israel is a phenomenon that has been present since the Mandate period. Its essence was clearly formulated by Aharon Barak: "A judge of the Supreme Court is not a mirror [of statutory law]. He is an artist, creating a picture with his own hands. Creates 'legislation' by engaging in judicial legislation. Judicial creativity is a natural feature of law. Law without discretionary authority is a body without a soul. Such creativity – judicial law-making – is the task of the Supreme Court."; Aharon Barak, "The Role of the Supreme Court in Democracy," *Hastings Law Review* 53, (2002): 1205–16. This does not mean that this role of the Supreme Court is not contested, especially given its visible activism. American judge Richard Posner wrote in 2007 that "what Barak created in its entirety was to give the court power that our most aggressive Supreme Court judges had never dreamed of," quoted by Ariel Bendor and Zeev Segal, "The Judicial Discretion of Justice A. Barak," *Tulsa Law Review* 47, no. 2 (2013): 465–77; Hearing this assessment, A. Barak could recall the words of T. Jefferson: [although the will of the majority in every case should prevail, in order for it to be correct, it must be reasonable], and this control rests with the court.

8 Zamir, "Unreasonableness, Balance of Interests and Proportionality," 131 et seq.

9 See: High Court of Justice, 1980, Dapey Zahav Limited v. Broadcasting Authority, application no. 389/80, Isr. Sc 35(10) 421; more on this topic, cf. Barak-Erez, "Israeli Administrative Law at the Crossroads," 63 et seq.; Neil MacCormick, *Rethoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005), 173; Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan, *Consequential Courts. Judicial Roles in Global Perspective* (Cambridge University Press, 2013), 255.

allow questioning an administration's act only in the event of a clear (extreme) lack of reasonableness, i.e. an extremely defective implementation of the administration's discretionary power. The Israeli court, using the reasonableness clause, adopted its broader formula, enabling the assessment and correction of an administrative act considered to be the result of unreasonable action, also without the additional condition of "extremeness." This position can be justified by the lack of a full constitution and legislation specifying the principles, scope and forms of operation of administrative bodies, and especially the lack of standards limiting the executive power. In this context, the reasonableness clause is of fundamental importance as an effective tool for judicial control of the executive power. The accumulation of power in the hands of the executive constitutes a threat to state security in any political system.[10]

The increasing role of the state in Israel since the 1980s and the dissemination of the judicial catalogue of guarantees of human rights have influenced the increasingly wider use of the clause in question by the Supreme Court and since the adoption of the above-mentioned Basic Law: Human dignity and freedom in 1992, the use of the proportionality standard.[11] Since then, both clauses – reasonableness and proportionality – have become one of the main tools for judicial assessment of the proper functioning of the executive power. Initially (in the 1990s), especially in theoretical considerations, balancing interests (circumstances) and using the proportionality standard were considered a category of assessing unreasonable action of the administration.[12] Difficulty in separating the two clauses was also noticed. It was also postulated that the development of their use would serve to clearly differentiate them depending on the subject of the case. In 1992, D. Barak-Erez suggested that rulings on matters of competences and relations within the executive power should be assessed according to the reasonableness standard. In turn, when deciding issues involving direct interference of the administration in human and citizen rights,

10 Mohammed S. Wattad, "The Reasonableness Standard: A Critical Administrative Tool for Oversite of Executive Authority," The Institute of National Security Studies, July 24, 2023, accessed July 25, 2023, https://www.inss.org.il/social_media/the-reasonableness-standard-a-critical-administrative-tool-for-oversight-of-the-executive-authority/.

11 Barak-Erez, "Israeli Administrative Law at the Crossroads," 63.

12 See: Zamir, "Unreasonableness, Balance of Interests and Proportionality," 131–2.

the court should use the standard of proportionality.[13] However, the reality of court decisions turned out to be more complex. First, when the court uses the reasonableness clause, it does not always indicate whether what is at issue is only the lack of reasonableness of the administrative action or whether it is of an extremely unreasonable nature. Second, the court, as it seems, uses the reasonableness standard to strengthen its position in matters relating to human and citizen rights and freedoms subject to restrictions by the administration. It is therefore worth taking a look at examples of selected judgments to make it easier to assess comments both criticizing and supporting the use of the reasonableness clause in respect of the administration in its decision-making process and in its issuance of normative acts – those issued on the basis of statutory delegation and the autonomous ones. Ten cases were selected for analysis in which the administration interfered with the fundamental rights of citizens and four cases concerning relations within the central executive power.[14] Among the first ten cases,[15] the majority (eight) concerned two or more fundamen-

13 Barak-Erez, "Israeli Administrative Law at the Crossroads," 64.

14 The author consulted the accuracy of the selection of cases with Amir Fuchs, Senior Researcher, Center for Democratic Values and Institutions, IDI.

15 First ten cases: High Court of Justice, Judgment of 2 February 2021, Idan Mercaz Dimona Ltd. v. Government of Israel, application no. 6939/20, unreported, (HCJ 6939/20), regarding restrictions on the freedom to conduct commercial activities due to the restrictions of the COVID-19 pandemic; High Court of Justice, Judgment of 26 April 2020, Ben Meir. v. Prime Minister, application no. 2109/20, unreported, (HCJ 2109/20), regarding the scope of collecting data of sensitive persons diagnosed with the COVID-19 virus by the Security Agency; High Court of Justice, Judgment of 1 March 2021, Association of Civil Rights in Israel v. Knesset, application n. 6732/20, unreported, (HCJ 6732/20), regarding the violation of the right to privacy and the use of inadequate anti-virus protection measures; High Court of Justice, Judgment of 4 April 2021, Israel My Home v. Government of Israel, application no. 5469/20, unreported, (HCJ 5469/20), regarding restrictions on participation in gatherings, including the distance of 1,000 m from the place of residence; High Court of Justice, Judgment of 3 December 2020, application no. 5314/20, unreported (HCJ 5314/20), regarding the legality of government emergency regulations adopted by the government at the beginning of the outbreak of the COVID-19 pandemic; High Court of Justice, Judgment of 7 April 2020, Yedidya Loewenthal v. Prime Minister, application no. 2435/20, unreported, (HCJ 2435/20), which questioned the government's decision to temporarily declare the city of Bnei-Brak a "restricted area" due to the high infection rate in the city as violating residents' constitutional rights to freedom of work, liberty, human dignity and freedom of movement; High Court of Justice, Judgment of 14 April 2020, Adalah – Legal Center for

tal rights, ranging from personal liberty, the right of free movement, freedom of assembly, the right to privacy, the right to good administration, and the right to conduct a business. The Supreme Court, acting in these cases as a single-instance HCJ, considered both administrative decisions (seven cases), as well as regulations of the central executive power and orders of administrative agencies subordinated to the government or ministers. Inspecting the administration of the HCJ only in exceptional circumstances, it relied on one criterion: in case HCJ 2109/20, finding excessive interference with the right to privacy by providing the Israel Security Agency, by decision of the government, with the power to collect sensitive data about those who test positive for COVID-19, applying the standard of proportionality and, at the same time, reminding the government that limitations on fundamental rights should be clearly stated in the law. In the second ruling, applying only the standard of reasonableness and stating in case HCJ 8397/06 that protecting students from bomb threats by creating by ministerial decision a "protected zone" for them that does not provide a real guarantee of safety, is extremely unreasonable. At the same time, the court set a five-month deadline for completing the investment ensuring proper protection of students. In other cases, the court used both the proportionality and reasonableness criteria. What is noteworthy in the analyzed judgments is the frequent use of the reasonableness standard in cases where

Arab Minority Rights v. Prime Minister, application no. 2359/20, (HCJ 2359/20), unreported, regarding the rejection of the Bedouin petition for funding for travel for COVID-19 tests; High Court of Justice, Judgment of 14 March 2021, Oren Shemesh v. Prime Minister, application no. 1107/21, unreported, (HCJ 1107/21), regarding passenger service limits at Ben Gurion Airport during the pandemic; High Court of Justice, Judgment of 4 March 2004, Yoav Hess et al. v. IDF West Bank Military Commander, application no. 10356/20, unreported, (HCJ 10356/20), regarding the order to expropriate land through the IDF's decision to widen the road for pilgrims to holy places; High Court of Justice, Judgment of 29 May 2007, Wasser v. Ministry of Defence, application no. 8397/06 IsrSC 62(2) 198, (HCJ 8397/06), regarding the establishment by decision of the Minister of Defense of a security zone for students in schools in towns located next to the Gaza Strip, in which the court found that the rationing of protection and security guarantees was irrational; see also Ittai Bar-Siman-Tov, Itay Cohen, and Chani Koth, "The Changing Role of Judicial Review during Prolonged Emergencies: The Israeli Supreme Court during COVID-19," *Legal Policy and Pandemics: The Journal of the Global Pandemic Network, Bar Ilan University Faculty of Law Research Paper* 1, no. 1–2–3 (2021): 271–7.

there was no direct interference with fundamental rights. This proves both the practical difficulty of distinguishing the two clauses used by the court and the indolence of the public administration, which simultaneously acts in violation of the principles of proportionality and reasonableness.

The last four HCJ rulings concern key principles of the organization and functioning of the executive power – the Prime Minister and his cabinet – which are not regulated by law.[16] It is worth recalling that the executive in Israel has been struggling with the problem of non-governability (the inability of political and official decision-makers to conduct long-term policy and implement it effectively) for several decades, including: the consequences of the unregulated rules for appointing high positions in the administration and the non-normalized relations within the executive power. When deciding on these important issues, the Court ruled in two cases that the appointment of a person with a criminal history (e.g. a conviction for corruption) as a minister, or as a general director who is subject to an act of pardon before being formally convicted, does not meet the criterion of reasonableness of action (case HCJ 3094/93).[17] In the third case (HCJ 5261/04), the Court found that it was rational for the prime minister to' dismiss two ministers in order to implement the policy of the coalition government, and in the last case (HCJ 5167/00), the Court specified what powers were vested in the government (which often is a transitional government) during the period between its resignation and the appointment of a new cabinet, extensively developing an understanding of the rationale for continuing its core competencies. In this case, by failing to act in a state of necessity, the Court expressly superseded the statutory powers of the Knesset.

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16 See High Court of Justice, Judgment of 8 September 1993, Movement for Quality in Government v. State of Israel, application no. 3094/93, IsrSC 47(5) 404; IsrSJ 10 258, (HCJ 3094/93); High Court Of Justice, Judgment of 26 October 2004, Fuchs v. Prime Minister, application no. 5261/04, PD 59 (2), 446, 7 (HCJ 5261/04); High Court of Justice, Judgment of 23 March 1993, Eisenberg v. Minister of Building and Housing, application no. 6163/92, IsrSc 47(2) 229, (HCJ 6163/92); High Court of Justice, Judgment of 25 January 2001, Weiss v. Prime Minister, application no. 5167/00, PD 55 (2), 455, (HCJ 5167/00).

17 For more on this topic, see: Daniel Friedmann, *The Purse and the Sword* (Oxford University Press, 2016), 111–20.

The Supreme Court of Israel has been aware, especially since the 1980s and during the presidency of Aharon Barak, that by relatively often issuing rulings based on the reasonableness clause, which is difficult to define, it exposes itself to accusations of abuse of judicial power by replacing the decision-making freedom of the executive with its own discretion.[18] For this reason, the HCJ often emphasized that such an intention was alien to it and at the same time pointed out that the discretionary power of the administration cannot mean either freedom or arbitrariness of the proceedings, much less the lack of judicial control. Similarly, the HCJ, guided in its actions by good faith and obvious public interest, sometimes reduced the discretion of administrative decisions to zero, claiming, as in the judgment of HCJ 3094/93 (justification by A. Barak), that the discretion of an administrative decision sometimes means only an obligation or prohibition of a specific action.[19] There are also judgments in which the Court, fearing the accusation of making decisions in the so-called political questions, ignores – as relevant circumstances – political considerations of administrative decisions, especially those resulting from the need to maintain the existence of the coalition government. This may undoubtedly distort the Court's selection of important issues and the assessment of their proper balancing by the administration.[20]

Mainly academic criticism of the Supreme Court's use of the reasonableness clause, noticing some of its shortcomings, most often concluded that, in Israeli conditions, it is a necessary institution because in other democracies there are many other means of inhibition that do not exist in

[18] See critical remarks by Eugene Kantorovich, "Why Netanyahu Is Right to Go After Overmighty Supreme Court," *The Jewish Chronicle*, February 2, 2023, accessed June 12, 2023, https://www.thejc.com/lets-talk/all/why-netanyahu-is-right-to-go-after-overmighty-supreme-court-2PO7FKJsgtBxFECAULuBeD; Yotam Eyal, "Hypocrisy Unmasked: The Supreme Court's 'Reasonableness' Clause," *Israeli National News*, January 30, 2023, accessed October 12, 2023, https://www.israelnationalnews.com/news/373488.

[19] See justification of case HCJ 3094/93, in particular, point 17 […] "authority is in duty bound to exercise a power when the factual circumstances are such that the basic values of our constitutional and legal system make failure to exercise it so unreasonable as to go to the root of the matter."

[20] For more on this topic, see: Bendor, "Are There Any Limits to Justiciability."

Israel (as pointed out by Yoav Dotan).[21] The complete statutory removal of this clause will be "throwing the baby out with the bathwater" (as discussed by Amir Fuchs),[22] especially since the practice of government operation confirms the validity of Yitzhak Zamir's thesis about the low level of legal and ethical culture of administration.[23]

It should be noted that the weakening of the position of the Supreme Court – a change that begins with the removal of the reasonableness clause – aims at the gradual abolition of the systemic role of this body as an independent entity with the ability to inhibit and balance the government and parliament. So what arguments do the politicians of the ruling parties and some constitutionalists have to justify their such far-reaching plans? One should start by noting that among the supporters of the government project, one does not find, with a few exceptions, recognized authorities of the world of legal science,[24] judges, lawyers, former prime ministers or

[21] Prof. Yoav Dotan, a former dean of the Faculty of Law at the Hebrew University and a conservative legal scholar, has critiqued in writing on numerous occasions the use of the reasonableness clause by the courts. However, speaking in the Constitution Committee in Knesset, he took exception to what he said was the "coarse" way the current bill had been "stitched together", and to the "blanket" exemption from review by reasonableness that it would impose on decisions made by all elected officials. "If the government decided to build a new metropolis in the Gush Dan [region of central Israel], I don't see why the reasonableness of a court should be preferable to that of the government," said Dotan, making a distinction between policy set by the full cabinet and that set by ministers; see: Jeremy Sharon, "The Reason for Reasonableness: A Doctrine at the Heart of the Overhaul Explained," *Times of Israel*, July 8, 2023, accessed July 16, 2023, https://www.timesofisrael.com/the-reason-for-reasonableness-a-doctrine-at-the-heart-of-the-overhaul-explained/.

[22] Globes Whistleblower Team, "Why Is Reasonableness Making Us So Unreasonable?," accessed September 12, 2023, https://en.globes.co.il/en/article-why-is-reasonableness-making-us-so-unreasonable-1001451948.

[23] Yitzhak Zamir, "Courts and Politics in Israel," *Public Law*, no. 529 (winter 1991): 534–5; Menachem Hofnung, "The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel," *American Journal of Comparative Law* 44, no. 4 (1996): 585–604.

[24] It is significant that even the fierce opponent of the Supreme Court's activism, former Minister of Justice, prof. Daniel Friedmann preferred to hide his support for the plan to weaken the judiciary under the guise of creating a compromise project, which in fact did not change much in relation to the government's proposals; see: Suzie Navot, "Does Israel Really Need Judicial Reform? 5 Better Ways to Fix Judiciary," IDI, March 10, 2022, accessed June 12, 2023, https://en.idi.org.il/articles/47921; Navot, "The Reasonableness

other high state officials. The government sponsors of the project, headed by the Prime Minister, try to look for arguments and quote statements that are convenient for them, for example by A. Barak or other former judges of the Supreme Court. This is met with sharp retorts and reprimands from the cited authorities, who state that their statements concerned the court's self-limitation, and not the elimination of the clause by statute.[25] At this stage, the arguments of supporters of the government's "reform" of the judiciary are dominated by general, mainly populist theses, stating that the Supreme Court is a usurper exercising powers that it often created itself, and its main "sin" is claiming the position of the main legislator and excessively limiting administration's freedom of decision, which prevents it from functioning efficiently as an entity implementing the will of the nation.

Further allegations concern the replacement of powers typical of administration, resulting from decision-making freedom, with the discretionary and arbitrary will of judges and the Court's violation of the principle of separation of powers by abusing the standards of reasonableness as a criterion for assessing the activity of the executive.

In response to the above-mentioned allegations, defenders of the current position of the Supreme Court (and the rest of the secular judiciary) claim that for decades, the Knesset, recognizing its inefficiency in regulating constitutional issues, tacitly agreed to the flexible expansion of the Court's jurisdiction and followed the court's jurisprudence. Similarly, the Court's judgments were respected by subsequent governments even though they criticized the activist profile it adopted. It must be remembered that for a very long time, the Supreme Court enjoyed high social authority. The thesis that the Court does not have the legitimacy to perform the control function of inhibiting and balancing the administration is untrue. "Judicial review" has already established itself as a socially accepted concept and institution in Israel. The only difference in the form of legitimization is

Issue"; Navot, "There's No 'Compromise' in the Coalition's Play for Unlimited Power," IDI, March 22, 2023, accessed July 16, 2023, https://en.idi.org.il/articles/48542.

25 See the statements of Aharon Barak and Noam Sohlberg cited Toi Staff, "Ex-top judge refutes PM's use of his name: Reasonableness bill undermines rule of law," *Times of Israel*, July 23, 2023, accessed July 23, 2023, https://sephardicu.com/featured/ex-top-judge-refutes-pms-use-of-his-name-reasonableness-bill-undermines-rule-of-law/, A. Barak stated directly: "quoting me to justify this act is indecent and inappropriate."

the fact that it is based on common law, i.e. the judicial practice of courts. However, the principles of common law developed by the Supreme Court have been considered sources of law since the beginning of Israel's existence, which is confirmed by the 1980 Foundation of Law Act.

3. Conclusions

The Supreme Court's activism, criticized and currently sharply attacked by those in power, is the result of the lack of a constitution in the form of a complete and superior source of law. Despite the adoption of several basic laws, the Knesset still faces many challenges regarding the regulation of the state system. Activism or, as some say, excessive activism of the Court, involves hard work performed out of concern for the implementation of the values and principles of a democratic state and its legal order – filling legal loopholes through judicial interpretation.[26] It is a fact, admitted by some judges of the Court, that sometimes this body does too zealously replace the sluggish Parliament.[27] Some judges (including A. Barak and N. Sohlberg) believe that courts use the reasonableness standard too often. However, this hyperactivity should not be limited by statutory regulation, but by the court's self-limitation. An effective tool supporting such an attitude would be statutory definitions of the forms and limits of public administration activity, including principles, procedures and substantive and ethical qualifications when filling government positions and other high-ranking state functions, such as the prosecutor general or state auditor. Moreover, the removal of the reasonableness clause may affect the system of judicial protection of human rights, as it will enable the government and the Knesset – due to the similarities between the reasonableness and proportionality clauses – to contest the Court's use of the latter. It is therefore not surprising that with the act repealing the standard of reasonableness, the ruling coalition began implementing its plan of "reforms" of the justice system, treating

[26] See Aharon Barak, "Interpretation in the Law," Vol. 3 of constitutional interpretation (Tel Aviv: Nevo Publishing, 1994), 347 et seq.

[27] In the author's conversation with Aharon Barak in October 2019, this outstanding judge and professor repeated several times: if the Knesset is not satisfied with what the Supreme Court is doing, let it change it – of course, in accordance with the appropriate procedures and the principles of correct, democratic legislation.

it as a "systemic lockpick" opening the way to its incapacitation, starting with the Supreme Court.

Analyzing the arguments of opponents and supporters of the reasonableness clause, it can be noted that although not in every case the Court applied it reasonably, it is difficult to find many judgments that are irrational, unreasonable or issued contrary to good knowledge, violating democratic values and reason of state. The government, the prime minister and ministers – on the contrary – have committed dozens of acts that clearly violate legality and reasonableness due to corruption, lack of ethical principles, bias, subjective and narrowly political motives.

The functioning of a democratic state is based on a constant pursuit of balance in the relations between the main actors of political life – the parliament, the government and the judiciary. In principle, no authority has a position to dominate the other authorities. This happens thanks to the complex system of checks and balances, which is largely based on the exercise by the checking organ of certain powers, characteristic of the competences of the body subjected to balancing.[28] In Israel's political system, the prime minister and government not only have executive powers but they actually and permanently control the Knesset. As a result, the formal powers of the Israeli parliament are often not exercised, including the highly important control of the government's policy and its law-making activity. In the absence of a constitution or relevant fundamental laws, control of administration, especially of the government, through an independent and effective judicial review is the main and sometimes exclusive guarantee of the rule of law and the protection of human rights. If one accepts the view that the reasonableness test is one of the important bases for the protection of internal national security and freedoms and rights, then its elimination may have serious negative consequences as it may open the way to the usurpation of power by the government and become a threat to the existence of the state. The tragic events that began with the Hamas terrorist attack seem to confirm this.

[28] This was aptly formulated by Richard E. Neustadt, who stated that the division of power means a situation in which organizationally separated institutions participate in the performance of state functions; Richard E. Neustadt, *Presidential Power* (New York: John Wiley and Sons, 1980), 26.

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Between Enabling Law and Protecting Law – Some Remarks on the Method of Regulating the Law of Groups of Companies in Polish Commercial Companies Code

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Abstract: Although the groups of companies have been an indispensable part of the modern economy for several decades, they still continue to attract unwavering attention of both practice and doctrine of corporate law. The numerous legal challenges posed by the functioning of multi-level structures, based on diverse types of dominance and dependance relations adopt different regulatory strategies manifest a universal appeal. Yet, the national legislators adopt different regulatory strategies, aimed at securing the interests of various stakeholders, including minority shareholders, dependent companies and their creditors. As a result, the contemporary discourse entails two concepts – one emphasizing the risks and responsibilities associated with it (*protecting law*) and the other one, supporting the creation of groups, as well as instruments for their effective management (*enabling law*). The aim of the article is to verify the extent to which these concepts are addressed by the most recent Polish group law regulations, viewed in a comparative context outlined by selected European jurisdictions.

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1. Introduction

For several decades the topic of groups of companies (French: *groupes de sociétés*)[1] has attracted the attention of the EU legislature, national legislators and, above all, the practice and doctrine of corporate law.[2] Given the current degree of economic concentration, boosted by the liberal rules of capital movements, such ever-increasing interest is hardly a surprise.[3] In virtually all developed countries, the majority of legal entities, which appear on the market as juridically independent, are entangled in various types of relations of dominance and dependence. If these relations correspond to certain quantifiers of the intensity and durability of the influence exerted by the dominant organization (i.e., the so-called corporate power, German: *Konzernherrshaft* or *Konzernleitung*), the entities included in such a specific "conglomerate" can, from a functional and economic standpoint, be treated as a single economic unit.[4]

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1 In some jurisdictions, the terms "holding" or "concern" (German: *Konzern*) are interchangeable, at least in principle. This differentiation is primarily terminological in nature and is the result of the different legal traditions of individual countries. See: "Corporate Group Law for Europe: Forum Europaeum Corporate Group Law," *European Business Organization Law Review* 1, no. 2 (2000): 185, https://doi.org/10.1017/S1566752900000148.

2 See e.g.: Michael Bode, *Le groupe international de sociétés. Le système de conflit le lois en droit compare français et allemande* (Bern–Bruxelles–Frankfurt am Main–New York–Oxfrod–Wien: Peter Lang, 2010); Guy Keutgen, *Le droit des groupes de sociétés dans la CEE* (Bruxelles–Louvain: Bruylant, 1973); Frédéric Magnus, *Les groupes de sociétés et la protection des intérêts catégoriels. Aspects jurudiques* (Bruxelles: Larcier, 2011). In German-language literature, see in particular the two special issues of Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR): *Corporate Governance im grenzüberschreitenden Konzern*, eds. Peter Hommelhoff, Marcus Lutter, and Christoph Teichmann, ZGR-Sonderheft 20 (Berlin–Boston: De Gruyter, 2017); *Vom Konzern zum Einheitsunternehmen. Aktuelle Entwicklungsperspektiven des deutschen und europäischen Konzernrechts*, ZGR-Sonderheft 22, (Berlin–Boston: De Gruyter, 2020).

3 See: Christoph Teichmann, "Europaïsches Konzernrecht: Vom Schutzrecht zum Enabling Law," *Die Aktiengesellschaft*, no. 6 (2013): 184; as well as: "Corporate Group Law for Europe: Forum Europaeum Corporate Group Law," 168.

4 The phenomenon of depreciation of the separate legal personality of group companies and the "collective" perception of the group as a single economic entity has intensified in recent years, especially in the context of European state aid and competition law. See, e.g., CJEU Judgment of 10 September 2009, Akzo Nobel and Others v. Commission, Case C-97/07. With regard to the definition of a group in European legal science, see such classical titles as: Ludwig Raiser, *Die Konzernbildung als Gegenstand rechts- und wirtschaftlicher Untersuchung*

Of course, the functioning of a company within a group comes with specific risks, which are extremely difficult to eliminate upon the general instruments of company law. These risks are usually defined from the perspective of typical "group outsiders" (minority shareholders and creditors of subsidiaries[5]), especially when it comes to "sacrificing" the interests of a single company in the name of the interests of the group, the rules for intra-group transactions and application of the *arm's length rule*. The legally permissible instruments that may ensure effective management of the group and the rules for valuing the interests of the group and specific companies by the members of its bodies (going beyond the typical so-called *agency problems*) raise numerous concerns. These are further exacerbated by the lack of transparency regarding the group's existence, composition, strategy and operating principles. On the other hand, groups of companies enjoy undisputable benefits, e.g., in terms of their access to technology and capital, financial liquidity,[6] the option to outsource certain costs, etc. It is also worth mentioning special purpose vehicles (SPVs) created by the parent company for particular projects or the so-called service companies, whose sole task is to perform specific activities for the benefit of other group entities.

In this context, one may well wonder whether the problems related to the functioning of this complex economic and juridical phenomenon should be resolved based exclusively on general legal principles or a separate legal regulation. Nonetheless, the latter scenario requires determining the *ratio* and scope of the desired legislation. In today's legal discourse, models of regulating the law of groups of companies entail two concepts – one emphasizing the risks and responsibilities associated with it (*protecting law*) and the other supporting the creation of groups, as well as instruments for their effective management (*enabling law*). The article aims to verify the extent to which these concepts are addressed by the most recent Polish

(Berlin: 1964), 51 ff; Marcus Lutter, *The Law of Groups of Companies in Europe. A Challenge for Jurisprudence* (Deventer: 1988), 11 ff.

5 Such an approach seems simplistic: operating in a holding company may also entail additional risks for minority shareholders and creditors of the parent company (e.g. due to the transfer of profit to a subsidiary).

6 See: José Engrácia Antunes, *Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships* (Florence: European University Institute, 1991), 96.

group law regulations. For this purpose, the following sections examine the methods of regulating groups of companies in selected European jurisdictions and suggested by expert bodies. This comparative overview is followed by a substantive analysis of the Polish legal system, which is assessed against this backdrop and with respect to the protecting-enabling law relation.

2. Groups of Companies and Their Regulation from a Comparative Perspective

There is no uniform approach to the regulation of group law among European legal systems. In short, there are three basic models of regulatory approach towards the problems related to the functioning of groups of companies; accordingly, these promote (a) general instruments of company law or civil law[7]; (b) specific provisions of group law, or (c) specific provisions of law relating directly to particular areas of law (competition, insolvency, tax, environmental law, etc.).[8] Jurisdictions with specific group law arrangements (b) are also not a uniform category. They differ in the scope of regulations and the method of approach: from those that regulate corporate law separately and in detail (Germany, Portugal, Hungary, Slovenia, Croatia, Brazil, Turkey), to those that only introduce selected solutions supplementing general company law regulations (Italy, the Czech Republic since 2014), to those in which such solutions are the result of case law (France).

German law is a classic example of comprehensive regulation of group company law or, to be precise, the law of affiliated enterprises (German: *Recht der verbundenen Unternehmen*). The system of relevant regulations,

7 This approach has been adopted in France, as well as in *common law legal systems*, in which less attention is paid to the internal relations between shareholders, and the emphasis is put primarily on the impact of a company's possible insolvency on creditors – and thus, *de facto*, also an issue that is not specific to the law of groups of companies.

8 See: José Engrácia Antunes et al., eds., *Report of the Reflection Group on the Future of EU Company Law*, April 5, 2011, 59; and José Miguel Embid Irujo, *Trends and Realities in the Law of Corporate Groups*, 71, accessed September 29, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=699141; Klaus J. Hopt, *Groups of Companies. A Comparative Study on the Economics, Law and Regulation of Corporate Groups*, ECGI Law Working Paper No. 286/2015, accessed September 29, 2023, http://ssrn.com/abstract=2560935. The latter model, which is found in such countries as Denmark, Sweden and Finland and in principle in EU law, is commonly referred to as the "piecemeal approach."

not only the eldest but also the most extensive in the world, was first introduced by the German Act on Joint Stock Companies[9] and subsequently expanded in the case law of the German *Bundesgerichtshof* and the doctrine on limited liability companies.[10] The scope of application of these internally differentiated norms is determined by the existence of the so-called group power (*German: einheitliche Leitung*), presumed to exist in the case of dominance and dependence relationships between entities. It comprises extremely diverse structures, including both the so-called contractual and *de facto* groups.[11] One characteristic feature of the former type is a binding instruction, with an extremely narrow margin of self-assessment and the possibility of refusal to execute it by the members of the subsidiary's governing bodies, and an equivalent in the form of an obligation to compensate the subsidiary or its minority shareholders.[12] On the other hand, with respect to *de facto* groups, the primary protection methods involve reporting obligations, audits,[13] and the liability of the parent company and its officers, or the officers of the subsidiary.[14] Despite comprehensive regulations, the German model of group law is criticized by both German and foreign scholars for being extensively formalistic and inflexible.[15]

France exemplifies a legal system in which the lack of statutory group law solutions is creatively complemented by case law. Its core is the concept of flexibly balancing the interests of individual group companies in accordance with the so-called *Rozenblum doctrine*, formulated in the jurisprudence

9 See: Articles 15–22 and 291–328 of the German Stock Act (German: *Aktiengesetz*) of 6 September 1965 (BGBI. I, S. 1089, as amended); hereinafter: AktG, especially par. 18.

10 See: S. Mock, "National Report on Germany," in *Groups of Companies*, eds. R. Manóvil, J. E. Antunes, P. H. Conac, D. Corapi, D. Benincasa, R. Dotevall, M. Naharro, M. Fujita, F. Gevurtz, F. Heindler, F. Kuyven, M. Lemonnier, A. Moreira, M. Marques, M. Mock, G. Nilsson, M. Olaerts, T. Papadopoulos, V. Pönkä, S. Tang, N. Tepeš, H. Markovinović, P. Miladin, V. Tountopoulos, M. Uzal, R. Valsan, E. Wymeersch, R. Zagradišnik (Hague: Springer, 2020), 303; Volker Emmerich, in *Aktien- und GmbH-Konzernrecht*, eds. Volker Emmerich and Mathias Habersack (München: C.H. Beck, 2022), 24–5.

11 See: Emmerich and Habersack, eds., *Aktien- und GmbH-Konzernrecht*, 54.

12 See: Article 304, 35 and 308 AktG.

13 See: Article 312 and 314 AktG.

14 See: V. Emmerich, *Aktien*, p. 441.

15 See: Antunes et al., *Report of the Reflection Group on the Future of UE Company Law*, 60; Irujo, *Trends and Realities in the Law of Corporate Groups*, 67.

of French courts – *incidentally*, in criminal cases.[16] This concept legitimizes the pursuit of the entire group's interests by individual company managers, provided that certain conditions are met, namely: (a) the existence of a permanent organizational link between the companies expressed, e.g., in coordination of their activities by the parent company; (b) the implementation of a common, long-term business policy (strategy) aimed at balancing the interests of the individual group companies; and (c) ensuring a long-term balance between the benefits and losses that result from group membership.[17] In its original form, however, it is not linked to any specific instruments for managing the group or exercising dominant influence over subsidiaries.

An interesting example of a transition from a comprehensive model of corporate law based on the German model to a more flexible limited-regulation model referring to the concept of group interests and the *Rozenblum* doctrine[18] is Czech law.[19] Currently, the concept of a group of companies introduced therein covers only *de facto* groups[20] under the unified management of a parent company. Its essence is coordinating or managing key activity areas to pursue the interests of the group within the framework of

16 See the precedential judgment of the Chambre Criminelle de Cour de Cassation of 4 February 1985; Cass. Crim. JCP/E 1985, II, 14614. For more information, see, e.g., Pierre-Henri Conac, "Director's Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level," *European Company and Financial Law Review*, no. 2 (2013): 200.

17 See: Irujo, *Trends and Realities in the Law of Corporate Groups*, 88; Tomasz Staranowicz, "Podstawowe problemy regulacji koncernu w prawie spółek [Basic Problems of Concern Regulation in Company Law]," *Kwartalnik Prawa Prywatnego* 18, no. 2 (2009): 396.

18 See: Conac, "Director's Duties in Groups of Companies," 208; Paweł Błaszczyk, "Introduction," in *Kodeks spółek handlowych. Komentarz do zmian (tzw. prawo holdingowe)* [*Code of Commercial Companies. Commentary to the amendments (so-called holding law)*], eds. Andrzej Szumański, Radosław L. Kwaśnicki, and Filip Ostrowski (Warsaw: C.H. Beck, 2022), side note no. 34.

19 See: the Czech Act on Commercial Companies and Cooperatives (cz. *Zákon o obchodních společnostech a družstvech*) of 22 March 2012, 90/2012 Coll, also known as the Act on Commercial Corporations (cz. *Zákon o obchodních korporacích*), hereinafter: ZOK.

20 Group agreements, such as agreements on the management of a subsidiary or on the transfer of profit by a subsidiary, which were concluded under the previous regulation of the group law, in force until the end of 2013, expired by operation of law six months after the entry into force of the new regulation.

a single policy.[21] Following the normativization of this concept, (a) each entity of a group may invoke the interest of the group; (b) the parent entity has the right to issue binding instructions to its subsidiaries, provided that they are consistent with the interests of the parent entity or other entity forming the group; and (c) claiming action in the interest of the group exempts the members of corporate bodies from liability, provided that they act with due diligence and that the further rules of the *Rozenblum* doctrine are met.[22]

A similar though more limited variant of such a regulation was implemented in the Italian legal system following the 2004 reform. Specific rules introduced at that time are contained in as few as 8 articles of the Italian Civil Code,[23] which concern: parent company liability; the obligation to justify decisions taken in the interest of the group; group structure transparency; the right of exit of the subsidiaries' minority shareholders; the presumptions related to the application of these provisions and the subordination of claims by group members against other claims in the event of subsidiaries' bankruptcy. Interestingly, Italian law does not explicitly define the group of companies itself, and the scope of the regulation is defined by the concept of a subsidiary subject to management or coordination by another legal person (Italian: *direzione e coordinamento*) or included in the consolidated financial statements.[24] A key element of the Italian regulation is the general formula of the parent company's liability towards the shareholders and creditors of its subsidiary for improper management and acting in its own or someone else's interest, which refers to the *Rozenblum* doctrine and the so-called theory of compensatory benefits.[25] This liability is, howev-

21 See: Błaszczyk, "Introduction," side note no. 34.

22 According to Article 81.2 of the ZOK, governing body members may be exempt from liability if they demonstrate that they could reasonably expect to be compensated for the damage caused to the subsidiary in the interests of the parent company or another member of the group within a reasonable time. This does not apply if the company becomes insolvent. See: Błaszczyk, "Introduction," side note no. 35.

23 See: Italian Civil Code (Italian: *Codice civile*) of 16 March 1942, RD n. 262, as amended; hereinafter: CC.

24 An interesting solution in Italian law is also the presumption of management or coordination by another entity resulting from specific provisions of the articles of association. See: Błaszczyk, "Introduction," side note no. 30.

25 See: Article 2497 of the CC.

er, excluded if the damage did not arise or was fully compensated due to the actions of the parent company.[26]

3. Groups of Companies and Their Regulation from the European Expert Bodies' Perspective

While analyzing the evolution of group law regulations, the strategic documents of the EU bodies (mainly the European Commission) and expert groups provide an interesting perspective, drawing extensively on the experience of individual Member States. Following the collapse of the Ninth Directive draft, which did not even go beyond the stage of an unofficial document,[27] the first substantial project was the report of the so-called *Forum Europaeum Corporate Group Law*. Drafted in 2000, the document was the first to outline a proposal for limited regulation of group law based on the concept of group interest. The proposals presented at that time were further referenced by the 2002 report of the so-called *Winter Group*[28] and the 2003 *European Action Plan*.[29] The documents emphasized the need to ensure transparency in group relations and the uniform management of a parent company over its subsidiaries, subordinated to the interest of the entire group, yet taking into account the interests of creditors and minority shareholders. The 2011 position of the so-called *Reflection Group* was similar, as it underlined the right and obligation of the parent entity to manage

[26] See: Magdalena Zmysłowska, "Odpowiedzialność przebijająca w prawie amerykańskim i włoskim [Piercing Liability in American and Italian Law]," *Prawo w działaniu. Sprawy cywilne* 32, (2018): 53 ff.; Piotr Moskała, "Konstrukcja odpowiedzialności cywilnoprawnej we włoskim prawie spółek [The Construction of Civil Liability in Italian Company Law]," *Studia Prawa Prywatnego*, no. 1 (2016): 30 ff.

[27] Proposal for the Ninth Directive Based on Article 54(3)(g) of the EEC Treaty on Links Between Undertakings and, in particular, on Groups, accessed September 29, 2023, https://op.europa.eu/en/publication-detail/-/publication/7a0f7266-a05a-43ee-844c-45798999f3ca/language-en.

[28] See: Jaap Winter, in Jaap Winter, Jan Schans Christensen, José M. Garrido Garcia, Klaus J. Hopt, Jonathan Rickford, Guido Rossi, and Joelle Simon, *Report of the High-Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union*, eds. G. Ferrarini, K. J. Hopt, J. Winter, E. Wymeersch (Oxford: Oxford University Press, 2002), 97.

[29] See: EC Communication of 21 May 2003, *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*. Antunes et al., *Report of the Reflection Group on the Future of UE Company Law*, 60; Irujo, *Trends and Realities in the Law of Corporate Groups*, 60.

the group in accordance with its interests, proposed a normative distinction of the concept of group interest and indicated that its advantage would be to increase the legal security of members of the group participants' bodies.[30] This direction was further strongly confirmed in a 2014 report by the *Informal Company Law Expert Group*[31] (which, however, perceived the interest of the group as the sum of the isolated interests of the group's members) and the 2015 proposal by the *Forum Europaeum on Company Groups*[32] (though the latter nuanced both the permissible mechanisms of management and responsibility related to group relations depending on the degree of integration and the role of a given company in the group).

The most recent, and at the same time the most extensive and concrete proposal for the regulation of group law at the EU level, is the draft of the *European Model Company Act* of 2017. Although the EMCA brings to the forefront the right of the parent company to issue binding instructions to the subsidiary,[33] with reference to the *Rozenblum doctrine,* it also implements the concept of the interest of the group of companies, which provides the basis for excluding the liability of subsidiary managers, regardless of whether they acted to carry out such instruction or not.[34] Moreover,

30 Ibid. In this respect, see also: Błaszczyk, "Introduction," side note no. 47.

31 See: John Armour et al., *Report on the Recognition of the Interest of the Group*, October 30, 2016. In this case, the proposed solutions are also differentiated depending on whether we are dealing with a sole proprietorship or the participation of third parties. Of note is also the proposal to publish the so-called whitelist of typical and permitted intra-group transactions.

32 See: Pierre-Henri Conac et al., "Proposal to Facilitate the Management of Cross-Border Company Groups in Europe (March 30, 2015)," *European Company and Financial Law Review (ECFR)*, no. 12 (2015): 299 (*Transformacje Prawa Prywatnego*, no. 2 (2015): 67 et seq). For a broader discussion in this regard, see also: Krzysztof Oplustil, "Koncepcje interesu grupy spółek w pracach europejskich gremiów eksperckich (EMCA, FECG, ICLEG) [Concepts of the interest of the group of companies in the works of the European expert bodies (EMCA, FECG, ICLEG)]," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 81, no. 1 (2019): 13.

33 See, in particular, sections 15.09 and 16 of the EMCA draft. Notably, the instruction is not binding on directors appointed by entities other than the parent company and persons performing special functions (e.g., so-called independent directors).

34 See, in particular, section 15.16 of the EMCA draft. Apart from acting in the interests of the group, an officer must prove the following to be exempt from liability: (a) the officer acted in good faith and based on information that he had access to prior to making the decision; (b) the officer could have assumed that the damage or other adverse effect would be offset within a reasonable time; and (c) the action did not pose a threat to the continued

the EMCA provides for the right of compulsory buyout of shares held by subsidiaries' minority shareholders and the correlated right of the minority to demand the repurchase of those shares, as well as the liability of the parent company for damage to subsidiaries' creditors.[35]

4. Groups of Companies and Their Regulation in the Polish Commercial Companies Code

Poland is also a jurisdiction where the complex phenomenon of groups of companies has been normalized in law. Following an unsuccessful attempt to regulate this issue in 2010[36] and over a decade of legislative stagnation, the Act of 9 February 2022 amending the Commercial Companies Code and certain other acts[37] came into force on 13 October 2022. Article 4(1)(51) of the CCC provided a legal definition of a group of companies and a new Section IV of Title I of the CCC (Articles 211–2115) introduced a limited regulation of the group law. The explanatory memorandum to the 2022 amending Act and the first original commentaries emphasized that the group law regulations should be primarily perceived *as enabling law* (given the explicit recognition of the binding instructions as the only mechanism for influencing subsidiaries[38]) and pointed to intellectual inspiration drawn from the *Rozenblum* doctrine. At the same time, the new legislation established solutions aimed at balancing the risks borne by the "corporate outsiders," associated with facilitations in group management. Those include specific, but relatively narrowly defined, rules on parent company liability towards the subsidiary, its shareholders and, in the event of the subsidiary's insolvency, also its creditors.[39] Contrasting with the above assumptions are regulations providing not only for a special corporate exit right

existence of the subsidiary. In the case of a single-member company, the only applicable condition is (c). For more information, see: Oplustil, "Koncepcje interesu grupy spółek w pracach europejskich gremiów eksperckich," 10; Błaszczyk, "Introduction," side note no. 52.

35 Ibid., side note no. 47.

36 See the draft act amending the Commercial Companies Code and the Act on the National Court Register, version of 25 June 2010, prepared by the Civil Law Codification Commission, and the draft act on reducing administrative barriers prepared under the auspices of the Ministry of Economy, version of 8 March 2010.

37 Journal of Laws of 2022, item 807.

38 See: Articles 21^{2}–21^{5} of the CCC.

39 See: Articles 21^{12}–21^{14} of the CCC.

(sell-out) of minority shareholders but also for the compulsory acquisition of their shares by the parent company (squeeze-out).[40] Although it is somewhat inspired by the reports of *Forum Europaeum* and ICLEG, the EMCA project, French jurisprudence and Italian and Czech law, the new Polish law on groups of companies does not have a direct comparative prototype, but is rather the result of an original – and, occasionally, quite surprising – fusion of structures from different legal systems.

According to the above legal definition, a group of companies is

> a parent company and a company or subsidiaries which are capital companies, guided by a common strategy in accordance with the resolution on participation in a group of companies in order to pursue a common interest (the interest of a group of companies), justifying the exercise of unified management by the parent company over the subsidiary or subsidiaries (Article 4(1.1)(51) of the CCC).

The three main principles of the new regulation are certainly positive. They include (a) a distinction between the existing relationship between companies belonging to a group of companies and the "ordinary" relationship of dominance and dependence (Article 4(1)(51) of the CCC; Article 4(1)(4) of the CCC); (b) codifying the concept of "group interest"; and (c) partial differentiation of the principles of uniform group management and the parent company's liability depending on the degree of its integration (Article 214, Articles 1–3 of the CCC).[41] Whether these general assumptions have been implemented optimally is another issue entirely. At the same time, the concept adopted by the Polish legislator is characterized by at least three elements which require a thorough analysis (going beyond the scope of this article) and which raise doubts already at face value, including at the level of general assumptions.

First, the explanatory memorandum to the 2022 amending Act refers to the establishment of *de facto* concerns, and the wording of Article 4(1)

40 See: Articles 21^{10}–21^{11} of the CCC.

41 These rules are different for single-member subsidiaries and those in which other shareholders participate (in principle, this should refer to non-group shareholders). A classic example of this differentiation is the limited possibility of refusing to carry out a binding instruction: in the case of a single-member company, refusal is only possible if it would lead to insolvency.

(51) of the CCC refers directly to the relationship of dominance and dependence existing between group participants. However, an *opt-in* model has been adopted for the reference scope of the new regulations. In the CCC, a group of companies is *quasi-contractual*,[42] and the application of Article 211 et seq. depends on the adoption of a resolution on this matter by each company joining the group.[43] A resolution of the management board is generally sufficient in the case of parent companies; for subsidiaries, a resolution of the shareholders' meeting or the general meeting of shareholders, adopted by a majority of at least 3/4 of votes, is necessary (Article 211(2) of the CCC). In addition, each group participant is obliged to disclose this in the Register of Entrepreneurs of the National Court Register (Article 211(3) of the CCC), and most of the regulations on facilitating group management and related liability do not apply until such disclosure appears.[44] Therefore, it is necessary to distinguish between *de facto* (in the broader, previously accepted sense) and *de jure* groups (i.e., formalized groups of companies within the meaning of the new provisions of the Commercial Companies Code). This raises questions about the compatibility of the new regulation (based on the indicated formal criteria) and the essence of a group of companies (as a phenomenon that is a product of economic life defined by a specific set of factual relations) and, consequently, on whether it can be a panacea for the risks associated with the abuse of the so-called dominant influence.[45] A separate issue is whether businesses will deem the balance of positive and negative aspects of a formalized group of companies to be favorable enough to be subject to this regime. The initial results are far from encouraging: not a single formalized group of companies was entered into the Register of Entrepreneurs of the National Court Register during

[42] Adam Opalski, "Nowe polskie prawo grup spółek – krytyka założeń konstrukcyjnych (cz. I) [New Polish Law on Groups of Companies – Critique of Construction Assumptions (part I)]," *Przegląd Prawa Handlowego*, no. 8 (2023): 5.

[43] Further, the resolution must refer to a common strategy which, therefore, must be a formally adopted document.

[44] The exception is parent companies with their registered offices located abroad, in which case the subsidiary's register entry only needs to disclose participation in a group of companies.

[45] At this point, it is difficult to assess the inclination of the jurisprudence to apply, e.g., the new provisions of the Commercial Companies Code on the parent company's liability towards groups particularly exposed to the effects of such action, *per analogiam to* the so-called *de facto* holdings.

the first year of validity of the new regulations.[46] Finally, the relationship between the real factors (i.e., the existence of a relationship of dominance and dependence, the actual exercise of corporate influence) and the formal factors (adopting a resolution on group participation, establishing and following a common economic strategy) proves extremely problematic.[47]

Second, inspired by the *Rozenblum doctrine*, the Polish legislator obliged group companies to be guided by group interests as well as their own – "as long as it does not lead to the detriment of creditors or minority shareholders or minority shareholders of the subsidiary (Article 211(1) of the Commercial Companies Code)." The interest of a group of companies also determines the shape of further regulations on such things as (a) allowing group body members, liquidators or proxies to claim that they were acting in the group's interest (Article 211(4) of the CCC); (b) allowing the parent company to issue binding instructions to subsidiaries on managing company affairs (Article 212(1) and (3)(2) of the CCC); (c) excluding the liability of parent company body members or liquidators for damages (Article 215(2) of the CCC); (d) the rules governing the supervision by the parent company corporate bodies over the pursuit of group interests by the subsidiary (Article 217(1) of the CCC). What contrasts with the meaning of this concept is the extremely vague way in which it is conceptualized normatively. Against the backdrop of the Commercial Companies Code, it is impossible to determine unequivocally whether group interest and company interest are separate concepts or, on the contrary, whether group interest defines how company interest is construed, as well as whether these interests can be competitive or conflicting, whether they can (or should) be aligned, and whether it is justified to operate only in one general category

46 See: Bartosz Wojsław, "Bezużyteczne prawo Jacka Sasina. Prawie nikt nie skorzystał z martwych przepisów," Rzeczpospolita, October 20, 2023, October 21, 2023, https://www.rp.pl/abc-firmy/art39296351-bezuzyteczne-prawo-jacka-sasina-prawie-nikt-nie-skorzystal-z--martwych-przepisow.

47 By way of example, a question arises as to the consequences of the parent company losing an appropriate majority of votes or its actual failure to exercise unified management over its subsidiaries despite their prior adoption of resolutions on group participation.

or rather a distinction should be made between the general and specific group interests, etc.[48]

Third, from a normative point of view, the parent company's only instrument of influence over its subsidiaries is a binding instruction (Articles 212–215 of the CCC). Apart from this assumption being counterfactual,[49] one must note that the legislator has chosen an extremely formalized[50] and illegible, at times borderline incoherent,[51] way to regulate this issue. The literature already emphasizes that the problem in corporate relations is often the "pre-emptive" action of the subsidiary's bodies "as dictated by" the parent company. In the absence of any presumptions related to in-group decision-making,[52] there are concerns that the new regulation would only exacerbate this situation and that the establishment of a formal, binding instruction would be somewhat of a "sword of Damocles" for subsidiaries, confirming that they would inevitably have to comply with the parent company's will.[53] Considering the above, the provisions intended to balance the decisive influence of the group leader with their liability towards the subsidiary, its shareholders or creditors (Articles 2112–2114 of the CCC), which directly refer only to narrowly construed damage caused

48 See: Anne-Marie Weber, "Interes grupy spółek – ciało obce w sporach uchwałowych [Interest of a Group of Companies: A Foreign Body in Disputes About Resolutions]," *Przegląd Prawa Handlowego*, no. 7 (2023).

49 In practice, instruments used for uniform group management often include informal instructions, policies, regulations, decisions of joint committees and other bodies, etc.

50 See: Article $21^2(2)$, Article $21^3(1)$, Article $21^4(1)$ of the CCC.

51 In particular, it concerns the issue of the need for the subsidiary's governing body to decide on whether to follow a binding instruction. See: Article $21^2(3)(2–4)$, Article $21^3(1)$ and (3), Article $21^4(1–3)$ of the CCC. These provisions raise many concerns that must be addressed, starting with the consequences of a failure by the subsidiary's management board to take any decision, the effects of deciding to modify the parent company's instructions, the possibility of sending a binding instruction to a body of the subsidiary other than the management board, etc.

52 For example, concerning 100% integrated groups, covered by consolidated financial statements, in the scope of activities that are directly included in the common strategy.

53 A separate issue with respect to a binding instruction is that the control over its content under Article 214 of the CCC may prove illusory in practice. This is because Article 215 of the CCC excludes the personal liability of subsidiary (and parent company) governing body members for damage caused by its implementation.

by the execution of a binding instruction (and not other adverse consequences), seem far from sufficient.

5. Summary

The comparative law analysis highlights the lack of a uniform approach to regulating group law in Europe. However, it makes it possible to identify certain trends in this domain. First, there has been a noticeable shift in the perception of the role of group law in recent years, emphasizing the significance of mechanisms that ensure efficient group management. Nevertheless, the imperative to ensure effective protection, particularly in cases involving the abuse of decisive influence over subsidiaries by the parent companies, is widely acknowledged. Therefore, it is the choice between *enabling law* and *protecting* law that determines the primary function of group company law, and not the scope or content of the regulation.[54] Second, the idea to regulate this issue comprehensively and thoroughly is not widely supported. Yet, there is a broad consensus on the need to ensure transparency of group relations and transactions between related entities, as well as calls for recognizing the interests of a group of companies as a factor that should mitigate potential conflicts of loyalty among group members' officers and determine the possible exclusion of their liability. While the new Polish regulation on corporate groups is heading in a similar direction, it does not live up to the hopes invested in it. Due to its optional nature, the ambiguity of its core concept of group interest and its relation to group company interest, the formalism of the regulations on issuing binding instructions by the parent company, as well as the fragmentation of regulations protecting subsidiaries and the "corporate outsiders," even entities operating within permanent and uniformly managed structures are not willing to submit themselves to this regime.

[54] For a similar view, see: Staranowicz, "Podstawowe problemy regulacji koncernu w prawie spółek," 383. The author refers to the so-called balancing function of groups of companies.

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Gloss to the Judgment of the Court of Justice of the European Union (Third Chamber) of 25 November 2021 in Case C-488/20, Delfarma sp. z o.o. v. Prezes Urzędu Rejestracji Produktów Leczniczych, Wyrobów Medycznych i Produktów Biobójczych

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Keywords:
free movement of goods, medicinal products, parallel import licence, *pharmacovigilance*, public health

Abstract: Medicinal products are a special type of goods due to their importance for human health and life, and their trade is generally under the scope of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use. The preamble to this act states that the essential aim of the rules governing the production, distribution and use of medicinal products must be to safeguard public health. Hence, in the above-mentioned directive, the rules related to the authorisation of medicinal products for marketing and *pharmacovigilance* are very important. At the same time, it should be noted that parallel import of medicinal products as a form of trade in an EU Member State in connection with their authorisation for marketing in another Member State, although it has a long tradition, has not had a clear normative pattern, and has not been subject to the scope of Directive 2001/83/EC. It is based on the achievements of the *acquis communautaire* developed in this area and the principle of free movement of goods (Article 34 TFEU) and its exceptions set out in Article 36 TFEU concerning the protection of human health and life. The commented judgment sets an example of one more verdict confirming the interpretation of Articles 34 and 36 TFEU, according to which national provisions

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of a Member State should be considered unacceptable, according to which the withdrawal of the marketing authorisation for the reference medicinal product in the country of import has the automatic effect of expiring the parallel import authorisation. At the same time, new circumstances affecting the safety of the medicinal product on the market were analysed to give the conclusion as declared in the sentence.

1. Theses

Articles 34 and 36 TFEU must be interpreted as precluding national legislation under which a parallel import licence for a medicinal product expires automatically after one year from the expiry of the marketing authorisation of reference, without examining whether there is any risk to the health and life of humans.

The fact that parallel importers are exempt from the obligation to submit periodic safety reports is not a ground which may per se justify the adoption of such a decision.

2. Selected Legal and Factual Ground

The commented judgment of the Court of Justice of the European Union (hereinafter CJEU or Court) was given following the request for a preliminary ruling under Article 267 TFEU. The request was filed by the referring court, namely Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court in Warsaw, Poland; hereinafter Administrative Court) in connection with case number Vl SA/Wa 235120 pending before that court between the applicant: Delfarma Sp. z o. o. (hereinafter "Delfarma") and the national authority – the President of the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products (hereinafter "President of the Office"). The court proceedings concerned a decision declaring that a parallel import licence for a medicinal product has expired automatically due to the expiry of the marketing authorisation (hereinafter MA) for the reference medicinal product on the ground of Article 21a (3a) of the Pharmaceutical Law.[1]

[1] Pharmaceutical Law of 6 September 2001 (Journal of Laws of 2020, item 944); hereinafter the Pharmaceutical Law.

The decision to request a preliminary ruling was taken in the factual circumstances described as follows. Delfarma Sp. z o.o. was an undertaking engaged in parallel imports of medicinal products into the Polish market. A Chech licence for the parallel import of the medicinal product Ribomunyl, granules for oral solution, 0.750 mg + 1.125 mg, was granted to Delfarma by decision of the Polish Minister for Health of January 27, 2011 and subsequently extended by decision of the President of the Office of January 15, 2016. That licence had been granted under a marketing authorisation for Ribomunyl, the reference medicinal product, in the territory of the Republic of Poland. Since that MA expired on September 25, 2018, the President of the Office, by decision of September 24, 2019, declared, pursuant to Article 21a(3a) of the Pharmaceutical Law, that the parallel import licence for the medicinal product Ribomunyl expired with effect from September 25, 2019.

This decision was confirmed in response to Delfarma's request for re-examination by the decision of the President of the Office of November 18, 2019. Delfarma decided to bring an action against that decision before the Administrative Court, claiming, in essence, that that decision infringed Articles 34 and 36 TFEU.[2]

Legal grounds determining the request for the preliminary ruling concerned the disposition of Article 21a (3a) of the Pharmaceutical Law, according to which the licence for parallel import expires one year from the expiry of the MA in the territory of the Republic of Poland. It should be stressed that the main grounds for the MA expiration are determined by two factors: the marketing authorisation holder does not place the medicinal product on the market within three years from the date on which the authorisation was obtained, or the medicinal product is not marketed for three consecutive years.[3]

In the opinion of the Administrative Court, the interpretation of those provisions by the CJEU was necessary to determine whether the automatic expiry of a parallel import licence after one year from the expiry of the MA of reference on the basis of which that licence was granted is consistent

[2] Consolidated version of the Treaty on the Functioning of the European Union (hereinafter TFUE); Official Journal of the European Union, C 326, 26 October 2012, p. 47–390.

[3] Article 33a of the Pharmaceutical Law.

with EU law. The serious doubts of the referring court resulted, in particular, from two requirements set out by previous judgments. The first relates to the individual examination of the reasons for the end of validity of a parallel import licence, and the second relates to the consideration of the reasons which may justify maintaining the medicinal product on the market despite the end of validity of the MA of reference. Additionally, the referring court noted that since medicinal products are goods of a particular nature, the objective of the protection of the health and life of humans could justify such an automatic character. It refers in that regard to the argument of the President of the Office that maintaining a medicinal product on the market while no operator is required to update the data relating to the risks associated with the use of that product undermines that objective.

The circumstances outlined above gave the Administrative Court rise to the following questions which were asked to CJEU in the motion dated October 20, 2020:

> (1)Does Article 34 TFEU preclude national legislation under which a parallel import licence is to expire after one year from the expiry of the marketing authorisation for the reference medicinal product? (2) In the light of Articles 34 and 36 TFEU, may a national authority adopt a decision of a declaratory nature to the effect that a marketing authorisation for a medicinal product in connection with parallel import is to expire automatically, solely on the ground that the period laid down by law has expired, as from the date on which the marketing authorisation for the reference medicinal product expired, without examining the reasons for the expiry of [the marketing authorisation for] that product or other requirements referred to in Article 36 TFEU relating to the protection of the health and life of humans? (3) Is the fact that parallel importers are exempt from the obligation to submit periodic safety reports, and the authority consequently has no current data on the [risk-benefit balance] of pharmacotherapy, sufficient to adopt a decision of a declaratory nature to the effect that a marketing authorisation for a medicinal product in connection with parallel import is to expire?

The Court decided to examine together three of the asked questions for the reason that, in essence, all of them refer to one major issue: whether Articles 34 and 36 TFEU must be interpreted as precluding legislation of a Member State under which a parallel import licence for medicinal products is to expire automatically after one year from the expiry of the MA of

reference in that Member State, without examining whether there is any risk to the health and life of humans. During the main proceedings, the observations were submitted according to which the expiry of the MA of reference deprives the national authority responsible for *pharmacovigilance* of updated information on the quality, efficacy and safety of the medicinal product, which is the subject of a parallel import and, in particular, prevents that national authority from knowing the adverse reactions or from having access to the risk-benefit balance of that medicinal product. It was underlined that in the absence of an MA of reference, the updating of documents such as the package leaflet for the medicinal product is no longer guaranteed, and stated that the translation of those documents, updated by the MA holder in the exporting Member State by the parallel importer cannot remedy that shortcoming.

Taking into account the observation mentioned above, the legal framework for judicial considerations with respect to medicinal product safety was also set by relevant provisions of the Directive 2001/83/EC[4] related to the pharmacovigilance system. This system is used by the marketing authorisation holder and by Member States to fulfil the tasks and responsibilities to monitor the safety of authorised medicinal products and detect any change to their risk-benefit balance. This is the main legal tool enabling continuous supervision over the safety of medicinal products used in the population, involving the cooperation of both public authorities and the marketing authorisation holder that have been assigned relevant tasks, among others, the obligation to submit electronically to the database and data-processing network – EudraVigilance[5] information on all serious suspected adverse reactions that occur in the UE and in third countries as well as information on all non-serious suspected adverse reactions that occur

4 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as amended by Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012 (OJ 2012 L 299, p. 1) – hereinafter Directive 2001/83/EC.

5 Article 24 of Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004 L 136, p. 1) – hereinafter Regulation 726/2004.

in the UE.[6] The EudraVigilance database is fully accessible, particularly to the competent authorities of the Member States.[7]

It was evident to the Court that observations raised show two objectives determining the legal construction of licence expiry. First, it seeks to reduce the administrative and economic burden of searching for and analysing updated information relating to the medicinal products at issue that is borne by the national authority responsible for pharmacovigilance. Second, it intends to protect the health and life of humans by preventing the importation of a medicinal product, the package leaflet of which is not updated and for which there is no such information.

In its judgment of 25 November 2021, the Court recalled that a situation such as that at issue in the main proceedings falls under TFUE provisions on the free movement of goods, and, in particular, Articles 34 and 36, which, in essence, prohibit the Member States from imposing quantitative restrictions on imports and measures having an equivalent effect which may, however, be justified, inter alalia, on grounds of the protection of health and life of humans.

The Court concluded, in the first place, that a provision which seeks to protect the health and life of humans, according to Article 36 TFEU, has to respect the settled case law, which requires fulfilment of two conditions: that measure must be appropriate for securing the achievement of the objective pursued and does not go beyond what is necessary in order to attain it.[8] However, it also should respect the principle of proportionality, which is the basis of the last sentence of Article 36 TFEU, which requires that the power of the Member States to prohibit imports of products from other Member States be restricted to what is necessary in order to achieve the aims concerning the protection of health legitimately pursued.[9]

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6 Article 104 of Directive 2001/83/EC.

7 Article 24 of Regulation 726/2004.

8 CJEU Judgment of 3 July 2019, Delfarma Sp. z o.o. v. Prezes Urzędu Rejestracji Produktów Leczniczych, Wyrobów Medycznych i Produktów Biobójczych, Case C-387/18, EU:C:2019:556.

9 CJEU Judgment of 8 October 2020, kohlpharma GmbH v. Bundesrepublik Deutschland, Case C-602/19, EU:C:2020:804.

In the second place, the Court recalled that, according to the case law of the Court, national legislation which provides for the automatic cessation of the validity of a parallel import licence due to the withdrawal of the MA of reference constitutes a restriction on the free movement of goods contrary to that provision.[10] Since Artice 21a(3a) of the Pharmaceutical Law automatically prevents the import of medicinal products in parallel into Poland, it constitutes a restriction on the free movement of goods within the meaning of Article 34 TFEU. As regards the justification for such a restriction, the Court stressed that a parallel import licence for medicinal products might, for reasons of a general nature or, in specific cases, for reasons relating to the protection of public health, be linked to an MA of reference, so that the withdrawal of that MA may justify the withdrawal of the parallel import licence,[11] but in the case in question, the test of proportionality was not fulfilled.

The Court stressed that the MA of reference expires, pursuant to Article 33a of the Pharmaceutical Law, where the responsible operator does not place the medicinal product on the market within three years from the date on which the authorisation was obtained or where the medicinal product was not placed on the market for three consecutive years; the fact that the medicinal product poses no risk to the health and life of humans is irrelevant in that regard. In addition, the parallel import licence expires automatically following the expiry of the MA of reference and Article 21a(3a) of that Pharmaceutical Law does not require the competent Polish authority to carry out an individual and specific examination of the health risks which the medicinal product that is the subject of the parallel import might pose. It follows that the expiry of the MA of reference is not based on examining the specific risks to the health and life of humans arising from maintaining the medicinal product on the market.

In light of the above, the Court ruled that Articles 34 and 36 TFEU must be interpreted as precluding national legislation under which a parallel import licence for a medicinal product expires automatically after

10 CJEU Judgment of 10 September 2002, Ferring Arzneimittel GmbH v. Eurim-Pharm Arzneimittel GmbH, Case C-172/00, EU:C:2002:474.

11 CJEU Judgment of 8 May 2003, Paranova Läkemedel AB and Others v. Läkemedelsverket, Case C-15/01, EU:C:2003:256.

one year from the expiry of the marketing authorisation of reference without examining whether there is any risk to the health and life of humans. The fact that parallel importers are exempt from the obligation to submit periodic safety reports is not a ground which may per se justify the adoption of such a decision.

3. Commentary on CJEU Decision

The trading of medicinal products is subject to special regulation due to the nature of these goods and their importance for human life and health, as defined in Directive 2001/83/EC. The legal provision requires prior authorisation to place a medicinal product on the market under the national or central procedure.[12] However, it is clear from the case law of the Court that Directive 2001/83/EC cannot apply to a medicinal product covered by an MA in one Member State which goes into another Member State as a parallel import already covered by a marketing authorisation in that other Member State, because the imported medicinal product cannot, in such a case, be regarded as being placed on the market for the first time in the Member State of importation. Such a situation, therefore, falls under TFEU provisions on the free movement of goods.[13] Therefore, the parallel import of medicines is a legally unquestionable form of trade in medicinal products authorized in a given EU Member State or a Member State of the European Free Trade Association (EFTA) within the single market. Its importance in terms of increasing access to medicinal products cannot be overestimated. The legal

[12] Article 6 of Directive 2001/83/EC. See: Katarzyna Miaskowska-Daszkiewicz, "Dopuszczanie do obrotu produktów leczniczych," in *Prawo farmaceutyczne. System Prawa medycznego*, vol. 2, ed. Joanna Haberko (Warsaw: C.H. Beck, 2019), 465–560; Rafał Stankiewicz, *Model racjonalizacji dostępu do produktu leczniczego. Zagadnienia publicznoprawne* (Warsaw: C.H. Beck, 2014), 217.

[13] See to that effect CJEU Judgment of 12 November 1996, The Queen v The Medicines Control Agency, ex parte Smith & Nephew Pharmaceuticals Ltd and Primecrown Ltd v. The Medicine Control Agency, Case C201/94, EU:C:1996:432, paragraph 21; and CJEU Judgment of 16 December 1999, The Queen, ex parte Rhône-Poulenc Rorer Ltd and May & Baker Ltd v The Licensing Authority established by the Medicines Act 1968 (represented by the Medicines Control Agency), Case C94/98, EU:C:1999:614, paragraph 27; see also, judgment of 3 July 2019, Delfarma sp. z o.o. and Prezes Urzędu Rejestracji Produktów Leczniczych, Wyrobów Medycznych i Produktów Biobójczych, C-OJ EU:C:2019:556.

framework at the level of EU law has been determined for over fifty years, in particular, based on decisions made in specific cases referred to the Court.[14]

As a consequence of the above, the institution of parallel trade has not been regulated in any EU act of a normative nature but is the result of the development of the institution in question, based on the case law of the Court deriving it from the fundamental freedoms of the internal market.[15]

The European Commission commented on this form of trade in medicinal products,[16] stating in its communication from 2003 that:

> Parallel importation of a medicinal product is a lawful form of trade within the Internal Market based on article 28 of the EC Treaty and subject to the derogations regarding the protection of human health and life and the protection of industrial and commercial property, provided by article 30 of the EC Treaty.[17]

A set of rules has been developed for granting parallel import licences to parallel distributors by the competent national authorities under a simplified procedure.[18] The free movement of goods means that an operator

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14 See: Michał Roszak, *Handel równoległy produktami leczniczymi w prawie unijnym. Granice swobody przepływu towarów na rynku farmaceutycznym* (Warsaw: Wolters Kluwer Polska, 2014), 62.

15 For more, see, for example, Claudia Desogus, *Competition and Innovation in the EU Regulation of Pharmaceuticals: The Case of Parallel Trade* (Cambridge: Intersentia, 2011), 51; James S. Venit and Patrick Rey, "Parallel Trade and Pharmaceuticals: A Policy in Search of Itself," *European Law Review* 29, no. 2 (2004): 153–77; Roszak, *Handel równoległy produktami leczniczymi w prawie unijnym*, 62 et seq.; Maria Królikowska-Olczak, "Import równoległy produktów leczniczych a zasada swobodnego przepływu towarów," *Studia Prawno-Ekonomiczne* 100, (2016): 35–48.

16 In its Communication of 1998, the European Commission re-affirmed that pharmaceuticals are fully governed by the rules that oversee the functioning of the internal market – see Communication from the Commission on the single market in pharmaceuticals, COM(1998) 588, Brussels, November 25, 1988.

17 Subsequently, in 2003, it was stated that parallel trade was a legal form of trade among Members States. The Commission also underlined that these products are not identical but essentially similar to the products that have already received a marketing authorisation in the Member State; See Commission Communication on parallel imports of proprietary medicinal products for which marketing authorisations have already been granted, COM(2003) 839, Brussels, December 30, 2003.

18 See ibid., 7.

who has bought a medicinal product lawfully marketed in one Member State under a marketing authorisation issued in that State can import that medicinal product into another Member State where it already has a marketing authorisation without having to obtain such authorisation under Directive 2001/83/EC and without having to provide all the particulars and documentation required by the Directive 2001/83/EC to determine whether the medicinal product is effective and safe. Therefore, a Member State must not obstruct parallel imports of a medicinal product by requiring parallel importers to satisfy the same requirements as those applicable to undertakings applying for the first time for a marketing authorisation for a medicinal product, subject to the condition, however, that the import of that medicinal product does not undermine the protection of public health.[19]

Consequently, the competent authorities of the Member State of importation must ensure, at the time of import and based on the information in their possession, that the medicinal product imported as a parallel product and the medicinal product which is the subject of an MA in the Member State of importation, even if not identical in all respects, has at least been manufactured according to the same formulation, has the same active ingredient and has the same therapeutic effect, and that the imported medicinal product does not pose a problem of quality, efficacy or safety. If all those criteria are satisfied, the medicinal product to be imported must be regarded as having already been placed on the market in that Member State and, consequently, must be entitled to benefit from the marketing authorisation issued for the medicinal product already on the market, unless there are countervailing considerations relating to the effective protection of the life and health of humans. Thus, the authority is required to authorise that medicinal product where it is convinced that that product, in spite of differences relating to the excipients, as the case may be, does not pose a problem of quality, efficacy or safety.[20]

However, particular cases and decisions based on them do not exhaust all doubts. Locating this institution in the internal market rules specified in

19 CJEU Judgment of 3 July 2019, Delfarma Sp. z o.o. v Prezes Urzędu Rejestracji Produktów Leczniczych, Wyrobów Medycznych i Produktów Biobójczych, Case C387/18, EU:C:2019:556.

20 Ibid.

Article 34 TFEU can be used to justify their restriction based on Article 36 TFEU. It should be emphasised that the current situation does not guarantee legal certainty, both from the perspective of parallel importers and public authorities at the national level. The latter take actions aimed at protecting the values indicated in Article 36 TFEU, where the health and life of people are of primary importance when deciding on the level of protection and how this level will be achieved. It must also comply with the proportionality test, which involves the verification of two elements: whether a measure contrary to Article 34 is capable of achieving the objective pursued by the State and whether that objective could not be achieved by means which would have a lesser impact on trade between Member States.[21]

There is no doubt that in the light of the well-established case law of the CJEU, the provisions of Articles 34 and 36 TFEU exclude the application of national provisions of a Member State, according to which the withdrawal of the reference authorisation in the country of import automatically results in the expiry of the parallel import authorisation.[22] On the other hand, it follows from these judgments that in the event of withdrawal of the reference authorisation in the country of importation, this may impact the validity of the parallel import authorisation if the withdrawal was for reasons related to the protection of public health.[23]

In that regard, it should be stressed that a situation such as that at issue in the main proceedings before CJEU in case C-488/20 verify circumstances as to the possibility of justifying the expiry of the parallel import licence. The case broadly relates to the obligations imposed on the responsible entity (MA holder) in connection with the operation of the pharmacovigilance

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21 Dawid Miąsik and Ryszard Skubisz, "Commentary on Article 36," in *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom I (art. 1–89)*, eds. Dawid Miąsik, Nina Półtorak, and Andrzej Wróbel, Warsaw 2012, LEX/el.

22 See: Jarosław Dudzik, "Limitations on Parallel Import of Medicinal Products: Comments in the Context of the Judgement of the Court of Justice of the European Union in Case C-602/19 Kohlpharma," *Studia Iuridica Lublinensia* 30, no. 4 (2021).

23 CJEU Judgment of 10 September 2002, Ferring Arzneimittel GmbH v Eurim-Pharm Arzneimittel GmbH, Case C172/00, EU:C:2002:474; CJEU Judgment of 4 May 2003, Paranova Läkemedel AB and Others v Läkemedelsverket, Case C15/01, EU:C:2003:256; CJEU Judgment of 8 October 2020, kohlpharma GmbH v Bundesrepublik Deutschland, Case C-602/19, EU:C:2020:804; Rafał Stankiewicz, "Import równoległy," in *Instytucje rynku farmaceutycznego*, ed. Rafał Stankiewicz (Warsaw: Wolters Kluwer Polska, 2016), 342.

system. According to Article 104 of Directive 2001/83/EC, the MA holder must implement a pharmacovigilance system. In that respect, it is responsible, inter alia, for updating the risk management system and monitoring pharmacovigilance data in order to determine whether there are new risks, whether risks have changed or whether there are changes to the benefit-risk balance of medicinal products. Furthermore, the MA holder must, in accordance with Article 107b of Directive 2001/83/EC, submit to the EMA periodic safety update reports containing, inter alia, a scientific evaluation of the risk-benefit balance of the medicinal product.[24]

This was legitimately raised in the case as those obligations are imposed on the holder of the MA of reference and not on the parallel importer; in the absence of an MA of reference, the national authority responsible for pharmacovigilance in the Member State of importation does not have access to any updated documents or data relating, in particular, to the risk-benefit balance of pharmacotherapy in that Member State. However, it was also rightly stressed that even without an MA of reference, the national authority responsible for pharmacovigilance in the Member State of importation may effectively have access to the information necessary to carry out suitable pharmacovigilance. The Court considered that provisions of Directive 2001/83/EC can ordinarily be guaranteed for medicinal products that are the subject of parallel imports through cooperation with the national authorities of the other Member States by means of access to the documents and data produced by the manufacturer in the Member States in which those medicinal products are still marketed under an MA still in force.[25]

The updated information is accessible to the national authority responsible for pharmacovigilance in the Member State of importation in the context of cooperation between Member States. That authority may also have access to the periodic safety update reports, which are made available to the competent national authorities by means of a repository.[26] Moreover,

[24] Katarzyna Mełgieś, "Nadzór nad bezpieczeństwem produktów leczniczych," in *Prawo farmaceutyczne, System prawa medycznego*, ed. Joanna Haberko (Warsaw: C.H. Beck, 2019), 620.

[25] CJEU Judgment of 8 October 2020, kohlpharma GmbH v Bundesrepublik Deutschland, Case C-602/19, EU:C:2020:804.

[26] Article 107b(2) of Directive 2001/83/EC and the first paragraph of Article 25a of Regulation No 726/2004.

the adverse reactions to medicinal products reported by the MA holders, healthcare professionals or patients are listed in the EudraVigilance database, which is fully accessible to the competent authorities of the Member States.[27]

It should be pointed to the case that the national authority responsible for pharmacovigilance in the Member State of importation is informed where the medicinal product poses serious difficulties in the Member State of exportation or in the Member States, still marketed under a valid MA. An urgent procedure has been established enabling all Member States to be informed where a medicinal product poses such difficulties that measures relating to its MA are under consideration.[28]

All the above-mentioned arguments, in the light of the circumstances of the case, lead to the conclusion that the national authority responsible for pharmacovigilance in the Member State of importation has access to the updated information which is necessary for that authority to carry out its functions. Therefore, the conclusion that the automatic expiry of the parallel import licence for a medicinal product solely on the basis that the MA of reference has expired, without examining the risks arising from that product, goes beyond what is necessary to protect the health and life of humans.

It should be noted that due to a CJEU judgment resolving the issue of parallel import licence expiration, the legislator in Poland decided to change the provision of Article 21a(3a) of the Pharmaceutical Law.[29] In accordance with the current wording of this provision, the withdrawal of marketing authorisations of medicinal products does not constitute grounds for the automatic expiry of the parallel import licence for medicinal products.

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27 Article 107(3) and Article 107a(4) of Directive 2001/83/EC in connection with Article 24 of Regulation No. 726/2004.

28 Articles 107i, 107j and 107k of Directive 2001/83/EC.

29 Law of 17 August 2023 amending the Law on Reimbursement of Medicines, Foodstuffs for Special Dietary Purposes and Medical Devices and some other laws (Journal of Law of 2023, item 1938).

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