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Mater Sempre Certa Est – Should We Register Transsexual Woman-to-Man as a Father? Remarks on the ECHR Judgment O.H. and G.H. v. Germany

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Abstract: The study is designed as an in-depth interdisciplinary report of the case O.H. and G.H. against Germany, which was analyzed by the European Court of Human Rights in Strasbourg (ECHR). The authors explain why the best interest of the child should prevail over the interests of a trans man, who gave birth to a child and requests to be registered as the father of the child. One of the reasons is *mater semper certa est*, a universally known principle of Roman law stating that "the mother is always certain" and no counterevidence can be made against this principle. In this regard, the best interest of the child and the child's right to know his or her origin shall be observed. There are also several other life areas, that would be negatively impacted by breaking this principle.

1. Introduction

The Latin maxim *mater semper certa est* ("the mother is always certain") resolves the question of a child's relationship to his or her mother. It is a Roman

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law principle, which has the power of *praesumptio iuris et de iure* (literally: presumption of law and by law), stating that no counterevidence can be made against this principle.[1] Most of the world's legal systems accept it as it provides certainty that the mother of a child is conclusively established biologically, from the moment of birth, by the mother's role in the birth. The Roman law principle however does not stop at the mother and continues with *pater semper incertus est* ("the father is always uncertain") and e.g. the Czech law then sets three presumptions of paternity.[2] One is regulated by the law of *pater est, quem nuptiae demonstrant* ("the father is he to whom marriage points"). The same approach is adopted in the Slovak legal system.

The social relationship between a parent and child has its fundament in the biological consanguinity that exists between them. It is established by conception on the father's side and by giving birth to the child on the mother's side. It depends on whether the social convention admits such consanguinity also from the legal point of view, that is, whether it acknowledges the origin of the child from a certain mother and a certain father. Legal systems establish specific rules for such cases upon which maternity and paternity are determined.[3]

Older legal regulations emerged from the above-mentioned old Roman principle *mater sempre certa est*, which means that the woman who gives birth to a child is the child's mother (maternity is given by birth). The valid Slovak Family Act has preserved this construction,[4] and so did the Czech Family Act.[5] The birth of the child is not only a fact from which the origin of the child from a certain mother is being deduced but it also provides the basis for the legal relationship between the mother and the child with all legal consequences foreseen by legal regulations. Mutual rights and obligations between the mother and the child arise by the child's birth and

1 Aaron X. Fellmeth and Maurice Horwitz, *Praesumptio iuris (et de iure): Guide to Latin in International Law* (Oxford University Press, 2011).

2 Petr Novotný, Jitka Ivičičová, Ivana Syrůčková, and Pavlína Vondráčková, *Nový občanský zákoník: Rodinné právo*, 2nd ed. (Praha: Grada Publishing a.s., 2017).

3 Gabriela Kubíčková, "Substantive Civil Law," in *Občianske právo hmotné*, ed. Ján Lazar, 2nd ed. (Bratislava: Iuris Libri, 2018).

4 Zákon o rodine a o zmene a doplnení niektorých zákonov, February 11, 2005, Zákon č. 36/2005 Z. z.

5 Petr Novotný, *Nový občanský zákoník. Právo pro každého*, 1st ed. (Praha: Grada, 2014).

they cannot be disposed of and may not be waived. The legal bond between the mother and the child thus has its basis in their consanguine (biological) bond. Paternity of a certain man to a certain child is being deduced from the maternity of a certain woman to that child and her relation to a certain man as the genitor of the born child which means in fact that the father cannot be determined unless the mother of the child is determined.

There is no need to review genetics to determine maternity, as the origin of the child is a demonstrative objective reality (by virtue of the connection of the woman to the child through carrying the child and giving birth to the child). Meanwhile, in the case of paternity, there is no certainty that a specific man conceived a specific child and is thus that child's father (*pater incertus est*). The paternity of a man is determined by legal presumptions or must be determined by a court of law (presumption of paternity of the spouse and so on). These presumptions are construed in the way that the legally determined paternity corresponds to the biological paternity.

The purpose of the cited legal regulation is the protection of the best interest of the child defined by Article 3 of the Convention on the Rights of the Child[6] and the attempt to fulfil the child's right to family by assigning it immediately after birth a mother and father who will provide for the fulfilment of further rights, mainly the rights to parental upbringing and care.

In this article, we would like to explain why we fully agree with the decisions of the German Courts in the case, which concern the registration of O.H., a person who underwent female-to-male transition, under his former female first name as G.H.'s mother in the birth register.[7] This case was pending before the European Court of Human Rights (hereafter the "European Court" or ECHR) and the German Courts' decisions were subject to assessment before it.

6 United Nations, Convention on the Rights of the Child, 20 November 1989, General Assembly resolution 44/25.

7 ECtHR Judgment of 6 February 2019, Case O.H. and G.H. v. Germany, application no. 53568/18; 54941/18, hudoc.int.

2. The Case O.H. and G.H. against Germany before the European Court

According to the ECHR's review, O.H. changed his female forename to a male forename in 2010. In 2011 he changed his female registration to a male registration in the public records and subsequently, he became pregnant through self-insemination from an anonymous sperm donation. After having interrupted hormonal treatment related to gender reassignment, he gave birth to G.H. in 2013.[8] The applicants requested O.H. to be registered as the father of G.H. in the birth register.

In this case, the Berlin (Neuköln) authorities requested legal advice from the courts. Based on decisions of the Schöneberg District Court and appeal decisions of the Berlin Court of Appeal and the Federal Court of Justice, the Neuköln Registry Office registered O.H. under his former female forename as G.H.'s mother in the birth register. The applicant raised a subsequent complaint before the Federal Constitutional Court; however, it was unsuccessful.

The German courts maintained that a trans man who gave birth to a child after making the final decision to change gender is in the legal sense the mother of the child. He is registered in the child's birth records as well as in the child's birth certificate and the excerpts therefrom, if the data of the parents are listed therein, as the "mother" under his previous female name. The German Federal Court of Justice concluded that such an approach is not contrary to the German Constitution and maintained that the fundamental rights of the applicant as a transsexual person are not affected: his identity was changed and taken into account and the person's right to family was not violated. The right to protection of personality and to change of identity is limited in the legal system, for the sake of protecting the interests of other persons, for instance, a child. The fact that a person has reached a point where they feel the need to transition to a different sex may not influence the legal position of the child, which is guaranteed in the stable regulation of parenthood in the Civil Code. The German law of descent emerges, like in other legal systems, from the parenting or reproductive function of the family. Such function relates to the biological sex of the parent. In the view of the Federal Court, potential legal disputes

[8] Ibid.

concerning rather extraordinary cases of small groups of transsexual people should be settled upon the existing regulation of parenthood without amending the main fundament thereof.

According to the law, the mother is the woman who gave birth to the child, while the father is the man who had a certain relationship with the mother. The determination of maternity is important because the determination of paternity normally derives from it. The law reflects this fact and aims at attaining conformity between the biological and legal reality. The Federal Court ruled that the purpose of the legislation was to assign parents to children in a way that does not conflict with their biological conception in the form of double maternity or double paternity. The right of the child to know their origin must not be neglected either. The Federal Court also pointed to situations where the parent was reassigned to the former gender and, in this context, raised the question of stability for the child. According to the information in its possession, in the years 2011–2013 in Berlin, 10 transsexuals requested to be reassigned to their former gender.

These applicants complained before the European Court under Article 8 (Right to respect for private and family life), Article 14 (Prohibition of discrimination) in conjunction with Article 8, and Article 3 (Prohibition of torture) of the European Convention on Human Rights (hereafter the "Convention") of the fact that O.H. was not registered under his current forename and as G.H.'s father, but under his former female forename and as the child's mother.[9]

They complained of the fact that this registration fundamentally contradicted their perception of their relationship. Furthermore, they complained that the registration required both applicants to frequently disclose O.H.'s transsexuality. This case was communicated to the German Government on February 6, 2019.[10]

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9 Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950, as amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.

10 ECtHR Judgment of 6 February 2019, Case O.H. and G.H. v. Germany, application no. 53568/18 and 54941/18, accessed June 22, 2022, https://laweuro.com/?p=925.

3. Parent-Child Relationship, Identity of the Child, Legitimacy, and Necessity of State Intervention with Their Rights

The essence of the O.H. and G.H. case lies in the impossibility of registration of the applicant giving birth to the child as the father of the child on the child's birth certificate, objected to on the grounds of Article 8 and Article 14 in conjunction with Article 8 of the Convention against a violation of his rights by the fact that on the birth certificate he cannot be listed as the father of the child under his current name, but is forced to be registered as the child's mother under his former female name. Together with his child, they complained that such a record was in fundamental contravention of their perception of their mutual relationship and brought about the risk of disclosure of the applicant's transsexuality in everyday life.

Two interests collide in the present case: one is the interest of the transsexual parent wishing to create a family, respected by society, and wanting to live under his new name, corresponding to his gender of choice. The other is the best interest of the child who has the right to know his origin which is guaranteed by stable legal regulation of parenthood corresponding to the biological reality.

The European Court in its previous case law reiterated that the best interest of the child may prevail, depending on its nature and relevance, over the interest of the parent. The first and most important aspect of the case is the question of the right of the child to personal identity, family, and personal care and education by his or her parents. The question of parenthood belongs to serious legal questions because its legal regulation predisposes the personal status of the child, the personal status of the mother, and the personal status of the father. Through the parental relationship the child is, in a certain way, included also in the wider community and the entire society. A timely determination of the father and mother contributes to the stability and security of the parental relations. Also, in cases concerning the determination of parenthood and in the legal regulation of the relationship between parents and children, the best interests of the child shall be a primary consideration. The legal system traditionally protects the weaker party which in the case of parental legal relation is the child.

If the maternity of the woman in labor is doubted (the first applicant does not identify himself as a mother), there should be a legal situation of determination of paternity where the sperm donor would be considered

as the father in the first place, as he would be the biological originator of the child. In the case O.H. and G.H., the donor appears to be unknown but, in practice, there may be situations in which the child would be conceived naturally and the man conceiving it would apply for the recognition of his paternity. In such a case the courts would face the question of concurring paternity.

In general, it may be added that the legal systems of states, their judicial practice, and also the European Court's case law incline to recognize the biological reality.[11] In such a case where the court would most probably decide on the paternity of the originator of the sperm and the question of the position of the man who gave birth would not be resolved. With regard to the impossibility of "double paternity," one solution appears possible, which is the one preferred by the German authorities; namely, preserving his role as the mother. In the end, the fact remains that the applicant, by his pregnancy and giving birth to the child, manifested his female biological reality, corresponding in society with the role of the mother, even though he legally adopted the identity of a man.

Furthermore, the birth certificate of the child where the mother did not figure, and only the man who gave birth to the child would be listed as the father, without a mention of the donor of the sperm, would in the future disable the fulfilment of the right of the child to know his parents, granted by Article 7 of the Convention on the Rights of the Child.[12] As the European Court noted in the case Odièvre v. France, birth, and in particular the circumstances in which a child is born, form part of a child's, and subsequently an adult's private life guaranteed by Article 8 of the Convention.[13]

As in Mikulić v. Croatia,[14] and Gaskin v. the United Kingdom, no. 10454/83[15] the respect for private life requires that everyone should be able

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11 See: ECtHR Judgment of 14 January 2016, Case Mandet v. France, application no. 30955/12, hudoc.int.

12 UN General Assembly, Convention on the Rights of the Child, 20 November 1989.

13 ECtHR Judgment of 13 February 2003, Case Odièvre v. France, application no. 42326/98, hudoc.int.

14 ECtHR Judgment of 7 February 2002, Case Mikulić v. Croatia, application no. 53176/99, hudoc.int, § 53–54.

15 ECtHR Judgment of 7 July 1989, Case Gaskin v. the United Kingdom, application no. 10454/83, hudoc.int, § 36–37, 39.

to establish details of his or her identity as an individual human being and that an individual's entitlement to such information is of importance because of its formative implications for their personality, which includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents.[16]

While it may seem appropriate to arrange the family as designed by the parents while the child is minor, as the child grows older and reaches adulthood, his or her perception of rightness would manifest and thus transparency should be maintained and leave the possibility for the child to discover the truth about his or her origin. In the already mentioned case of Mandet v. France, the Court agreed with the conduct of the French authorities and wondered whether what seemed to be in the best interest of the child at the time of deliberations, would be so also in the future.[17]

According to the ECHR's decision, in this case, the domestic courts had not failed to attach decisive importance to the best interests of the child but instead maintained that those interests did not necessarily lie where the child perceived them (meaning in maintaining the parent-child relationship as established and in preserving emotional stability), but rather

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16 ECtHR Judgment of 7 February 2002, Case Mikulić v. Croatia, application no. 53176/99, hudoc.int; ECtHR Judgment of 7 July 1989, Case Gaskin v. the United Kingdom, application no. 10545/83, hudoc.int.

17 The first and second applicants were married for the first time in 1986. The third applicant was born after their divorce, in 1996. The following year, the child was recognized by the second applicant. The first and second applicants remarried in 2003. In 2005, the paternity was challenged by Mr Glouzmann, who claimed to be the biological father of the third applicant. The applicants moved to Dubai after the start of the proceedings, meaning that a DNA test could not be conducted. Nevertheless, the domestic court observed that the child had been born more than 300 days after the first and second applicants' separation. It regarded the refusal of the couple to take the child for a DNA test as an indication of their uncertainty concerning the second applicant's established paternity. The domestic court was convinced, after it had taken evidence from witnesses, that the first applicant and Mr Glouzmann had been having an intimate relationship at the time of the conception of the child and after the birth, and that the child had been known as their joint child. Therefore, the court, contrary to the expressed will of the child, annulled the first applicant's recognition of paternity, changed the child's name to the mother's surname and named Mr Glouzmann as the father. Mr Glouzmann was awarded contact rights, but the parental authority remained exclusively with Mrs Mandet. ECtHR Judgment of 14 January 2016, Case Mandet v. France, application no. 30955/12, hudoc.int.

in ascertaining the child's real paternity.[18] In their decisions, the courts did not unduly favor the interests of Mr Glouzmann over those of the child but held that their interests partly coincided.[19]

Because of the very fact that in real life children do not always accept the reality created for them by their parents (or people who are raising them up), for example, the Slovak legal system, as many others, establishes the rights of the child to deny paternity, setting up specific circumstance for such conduct, in particular "if such denial is in the interest of the child." The interest of the child must generally be seen in the removal of inconsistency between paternity determined by legal rules and biological paternity. The child may file for the denial of paternity if such paternity was determined by the first assumption (paternity of the mother's spouse) or the second assumption (concurrent declaration of parents), however not in case of the third assumption (when the court determines paternity emerging from the fact that the man had sexual intercourse with the mother at the decisive time and thus it is assumed that the court has already reviewed the facts in their entirety).

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18 Evelyn Merckx, "Mandet v. France: Child's "Duty" to Know Its Origins Prevails over Its Wish to Remain in the Dark," Strasbourg Observers, February 4, 2016, accessed June 22, 2022, https://strasbourgobservers.com/2016/02/04/mandet-v-france-childs-duty-to-know-its-origins-prevails-over-its-wish-to-remain-in-the-dark/.

19 See also: ECtHR Judgment of 2 June 2015, Case Canonne v. France, application no. 22037/13, hudoc.int: the Court found that an appropriate balance had been struck between the competing interests of the applicant's right and the (prevailing) right of the child – who was now an adult – to know his or her parentage (as a part of the child's right to respect for private life). The case of Godelli v. Italy (ECtHR Judgment of 25 September 2012, Godelli v. Italy, application no. 33783/09, hudoc.int.) concerned the confidentiality of information concerning a child's birth and the inability of a person abandoned by her mother to find out about her origins. The applicant maintained that she had suffered severe damage as a result of not knowing her personal history, having been unable to trace any of her roots while ensuring the protection of third-party interests. The Court ruled that there had been a violation of Article 8 (right to respect for private life) of the Convention, considering in particular that a fair balance had not been struck between the interests at stake since the Italian legislation, in cases where the mother had opted not to disclose her identity, did not allow a child who had not been formally recognized at birth and was subsequently adopted to request either non-identifying information about his or her origins or the disclosure of the birth mother's identity with the latter's consent (Canonne v. France, 2015).

A further significant aspect of the case to be considered is the truthfulness and completeness of data about the origin of an individual. Responsibility for their evidencing and storage is borne by the state, which provides for the respective keeping of birth records. The purpose of keeping birth records is to determine the identity of a person with certainty. There is no need to discuss the significance of such a measure for the functioning of the State, as that is self-evident, however it should not be forgotten that these records are in the end important for the individuals; whether in cases where they need to trace their roots or in case they are in a dispute with someone and the identity of the person needs to be established; the spectrum of possibilities is broad and the common people realize the true significance of these records only in extraordinary situations.

As we have already stated, we find it important that the adoption of a new role by persons who undergo a change of name and gender is facilitated, which entails enabling them to hide their original name and sex. For this purpose, diverse measures are taken (e.g. the issue of new ID documents, change of older certificates, diplomas, and birth registry numbers). The request for nondisclosure of the original name and gender is however not unlimited; it encounters limits where the public interest prevails in cases where for personal reasons or due to legal interest (as already stated above) such data must be disclosed even without the consent of the person concerned.

If the applicant objects to a potential disclosure of his or her transsexual identity in everyday life, it may be appropriate to regard this question not only on the theoretical level but also to consider it in practical terms. When does the parent submit the birth certificate of the child with complete data? We find that this is a relatively limited range of situations; i.e. when handling the passport (which is in the competence of the Ministry of Interior that keeps registers of birth and is *de facto* the office which should officially be aware of the change of gender of the given person, and may not use the information otherwise), at enrolment into a school (where the principal discharges transferred state powers and as such may not dispose of such information), when setting up a bank account for the child (all transsexual persons must announce the change of their identity to their bank, as well as to another person with whom they have a contractual – legal relationship, for instance, a loan agreement with the bank).

While considering practical situations when the child submits the birth certificate we should realize that this document will accompany him or her during his or her entire life; at marriage, at the registration of his or her children in the birth register, while requesting a residence permit in a foreign country, and so on. It is a fairly wide range of situations that his or her parent would prefer to avoid. Although we may hope that future generations will be tolerant, we assume that it is not right to put this burden on the child.

If we consider in what limited number of situations the parent will have to disclose his or her transition in real life and on the other hand the arguments in favor of a truthful record of facts in official records in the light of current legal regulations, we inevitably must arrive at the conclusion that the interest of the child prevails over the interest of the parent that lies in not being exposed to a risk of a potential disclosure of his or her transsexuality. Therefore, we need to insist on keeping the records that enable the child to exercise his or her right to know his or her origin, ensure protection from situations where the transsexuality of the child's parent could be disclosed and, last but not least, ensure protection of the public interest on the completeness and accuracy of records in the birth register and their testifying function.

4. Margin of Appreciation of the State

As was demonstrated in the previous lines, the case O.H. and G.H. doubtlessly gives rise to sensitive moral, legal, and social issues the Court or states have not needed to resolve by now. Those are legal consequences of the Court´s approach expressed in the case A.P., Garçon and Nicot v. France.[20] Therefore, they should be handled in a consistent manner and universally acceptable solutions need to be found. In this case, the European Court should not play an initiative-taking role but should afford states a wide space for free appreciation, even more so, if the best interests of children are at stake.

In an older judgment X., Y. and Z. v. the United Kingdom the European Court observed that there is no common European standard with regard

[20] ECtHR Judgment of 6 April 2017, Case A.P., Garçon and Nicot v. France, application nos. 79885/12, 52471/13 and 52596/13, hudoc.int.

to the granting of parental rights to transsexual persons, the State must therefore be afforded a wide margin of appreciation in this regard. The European Court has since then adopted several key decisions concerning parenthood where it sometimes preferred the wide margin of appreciation of the state and reduced it at other times.[21] As was stated in the case Mennsson v. France, its extent differs depending on the circumstances of the respective case. It had to ascertain whether there was a wider consensus of states within the Council of Europe and whether the fair balance had been struck between the interests of the state and those of the individuals.[22]

In the case of Ahrens v. Germany it was sufficient for the European Court that the "substantial minority" of nine States disables the presumed biological father to challenge the paternity of the legal father to arrive at the conclusion that there was accordingly no settled consensus between the states of the Council of Europe on this issue and the states thus enjoy a wide margin of appreciation as regards the rules on determination of a child's legal status.[23] It adopted a similar approach in the already mentioned cases Canonne v. France and Mandet v. France. The European Court's decision in the case of Odièvre v. France should also be mentioned (see above) where it stated that the state has not overstepped the margin of appreciation that it must be afforded in view of the complex and sensitive nature of the issue of access to information about one's origins, an issue that concerns the right to know one's personal history, the choices of the natural parents, the existing family ties and the adoptive parents.

Last but not least, also in its first Advisory Opinion of 10 April 2019 issued upon the request of the French Cassation Court in the case of legal admission of a parental relationship between a woman receiving her child upon surrogate agreement and this child, the Court commented that "the choice of means by which to permit recognition of the legal relationship

21 ECtHR Judgment of 22 April 1997, Case X, Y, Z v. The United Kingdom, application no. 21830/93, hudoc.int.

22 ECtHR Judgment of 26 June 2014, Case Mennesson v. France, application no. 65192/11, hudoc.int.

23 ECtHR Judgment of 22 March 2012, Case Ahrens v. Germany, application no. 45071/09, hudoc.int.

between the child and the intended parents falls within the states' margin of appreciation."[24]

Having regard to the above-mentioned arguments, we find that the examined question falls into the margin of appreciation of the state which should be wide in such cases. In our view, since sensitive moral and ethical questions are concerned, the domestic authorities are in a better position than the international court to assess the issue with regard to their direct and permanent contact with the situation in the specific field at the specific time and place.

It must be remembered that it is not only a sensitive question, about which opinions may differ and where the public opinion as well as the opinion of professionals will be formed only gradually according to what cases will occur in the future in the respective states, but also that the best interests of the child are at stake. Moreover, the public interest to which we have already pointed, and which shall prevail over the interest of the parent by which the fair balance is struck in the sense of Article 8, is at stake.

5. Third-Party Comments in the Proceedings before the European Court

In the proceedings before the European Court related to the case of O.H. and G.H. several Slovak institutions intervened, in addition to the Slovak Republic.

The Government of Slovakia in their intervention in the case O.H. and G.H. noted that German legislation corresponds to the rules applicable in Slovakia. They believed that the main objective must be the well-being of the child, whose birth creates reciprocal rights and obligations that cannot be set aside or waived. The Government of Slovakia explained that the law traditionally protects the weakest party, which in a parent-child relationship is usually the child, who must be protected against the disclosure of the transsexuality of one of his or her parents. They added that a birth certificate featuring no mother, but only a father who did not donate his sperm but who gave birth to the child, would not serve the child's right to know his or her parents, enshrined in Article 7 of the Convention on the Rights

[24] ECtHR Advisory opinion, in response to the request from the French Court of Cassation, 10 April 2019, no. P16–2018–001.

of the Child, nor the right to know one's origins as the European Court's case-law has defined it. The Government of Slovakia recalled that State authorities have the responsibility to ensure the accuracy and completeness of data entered in the birth register, which is important not only for the proper functioning of the state but also for individuals when a person's identity needs to be established. They further maintained that the occasions when a birth certificate must be presented are limited and in some cases involve requests addressed to administrative authorities, who in any case are already aware of the parent's transsexuality.

The other intervenor which was the Slovak Institute for Human Rights and Family Policy, emphasized that there is no consensus on sex and gender issues among the Contracting States, that there is no international law that the European Court could apply and interpret in the matter and that, therefore, it is up to state authorities to resolve these questions. Furthermore, the third-party intervenor pointed out that many countries have provided rules relating to a transition with the aim of alleviating the suffering of the people concerned. He also emphasized how important it is for children to know their biological parents, as was demonstrated by the experience of adopted children.

The Association of Slovak Family Law Judges observed in its intervention that the rules in Slovak law on the designation of the sex of a transgender parent correspond to those in German law. It wondered what would happen if the sperm donor wished to be listed as the "father" in the birth register. It further considered that, in a situation such as that of the presently considered cases, the interests of the parent and the child are divergent, and that the child should be represented by a neutral person. The child's interest would also consist in eliminating the discordance between legal parenthood and biological parenthood.

The Slovak Bishops' Conference in its intervention expressed its belief that the legal order and laws governing family relations are based on the family as a unit of human society that they intend to protect. The third-party intervenor maintained that no entry in a state register can change the objective reality. It deduced from this that a biological woman who has retained her feminine faculty of procreation and who gives birth to a child remains the mother of that child forever. The third-party intervenor declared that it is not possible to abolish or freely exchange the concepts of "mother"

and "father," while specifying that the notion of "mother" includes not only the woman who gave birth to a child, which reflects objective reality, but also includes the relationship between an adoptive mother and her adoptive child. It specified that, in the latter case, the child objectively has a biological mother but also a legal mother, who obtained this status for the well-being of the child. The third-party recalled that, from an objective point of view, it is impossible to have no biological mother, despite modern reproductive technologies, which should not be able to call into question the fundamental principles on which humanity has been based since its inception.

6. The Judgment of the European Court

The judgment of the European Court was delivered on April 4, 2023.[25] The European Court in its chamber judgement held, unanimously, that there had been no violation of Article 8 with argumentation which is consistent with the text provided above. The Court recalled that, while the purpose of Article 8 is essentially to protect the individual against arbitrary interference by public authorities, it does not merely require the State to refrain from such interference: in addition to this rather negative undertaking, there are positive obligations inherent in effective respect for private life. The boundary between positive and negative obligations of the state under Article 8 of the Convention does not lend itself to a precise definition, but the principles applicable in the case of the former are comparable to those valid for the latter. In determining whether an obligation, positive or negative, exists, account must be taken of the fair balance that needs to be struck between the general interest and the interests of the individual (see, among others, Söderman v. Sweden and X, Y and Z v. the United Kingdom). The European Court reiterated that the choice of the means calculated to secure compliance with Article 8 in the sphere of relations between individuals was in principle a matter that fell within the Contracting States' margin of appreciation. The ECHR also pointed to the fact that there may be only a limited number of situations that could lead to the revelation of the transgender identity of O.H. due to the presentation of the child's birth certificate to

[25] ECtHR Judgment of 6 February 2019, Case O.H. and G.H. v. Germany, application no. 53568/18; 54941/18, hudoc.int.

the child. Subsequently and having regard, on the one hand, to the fact that the first applicant was the parent of the second applicant had not in itself been called into question, to the limited number of scenarios which could lead, when the child's birth certificate was presented, to the disclosure of O.H.'s transgender identity and, on the other, to the wide margin of appreciation afforded to the respondent state, the European Court considered that the German courts had struck a fair balance between the rights of the first applicant (O.H.), the interests of the second applicant (G.H.), considerations concerning the child's welfare, and the public interests.

7. Discussion

As Ribar states, social science and medical research demonstrate conclusively that children who are raised by their biological married parents achieve better physical, cognitive, and emotional outcomes on average than children raised in other settings.[26] To this can be added a result of Yaffe's systematic review, in which she says that parenting is a broad construct that comprises stable and durable attitudes and behaviors regarding child-rearing, because mothers and fathers play different roles in the family. In her view, mothers as opposed to fathers, are perceived as more accepting, responsive, and supportive, as well as more behaviorally controlling, demanding, and autonomy-granting than fathers.[27]

To this can be added, that the healthy development of children requires stability and protection from the premature demands of the outside world, with gradual initiation (introduction to the world) according to age and innate predispositions. Such conditions are most fully provided by their own parents, if they are healthy and mature, take their parenting seriously, and devote themselves sufficiently (from the child's point of view, not the adult's) to their children. The described case is, therefore, open to debate also from a psychosocial perspective. Namely, one may ask the question whether the transgender mother is not subjecting the child to a form of discrimination and is indeed acting in the best interests of the child within

[26] David. C. Ribar,"Why Marriage Matters for Child Wellbeing," *The Future of Children* 25, no. 2 (2015): 11–27.

[27] Yosi Yaffe, "Systematic Review of the Differences between Mothers and Fathers in Parenting Styles and Practices," *Current Psychology* 42, (2020): 16011–24.

the meaning of longitudinally valid Principles 2 and 10 of the Declaration of the Rights of the

Child,[28] does not negatively influence the child's mental development, by insisting on being the father and not the biological mother to the child. We are not acquainted with full details of the family situation, yet, it would be interesting to have more information about the circumstances of the child's upbringing and the role of the biological parent/s to the child.

8. Conclusion

The purpose of the legal regulation is, however, to ensure that despite the transition of the parent, the concerned child is at all times assigned one father and one mother and that his or her biological parents remain also the legal parents. In this regard, the best interest of the child and the child's right to know his or her origin shall be observed. In practice, there may occur a situation where the child will not be conceived by an anonymous donor but naturally, whereas the existing legal regulation will not only be in the best interest of the child but also of the second parent who may request the determination of paternity and exercise rights and obligations towards his child. The mere fact that the applicant cannot be registered in the records as the father of the child does not significantly limit his right to family life.

It shall similarly be stressed that the public interest in the completeness and correctness of birth records includes also the interest of the child in the records in the registry being complete and correct. It must be necessarily concluded that in cases analogical to the one assessed here, which may in consequence of the European Court's judgment A.P., Garçon and Nicot v. France arise in the member states of the Council of Europe, the best interest of the child to know his or her origins and the public interest prevail over the right of the parent to legal admission of his or her sexual identity and thus in the existing legal regulations of the majority of member states of the Council of Europe a fair balance is being struck between the concurring interests. The actual legal state moreover falls within the wide margin of appreciation of the State which the European Court should leave to the states in sensitive moral and ethical questions such as these.

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[28] Deklarace práv dítěte, November 20, 1959, New York, accessed June 22, 2022, https://osn.cz/wp-content/uploads/2022/08/deklarace-prav-ditete.pdf.

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Achmea, Kramer and Disconnection Clauses: EU Legal Regionalism in Action

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Abstract: Over the past decades, the European Union has been gradually developing and maintaining legal regionalism within its jurisdiction. Its purpose is to preserve the achievements of integration, as well as the unity and autonomy of EU law. In this paper, I recount the toolbox of EU legal regionalism from primary law, through the case law of the Court of Justice of the European Union, to the institution of the so-called disconnection clauses employed by the EU in certain international treaties, expanding also on their possible effects on international law and the Member States' relations with third parties.

1. Introduction

According to Article 3 Section 5 of the Treaty on European Union (TEU), "in its relations with the wider world, the Union shall uphold and promote its values and interests" and contribute to "the strict observance and the development of international law." To meet both of these objectives, a form of legal regionalism has been gradually developed under EU law, which has been most recently illustrated by the Achmea judgment of the Court of Justice of the European Union (CJEU). This attempt of the CJEU to insulate the internal market from international law commitments assumed on an *a priori* basis is not an exception, but a consistent policy of the EU to promote separate undertakings at global and EU, i.e. regional, levels.

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According to the UN Commission on International Law, the concept of legal regionalism covers at least three phenomena: an approach to international law marked by historical, cultural or specific legal traditions; development of international law through a gradual expansion of the scope of regional rules; and an attempt to establish geographical exceptions to the application of universal rules of international law.[1] In the latter sense, legal regionalism is recognized by the UN Commission on International Law in two forms: either an international rule applies only to the states of a region, or an otherwise universal rule does not apply to the states of a region.[2]

Although the notion of legal regionalism was coined in the context of universal rules of international law, following Dawar, I will use it to illustrate the efforts of the treaty-makers, the CJEU and the Commission to insulate rules in and between Member States from the application of particular rules of international law.[3] In all cases, the purpose of these tools is to exclude the application of international law between the Member States on matters governed by EU law, in the interests of the autonomy and unity of EU law. From a temporal perspective, Schütze distinguishes between tools for achieving legal regionalism in relation to international commitments that were made before and after EU accession, respectively;[4] this paper is structured according to this temporal approach. First, I take stock of the instruments contained in the founding treaty and international treaties, as well as in the case law of the CJEU, which serve the purpose of legal regionalism. Next, I turn to the figure of disconnection clauses which effectively

1 Report of the 57th session of the UN International Law Commission (2–3 June and 11 July – 5 August 2005), sec. 451; see also: Liliana Obregón, "Latin American International Law," in *Routledge Handbook of International Law*, eds. David Armstrong et al. (Abingdon: Routledge, 2008), 154–64.

2 Report of the 57th session of the UN International Law Commission (2–3 June and 11 July – 5 August 2005), sec. 456.

3 Kamala Dawar, "Disconnection Clauses: An Inevitable Symptom of Regionalism?," Society of International Economic Law (SIEL), Second Biennial Global Conference, University of Barcelona, June 2010, 5.

4 Robert Schütze, "European Law and Member State Agreements. An Ambivalent Relationship?," in *Foreign Affairs and the EU Constitution. Selected Essays*, ed. Robert Schütze (Cambridge: Cambridge University Press, 2014), https://doi.org/10.1017/CBO9781139794756.006, 122–3.

shield Member States' relations from the international commitments jointly undertaken towards third states. Finally, I summarize my findings with an outlook on the possible effects of disconnection tools on international law.

2. Rationale and Tools for Developing and Maintaining EU Legal Regionalism

The Member States of the European Union have achieved a high level of integration in certain areas and have an interest in both maintaining and deepening this integration, while at the same time developing fruitful relations with third countries through international treaties. To preserve the achievements of integration among them, and to secure the autonomy and unity of the ensuing EU legal order, Member States must ensure that the international commitments they undertake do not interfere with their existing EU arrangements, such as the rules of the internal market.

Comparable interests of trade groupings have been recognized in numerous international agreements. For example, Article 24 of the General Agreement on Tariffs and Trade (1947)[5] provided for a special treatment of customs unions and free trade areas, foreseeing that the former "exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party" (Section 1). More recently, Article 27 of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters stipulated that "a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention (…)."

The European Union, for its part, develops and maintains legal regionalism through various tools, depending on whether the international commitment in question was undertaken before, or after accession, and whether such commitments were made toward Member States or third parties.

[5] As early as the turn of the century, Nigel Nagarajan noted that while legal regionalism is on the rise, there are concerns that such trade groupings and their special treatment under the WTO may be undermining the "benefits which the multilateral system is supposed to deliver." Nigel Nagarajan, "Regionalism and the WTO: New Rules for the Game?," *European Economy. Economic Papers*, no. 128 (June 1998): 3.

In the subsequent sections, I describe this toolkit of the European Union following the above-mentioned temporal approach and distinguishing between inter-Member State and Member State/third state scenarios.

2.1. Status of International Treaties Concluded by Member States before EU Accession: Article 351 TFEU and Related Case Law

The main conundrum of EU legal regionalism is that

> [t]he internal division of competences between the Union and the Member States did not correspond to the international law perspective that accords external sovereignty to the Member States. The continued existence of the states' treaty-making powers raised complex questions about the normative relationship between the European legal order and the international legal order.[6]

As a primary law solution to this situation, the principle of sincere cooperation enshrined in Article 4 Section 3 TEU implies that Member States must not conclude international treaties that could jeopardize the attainment of the Union's objectives.

While the principle of sincere cooperation effectively deals with undertakings of the Member States *pro futuro*, the Masters of the Treaty also had to deal with the international commitments of the Member States made prior to accession. It was Article 351 TFEU (ex Article 307 TEC) which sought to harmonize such commitments with EU law,[7] stipulating the following:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

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6 Schütze, "European Law and Member State Agreements," 121.

7 Petra Lea Láncos, "Az Európai Unió tagállamai között a csatlakozást megelőzően létrejött nemzetközi szerződéseinek helyzete, különös tekintettel a vízpótlásról szóló 1995. április 19-i magyar–szlovák megállapodás időbeli hatályának meghosszabbítására" ["The Status of International Treaties Concluded between the Member States of the European Union Prior to Accession, with Particular Reference to the Extension of the Hungarian-Slovak Agreement of 19 April 1995 on Water Recharge"], in *Bonas Iuris Margaritas Quaerens. Emlékkötet a 85 éve született Bánrévy Gábor tiszteletére* [*In Honour of Gábor Bánrévy, Born 85 Years Ago*], ed. Szabó Sarolta (Budapest: Pázmány Press, 2015), 139–41.

> To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. (…)

According to Bartha, Article 351 TFEU "in principle gives precedence to agreements previously concluded by the Member States, with the proviso that Member States must refrain from implementing any obligations imposed by these agreements which are contrary to Community law."[8] Article 351 TFEU does not foresee an automatic derogation from prior international commitments that are incompatible; however, there is a mandatory obligation for the Member States to resolve any existing conflicts: "to the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established."

What could be considered "appropriate steps" to eliminate a possible incompatibility? According to the ruling of the European Court of Justice in Commission v. Portugal, if the international agreement in question so permits, the Member State is obliged to withdraw from the treaty in order to eliminate the incompatibility and ensure the proper application of Community law.[9] According to the Court, if an international agreement (foreseeing commitments incompatible with Community law) allows for its denunciation, this shall be a sufficient guarantee that the rights of the non-Member State third party will not be infringed.[10]

One of the main concerns regarding Article 351 TFEU was whether it applies to agreements concluded by Member States with any country or rather only with other EU Member States prior to accession. The case law of the Court of Justice seems to support the view that it applies only to the Member States' prior agreements with third States. The Budějovický Budvar case concerned a bilateral agreement between the Czech Republic

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8 Bartha Ildikó, "Az Európai Közösség és tagállamok nemzetközi szerződéskötési hatáskörei az Európai Bíróság esetjogában" ["The International Treaty-Making Powers of the European Community and the Member States in the Case Law of the European Court of Justice"] (PhD diss., University of Miskolc, 2009), 239.

9 CJEU Judgment of 4 July 2000, Commission v. Portugal, Case C-62/98, ECLI:EU:C:2000:358.

10 Bartha, "Az Európai Közösség," 256.

and Austria on the protection of geographical indications. According to the Court's judgment,

> since the bilateral instruments at issue now concern two Member States, their provisions cannot apply in the relations between those States if they are found to be contrary to the rules of the Treaty (...). In addition, it must be pointed out that Article 307 TEC does not apply to such agreements since no third country is party to them.[11]

The earlier Deserbais case revolved around a conflict that arose between French legislation implementing the International Convention on the Use of Designations of Origin and Names for Cheeses (Stresa Convention) and Community law governing the free movement of goods. The Court of Justice pointed out that only Denmark, France, Italy and the Netherlands were parties to the Stresa Convention.[12] According to the judgment, in the case of an agreement in which "the rights of non-member countries are not involved, a Member State cannot rely on the provisions of a pre-existing convention" to undermine the application of Community law.[13] As such, Community law replaces prior international commitments in the relations between Member States. It should nevertheless be noted that the Court remained silent on the fact that the Stresa Convention actually involved several third States, including certain members of the European Economic Area. In assessing the situation of prior treaty relations between the Member States, Bartha pointed out that the Member States "undertake, together with the transfer of competence, to terminate their earlier commitments towards each other."[14] Incidentally, this is also the obligation that Member States are fulfilling when terminating bilateral investment protection treaties they concluded with each other following the Achmea judgment.[15]

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11 CJEU Judgment of 8 September 2009, Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH, Case C478/07, ECLI:EU:C:2009:521, sec. 98–9.

12 CJEU Judgment of 22 September 1988, Ministere Public v. Deserbais, Case C-286/86, ECLI:EU:C:1988:434, sec. 16.

13 Ibid., sec. 18.

14 Bartha, "Az Európai Közösség," 238.

15 CJEU Judgment of 6 March 2018, Slovak Republic v. Achmea, Case C-284/16, ECLI:EU:C:2018:158.

The case revolved around a bilateral investment treaty (BIT) between two Member States, the Netherlands and Czechoslovakia, concluded in 1991, i.e. before Czechia and Slovakia acceded to the European Union. Achmea B.V., a Netherlands company providing private sickness insurance brought action against Slovakia since the country had prohibited the sale of private medical insurance portfolios in 2006. Under the BIT arbitration clause, Achmea brought an action for damages before the competent arbitration tribunal in Frankfurt, which decided in favor of Achmea. Slovakia sought to have the award reversed before the competent Oberlandesgericht Frankfurt am Main, and subsequently appealed to the Bundesgerichtshof. This forum, in turn, referred for a preliminary ruling to the CJEU, inquiring whether the so-called intra-EU BITs foreseeing the jurisdiction of an arbitration tribunal were compatible with the EU law, in particular with Article 344 TFEU, which prohibits Member States from submitting disputes concerning the interpretation and application of the Treaties, and with Article 267 TFEU, which confers these specific powers of interpretation on the CJEU.

The CJEU recalled that "according to settled case law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system." This is safeguarded by Article 344 TFEU, which precludes submitting disputes over the interpretation or application of the Treaties to other forums.[16] The CJEU declared that the set of common values enshrined in Article 2 TEU forms the basis of EU law, which gives rise to mutual trust between the Member States that these values and EU law shall be respected. In addition, the duty of sincere cooperation under Article 4 Section 3 obliges Member States to apply and respect EU law.[17] Indeed, the CJEU refers to the toolkit developed to maintain legal regionalism in the EU when stating that "in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law."[18] The BIT between the Netherlands and Slovakia foresaw an arbitral tribunal

16 Ibid., sec. 32.
17 Ibid., sec. 34.
18 Ibid., sec. 35.

which "may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital."[19] However the tribunal cannot be considered a court that can make preliminary references to the CJEU; therefore, the arbitration clause may jeopardize the full effectiveness and autonomy of EU law and "call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties."[20]

Member States were quick to react to the Achmea judgment, concluding that such intra-EU BIT arbitration clauses are incompatible with EU law and that the BITs between them must be terminated.[21] To that end, they signed the Agreement for the Termination of all Intra-EU Bilateral Investment Treaties on May 5, 2020. Of course, from the perspective of the MOX plant case,[22] the Achmea judgment may have been a foregone conclusion. In MOX plant, the CJEU declared that "[a]n international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system." Indeed, Article 293 TFEU (ex Article 220 TEC) vests the CJEU with exclusive jurisdiction in disputes concerning the interpretation and application of Community law, and Article 344 TFEU (ex Article 292 TEC) bars Member States from submitting disputes concerning the interpretation and application of EU law to any method of settlement other than those provided for in the Treaty.[23]

The Achmea judgment clearly illustrates the CJEU's efforts to insulate the European Union legal regime from possible incursions by prior international commitments of the Member States, incurred while pursuing autonomy-related goals.[24]

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19 Ibid., sec. 42.

20 Ibid., sec. 56, 58, 59.

21 An immediate reaction was the Declaration of the Represantives of the Governments of the Member States of 16 January on the Enforcement of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, 16 January 2019.

22 CJEU Judgment of 30 May 2006, Commission of the European Communities v. Ireland, Case C-459/03, ECLI:EU:C:2006:345.

23 Cf. Marcel Szabó, "A MOX Plant ügy: út az eurosovinizmus felé?" ["The MOX Plant Case: On the Path Towards Eurochauvinism?"], *Európai Jog* 10, no. 2 (2010): 18–28.

24 These autonomy-related goals are detailed in length in Opinion No. 2/13 of 18 December 2014, ECLI:EU:C:2014:2454. Notably, while the apparent obstacle in upholding BITs, as per

2.2. International Commitments of Member States Assumed after Accession: Sincere Cooperation, Pre-emption and Supremacy

After joining the European Union, Member States did not lose their prerogative to conclude international agreements, not only in areas falling outside the scope of EU competence but also in areas covered by EU law. However, as noted by Schütze, there is a distinction between agreements that are *erga omnes* within the EU, i.e. to which each Member State is a Party, and other international agreements concluded by only some of the Member States.[25]

In the former case, Member States may be inclined to conclude agreements outside the scope of the EU, aiming to exclude EU institutions and their possible encroachment by them upon the process to forego the implications of EU law such as direct effect in their cooperation. However, such agreements may be deemed an attempt to amend the Treaties, and indeed, in Defrenne, the CJEU confirmed that the Treaties can only be amended through a proper procedure.[26]

As far as international agreements involving some but not all Member States, are concerned, these do not pose a threat of effectively amending the Treaties. As stressed by Schütze, Member States were encouraged to conclude bilateral agreements in certain areas, while the supremacy of EU law ensured that States Parties could not contract out of their obligations under EU law.[27]

In Kramer, the European Court of Justice conceded that in so far as the Community did not exercise its powers in a specific area, Member States could continue to enter into agreements with third states on such matters. However, this power of the Member States is not without limits. For example, the Netherlands joined the North-East Atlantic Fisheries Convention (NEAFC) in 1959, that is, after becoming a Member State of the European Communities. As a state party to the NEAFC, it was bound by certain

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the Achmea ruling, is that their arbitration tribunals cannot make preliminary references, this obstacle was actually put in place by the CJEU itself in Dorsch Consult. See: CJEU Judgment of 17 September 1997, Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH, Case C-54/96, ECLI:EU:C:1997:413.

25 Schütze, "European Law and Member State Agreements," 139.

26 CJEU Judgment of 8 April 1976, Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena, Case 43–75, ECLI:EU:C:1976:56, sec. 58.

27 Schütze, "European Law and Member State Agreements," 151.

recommendations of the Convention's Fisheries Commission, one of which was contrary to the system of Community fishing quotas. While acknowledging the lack of Community conservation rules, the European Court of Justice stated that based on the principle of sincere cooperation

> Member States participating in the Convention and in other similar agreements are now not only under a duty not to enter into any commitment within the framework of those conventions which could hinder the Community in carrying out the tasks entrusted to it (…), but also under a duty to proceed by common action within the Fisheries Commission. (…) [M]ember States will be under a duty to use all the political and legal means at their disposal in order to ensure the participation of the Community in the Convention and in other similar agreements.[28]

In effect, the Community replaced the Member States in the Convention, thus securing harmony between the common fisheries and conservation policy and the NEAFC rules, respectively.

Consequently, while Member States are not excluded from concluding agreements with third states, they must abide by the principle of sincere cooperation and refrain from entering into agreements or commitments which could jeopardize the attainment of the objectives of the Treaties. Compatibility of agreements between Member States and third countries with EU law is ensured through pre-emption and supremacy: according to the former, Member States may not conclude agreements in areas that are covered by EU law;[29] at the same time, any conflicting commitment of the Member States are overridden by EU law due to its supremacy.

3. Decoupling Obligations from International Agreements to which Member States and the EU Are Parties: Disconnection Clauses

The purpose of disconnection clauses is to allow individual Member States that joined an international agreement to derogate from provisions of the agreement in their relations with other Member States. In general, Dawar distinguishes between three kinds of disconnection clauses: a "complete"

[28] CJEU Judgment of 14 July 1976, Cornelis Kramer and others, Cases 3, 4 and 6/76, ECLI:EU:C:1976:114, sec. 44/45.

[29] Schütze, "European Law and Member State Agreements," 162–3.

disconnection clause, where the relevant international agreement is replaced in its entirety by another law regulating the relations between the States concerned; a "partial" disconnection clause, where the States concerned apply another law only in place of certain provisions of the agreement; and an "optional" disconnection clause, allowing the States Parties concerned to exclude by declaration the application of provisions of the international treaty in their relations with each other.[30]

Disconnection clauses were introduced in the late 1980s by the European Community in certain international treaties concluded by the EC and the Member States to decouple international treaty obligations in respect of inter-Member State relations since these were governed by Community law.[31] At the same time, Member States had to guarantee that they would give full effect to the provisions of the international treaty *vis-à-vis* third countries that were States Parties to the international agreement.[32]

The following clause, developed by the Council of Europe Secretariat, is included in several ET conventions:

> In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.

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30 Dawar, "Disconnection Clauses," 5. Dawar cites the following examples of different types of disconnection clauses: "complete": article 27 (1) of the European Convention on Transfrontier Television, Strasbourg, 1989, "partial": Article 20 (2) of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, 2003, "optional": Article 13 (3) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995.

31 The first convention containing a Community disconnection clause was the 1988 Council of Europe/Organisation for Economic Cooperation and Development Convention on Mutual Administrative Assistance in Tax Matters. According to Article 27 (2) of the Convention: "[P]arties which are member States of the European Union can apply, in their mutual relations, the possibilities of assistance provided for by the Convention in so far as they allow a wider co-operation than the possibilities offered by the applicable European Union rules."; Maja Smrkolj, "The Use of the Disconnection Clause in International Treaties: What Does It Tell Us about the EC/EU as an Actor in the Sphere of Public International Law?," May 2008, http://dx.doi.org/10.2139/ssrn.1133002.

32 Dawar, "Disconnection Clauses," 1.

According to Dawar, the function of the disconnection clauses is to inform contracting states that the Member States will apply different Community rules in their relations with each other, and that said clauses secure the uniform application of Community law even when an international treaty requires otherwise.[33] Under the disconnection clause, the Member States are barred from invoking international treaties between themselves in matters governed by Community law.

According to Tell, it is the rules of the Vienna Convention on the Law of Treaties that force states to use such disconnection clauses in their treaties. The wording of the Vienna Convention itself is too strict; it does not offer an adequate solution for members of regional integration organizations such as the European Union, and we should expect to see similar clauses in the future.[34] Still, the UN International Law Commission has noted that disconnection clauses pose a risk because they undermine the international treaty itself by impeding its uniform application.[35]

Although the EU legislator wants to use disconnection clauses to ensure the benefits of international treaties and the autonomy and unity of EU law, i.e. the best of both worlds, it is no longer only third countries that are opposed to the inclusion of these clauses in international treaties, but also the Member States. For example, during the Uruguay Round of World Trade Organisation (WTO) negotiations (1986–1994), which resulted in a mixed treaty under the competence of the European Economic Community, the Community negotiators sought to create rights and obligations only in relation to third states. "At this time however, on the brink of the close of negotiations, the mistrust of the Member States was, if possible, even greater than that of third States. They believed that [the insertion of the disconnection clause] was another convoluted tactic of the Commission

33 Ibid.

34 Olivier Tell, "La 'Disconnecting Clause'. Disconnection Clause," presentation at the UIA Seminar (20–21 April 2001, Edinburgh), 6, accessed January 20, 2024, http://www.cptech.org/ecom/jurisdiction/Tell.pdf.

35 Report of the International Law Commission, 57th session, 2005, supplement No. 10 (A/60/10), Ch XI.

to undermine their full status of membership in the WTO,"[36] and the attempt failed because of the resistance of the Member States.

Likewise, when joining the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the Community sought both to protect cultural goods and to guarantee unrestricted trade in these goods on the internal market. Articles 6 through 8 of the Convention allow contracting states to adopt regulatory instruments to protect cultural property, to identify serious threats to their own culture and to subsidize local cultural activities and industries. The European Community originally intended to prevent the Convention from affecting the EC itself by introducing a disconnection clause to make it impossible for Member States to restrict the free movement of cultural goods or services in the internal market in order to protect cultural goods. However, the introduction of the clause was again rejected due to the resistance of the Member States, who probably saw the Convention as a major opportunity to protect their culture within the EC. Since international treaties rank below the provisions of the founding treaties in the hierarchy of sources of Community law, but above the provisions of secondary law, the rules of the Convention may undermine secondary acts in the absence of a disconnection clause.[37]

A recent example is the Energy Charter Treaty (ECT), where, in the absence of a disconnection clause, it is the primacy of EU law over the international commitments of Member States that is at stake. The Charter, which entered into force in 1998, was originally concluded by the Community and its Member States as a mixed agreement with third countries. As made clear by the *travaux préparatoires*, both the Community and the Member States intended to include in the ECT a disconnection clause to rule out its application in relations between Member States.[38] However, in the course of the negotiations, the disconnection clause was eventually abandoned due

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36 Pieter Jan Kuijper, "The Conclusion and Implementation of the Uruguay Round Results by the European Community," *European Journal of International Law* 6, no. 2 (1995): 228–9.

37 Petra Lea Láncos, *Nyelvpolitika és nyelvi sokszínűség az Európai Unióban* [*Language Policy and Linguistic Diversity*] (Budapest: Pázmány Press, 2014), 147–52.

38 Johann Robert Basedow, "The *Achmea* Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration," *Journal of International Economic Law* 23, no. 1 (2020): 272–3, https://doi.org/10.1093/jiel/jgz025.

to opposition from third parties,[39] and an international legal commitment was established between the Member States under the ECT, including investment arbitration. Meanwhile, according to the Commission, the treaty contains an "implied disconnection clause," which can be inferred from its *travaux préparatoires*, the ECT negotiations and the political circumstances in which it was concluded.[40]

Of course, from the point of view of international law, a possible way forward for the EU Member States is not to apply the ECT among themselves as a consistent practice on a permanent basis. If the Member States do not apply ECT consistently and with legal conviction in their relations with each other over a longer time, a kind of regional customary law will emerge. However, other States Parties to the ECT may invoke a breach of the ECT by a Member State, even if such third states are not affected by its non-application in their relations with the Member States.

4. Instead of a Conclusion: A Critique of Disconnection Clauses

From an external perspective, EU law may be considered regional international law, which forces Member States to choose between two different international commitments (EU law and international law), justifying their choice by the principles of sincere cooperation, pre-emption, supremacy and the infringement procedure. Over the decades, primary law, with its Article 4 Section 3 TEU and Article 351 TFEU and coupled with the jurisprudence of the CJEU, effectively managed the possible threats to the autonomy and unity of EU law stemming from conflicting international agreements concluded by the Member States before or after their accession to the EU. Meanwhile, the European Community also had to face the conundrum of wishing to join international agreements without allowing them to override Community rules governing relationships between Member States at the same time. The solution to this quandary was to be the insertion of disconnection clauses in agreements concluded by the EU and its Member States with third states. However, there seems to be resistance against this practice from both third states and Member States since disconnection clauses have various effects on international law.

39 Ibid., 289.

40 Ibid., 273.

According to a report on the fragmentation of international law by the Study Group of the UN Commission on International Law, while disconnection clauses are not very different from treaty changes between individual contracting parties, they may be used by third parties to impose a legal regime that will change in the future. In the view of the International Law Commission, the law applicable between parties affected by a disconnection clause should not be open to unlimited amendments to a degree that is incompatible with the object and purpose of a treaty. This is because the third parties allowed the inclusion of the disconnection clause in light of the specific content of the law applicable between the states concerned, as they knew it.[41]

A disconnection clause can affect the rights and obligations of third states party to a treaty, as illustrated by Commission v. United Kingdom and its consequences.[42] According to the European Commission, the United Kingdom did not correctly transpose Directive 89/552/EEC on audiovisual media services when defining the broadcasters under its jurisdiction. The UK transposed the rules of the Directive in the light of the Council of Europe's 1989 European Convention on Television without Frontiers, stressing that a different approach would place Member States in an impossible situation by requiring them to infringe their legal obligations either at the international or Community level.[43] As Azoulai points out, the development of Community law, protected by a disconnection clause, eventually led the Council of Europe to amend the Convention "to avoid the risks of fragmentation and to create 'a coherent approach' in the audiovisual sector 'at the pan-European level.'"[44] Thus, secured by the disconnection clause, the development of EU law prompted a change in international law.

41 Fragmentation of international law: the difficulties arising from the diversification and expansion of international law. Report of the 58th session of the United Nations Commission on International Law (1 May – 9 June and 3 July – 11 August 2006), 291–3; Smrkolj, "The Use of the Disconnection Clause in International Treaties," 8.

42 CJEU Judgment of 10 September 1996, Commission v. United Kingdom, Case C-222/94, ECLI:EU:C:1996:314.

43 Ibid., sec. 52.

44 Loic Azoulai, "The *Acquis* of the European Union and International Organisations," *European Law Journal* 11, no. 2 (2005): 201, https://doi.org/10.1111/j.1468-0386.2005.00257.x.

Finally, as noted by Smrkolj, disconnection clauses can also affect the position of international treaties in the EU hierarchy of norms: while international treaties concluded by the EU are part of the primary law of the Union, which cannot be contradicted by secondary legislation, the disconnection clause overrides this rule.[45]

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[45] Smrkolj, "The Use of the Disconnection Clause in International Treaties," 3.

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New Regulation on Membership and Investor Shares in Credit Unions. Comparative Interpretation of Polish Law on Credit Unions

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field of membership,
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Abstract: This paper analyzes the 2023 amendment to the Act on Credit Unions of 9 November 2009 using dogmatic and comparative methods. First, the author considers membership of partnerships in credit unions in the context of the requirement of a common bond for membership. Second, the author analyzes the legal status of investor shares, conditions of dividend payment on their basis, as well as their termination. In conclusion, the author indicates that Polish regulation on membership of partnerships requires establishing multiple common bond credit unions and that restrictions for holders of investor shares in credit unions are similar in Poland and the UK.

1. Introduction

The amendment to the Act on Credit Unions of 9 November 2009[1] (CUA) by the Act on a pan-European Personal Pension Product of 7 July 2023[2] introduced changes to regulations on membership in credit unions and on credit union assets. These changes concern the field of membership in credit unions by allowing membership of general partnerships (Article 22

[1] Consolidated text: Journal of Laws 2023, item 1278, as amended.
[2] Journal of Laws 2023, item 1843.

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paragraph 1 of the CCC[3]), limited liability partnerships (Article 86 paragraph 1 of the CCC) and limited partnerships (Article 102 of the CCC). Under Polish law, these kinds of partnerships have legal capacity and can acquire rights, incur obligations on their behalf and have the capacity to sue and be sued (Article 8 paragraph 1 of the CCC). The amendment also introduced a new category of shares in credit unions, i.e. the investor shares. The amendment introduces changes proposed in the literature to enable partnerships to join credit unions and to allow cooperatives to issue investor shares.[4]

The author analyzes the introduced changes using dogmatic and comparative methods. Further, the author considers the changes in the field of membership while taking into account foreign regulations on credit unions. An analysis of new regulation on investor shares is also conducted by comparing it to other European legislation on cooperatives. In addressing these issues, the author considers the European legislation of credit unions which are represented in the World Council of Credit Unions (WOCCU). Credit union legislation is present in 16 European countries.[5] Among them, national credit union organizations from 8 European countries are members of or are affiliated with WOCCU.[6] This includes national credit unions from Poland, Croatia, Estonia, the United Kingdom (UK), Ireland, North Macedonia, Romania and Ukraine.[7] WOCCU is a nonstock corporation organized under Chapter 181 of the Wisconsin Statutes.[8] WOCCU's purpose is to promote, support, represent, and serve the worldwide credit union movement and to engage in any other lawful activity for the purposes for which a corporation may be organized under Chapter 181 of the Wisconsin Statutes (article I paragraph 1.1. of Bylaws of World Council of

3 Act on Code of Commercial Companies of 15 September 2000, consolidated text: Journal of Laws 2022, item 1467, as amended.

4 Dominik Bierecki, "The De Lege Ferenda Propositions Regarding the Membership in the Cooperative in Poland," *Prawo i Więź*, no. 3 (2019), 38–41, 50–1.

5 World Council of Credit Unions Statistical Report 2022, accessed November 24, 2023, https://www.woccu.org/about/statreport.

6 Ibid.

7 Ibid.

8 Accessed November 24, 2023, https://casetext.com/statute/wisconsin-statutes/partnerships-and-corporations-transportation-utilities-banks-savings-associations/chapter-181-nonstock-corporations.

Credit Unions, Inc.[9]). Moreover, the author takes into account the US state and federal laws on credit unions because the US is home to the world's largest credit union movement with 136,580,000 credit union members.[10] The author also considers the international guidelines issued by the World Council of Credit Unions, i.e. Model Law for Credit Unions[11] (MLCU).

This article's research thesis is that Polish regulation of membership of general, limited liability and limited partnerships in credit unions complies with foreign legislation. The research thesis also states that Polish law permits investor shares only in credit unions but not in other types of cooperatives. On the other hand, laws in other European countries where credit unions are regulated do not permit investor shares, except in the UK. Finally, the research thesis indicates that the changes to the CUA comply with the MLCU.

2. Common Bond (Field of Membership)

Eligibility for credit union membership depends on a person's common bond. This internationally recognized standard dates back to a model of credit cooperatives developed by Friedrich Raiffeisen in 19th-century Germany.[12] Credit unions are credit cooperatives that are shaped after Friedrich Raiffeisen's model of credit cooperatives[13] (Article 2 of the CUA states that a credit union is a cooperative and CL applies to the extent not regulated by the CUA). Credit union legislation most often refers to a common bond as a relation between people which is based on an organizational, professional or territorial foundation. However, the foundation of a common bond is usually not limited to statute law which enables the determination of other types of common bonds in credit union bylaws (Article 10 paragraph 1 of

9 Accessed November 24, 2023, https://www.woccu.org/member_services/our_network/membership/join.

10 World Council of Credit Unions Statistical Report 2022, accessed November 24, 2023, https://www.woccu.org/about/statreport.

11 "Model Law for Credit Unions," Madison, WI: World Council of Credit Unions, 2015, accessed November 28, 2023, https://www.woccu.org/documents/Model_Credit_Union_Law_2015.

12 Johnston Birchall, *People-Centred Businesses. Co-operatives, Mutuals and Idea of Membership* (London: Palgrave Macmillan, 2011), 135–42.

13 Ian MacPherson, *Co-operation, Conflict and Consensus. B.C. Central and the Credit Unions Movement to 1944* (Vancouver: B.C. Central Credit Union, 1995), 13–4.

the CUA, section 1A paragraph 2 (e) of the UK Credit Unions Act 1979;[14] section 17 paragraph 2 of the Irish Credit Union Act 1997[15]). In the USA, the relationship between people that establishes a common bond is considered a field of credit union membership (Section 109 of the Federal Credit Union Act,[16] Chapter 186.02 of the Wisconsin Statutes,[17] Rule 80–2-8-.01 of Georgia Complied Rules and Regulations,[18] Chapter 2 Article 11 section 451-A of Consolidated Laws of New York[19]).

In Poland, statute law defines that a common bond between credit union members must be of a professional or organizational nature (Article 10 paragraph 1 of the CUA). In this regard, Polish law complies with the MLCU. Nonetheless, it does not allow credit union membership based on a territorial common bond. In the USA, the territorial common bond exists next to organizational and professional common bonds in the MLCU, Credit Unions Act 1979 and state law. A territorial common bond is one of a common place of residence, work or education (section 4.10 paragraph 3 of the MLCU, section 1A paragraph 3 (c) of the Credit Unions Act 1979, Chapter 186.02 of the Wisconsin Statutes, Rule 80-2-8-.01 of Georgia Complied Rules and Regulations, Chapter 2 Article 11 section 451-A of Consolidated Laws of New York). The Republic of Lithuania Law on Credit Unions[20] also enables credit union membership based on a territorial common bond, i.e. residence in the same location – township or village (Article 17 paragraph 4 p. 4 of Republic of Lithuania Law on Credit Unions). However, Lithuania's national credit union organization is not a member of nor is

14 Accessed November 26, 2023, https://www.legislation.gov.uk/ukpga/1979/34.

15 Accessed November 26, 2023, https://www.irishstatutebook.ie/eli/1997/act/15/enacted/en/print#sec17.

16 Accessed November 26, 2023, https://www.govinfo.gov/content/pkg/COMPS-264/pdf/COMPS-264.pdf.

17 Accessed November 26, 2023, https://law.justia.com/codes/wisconsin/2022/chapter-186/section-186-02/.

18 Accessed November 28, 2023, https://www.law.cornell.edu/regulations/georgia/Ga-Comp-R--Regs-R-80-2-8-.01.

19 Accessed November 28, 2023, https://www.nysenate.gov/legislation/laws/BNK/451-A.

20 Accessed December 5, 2023, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.71010?jfwid=bkaxlykv.

affiliated with WOCCU.[21] It is postulated that the territorial common bond should be included in the catalogue of common bonds in the CUA.[22]

Professional or organizational common bonds can exist only between natural persons (Article 10 paragraph 1 of the CUA). Statute law also gives examples of common bonds that are considered professional or organizational; however, credit union bylaws can indicate other types of such common bonds. According to Article 10 paragraph 1 p. 1 of the CUA, a professional common bond exists between workers of the same employer or those working for multiple employers. In the latter case, a person who works for multiple employers falls within more than one common bond. As such, employees can share a common bond with persons who do not work for the same employer. This is considered a meta bond between groups of people who are connected by a common bond within a group.[23] Such groups of people may take the form of legally recognized organizations. In this case, a common bond connects the members of these organizations and not the organizations as legal persons (compare with Article 10 paragraphs 1a and 2 of the CUA). Notably, Article 10 paragraph 1 p. 1 of the CUA applies not only to workers employed under an employment contract (Article 22 of the Labour Code[24]) but also to those employed based on other types of agreements obliging them to perform work.[25]

Moreover, under Article 10 paragraph 1 p. 1 of the CUA, credit union bylaws can recognize multiple common bonds of different groups which are not connected by a meta bond.[26] A common bond of a professional nature should exist in each of these groups. Therefore, employees of different employers can be members of the same credit union which is expressly provided in Article 10 paragraph 1 p. 1 of the CUA. In this regard, the CUA

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21 World Council of Credit Unions Statistical Report 2022, accessed November 24, 2023, https://www.woccu.org/about/statreport.

22 Bierecki, "The De Lege Ferenda Propositions," 49–51.

23 Adam Jedliński, *Członkostwo w spółdzielczej kasie oszczędnościowo-kredytowej* (Warsaw: LexisNexis, 2020), 74.

24 Act on the Labour Code of 26 June 1974, consolidated text: Journal of Laws 2023, item 1465.

25 Adam Jedliński, "Art. 6," in *Komentarz do ustawy o spółdzielczych kasach oszczędnościowo-kredytowych* (Gdańsk: Info-Trade, 1998), 31.

26 Jedliński, *Członkostwo w spółdzielczej kasie oszczędnościowo-kredytowej*, 75–6.

is similar to the Federal Credit Union Act whose Section 109 states that a membership field can be described as a multiple common bond. According to Section 109 of the Federal Credit Union Act, multiple common bond credit unions enable membership of more than one group of people, each of whom has (within the group) a common bond of occupation or association. This provision was amended by Public Law 105–219 of 7 August 1998,[27] referred to as the Credit Union Membership Access Act. This act enabled credit union membership based on a multiple common bond following the US Supreme Court ruling of 25 February 1998 in National Credit Union Administration v. First National Bank & Trust Co.,[28] which determined that credit unions are not allowed to have multiple common bonds among their members.

A multiple common bond is also expressly allowed under the Credit Unions Act 1979. Section 1A paragraph 1 of the Credit Unions Act 1979 states that admission to credit union membership must be limited to persons who fall within one or more common bonds appropriate to a credit union. This section was introduced to the Credit Unions Act 1979 by the amendment of Article 13 of the Legislative Reform (Industrial and Provident Societies and Credit Unions) Order 2011.[29] It was a part of legislative and regulatory changes related to credit unions, which were introduced between 2000 and 2014.[30]

On the other hand, Article 10 paragraph 1 p. 2 of the CUA states that an organizational common bond exists between natural persons who are affiliated with the same social or professional organization. In this case, only one common bond is allowed. An organizational common bond must be of a legal nature.[31] This does not mean, however, that such a common

27 Accessed November 28, 2023, https://www.congress.gov/105/plaws/publ219/PLAW-105publ219.pdf.

28 Accessed November 28, 2023, https://supreme.justia.com/cases/federal/us/522/479/.

29 Accessed December 4, 2023, https://www.legislation.gov.uk/uksi/2011/2687/contents/made.

30 Daniel Tischer, Carl Packman, and Johnna Montgomerie, *Gaining Interest: A New Deal for Sustained Credit Union Expansion in the UK* (London: University of London, Goldsmiths, 2015), 14–7.

31 Piotr Zakrzewski, "Art. 10," in *Spółdzielcze kasy oszczędnościowo-kredytowe. Komentarz*, eds. Andrzej Herbet, Szymon Pawłowski, and Piotr Zakrzewski (Warsaw: C.H. Beck, 2014), 134–5.

bond exists solely due to a legal relationship between an organization (corporation) and its members. Article 10 paragraph 1 p. 2 of the CUA expressly states that an organizational common bond applies to persons belonging (affiliated) with an organization of professional or social character. According to Henry Hansmann and Reiner Kraakman, an organization (corporation) is a nexus of contracts. Yet, this nexus considers not only membership in an organization but also other types of contractual legal relationships which involve employees and consumers.[32] In my opinion, any kind of contractual relationship between individuals and a social or professional organization should be recognized as a common bond under Article 10 paragraph 1 p. 2 of the CUA, unless it is a contract of employment or another type of agreement obliging them to perform work because then it would be a common bond of professional nature and would be regulated by Article 10 paragraph 1 p. 1 of the CUA.

Article 10 paragraph 1 p. 2 of the CUA also provides that if legal persons are members of an organization, their members are connected with an organizational meta common bond and are eligible to join a credit union.[33]

Legal entities are eligible for credit union membership based on a common bond with natural persons. The common bond in question is one between a member of a credit union (natural person) and a legal entity. However, the legal grounds for such a common bond are different in the case of partnerships (Article 10 paragraph 1a of the CUA) and other types of legal entities (Article 10 paragraph 2 of the CUA). For general partnerships, limited liability partnerships and limited partnerships, only membership in them constitutes a common bond between a partner and a partnership. Moreover, the CUA only recognizes membership of natural persons in a partnership as a common bond which makes the partnership eligible for credit union membership (Article 10 paragraph 1a of the CUA). Indeed, this common bond is a type of organizational common bond of credit union members, both in the case of natural persons and

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32 Henry Hansmann and Reiner Kraakman, "The Essential Role of Organizational Law," *The Yale Law Journal* 100, no. 3 (2000): 391; Henry Hansmann and Reiner Kraakman, "Organizational Law as Asset Partitioning," *European Economic Law Review*, no. 44 (2000): 809, 812, 814, 816.

33 Jedliński, "Art. 6," 32.

partnerships. It is not a meta bond between a group of people (credit union members) who are connected by a common bond within a group (partners of a partnership), because it is the legal entity and not its members (partners) that are relevant here.

Under Article 10 paragraph 1a of the CUA, all partners of a partnership must be credit union members for a partnership to be eligible to join as a member. Therefore, partnerships are eligible for credit union membership if the bylaws permit multiple common bonds. A partnership is not obliged to have a common bond with all credit union members but rather only with its partners. Therefore, Article 10 paragraph 1a of the CUA permits multiple common bonds of organizational nature.

On the other hand, the UK Credit Unions Act 1979 regulates the membership of persons in terms of their capacity as partners in a partnership. These persons fall within common bonds appropriate to a credit union if the partnership distinctly relates to those who qualify for credit union membership by employing them or otherwise engaging them, providing services for their employer, or if the partnership has a place of business in or other significant connection with the locality of residence or employment of credit union members, or is a member of a *bona fide* organization or is otherwise associated with other union members (section 1A paragraph 4 (a)–(d) of the Credit Unions Act 1979). In such cases, the relevant party in determining a common bond is the partner and not the partnership; this is because general and limited partnerships do not have legal capacity under UK law (section 1 paragraph 1 of Partnership Act 1890,[34] sections 4 and 7 of Limited Partnerships Act 1907[35]). This applies also in the case of partners of limited liability partnerships, even though such partnerships have a separate legal capacity (legal personality) from their partners (section 1 paragraph 2 of Limited Liability Partnerships Act 2000[36]).

Under Polish law, other legal entities that can be credit union members include non-governmental organizations which conduct public benefit activities (Article 3 paragraph 2 of the Act on Public Benefit Activities and

34 Accessed December 3, 2023, https://www.legislation.gov.uk/ukpga/Vict/53-54/39/contents.
35 Accessed December 3, 2023, https://www.legislation.gov.uk/ukpga/Edw7/7/24/contents.
36 Accessed December 3, 2023, https://www.legislation.gov.uk/ukpga/2000/12/section/1.

Volunteering of 24 April 2003[37]), cooperatives, trade unions, church and religious association organizational units with a legal personality, as well as housing communities (Article 10 paragraph 2 of the CUA). These legal entities are eligible for credit union membership if they operate among credit union members. In this case, the above act requires a specific kind of single common bond which is not only organizational. Such a common bond is established solely through the legal entity's activities with credit union members. The activities in question may apply only to members who are natural persons and not legal partnerships. Indeed, Article 10 paragraph 2 of the CUA states that activities relevant to common bonds of legal entities concern members who are eligible for credit union membership due to professional or organizational common bonds (Article 10 paragraph 1 of the CUA). Such a common bond is a single common bond and not a meta bond because it binds legal entities and not their members. It is also considered that it is not required for a legal entity to actually operate among credit union members but only to have such a possibility under legal provisions or bylaws.[38]

The MLCU allows partnerships and other legal entities (societies, associations, credit unions, companies and governmental units) to become members of a credit union if they comply with its membership criteria (section 4.15 paragraph 2 of the MLCU). In contrast, the MLCU states that credit union membership criteria may include one or more common bonds of professional, organizational or territorial nature (section 4.10 paragraph 2 of the MLCU). Therefore, under the MLCU, partnerships and other legal entities are eligible for credit union membership if they share a common bond with other members. There is no requirement for all partners to be credit union members.

37 Consolidated text: Journal of Laws 2023, item 571.

38 Dominik Bierecki, *Członkostwo w spółdzielczej kasie oszczędnościowo-kredytowej* (Sopot: Wydawnictwo Spółdzielczego Instytutu Naukowego, 2013), 31–2.

3. Investor Shares

3.1. Legal Status

The amendment of the CUA by the Act on a pan-European Personal Pension Product of 7 July 2023 also introduced investor shares, a new category of credit union shares. Among cooperatives, only credit unions can issue investor shares – insofar as their bylaws provide for that (Article 16c paragraph 1 of the CUA). Other European legislation that regulates credit unions does not permit investor shares, except in the UK. The UK Co-operative and Community Benefit Societies Act 2014[39] allows investor shares to be held by non-user investor members.[40] Credit unions themselves are also registered under the Co-operative and Community Benefit Societies Act 2014 (section 1 paragraph 1 of the Credit Unions Act 1979). Investor shares held by non-user investor members must be distinguished from interest-bearing shares which entitle the holder to interest but not to a dividend (section 7A paragraphs 1–6 of the Credit Unions Act 1979).

Under the CUA, the characteristics of investor shares are not common to membership shares. Membership shares always arise due to membership in a cooperative. They are considered a member's debt to or claim against the cooperative, depending on whether the member fulfils their obligation to pay the share value (Article 19 paragraph 1, Article 21 and Article 26 paragraph 1 of the CL[41]).[42] Shares are not securities and credit unions may not issue certificates denoting share ownership (this is explicitly forbidden in the UK under section 7 paragraph 2 of the Credit Unions Act 1979 and in Ireland under section 28 paragraph 2 of the Credit Unions Act 1997). Also, shares must be distinguished from members' contributions to

39 Accessed December 4, 2023, https://www.legislation.gov.uk/ukpga/2014/14/contents.

40 Ian Snaith, "United Kingdom," in *Principles of European Cooperative Law. Principles, Commentaries and National Reports* (Cambridge–Antwerp–Portland, OR: Intersentia, 2017), 639, 686–7.

41 Act on Cooperatives Law of 16th of September 1982, consolidated text: Journal of Laws 2021, item 648, as amended.

42 Dominik Bierecki, "Acquisition of a Share in a Cooperative. Comparative Interpretation of Polish Cooperative Law," *Transformacje Prawa Prywatnego*, no. 1 (2021): 7–8; Piotr Zakrzewski, "Udział zadeklarowany," in *System Prawa Prywatnego*, ed. Krzysztof Pietrzykowski (Warsaw: C.H. Beck, 2020), 137–8; Piotr Zakrzewski, *Majątek spółdzielni* (Warsaw: LexisNexis, 2003), 39–69.

the cooperative which may be made in cash or in kind (Article 20 paragraph 2 of the CL). The legal character of these contributions varies, depending on the type of obligation entitling the cooperative to receive it from the member.[43] Under Article 12 of the CUA, credit union members should make contributions in cash apart from paying the share value. While such contributions may be interest-bearing, it does not mean that members are entitled to a dividend on this basis. In the case of credit unions, only investor shares entitle holders to a portion of the balance sheet surplus (dividend) for a given financial year (Article 26 paragraph 5 of the CUA).

Under the CL, member rights arise from membership in the cooperative (Article 18 paragraph 2 p. 1–6 of the CL).[44] This includes the right to receive a portion of the cooperative's balance sheet surplus, i.e. dividend (Article 18 paragraph 2 p. 5 and Articles 76 and 77 of the CL). Nonetheless, the CUA provides that investor shares are not related to credit union membership (Article 16c paragraph 1 of the CUA). This provision differentiates the Polish investor share concept from that included in UK regulations – under the Co-operative and Community Benefit Societies Act 2014, holders of investor shares are credit union members but not users of the union's services and, therefore, have limited voting rights (paragraph 6.31 and 6.32 of Guidance on the FCA's registration function under the Co-operative and Community Benefit Societies Act 2014[45]). In Poland, acquiring credit union membership is not a legal action which creates an investor share (Articles 16 paragraph 1 and Article 17 paragraph 1 of the CL). Investor shares are taken up under agreements other than a cooperative membership contract (Article 16c paragraph 2 of the CUA). All of the shareholder's rights against the cooperative derive from an investor share. The rights covering the investor shares should be determined in the credit union bylaws (Article 16c paragraph 6 pt. 1 of the CUA).

43 Dominik Bierecki, "Art. 20," in *Prawo spółdzielcze. Komentarz* (Warsaw: C.H. Beck, 2024), 93–4.

44 Dominik Bierecki, "Zasada równości praw i obowiązków członków spółdzielni. Uwagi na tle orzecznictwa Sądu Najwyższego," Prawo i Więź, no. 1 (2022): 267–8; Krzysztof Pietrzykowski, *Powstanie i ustanie stosunku członkostwa w spółdzielni* (Warsaw: Wydawnictwo Uniwersytetu Warszawskiego, 1990), 53–9.

45 Accessed December 5, 2023, https://www.fca.org.uk/publication/finalised-guidance/fg15-12.pdf.

The investor share may entitle the holder to claim a return of the share value and payment of part of the balance sheet surplus (dividend) for the given financial year from the credit union (Article 26 paragraph 5 of the CUA). In this respect, the CUA corresponds to the Co-operative and Community Benefit Societies Act 2014 since both entitle holders of investor shares to dividends. Investor shares may also grant corporate rights to holders who are not credit union members. According to Article 16d paragraph 2 pt. 1–3 of the CUA, such corporate rights include the following (credit union bylaws may grant some or all of them):

1. Appointing representatives entitled to participate in the meetings of credit union bodies without the right to vote. This right applies only to participation in meetings of credit union bodies that members can also attend, i.e. general assemblies and meetings of member groups (Article 18 paragraph 2 pt. 1 of the CL).
2. Receiving a copy of the statute and regulations and getting acquainted with resolutions and meeting minutes of the credit union bodies, as well as lustration protocols, annual financial reports and contracts concluded by the credit union with third parties. This right does not apply to information protected under Article 9e of the CUA. Where other information is requested, the credit union can also refuse to share it on the grounds of violating the rights of third parties or a reasonable suspicion that the requesting member may use it for purposes contrary to the credit union's interests, thereby causing it significant damage (Article 16d paragraph 2 pt. 3 of the CUA and Article 18 paragraph 3 of the CL).
3. Requesting that the competent bodies of the credit union consider applications regarding its activities (compare with Article 18 paragraph 2 pt. 4 of the CL which gives similar rights to credit union members).

The nominal value of an investor share is equal to the nominal value of a member share determined at the credit union (Article 16c paragraph 3 of the CUA). An investor share may only be taken up in exchange for cash (Article 16c paragraph 4 of the CUA). The total value of investor shares taken up at the credit union may not exceed 50% of the value of the share fund as specified in the credit union's current approved financial statements (Article 16c paragraph 5 of the CUA). The credit union bylaws

should determine the maximum number of investor shares at the credit union (Article 16c paragraph 6 pt. 2 of the CUA).

Although an investor share contains a claim against the credit union, it is non-transferrable (Article 16e paragraph 1 of the CUA; compare with Article 509 paragraph 1 of the CC[46]). This refers to the traditional feature of membership shares in a cooperative, which are non-transferable as well. Yet, the newest Polish legislation on cooperatives permits limited share transfer. According to the Act on Farmers' Cooperatives of 4 October 2018[47] shares can be transferred to another member in the case of membership termination or when received by a person to whom the farmers' cooperative is obliged to return them after a member's death (Article 11 paragraphs 4 and 6 of the Act on Farmers' Cooperatives of 4 October 2018).[48] Shares are also transferrable under the SCER[49] (Article 4 paragraph 11 of the SCER).[50] Further, cooperative shares are transferable under French law (if authorized by a cooperative's executive body)[51] and German law.[52] However, the issue of share transferability is addressed differently across European credit union legislation. In the UK, credit union shares other than deferred shares are not transferable (section 7 paragraph 2 of the Credit Unions Act 1979). On the other hand, shares in credit unions are transferable between members in Ireland. Restrictions in the case of the latter apply to the number of shares held by members and the mandatory approval by the credit union's board (section 29 paragraph 1 of Credit Unions Act 1997).

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46 Act on the Civil Code of 23 of April 1964, consolidated text: Journal of Laws 2023, item 1610, as amended.

47 Journal of Laws 2018, item 2073, as amended.

48 Dominik Bierecki, "Zbycie udziału w spółdzielni rolników," *Pieniądze i Więź*, no. 1 (2019): 86–8.

49 Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (O.J.E.C. L207, 18 April 2003).

50 Dominik Bierecki, *Spółdzielnia europejska w świetle prawa polskiego* (Sopot: Wydawnictwo Spółdzielczego Instytutu Naukowego, 2017), 270–80.

51 David Hiez, "France," in *International Handbook of Cooperative Law,* eds. Dante Cracogna, Antonio Fici, and Hagen Henrÿ (Berlin–Heidelberg: Springer, 2013), 444.

52 Volker Beuthien, "§ 76," in *Genossenschaftsgesetz mit Unwandlungs- und Kartellrecht sowie Statut der Europäischen Genossenschaft*, eds. Volker Beuthien, Reinmar Wolff, and Martin Schöpflin (München: C.H. Beck, 2018), 854–8.

Investor shares can be taken up only by legal persons (Article 16c paragraph 2 of the CUA). Because investor shares are not related to credit union membership, their acquisition is not limited to legal persons eligible for credit union membership (Article 10 paragraph 2 of the CUA). While a literal interpretation of Article 16c paragraph 2 of the CUA indicates that only legal persons can take up investor shares, one must also take into account Article 33^1 of the CC. According to Article 33^1 of the CC, the provisions on legal persons must be applied accordingly to the entities to which the legal act grants legal capacity. Therefore, under Article 16c paragraph 2 of the CUA and 33^1 of the CC, investor share acquisition should not be limited to legal persons but should also be allowed in the case of entities with legal capacity under the relevant legal act. This includes general, professional and limited partnerships (Article 10 paragraph 1a of the CUA), housing communities (Article 10 paragraph 2 of the CUA) and more since investor shares are not related to credit union membership. As such, other kinds of entities to which the legal act grants legal capacity are thus eligible for membership in credit unions and can take up investor shares. This includes limited joint-stock partnerships (Article 125 of the CCC), limited liability companies in organization, joint-stock companies in organization and simple joint-stock companies in organization (Articles 11, 161, 300^{11} and 323 of the CCC).

While investor shares are not related to credit union membership, members can take them up based on legal relationships other than membership. Where this is the case, however, a member's right to enter into transactions with the credit union is limited because they cannot use credits or loans granted by the credit union (Article 16d paragraph 1 of the CUA). Notably, other types of credit union financial services are still available to members who are holders of investor shares. These services include collecting funds in a savings account, making cash settlements, as well as mediations related to concluding insurance contracts and selling and redeeming investment fund participation units or fund participation titles (Article 3 paragraph 1 and 1a of the CUA).

3.2. Balance Sheet Surplus (Dividend) Payable Based on Investor Shares

The credit union bylaws may provide that part of the balance sheet surplus for a given financial year may be allocated proportionally to holders

of investor shares who have paid their full value (Article 26 paragraph 5 of the CUA). Notably, this does not undermine the not-for-profit nature of the credit union since holders of investor shares are not credit union members. Not-for-profit entities do not divide profit between their members but use all of it for statutory activities.[53] Nonetheless, payments on investor shares are made after the profit (balance sheet surplus) is determined. Therefore, although credit union profit is not fully allocated to further statutory activities, the payments are made to external investors who choose to take up investor shares as a form of investment in the credit union. Sharing profit between members is also accepted under the MLCU. Under these guidelines, credit unions can pay dividends to their members based on ownership and preferred shares (section 6.15 paragraph 4 and section 6.20 of the MLCU).

As already noted, investor shares in this case should be considered claims against a credit union for payment of a portion of the balance sheet surplus (dividend). The portion payable based on investor shares should be determined by credit union bylaws and cannot exceed the share of the nominal value of investor shares in the credit union's share fund (Articles 16c paragraph 6 pt. 3 and 26 paragraph 6 of the CUA). Funds acquired by the union as payment for the investor shares are accumulated in a share fund (Article 24 paragraph 2 of the CUA). Moreover, the portion of the balance sheet surplus subject to payment based on investor shares may not exceed 25% of the credit union's balance sheet surplus for a given financial year (Article 26 paragraph 9 of the CUA).

Dividend payment based on investor shares is due after a resolution of the union's general assembly on the division of the balance sheet surplus (Article 77 paragraph 1 of the CL). However, several conditions must be met before the payment is made. Article 26 paragraph 7 of the CUA states that to pay investor share claims, the credit union:

1. must not have been obliged to develop and implement a restructuring program under Article 72a of the CUA (Article 26 paragraph 7 p. 1 of the CUA),

[53] Bernardo Bátiz-Lazo and Mark Billings, "New Perspectives on Not-for-Profit Financial Institutions: Organizational Form, Performance and Governance," *Business History* 54, no. 3 (2012): 311.

2. must have a solvency ratio of at least 5% (Article 24 paragraph 5 of the CUA) and the payment cannot lower this ratio, and where this condition remains unfulfilled, result in its further decrease (Article 26 paragraph 7 p. 2 and 3 of the CUA).

Where the credit union is implementing a restructuring program, dividend payments based on investor shares also require the following (besides meeting the conditions set out in Article 26 paragraph 7 p. 2 and 3 of the CUA):

1. the credit union must implement the restructuring program according to the agreed-upon schedule, at least in terms of own funds, solvency ratio, financial result and asset quality (Article 26 paragraph 8 p. 1 of the CUA),
2. the restructuring program must provide for dividend payments (Article 26 paragraph 8 p. 2 of the CUA).

If the above dividend payment conditions are not met, the portion of the balance sheet surplus to be paid out based on investor shares, as set out in a resolution by the credit union's general assembly, should be transferred to the credit union's resource fund (Article 26 paragraph 10 of the CUA). Once these conditions have been met, the payment based on investor shares should be made from the resource fund (Article 26 paragraph 11 of the CUA).

In my opinion, the portion of the balance sheet surplus (dividend) can be granted based on investor shares in the form of interest on shares (Article 77 paragraph 4 of the CL). Although Article 77 paragraph 4 of the CL refers to a division of balance sheet surplus (profit) between cooperative members, it should be applied as appropriate to credit unions (Article 2 of the CUA), because credit unions do not share profit between members and division of profit in their case is only allowed based on investor shares. The credit union's dividend can be distributed as interest on investor shares in two ways: by paying the appropriate amounts to the holders of investor shares or by increasing investor share value.[54] While Article 26 paragraph 7

[54] For more on dividend distribution in the form of interest on shares, see: Krzysztof Pietrzykowski, *Prawo spółdzielcze. Komentarz do zmienionych przepisów* (Warsaw: Wydawnictwo Prawnicze, 1995), 109.

of the CUA only to the payment of a portion of the balance sheet surplus to the holders of investor shares, it should be noted that this payment can be done later, after an increase of investor share value due to interest. In this case, conditions listed in Articles 26 paragraph 7 and 8 of the CUA and provisions indicated by Article 26 paragraph 10 and 11 of the CUA apply.

3.3. Termination of Investor Shares

Cooperative laws worldwide share a rule that member shares are reimbursed at a nominal value upon membership termination.[55] Under the CUA, this rule applies to investor shares, even though their reimbursement occurs due to termination by an investor (Article 16e paragraph 2 of the CUA). After all, investor shares are not related to credit union membership (Article 16c paragraph 1 of the CUA). If credit union bylaws permit the issuing of investor shares, their provisions should also determine the method and date of returning payments made on their account (Article 16c paragraph 6 pt. 6 of the CUA). The date of return determines the maturity of a claim for investor share reimbursement. Yet, this claim cannot be due until the approval of the credit union's financial statements for the year in which the holder of the investor share applied for reimbursement (Article 16e paragraph 3 pt. 1 of the CUA).

Investor shares cannot be reimbursed if they were used to cover the credit union's loss (Article 16e paragraph 3 pt. 2 of the CUA). Under Article 16e paragraph 4 pt. 1 (a) of the CUA, investor share termination is ineffective and shares are not reimbursed if this would result in potential or actual non-compliance with the credit union's solvency ratio requirements, and where they remain unmet, a further reduction in the credit union's solvency ratio.

Investor share termination is ineffective and shares are not reimbursed also in cases where the amount of the terminated investor shares exceeds the credit union's balance sheet surplus for the year in which the holder of the investor share applied for a reimbursement (Article 16e paragraph 4 pt. 2 of the CUA).

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55 Hagen Henrÿ, *Guidelines for Cooperative Legislation* (Geneva: International Labour Organization, 2012), 78.

The credit union must immediately inform the Financial Supervision Authority about the termination of investor shares and the request for reimbursement of payments for investor shares (Article 16e paragraph 5 of the CUA).

4. Conclusions

While credit unions are not obliged to accept partnerships as members or issue investor shares, their bylaws may introduce such possibilities. Opening up to partnerships' membership establishes a multiple common bond credit union. The bond between credit union members (who are partners) and a partnership is organizational in nature.

In European credit union legislation, only the CUA and the Co-operative and Community Benefit Societies Act 2014 permit investor shares in credit unions. In both cases – in Poland and the UK – a credit union may issue investor shares based on its bylaws. However, the CUA includes extensive statutory regulation on investor shares, which limits the discretion to shape the bylaws' provisions regarding investor shares. In the UK, a variety of factors determine whether bylaws providing for investor shares infringe on the cooperative nature of a union. This includes, but is not limited to, credit unions. These factors are as follows: restricting the voting rights of non-user investor members to prevent them from voting on a motion to convert the cooperative into a company; and ensuring that the ultimate control of the credit union remains with members other than non-user investor members at all times by preventing the non-user investor members from accumulating a share of voting rights which would exceed that held by user-members, causing the latter to lose control over the union (paragraph 6.32. of Guidance on the FCA's registration function under the Co-operative and Community Benefit Societies Act 2014). Both Polish and UK regulation of investor shares comply with the International Cooperative Alliance rule that external investors (non-members) should not have the power to influence a cooperative.[56]

[56] Jean-Louis Bancel, "3rd Principle: Member Economic Participation," in *Guidance Notes to the Co-operative Principles*, eds. Akira Kurimoto et al. (Brussels: International Cooperative Alliance, 2015), 39–40.

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Negative and Positive Freedom: The Case of Turkey

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Abstract: The meaning of the concept of freedom has constantly changed in history. In Ancient Greece, freedom referred to making a choice and doing something willingly; Hannah Arendt conceptualized it as a necessary discovery made by people in historical periods when the conditions for manifesting the idea of searching the same concept within oneself as an action were insufficient. Today, the concept of freedom has evolved into a dual meaning as negative and positive, shaped by the expressions of Isaiah Berlin. In this sense, the freedoms that we call classical freedoms, which the individual acquires because of being human, without considering the differences in religion, language, gender, and race, are evaluated in the context of negative freedoms. The basis of this understanding is the absence of pressure and coercion from the environment in which the individual lives rather than the creation of surplus value in the individual by external influence. However, with the deterioration of the freedom concept, the gains included in negative freedom have become a problem that the state needs to solve. The need for state intervention in creating a positive effect on the individual has emerged. The concept of positive freedom that emerged in this sense reveals itself in a structure that requires more than the intervention of others; it requires that individuals have control over their selves and that they have an active role in this dominance. Proponents of positive freedom argue that freedom means the individual dominates their own passions, desires, and all obstacles to self-realization. In order to achieve this, the state must firmly stand by the individual

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regarding collective freedoms. In this context, since the discussions on the concept of rights and freedoms in Turkey spread to negative and positive areas of freedom, this paper aims to show that presenting the concept with a single definition of freedom would be challenging. The re-reading has shown that the rights and freedoms in Turkey are derived from the concept of both positive and negative individual rights. However, it has been observed that the framers of the Constitution limited the fundamental rights and freedoms based on the idea that there should be a limit to the individual's rights and covered it in the necessary sections in the Constitution to ensure that the fundamental rights and freedoms could not be abused.

1. Introduction

Being free means that an individual has the opportunity to develop themselves in a way that will take their qualities to the next level. These opportunities can be possessed in a free society that can direct the rules of the environment and social structure in which they live in line with their interests and have all the prerequisites for development. Achieving this requires dominating the imperatives rather than resisting them. On the other hand, dominance requires accepting the existence of the whole set of rules of the environment and the society in which one lives, recognizing and controlling them, and benefitting from them in line with one's interests. On the other hand, by using their mind, human beings live in a world where they are only in a passive position as objects and can perceive a sense of freedom with the decisions they make within the social structure. Humankind shapes their freedom in a way determined within the framework of their individuality, being aware of the social structure and nature's limitations.[1]

In the words of Aristotle, human is a social animal,[2] and other individuals also have rights in the social structure where the individual is socialized. The natural outcome of this acceptance is mutual respect among the individuals in society. However, there was no consensus about the approach and definition of the concept of freedom for each individual in

1 Orhan Hançerlioğlu, *Felsefe Sözlüğü* (İstanbul: Remzi Kitabevi, 1982), 323–4.
2 Aristoteles, *Metafizik* (İstanbul: Divan Kitap, 2017), 1253.

society; therefore, preserving the continuity of the concept has been under the protection of the state in the historical process. Based on this idea, one of the reasons for the existence of the concept of the state is "freedom".

According to the realist approach, a higher power is required to eliminate individuals' inequality and intervene in possible injustices. Naturally, freedom cannot exist in the absence of a higher power. Humans, with a selfish nature, will think of their own interests if they have unlimited freedom. This thought brings us to the following point: freedom itself must be limited to have freedom.[3] In the final analysis regarding this basic idea, the concept of freedom in the social structure causes the individual's right to behave and act as they wish to disappear. Individual freedom is tied to obeying the laws. An order in which freedom spreads to all segments can occur in civilized societies, with the understanding of freedom based on obeying the laws.[4]

For the understanding of freedom to dominate society, first of all, the concept of an individual's positive and negative rights, derived from negative and positive freedom provided and guaranteed by the state, should be explained. When the subject is considered in this context, it is undeniable that the state's intervention is needed when the concept of rights is in question.

In this circumstances, the main subject of our study is to examine whether the Constitution of the Republic of Turkey guarantees the rights and freedoms of the individual. At the same time, if problems arise from the Constitution in ensuring this guarantee, this paper will attempt to reveal these problems. Since the concept of freedom will be discussed in more detail at a later point, it is appropriate first to examine the evolution of the idea of freedom in the historical process, which will reveal the concept of rights.

2. Theoretical Framework

Having a preference is to make a choice willingly and knowingly. To do something willingly means that the initiator of the action is the maker. In this case, the individual has the opportunity to act voluntarily, not by

3 David Daiches Raphael, *Problems of Political Philosophy* (London and Hong Kong: Macmillan Press, 1990), 56.

4 Timuçin Afşar, *Felsefe Sözlüğü* (İstanbul: İnsancıl Yayınları, 1998), 239.

force or ignorance. The individual who has these possibilities is the one who already has freedom.[5] Aristotle described a free individual as someone who evaluates what will happen before and after an action in their mind and makes a choice. On the other hand, freedom is shaped by the individual's ability to do what they do within their power and ability.[6]

Suppose a man does not interfere in the affairs of others and acts as he thinks and wills in matters which concern only himself. In that case, it must be recognized that the reasons which require freedom of thought also require the freedom to put those thoughts into practice unhindered, to one's advantage or detriment.[7] Mill's position is that only minimal restrictions can be placed on an individual's freedom, only to prevent harm to others.[8]

Arendt stated that the confusion of freedom with liberty in the modern period creates problems in revealing the true meaning of freedom. It is because, in the modern era, liberty is more important than freedom. Therefore, freedom has been transformed into an insignificant intermediate concept under liberty. In this thought, the concept of liberty is synonymous with "freedom". It is understood as the ability to act without restriction within the framework of the law, which evokes the meaning of not limiting the acting ability of human behavior. This approach leads us to the idea that an individual under pressure cannot be free. From this point of view, it can be stated that freedom has a political meaning and is a concept that requires the individual's participation in public issues and problems and their engagement in the public sphere.[9]

On the other hand, Immanuel Kant did not address the concept of freedom only in the context of individual freedoms. However, he stated that human beings transform into social beings due to socialization and bear the responsibility for the consequences of their decisions. Humans must have goals other than happiness in life, and Kant defines them as duties and calls them goodwill.[10] In this case, human freedom is described as the indi-

5 Kevin M. Staley, "God's Personal Freedom: A Response to Katherine Rogers," *Saint Anselm Journal*, 1:1 (Fall 2003): 9–16.

6 Aristoteles, *Nikhomakhos'a Etik* (Ankara: Ayraç Yayınları, 1997), 1113.

7 John Stuart Mill, *Hürriyet Üstüne* (Ankara: Liberal Düşünce Topluluğu, 2003), 114.

8 Andrew Heywood, *Siyasî İdeolojiler* (Ankara: BB101 Yayınları, 2016), 52.

9 Hannah Arendt, *Devrim Üzerine* (İstanbul: İletişim Yayınları, 2012), 40.

10 Macit Gökberk, *Felsefe Tarihi* (İstanbul: Remzi Kitabevi, 2000), 363.

vidual's ability to make choices in a world with laws determined by society and nature. Therefore, the structure in which the individual will only keep themselves in the forefront in a selfish way is removed, and it is ensured that they start to want the good things that they wish for all individuals in society.[11] Thus, each individual in the society enjoys their freedom in a way that does not disrupt the existing social order. In other words, freedom is based on moral law. According to Kant, the morality of the individual's actions necessitates that they are not performed because of the love or inclination they will create but from respect for the law and duty.[12]

The idea that some freedoms existed before the concept of the state and that free individuals formed the state by combining their will emerges as the dominant thought within the framework of the social contract and natural law concepts. As a result of this thought, the most critical function of the state is to ensure the freedom of the individuals under its rule, which is considered legitimate as long as it fulfils this function. The individuals perceive themselves as having unlimited freedom in the face of the state they have created with their free will. The emergence of this idea lies at the core of the 1789 French Declaration of the Rights of Man and of the Citizen, which states that individuals can use their innate freedoms as they wish without any restrictions: freedom has an absolute, limitless nature, and the only limit is the freedom of other individuals.[13] However, in today's democracies, freedom is no longer a concept that can be used by the individual who owns it, and it has been turned into a social notion. In other words, today, freedom is still important for the individual, but the fact that the individual is a social being is not ignored.[14] This understanding of freedom was adopted with the Revolutions of 1848 in the historical process; afterwards, the principle of individuals using their freedom in a balanced way while living in society began to settle.[15]

According to Kant, freedom occurs in two stages: positive and negative conceptuality. The concept of negative freedom emphasizes that

11 Aristoteles, *Nikhomakhos'a*, 1113.

12 Immanuel Kant, *Pratik Aklın Eleştirisi* (Ankara: Türk Felsefe Kurumu Yayınları, 2009), 90.

13 John Stuart Mill, *On Liberty* (Ontario: Batoche Books Limited, 2001), 52–3.

14 Ömer Anayurt, *Türk Anayasa Hukukunda Toplanma Hürriyeti* (İstanbul: Kazancı Hukuk yayınları, 1998), 132.

15 İlhan Akın, *Kamu Hukuku* (İstanbul: Beta Yayınları, 1987), 398.

the individual's choice is free from desire and wish. The individuals living in a world where they cannot determine the causes and consequences are exposed to heteronomy in the field of objects. However, the will of a thinking individual is defined by the mind arising from their freedom, which has already been born from the mind itself, not by natural causality. The emerging will is independent of foreign matter, and according to Kant, this state of independence emerges as negative freedom.[16] However, Kant does not consider the definition of negative freedom sufficient because he believes that what will set the individual free must be determined by the moral law guided by the mind. As a result, he introduces the concept of positive freedom, which is not based on a foreign cause but on the moral law that originates from the individual's mind. In Kant's own words, "the self-legislation of purely practical mind is freedom in a positive sense."[17] In the Kantian concept of positive freedom, the will that puts the individual into action becomes the cause that creates the effect. According to Kant, autonomy, the basis of the individual's value, emerges when the individual determines the law that puts them into action.[18]

For Isaiah Berlin, freedom is embodied as the distinction between negative and positive freedom concepts. Negative freedom in the political sense answers the question: "What is the space in which the subject should be free to do what they can do or be what they can be without the interference of other people?". The answer sought in the concept of positive freedom is, "What or who is the source of control or interference that can determine whether someone does this or that?".[19]

As expressed by Berlin to answer the questions mentioned above, the concept of negative freedom includes the domination of the individual on their body and mental structure. It is the individual's dominance over their personal property and immediate environment. In other words, it implies the absence of interference; no one interferes with the acts and actions of the individual, the individual's ability to make their choices without

16 Bedia Akarsu, *Ahlak Öğretileri* (İstanbul: Remzi Yayınevi, 1982), 187.

17 Kant, *Pratik*, 38.

18 Immanuel Kant, *Ahlak Metafiziğinin Temellendirilmesi* (Ankara: Türk Felsefe Kurumu Yayınları, 2013), 53–68.

19 Isaiah Berlin, "Two Concepts of Liberty," *Liberal Düşünce* 12, no. 45 (2007): 61–2.

being forced or hindered in any way.[20] On the other hand, the concept of positive freedom requires more than the intervention of others. Individuals should control themselves and actively participate in this dominance.[21] It refers to the individual's ability to make their own choices and realize their own will. From this perspective, when it is defined as the freedom to do something with their own will by the advocates of positive freedom, rather than being privileged from being under control or being interfered with by the advocates of positive freedom, it indicates the domination of the individuals over themselves.

3. Discussion on the Relationship between Rights and Freedom

The concept of right comes to the fore in the historical conceptualization of freedom. For example, human rights are natural rights necessary for the individual to establish their existence as a human. The rights to dignity and decent living conditions are acquired while the individual is in the mother's womb.[22] In some democratic societies, the realization and maintenance of human rights are the main reasons for the state's existence. Rights vary according to their content and the authority by which they are protected.

The most common method used in classifying fundamental rights and freedoms is the "Jellinek Grouping", developed by Georg Jellinek. Accordingly, fundamental rights and freedoms are divided into three groups: negative rights, positive rights, and active rights.[23] Negative rights (*status nagativus*) are individuals' rights that are inviolable by the state and set the limits for using these rights. These rights are also called "protective rights" because they protect the individual against the state. Due to their nature, they impose an obligation on the state to respect individuals' rights and not infringe on them.[24] On the other hand, positive rights (*status positivus*) are the rights that individuals demand from the state. Active rights

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20 Fatmagül Berktay, "Hannah Arendt: Bir İnci Avcısı," in *Metafizik ve Politika*, eds. Sanem Yazıcıoğlu Öge, Önay Sözer, and Fiona Tomkinson (İstanbul: Boğaziçi Ünv. Yayınları, 2002), 255–72.

21 Fhilip Pettit, *Cumhuriyetçilik* (İstanbul: Ayrıntı Yayınları, 1998), 37–8.

22 Andrew Burrows, *English Private Law* (Oxford University Press, 2013), 939.

23 Georg Jellinek, *L'Etat Moderne et son droit*, vol. 2 (Paris: Girard et Brière, 1913), 51–7.

24 Kemal Gözler, *Anayasa Hukukunun Genel Esasları* (Bursa: Ekin Yayınları, 2000), 203.

(*status activus*) are the rights that enable an individual to participate in state government.[25]

Despite the classifications and distinctions made on fundamental rights, the integrity of freedoms or rights should be considered as a whole. "Individuals can be free only when they possess all fundamental rights and freedoms. For an individual to be free, first of all, they undoubtedly must have negative rights, that is, individual rights."[26] Individuals with negative rights are protected against the state through their inviolable rights, which means the individual's freedom. For an individual who cannot meet their shelter and nutrition needs, having these rights will be meaningless compared to someone who maintains their living standards under normal conditions because the individual has not yet reached out to the state to meet their basic needs. Therefore, an individual should also have political rights through positive rights, that is, social rights.[27]

The right to do something means that the individual cannot and should not be prevented from doing it. Because of this, other individuals' freedom of action is restricted due to the avoidance obligation imposed on them.[28] Indeed, every right limits the freedom of another. To have a right means to have a just reason to restrict another's freedom or even to determine how they should act.[29] According to Kuçuradi,[30] who sees freedom as the legal guarantee of rights, freedoms emerge with the recognition of fundamental rights by positive law, and fundamental freedoms constitute the legal guarantee of fundamental rights. As a natural consequence, social freedoms will be available in a country to the extent to which these guarantees are found.

Regarding the concept of negative and positive rights in Turkey, the first part of the second section of the Turkish Constitution determines

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25 Anayurt, *Türk*, 69.

26 Munci Kapani, *Kamu Hürriyetleri* (Ankara: Yetkin Yayınları, 1993), 6–7.

27 Mehmet Akad, *Genel Kamu Hukuku* (İstanbul: Der Yayınları, 2016), 1.

28 Barry Gower, "Understanding Rights: An Analysis of A Problem," in *Human Rights*, ed. Frank Ernest Dowrick (Westmead: Teakfield, 1979), 55–8.

29 Herbert Lionel Adolphus Hart, "Are There Any Natural Right?," in *Theories of Rights*, ed. Herbert Lionel Adolphus Hart (New York: Oxford Universty Press, 1992), 82.

30 Ioanna Kuçuradi, "'World Problems' From The View-point of Human Rights," in *Philosophy Facing World Problems*, eds. İaonna Kuçuradi and Nurdan Sümer (Ankara: Philosohhical Society of Turkey, 1998), 70.

the "Fundamental Rights and Duties" and their nature and limitations. In this context, according to Article 12 of the Constitution, "Everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable. Fundamental rights and freedoms also include the duties and responsibilities of the individual towards society, his family, and others."

The concept of "negative freedoms", one of the fundamental rights and freedoms of individuals, is widely included in the second part of the second section under the title of "rights and duties of the individual" and guaranteed by the Constitution. In this context, the following matters are guaranteed and secured:

- personal inviolability, material and spiritual entity of the individual;
- the prohibition of forced labor;
- personal liberty and security;
- privacy and protection of private life;
- freedom of residence and movement;
- freedom of religion and conscience;
- freedom of thought and opinion;
- freedom of expression and dissemination of thought;
- freedom of science and arts;
- provisions on press and publication;
- rights and freedoms of assembly;
- right of property;
- provisions relating to the protection of rights;
- right to prove an allegation;
- protection of fundamental rights and freedoms.

Articles 17–40[31] of the Constitution and rights and freedoms are negative rights and impose a negative attitude on the state, the duty of not interfering and "not shadowing". Since these rights are supposed to protect the individual against the state and society, they are also called "protective rights". These rights are gathered under the title of "rights and duties of the individual" in the Constitution; therefore, they can also be called "personal rights" in short.

[31] Constitution of the Republic of Turkey, 18.10.1982 with Law No. 2709.

The same guarantee of individuals' fundamental rights and freedoms within the scope of "positive freedoms" has been extensively covered in the third part of the second section of the Constitution under the title of "rights and duties of the individual". In this context, the following are guaranteed and secured:

- protection of the family and child rights;
- the right and duty of training and education;
- public interest;
- freedom to work and conclude contracts;
- provisions related to labor;
- collective bargaining, right to strike and lockout;
- health, environment, and housing;
- youth and sports;
- right to social security;
- conservation of historical, cultural, and natural wealth;
- protection of art and the artist;
- the extent of social and economic rights.

Positive rights in the Constitution (Article 41–65)[32] outlined above are the rights that allow individuals to request a positive behavior, service, or help from the state. Such rights are also called "right to demand" because they impose specific duties on the state in the social field and entitle the individual to request something from the state. As the majority of these rights are related to the social and economic spheres, and the title of the section of the Constitution regulating them is "social and economic rights and duties", and these rights are the results of the social state understanding, they are also called "social rights" in short.

In addition, based on the idea that there should be a limit to the individual's rights, the following points are guaranteed in Part 2 (Fundamental Rights and Duties), Section 1 (General Provisions) of the Constitution:

- limitation of basic rights and freedoms;
- non-abuse of fundamental rights and freedoms.

32 Ibid.

4. The Concept of Fundamental Rights in the Turkish Constitution

Regarding the positive and negative rights in the Constitution of the Republic of Turkey[33] in terms of their content, the negative rights are covered as follows.

According to the personal inviolability, material, and spiritual entity of the individual (Article 17), everyone has the right to life and protect and develop their material and spiritual entity. The law guarantees that the individual's physical integrity may not be violated except under medical necessity and in cases prescribed by law. They may not be subject to scientific or medical experiments without their consent. No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalty or treatment incompatible with human dignity. The prohibition of forced labor (Article 18) states that no one may be required to perform forced labor. Unpaid compulsory work is prohibited.

Personal liberty and security (Article 19) guarantees that everyone has the right to enjoy personal liberty and security. No one may be deprived of their liberty except in the following cases where procedure and conditions are prescribed by law: execution of sentences restricting liberty and the implementation of security measures decided by courts, apprehension or detention of a person as a result of a court order or as a result of an obligation upon him designated by law; execution of an order for the educational supervision of a minor or for bringing him before the competent authority; execution of measures taken in conformity with the relevant legal provision for the treatment, education, or correction in institutions of a person of unsound mind, an alcoholic or drug addict or vagrant, or a person spreading contagious diseases, when such persons constitute a danger to the public; apprehension or detention of a person who enters or attempts to enter illegally into the country or concerning whom a deportation or extradition order has been issued.

Privacy of the individual's life (Article 20) guarantees that everyone has the right to demand respect for their private and family life. Privacy of individual and family life may not be violated. In this context, the inviolability of residence and freedom of communication is also included, along with private life. Freedom of residence and movement (Article 23) guarantees

[33] Ibid.

everyone the right to freedom of residence and movement. Freedom of religion and conscience (Article 24) ensures everyone has the right to freedom of conscience, religious belief, and conviction. Acts of worship, religious services, and ceremonies may be conducted freely, provided they are not exercised to violate the indivisible integrity of the State with its territory and nation, endanger the existence of the democratic and secular republic based on human rights. No one may be compelled to worship, participate in religious ceremonies and rites, reveal religious beliefs and convictions, or be blamed or accused because of their religious beliefs and convictions.

Freedom of thought and opinion (Article 25) guarantees everyone the right to freedom of thought and opinion. No one may be compelled to reveal their thoughts and opinions for any reason or purpose, nor shall anyone be blamed or accused on account of their thoughts and opinions. Freedom of expression and dissemination of thought (Article 26) expresses that everyone has the right to express and disseminate their thought and opinions by speech, in writing or pictures, or through other media, individually or collectively. Freedom of science and arts (Article 27) states that everyone has the right to study and teach freely, explain and disseminate science and arts, and conduct research in these fields. Freedom of the press (Article 28) states that the press is free and may not be censored. Establishing a printing house may not be subject to prior permission and the deposit of a financial guarantee. The State shall take the necessary measures to ensure the freedom of the press and freedom of information.

Rights and freedoms of assembly (Article 33) states that everyone has the right to form associations without prior permission and is free to become a member or withdraw from their membership. No one may be compelled to become or remain a member of an association. The right to hold meetings and demonstration marches (Article 34) guarantees that everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission. The right of property (Article 35) guarantees everyone the right to own and inherit property. These rights may be limited by law only because of public interest. The exercise of the right to own property may not be in contravention of the public interest.

Regarding the provisions relating to the protection of rights, the freedom to claim rights (Article 36) guarantees that everyone has the right to litigation, either as a plaintiff or defendant, before the courts through lawful

means and procedure. No court may refuse to hear a case within its jurisdiction. The guarantee of a lawful judge (Article 37) states that no one may be tried by any judicial authority other than the legally designated court. Extraordinary tribunals with jurisdiction that would remove a person from the jurisdiction of their legally designated court may not be established. Principles relating to offences and penalties (Article 38) guarantee that no one may be punished for any act which did not constitute a criminal offence under the law in force at the time it was committed; no one may be given a heavier penalty for an offence than the penalty applicable at the time when the offence was committed.

The right to prove an allegation (Article 39) guarantees that the defendant has the right to prove the allegations in libel and defamation suits involving allegations against persons in the public service in connection with their functions or services. Protection of fundamental rights and freedoms (Article 40) guarantees that anyone whose constitutional rights and freedoms are violated has the right to request prompt access to competent authorities.

Regarding the positive rights in the Constitution of the Republic of Turkey:

Protection of the family and the child's rights (Article 41) states that the family is the foundation of Turkish society and is based on equality between spouses. The State shall take the necessary measures and establish the organization to ensure the peace and welfare of the family, especially the protection of the mother and children, and for family planning education and application.

Right and duty of training and education (Article 42) determines the form of education and training, stating that no one may be deprived of the right to learning and education. The scope of the right to education shall be defined and regulated by law. Training and education shall be conducted under the supervision and control of the State, in the light of contemporary science, in line with the principles and reforms of Atatürk. Institutions of training and education contravening these provisions shall not be established.

Utilization of the coasts (Article 43) among public interest states that the coasts are under the sovereignty and at the disposal of the State. Public interest shall be prioritized in utilizing the sea coast, lake shores or river

banks, and the coastal strip along the sea and lakes. Regarding land ownership (Article 44), the State shall take the necessary measures to maintain and develop efficient land cultivation, prevent its loss through erosion, and provide land to farmers with insufficient or no land. For this purpose, the law may define the size of appropriate land units according to different agricultural regions and types of farming. Lands distributed for this purpose may neither be divided nor be transferred to others, except through inheritance. They shall be cultivated only by farmers, to whom they have been distributed, and their heirs. The principles relating to the recovery by the State of the land thus distributed in the event of loss of these conditions shall be prescribed by law. Regarding the protection of agriculture, animal husbandry, and persons engaged in these activities (Article 45), the State shall assist farmers and livestock breeders in acquiring machinery, equipment, and other inputs in order to prevent improper use and destruction of agricultural land, meadows, and pastures and to increase crops and livestock production according to the principles of agricultural planning. Expropriation (Article 46) entitles the state and public corporations, where the public interest requires it, to expropriate privately owned real estate wholly or in part or impose administrative servitude on it according to the principles and procedures prescribed by law, provided that compensation is paid in advance. Nationalization and privatization, as the last item in the expropriation article within the scope of positive rights (Article 47), states that private enterprises performing public service may be nationalized when the exigencies require this of public interest. As seen in an article such as expropriation, which requires the state's intervention in individual rights and freedoms, creating social benefit emerges as the primary objective.

Freedom to work and conclude contracts (Article 48) ensures that everyone has the freedom to work and conclude contracts in the field of their choice. The establishment of private enterprises is free.

Regarding provisions relating to labor, rights, and duty to work (Article 49), work is everyone's right and duty. The State shall take the necessary measures to raise workers' standard of living, protect them by improving the general conditions of labor, promote labor, and create suitable economic conditions to prevent unemployment. According to working conditions and the right to rest and leisure (Article 50), no one may be required to perform work unsuited to their age, sex, and capacity. Minors, women, and

persons with physical or mental disabilities shall enjoy special protection concerning working conditions. The right to organize labor unions (Article 51) provides workers and employers the right to form labor unions and employers' associations, and higher organizations, without prior permission, to safeguard and develop their economic and social rights and the interests of their members in their labor relations. Everyone shall be free to become a member of or withdraw from membership in a union. Regarding collective bargaining, the right to strike and lockout, and the right of collective bargaining (Article 53), workers and employers have the right to conclude collective bargaining agreements reciprocally to regulate their economic and social position and work conditions. The right to strike and lockout (Article 54) gives workers the right to strike if a dispute arises during the collective bargaining process; procedures and conditions governing the exercise of this right and the employer's recourse to a lockout, the scope of both actions and any exceptions to which they are subject to be regulated by law. However, the provision: "The right to strike, and lockout may not be exercised in a manner contrary to the principle of goodwill to the detriment of society, and a manner damaging national wealth" is added considering the commonwealth.

Regarding the guarantee of a fair wage (Article 55), wages shall be paid in return for work. The State shall take the necessary measures to ensure that workers earn a fair wage suitable for their work and enjoy other social benefits. The country's economic and social conditions shall be considered in determining the minimum wage.

Regarding health services and conservation of the environment (Article 56) under Health, the Environment, and Housing, everyone has the right to live in a healthy, balanced environment. It is the duty of the State and the citizens to improve the natural environment and prevent environmental pollution. With the right to housing (Article 57), the state shall take measures to meet the housing needs within the framework of a plan that takes into account the characteristics of cities and environmental conditions and supports community housing projects.

Regarding the protection of youth (Article 58), under Youth and Sports, the State shall take measures to ensure the training and development of youth to whose keeping our State, independence, and our Republic are entrusted, in the light of contemporary science, in line with the principles and

reforms of Atatürk, and opposition to ideas aiming at the destruction of the indivisible integrity of the State with its territory and nation; regarding the development and strengthening of Sports (Article 59), the State shall take measures to develop the physical and mental health of Turkish citizens of all ages, and encourage the spread of sports among the masses. The State shall protect successful athletes.

Regarding the right to social security under Social Security Rights (Article 60), everyone has the right to social security. The State shall take the necessary measures and establish an organization to provide social security. Within the scope of persons requiring special protection in the field of social security (Article 61), the State shall protect the widows and orphans of those killed in war and the line of duty, together with the disabled and war veterans, and ensure that they enjoy a decent standard of living. Regarding Turkish nationals working abroad (Article 62), the State shall take the necessary measures to ensure family unity, the education of the children, the cultural needs, and the social security of Turkish nationals working abroad. It shall take the necessary measures to safeguard their ties with the country and to help them on their return home.

With the conservation of historical, cultural, and natural wealth (Article 63), the State shall ensure the conservation of the historical, cultural, and natural assets and wealth and take supporting and promoting measures towards this end. Any limitations to be imposed on such assets and wealth which are privately owned and the compensation and exemptions to be accorded to the owners of such, as a result of these limitations, shall be regulated by law.

With the protection of arts and artists (Article 64), the State shall protect artistic activities and artists. The State shall take the necessary measures to protect, promote and support works of art and artists and encourage the spread of art appreciation. The extent of social and economic rights (Article 65) states that the State shall fulfil its duties as laid down in the Constitution in the social and economic fields within the limits of its financial resources, considering the maintenance of economic stability.

It should be noted that the sections on fundamental rights and freedoms were designed in response to liberal constitutionalism, which seeks to protect the individual from political power. Within this understanding,

the instinct to protect the state against society and the individual, and sometimes the society against the individual, is clearly dominant.

However, considering that there should be a limit to the individual's rights, Article 13 of the Constitution states that:

Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, to safeguard the indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest public morals and public health, and also for specific reasons outlined in the relevant articles of the Constitution. General and specific grounds for restrictions of fundamental rights and freedoms may not conflict with the requirements of the democratic order of society, the secular Republic, and the principle of proportionality.

Thus, the Constitution paves the way for the limitations made/to be made on the individual's rights and determines the boundary of this limitation.

Again, it is stated within the scope of Article 14 of the Constitution, in order to prevent the abuse of the rights guaranteed by the individuals through the Constitution,

None of the rights and freedoms embodied in the Constitution may be exercised to violate the indivisible integrity of the State with its territory and nation, of endangering the existence of the Turkish State and Republic, of destroying fundamental rights and freedoms, of placing the government of the State under the control of an individual or a group of people, or establishing the hegemony of one social class over others, or creating discrimination based on language, race, religion or sect, or of establishing by any other means a system of government based on these concepts and ideas. Sanctions to be applied against those who violate these prohibitions and those who incite and provoke others to the same end shall be determined by law.

The aim here is to refrain from sacrificing the state's general principles and foundations for individual rights.

5. Conclusion

Individual freedoms, closely related to economic freedom, have begun to be interpreted in a way that the state should produce solutions/actively

intervene as a higher power in the face of the problems faced by liberal thought.[34] The understanding of liberal freedoms is also divided into two different channels in this context. The first one makes sense of itself through the absence of oppression, and the other may impose some obligations on other individuals or the state. Although negative and positive freedom concepts are the products of different structural and intellectual processes, they do not have to be in an existential opposition, as Berlin emphasized. The reason is that political and civil rights, which result from the negative conception of freedom, are established and used in society, and individuals need the positive exercise of power by the state to benefit from these rights.

If we examine the section of the Constitution of the Republic of Turkey devoted to the concept of rights, we will see that it includes both negative and positive freedoms. This portrayal of the concept of freedom imposes negative functions on the concept by limiting the practical sphere of the instrument of power, which we call the state;[35] it also includes the positive functions that protect the right of the individual to make demands from the state.

In addition, the Constitution of the Republic of Turkey, as a regime of freedoms, has limited the rights of freedom within a rigid and strict set of rules in Articles 13–14, which is conducive to creating a potential danger that the practices of the legislature and the executive will reinforce the reactionary behavior of the constitution makers.

It exposes fundamental rights and freedoms to the arbitrary exercise of the legislator through a general limitation provision (Article 13) that is broad in content, and it also exposes them to a second limitation through the specific limitation grounds contained in the articles to which they belong. Article 14 of the Constitution creates an additional safety measure for the possibility of abuse of fundamental rights and freedoms, undermining the accessibility of fundamental rights and freedoms within a democratic, pluralistic social structure under the 1982 Constitution.

Setting the grounds for restriction within the framework of concepts such as "national sovereignty, national security, public safety, public order,

34 Norman Barry, *Modern Siyaset Teorisi* (Ankara: Liberte Yayınları, 2018), 2.

35 Terry Caslin, "Ekonomi ve Devlet," in *Liberalizm, Refah Devleti, Eleştiriler, ed. Kemali Saybaşılı* (İstanbul: Bağlam Yayınları, 1993), 293.

public interest, public morality, public health, etc.", the meaning of which is arbitrary and can be interpreted in any way, expands the discretion of political decision-making bodies. At the same time, the decisions of the administrative courts and the Constitutional Court, which are tasked with protecting the individual, the supremacy of law, and the Constitution against judicial and administrative actions, will inevitably be subject to political fluctuations.

The definition of fundamental rights and the category of fundamental rights in the 1982 Constitution are formed according to the principles of modern constitutionalism; however, when it comes to the limitation of fundamental rights and freedoms, the 1982 Constitution introduced extensive grounds, means, and methods of limitation. Thus, the exercise of freedoms is left to the discretion and mercy of the political powers; the constitutional judicial system, the activation of which is subject to demanding conditions, is weak and insufficient to prevent violations. And individuals can be free only within the framework established by laws or governments.

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EU Directive on Work-Life Balance for Parents and Carers in the Context of Human Resources Problems in the Polish Public Administration

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Abstract: This article attempts to present and assess the adequacy of the solutions in the directive on work-life balance for parents and carers in the context of the problems and challenges faced by the Polish public administration in human resource management. The directive's solutions are analyzed from the perspective of post-pandemic reality, demography, changes in the structure of society and equality, and growing numbers and activation of women in the labor market. An example of applying the WLB policy in the Polish civil service was also presented.

1. Introduction

The changes brought by the post-pandemic reality, changing structure of society, socio-economic changes, digitization, and the changing labor market, including managing human resources, are undoubtedly a great challenge for public administration. The ongoing transformations significantly affect human functioning and increase the quality of life. Still, they also generate a number of new threats and challenges, such as maintaining a balance between work and private life. The increasing pace of life and the ever-increasing demands regarding both professional and personal life make conflict between these two spheres inevitable. The changing demographics, family model, conditions of its functioning, and the burden of an increasing number of duties make the search for a balance between

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professional and personal life necessary for the proper functioning of a human being. Therefore, the challenge has become to develop and implement mechanisms to reconcile professional and private life, the so-called work-life balance (WLB). Challenges related to globalization, rapid development of technology, increasing competitiveness, and constantly emerging crises mean that employers and employees face increased demands and mutual expectations. Empirical research suggests that job satisfaction is one of the most important factors and predictors of overall life satisfaction. An employer aware of the changes taking place and wants to meet them must be open to the employees' needs in this area. In order to be competitive in the labor market and attract and retain the best employees, creating and improving the work-life balance policy is now necessary and has become a permanent part of human resource management.

The importance of issues related to maintaining a balance between these two spheres is emphasized by the European Union. Considering, among other things, the promotion of employment and the improvement of living and working conditions, the EU policy is to support and complement the activities of the member states regarding equal opportunities for both sexes on the labor market and equal treatment at work.[1] At present, the challenge facing the European Union is to deal with the effects of the COVID-19 pandemic. It continues to have a considerable impact on people's lives worldwide, with serious repercussions on the quality of life and work.[2] The EU has a long-standing commitment to promote work-life balance. This has resulted in targets set to improve childcare, addressing the work-life balance challenges parents and carers face. In order to monitor and further investigate progress in this area, the EU Labour Force Survey (EU-LFS) module on reconciliation between work and family life was implemented in 2018.[3] On 17 November 2017,

1 Article 153(1)(i) of the Consolidated version of the Treaty on the Functioning of the European Union (O.J.E.C. C326, 26 October 2012).

2 The effects of the pandemic on the lives and work of Europeans are the subject of research conducted by the European Foundation for the Improvement of Living and Working Conditions (Eurofound).

3 Eurostat, "Reconciliation of work and family life – statistics," accessed February 10, 2023, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Reconciliation_of_work_and_family_life_-_statistics&oldid=511883#Background.

the European Parliament, the Council, and the European Commission formally proclaimed the European Pillar of Social Rights, which included an initiative to promote work-life balance. The answer to the future challenges faced by the labor market in the EU was the introduction of the directive on work-life balance for parents and carers on June 17, 2019. Work-life balance policies should contribute to the achievement of gender equality by promoting the participation of women in the labor market, the equal sharing of caring responsibilities between men and women, and the closing of the gender gaps in earnings and pay. Such policies should consider demographic changes, including the effects of an ageing population.[4]

The directive lays down minimum requirements designed to achieve equality between men and women regarding labor market opportunities and treatment at work by facilitating the reconciliation of work and family life for working parents and carers. To that end, it provides for individual rights related to paternity leave, parental leave and carers' leave, as well as flexible working arrangements for working parents and carers.

In the face of ongoing changes and new challenges related to, among others, the effects of the COVID-19 pandemic, an analysis of solutions facilitating the reconciliation of professional and personal life, including family life, which will enable combining work with other duties, seems necessary from the point of view of effective human resource management in public administration in Poland. Human resource management directly affects the efficiency and effectiveness of public administration. Work-life balance policies and initiatives are key to developing a diverse workforce in the public sector and increasing the employment rate of women, which is all the more relevant in the context of public administration, as women account for more than 68% of public administration employees.

This article aims to discuss the assumptions of the directive of the European Parliament and of the Council on work-life balance for parents and carers, which is the basis for the changes introduced to Polish labor laws. The above discussion will be made in the context of diagnosed

[4] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (O.J.E.C. L188).

contemporary and future problems and challenges in human resource management in public administration in Poland. The relevant considerations will be preceded by general comments on the concept of work-life balance, with particular emphasis on the assumptions of European Union policy. Then, the most important changes in labor laws related to the implementation of the WLB directive will be presented, as well as the main problems and challenges in human resource management in public administration in Poland in the context of WLB solutions; moreover human resource management in the civil service as an example of the implementation of the WLB policy in public administration.

The research questions that the author tried to answer were: Are the solutions of the WLB directive adequate to the diagnosed problems that public administration is currently facing and will also face in the near future? Should actions be taken, including those of a legal nature, going beyond the minimum specified in EU regulations? Should the public administration take forward-looking and strategic actions regarding WLB solutions?

2. The Essence and Assumptions of Work-Life Balance

The assumptions of the work-life balance concept were created as a result of the emergence of real needs to introduce solutions to maintain the employees' balance between work and personal life. Attention was drawn to the fact that the employees' personal life has a direct impact on their effectiveness, efficiency, motivation, and creativity. The correlation between professional work and personal life turned out to be a matter of interest not only to the employees but also to the employers. The use of specific solutions by employers to help the employees combine these two spheres of life pays off in obtaining measurable economic benefits and determines their competitiveness in the labor market. Work-life balance is a term that is difficult to define. This is due to the ambiguity of the terms it includes, but mostly "life", which in this case covers the entire area of human activity outside work. It means such spheres as family life (care for children and other dependants), social life (e.g. maintaining relationships with other people), and personal life (e.g. health care, hobbies, recreation). When defining work-life balance, the subjective approach of a person to this problem and

cultural conditions should be taken into account.[5] At the individual level, work-life balance means the ability to combine work with other dimensions of human life, home, family, health, social activity, and private interests. At the state level, the reconciliation of work and family life is part of three policies: employment policy, family policy, and gender equality policy.

Work-life balance is defined as the overall level of contentment resulting from an assessment of one's degree of success at meeting work and family role demands.[6] Some definitions suggest that work-life balance is the ability to accomplish the goals set in both work and personal life and achieve satisfaction in all life domains. Other definitions suggest that the term balance implies equal engagement in and satisfaction with work and personal life roles. Still, other definitions include the idea that balance is indicative of the absence of conflict between work and personal life, an idiosyncratic construct, or a social construct built between an individual and others in their work and personal life domains.[7] It is also referred to as equal engagement in and satisfaction with work and personal life roles,[8] where individuals and other people in their lives perceive little or no conflict between work and personal life.[9] WLB is defined as such organizational activities (e.g. flexible working time, telework, childcare at the workplace) that facilitate the reconciliation of professional and non-professional duties, i.e. caring for dependants and having a personal life, hobbies, leisure, or recreation.[10]

The first sphere of interest of employers in the personal life of employees was family life. The precursors of using family-friendly solutions are American companies, which from the 1960s noticed the growing problem

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5 Katarzyna Hildt-Ciupińska, "Work-life balance a wiek pracowników," *Bezpieczeństwo Pracy – Nauka i Praktyka*, no. 10 (2014): 14.

6 Anja-Kristin Abendroth and Lura den Dulk, "Support for the Work-Life Balance in Europe: The Impact of State, Workplace, and Family Support on Work-Life Balance Satisfaction," *Work, Employment and Society* 25, no. 2 (2011): 3.

7 Carrie Bulger, "Work-Life Balance," in *Encyclopedia of Quality of Life and Well-Being Research*, ed. Alex C. Michalos (Heidelberg–New York–London: Springer Dordrecht, 2014), 7231–2.

8 Jeffrey Greenhaus, Karen M. Collins, and Jason D. Shaw, "The Relation between Work – Family Balance and Quality of Life," *Journal of Vocational Behavior* 63, no. 3 (2003): 510–31.

9 Sue Campbell Clark, "Work-Family Border Theory: A New Theory of Work-Life Balance," *Human Relations: Thousand Oaks* 53, no. 6 (2000): 747–70.

10 Hildt-Ciupińska, "Work-life," 14.

of reconciling professional and family roles, especially by women raising small children, who began to enter the labor market en masse. In the following years, a conviction emerged very quickly, supported by numerous studies conducted mainly in the 1990s, especially in the USA, Canada, and Australia, that all employees in companies should be covered by work-life balance programmes. As noted by David Clutterbuck, the inability to meet the needs of employees who want fulfilment in life is the cause of problems in most companies, including those related to achieving a competitive advantage and maintaining profitability.[11] Research shows that work-life balance plays a vital role in individual well-being, such as health satisfaction, family satisfaction, and overall life satisfaction. Hence, this is a key area of research in organizational behavior, human resource management, and quality of life studies.[12]

The essence of work-life balance is defined as directing attention to maintaining a balance between professional and personal life, enabling the individual to strive for self-realization in non-work aspects of life while maintaining an understanding of the multidimensionality of the situation. Therefore, WLB is the attitude of the employer and the employee manifested in activities facilitating the balance between professional work and private life. The key to realizing this idea is to perceive these two spheres as complementary, not opposed to each other. The goal, however, is satisfaction and well-being in all spheres of life without making difficult decisions that may negatively impact our actions.[13] The standards of human resource management in the civil service specify that the main objective of WLB is to promote solutions aimed at reconciling work with other aspects of the employee's life, creating a friendly atmosphere at work, increasing the motivation and efficiency of employees, strengthening the positive

11 Cecylia Sadowska-Snarska, "Wspieranie równowagi praca-życie pracowników na poziomie firm: teoria i praktyka," *Research Papers of Wrocław University of Economics*, no. 292 (2013): 100–2.

12 Joseph M. Sirgy and Dong-Jin Lee, "Work-Life Balance: An Integrative Review," *Applied Research in Quality of Life* 13 (2018): 229.

13 Małgorzata Gotowska, "Work Life Balance in the Balance Model of Life (Being)," in *Relacja praca-życie pozazawodowe. Droga do zrównoważonego rozwoju jednostki*, ed. Renata Tomaszewska-Lipiec (Bydgoszcz: Wydawnictwo Uniwersytetu Kazimierza Wielkiego, 2014), 64.

image of the employer among employees and job candidates, and supporting a healthy lifestyle.[14]

3. Work-Life Balance Assumptions in the Policy of the European Union

Work-life balance refers to the level of prioritization between an individual's work and personal life. A good work-life balance is achieved when an individual's right to a fulfilled life inside and outside paid work is accepted and respected as the norm for the mutual benefit of the individual, business, and society. Enabling a better work-life balance for workers across the life course has been an EU policy goal for many years, as it is central to ensuring that work is sustainable for all.[15]

The first changes in the EU countries could be noticed in the early 1990s when attention began to be paid to the need to involve employers in helping employees combine professional and family life. In 1997, the European Employment Strategy (EES) established a framework to encourage EU member states to implement effective policies. As a result of demographic change, the proportion of people of working age in the EU is shrinking while the relative number of those retired is expanding. The share of older people in the total population is expected to increase significantly in the coming decades. This may, in turn, lead to an increased burden on those of working age to provide for the social expenditure required by the ageing population for a range of related services.[16]

More and more companies are aware that to attract and retain talented employees, they must focus their activities not only on offering adequate remuneration but also on creating an appropriate organizational and work culture conducive to reconciling life.[17] At the organizational level, the dis-

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14 Ordinance No. 6[1] of the Head of Civil Service of 12th March 2020 concerning the standards of human resources management in the civil service.

15 Eurofund, "Work-life balance," accessed February 10, 2023, https://www.eurofound.europa.eu/topic/work-life-balance.

16 Eurostat, "Population Structure and Ageing," accessed February 10, 2023, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population_structure_and_ageing.

17 Ewlira Gross-Gołacka, "Jak wygląda zarządzanie różnorodnością i work-life balance w Polsce," in *Odwaga i równowaga czyli work-life balance po polsku* (Warsaw: Karta różnorodności koordynowana przez Forum Odpowiedzialnego Biznesu, 2020), 55.

cussed concept and its solutions are an instrument for improving the quality of work and life. In the external dimension, a positive image of the employer is being built (employer branding). For organizations implementing the WLB concept, it is easier and cheaper to attract suitable candidates for work in the company, and, at the same time, it is easier to prevent the outflow of employees to the competition.[18] In Poland, this plays a fundamental role in creating a strong, stable public administration staff, where recruiting and retaining high-class specialists, e.g. IT, has been very difficult for years. Research shows that an effective work-life balance policy translates into decreased absenteeism and staff liquidity, protection of investments made in employees, lower recruitment and training costs, less frequent use of sick leave, reduced employee stress, greater employee loyalty, increased productivity, and improved company image. Effective implementation of work-life reconciliation measures can benefit both employees and employers. On the one hand, it is a way to better manage and use employees' potential; on the other hand, WLB measures also provide an opportunity to earn the reputation of a good employer and attract the best and most competent employees to the company. The above benefits play an important role for the Polish public administration, which should develop specific, high standards in this respect to become an attractive employer in the labor market.

The premise of the new work-life balance directive for parents and carers is that the work-life balance policies should contribute to the achievement of gender equality by promoting the participation of women in the labor market, making it easier for men to share caring responsibilities on an equal basis with women, and closing gender gaps in earnings and pay.[19] The directive sets out a number of new or improved minimum standards for parental, paternity and carers' leave, as well as flexible working arrangements, also aimed at increasing their uptake by men. The previous EU directive from 2010 was repealed due to demographic challenges, migration problems, and the situation of women in the EU labor market. Work-life balance is the subject of research by specialized EU bodies. Since this is

18 Gotowska, "Work life balance," 65.

19 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (O.J.E.C. L188).

an important issue for the EU and refers to problems related to the labor market, shaping demographics and gender equality, the results of the observations and analyses are the basis for the introduced legal solutions. Eurofound gathers information on working life in the EU, looking at national and EU-level policies to promote work-life balance and investigating the role of social dialogue and collective bargaining in this area. The European Quality of Life Surveys (EQLS) provide comparisons between countries on the reconciliation of work and family life, flexible working time arrangements, and the provision of quality care services. The EQLS indicators are more inclusive of environmental and social aspects of progress and, therefore, easily integrated into the decision-making process and taken up by public debate at EU and national levels in the European Union.[20] The European Company Surveys (ECS) provide data on why and how companies make use of a wide variety of working time arrangements. The European Company Survey (ECS) has been carried out regularly since its inception in 2004–2005 as the European Establishment Survey on Working Time and Work-Life Balance (ESWT).[21] The European Working Conditions Surveys (EWCS) look at the organization of working time across the EU and related issues, including flexible arrangements, working time preferences, and work-life balance.[22]

At the community level, there have been no paternity or sick leave regulations, except for absences due to force majeure (urgent family matters, fortuitous events). Therefore, the European Union has initiated work to improve work-life balance solutions for parents and carers and to increase their use by men. The aim of the work is to prevent the complete withdrawal of women from the labor market and achieve a more balanced distribution of caring roles between women and men.[23]

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20 Eurofound, "European Quality of Life Surveys (EQLS)," accessed February 10, 2023, https://www.eurofound.europa.eu/surveys/european-quality-of-life-surveys.

21 Eurofound, "European Company Surveys," accessed February 10, 2023, https://www.eurofound.europa.eu/surveys/european-company-surveys.

22 Eurofound, "Work-life balance," accessed February 10, 2023, https://www.eurofound.europa.eu/topic/work-life-balance.

23 Katarzyna Siemienkiewicz, "Jak dyrektywa work-life balance zmieni polski Kodeks pracy?," in *Odwaga i równowaga czyli work-life balance po polsku* (Warsaw: Karta różnorodności koordynowana przez Forum Odpowiedzialnego Biznesu, 2020), 71.

4. Implementation of the Directive into the Polish Legal System – Changes in Labor Laws

It should be emphasized that although the deadline for implementing the EU directive on work-life balance for parents and carers[24] expired on August 1, 2022, the amendment to the Labour Code introducing the provisions of the above directive entered into force on April 26, 2023. It is worth noting that some solutions contained in the directive exist in the Polish legal order, and some assumptions are new or recommend using more favorable solutions than those currently in force in Polish legislation. This is the case with parental leave, regulated by the Labour Code, where the directive provides more favorable provisions, which means that parental leave will be extended. One of the goals of the work-life balance directive is to increase fathers' participation in childcare. For this reason, each parent is only entitled to 9 weeks of parental leave. They cannot transfer it to the other parent. However, they can use it simultaneously. Their leave is then added up. If this leave is not taken, it will be forfeited. It is projected that fathers will be more likely to request parental leave under this amendment to avoid losing their entitlement to this paid leave.[25] A significant change brought about by the directive is the introduction of a carers' leave, under which each employee will be entitled to five days off work a year. Currently, Article 188 § 1 of the Labour Code provides only for an exemption from work for the care of a child under 14 years of age for 16 hours or two days while retaining the right to remuneration. The directive extends this right to other persons. Under Articles 173^1 to 173^3 of the Labour Code, according to the proposed provision, an employee will be entitled to a care leave during a calendar year to provide personal care or support to a person who is a family member or lives in the same household and who requires care or support for serious medical reasons, for five days. This leave will be used whole or in parts. A son, daughter, mother, father, or spouse will be considered a family member.[26] Due to the ageing of the population and the resulting dissemination of

24 Ibid.

25 Article 5 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (O.J.E.C. L188).

26 Ustawa z dnia 9 marca 2023 r. o zmianie ustawy – Kodeks pracy oraz niektórych innych ustaw (The Constitution of the Republic of Poland, Journal of Laws 2023, item 641).

age-related restrictions, a constant increase in the need for care is expected, as noted in the directive's preamble. A new solution is also the introduction of force majeure leave to ensure that every worker is entitled to leave from work for urgent family reasons in the event of illness or accident, which makes the worker's immediate assistance essential. Article 148[1] of the Labour Code states that an employee will be entitled to leave from work due to force majeure for two days or 16 hours during a calendar year while retaining the right to half of their remuneration.[27] Member states may limit any worker's right to time off work on grounds of force majeure to a certain period each year, by case, or both.[28] The directive also provides for facilitations in the flexible organization of work. Flexible working conditions for employees who are parents or carers mean that employees can adjust their work schedule, including by using remote work, flexible work schedules, or reduced working hours.[29] Article 188[1] of the Labour Code states that an employee raising a child may submit an application for flexible work organization in paper or electronic form until that child is eight years old. The Code defines what flexible work organization is and includes telework.[30] The Europeanization literature underscores that directives include in-built means for member states to implement and transpose EU directives suited to their domestic institutions. Furthermore, it highlights the importance of looking not only at legal implementation but also at practical implementation, which involves the "domestication" of directives, that is, how different political and societal actors, with different aims, play a role in adapting EU law to domestic institutions.[31]

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27 Ibid.

28 Article 7 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (O.J.E.C. L188).

29 Ibid., Article 9.

30 Articles 139, 140[1],142, 143, and 144 of Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy (The Constitution of the Republic of Poland, Journal of Laws 1974, No. 24, item 141).

31 Karolina de la Porte et al., "The EU's Work-Life Balance Directive: Institutional Change of Father-Specific Leave across Member States," *Social Policy Administration* 57, no. 4 (July 2023): 552.

5. Main Problems and Challenges in Human Resource Management in Public Administration – WLB Solutions

Public administration in our country faces many problems and challenges in human resource management. Issues related to the post-pandemic reality, demography, ageing society, equality, and increasing the number and activation of women in the labour market relate to general problems of human resource management in the EU and globally. Assuming that people are the most important resource of an organization, or public administration in this case, the work-life balance issues become the key element of the human resource management strategy. Moreover, considering its mission and the need to function continuously and sustainably, public administration is obliged to take action to minimize risks in human resource management. The benefits of implementing work-life policy recorded in the private sector can also be directly applied to the public sector. Given the current problems and challenges facing public administration in human resource management, benchmarking activities are fully justified.

5.1. The COVID-19 Pandemic – A Hybrid Work Model

The COVID-19 pandemic forced both employees and employers to verify and look at the labor market and WLB issues from a different perspective. A study on living and working during the pandemic (Eurofound's e-survey, Living, working and COVID-19) showed that the work-life balance worries related to home life have worsened.[32] In addition, the latest round of the e-survey indicates a sharp decline in family time among workers.[33] The latest findings, published in July 2022, show that despite some improvement in work-life balance, almost 30% of workers reported that their job is preventing them from spending time with their family, compared to a significantly lower figure of 19% in 2020.[34] The pandemic has also forced

[32] In 2020, 20% of men and 25% of women reported they were too tired to do household jobs after work, while the corresponding figures for 2022 are 32% and 41%, respectively. Eurofound, *Fifth Round of the Living, Working and COVID-19 E-survey: Living in a New Era of Uncertainty* (Luxembourg: Publications Office of the European Union, 2022), 5.

[33] Ibid. In 2020, 19% of men and women reported that their jobs prevented them from spending time with their families; in 2022, 30% of men and 29% of women expressed this opinion.

[34] Eurofound, "Work-life balance," accessed February 10, 2023, https://www.eurofound.europa.eu/topic/work-life-balance.

changes in the way we work. The need to work remotely or in a hybrid mode has permanently changed the possibilities and approach of both employers and employees to work. Undoubtedly, many changes in this sphere have taken place in public administration. The initial difficulties associated with pandemic restrictions and the transition to remote work from the public administration perspective seem to reveal new opportunities and create a chance to make changes involving digital transformation. Performing work remotely also created opportunities to verify the capabilities, needs, and expectations of public administration human resources in this area and to introduce changes related to hybrid work performance.

A survey conducted during the pandemic among public administration employees in Poland shows that 54.4% of respondents stated that the pandemic significantly influenced the functioning of their institutions, and 41.2% said that the state of the pandemic significantly influenced the way they performed their official duties. When the pandemic began, 83.4% of respondents started working remotely, including 31.5% working exclusively at home. Almost half (49.2%) of employees said remote work was not done in their workplace before the pandemic. Another 40.6% answered that it was used occasionally. Only 10.2% of respondents indicated that remote work took place often and very often. Moving on to the assessment of remote work and the attitude towards performing it in the future, let us note that as many as 76.5% of the officials interviewed rated their experiences in remote work as very good or good. It is worth emphasizing that many employees would like to continue working remotely after the pandemic. However, a preference for full-time remote work was declared by 25.4% of respondents. Still, 47.5% of surveyed employees would be willing to work remotely. Preference for remote work in the future was declared by employees without minor children in the household – 77.6% of respondents would like to do some or all of their work remotely, and among people taking care of children – 67.1% in total. The vast majority of employees considered their remote work conditions good (36.2% very good and 39.5% good). More than half of employees (50.3%) had no problems with remote work tools. The rest reported sporadic problems related mainly to technical aspects of using ICT systems. The most frequently highlighted problem was the quality of the system infrastructure. It is worth noting that remote working conditions were rated higher by employees without minor children

in the household – 39.3% very good and 41.3% good. Among respondents with minor children in the household – 32.3% and 37.3%, respectively. The benefits of remote work included "better time management" (62%), "focusing only on a specific task (without being distracted by other tasks)" (49%), "the ability to work in a more pleasant environment of one's own housing" (40%), and "the possibility of taking care of household matters at the same time" (36%). According to the respondents, a significant advantage is eliminating commuting to work and saving time and money. As a result, 76.5% of the officials interviewed rated their experiences in remote work as very positive and positive, and a large proportion would like to continue remote work after the end of the pandemic. There is an increase in flexibility and a necessary departure from rigid regulations at the level of the employment contract, as 25.4% of respondents declared their willingness to switch to remote working mode permanently. Partial remote work would be performed by 47.5% of surveyed employees.[35] In the report's summary, a *de lege ferenda* proposal was made to amend the Labour Code regarding the sanctioning of remote work.

According to the International Labour Organization (ILO), the organization of working time should ensure the health, safety, and gender equality of employees, as well as be "family-friendly" and allow employees to co-decide about their working hours.[36] Flexible working conditions are among the most important factors for employees when choosing a workplace and maintaining job satisfaction. Therefore, employers who decide to offer their employees, for example, the possibility of remote work or flexible working hours, will become more attractive and will have a greater chance of bringing and retaining the best employees. McKinsey research[37] revealed that 94% of Polish mothers who do not work want to return to the labor market. However, 70% are concerned about combining professional work with childcare. For 67% of respondents, the solution

35 Jarosław Szczepański and Łukasz Zamęcki, *Praca zdalna w administracji publicznej w czasie pandemii COVID-19* (Warsaw: Wydawnictwo Instytutu Nauki o Polityce, 2021), 13–25.

36 Gotowska, "Work life balance," 66.

37 McKinsey & Company, *Win-win: How Empowering Women Can Benefit Central and Eastern Europe*, 2021.

would be introducing flexible working hours, while for 48%, it would be remote work.[38]

To encourage working parents and carers to remain in the workforce, those workers should be able to adapt their working schedules to their personal needs and preferences. Therefore, working parents and carers should be able to request flexible working arrangements, meaning the possibility for workers to adjust their working patterns, including remote working arrangements, flexible working schedules, or a reduction in working hours, for caring purposes. To address the needs of workers and employers, it should be possible for the EU member states to limit the duration of flexible working arrangements, including a reduction in working hours. While working part-time has been shown to be useful in allowing some women to remain in the labor market after having children, long periods of reduced working hours may lead to lower social security contributions, translating into reduced or non-existing pension entitlements. The ultimate decision to accept or reject a worker's flexible work arrangement request should lie with the employer. Specific circumstances underlying the need for flexible working arrangements can change. Workers should, therefore, not only have the right to return to their original working patterns at the end of a given agreed period but also be able to request to do so at any time when a change in the underlying circumstances necessitates it.[39]

Subsequently, this indicated that working from home and being engaged at work favorably and significantly impacted work-life balance. Individuals who remained productive while working from home exhibited an enhancement in their work and life, and dedication at work was shown to help in achieving work-life balance. These results can enable the public sector to properly plan the work-from-home concept that will improve work-life

38 "Dyrektywa work-life balance wchodzi w życie! Czy to szansa dla przepracowanych polskich rodziców?," April 26, 2023, INFOR PL S.A., accessed April 26, 2023, https://kadry.infor.pl/kodeks-pracy/czas-pracy/5731196,dyrektywa-worklife-balance.html.

39 Article 9 of Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (O.J.E.C. L188).

balance.[40] Hybrid work is common in public administration (32%).[41] On the work front, it is evident that with the reopening of society, people would return to their place of work. While it was widely predicted that teleworking was here to stay and that the pandemic would trigger a work-from-home revolution that would permanently change the future of work, by spring 2022, many e-survey respondents were working exclusively at their workplace again. Yet, the respondents' preference seems to have been to continue to telework daily or several times a week. The proportion expressing this preference is highest among those aged 30–44, who typically have young children.[42] In light of the aforementioned changes in the labor market, the development of future WLB policies must include a spectrum of directions, such as customization of working hours under WFH (working from "home"), ensuring trust and support for WFH employees, responding to the demands to work from the office, and guaranteeing equal pay and the right to disconnect.[43] The literature includes several studies that stress the importance of the flexibility conferred by teleworking on motivation since it can help people carry out their work activities in a more friendly and pleasant environment. Public administration employees are generally strongly motivated by the possibilities offered by teleworking to improve work-life balance. However, there are doubts about whether teleworkers can manage this alternative form of work organization to improve their lives effectively.[44] There is clear continuity around personal work benefits and satisfaction, balancing working and personal life and having some control over work. This includes evidence of increasing productivity when telework becomes flexible but not dominant in working life. The introduction of telework is having, and will continue to have, a notable impact on

40 Nur Izzatul Afifah and Aryana Satrya, "Work–Life Balance in the Public Sector: The Effect of Work from Home and Work Engagement," in *Contemporary Research on Management and Business*, ed. Siska Noviaristanti (London: CRC Press/Taylor & Francis Group, 2022), 123.

41 Eurofound, *Fifth Round*, 3.

42 Ibid., 16.

43 Lynna Vyas, "'New Normal' at Work in a Post-COVID World: Work–Life Balance and Labor Markets," *Policy and Society* 41, no. 1 (March 2022): 163.

44 Cesar Madureira and Belén Rando, "Teleworking in Portuguese Public Administration during the COVID-19 Pandemic: Advantages, Disadvantages, Work-Life Balance and Motivation," *Work Organisation, Labour & Globalisation* 16, no. 2 (2022): 123.

public sector organizations, including the need for new rules for telework, social and personal factors, and the need for adequate infrastructure and competences, in other words, an organizational change. With COVID-19 as the tipping point, teleworking has become mainstream, also in the public sector.[45]

5.2. Demography – Changes in the Structure of Society

Demographic changes, including the ageing of the population and the associated increase in demand for informal care, also form the background of the regulations introduced by the WLB directive. These regulations take into account the need to promote a high level of employment in the Union and keep workers connected with the labor market.[46] The increase in dual-earner families and changes in family structures, such as the increase in single-parent families, have brought the work-life balance into the agenda of national and European Union policies.[47] The importance of problems and changes is felt throughout the structures of the European Union. The impact on society in the Union is likely to be a major factor in the changes ahead. Consistently low birth rates ("ageing at the bottom") and longer life expectancy "ageing at the top") change the shape of the age pyramid, and then the change will result from entering the older structure. This brings about demographic change in the EU, where the working-age population is declining, and the relative number of pensioners is increasing.[48] A generally

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45 Noella Edelmann and Jeremy Millard, "Telework Development Before, during and after COVID-19, and Its Relevance for Organizational Change in the Public Sector," ICEGOV '21: 14th International Conference on Theory and Practice of Electronic Governance, October 2021, 441–2.

46 Joanna Dudek, "Work-Life Balance – An EU Perspective," HRlaw.pl, May 16, 2022, accessed February 10, 2023, https://hrlaw.pl/en/work-life-balance-an-eu-perspective/.

47 Timo Anttila et al., "Working-Time Regimes and Work-Life Balance in Europe," *European Sociological Review* 31, no. 6 (2015): 714.

48 The population of the EU on 1 January 2021 was estimated at 447.2 million. Young people (0 to 14 years old) made up 15.1% of the EU's population, while people considered to be of working age (15 to 64 years old) accounted for 64.1% of the population. Older people (aged 65 or over) had a 20.8% share (an increase of 0.2 percentage points (pp) compared with the previous year and an increase of 3 pp compared with 10 years earlier). To compare, in 2020, the three population groups, young people (0 to 14 years old), working age (15 to 64 years old) and older people (aged 65 and over) represented, respectively, 15.1%, 64.3%,

increasing trend can be observed for the EU's old-age and total dependency ratios.[49]

Population ageing is a long-term trend which began several decades ago in Europe. Consistently low birth rates and higher life expectancy are transforming the shape of the EU's age pyramid; probably the most important change will be the marked transition towards a much older population structure, a development which is already apparent in several EU member states. This is reflected in an increasing share of older people coupled with a declining share of working-age people in the total population. During the period from 2021 to 2100, the share of the population of working age is expected to decline, while older people will probably account for an increasing share of the total population: those aged 65 years or over will account for 31.3% of the EU's population by 2100, compared with 20.8% in 2021.[50]

Unfortunately, the negative effects of the changing structure of society are also noticeable in Poland. The statistics unambiguously and unequivocally reveal the problems that the public administration is already facing, and the above problems will only increase in the future. The Polish population will decline by approximately seven million by 2070. The main cause of this change is a decline in the total fertility rate (TFR) in recent decades, from a level close to ensuring a stable population in 1990 (2.06 live births per woman) to 1.36 in 2019. According to the Eurostat projections, fertility will increase to 1.65 in 2070, but it will remain well below the natural replacement rate. The old-age dependency ratio would increase from about 29% in 2019 to 68% in 2070.[51]

The 2021 General Population Census results indicate significant changes in the population structure by economic age groups. As a result of

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and 20.6% of the EU's population. Eurostat, "Population Structure and Ageing," accessed February 10, 2023, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population_structure_and_ageing#The_share_of_elderly_people_continues_to_increase.

49 Ibid. The old-age dependency ratio increased by 5.9 pp during the past decade (from 26.6% in 2011 to 32.5% in 2021), while the total dependency ratio increased by 6.3 pp over the same period (from 49.7% in 2011 to 56.0% in 2021).

50 Ibid.

51 European Economy Institutional Papers, *The 2021 Ageing Report: Economic and Budgetary Projections for the EU Member States (2019–2070)*, Country Fiche on public pensions for the Ageing Report 2021 – Poland, Brussels: 2021, 14.

unfavorable demographic trends, the percentage of people of pre-working age has decreased. In the 2021 census, the share of the total population aged 0–17 was 18.4%, compared to 18.7% in the 2011 census. The main reason for the decrease in the number of people in the pre-working age group was the low number of live births (by over 2.2 million), and the percentage (by 3.0 percentage points) of the working age population also decreased. On the other hand, the share of the post-working age population increased significantly, from 16.9% to 22.3%, i.e. by more than 5 percentage points. This means that nearly 2 million people in the age group 60/65 and more have arrived within a decade, and thus more than every fifth inhabitant of Poland is over 60 years old. As a result of changes in economic age groups, the dependency ratio increased. This means that in 2021, for every 100 people of working age, there were 69 people of non-working age, nearly 14 people more than in 2011.[52] According to the preliminary report of Statistics Poland (GUS), based on the census results, the number of people of working age decreased by 2.2 million in 2021 compared to the situation 10 years before. At the same time, in the last decade, there have been almost 2 million seniors (women aged 60 and over and men 65 and over). Forecasts are not optimistic. According to the European Commission's report, *The 2021 Ageing Report: Economic & Budgetary Projections for the EU Member States (2019–2070)*, the population of Poland will decrease by almost 20% before 2070. In addition, an increase in the old-age dependency ratio can be expected, an indicator showing the number of people at retirement age compared to the number of people at working age. According to the report's authors, Poland will have one of the highest ratios in the EU, which will exceed 65%. The same report indicates that the labor force in Poland will decrease by at least a third by 2070. In this respect, our country is among six EU countries where this problem is the most urgent. The situation in which fewer and fewer employees have to support an increasing number of retirees raises concerns about the amount of benefits.[53]

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52 Główny Urząd Statystyczny, *Report on Preliminary Results of the National Census of Population and Housing 2021*, Warsaw: 2022, 24–5.

53 Marcin Jendrzejczak, "Pogarszają się prognozy demograficzne dla Polski," FORSAL.PL, August 31, 2022, accessed February 10, 2023, https://forsal.pl/gospodarka/demografia/artykuly/8525768,pogarszaja-sie-prognozy-demograficzne-dla-polski.html.

An important issue related to changing demographics is recruiting employees from a significantly limited pool of candidates in the labor market by the public administration. Equally important are the changing patterns and expectations of young people entering the labor market. Generations Y and Z are setting new patterns in human resource management. The generation born in the 1980s and early 1990s is estimated to be the fastest-growing segment of the current workforce. Today's public sector HR professionals would be hard-pressed to take lightly the needs, desires, and attitudes of a generation from which public managers will be mining future employees. Their philosophy is to live first and then work. One of the criteria in choosing an employer is lifestyle. Generation Y is better educated and more tech-savvy than previous generations, but managing them in the workplace poses unique challenges to employers. Undoubtedly, it can be said that they are much more aware of the role of maintaining a balance between work and private life. Consequently, they also have high expectations towards the employer to understand the essence of this balance and enable it to be maintained. Generation Y members not only want flexible hours and schedules but also remote work options because of their perception of the never-ending intersection of work and life. They see themselves doing work everywhere except in a cubicle. Jobs must be designed to accommodate these workers' personal lives, not the other way around.[54] Even greater changes in attitudes and views that will affect the shape of the future labor market are presented by Generation Z. This is the generation of people born after 1995, i.e. currently entering the labor market and in the process of education. We learn from research that when choosing a workplace, the most important criterion for representatives of Generation Z is a good atmosphere and relations with people, a good location, and quick access to work, while employment stability comes only third. The importance of flexible working time is growing compared to previous generations. It is also relevant that the interest in work under employment contracts has decreased significantly. They are the first generation brought up entirely in the times

[54] Joe Jarret, "American Society for Public Administration, Generation Y and the Work-life Balance: Challenges for Public Sector HR Professionals," *PA Times*, accessed February 10, 2023, https://patimes.org/generation-work-life-balance-challenges-public-sector-hr-professionals/.

of a market economy shaped under neoliberal influences. The dominant narrative is permeated with the concepts of self-made man, creative industries, and the myth of Silicon Valley, which results in the popularity of start-ups and the desire to run your own business. It can be assumed that in the future, many more people from Generation Z will want to run their own businesses than their predecessors did. Young people prefer flexible forms of employment or self-employment, as they associate it with freedom and self-determination.[55] In this context, the introduction of WLB solutions seems to be a strategic move in human resource management. Creating the image of public administration as an attractive employer understanding and meeting the needs of the future generation of employees is part of employer branding activities, which, given the current trends in the changing number of potential job candidates, is necessary.

5.3. Equality, Increasing Number and Activation of Women in the Labor Market

The reconciliation of work and life is considered a priority in the European Union in achieving gender equality, fostered by increasing women's participation in the labor market and promoting the sharing of household duties (childcare) between women and men. Reconciling these spheres of life was a key element in achieving the primary goal of the Europe 2020 strategy, i.e. raising the employment rate of women and men aged 20–64 to 75%. The Strategy for equality between women and men 2010–2015, adopted by the Commission, emphasizes that economic independence is a prerequisite for taking control of one's life for both women and men. Facilitating the effective reconciliation of work and life for both women and men is a key factor in increasing their participation in the labor market, especially given the contemporary demographic problems.[56]

A major goal of the WLB directive is to make it easier for parents and carers to combine work and private life, achieve gender equality in employment, and work towards a balanced sharing of caring responsibilities between men and women. On the one hand, attention is drawn to the difficulties of reconciling professional and family responsibilities, contributing

55 Karolina Messyasz, "Pokolenie Z na rynku pracy – strukturalne uwarunkowania i oczekiwania," *Acta Universitatis Lodziensis, Folia Sociologic* 76 (2021): 105–11.

56 Hildt-Ciupińska, "Work-life," 15.

to women's under-representation in the labor market. A point is made that women with children or sick or dependant relatives usually devote much of their time to unpaid caring duties. This has a negative impact on women's employment – women in this situation often devote less time to paid work or withdraw from the labor market altogether. On the other hand, it is emphasized that men need to be encouraged to share care responsibilities more equally. It is crucial here to tackle inequalities that perpetuate gender stereotypes and widen gender gaps in work and care. The frequently discussed right of the father to participate in the upbringing of his child and the benefits to the child of care provided by both parents are also important in this context.[57] The Social Insurance Institution (ZUS) statistics show that in 2021, only 1% of men took parental leave, and only 55% took paternity leave. Men collected 31% of care benefits paid in Poland in 2021. The IQS study indicated that financial issues, fears related to loss of job and salary, and limited opportunities for promotion are the key barriers to the use of parental leave by fathers. Almost one in three fathers believe that a man taking leave will be unwelcome in their workplace. Interestingly, one in five did not receive consent from their partner.[58] According to the latest Pracuj.pl study, as many as 85% of working parents appreciate the amendment to the Labour Code, which introduces an additional nine-week parental leave for fathers. This change has a chance to translate into tangible support for mothers and relieve them of some of their responsibilities. However, 53% of working fathers fear their employer would view such a benefit negatively.[59] Undoubtedly, women are important to the public sector as one-third of working women are employed in the public sector, compared to every sixth man.[60] The percentage of women employed in Poland in the public sector is significantly higher than in the private sector, as confirmed by GUS data for

57 Dudek, "Work-Life Balance," accessed February 10, 2023, https://hrlaw.pl/en/work-life-balance-an-eu-perspective/.

58 "Zaledwie 1% ojców korzysta z urlopu rodzicielskiego a tylko ponad połowa z ojcowskiego," legalis administracja, September 24, 2023, accessed September 24, 2023, https://gov.legalis.pl/zaledwie-1-ojcow-korzysta-z-urlopu-rodzicielskiego-a-tylko-ponad-polowa-z-ojcowskiego/.

59 Grażyna J. Leśniak, "Tata na (nowym) rodzicielskim – badanie Pracuj.pl," Prawo.pl, February 9, 2023, accessed February 9, 2023, https://www.prawo.pl/kadry/urlop-rodzicielski-dla-ojcow-badanie-pracujpl,519732.html.

60 Główny Urząd Statystyczny, *Kobiety i mężczyźni na rynku pracy* (Warsaw: 2018), 7.

years. It should be considered whether the directive solutions significantly affect the situation of women in the labor market and whether the introduced changes correspond to the needs of the domestic market. This is an important issue from the point of view of public administration, for which women constitute a significant part of its human resources. According to the results of the 2022 survey, more than half (60.9%.) of the economically inactive people were women. The unemployment rate in the male population was lower than in the female population.[61] GUS statistics clearly indicate that the position of women in the labor market is unstable and requires a number of changes. Family responsibilities are the second reason for Polish women's economic inactivity after retirement. Additionally, 16.5% of women work part-time due to caring for children or other people. Women's salary is 26% lower than men's in the group of "representatives of public authorities, senior officials, and managers". This is the occupational group with the highest difference. The arduousness of work is the only type of risk affecting more women than men.[62] In the period between the censuses, the proportions of the population by sex did not change significantly, and men constitute 48.3% of the total population (women 51.7%). The feminization rate varies with the age of the population; men predominate in numbers up to the age of 48 (with a ratio of 99.6); in the population from the age of 49, there are already over 100 women per 100 men, and in the oldest groups (aged 85 and more) – 260. The age limit for the numerical predominance of men moved by two years compared to the 2011 census, when more men than women were recorded up to the age of 46.[63]

According to the European Commission, the gender gap in the labor market is most pronounced in the case of parents and people with caring responsibilities. Women, more often than men, assume the role of informal carers of elderly or dependant relatives. Also, assuming the role of a parent who takes care of the child to a greater extent, in the case of women, has a greater impact on their situation in the labor market, and it is the second, after retirement, cause of the professional inactivity of women in Poland.

61 Główny Urząd Statystyczny, *Pracujący, bezrobotni i bierni zawodowo (wyniki wstępne Badania Aktywności Ekonomicznej Ludności)* (Warsaw: 2022), 7.

62 Główny Urząd Statystyczny, *Kobiety*, 7–16.

63 Główny Urząd Statystyczny, *Report*, 21–2.

Therefore, the European Union has initiated work to improve work-life balance solutions for parents and carers and to increase their use by men. The aim of the work is to prevent the complete withdrawal of women from the labor market and achieve a more balanced division of caring roles between women and men.[64]

According to the 2021 Future Collars report, *Working titans. Women in the labour market in the age of digital transformation*, two-thirds (67%) of the surveyed women believe that women and men are not treated equally by employers in Poland. Also, almost two out of three respondents believe that women do not have equal opportunities for professional development (63%) or promotion (64%) compared to men. Nearly 60% of respondents believe that household and parental responsibilities hinder their professional development. This view is shared by women in all the surveyed age groups, and it is common to respondents regardless of their level of education and income. According to women, the motivation to change jobs is mainly the possibility of obtaining a higher salary (61%). Every third woman would be convinced to change jobs by better working conditions (33%) and a convenient location (32%).[65]

A critical element of professional life is the organization of working time. It affects family life, determining the amount and distribution of time for relatives. The research shows significant differences in the degree of involvement of women and men in caring responsibilities. Of course, it is mainly women who quit their jobs or have to reduce their professional activities to care for their children. This is not due to gender discrimination but is often related to the place of employment and occupations performed by women, which are characterized by a lower degree of flexibility in employment.[66] The long-standing challenges related to women's labor market participation have been exacerbated by the COVID-19 pandemic. Employment rates in the first year of the pandemic declined for both sexes, but women experienced a steeper fall in working hours than men during the lockdowns.

64 Siemienkiewicz, "Jak dyrektywa," 71.

65 Mariola Błażej, "Kobiety na rynku pracy w nowoczesnych technologiach," Thinkstat NASK, March 18, 2022, accessed February 10, 2023, https://thinkstat.pl/aktualnosci/kobiety-na-rynku-pracy-w-nowoczesnych-technologiach.

66 Gotowska, "Work life," 68.

Women of childbearing age (aged 25–49) had the lowest chance of obtaining a job in the summer of 2020. The COVID-19 crisis clearly affected the employment of workers in part-time schemes and on temporary contracts, both of which are particularly widespread among women. Female employment plays a vital role in a gender-sensitive post-COVID recovery. In 2021, EU leaders committed to stepping up the fight against gender discrimination. In a similar vein, Council Conclusions, approved in June 2021, called for stepping up gender equality policies and strengthening the empowerment of women and girls as a political priority, especially in the context of responding to the COVID-19 crisis and its aftermath.[67] Attention should also be paid to the effects of the pandemic on women's health and general well-being. Data from the fifth e-survey shows that almost one in four women (24%) in spring 2022 reported unmet mental health care needs, up from one in five (21%) in spring 2021. The problem was less widespread among men, both in 2021 (18%) and in 2022 (19%).[68] Looking ahead, it will remain important to counter the setbacks caused by the COVID-19 pandemic, especially given that studies show that the socio-economic impact of the crisis might last much longer for women than for men. In order to counter any further setbacks and empower women economically, the Commission has set the target to halve the gender employment gap by 2030 through the European Pillar of Social Rights Action Plan. Women can only thrive in the labor market and contribute fully if their opportunities in and access to the labor market are facilitated with concrete actions.[69] As the pandemic progressed, the most considerable increase among parents reporting they were too tired after work to do household tasks was found among women with young children, particularly those who worked only from home.[70]

Also, issues related to the pension system will not be distributed evenly. Women will be particularly affected. They are more likely to interrupt their careers to care for their children and sometimes to look after their parents. On average, they also earn less than men, reach retirement age

67 European Commission, *2022 Report on Gender Equality in the EU* (Publications Office of the European Union, Luxembourg: 2022), 21.

68 Eurofound, *Fifth round*, 7.

69 European Commission, *2022 Report*, 68.

70 Eurofound, *Living, working and COVID-19:Mental health and trust decline across EU as pandemic enters another year* (Luxembourg: Publications Office of the European Union, 2021), 3.

earlier, and live longer. As a result of the combination of these factors, they are particularly affected by the problems of the pension system.[71] Consequently, arrangements such as job sharing, part-time work, reduced hours or term-time work, and sick leave to care for a family member are mostly used by low-paid, predominantly female workers in clerical and lower administrative jobs. They are very rarely used at the top level of public sector organizations. A profound cultural change is needed to enhance the use of work-life balance measures by men and senior managers.[72]

Analysis of the current situation of women in the labor market suggests that the directive solutions seem to be the minimum to activate women and create appropriate conditions to ensure a proper balance between professional and private life, enabling them to stay in the labor market as long as possible. However, experts say that the draft implementation of the directive to Polish conditions should contain more solutions, for example, from the preamble to these EU regulations. The directive aims to improve the work-life balance, which in practice means more female involvement in professional life and male in private life. In this context, the directive discusses developing public services that relieve women of unpaid work to care for children and other family members.[73] Such solutions were not included directly in the provisions introducing the directive into the Polish legal order.

6. Human Resource Management in the Civil Service Corps as an Example of Applying the WLB Policy in Public Administration

Applying the WLB directive solutions in public administration will be related to labor laws generally applicable to all categories of employees. Considering the specificity of public administration and its human resources,

71 Jendrzejczak, "Pogarszają się prognozy demograficzne dla Polski", accessed February 10, 2023, https://forsal.pl/gospodarka/demografia/artykuly/8525768,pogarszaja-sie-prognozy-demograficzne-dla-polski.html.

72 "Work-Life Balance and Family-Friendly Policies and Practices Are Available and Equally Used by Men and Women, Including at the Top," OECD, accessed February 10, 2023, https://www.oecd.org/gender/governance/toolkit/public-administration/gender-sensitive-employment-systems/work-life-balance/.

73 "Dyrektywa work-life balance niewdrożona, ale już działa," *Dziennik Gazeta Prawna*, November 15, 2022, accessed February 10, 2023, https://kadry.infor.pl/kodeks-pracy/przepisy-ogolne/5609546,dyrektywa-worklife-balance.html.

a policy of work-life balance should be created that would be appropriate to its specificity but also adequate to the needs of employees in this sector and taking into account the tangible challenges and problems and the future concerning the management of public administration human resources.

A good example of WLB solutions functioning in public administration is the activities undertaken in the civil service corps. Human resource management standards applicable to the civil service contain recommendations regarding WLB, as well as a catalogue of specific tools recommended to be used in offices. The development and implementation of available solutions in sustainability policy is recommended with the participation of employees as a result of a dialogue. The importance of analysing the needs and demographic statistics of employees (e.g. generational diversity, gender) is emphasized to more effectively adjust the work-life balance tool to the needs of employees and the capabilities of offices, as well as cataloguing, describing, disseminating, and promoting information about tools used in the office.

The areas in which WLB solutions should be used include working time and work organization (e.g. flexible working time, telework), commuting to work (e.g. parking space, room or bicycle racks in the office), caring for a child or a dependant person (e.g. a room for a parent with a child, the possibility of coming to work with a child, subsidies to a nursery, kindergarten or children's club), leisure (e.g. co-financing for holidays, discounts for stays in holiday resorts), sport, recreation, and free time (e.g. sports cards or co-financing of sports and recreation activities, surcharge for tickets to cultural events), integration and communication (e.g. internal communication and exchange of information between employees), health and medical care (e.g. taking care of ergonomic and comfortable – higher than standard – working conditions, activities promoting a healthy lifestyle), and material support (e.g. assistance in case of fortuitous events, loans for housing).[74]

Activities undertaken in the civil service aim to promote knowledge about the balance policy, its meaning, and its role. Work is still underway to expand the base of available WLB tools and disseminate examples

[74] Ordinance No. 6[1] of the Head of Civil Service of 12th March 2020 concerning the standards of human resources management in the civil service.

of best practices. The best work-life balance practices are promoted in the civil service, and the offices that apply them are distinguished. In 2021, a competition for the best work-life balance practices was organized, in which 16 offices submitted 46 practices. The assumption of the competition was to increase the number of offices that will use such solutions, and the existing activities will be improved and developed. It is assumed that thanks to this, employees will be more motivated, effective, and satisfied with their work, and the civil service will be perceived as a friendly and attractive workplace, also by people with special needs. Ten practices from nine offices qualified for the finals of the competition. The finalists presented them in two categories during the Final Gala on November 16, 2021. The general category included the following practices: Take care of your mental health – Agreement with the Wolskie Mental Health Centre (Office of the Patient Ombudsman), Cafeteria system (Ministry of Finance), With a parent to work (Statistical Office in Kielce), Psychological corner (Chamber of Tax Administration in Opole), Age Management Policy at the Lubuskie Voivodship Office in Gorzów Wielkopolski (Lubuske Voivodship Office in Gorzów Wielkopolski). The second category included practices that integrate office employees in a unique way: Appointment and activity of the Charity Council and the Diversity Ombudsman (Office of Rail Transport), Activity Zone and Relaxation Zone (Chancellery of the Prime Minister), Employee initiatives (Ministry of Funds and Regional Policy), Power of sport in the Lubuskie Voivodeship Office (Lubuskie Voivodeship Office in Gorzów Wielkopolski), Dog at work (Ministry of Agriculture and Rural Development).[75]

Some WLB practices, for instance, the possibility of coming to work with a child or a dog and the option of a psychologist's assistance with problems, are very popular with members of the civil service corps. Remote work and individual work schedules are becoming more and more popular tools that help reconcile private and work life. This is how directors general of offices try to attract employees. The pandemic has undoubtedly contributed to the popularity of remote work. At its peak, up to 42% of the official corps worked from home. It turns out that civil servants work from home

[75] "Konkurs na najlepsze praktyki WLB," gov.pl, accessed February 10, 2023, https://www.gov.pl/web/sluzbacywilna/konkurs-na-najlepsze-praktyki-wlb.

twice as often as other employees in the labor market in Poland. The head of the civil service himself believes that remote or hybrid work should be permanently available to the civil service corps. It increases the comfort of work, ensuring a balance between professional activity and private life, and enables employment in the administration of people whose health or personal situation precludes them from working outside their place of residence. The report of the head of the civil service shows that last year, due to the pandemic, people employed in ministries and the Chancellery of the Prime Minister (73%) and central administration offices (59%) most often worked from home. The lowest share of remote work was found in local administration offices (26%).[76]

Work on extending the WLB tools package used in the civil service is still in progress, which is the best example of understanding the importance and essence of such solutions for improving the quality of human resource management in public administration. The work-life balance policy implemented this way can use benchmarking among other public administration staff. In creating effective WLB solutions for public administration, it will be helpful to use the OECD recommendations for activities conducive to promoting WLB policy and gender equality. These include elaborating strategies to change the current perceptions about work-life balance measures – including at senior management levels – used mainly by low-level and low-income groups of employees; developing a deeper understanding and responsive actions about the perceptions of the detrimental impact of the use of work-life balance measures on employees' career aspirations; incorporating part-time and other time flexibility options in career patterns; ensuring that employees who use workplace flexibility are not penalized for doing so; facilitating continuous support systems for family (child, disabled, elderly) members' care to enable women's and men's full participation in the workforce and empower men to take on more family-related responsibilities; promoting part-time employment as a temporary rather than permanent solution for employees with family obligations; and developing

[76] Katarzyna Wójcik, "Work-life balance w służbie cywilnej. Do pracy z psem albo z dzieckiem," *Rzeczpospolita*, December 29, 2021, accessed February 10, 2023, https://www.rp.pl/urzednicy/art19240851-work-life-balance-w-sluzbie-cywilnej-do-pracy-z-psem-albo-z-dzieckiem.

policies and transition paths supporting the move from part-time to full-time work.[77]

7. Conclusions

This directive on work-life balance for parents and carers lays down minimum requirements designed to achieve equality between men and women with regard to labor market opportunities and treatment at work through facilitating the reconciliation of work and family life for working parents and carers, thereby giving EU member states the possibility to introduce or maintain provisions that are more favorable to workers.

For years, research has shown that improving work-life balance is crucial for employees. Employees are ready to give up higher earnings, professional development, or promotion in favor of improving the balance between work and private life.[78] The effective implementation of measures facilitating the reconciliation of work and life may contribute to improving employees' psychophysical health, general well-being, and efficiency, both in the sphere of work and beyond.[79] The global health crisis has made people pay more attention to health and hygiene, increasing the demand for healthy workplace cultures. WLB should take centre stage in developing labor policies in the post-pandemic working world. Balancing work and personal life is challenging both for employers and employees.[80] Given the benefits of the WLB policy and the challenges and threats faced by the public administration's human resource management, the directive provisions should be considered in a broader context and go beyond the established minimum. In answer to the first research question posed in this article, it should be stated that the directive provisions are a sound basis for further WLB solutions. However, in the face of the discussed problems of public administration, as research shows, the directive solutions

77 "Work-Life Balance and Family-Friendly Policies and Practices Are Available and Equally Used by Men and Women, Including at the Top," OECD, accessed February 10, 2023, https://www.oecd.org/gender/governance/toolkit/public-administration/gender-sensitive-employment-systems/work-life-balance/.

78 Kelly Services, *Workers Preferences and Workplace Agility*, Kelly Global Workforce Index 2014, 7.

79 Hildt-Ciupińska, "Work-life," 16.

80 Vyas, "'New Normal,'" 161–3.

are inadequate to the needs. For example, the percentage of fathers taking parental leave does not change, and women still face problems in the labor market (differences in earnings compared to men, greater burden of caring for their family, and working fewer hours). The possibility of flexible work is limited for various reasons, and the expectations and needs of staff in this area are much greater.

Appropriate legal solutions play a fundamental role in this process and will create a favorable environment for changes. The change in labor laws related to introducing the provisions of the discussed directive constitutes the basis for broader activities aimed at spreading awareness among employees and employers regarding the needs and benefits resulting from the WLB policy. At the state level, reconciliation of work and family life is embedded in employment, family, and gender equality policies. The postulate of going beyond the assumptions of the directive will be an expression of strategic thinking about human resource management in public administration, understanding the role of equality, and strengthening the position of women in the labor market. It may also be an employer branding tool.

The reality requires paying attention to the need for transformations that favor equality in the labor market but also outside it, taking measures to increase the involvement of men in parenthood and taking care of relatives, creating optimal conditions for women to combine professional life, and not giving it up for motherhood or caring for their family. The directive directly recommends disseminating knowledge among employees about the importance of the WLB policy, available tools, and benefits.[81] These activities require a systemic approach; the changes introduced by the directive in question should be the beginning of the ongoing transformation.

[81] It is worth paying attention to initiatives helping employers create, implement, and run family-carer-friendly support in the workplace. For example, Employers for Carers is an association of companies and organizations that run programmes supporting working family carers. It also conducts research and public education on the subject. Founded in 2009 as an employers' forum, it currently has over 145 member organizations from the public, private, and non-governmental sectors. It offers them (and new members) training and materials showing the next steps to be taken by introducing various assistance programmes and examples of good practice. Its activities can be an inspiration for Polish employers. Anna Janowicz, "Przykłady wyzwań i istniejących rozwiązań z zakresu work-life balance w kontekście opieki nad dorosłymi osobami zależnymi," in *Odwaga i równowaga czyli work-life balance po polsku* (Warsaw: Karta różnorodności koordynowana przez Forum Odpowiedzialnego Biznesu, 2020), 95.

Unfortunately, these actions seem insufficient and do not bring the intended effect.[82] In answer to the next two questions, it is strongly recommended to take action to introduce WLB both in terms of expanding legal regulations and beyond the legal sphere. When introducing changes required by the EU directive, we should instead think about developing good practices that would show how to apply new and existing solutions (e.g. the right to a break for breastfeeding, the right to reduced working hours, or additional two days off to care for a child under 14 years of age) to improve the work-life balance of employees.[83] Undoubtedly, financing new solutions is a crucial issue, but the necessity and perspective of these activities should be taken into account. The question of how to finance the growing care needs of an ageing population has been a subject of discussion for years.

Being aware of the inevitable consequences of the changing structure of society, which significantly shapes the labor market, it is necessary to take immediate action to adapt public administration's human resource management to include WLB. Following the social trend and building an organizational culture related to parental equality and work-life balance for employees should be considered. This could be achieved by developing internal policies, conducting dialogue, and creating an atmosphere of comfort and understanding for both parents' desire to fulfil their role as parents and their ambitions to achieve their professional goals. As a result,

[82] It is alleged that there are currently no plans to conduct information campaigns to raise awareness about the new entitlements although the need for information campaign was raised by the employers' organization expert who suggested that "change in regulations will not bring in the expected consequences, and an emphasis should be placed on promoting the solutions". At the same time the issue is not salient among the social partners: as the trade union expert mentioned: "we have not devoted much time to these parental leave entitlements". Extending the existing leave in the form of two nontransferrable months with a low intention of the policymakers to introduce change can be classified as layering. In contrast to the Danish case, the purpose of parental leave in Poland, to enable mothers to take long leave, has not change despite formal compliance with the WLB directive. Poland, like Denmark, has made extensive changes, to reduce the pre-existing bias towards mothers in the system, and the compensation for leave is high. However, in Poland, these planned formal changes are de-coupled from the intention of the policymakers, which is to maintain traditional gender roles. Karolina de la Porte et al., "The EU's Work-Life Balance Directive," 558–9.

[83] Malwina Wrotniak, "Nadchodzi work-life balance dla Polaków. 'Pudrujemy trupa'," Bankier.pl, October 20, 2022, accessed October 20, 2023, https://www.bankier.pl/wiadomosc/Work-life-balance-dla-Polakow-Pudrujemy-trupa-8423959.html.

employees will be more motivated, productive, and connected to their employer, which is a clear benefit for the latter.[84] The example of the WLB policy used in the civil service corps illustrates the employees' need for such tools. Also, it confirms the need to introduce changes in those areas of public administration where the assumptions of the above policy are not yet popularized. The justification for taking such actions in the civil service may be indicated primarily by a high level of understanding and acceptance of the WLB policy, a change in the image of the civil service as a potential employer, and the creation of specific, high human resource management standards. Action aimed at achieving a work-life balance translates into measurable benefits not only in the economic but also in the social aspect, in the general well-being of the society in all spheres of life, also in the health dimension, which is very much needed in the era of intensified crises related to the COVID-19 pandemic or the ongoing war in Ukraine.

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[84] Dudek, "Work-Life Balance," accessed February 10, 2023, https://hrlaw.pl/en/work-life-balance-an-eu-perspective/.

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Limiting Social Assistance under the EU Temporary Protection Directive to Displaced Persons Working Remotely for the Public Administration of Their Country of Origin

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mass influx of displaced persons, temporary protection, refugees, remote work, social assistance

Abstract: This research focuses on the legal situation of displaced persons who benefit from Directive 2001/55/EC regulating the EU temporary protection mechanism. This law can be activated in the case of mass influx of persons in need of international protection. A displaced person (unlike a refugee) can work remotely for the authorities of their country of origin, although this should be verified individually. Thanks to this, the financial benefits from this type of work can be taken into account by the country of residence of the displaced person when determining the level of social assistance granted to that person under Directive 2001/55/EC.

1. Introduction

The Refugee Convention[1] (RC) forms foundations of the EU's Common European Asylum System (the CEAS). Although EU asylum law has been

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[1] United Nations General Assembly, The 1951 Refugee Convention (United Nations General Assembly Resolution 429(V) of 14 December 1950) and its 1967 Protocol (Attached to United Nations General Assembly Resolution 2198(XXI) of 16 December 1967).

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amended, Directive 2001/55/EC (Directive)[2] – the only international law which establishes binding minimum standards for granting temporary protection in the event of a mass influx of displaced persons (DPs)[3] – has remained unchanged. The Directive does not define terms "suitable accommodation" and "necessary assistance in terms of social welfare and means of subsistence". Still, it promotes a balance of efforts between the EU Member States (the EUMSs) in receiving and bearing consequences of receiving DPs.

The Directive has been activated only once – to address displacement from Ukraine (the CID).[4] Its beneficiaries have been called using "a new term 'war refugees from Ukraine'"[5] popular amongst Poles[6] but also the UNHCR, OECD and WHO.[7] This term is based on the date of crossing an EUMS's border.[8] Still, it seems that it could also be used with respect to these persons even if they have left Ukraine before February 24, 2022, if the European Commission's views were implemented by the EUMS.[9] Thus,

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2 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (O.J.E.C. L212, 7 August 2001), 12–23.

3 Meltem Ineli-Ciger, "The Missing Piece in the European Agenda on Migration: The Temporary Protection Directive," *EU Law Analysis*, July 8, 2019, accessed June 29, 2023, https://eulawanalysis.blogspot.com/2015/07/the-missing-piece-in-european-agenda-on.html; Piotr Sadowski, "Czy zakres podmiotowy prawa polskiego jest zgodny z decyzją wykonawczą Rady (UE) 2022/382 w sprawie masowego napływu wysiedleńców z Ukrainy?," *Studia Iuridica* 94 (2022): 338, https://doi.org/10.31338/2544-3135.si.2022-94.20.

4 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection (O.J.E.C. L71, 4 March 2022), 1–6.

5 Anna Szachoń-Pszenny, "Szczyt kryzysu migracyjnego w 2015 r. a szczyt kryzysu uchodźczego w 2022 r. – próba analizy porównawczej wpływu na 'obszar bez granic' UE," *Studia Politologiczne* 68 (2023): 58–9, https://doi.org/10.33896/SPolit.2023.68.3.

6 Robert Miron Staniszewski, "Uchodźcy czy migranci? – społeczna percepcja pojęć na podstawie wyników badań opinii publicznej," *Studia Politologiczne* 68 (2023): 9–37, https://doi.org/10.33896/SPolit.2023.68.1.

7 Szachoń-Pszenny, "Szczyt kryzysu," 61.

8 Staniszewski, "Uchodźcy," 35–6.

9 European Commission, Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of

the term "war refugees from Ukraine" is more geographically specific than the words "displaced people". Relationship between the terms "refugee" and "displacement" is more complicated.[10] Both refer to persons who have left their country of origin or residence (hereinafter: CoO). Still, not every displaced person may obtain refugee status. Under the RC, these two forms of protection should complement each other.

The first activation of Directive 2001/55/EC exemplifies a new form of forced migration, because "many displaced Ukrainians are highly educated with previous work experience in sectors such as sales, management, education, and healthcare, and can speak, beside Ukrainian and Russian, English, and to a lesser extent several other languages,"[11] and a substantial number of persons work remotely in Ukraine.[12]

The research aims to answer a question of whether the country of residence (CoR) of a DP can take into account financial benefits from work performed in the CoO when granting social assistance to that person. The analysis has been limited to remote work for public authorities of the CoO. This is because although refugee status is denied to persons who cooperate with the authorities of their CoO, it is unclear whether this reasoning also applies to DPs or whether the law regulating subsidiary protection[13] should apply in their cases. Ukraine has not asked persons performing work for public authorities to seek protection outside that state and to

Directive 2001/55/EC, and having the effect of introducing temporary protection (2022/C 126 I/01), (O.J.E.C. CI 126/1, 21 March 2022), 1–16, hereinafter: the Guidelines.

10 Identifying the differences between these terms would be even more complicated if the term "migrant" was added to the list of terms referring to persons who have left Ukraine; Staniszewski, "Uchodźcy," 34.

11 European Union Agency for Asylum, International Organization for Migration, and Organisation for Economic Cooperation and Development, *Forced Displacement from and within Ukraine: Profiles, Experiences, and Aspirations of Affected Populations* (Luxembourg: Publications Office, 2022), 3, https://data.europa.eu/doi/10.2847/739455.

12 28% of DPs in Poland work remotely in Ukraine; Piotr Długosz, Liudmyla Kryvachuk, and Dominika Izdebska-Długosz, "Problemy ukraińskich uchodźców przebywających w Polsce," PsyArXiv. May 19, 2022, https://doi.org/10.13140/RG.2.2.14921.01125.

13 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (O.J.E.C. L337, 20 December 2011), 248–65.

continue their work remotely. Therefore, the above-mentioned peculiarity of the displacement which began in 2022 has only served as an inspiration for this analysis.

Firstly, based on an analysis of previous research, which has shown that Directive 2001/55/EC does not generally prohibit performing remote work for the CoO,[14] it has been established that these persons should be able to benefit from the international protection initiated in a mass influx situation, if this does not conflict with refugee law, which has to be verified for each individual case. Secondly, a linguistic interpretation of Directive 2001/55/EC and the CID, which takes into account a systemic[15] and a comparative[16] interpretation of that secondary legislation, has led to the conclusion that the CoR can limit social assistance to DPs if they receive financial benefits in the CoO. Decisions on these limits must be taken on a case-by-case basis. Nevertheless, the Directive does not clearly set a minimum level of the support.

In view of the increasing popularity of remote work, the findings of this article can contribute to building new theoretical knowledge by identifying loopholes in the Directive. The results of this analysis may also have an impact on the practice of limiting social assistance to DPs and, consequently, on public finances of the CoR.

The dominant research method used in this study was a dogmatic-legal method. The selection of legal texts was based on the importance of the RC to the UN human rights protection system (the Convention is one of the most widely ratified international treaties) and to the CEAS. Having in mind the thematic scope of this analysis, the UN's human rights treaty on social policy (ICESCR) has also been used. Analysis of regional

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14 This theme is analyzed in Piotr Sadowski, "Remote Work for the Public Administration of a Country of Origin under the EU Temporary Protection Directive," *Studia Iuridica Toruniensia* (34) 2024, in print.

15 By analyzing the aims of the Directive, Consolidated version (2016) of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) and Charter of Fundamental Rights of the European Union, (O.J.E.C. C202, 7 June 2016), 1–405.

16 By referring to the UN General Assembly International Covenant on Economic, Social and Cultural Rights of 16 December 1966; United Nations Treaty Series, vol. 993, p. 3 (hereinafter: ICESCR) and the Council of Europe European Social Charter, Turin; European Treaty Series No. 035 (1961) (hereinafter: ESC).

legislation has been narrowed to standards clarifying the importance of the RC to the EU's laws (TEU, TFEU, the Charter). Based on that, relevant secondary EU law on asylum has been identified and considered. Given the importance of the Council of Europe norms to the EU, reference was also made to the Council's treaties. Particular attention was paid to standards on the procedural aspects of granting protection and ensuring efficient access to adequate social assistance. Their interpretation took into account previous research findings. Finally, a historical method was used to underline the need to analyze the RC in terms of the aims of this treaty.

The first part of this article highlights the particularities of the EU asylum law, in particular the Directive on the mass influx of DPs. The next part of this text refers to the findings of previous research. They prove that a DP may work remotely for the CoO in the CoR if an individually concluded verification does not show that that work conflicts with refugee protection objectives. Finally, the article examines whether (and if so, to what extend) the benefits from that work may limit social assistance granted to that person in the CoR. The text ends with a brief summary and conclusions.

2. Common European Asylum System

Under Article 52 of the UN Charter all regional organizations have to respect the UN principles. Still, they can develop them.[17] In this way, the interested countries can increase the effectiveness of the implementation of international law by taking into account e.g. regional social and economic particularities. The development of the Common European Asylum System illustrates this view.

The CEAS is based on: the RC, which "in Article 33, contains the principle of non-refoulement, according to which a country may not expel or return refugees to territories where their lives or freedoms would be threatened,"[18] Article 78 of the TFEU, the EU Charter, and the secondary EU

[17] 1 United Nations Treaty Series, vol. XVI; Krzysztof Orzeszyna, "Universalism of Human Rights: Notion of Global Consensus or Regional Idea," *Review of European and Comparative Law* 46, no. 3 (2021): 165, https://doi.org/10.31743/recl.12428; Piotr Sadowski, "The EU's Approach to the Extraterritorial Processing of Asylum Claims and Its Compliance with International Law," *Revista General De Derecho Europeo*, no. 53 (2021): 40–2.

[18] Mieczysława Zdanowicz, "The Migration Crisis on the Polish–Belarusian Border," *Białostockie Studia Prawnicze* 28, no. 1 (2023): 108, https://doi.org/10.15290/bsp.2023.28.01.06.

standards.[19] The need to respect the fundamental rights of protection seekers can also be derived from Article 2 of the TEU and the 1950 European Convention on Human Rights and Fundamental Freedoms[20] (the ECHR) which indirectly (as the EU has not yet acceded to the ECtHR) sets a minimum common standard for the EU law (Article 52(3) of the EU Charter). Unlike Article 18 of the EU Charter, the text of the ECHR does not explicitly refer to the protection from refoulement. Nevertheless, thanks to a progressive interpretation of that Convention, it also applies to persons who cannot be returned because their lives would be endangered or because they would be exposed to torture, inhuman or degrading treatment upon return.[21] This is because the rights and freedoms should not be an illusion, but should be protected in practice.[22]

The CEAS was created in two stages.[23] It begun with the adoption of minimum harmonization. This left the establishment of more detailed standards to the EUMSs. Later, when the Area of Freedom, Security and Justice has been regulated under the ordinary legislative procedure by the Treaty of Lisbon,[24] that decision-making margin was reduced. As a result, full harmonization was achieved in:

– standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (currently: Directive 2011/95/EU),

19 Elżbieta Karska et al., *Human Rights in the European Paradigm of the Protection of Aliens* (Warsaw: Cardinal Stefan Wyszyński University in Warsaw, 2023), 151, https://doi.org/10.13166/hr/QHLC7301.

20 European Treaty Series No. 005.

21 Agnès G. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, Oxford Monographs in International Law (Oxford-New York: Oxford University Press, 2009), 190.

22 ECtHR Judgment of 9 October 1979, Airey v. Ireland, App. No. 6289/73.

23 More on the CEAS's developments in Piotr Sadowski, *Wspólny Europejski System Azylowy – Historia, Stan Obecny i Perspektywy Rozwoju* (Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2019), passim; Elżbieta Borawska-Kędzierska and Katarzyna Strąk, *Przestrzeń Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej, Część 2: Polityka Wizowa, Azylowa i Imigracyjna*, 2nd ed. (Warsaw: EuroPrawo, 2009), passim.

24 Karska et al., *Human Rights*, 15:336.

- common procedures for granting and withdrawing international protection,[25]
- standards for the reception of applicants for international protection,[26] and
- the criteria and mechanisms for determining the EUMS responsible for examining an application for international protection.[27]

Moreover, the Treaty of Lisbon has given the CJEU the right to decide on the EU's asylum policy. That court refers to the decisions of the ECtHR, and the ECtHR refers to the decisions of the CJEU. This judicial dialogue strengthens the coherence of European interpretation of refugee law, although some divergences remain.[28]

Directive 2001/55/EC is the only part of the CEAS which has not been amended. Article 12 of Directive which stipulates that "The Member States shall authorise, for a period not exceeding that of temporary protection, persons enjoying temporary protection to engage in employed or self-employed activities" confirms that this secondary EU legislation has established only minimum standards for giving temporary protection in the event of a mass influx of DPs from third countries. The accuracy of this view is reinforced by the fact that the Directive does not provide more detailed rules on how the above-mentioned engagement should be achieved.

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25 Currently: Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (O.J.E.C. L180, 29 June 2013), 60–95.

26 Currently: Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (O.J.E.C. L180, 29 June 2013), 96–116.

27 Currently: Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (O.J.E.C. L180, 29 June 2013), 31–59.

28 Confront e.g. ECtHR Judgment of 21 November 2019, Ilias and Ahmed v. Hungary, App. No. 47287/15 with CJEU Judgment of 14 May 2020, FMS, FNZ (C-924/19 PPU). SA, SA junior (C-925/19 PPU) v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, ECLI:EU:C:2020:367.

Examples from other EU standards[29] show that, although labor market access is not an exclusive competence of the EU,[30] other policy areas can (at least indirectly) determine certain issues at the EU level.

Finally, given the thematic focus of this article, it should be emphasized that all the EUMSs have ratified the ICESCR and the ESC. Still, the EU, which has legal capacity (Article 47 of TEU), is not a party to these treaties and is therefore not legally bound by them. Nevertheless, an interpretation of EU law which would not take into account the ICESCR and the ESC may lead to a breach of the international obligations of the EUMSs.

3. Denying Protection to Persons Exercising State Powers of a Country of Origin

Undoubtedly, there is no reference to health and safety working conditions in the CoO in the narrow catalogue of conditions that must be met in order to receive a positive decision in refugee cases. However, refugee status may be granted to persons belonging to a particular social group. The term "social group" is not defined in international law, but it refers to "a combination of matters of choice [e.g. economic activity] with other matters over which members of the group have no control [e.g. ethic origin]."[31] The aforesaid economic activity includes work, which "should be understood as any gainful activity for another entity, leading to economic dependence between them."[32] This dependence (the execution of the state's powers) is the reason

29 Cf. Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (O.J.E.C. L343, 23 December 2011), 1–9.

30 Luc Leboeuf, "The Quest for Equilibrium Between Security and Humanitarian Considerations in a Fast-Evolving Legal Environment: The Case of Belgium," in *Law and Migration in a Changing World*, eds. Marie-Claire Foblets and Jean-Yves Carlier, *Ius Comparatum* 31 (Cham: Springer, 2022), 149–50.

31 Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (Oxford–New York: Oxford University Press, 2007), 75.

32 Adam Krzywoń, "Rozdział 13. Wybrane Prawa Gospodarcze, Społeczne i Kulturalne. Prawa Pracownicze," in *Prawa Człowieka*, eds. Wojciech Brzozowski, Adam Krzywoń, and Marcin Wiącek, 2nd ed. (Warsaw: Wolters Kluwer, 2019), 306.

why working for the authorities of the CoO is an obstacle to obtaining refugee status.

The analysis of a situation of persons in need of protection gets complicated when a state is unable to offer protection e.g. owing to its lack of military resources to ensure safety on a certain territory. Persons working for the authorities of the CoO may be asked to move to another part of the country and work remotely. If security were to deteriorate further, the state could recommend that some employees, e.g. civil servants, emigrate and continue their work remotely using modern communications technology. In this case (contrary to a situation when the CoO is a "source" of threat to life or freedom from torture), the employee would not sever ties with the CoO. Nevertheless, in order to reflect current social and economic realities (e.g. popularization of remote work after the COVID-19 pandemic), the interpretation of the RC should be changed and the asylum caseworkers should focus on "considering the consequences of the execution of powers attributed to a state by the applicants (…) [, and thus on a] verification of whether the subordination of an employee to an employer involves direct or indirect participation in the exercise of powers [using coercion] conferred by public law."[33] This is because a nature of activities performed by e.g. soldiers and teachers differs substantially.

However, even members of one group of workers may have different types of contracts concluded with the state actors. This may be a consequence of a "strong fragmentation of the national public sectors: there are different levels of government (…); different functions ascribed to the public administration and public enterprise; bodies which are formally separate from the State or the government, the so-called regulatory agencies; independent administrative authorities and executive agencies."[34] The level of subordination of different members of one group to their supervisors (e.g. a local authority), the way in which the person is remunerated, and the type of contract which the person has concluded may also vary.[35] If such

33 Sadowski, "Remote Work." This issue is analyzed in details in that article.

34 European Commission, "Commission Staff Working Document – Free Movement of Workers in the Public Sector," The Official Journal of the EU SEC(2010) 1609 final.

35 Cf. examples from case-law provided at: European Commission, "Employment, Social Affairs & Inclusion: Case Law – Employment in the Public Sector," accessed February 16, 2024, https://ec.europa.eu/social/main.jsp?catId=953&langId=en&intPageId=1218.

divergences have been noted in the European Communities (now: the EU), and thus among states which are expected (under Article 145 of TFEU) to "work towards developing a coordinated strategy for employment," then they are even more likely to occur when the person is employed outside the EU. This means that the CoR's law should be used to determine the existence of an employment relationship in individual cases. Consequently, if it is established that there is a link between the applicant and the CoO, a caseworker should verify whether the employees are directly or indirectly engaged in the exercise of public authority and duties designed to safeguard the general interest of the state. Under the RC, such engagement of the person applying for protection would be an obstacle to obtaining refugee status, even if the work is performed remotely.

The refugee recognition procedure is based on an individual assessment of a case. Such a procedure is not envisaged in mass influx situations. Nevertheless, the EUMS can exclude a person from temporary protection. Reasons which can justify making such a decision are enumerated in Article 28 of Directive 2001/55/EC. They refer to war crimes and considering the person as a danger to the EUMS's security, among others. However, the enumeration does not include cooperation with the CoO. Hence, the states cannot deny protection on this ground as long as the work does not conflict with the aims of the refugee protection system. Links to the CoO are also irrelevant in EU-harmonized subsidiary protection cases. Therefore, the interpretation that opts for an individual assessment of the nature of the activities carried out by the applicants contributes to a more coherent interpretation of EU law and favors an interpretation of the RC in line with the RC's objectives.

4. The Right to Necessary Assistance

The UN considers protection seekers as vulnerable persons from a socially disadvantaged group.[36] This vulnerability can also be noticed when they attempt to access the labor market.[37] Consequently, promoting their full

[36] Krzysztof Orzeszyna et al., eds., "Chapter I. Conceptual Framework and General Principles of Human Rights," in *International Human Rights Law*, Legal status as of 1 January 2023 (Warsaw: Wydawnictwo C.H. Beck, 2023), Legalis, 20.

[37] Cf. the UN General Assembly, "Resolution Adopted by the General Assembly on 25 September 2015 on Seventieth Session (Agenda Items 15 and 116) – Transforming Our World: The 2030 Agenda for Sustainable Development," A/RES/70/1 (2015), accessed February 17,

rational employment is particularly valuable. Such an employment should be understood as the highest level of the most efficient employment.[38] Nevertheless, the obligation stemming from e.g. Article 9 of the TFEU (which is the so-called horizontal social clause, so it extends to the Area of Freedom, Security and Justice), Article 6 of the ICESCR, and §2 of the ESC "does not mean the assurance of work for every individual, but it entails the requirement to guarantee that every individual will have a real, open opportunity for employment."[39]

The reluctance to grant access to the national labor market to persons seeking international protection has resulted in leaving these issues at the discretion of the EUMSs. Under Directive 2013/32/EU, the states decide whether to grant the right to work in the first six months of an asylum procedure. This duration of suspending access to employment was supported by the UNHCR.[40] This is because it was assumed that most applicants would receive their decisions within this period.

In contrast, Article 12 of the Directive provides for the need to ensure a facilitated and effective access to national labor markets.[41] Individuals should also be able to run a business and participate in educational opportunities. Detailed regulations on how to achieve these aims differ between countries (Polish law on self-establishment[42] and gaining employment in

2024, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (hereinafter: the 2030 Agenda).

38 Stanisław Kamiński, "Koncepcje Modeli Polityki Społecznej," in *Wymiary Polityki Społecznej*, eds. Olga Kowalczyk et al., 3rd ed., updated (Wrocław: Wydawnictwo Uniwersytetu Ekonomicznego we Wrocławiu, 2021), 180.

39 Karska et al., *Human Rights*, 15:346; Tadeusz Zieliński, "Rozdział I. Problemy części ogólnej prawa pracy," in *Prawo pracy RP w obliczu przemian*, eds. Maria Matey-Tyrowicz and Tadeusz Zielinski (Warsaw: C.H. Beck, 2006), 45–6.

40 UNHCR, "UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council Laying down Standards for the Reception of Applicants for International Protection (Recast) COM (2016) 465 (UNHCR Comments EU RCD (Recast))" (UNHCR, August 2017), 14, accessed November 17, 2023, www.refworld.org/docid/59a6d6094.html.

41 Karol Karski, "Migration," in *Legal Studies on Central Europe*, ed. Anikó Raisz, vol. 9 (Budapest: Central European Academic Publishing, 2022), 228, https://doi.org/10.54171/2022.ar.ilfcec_10.

42 Paweł Widerski, "Taking up and Pursuit of Business Activity in the Republic of Poland by a Citizen of Ukraine as an Individual Entrepreneur on the Basis of the Act of March 12, 2022 on Assistance to Citizens of Ukraine in Connection with Armed Conflict on the Territory

Poland[43] have already been analyzed). The adoption of the CID has not changed this view, as the EU's competencies have not been expanded. Thus, the CID has not amended the rules established by the Directive. Nevertheless, EU law and Article 6 of the ICESCR provide some interpretation guidelines clarifying the aim which should be achieved by a successful employment policy. They confirm that access to the employment of one's choice is essential for realizing other human rights. These rights naturally include the second generation of human rights. Therefore, researchers correctly correlate the right to work with the possibility of supporting oneself.[44]

The Directive did not establish a link between the above-mentioned self-sufficiency and a standard of living. This secondary EU law refers to "suitable accommodation" or "necessary assistance in terms of social welfare and means of subsistence," leaving it at the discretion of the EUMSs to define those imprecise terms. Still, it follows from the European Commission's Guidelines that "when implementing the Council's decisions, the Member States must respect the Charter [in particular Article 34] (…) and the spirit of Directive 2001/55/EC." The need to ensure the humane living conditions for beneficiaries of temporary protection was stressed during work on that secondary law.[45] The Directive also includes a reference to the need to respect the Charter in its recitals, so an interpretation of these regulations also stems from the need to consider the purpose of that Treaty. This is particularly important given that this treaty is one "in which social

of That Country," in *Закарпатські Правові Читання. Право Як Інструмент Стійкості Та Розвитку В Умовах Сучасних Цивілізаційних Викликів. Частина 1* (Liha-Pres, 2023), 215–19, https://doi.org/10.36059/978-966-397-298-5-51.

43 Robert Miron Staniszewski and Tomasz Kownacki, "Diagnoza życia, postaw oraz planów obywateli Ukrainy, którzy przybyli do Polski w wyniku działań wojennych tj. od dnia 24 lutego 2022 roku. Raport z badania opinii publicznej," 2023, https://doi.org/10.13140/RG.2.2.14330.88009.

44 Karska et al., *Human Rights*, 15:346.

45 Economic and Social Committee, Opinion on the Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (O.J.E.C. C155, 29 May 2001), 21–5, para. 3.2.2.

values are recognized and expressed in the broader context of the objectives and priorities that shape the EU."[46]

If the "adequate social protection" which is referred to in Article 9 of the TFEU is to be ensured in all EU policies, then it is reasonable to conclude that the EUMS which provides temporary protection must follow "a dignified standard of living." This standard is higher than an "ability to meet their own needs" which is referred to in Article 13(3) of the Directive. This view should be promoted because, firstly, *Lex posterior derogat legi priori*. Secondly, the EU Treaty is higher in the hierarchy of EU standards than EU secondary legislation. Thirdly, the CJEU has repeatedly favored a functional interpretation of EU law. Hence, this type of deduction should also be applied in the context of identifying the standard of living for displaced persons.

Nevertheless, the reference to "a dignified standard of living" does not conflict with the right of the EUMS to limit support to DPs. This is because the EUMS must ensure that they can effectively bear the financial consequences of providing protection. In a time of a large number of displaced persons, public spendings on social assistance would be high. Nevertheless – unlike in the case of, for example, family reunification – the EUMSs cannot deny access to their territory to protection seekers. Therefore, the only way in which the states can ensure that protection seekers are not an unbearable burden on the public welfare system is to support the persons in need rationally. This is clearly reflected in the aims of the Directive, which intends to promote solidarity (including financial solidarity) between the EUMSs affected by a mass influx.

Yet, the CID has not identified new financial sources to support the EUMSs receiving a large number of DPs. This is because the Directive has not delegated the power to establish new EU funding to the Council or the European Commission. Therefore, only previously established EU funds have been made available to support the needs of DPs. However, these resources are very limited, calling into question the EU's fulfilment

[46] Maria Eugenia Bartoloni, "The Horizontal Social Clause in a Legal Dimension," in *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, eds. Francesca Ippolito, Maria Eugenia Bartoloni, and Massimo Condinanzi, Routledge Research in EU Law (Abingdon–Oxon: Routledge, 2019), 83.

of the aims of the Directive which refer to solidarity among the EUMSs in bearing the burden of welcoming displaced persons. As Francisco Javier Durán Ruiz correctly states:

> Member States will receive funding for temporary protection from the Asylum, Migration and Integration Fund (…) [to be] distributed as follows: a) 8 million euros for each Member State, except Cyprus, Malta, and Greece, which receive 28 million; b) the remaining resources are divided: 35% for asylum, 30% for legal migration and integration and 35% for the fight against irregular immigration, including returns; c) of the 35% allocated for asylum, 60% of the resources go to applicants for international protection and only 30% (…) is intended for refugees, stateless persons or beneficiaries of subsidiary protection and beneficiaries of temporary protection, all with already recognised status.[47]

Most of the costs of supporting the DPs are covered by national resources. The EUMSs have obeyed these rules. Yet, unsurprisingly, having in mind e.g. raising inflation, some limitations have been introduced e.g. in Poland and the Czech Republic in 2023 (they require displaced persons to cover part of the accommodation costs).[48] It should therefore be explicitly declared that the EUMSs have a right to limit financing to the minimum standard in the case of persons who are able to support themselves. Such a limitation would make it possible to rationally manage public finances by providing support to persons with the most urgent needs.

Before the re-eruption of the war, Polish law regulated limitations on accessing some social rights. Some of these rules apply to all nationals e.g. when the amount of benefits which are granted depends on the financial resources of the applicant. These limitations apply the same restrictions to all persons. Hence, the nationality or legal status of the beneficiaries is

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47 Francisco Javier Durán Ruiz, "La Regulación de La Protección Temporal de Los Desplazados Por La Guerra de Ucrania y Su Compatibilidad Con Otras Formas de Protección Internacional En El Contexto de Una Nueva Política Migratoria de La UE," *Revista de Derecho Comunitario Europeo*, no. 73 (2022): 969–70, https://doi.org/10.18042/cepc/rdce.73.07. Translation by the Author. See recital 22 of the CID.

48 See: Marika Kosiel-Pająk and Piotr Sadowski, "British and Polish Temporary Protection Schemes Addressing Displaced Persons from Ukraine," *Journal of Jurisprudence and Legal Practice*, no. 4 (2023): 887–912, https://doi.org/10.5817/CPVP2023-4-5.

irrelevant in deciding the amount of social support which will be granted. Therefore, there is no reverse discrimination in such cases.

Under this type of limitations, a responsible institution "takes into account" performing work or running a business. This does not infringe Article 13(3) of the Directive, which explicitly states that "account shall be taken, when fixing the proposed level of aid, of their [(the beneficiaries)] ability to meet their own needs." One cannot but agree that "early access to the labour market for persons applying for international protection results in a reduced demand for financial and social assistance from the host country."[49] Consequently, limitations are possible, but they conflict with EU law (including Directive 2001/55/EC) if they do not ensure an adequate reception standard in practice.[50] Therefore, the EUMS must ensure that "core benefits" which cover "at least minimum income support" are provided to protection seekers, as specified in Directive 2011/95/EU. Thus, limitations can be applied on a case-by-case basis.

Directive 2001/55/EC does not specify a source of an income which can be "taken into account." It seems reasonable to say that the authority which decides on granting social assistance can ask an applicant to disclose their remuneration (a salary and a wage), as well as financial resources received from e.g. self-employment or copyrights. However, international laws do not specify whether these sources of income include sources in the CoO. Interpretation guidelines can be deduced from the purpose for which the Directive has been adopted. Recital 15 of that law explicitly states that "The Member States' obligations as to the conditions of reception and residence of persons enjoying temporary protection (…) should be fair and offer an adequate level of protection to those concerned." The expression "adequate level" can be further clarified by referring to the Luxembourg court case in which (as Maria Eugenia Bartoloni correctly puts it) it was declared "that Art 9 [which] 'require[s] it to ensure' the objectives set down, appears to suggest that the EU is subject to an 'obligation' and

49 Karska et al., *Human Rights*, 15:352.

50 Małgorzata Cilak and Piotr Sadowski, "Polish National Financing of Support to Mass Arrivals of Persons Fleeing Ukraine After 24 February 2022," *Krytyka Prawa* 15, no. 3 (2023): 71–85, https://doi.org/10.7206/kp.2080-1084.621.

that this amounts to an 'obligation of result.'"[51] Therefore, the EUMS is not accountable for taking rational steps to achieve the Directive's aims, but for effectively achieving these aims in practice. Once the Council implementing decision is adopted, the EUMS acts "within EU law" when it addresses the needs of displaced persons. Thus, the state cannot claim that another state (e.g. the CoO) bears responsibility for persons under the EUMS' jurisdiction. This, again, confirms that the limitation of social assistance may enable rational management of public finances by providing support to persons with the most urgent needs.

Expenses on social protection of a large number of DPs can be so high that they may threaten the financial stability of the EUMS. If such a situation occurs, it seems rational to apply a limitation clause. This view is not in conflict with the fact identified by Tadeusz Jasudowicz, i.e. that the essential core of legitimate goals is limited to state security, public health, and public morality.[52] He did not mention the state of public finances as a legitimate goal which allows for a narrow interpretation of human rights. Nevertheless, social assistance is not a first-generation of human right, so the states have more freedom in limiting these rights. Thus, the states can interpret the terms "necessary assistance in terms of social welfare and means of subsistence" narrowly and interpret the term "take into account" a foreigner's financial resources broadly to limit the extent of social support, if national law provides for such a possibility, and if such a limitation is necessary in a democratic society. This must be decided individually, cannot be arbitrary, and cannot go beyond the minimum level which would guarantee a dignified existence. To confirm that the limitation was thoroughly analyzed, a state could claim that a DP can still support themselves by working remotely. This supports the view that the right to work should be effectively available to persons protected in mass influx situations.

A displaced person, due to the stress and trauma experienced in the CoO and the feeling of alienation in the CoR, may need to receive

51 Bartoloni, "The Horizontal," 87. She refers to the CJEU Judgment of 4 May 2016, Pillbox v. Secretary of State for Health, Case C-477/14, ECLI:EU:C:2016:324.

52 Tadeusz Jasudowicz, "Test Celowości w Funkcjonowaniu Mechanizmu Limitacji Korzystania z Praw Człowieka w Systemie EKPC," *Polski Rocznik Praw Człowieka i Prawa Humanitarnego*, no. 3 (2012): 113.

specialized psychological treatment. Hence, all forms of assistance which increase their self-confidence should be supported. Performing remote work fits perfectly with this objective. It makes it possible to stay connected with persons from the same culture and to reduce the feeling of alienation. It can also increase a feeling of being needed. Finally, employment helps to develop new skills and benefit from life-long learning. Therefore, researchers properly stress that "The possibility of taking up gainful employment allows the refugees to get back on their feet more quickly, to get out of the difficult situation they find themselves in, and contributes to achieving self-sufficiency."[53] Similar view can be deduced from the Pope's message.[54]

The positive impact of employment on the mental health of persons in need of international protection can also be seen from the perspective of public spendings. This is because a brain gain can increase the productivity of displaced persons. This, in turn, can increase their earnings and support their career advancement. Consequently, performing work remotely can reduce the expenses on social assistance, because a displaced person's financial resources can be taken into account when making a decision on granting them financial support.

Finally, an increase in human capital can contribute to the development of the CoO when the person in need of protection is able to safely return to that state. Therefore, the promotion of fair employment should also be seen in the context of the migration and development nexus, which is promoted by the UN. Firstly, actions promoting the development of the CoO should be supported. This was accurately underlined by the IOM which linked these actions with migrants' "ability to access services, integrate into society and stay connected with their communities of origin."[55] Secondly, policies which restrict the efficient performance of work contradict Point 10.b of the UN Goal 10 of the 2030 Agenda which in para. 27 "Encourage[s] official development assistance and financial flows, including foreign

53 Karska et al., *Human Rights*, 15:344.

54 Pope Francis, "Message Of The Holy Father Pope Francis For The II Global Refugee Forum (Geneva, 13–15 December 2023)," accessed December 15, 2023, https://www.vatican.va/content/francesco/en/messages/pont-messages/2023/documents/20231214-messaggio-refugee-forum.html.

55 IOM, "Migration, Sustainable Development and the 2030 Agenda," 2023, accessed December 15, 2023, https://www.iom.int/migration-sustainable-development-and-2030-agenda.

direct investment, to States where the need is greatest." That goal suggests that the implementation of policies addressing Goal 8 of the 2030 Agenda ("Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all") should be carried out by the CoR and the CoO. Thus, although the CoR may limit social assistance to displaced persons, it should let them continue their remote work for the CoO, as this supports the CoO's development and productive employment in that country.

5. Conclusions

Unlike a refugee, a displaced person can perform remote work for their CoO if it does not conflict with aims of the refugee system. This interpretation respects the RC, as the states (and international organizations, including the EU) can extend the subjective scope of protection. Directive 2001/55/EC promotes this view.

Moreover, granting the right to continue performing remote work for the CoO is in line with the obligation to promote productive employment. Although international law does not explicitly state in which country such a promotion should take place, this can be inferred from the UN standards that address the interests of the CoR and the CoO.

Remote work also helps the DPs to stay connected with people with whom they share cultural and linguistic ties. This, in turn, supports their psychological recovery and reduces the feeling of alienation in the CoR. However, well-managed remote work can also support the integration of persons in need of international protection into the host society. This is because they can use their knowledge and skills by building links with local communities. They will also develop their human capital, which (if well managed) should increase their productivity and competitiveness in labor markets. As a result, their incomes should increase.

In this context, it should be emphasized that remuneration can be considered by the authorities of the EUMS as a factor that may limit the extent of assistance provided to displaced persons. This could be a particularly useful method of limiting expenditure on social protection when a large number of beneficiaries would place a significant burden on public finances, which could pose a threat to the financial stability of the EUMS. A limitation of social assistance, justified by reference to legitimate goals, would

be possible if national law provided for such a possibility and if such a limitation was necessary in a democratic society. In order to confirm that the need for such a restriction has been thoroughly analyzed, a state could claim that displaced persons can still support themselves by working remotely. This reasoning supports the view that the right to work for the CoO should be effectively available to protected persons in situations of mass influx.

Nevertheless, the authorities of the host state should be able to verify that such activities do not violate refugee law. Indeed, the doctrinal-legal analysis carried out in this article has shown that the answer to the research questions depends on the nature of the activities performed by a displaced person, but not on the type of contract that this beneficiary concludes with the authorities.

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Harmonizing European Financial Regulation: Is There a Need for Improved Similarity in Prospectus Liability Rules?

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Abstract: This paper on financial regulation addresses the extent to which rules on liability for information should be standardized across the EU/EEA region. The method applied is an analysis of legal documents. My finding is that further harmonization may lead to difficulties concerning procedural rules. Some authors suggest harmonizing the civil procedure for prospectus liability cases. This could reduce asymmetric information and thus contribute to efficient markets. However, mandatory disclosure comes with costs. These may increase if standards inconsistent with domestic procedures are imposed. The topic may be of interest for regulating other aspects of life, such as environmental information disclosure.

1. Introduction

The EU has come a long way in harmonizing prospectus responsibility. Among the remaining subjects is the sanctioning of violations. Some academics have called for rule similarity in the civil procedure in these cases.[1] However, the Member States have organizational set-ups that safeguard checks and balances in this regard. This is evidenced by the similarity sought

[1] Danny Busch, "The Influence of the EU Prospectus Rules on Private Law," *Capital Markets Law Journal* 16, no. 1 (1 January 2021): 30, https://doi.org/10.1093/cmlj/kmaa029.

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after in relevant Supreme Court rulings. The choices in the legal area of finance may inspire efforts to regulate climate change. Companies are being tasked with handling some challenges posed by climate change, and financial disclosure has been subject to strict regulations for decades. To improve environmental regulations, it may be necessary to comprehend the advantages and disadvantages of mandatory disclosure in the stock market.

The research question is whether rules in prospectus litigation should be similar across the EU/EEA area. When a company is preparing to be listed on the stock exchange or has already been listed, it must disclose a significant amount of information to the public. For instance, when raising capital, there is a need for a prospectus that outlines all material information regarding the company's finances and operations. The recent PR[2] struck a balance in determining the appropriate level of harmonization for prospectus responsibilities in the EU/EEA area. This study aims to analyze the current state of prospectus liability theory and explore its potential applicability to other domains.

Although legislators have addressed harmonizing securities regulation, some areas remain without common, binding standards. The problem is identifying aspects that have not yet been harmonized and analyzing if further integration is required or if some aspects would be better left to individual nations. The claim to be tested is that pursuing further harmonization will not lead to problems with other procedural set-ups. This claim will be compared to the observations in the upcoming discussion.

To investigate this claim, I will examine relevant theories and empirical legal evidence. A document analysis will be applied to connect observations and the claim. Some aspects of this judicial method will be discussed, specifically incorporating considerations to equal information. The reasoning will be presented, along with relevant objections. The conclusion will focus on securities markets. Finally, some perspectives related to climate change will be offered. The starting point to get there is the debate about the harmonization level.

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[2] Regulation (EU) of the European Parliament and of the Council No. 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (O.J.E.C. L168, 30 June 2017), 12, accessed June 30, 2017, http://data.europa.eu/eli/reg/2017/1129/2021-11-10/eng.

2. Theoretical Discussion of Liability Harmonization

After periods of market exuberance, there are often calls for regulation to prevent securities fraud. There is an academic discussion about how far to go in harmonizing prospectus liability. Some say the burden of financial reporting may have reached a tipping point in certain jurisdictions, where the costs may outweigh the benefits.[3] This could be qualified, as the burden will depend on the nature of the responsibility imposed. An author has cited the current political hesitance towards deeper integration as the reason for an anticipated status quo. "EU legislation on prospectus liability would be the best solution (…)."[4] The arguments for common regulation are that it will provide legal certainty, uniform investor protection, and a true level playing field in the region. However, if the Member States have consistent procedural rules, attempts to regulate a particular subset of sanctions could cost more than they gain.

Sanctions are important to ensure adherence to imposed legal norms. Current theory states: "The best interpretation of EU law is a preference for administrative sanctions rather than civil and criminal sanctions."[5] This position suggests that EU law favors decisions made by supervisory bodies rather than civil or criminal claims. This may reflect the legal competence of EU bodies and the subsidiarity principle, whereby nations establish procedural norms that align with their national hierarchy of enforcement institutions.

Some argue that a standard of effective remedy in criminal law should be universal in the EU.[6] Before this is completed, Member States should see standardization as an opportunity rather than a threat to their sovereignty. Similarly, statutes sanctioning information mistakes should be interpreted considering procedural guarantees. This could promote norm similarity before financial regulation is harmonized in this regard.

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3 Niamh Moloney, Eilis Ferran, and Jennifer Payne, *The Oxford Handbook of Financial Regulation. Oxford Handbooks* (Oxford: University Press, 2015), 534.

4 Busch, "The Influence," 30.

5 Martin Gelter and Pierre-Henri Conac, *Global Securities Litigation and Enforcement* (Cambridge University Press, 2019), 272, https://doi.org/10.1017/9781316258118.

6 Paweł Wiliński and Karolina Kiejnich-Kruk, "Right to Effective Legal Remedy in Criminal Proceedings in the EU. Implementation and Need for Standards," *Review of European and Comparative Law* 54, no. 3 (30 September 2023): 164, https://doi.org/10.31743/recl.16244.

Objections to such regulation can be seen in the US debate over case law from Delaware. Some say the Caremark decision imposing liability on directors after inadequate internal controls should not be extended to cover monitoring voluntary ESG issues.[7] One of the reasons is to draw a line against business decisions. This contrasts with current EU regulations that put the valuation of environmental decisions at centre stage.[8] In the relevant preamble, the EU points to the fact that this area still is not harmonized.[9] The importance of handling asymmetric information is emphasized in this regard.[10]

3. The Method for Connecting Observations and the Claim

The starting point here for connecting observations and the claim is legal science. When searching for relevant documents, Norway, as an EEA country, is selected due to its early attention to sustainability and growing alignment with EEA/EU regulations. This will limit the discourse on legal methodology to Norwegian customs. However, this does not render the discussion irrelevant to other jurisdictions, as the methods appear to overlap significantly.[11] As emphasized in recent literature, comparative law can be

7 Stephen M. Bainbridge, "Don't Compound the Caremark Mistake by Extending It to ESG Oversight," *The Business Lawyer* 77, no. 3 (2022): 655.

8 Norwegian Act on Financial Sustainability Disclosure of 22 December 2021 No. 161, as amended, accessed January 3, 2024, https://lovdata.no/pro/#document/NL/lov/2021-12-22-161?searchResultContext=1479&rowNumber=1&totalHits=5948; Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector (Text with EEA Relevance), preamble point (14), accessed January 3, 2024, https://lovdata.no/pro/#document/CLX3/eu/32019r2088.

9 Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector (Text with EEA Relevance), preamble point (5), accessed January 3, 2024, https://lovdata.no/pro/#document/CLX3/eu/32019r2088.

10 Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector (Text with EEA Relevance), preamble point (10), accessed January 3, 2024, https://lovdata.no/pro/#document/CLX3/eu/32019r2088.

11 Sverre Blandhol, "Er Rettsanvendelsen i EU-Domstolen Og Menneskerettsdomstolen Vesensforskjellig Fra Norsk Rettskildelære? Lov Og Rett 2005 s 316–327 – (LOR-2005–316)," 2005, 323, accessed June 20, 2023, https://lovdata.no/pro/#document/JUS/blandhol-s-2005-01.

a valuable tool for courts when addressing fundamental issues in European law and its interaction with national law.[12] This aspect of comparison is well suited to the discussion of equal information. To apply the outlined method, relevant observations in the form of legal documents are needed.

4. Analysis of Legal Documents

To investigate the claim and discuss the theory, I will analyze certain observations and findings. Specifically, the relevant EU and national legislation are examined, along with the decisions of the European Court of Justice (ECJ) and the Supreme Court. The latter handled the medical product case regarding information responsibility. Claims for damages were brought against the board members.[13] Investors had subscribed to shares in a private placement, but the company went bankrupt due to delays in completing and selling this medical product. The legal basis was the Norwegian Private Companies Act (Aksjeloven – asl) § 17–1,[14] and the actual basis was allegedly incorrect or misleading information from the company board members.

The Supreme Court found the communications mostly accurate but determined that a failure to conduct physical testing had resulted in a misjudgment regarding the product's reusability. As the threshold for liability for misjudgment was high, these professional investors had to bear the risk of their own failed expectations. Thus, the board members were cleared of liability. A consistent set of rules was applicable to the problem, and one can ask what rule similarity would provide additional protection to the parties. European sources were hardly mentioned in the medical product reasoning, even though investor protection has recently been incorporated in the domestic statute. If there was a need for additional protection, one would expect comparative law to be relevant to highlighting solutions elsewhere.

This comparative aspect may be reflected in another Supreme Court decision on Reno Norden. In this case, board members were sued when

12 Mads Andenas and Duncan Fairgrieve, *Courts and Comparative Law*, 1st ed. (Oxford: University Press, 2015), 9, https://doi.org/10.1093/acprof:oso/9780198735335.001.0001.

13 "Norwegian Supreme Court, HR-2022–2484-A – Medical Product," 2022, accessed June 18, 2023, https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2022-2484-a.

14 Norwegian Act on Company Shares of 13 June 1997 No. 44, as amended, 1997, https://lovdata.no/pro/#document/NL/lov/1997-06-13-44/%C2%A717-1.

a capital emission was followed by a relatively quick bankruptcy.[15] The question was whether being aware of a dire financial situation constituted insider information, even when the possibility of collapse was less than fifty per cent. Even though a previous statute was invoked, recent case law from the ECJ was considered significant.[16] A violation was found based on the European court's emphasis on disclosure to prevent market failure. This could be interpreted as a construction of responsibility by using European sources. Reno Norden had asymmetric information regarding its desperate financial situation, and recent theory emphasizes this as a possible motive for securities fraud.[17] As a result, a plaintiff could risk not receiving a payout, even if the civil court case is successful.

Civil prospectus litigation is addressed by Article 11 PR,[18] and a natural interpretation in the current context is that it imposes a duty on nations to ensure a standard of appropriate behavior. Recent literature points to the European principle of effectiveness in this regard. For instance, the Austrian Immofinance case is seen as relevant.[19] This verdict found that in the absence of EU rules, it is the responsibility of the Member State to establish the criteria for determining the amount of damages, as long as the principles of equivalence and effectiveness are upheld.[20] Effectiveness should not come at the expense of procedural rights, such as the right to contradict. This is guaranteed by a domestic norm; see the Norwegian Civil Procedures Act[21] 11–1 (3) first sentence.

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15 "Norwegian Supreme Court, HR-2022–695-A – Reno Norden," 2022, accessed June 23, 2023, https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2022-695-a?searchResultContext=2886&rowNumber=9&totalHits=31.

16 CJEU Judgment of 28 June 2012, Markus Geltl v. Daimler AG, Case C-19/11, ECLI:EU:C:2012:397.

17 Gelter and Conac, *Global Securities Litigation and Enforcement*, 137.

18 Regulation (EU) of the European Parliament and of the Council No. 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (O.J.E.C. L168, 30 June 2017), 12, accessed June 20, 2023, http://data.europa.eu/eli/reg/2017/1129/2021-11-10/eng.

19 CJEU Judgment of 19 December 2013, Alfred Hirmann v. Immofinanz AG, Case C-174/12, ECLI:EU:C:2013:856, section 40.

20 Busch, "The Influence," 11.

21 Norwegian Act on Civil Disputes of 17 June 2005 No. 90, as amended, 2005, https://lovdata.no/pro/#document/NL/lov/2005-06-17-90/%C2%A711-1.

There will be corresponding regulations in the ECHR incorporated by the Norwegian Human Rights Act.[22] If European regulators aim to fully harmonize civil liability, they must address contradictions, which should be carefully crafted in line with the administrative structure of national enforcement bodies. In a civil case, there will be considerations for both parties. However, the balance may be distorted by new regulations, potentially leaving one party worse off. This will not constitute a Pareto improvement where no one is worse off, and some are better off. Thus, any possible harmonization of civil litigation rules should be carefully implemented.

In addition to civil litigation, administrative sanctions are the main sanction against securities fraud. In the administrative track, issues raised might be resolved without much appeal since the fines are relatively small. The administrative and criminal proceedings are addressed by Article 38 PR:

> Without prejudice to the supervisory and investigatory powers of competent authorities under Article 32, and the right of Member States to provide for and impose criminal sanctions, Member States shall, in accordance with national law, provide for competent authorities to have the power to impose administrative sanctions (…).

An interpretation of this text is that the EU does not interfere with criminal and administrative sanctions imposed by the nations but rather assumes that these sanctions already exist. When reading this in line with the principle of effectiveness, there will be strict guidelines on national procedures.[23] This is a natural outcome of the integration and cooperation between supervisory bodies across the EU/EEA. Although prospectus responsibility is addressed by the PR, much is left to the Member States. This responsibility applies at a general level. Under the authority granted by Article 75 (a) of the Constitution (Grunnloven) of 17 May 1814, the Securities Trading Act (Verdipapirhandelloven, vphl.) was made statutory on June 29, 2007. When addressing EU/EEA prospectuses for raising more than 8 million EUR, section 7–1 of vphl reads: "1) EØS-avtalen vedlegg IX forordning (EU) 2017/1129 (om prospekter ved

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22 Norwegian Act on the Human Rights of 21 May 1999 No. 30, as amended, 1999, https://lovdata.no/pro/#document/NL/lov/1999-05-21-30/%C2%A71.

23 Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials*, 7th ed., UK version (Oxford: University Press, 2020), 273.

offentlige tilbud og notering på regulert marked (prospektforordningen)), som endret ved forordning (EU) 2021/337 om EU-gjenopprettingsprospekt, gjelder som lov (…)." A literal interpretation of this is a complete alignment, as the competence to make statutes is extended to include the relevant EU PR[24] in domestic legislation. Article 11(2) PR states: "Member States shall ensure that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus." A contextual interpretation will impose an obligation on national regulators to facilitate damages claims in the event of securities fraud in the primary market. The PR thus stopped short of regulating the specifics of civil liability that apply to prospectuses.

The principles of supremacy, state liability, and national procedural autonomy are discussed in the relevant literature,[25] referencing the ECJ's Rewe case.[26] In this case, the topic was a time limit on a refund for inspection costs, which was found to be not in line with what is now Article 4(3) TFEU.[27] The national court had to ensure the effective procedural protection of citizens. A similar need for effective protection of investors will arise when Article 11 PR is violated. To ensure easy access to justice and promote efficient market functioning, it is essential to consider whether harmonizing civil procedural rules will improve market functioning or if it may lead to problems with important issues such as contradiction.

5. Discussion of the Connection between the Documents and the Claim

This section will discuss the extent to which the observations substantiate the claim regarding further harmonization of litigation. To reach

24 Regulation (EU) of the European Parliament and of the Council No. 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (O.J.E.C. L168, 30 June 2017), 12, accessed June 21, 2023, http://data.europa.eu/eli/reg/2017/1129/2021-11-10/eng.

25 Craig and De Búrca, *EU Law*, 273.

26 ECJ Judgment of 16 December 1976, Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland, Case 33–76, ECLI:EU:C:1976:188 at 1997.

27 EU The Treaty on the Functioning of the European Union (TFEU) 12012E/TXT, (O.J.E.C. C326, 26 October 2012), accessed May 10, 2023, http://data.europa.eu/eli/treaty/tfeu_2012/oj/eng.

a conclusion, a discussion of the connection between the observations and the details of the claim is needed. Different reasons and evidence will be presented. Firstly, the material statutes are now similar, but their interpretations still spark discussions. Secondly, courts strive for consistent rulings, and national courts should seek guidance from the European courts. Thirdly, the practice of making information public seems quite common across jurisdictions.

One relevant observation is incorporating the prospectus regulation into the Securities Trading Act as domestic law. By its nature, this will be an almost complete harmonization of the material rules. The EEA prospectus norms only apply to the larger offerings, while smaller ones are not subject to such a high degree of rule similarity. A possible improvement may be to reduce the financial threshold of the prospectus regulation. Supreme Court argumentation often incorporates the interpretation of EU law. There seems to be an intention to reach a conclusion in the specific case that is in line with, supported by, or at least not in conflict with international sources. This strive, which can be observed in the preface to Section 5 of the EEA Agreement, is expressed by the phrase dynamic and uniform, as stated in EEA law § 1. When the intention of establishing a singular economic area of cooperation is pursued, it promotes rule similarity. In particular, this applies to prospectus liability when the EU statutes are implemented as domestic legislation.

5.1. Prospectus Liability as a Starting Point

Material regulation of prospectus liability aims to ensure market functioning. This is not significantly improved by standard litigation rules. The requirement for effective access should be sufficient, as can be seen in facts found in cases regarding prospectus liability. The aim is to find the right level of harmonization. This may help others improve their understanding of regulation in various areas, such as climate change. The question in the discussion of prospectus regulation will be whether there are preferences for certain legal effects over others. This effort will clarify the prospectus liability status, even if there is no move towards a unified regulation. An assumption to be discussed is whether harmonized rules in this area will lead to improvement.

The explicit administrative consequences stem directly from regulations, while domestic law typically defines private damages.[28] EU law will govern reporting obligations, and administrative effects will naturally result from this system. There is no harmonization apart from the requirement for an effective process, so private claims must be resolved through a domestic civil case. Thus, identifying domestic cases and discussing them to clarify the current law regarding prospectus liability may enhance our understanding in this area. The potential findings in this analysis could potentially be applied to other situations, different points in time, or various walks of life. An objection may arise from the conflicting interests between efficient trade and climate change prevention. On the other hand, while mandatory disclosure has been a regulated and debated subject for decades, the mechanisms used in finance to address this issue may serve as inspiration for regulating environmental announcements. For instance, managing information concerning pollution can result in accountability with various legal consequences.

This subject matter is international, and a comparative analysis may be fruitful for the discussion. Gelter states that effective investor protection is provided by opt-out class action and the fraud-on-the-market theory in the US.[29] This theory, established in Basic[30] and affirmed in Halliburton,[31] asserts that material disclosure will affect share prices because it incorporates important information. Gelter finds that the mentioned theory helps reduce the information asymmetries common in investor litigation.

The issue of asymmetric information is also mentioned in the preamble to the PR, where it cautions that a lack of harmonization could result in fragmented markets.[32] The solution is a common regulation of the disclo-

28 Federico Della Negra, *MiFID II and Private Law Enforcing: EU Conduct of Business Rules*, Hart Studies in Commercial and Financial Law (Oxford: Hart, 2020).

29 Gelter and Conac, *Global Securities Litigation and Enforcement*, 104.

30 Justia Law, "Basic, Inc. v. Levinson, 485 U.S. 241," 1988, accessed May 18, 2023, https://supreme.justia.com/cases/federal/us/485/224/.

31 Justia Law, "Erica P. John Fund, Inc. v. Halliburton Co., et al., 563 U.S. 804," 2011, accessed April 20, 2023, https://supreme.justia.com/cases/federal/us/563/804/.

32 Regulation (EU) of the European Parliament and of the Council No. 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (O.J.E.C. L168, 30 June 2017), 12, preamble section 4, accessed April 5, 2023, http://data.europa.eu/eli/reg/2017/1129/2021-11-10/eng.

sure duties, which is easy to adopt and demonstrates determination without imposing significant costs on society at large.[33] One could ask if this is limited to regulating the actions of mandatory disclosure or if it must also encompass the responsibility imposed in the event of a breach. Considering the principle of effectiveness,[34] it is preferable to harmonize both the obligation and its sanctioning. The principle of subsidiarity limits the latter, although this can lead to regulatory failure.[35]

This possibility of a breakdown is a central aspect of regulating securities markets. The topic is addressed in economic theory, which refers to the study of commercial activities, including the production and consumption of goods and services. Asymmetric information influences market functioning, as explained by Akerlof's lemons theory. According to this, differences in knowledge about used cars (known as lemons) may result in bid-offer price gaps and a lack of transactions.[36] In the first-hand market for shares, mandatory disclosure is one mechanism adopted to mitigate the problems caused by differences in quality information. A question arises as to why this regulation was adopted, as it was recently discussed in a comparison of the regulatory systems in the United States and the European Union.[37] The causation in this regard would be from rules to crisis rather than Akerlof's causation from asymmetric information to crisis.

The lessons from Akerlof's insight can be applied when analyzing the development of regulations following a market crash. Mandatory screening of prospectuses may improve market functioning, while litigation rules must be tailored to the structure of the financial supervision that handles most of the sanctions. Differences in sanctions are part of the academic debate about contemporary prospectus litigation.

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33 Moloney, Ferran, and Payne, *The Oxford Handbook of Financial Regulation*, 514.

34 Craig and De Búrca, *EU Law*, 323.

35 Ibid., 133.

36 George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," *The Quarterly Journal of Economics* 84, no. 3 (1970): 499, https://doi.org/10.2307/1879431.

37 Min-woo Kang, "Inside Insider Trading Regulation: A Comparative Analysis of the EU and US Regimes," *Capital Markets Law Journal* 18, no. 1 (January 2023): 103, https://doi.org/10.1093/cmlj/kmac026.

5.2. Widening the Scope of Information Errors

According to recent literature on sanctions, the Reno Norden verdict has limited importance, at least in criminal proceedings.[38] This argument appears to be based on the interpretation of statutory law, taking into account factors such as lack of clarity and the need to balance conflicting considerations. The domestic use in this regard seems somewhat different from the general EU law principles. When discussing EU law, one would expect general principles to be applied below the treaty text in the hierarchy, followed by legislative and delegated acts.[39] Although arguments are inferred from the objectives in the preambles to directives in sections 47 and 48 of Geltl, these cannot be categorized as general principles, which encompass proportionality, equality, and legal certainty.

In Section 57 of the Reno Norden case, the Supreme Court derived two conflicting interpretations from these sections. Investor confidence would be strengthened by providing information, as the reasoning was in section 47 of Geltl. On the other hand, the discussion in section 48 of Geltl focused on the issue of being obligated to disclose non-material information to the public. The Supreme Court made explicit the trade-off in section 58 of Reno Norden, but this did not lead to a clear result. The Supreme Court then commented on the significant importance the EU Court places on making all price-sensitive information public but did not provide any references in this regard.

The argument seems critical as it leads to a test deciding the case. An aspect of the Reno Norden case was the extent of the loss as the company went bankrupt. This may moderate the probability requirement, as the effect follows from multiplication. The medical product verdict had a similar claim after the emission, followed by bankruptcy, but it did not lead to liability.[40] There was little reference to European sources, in contrast to the extensive discussion in Reno Norden. The liability norm in these cases could be subject to a possible harmonized regulation, as the outcomes

38 Knut Bergo, "Sannsynlighet, forventning og mulighet – kommentarer til HR-2022–695-A," Juridika, 12 September 2022, 36, accessed June 20, 2023, https://juridika.no/tidsskrifter/tidsskrift-for-forretningsjus/2022/1/artikkel/bergo.

39 Craig and De Búrca, *EU Law*, 148.

40 "Norwegian Supreme Court, HR-2022–2484-A – Medical Product," 2022, accessed June 20, 2023, https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2022-2484-a.

are different, and the reasoning is up to debate, at least in Reno Norden. While the cases settled civil liability, they may still be used as arguments with related facts in later criminal proceedings. This shows that the legal effects are interconnected and that complete harmonization of one effect, for instance, civil claims, may limit the court when deciding other effects, such as criminal cases. This has been commented on recently, where the clarity needed for criminal proceedings is highlighted as a problem when applying the Reno Norden case in the future.[41]

5.3. The Regulation of Liability

The topic of prospectus liability has been raised recently, and one central question is whether national courts may deviate from the liability thresholds of the PR.[42] This may be a less or more strict liability imposed on the persons responsible. As an effective prospectus liability norm seems to exist, the relevant question could be what gains a uniform procedural regulation would bring in the form of clarity and a level playing field. This may be held up against the cost of constructing a system colliding with the domestic procedural norms. These will be carefully crafted through legislation and jurisprudence and aligned with the administrative set-up within the national courts. Even though different elements from the balancing of regards to the civil parties may distort future criminal cases, the protection of rights should be relevant in each case a court considers.

Trying to impose common rules of contradiction will most likely lead to considerable practical problems that, in the EU, are usually left to the principle of subsidiarity reflected in Article 5 TEU.[43] This is commented on in the preamble to the PR[44]: "In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives." This could be interpreted

41 Bergo, "Sannsynlighet, forventning og mulighet – kommentarer til HR-2022–695-A," 45.

42 Busch, "The Influence," 11.

43 The Treaty on European Union (TEU) 12012M/TXT (O.J.E.C. C326, 26 October 2012), accessed May 18, 2023, http://data.europa.eu/eli/treaty/teu_2012/oj/eng.

44 Regulation (EU) of the European Parliament and of the Council No. 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (O.J.E.C. L168, 30 June 2017), 12, preamble section 87, accessed April 12, 2023, http://data.europa.eu/eli/reg/2017/1129/2021-11-10/eng.

as a reasoned decision to harmonize prospectus litigation to a certain extent while leaving further implementation to the Member States. The debate of a common procedural liability regime in the EU could serve almost as an ideal in the form of a goal that can be strived for but never achieved. This may be a reason for continuing the norm as the EU did when addressing prospectus responsibility in its recent efforts to promote the Capital Markets Union.[45]

Will a common norm of prospectus liability be tempting? Bush leaves clarification to the CJEU and again hinges this on the propensity of national supreme courts to refer case questions to the European institution and even the plaintiffs and their lawyers.[46] Over time, this will bring clarity to the norm, and jurisprudence can be applied in later claims. However, there will be a less political drive towards a Capital Markets Union with its clarifying legislation. The area will be left to the balanced application of those who know the details of the legal procedure needed to ensure citizens' rights, both in criminal and civil proceedings.[47] When cases are lifted to EU courts, aspects such as the four freedoms will be observed, and these may have greater value to investors than a harmonized system of civil liability norms.

A recent statement could be seen as reluctance to harmonize prospectus litigation. "The best interpretation of EU law is a preference for administrative sanctions rather than civil and criminal sanctions."[48] This statement highlights the explicit regulation of administrative sanctions as opposed to the criminal and civil effects that are left to the nations in line with subsidiarity and effectiveness. These aspects may be relevant when assessing regulation in other walks of life, such as environmental challenges. Some efforts to harmonize sustainability reporting are expected in the EU, despite objections against "carving in" stakeholders other than

45 Danny Busch, Guido Ferrarini, and Jan Paul Franx, *Prospectus Regulation and Prospectus Liability* (Oxford University Press, 2020), 6, accessed May 10, 2023, https://olrl.ouplaw.com/view/10.1093/law/9780198846529.001.0001/law-9780198846529.

46 Busch, "The Influence," 30.

47 Craig and De Búrca, *EU Law*, 286.

48 Gelter and Conac, *Global Securities Litigation and Enforcement*, 272.

the traditional financial ones.[49] The interpretation could be correct when reading the vague norms of liability and firmness in administrative sanctioning when analyzing the EU PR. As Busch emphasizes, the European courts should be referred cases to clarify the norm in the years ahead.[50] If this happens, regard to equal information may be commented on and later used as legal arguments.

5.4. Discussion of the Applied Method

Equal information has been included in the method applied in this paper. The legal method is designed to address the link between observations and norms and is particularly useful in such an analysis. However, a special feature of this paper has been the application of the theory of asymmetric information and the resulting issues in getting all information to the markets. These issues have received little explicit attention in theory and verdicts and need some qualifications.

Equal information often leads to demands for costly mandatory reporting. Some of these costs can be difficult to reveal. The Reno Norden verdict seems to have expanded the prospectus liability using these regards, and the opposing views need to be taken into consideration. At first, the need for secrecy is central to innovation. Secondly, when environmental issues are included, the reporting burden may reach a tipping point of company bureaucracy that may divert attention from the profit-generating business. The trade-off between such regards may take the central stage when deciding future civil prospectus liability cases.

6. Conclusions

I believe this paper shows that a claim of similar prospectus litigation rules should be rejected as it would create problems without much gain related to market functioning. The current literature states that the burden imposed by financial reporting may have reached a tipping point relative to its gains

49 Frits-Joost Beekhoven van den Boezem, Corjo Jansen, and Ben Schuijling, *Sustainability and Financial Markets*, vol. 17, *Law of Business and Finance* (Deventer: Wolters Kluwer, 2019), 318.

50 Busch, "The Influence," 30.

in some jurisdictions.[51] Despite academics calling for further rule similarity in civil proceedings, this paper argues that the area should still be left to the various nations. This is shown by the striving for similarity in Supreme Court reasoning and supported by regard to equal information. Central aspects of regulating financial mandatory disclosure will be relevant to crafting climate change reporting norms. The negative aspects of disclosure must be respected to achieve an effective reporting duty. Reporting requirements are easy to impose, but the burden may become excessive for regulated entities. The discussion above has shed new light on the regulation of prospectus liability. The legal effects are interconnected across disciplines such as civil and criminal law, an aspect that could also be relevant to environmental regulation, as shown in recent publications.[52] A call for further integration of legal effects in one area will affect other disciplines. Perhaps the flexibility given to domestic courts when deciding cases based on EU legislation is welcome.

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51 Moloney, Ferran, and Payne, *The Oxford Handbook of Financial Regulation*, 534.

52 Busch, "The Influence," 29.

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Economic Dependence as a Criterion for the Protection of the Self-Employed under EU Law and in Selected Member States

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self-employment

Abstract: This paper presents the cornerstones of the conceptual distinctions necessary to map out a separate category of workers, namely "economically dependent self-employed workers" (who fall between dependent subordinated employees and independent self-employed entrepreneurs) from the perspective of the EU law and the laws of selected Member States. The author considers how the economic dependency of self-employed workers should be defined, which method(s) of protection should be applied to these workers, and what scope of protection they should enjoy. The observations in this paper serve as a basis for *de lege ferenda* recommendations for the Polish legislator. At present, there is no separate category of "economically dependent self-employed workers" in Polish law.

1. Introductory Remarks

Self-employment has been known in the European Union for many years as a manifestation of individual entrepreneurship aimed at economic activity that provides the individual with a source of income. For a long time, this form of gainful activity has been an important element of the EU labor market, and the scale of self-employment is constantly growing, displacing the classic employment relationship based on an employment contract. The main reason for expanding self-employment is primarily the desire to reduce labor costs by shifting a significant part of those costs to contractors

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and the search for more and more flexible forms of employment.[1] According to data published by the OECD, the average level of self-employment in all European Union Member States in 2021 was 15.27% of the total workforce[2] and has been gradually increasing over the past few years. The highest level of self-employment in the European Union in 2021 was recorded by the OECD in southern European countries (Greece – 31.82%, Italy – 21.83%), while the lowest in countries such as Latvia (12.98%), France (12.61%), Hungary (12.51%), Austria (11.91%), Lithuania (11.63%), Sweden (10.60%), Luxembourg (10.23%), Denmark (8.84%), and Germany (8.75%).[3] According to OECD data, in 2021, based on the statistics presented above, Poland's level of self-employment significantly exceeds the EU average and amounts to 19.73%. The largest share of self-employment is recorded in the service sector, where about 60% of employees are gainfully self-employed.[4] The development of modern technologies, computerization, and digitization undoubtedly contribute to the further spread of self-employment in the EU. This has resulted, among other things, in the expansion of platform work, which is very often provided in self-employment conditions. Currently, as many as 11% of EU citizens work through online platforms, and for three million people, it is a stable source of income. Currently, more than 28 million people in the EU, usually self-employed, work through digital platforms, and the European Commission estimates that this number will reach 43 million in 2025.[5]

The widespread use of self-employment in the EU, in which gainfully employed persons very often operate in conditions similar to those of employees (especially in conditions of economic dependence on

1 For more information, see: Tomasz Duraj, "The Future of Civil Law Employment Relations," *Acta Universitatis Lodziensis. Folia Iuridica* 88 (2019): 5 et seq.

2 "Self-Employment Rate," OECD, accessed March 10, 2024, https://data.oecd.org/emp/self-employment-rate.htm#indicator-chart.

3 Ibid.

4 Self-employment is most common in construction, transport, trade, business, hospitality, gastronomy, IT, professional and scientific activity, health care, finance, and insurance.

5 See: Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM/2021/762 final, accessed March 10, 2024, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:52021PC0762. Cf. Aneta Tyc, "Gig Economy: How to Overcome the Problem of Misclassifying Gig Workers as Self-Employed?," *Revue Européennee du Droit Social* 56, no. 3 (2022): 35 et seq.

the contracting entity), has forced us to reflect on the necessity of extending protection to this category of contractors, which until recently was reserved only for employees.

This is important because work provided based on self-employed falls outside the scope of labor law regulations, which only govern work based on dependent employment (nowadays often referred to as voluntarily subordinated work). It is a type of arrangement in which a worker (employee) undertakes to perform, personally and in exchange for remuneration, activities of a specified type for the client (employer) and under the employer's direction at a place and time designated by the employer and at the employer's risk.[6] In contrast, a self-employed worker performs work under conditions of independence, autonomy, and non-subordination vis-à-vis the client (in particular with regard to the manner in which it is carried out) and on behalf of and at the risk of the worker rather than the client.[7] Consequently, self-employed workers in many EU countries are, as a rule, not eligible for the statutory protection guaranteed to employees under labor law. Generally, self-employed workers enjoy no regulatory protection regarding their life and health, remuneration for work, employment permanence, maximum working time standards, daily and weekly rest time, paid time off and other paid breaks, or collective rights.

The problem is that self-employed workers, in particular those providing their services personally to only one client, are usually heavily dependent on this client, who – taking advantage of the dominant negotiating position – tends to impose unfavorable working conditions. This dependence is very different from the subordination of an employee to the employer. It is multifaceted and manifests, among other things, by economic dependence if work for a given client is the sole (main) source of income; supervision and oversight by the client; accountability of the self-employed worker for the results of the work, potentially resulting in cuts to remuneration or termination of the contract; elements of subordination in terms of place and time of work, and work order and organization. While the core nature of

6 Tomasz Duraj, *Podporządkowanie pracowników zajmujących stanowiska kierownicze w organizacjach* (Warsaw: Difin, 2013), 21 et seq.

7 Tomasz Duraj, "Praca na własny rachunek a prawo pracy," *Praca i Zabezpieczenie Społeczne*, no. 11 (2009): 24 et seq.

the relationship differs from the subordination of an employee to the employer,[8] the situation of self-employed workers resembles that of employees in numerous areas and to a significant degree, thus generating the need for extending statutory protection to these workers.[9] This is also reflected in international law, which already guarantees these workers far-reaching standards of protection at work, often at a level comparable with the protection enjoyed by employees. This is particularly clear in the standards enacted by the United Nations and the International Labour Organization, which issue protective regulations covering all workers (not only employees), regardless of the type and legal form in which they provide work, very often using the term "worker" in a broad sense in English (and *travailleur* in French). The protection guaranteed under international law to these workers covers, in particular, life and health, dignity, non-discrimination, equal treatment in employment, remuneration for work, childcare, leisure, and collective rights.[10]

This issue has gained recognition both at the level of the European Union and in several Member States, including Spain, Germany, and Italy. A new category has consequently emerged: economically dependent self-employed workers. These workers are in an intermediate position between employees and truly independent entrepreneurs.[11] The overarching

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8 The economic dependency of the self-employed worker in relation to the client may not, in any case, be conflated with the subordination of an employee in an employment relationship. For more information, see: Tomasz Duraj, "Zależność ekonomiczna jako kryterium identyfikacji stosunku pracy – analiza krytyczna," *Praca i Zabezpieczenie Społeczne*, no. 6 (2013): 8 et seq.

9 See: Tomasz Duraj, "Funkcja ochronna prawa pracy a praca na własny rachunek," in *Ochronna funkcja prawa pracy. Wyzwania współczesnego rynku pracy*, eds. Anna Napiórkowska, Beata Rutkowska, and Mikołaj Rylski (Toruń: TNOiK, 2018), 37 et seq.; Tomasz Duraj, "Protection of the Self-Employed – Justification and Scope," in *Pravni Rozpravy, New Features and Law* (Hradec Králové: Magnanimitas, 2018).

10 For more information, see: Tomasz Duraj, "Ochrona osób pracujących na własny rachunek w świetle aktów Organizacji Narodów Zjednoczonych i Międzynarodowej Organizacji Pracy – wnioski z projektu badawczego Narodowego Centrum Nauki Nr 2018/29/B/HS5/02534." *Acta Universitatis Lodziensis. Folia Iuridica* (2024), (forthcoming).

11 See: Anna Musiała, "Prawna problematyka świadczenia pracy przez samozatrudnionego ekonomicznie zależnego," *Monitor Prawa Pracy*, no. 2 (2014): 69 et seq.; Agata Ludera-Ruszel, "Samozatrudnienie ekonomicznie zależne a konstytucyjna zasada ochrony pracy," *Roczniki Nauk Prawnych* 27, no. 1 (2017): 43 et seq.; Kinga Moras-Olaś, "Możliwe kierunki regulacji ochrony pracy samozatrudnionych ekonomicznie zależnych," *Acta Universitatis*

objective of separating this category of self-employed workers is to ensure that they enjoy a certain scope of protection (smaller than employees) while not being considered a subset category of employees.

This paper aims to outline the main components of this concept, as reflected in the legal regulations in selected EU Member States. Key issues include the definition of economic dependency of the self-employed workers, the method(s) of providing protection, and the scope of guarantees that should be extended to this category of workers. The conclusions will serve as comments *de lege ferenda* for the Polish legislator, given that the Polish law currently contains no separate provisions applicable specifically to economically dependent self-employed workers.

2. Economic Dependency as a Criterion for the Protection of the Self-Employed in EU Law

At the EU level, the first indications of the emerging need to designate a separate category of economically dependent self-employed workers, who require protection due to the similarity between their working conditions and those of employees, can be traced back to as early as 1999. At that time, a group of academics led by Alain Supiot submitted a report to the European Commission, drawing attention to the existence of a new group of workers who could not be classified as employees but were in a situation of economic dependence on the entity contracting them to work. The authors of the report recommended that these workers should be able to benefit from the social rights since, due to the economic dependency, they remain in a "grey area" between dependent employment and self-employment, deprived of protection extended to employees under the labor law regulations.[12] The necessity of conceptualizing the category of economically dependent self-employed workers was also noted by the European Commission in the 2006 green paper, *Modernising*

Lodziensis. Folia Iuridica 101 (2022): 105 et seq. Cf. Ulrike Muehlberger, *Dependent Self-Employment* (London: Palgrave Macmillan, 2007); Hugh Collins, Keith D. Ewing, and Aileen McColgan, *Labour Law: Texts and Materials* (Portland, OR–Oxford: 2005); Silvana Sciarra, *The Evolution of Labour Law (1992–2003),* Vol. 1, *General Report* (Luxembourg: Office for Official Publications of the European Communities, 2005).

12 "Transformation of Labour and Future of Labour Law in Europe: Final Report," European Commission, Brussels, 1999, accessed February 1, 2023, http://bookshop.europa.eu/en/transformation-of-labour-and-future-of-labourlaw-in-europe-pbCE1998302/.

labour law to meet the challenges of the 21st century.[13] A similar view can be found in the opinion of the EESC (the European Economic and Social Committee), dated February 26, 2009, on "New trends in self-employed work: the specific case of economically dependent self-employed work."[14] In this opinion, the EESC notes that economically dependent self-employed work is an issue of current concern in the European Union and that a number of Member States specifically recognize in their legislation the concept of economically dependent self-employed workers as such, locating them in an intermediate category between dependent employment and truly independent self-employment. The objective being pursued is not to turn self-employed but economically dependent workers into employees but rather to give them a specific status, entitling them to specific protection based on their economic dependency. The EESC observes that in the states which recognize it, the status of economically dependent self-employed workers has been a means of extending greater legal protection to workers who are not employees but genuinely self-employed, albeit in a situation where they cannot take advantage of the economic protection, they would be afforded were they able to work for several clients. The EESC suggests that with the development of cross-border services, employment statuses need to be harmonized, starting with a European definition of economically dependent self-employed work. The EESC realizes that the diversity of national regulations and practices will likely make it difficult. However, failure to act on behalf of the European bodies can generate large disproportions between Member States. In countries where no separate category of economically dependent self-employed workers is specified, and certain rights are granted, a growing sector of European workers risks being left without protection. On the other hand, the EESC notes that there is reason to fear that recognition of economically dependent self-employed work, followed by increased legal protection for workers who provide such work, might lead to people hitherto defined as employees being transferred to the category of economically dependent self-employed work, for example in connection with companies' outsourcing strategies. This, in turn,

13 COM(2006) 708 final, 11–12.

14 O.J.E.C. C18, 19 January 2011, 2011/C 18/08. See also the opinion of the EESC dated May 30, 2007 on the Green Paper – Modernising labour law to meet the challenges of the 21st century COM(2006) 708 final, O.J.E.C. C175, 27 July 2007, 2007/C 175/17.

could increase so-called bogus self-employment, which merely serves to hide what is, in fact, dependent employment.

The problem is that, so far, no regulation at the EU level has established the category of economically dependent self-employed workers with a specific vested protection standard. Even more alarmingly, no uniform EU definition of self-employment exists. The term is sometimes conflated with freelancing, while at other times denoting all individuals who operate an independent business (whether or not they employ other workers). The European Commission has been arguing for years for greater clarity in the legal definitions of employment and self-employment in the Member States. The above-cited green paper (2006) recognizes that the absence of an EU-wide definition of self-employment can cause problems, particularly in situations involving cross-border work and the supply of services.[15] Similarly, the EESC has noted on several occasions that, despite the efforts of the Member States, no precise definition of the difference between employees and self-employed workers has been developed.[16]

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15 The definition of self-employment has emerged from the case law of the CJEU, with the most representative case being judgment of the Court of 20 November 2001 (Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie, Case C-268/99, ECLI:EU:C:2001:616, ECR 2001, no 11A, I-8615), the focal point of which is the operation of a business by a sex worker in the Netherlands, where self-employment is defined as operations situated outside any relationship of subordination as far as the scope of operations, conditions of work and pay, carried out at the worker's own behalf and at their responsibility, in return for remuneration payable to that worker in person directly and in full. See also: CJEU Judgment of 27 June 1996, P. H. Asscher v. Staatssecretaris van Financiën, Case C-107/94, ECLI:EU:C:1996:251; CJEU Judgment of 8 June 1999, C.P.M. Meeusen v. Hoofddirectie van de Informatie Beheer Groep, Case C-337/97, ECLI:EU:C:1999:284; CJEU Judgment of 10 September 2014, Iraklis Haralambidis v. Calogero Casilli, Case C-270/13, ECLI:EU:C:2014:2185; CJEU Judgment of 4 December 2014, FNV Kunsten Informatie en Media v. Staat der Nederlanden, Case C-413/13, ECLI:EU:C:2014:2411; CJEU Order of 22 April 2020, B v. Yodel Delivery Network Ltd, Case C-692/19, ECLI:EU:C:2020:288, OJ C 2020, no 287, item 22. See Joanna Unterschütz, "Europejska autonomiczna definicja pracownika i jej implikacje dla osób prowadzących działalność na własny rachunek w sferze indywidualnego i zbiorowego prawa pracy," *Acta Universitatis Lodziensis. Folia Iuridicain* 101 (2022): 21 et seq.; Mateusz Barwaśny, "Self-Employment in the Light of International and Union Law," *Acta Universitatis Lodziensis. Folia Iuridica* 103 (2023): 29 et seq.

16 Opinion of the European Economic and Social Committee on 'Abuse of the status of self-employed' (own-initiative opinion) (2013/C 161/03), accessed February 1, 2024, https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:52012IE2063&from=EN.

When considering the notion of the economic dependence of self-employed workers at the EU level and in the legislation of selected Member States, the focus should be on natural persons operating as service providers without the option of hiring employees or using hired contractual non-employee labor, personally providing work on a B2B basis, to either one client or a few clients, over an extended period, in a relationship of dependence triggered by the fact that a significant portion of these workers' income comes from that single or those few clients.[17] This is the direction followed by Adalberto Perulli, who (in a report on economically dependent employment prepared for the European Commission[18]) argued that a possible avenue of providing protection for self-employed workers is to establish a separate category of economically dependent self-employed workers, situating them between the categories of dependent employees and the typical self-employed entrepreneurs. Perulli argues the worker's economic dependence would consist in providing services to only one client (or a small number of clients) with no direct contact with the market, and the work results would enter the market not directly but rather intermediated by that client. Unable to spread the inherent business risk over relationships with various clients, the self-employed worker would have no economic independence (autonomy). Moreover, in Perulli's model of economically dependent self-employed work, an important feature is also the obligation to provide work personally without the help of dependent workers.[19]

Despite the absence of EU regulation establishing the category of economically dependent self-employed workers, there are two instances where, at the EU level, a direct reference is made to economic dependence; in both cases, it is interpreted in a manner somewhat similar to that outlined above.

The first instance is the above-cited EESC opinion dated January 19, 2012 on the abuse of the status of self-employed, in which the EESC notes the criteria that contribute to making a clear distinction between bona fide self-employed people working on their own account and sham

17 See also: Musiała, "Prawna problematyka świadczenia pracy," 69–71.

18 Adalberto Perulli, "Economically Dependent Work/Parasubordinate (Quasi-Subordinate) Work," 2002, accessed March 10, 2024, https://imago.org/wp-content/uploads/2013/10/images_pdfs_5c32fc1b528601980f68d5b8cbabde44.pdf.

19 Ibid., 105–6.

self-employed. In line with this opinion, when considering the employment status of a person who is nominally self-employed and is prima facie not considered an employee, it should be presumed that there is an employment relationship and that the person for whom the service is provided is the employer if at least five (out of a total of eight) criteria are satisfied. In terms of economic dependency, the crucial criterion is that the worker depends on a single client for at least 75% of income over one year. Another important criterion is that the worker cannot subcontract the work to other persons (to substitute for the worker). These criteria clearly point to a similarity with subordinated, dependent work.

The second instance of a direct reference at the EU level to the economic dependency of self-employed workers appears *expressis verbis* in Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (dated 9 December 2021, issued by the European Commission).[20] The Guidelines stipulate that the situation of these workers resembles that of employees. As a result, collective agreements covering these workers are not in breach of Article 101 of the Treaty on the Functioning of the European Union[21] if the self-employed workers offer services solely or primarily to a single counterparty, which puts them in a situation of economic dependence. The Commission considers that a solo self-employed person is in a situation of economic dependence where that person earns, on average, at least 50% of total work-related income from a single counterparty over a period of either one or two years, meaning that the worker is not an independent player on the market and is instead dependent on the client and integrated into the business of that client.[22]

In order to clarify the notion of economic dependency as a criterion for the protection of self-employed workers, it is important to reference

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20 2022/C 374/02, O.J.E.C. C374, 30 September 2022.

21 Under Article 101 TFEU (Official Journal 115, 09/05/2008 P. 0088–0089), all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are prohibited as incompatible with the internal market.

22 See also CJEU Judgment of 4 December 2014, FNV Kunsten Informatie en Media v. Staat der Nederlanden, Case C-413/13, ECLI:EU:C:2014:2411, ZOTSiS 2014, no. 12, I-2411.

specific legal regulations in force in the Member States. Spain has the broadest regulation in this respect, having adopted the act 20/2007 of 11 July 2007 – Self-Employment Act (hereinafter LETA), setting out the scope of protection for this category of workers.[23] In LETA, the Spanish legislator established a separate category of economically dependent self-employed workers, to whom the law now guarantees privileges and rights previously reserved exclusively for employees. According to Article 11(1) LETA, economically dependent self-employed workers are defined as those who carry out economic or professional activities for profit, on a regular basis, personally, directly, and predominantly for the benefit of a natural or legal person (client), and who are economically dependent on that client, receiving from that counterparty at least 75% of their income from their work, business, or professional activities.[24] This refers to the full scope of income (monetary or in-kind), including income that could have been earned for work as an employee for another client, an employer, or even the principal client. A self-employed worker's economic dependence is verified via an income certificate as declared to the fiscal authority. Any party trying to challenge the data in this certificate bears the burden of proof, and the court may conduct its own evidentiary proceedings, too. In addition to the crucial condition of 75% of income generated from a single client, the Spanish legislator has introduced a number of additional conditions that must be met cumulatively in order for a worker to qualify as an economically dependent self-employed worker (Article 11(2) LETA). These include (1) no responsibility for hired employees and no ability to subcontract the work, in part or in its entirety, to third parties, neither for the primary client nor

[23] Ley del Estatuto del Trabajo Autónomo, Boletín Oficial del Estado of 12 July 2007 no 166. For example, see: Anna Musiała, "Prawna regulacja pracy samozatrudnionego w świetle hiszpańskiej ustawy o pracy autonomicznej," in *Księga Pamiątkowa w Piątą Rocznicę Śmierci Profesora Andrzeja Kijowskiego*, ed. Zdzisław Niedbała, Lex 2010, 145 et seq.; Aneta Tyc, "Self-Employment in Spanish Law," *Acta Universitatis Lodziensis. Folia Iuridica* 103 (2023): 165 et seq.; Martín Apilluelo, "Ámbito subjetivo de aplicación," in *Tratado del Trabajo Autónomo*, ed. Guillermo L. Barrios Baudor (Cizur Menor: Thomson Reuters Aranzadi, 2018), 35–6.

[24] Cf. Stefanie Sorge, "German Law on Dependent Self-Employed Workers: A Comparison to the Current Situation Under Spanish Law," *Comparative Labor Law and Policy Journal* 31, no. 2 (2010): 252; Sylvie Célérier, Alberto Riesco-Sanz, Pierre Rolle, "Trabajo autónomo y transformación del salariado: las reformas española y francesa," *Cuadernos de Relaciones Laborales* 35, no. 2 (2017): 403.

for other clients; (2) operating in a manner differing from hired employees of the primary client; (3) owning separate (independent of the primary client) production and material infrastructure necessary to carry out the work, if it is economically significant in the operations of the worker; (4) operating following the worker's own organizational rules but taking into account any technical instructions from the primary client; (5) receiving remuneration that is conditional on the result of the work (outcome-based remuneration), under the agreement with the primary client and after the latter has assumed the risk inherent in the work.[25] This set of criteria has not worked out well in practice. Due to the restrictive nature of the regulation and pervasive casuistry, the number of self-employed workers who enjoy the protective guarantees provided by LETA is negligible. Of all workers who are, in reality, economically dependent – a number estimated at about 1,200,000—only about 10,000 enjoy the TRADE status (*trabajadores autónomos económicamente dependientes*): less than 0.33% of all self-employed workers and less than 0.05% of workers in Spain in general.[26] These figures clearly demonstrate that the significance of this attempt at legal regulation of the category of economically dependent self-employed workers has been marginal.[27]

German law has no comprehensive regulation concerning economically dependent self-employed workers. However, the legislator establishes this category of workers as a subcategory of the self-employed, with a view to offering these workers certain specific types of protection;[28] this is labelled as the category of "employee-resembling persons" (*arbeitnehmerähnliche Personen*). No definition of the term is provided.[29] Yet, to offer to these "employee-resembling persons" the right to enter into a collective agreement,

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25 For more information, see: Tyc, "Self-Employment in Spanish Law," 170 et seq.; Esther Sánchez Torres, "The Spanish Law on Dependent Self-Employed Workers: A New Evolution in Labor Law," *Comparative Labor Law and Policy Journal* 31, no. 2 (2010): 231 et seq.

26 Adrián Todolí-Signes, "Workers, the Self-Employed and Trades: Conceptualisation and Collective Rights in Spain," *European Labour Law Journal* 10, no. 3 (2019): 258 and 266.

27 Tyc, "Self-Employment in Spanish Law," 181–2.

28 For more information, see: Rolf Wank, "Self-Employment in Germany and Austria," *Acta Universitatis Lodziensis. Folia Iuridica* 103 (2023): 139 et seq.

29 Nicole Neuvians, *Die arbeitnehmerähnliche Person* (Berlin: Duncker & Humblot, 2002), 49 et seq.

it is assumed they are economically dependent if the work primarily for one client generates, on average, more than 50% of income (Tarifvertragsgesetz of 9 April 1949, § 12a[30]).[31] It is sometimes argued in this context that economic dependence should be set against a background of relationship with one client, defined by time or income.[32] The law itself makes no reference to specific numbers, but case law suggests that a self-employed worker does not qualify for this status if the income generated outside the relationship with the primary client allows the self-employed worker to be independent.[33]

The Italian legislator has addressed the issue of protection for self-employed workers by adopting, on 22 May 2017, the act (no. 81) on the work of self-employed persons.[34] The act applies to contracts regulated by the Italian Civil Code, namely, the contract for the performance of specific work and the contract for the provision of services (Articles 2222–2238). This pertains to cases in which a person undertakes to provide work or services in exchange for remuneration, primarily personally, without subordination to the principal (self-employment).[35] Instead of an income threshold, the Italian legislator invokes the "criterion of coordinated and permanent cooperation".[36] There are two legal institutions in Italian law: "cooperation organized by the principal/client" (*collaborazioni organizzate dal committente; lavoro etero-organizzato*) and "coordinated cooperation organized by the collaborator" (*collaborazioni coordinate organizzate dal collaboratore*), where the "collaborator" is the party accepting the work (within

30 Uniform text of 25 August 1969, BGB I, 1323.

31 There are also other laws that pertain not only to employees but also to persons with a status resembling that of employees; these laws are listed in Frank Bayreuther, *Sicherung der Leistungsbedingungen von (Solo-) Selbständigen, Crowdworkern und anderen Plattformbeschäftigte* (Frankfurt: HSI-Schriftenreihe, 2018), 18, 25.

32 Martin Franzen, "Kommentar zu § 12a Tarifvertragsgesetz," in *Erfurter Kommentar zum Arbeitsrecht*, eds. Rudi Müller-Glöge, Ulrich Preis, Ingrid Schmidt (München: C.H. Beck, 2021).

33 Moras-Olaś, "Możliwe kierunki," 109.

34 Misure per la tutela del lavoro autonomo non imprenditoriale e misure volte a favorire l'articolazione flessibile nei tempi e nei luoghi del lavoro subordinato. Gazzetta Ufficiale of 13 June 2017, no. 135.

35 For more information, see: Aneta Tyc, "Self-Employment in French and Italian Law," *Acta Universitatis Lodziensis. Folia Iuridica* 103 (2023): 185 et seq.

36 Lavoro a progetto, Art. 61–69 D.Lgs. 276/03; L.92/2012; D.L. n.76/2013 convertito in L. n. 99/2013.

the framework of cooperation).[37] Another notable regulation is Article 3(4) of the act (no 81) on the work of self-employed persons, which stipulates that Article 9 of the act of 18 June 1998 (no 192[38]) on the abuse of economic dependence applies *mutatis mutandis* to the relationships governed by that act (no 81). According to this Article 9, economic dependence occurs when an undertaking is able to establish, in its commercial relations with another undertaking, an excessive imbalance of rights and obligations. Economic dependence is assessed by considering the extent of the genuine capacity of the abused party to find satisfactory alternatives on the market.[39]

3. Method and Scope of Protection for Economically Dependent Self-Employed Workers in EU Law and in Selected Member States

Unquestionably, self-employed persons who work under conditions of strong economic dependence from a client that can use their greater negotiating power to unilaterally impose unfavorable contractual provisions must be granted – just like dependent, subordinated employees[40] – a broader range of protection than self-employed persons who work under conditions of full autonomy. The Member States' legislation uses two main methods of applying protective regulations to economically dependent self-employed workers.

The first method is labor law expansion, whereby labor law provisions that create certain rights and privileges for employees are also applied to economically dependent self-employed workers, *mutatis mutandis*.[41] This method is used in Germany, where "employee-resembling persons" are covered by regulations otherwise restricted to subordinated employees (to guarantee certain specific rights). This approach is evident, for instance, in

37 For more information, see: Tyc, "Self-Employment in French and Italian Law," 194 et seq.

38 Disciplina della subfornitura nelle attività produttive. Gazzetta Ufficiale, 22 June 1998, no. 143.

39 Ibid., 196–7.

40 It should be noted here that while dependent, subordinated employees are covered by statutory protective guarantees, self-employed persons are subject to a civil law regime that shapes their working conditions based on the principle of freedom of contract and freedom to shape mutual relations, which gives the economically stronger entity a dominant negotiating position and an almost inorganic capacity to unilaterally impose contractual provisions.

41 A. Ludera-Ruszel favors this method due to the similarity of forms of relationships in which work is provided; Ludera-Ruszel, "Samozatrudnienie ekonomicznie," 56.

the German law on collective agreements (Tarifvertragsgesetz of 9 April 1949), which expands the scope of the employees' right to enter into collective agreements to the category of *arbeitnehmerähnliche Personen*[42]; Tarifvertragsgesetz 12a allows these self-employed workers to organize and to enter into certain types of collective agreements.[43] It also grants them the freedom to engage in industrial action as long as it does not violate cartel law.[44]

The second method is the establishment of new, separate legal solutions, creating new norms based on the provisions of the labor law dedicated specifically to economically dependent self-employed workers to fully consider the specificity and differences in the nature of work provided under the conditions of working on the worker's own account and at the worker's own risk.[45] This method is behind Spain's LETA, which not only defines in detail the category of self-employed workers (including those workers who are economically dependent on one primary client) but, above all, comprehensively and systemically standardizes the status of this group of workers, including in particular their fundamental rights and obligations, as well as the form and duration of the contract under which they provide work.[46] The Spanish legislator created a separate legal regime, which includes a list of individual and collective rights and privileges applicable to this category of workers. A distinction was also made between rights guaranteed across the entire category of self-employed workers, on the one hand, and the (much more extensive) rights reserved exclusively for the economically dependent self-employed workers who, given the similarity of their situation to that of employees, should enjoy more far-reaching protection. It is important to note here that the Spanish legislator, in principle, has excluded

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42 In German anti-discrimination law, the protective provisions for dependent, subordinated employees are also extended to persons with a status resembling that of an employee. See: Rolf Wank, "Antidiskriminierungsrecht im Selbständigenrecht und im Gesellschaftsrecht," in *Festschrift für Uwe Hüffer* (München: C.H. Beck, 2009), 1049 et seq.

43 Cf. CJEU Judgment of 4 December 2014, FNV Kunsten Informatie en Media v. Staat der Nederlanden, Case C-413/13, ECLI:EU:C:2014:2411.

44 Wank, "Self-Employment in Germany and Austria," 145.

45 Supporters of this method include: Musiała, "Prawna problematyka świadczenia pracy," 72; Moras-Olaś, "Możliwe kierunki," 116.

46 For more information, see: Musiała, "Prawna regulacja pracy samozatrudnionego," 145 et seq.

the issues of self-employment from the general scope of labor law. Under Article 3(3) LETA, self-employment falls outside the scope of labor law, except where the law explicitly states otherwise.[47]

The scope of statutory protection for economically dependent self-employed workers at the EU level and in individual Member States should arise from a combination of three key factors. Firstly, there is the need to bring the minimum level of protection into line with international law standards outlined in the UN and ILO instruments. At present, these standards guarantee protection for all workers (not only for employees), regardless of the type and legal form under which they provide work. This protection includes the protection of life and health, dignity, non-discrimination and equal treatment in employment, remuneration for work, childcare, leisure, and collective rights. Secondly, the scope of statutory protection of economically dependent self-employed workers should reflect the constitutional standards adopted in the Member States. These constitutional standards set a certain minimum threshold of rights pertaining to the conditions under which work may be provided. Thirdly, the socio-economic situation of individual Member States must also be considered since they differ significantly in their wealth and economic development levels.

De lege lata, there is no legislation in the EU that would harmonize the scope of minimum protection guaranteed to economically dependent self-employed workers (or even, more broadly, to those who provide work for remuneration outside an employment relationship). Hence, the emerging regulatory efforts differ from one Member State to another. In Spain, LETA guarantees self-employed workers a broad, two-tiered scope of protection, purpose-designed to reflect the realities of work provided in this mode.[48] The Spanish legislator grants all self-employed workers the right to work and the right to freely choose a profession or craft; the freedom of economic initiative and the right to free competition; the right to intellectual property over one's works or other protected objects; the right to equal treatment and non-discrimination, including on the grounds of disability; the right to respect for privacy; the right to adequate protection from sexual harassment

47 Cf. Manuel Carlos Palomeque López, "Trabajo subordinado y trabajo autónomo en el ordenamiento laboral español," *Revista Gaceta Laboral* 10, no. 1 (2004): 63.

48 For more information, see: Tyc, "Self-Employment in Spanish Law," 173 et seq.

and harassment on grounds of sex or any other personal or social grounds; the right to vocational training and retraining; the right to physical integrity and adequate protection of safety and health at work; the right to receive agreed consideration for the professional performance of their activities in a timely manner; the right to reconcile professional activities with personal and family life, including the right to suspend activities in the event of birth of a child, joint custody of a child, risks during pregnancy, risks during breastfeeding and adoption, and care for adoption and foster care; the right to sufficient social assistance and benefits in the case of need accordingly; the right to the individual exercise of activities arising from their professional activity; the right to effective judicial protection of their professional rights as well as access to out-of-court dispute resolution; the right to associate in a trade union or professional association of one's choice under the conditions set out in the relevant legislation; the right to associate and form, without prior authorization, specific professional associations of self-employed persons (*asociaciones profesionales específicas de trabajadores autónomos*); the right to take collective action to defend one's professional interests. However, when it comes to economically dependent self-employed workers, LETA offers more far-reaching guarantees.[49] These include, in particular, the right to transparent rules for the conclusion of contracts to provide work (*contrato para la realización de la actividad profesional)*, including the requirement of the written form, registration, presumption of indefinite duration, and invalidity of prohibited clauses; the right to participate in collective bargaining leading to agreements to protect the workers' collective work-related interests;[50] the right to rest; the right to stop working on reasonable grounds; the right to have the protection of permanence of employment with a guarantee of compensation; the right to settle disputes before an employment tribunal; the right to strike.

In contrast, the legislator offers no significantly better protection to economically dependent self-employed workers in Germany. Beyond

[49] Ibid., 177 et seq.

[50] These are agreements between associations representing economically dependent self-employed workers and businesses for the benefit of which the work is carried out. The agreements define, in particular, the working conditions of these self-employed workers (but not exclusively). They are not prescriptive in nature and are only binding on the parties to the agreement.

workplace health and safety regulations, statutory periods of notice for the self-employed (621 BGB and 649 BGB[51]), and protection against discrimination and unequal treatment, the legislator grants to the *arbeitnehmerähnliche Personen* the additional right to organize and to enter into certain collective agreements (12a TVG), and also to engage in industrial action, as long as it does not violate cartel law.[52]

In the face of inaction by EU bodies, these national practice and regulation disparities lead to increasing divergence between Member States. As a result, in some Member States, economically dependent self-employed workers enjoy no protection, leading to a precarious employment situation.[53] The relevant EU authorities are now alert to the need for legislation at the EU level to introduce a minimum protection standard for self-employed workers (or, more broadly, non-employees), but this has so far only applied to the digital platform sector. Furthermore, these efforts involve the legally questionable mechanism of presumption of an employment relationship in platform work.[54]

4. Protection of Economically Dependent Self-Employed Workers: Recommendations for the Polish Legislator

My analysis of the present issues is conducted as part of the international research project financed by the Polish National Science Centre, "In Search of a Legal Model of Self-Employment in Poland. A Comparative Legal Analysis". This paper presents a subset of findings from this project. Following

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51 Bürgerliches Gesetzbuch (1896).

52 For more information, see: Wank, "Self-Employment in Germany and Austria," 156 et seq.

53 The precarity is associated with the absence of seven employment guarantees, which include the following: labour market security, employment security, job security, work security, skill reproduction security, income security, representation security. This follows Guy Standing, *The Precariat: The New Dangerous Class* (London: Bloomsbury, 2011), 18, 27.

54 At present, at the EU level, work is in progress on the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work. The directive aims to achieve this objective by ensuring that the employment status of those doing platform work (especially the self-employed) is correctly defined. The proposal envisages the introduction of a presumption of an employment relationship, which (the European Commission estimates) would ensure the employment status for up to 4 million people currently performing platform work outside an employment relationship. A broader analysis of this issue is beyond the scope of this paper.

up on the discussion in previous parts of the paper, I will address the Polish regulatory efforts in this area.[55]

At present, self-employed workers under Polish law enjoy the following rights: protection of life and health, which covers all self-employed persons providing work in an establishment of an entity organizing it;[56] prohibition of discrimination and the requirement of equal treatment in employment;[57] guarantee of minimum wage and the protection of remuneration for work;[58] protection of maternity and parenthood;[59] and the right of association in trade unions, which consequently leads to a wide variety of

55 "International Research Project: In Search of a Legal Model of Self-Employment in Poland. Comparative Legal Analysis," University of Lodz, accessed February 5, 2024, https://www.wpia.uni.lodz.pl/en/struktura/centra-naukowe/centrum-nietypowych-stosunkow-zatrudnienia/international-research-project-in-search-of-a-legal-model-of-self-employment-in-poland-comparative-legal-analysis.

56 Tomasz Duraj, "Kilka refleksji na temat ochrony prawnej osób pracujących na własny rachunek w zakresie bezpiecznych i higienicznych warunków pracy," in *Pro opere perfecto gratias agimus. Księga Jubileuszowa prof. Tadeusza Kuczyńskiego*, eds. Agnieszka Górnicz-Mulcahy, Monika Lewandowicz-Machnikowska, and Artur Tomanek (Wrocław: Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2022), 69 et seq.; Tomasz Duraj, "Legal Protection of the Self-Employed to the Extent of Safe and Hygienic Working Conditions – Assessment of Polish Regulation" (Comparative European Research Conference, London 2022), 103 et seq.

57 Tomasz Duraj, "Protection of the Self-Employed to the Extent of Non-discrimination and Equal Treatment – An Overview of the Issue," *Acta Universitatis Lodziensis. Folia Iuridica* 101 (2022): 161 et seq.

58 Tomasz Duraj, "Ochrona wynagrodzenia za pracę w zatrudnieniu cywilnoprawnym – refleksje na tle ustawy o minimalnym wynagrodzeniu za pracę," in *Prawo pracy i prawo socjalne: teraźniejszość i przyszłość. Księga jubileuszowa dedykowana Profesorowi Herbertowi Szurgaczowi*, eds. Artur Tomanek et al. (Wrocław: Uniwersytet Wrocławski, 2021), 49 et seq.; Tomasz Duraj, "The Guarantee of a Minimum Hourly Rate for Self-Employed Sole Traders in Poland," 433 et seq. (International Masaryk Conference, Hradec Králové, the Czech Republic, 20–22 December 2021).

59 Tomasz Duraj, "Uprawnienia samozatrudnionych matek związane z rodzicielstwem – wybrane problemy," *Studia Prawno-Ekonomiczne* 113 (2019): 11 et seq.; Tomasz Duraj, "Uprawnienia związane z rodzicielstwem osób samozatrudnionych – uwagi de lege lata i de lege ferenda," *Studia z Zakresu Prawa Pracy i Polityki Społecznej* 26, no. (2019): 341 et seq.; Tomasz Duraj, "The Legitimacy of Protection of Parental Rights of Persons Working outside the Employment Relationship in the Light of the International, EU and Polish Laws," (European Research Conference, London, 28–30 October 2019, 12th International Scientific Conference), 73 et seq.

collective rights.[60] The efforts of the Polish legislature in extending legal protection to self-employed persons should, in principle, be viewed positively. However, it is difficult to speak of the existence of a legal model for the protection of the self-employed in Poland at the moment. On the contrary, even a cursory analysis of the provisions reveals a complete absence of a systemic and comprehensive approach to this issue. Instead, legal solutions adopted to protect the self-employed show considerable randomness and fragmentation. Changes in this area are often made *ad hoc*, without any coherent underlying concept, for instance, under the influence of political factors. Legal regulations on protecting persons who conduct business on their own account are not correlated properly with international and EU standards and the Polish Constitution.[61] The rights guaranteed to the self-employed are scattered across many legal acts, which use diverse conceptual systems[62] and unfounded criteria to determine the scope of this protection. These criteria are often incomprehensible from the point of view of the characteristics and objectives of the type of protection offered.

60 Tomasz Duraj, "Prawo koalicji osób pracujących na własny rachunek," in *Zbiorowe prawo zatrudnienia*, eds. Jakub Stelina and Jakub Szmit (Warsaw: Wolters Kluwer Polska, 2018), 127 et seq.; Tomasz Duraj, "Self-Employment and the Right of Association in Trade Unions," (Proceedings. Research Track of the 9th Biannual CER Comparative European Research Conference. International Scientific Conference for Ph.D. students of EU countries. March 28–30, 2018 London), 58 et seq.; Tomasz Duraj, "Prawo koalicji osób pracujących zarobkowo na własny rachunek po nowelizacji prawa związkowego – szanse i zagrożenia," *Studia z Zakresu Prawa Pracy i Polityki Społecznej* 27, no. 2 (2020): 67 et seq.; Tomasz Duraj, "Collective Rights of the Self-Employed Following the Amendments to the Polish Trade Union Law" (Hradec Králové, Czech Republic, QUAERE 2020 X), 1348 et seq.; Tomasz Duraj, "Collective Rights of Persons Engaged in Gainful Employment Outside the Employment Relationship – An Outline of the Issue," *Acta Universitatis Lodziensis. Folia Iuridica* 95 (2021): 7 et seq.; Tomasz Duraj, "Ochrona osób samozatrudnionych w świetle przepisów zbiorowego prawa pracy po zmianach – wybrane problemy," in *Zatrudnienie w epoce postindustrialnej*, XXII Zjazd Katedr i Zakładów Prawa Pracy i Ubezpieczeń Społecznych, eds. Krzysztof Walczak and Barbara Godlewska-Bujok, Warsaw 2021, 63 et seq.; Tomasz Duraj, "Powers of Trade Union Activists Engaged in Self-Employment – Assessment of Polish Legislation," *Acta Universitatis Lodziensis. Folia Iuridica* 95 (2021): 83 et seq.; Aneta Tyc, "Collective Labour Rights of Self-Employed Persons on the Example of Spain: Is There any Lesson for Poland?," *Acta Universitatis Lodziensis. Folia Iuridica* 95 (2021): 135 et seq.

61 The Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

62 In Poland, the legislator has not established a definition of this term *de lege lata*.

Unlike in Spain, Germany, or Italy, the Polish legislator has made no reference to the criterion of economic dependence as a premise determining the scope of protection of self-employed workers. This, in my opinion, must be assessed unfavourably.

The issue that must be viewed as the most significant shortcoming of the Polish legislation is the absence of regulations dedicated specifically to the category of self-employed workers, taking into account the specific mode of these workers' functioning within the legal realities of the market. Unfortunately, the Polish legislator has often decided to cut corners by resorting to the expansion of labor law. When granting certain rights to self-employed workers, references to labor law are widely used (to be applied *mutatis mutandis*). For example, this is the case of protecting life, health, and collective rights. These legal mechanisms must be considered inappropriate, and often even harmful, to ensure the effective protection of self-employed workers. Over-reliance on these mechanisms generates numerous interpretative dilemmas, undermining the security of the legal position of self-employed workers. Furthermore, it often results in an unjustified conflation of the protective guarantees extended to self-employed workers and to dependent, subordinated employees; for example, this is the case with the protected status of trade union activists and the right to strike and other forms of protest; the issue raises legitimate questions of both an axiological and legal nature. It constitutes excessive interference with the principle of freedom of contract (Article 3531 of the Polish Civil Code[63]), with the constitutional principle of freedom of economic activity (Article 22 of the Polish Constitution) and with the principle of fair (free) competition (Article 9 of the act of 6 March 2018 – Enterprise Law[64]).

In my opinion, *de lege ferenda* in Poland, the choice should be made in favor of adopting a legal model founded on the adoption of a new, separate law (following the example of Spain) that would attempt to comprehensively regulate all the issues related to the protection of self-employed workers, while simultaneously limiting the labor law expansion to

63 Act of 23 April 1964 – Civil Code, consolidated text: Journal of Laws 2022, item 1360, as amended.

64 Consolidated text: Journal of Laws 2021, item 162, as amended.

the necessary minimum.[65] The legislator should consider the specificity of work provision under self-employment conditions, with a view to including the aforementioned principles of freedom of contract, freedom of economic activity, and fair competition. The new act should outline a two-tier model of protection for self-employed persons. The first tier should cover all self-employed persons who personally, on their own account, and at their own risk, without supervision, provide services to at least one client in a B2B relationship. At this level, a list of basic social rights should be created for all natural persons who provide work (regardless of the legal basis). It should incorporate the standards of international and EU law and the provisions of the Polish Constitution, including the principle of social justice (Article 2) and the principle of equality before the law (Article 32). The Polish legislator should guarantee the following to all self-employed workers: protection of life and health, protection against discrimination and unequal treatment, protection of human dignity, protection of women immediately after childbirth, the right to maternity benefit, as well as the freedom of association and the resulting protection under collective agreements, and protection of the permanence of the civil-law based contracts of trade union activists. In contrast, a further degree of protection must be afforded to those self-employed persons who personally provide work to one primary client under conditions of economic dependence. A separate category of economically dependent self-employed workers, positioned between subordinated employees and self-employed entrepreneurs, should be created. It is specifically to workers in this new category that the new regulations should guarantee the widest range of rights, most akin to employee rights. In particular, economically dependent self-employed workers should enjoy the guarantees of the right to a minimum wage and the protection of this wage; the right to rest; protection of the permanence of employment for women while pregnant and for the period of paid leave (8 weeks) in connection with the birth of a child; the right to refrain from hazardous work with a guarantee of remuneration; the right to count the period of self-employment into the total number of years worked; the right to a notice period;

[65] For more information, see: Tomasz Duraj, "Self-Employment and the Legal Model of Protection in Poland," *Studia z Zakresu Prawa Pracy i Polityki Społecznej* 29, no. 3 (2022): 257 et seq.

protection against immediate termination of the contract, the right to paid breaks in connection with holding a trade union office; the right to strike; the right to proceedings before an employment tribunal (a labor court). However, I believe that the scope of protection of self-employed workers cannot be an exact match for the protection that the legislator guarantees to dependent, subordinated employees. This would constitute excessive interference with the principles of freedom of contract, freedom of economic activity, and fair competition. It would also directly distort the relationship between labor and capital.

The adoption of the two-tier model postulated here requires the development of new Polish terminology. Crucially, terms such as "self-employed person" and "self-employed economically dependent person" must be defined. A self-employed person is a natural person who personally provides work to at least one enterprise,[66] organizational unit that is not an enterprise, or agricultural operator (the client), on their own account and at their own risk, without management and supervision from the client, as a registered business entity operating under the provisions of the Enterprise Law, without hiring employees and workers providing work under civil-law contracts. As for the definition of the "self-employed economically dependent person", due consideration should be given to adopting a formula for defining the economic dependence that would be easily verifiable against clear, objective criteria. In practice, as demonstrated by the experience of Spain, objective verification of income criteria (such as one client accounting for at least 75% of total income) is problematic and open to abuse.[67] Therefore, it might be better to consider a time-based model of economic dependency, as proposed in the 2018 Labour Code draft. Under Article 177(1) of the proposed regulation, an economically dependent self-employed person is a person engaged in the provision of services, performing them independently for the benefit of a specific enterprise, an organizational unit that is not an enterprise, or an agricultural operator

66 The worker's reliance on the assistance of family members in the same household does not serve to preclude the personal nature of the work rendered.

67 This is easily circumvented in practice, for instance, by artificially prolonging the chain of commissioning entities (by including businesses that are linked by capital).

(a client), in a direct manner, for an average of at least 21 hours per week, for at least 182 days.[68]

To complement the proposed *de lege ferenda* model for the protection of self-employed workers in Poland, a mechanism to effectively counteract self-employment as a way of circumventing labor law should be implemented. Currently, there are no effective measures to prevent self-employment where employment should prevail instead; this is a violation of labor law, in particular of Article 22 of the Labour Code.[69] The number of sham, bogus self-employed workers in Poland is currently estimated at about 500,000 and rising. Many of these workers can enjoy the protection offered to employees (rather than to self-employed workers). To this end, the Polish legislator should more precisely define "management" as used in Article 22(1) of the Labour Code by stipulating that the provision refers to the type of management in which the employer issues specific, binding instructions to the worker. This element is absent in self-employed work. This would give the National Labour Inspectorate and the labor courts (that have the power to establish the existence of an employment relationship) an additional instrument to counteract the problem of self-employment designed to circumvent the provisions of labor law. Furthermore, it would contribute to drawing a clear line between dependent, subordinated employees (who enjoy the greatest scope of protection) and self-employed workers, including economically dependent self-employed workers.[70]

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68 Dependence on the client based on a certain number of hours of work required by this client falls within the concept of economic dependence *sensu largo*. It must be presumed that with such a significant time commitment, the self-employed person is economically dependent on this client.

69 Act of 26 June 1974 – Labour Code, consolidated text: Journal of Laws 2023, item 1465.

70 For more information, see: Tomasz Duraj, "Problem wykorzystywania pracy na własny rachunek w warunkach charakterystycznych dla stosunku pracy," in *Nauka i praktyka w służbie człowiekowi pracy: Inspekcja pracy – wyzwania przyszłości*, ed. Anna Musiała (Poznań: Wydawnictwo Naukowe UAM, 2017), 103 et seq.; Tomasz Duraj, "Kilka uwag na temat stosowania pracy na własny rachunek z naruszeniem art. 22 Kodeksu Pracy," *Studia z Zakresu Prawa Pracy i Polityki Społecznej* 30, no. 3 (2023): 175 et seq.

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Democratic Transition or Autocratic Adjustment? Constitutional Amendments in Kazakhstan and Uzbekistan in 2022–2023

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Abstract: Central Asian states have recently implemented significant constitutional reforms. In the case of the authoritarian republics of Kazakhstan and Uzbekistan, the nature of the constitutional amendments, introduced in 2022 and 2023, respectively, is hard to accurately assess. On the one hand, they are a step towards democratization and strengthened guarantees of human rights and freedoms; on the other, they reinforce the current undemocratic government mechanisms. This article discusses the most recent constitutional reforms in both countries, distinguishing three main areas of change: ideology, social issues, and governance mechanisms. It is argued that these reforms generally fall within the paradigm of authoritarian constitutionalism and are an adjustment of the countries' constitutions to the current needs of their undemocratic presidents.

Since announcing independence in 1991, the post-Soviet Central Asian republics have been consistently classified as non-democratic regimes.[1] They are plagued by rampant human rights and freedoms violations, imbalance of

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[1] See e.g. "Democracy Index 2022," The Economist Intelligence Unit, accessed January 12, 2024, https://www.eiu.com/n/campaigns/democracy-index-2022/; "Nations in Transit," Freedom House, accessed January 12, 2024, https://freedomhouse.org/report/nations-transit.

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power, limited political pluralism, and concentration of power in the hands of the presidents. As such, the political systems of these states are called super-presidential or crown-presidential. The direction in which such political systems evolve is determined by the presidents, whose main goal is to maintain power or to eventually transfer it to a nominee in a fully controlled manner.[2] The consistent authoritarianism of Central Asian republics does not imply passivity or indolence in terms of maintaining the constitutional order. Conversely, constitutional amendments are frequently adopted across all countries in the region. The changes in question concern various salient issues: the axiology of the constitution, the legal position of the individuals and society's organization, the model of relations among state institutions, and governance. This confirms that the Central Asian autocracies "cherish" their institutions and are devoted to a kind of formalism that can be called "autocratic legalism."[3] The assumption that non-democratic regimes are characterized by lower institutionalization of power is no longer valid.[4] In the case of recent amendments to the Central Asian constitutions, it is hard to generalize their scope and content due to their balancing between modernization and re-traditionalization and the introduction of a "global constitutionalism" as well as the quest for a post-colonial national identity and attempts to strengthen state sovereignty.[5] These amendments can be classified as authoritarian constitutionalism – a paradigm of growing popularity among scholars. An empirical basis for this paradigm is mainly the cases

2 William Partlett, "Crown-Presidentialism," *International Journal of Constitutional Law* 20, no. 1 (2022): 204–36, https://doi.org/10.1093/icon/moac006; Rafał Czachor, "Superprezydencjalizm jako odrębny system polityczno-prawny," *Przegląd Prawa Konstytucyjnego* 68, no. 4 (2022): 89–98, https://doi.org/10.15804/ppk.2022.04.07.

3 Kim Lane Scheppele, "Autocratic Legalism," *University of Chicago Law Review* 48, no. 1 (2018): 545–84.

4 Guillermo O'Donnell, "Delegative Democracy," *Journal of Democracy* 5, no. 1 (1994): 55–69.

5 Rafał Czachor, "Reformy konstytucyjne w państwach Azji Środkowej. Analiza porównawcza," *Zeszyty Naukowe Uczelni Jana Wyżykowskiego. Studia z Nauk Społecznych* 12 (2019): 35–50; Елена Гарбузарова, "Роль конституционных реформ в развити государств Центральной Азии," *Центральная Азия и Кавказ* 24, no. 3 (2021): 28–39 [Elena Garbuzarova, "Roľ konstitucionnyh reform v razviti gosudarstv Central'noj Azii," *Central'naâ Aziâ i Kavkaz* 24, no. 3 (2021): 28–39].

of Latin American, African and South-East Asian countries.[6] The rise of authoritarian constitutionalism makes it clear that global constitutionalism, based on the presumption of the universalization of liberal democracy, is receding.[7] It is also post-Soviet republics that provide examples of various forms of non-democracy. Here, one common feature is a specific form of constitutional law – one that fulfils the need for the law and the legal system as an important regulator of social relations while simultaneously ensuring political stability and limiting the possibilities of a change of power.

In this context, it seems reasonable to analyze the recent Central Asia constitutional reforms introduced after 2020 and attempt to answer the question of where Central Asian countries are heading at the beginning of the third decade of the 21st century. Are the newest constitutional amendments a manifestation of gradual democratization or just an adjustment of the autocratic model of governance? This study examines the constitutions of Kazakhstan and Uzbekistan, which were amended in 2022 and 2023, respectively. At the same time, the case of Kyrgyzstan, where the constitution was last amended in 2021, is beyond its scope. To some extent, Kyrgyzstan does not follow the logic of the evolution of the Central Asian republics. Frequent political coups (in 2006, 2010, and 2021), accompanied by significant constitutional changes, support the assertion that Kyrgyzstan is the region's "constitutional laboratory." Moreover, it was recently the focus of a separate in-depth study in the context of authoritarian constitutionalism.[8]

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6 Tom Ginsburg and Alberto Simpser, eds., *Constitutions in Authoritarian Regimes* (New York: Cambridge University Press, 2014); Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Penguin Books, 2018); Mark A. Graber, Sanford Levinson, and Mark V. Tushnet, eds., *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018); Helena Alvar García and Günter Frankenberg, *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Cheltenham: Edward Elgar, 2019); Günter Frankenberg, *Authoritarianism: Constitutional Perspectives* (Cheltenham: Edward Elgar, 2020).

7 See e.g. Takao Suami et al., *Global Constitutionalism from European and East Asian Perspectives* (Cambridge: Cambridge University Press, 2018).

8 Rafał Czachor, "Reforma ustrojowa w Kirgistanie w 2021 roku na tle konstytucjonalizmu autorytarnego," *Studia nad Autorytaryzmem i Totalitaryzmem* 44, no. 2 (2022): 45–63, https://doi.org/10.19195/2300-7249.44.3.4.

The 2022 constitutional reform in Kazakhstan[9] continues the tradition of formal amendments to the initial document adopted in 1995. While there had already been six amendments by that point (1998, 2007, 2011, 2017, 2019),[10] the most recent one proved the most significant. Similarly, Uzbekistan introduced yet another amendment to its 1992 constitution – the most radical to date – which officially entered into force on May 1, 2023.[11] Between 2018 and 2021 alone, the Uzbek constitution was amended five times, even though the changes were not significant. The recent reforms in both countries share the same political context. They were held after the long-lasting presidencies of Nursultan Nazarbayev and Islom Karimov came to an end, and so they can be viewed as an adjustment of the constitutional order to the new circumstances and the expectations of the new leaders – Kassym-Jomart Tokayev and Shavkat Mirziyoyev. In both cases, constitutional reforms were approved in nation-wide referenda. In Kazakhstan, where the referendum was held on June 5, 2022, 77% of voters supported the reform, with a 68% turnout.[12] In Uzbekistan, the constitutional

9 In fact, the reform was introduced in two stages: the bill of 8 June 2022 adopted based on the results of a referendum, comprising 62 amendments to 33 articles of the Constitution and the bill of 17 September 2022, which included 8 amendments to 6 constitutional articles regarding the president (extension of the term of office from 5 to 7 years and banning re-election), judges of the Constitutional Court (8-year term), and restoration of the name of the capital city, Astana. Закон Республики Казахстан от 8 июня 2022 г., "О внесении изменений и дополнений в Конституцию Республики Казахстан," [Zakon Respubliki Kazahstan ot 8 iûnâ 2022 g., "O vnesenii izmenenij i dopolnenij v Konstituciû Respubliki Kazahstan"], accessed January 12, 2024, https://adilet.zan.kz/rus/docs/Z220000001K; Закон Республики Казахстан от 17 сентября 2022 г. №142-VII ЗРК, "О внесении изменений и дополнений в Конституцию Республики Казахстан," [Zakon Respubliki Kazahstan ot 17 sentâbrâ 2022 g. № 142-VII ZRK, "O vnesenii izmenenij idopolnenij v Konstituciû Respubliki Kazahstan"], accessed January 12, 2024, https://adilet.zan.kz/rus/docs/Z220000001K/links.

10 Jarosław Szymanek, "Geneza i ewolucja konstytucjonalizmu kazachstańskiego," *Studia Politologiczne* 33 (2014): 397–418.

11 Конституционный Закон Республики Узбекистан, от 01.05.2023 г. № ЗРУ-837, "О Конституции Республики Узбекистан," [Konstitucionnyj Zakon Respubliki Uzbekistan, ot 01.05.2023 g. № ZRU-837, "O Konstitucii Respubliki Uzbekistan"], accessed January 12, 2024, http://lex.uz/ru/docs/6449035.

12 "Об итогах голосования на республиканском референдуме 5 июня 2022 года," Центральная избирательная комиссия Республики Казахстан ["Ob itogah golosovaniâ na respublikanskom referendume 5 iûnâ 2022 goda," Central'naâ izbiratel'naâ komissiâ

amendments were passed through a public vote, since previous constitutional changes had been confirmed by the parliament. Initially, the vote had been scheduled for December 8, 2022 but was delayed due to mass protests against the planned downgrade of the legal status of the autonomous region of Karakalpakstan; it was eventually held on April 30, 2023. The turnout was 84.5%, and 90.2% of the votes were in favor of the amendments to the constitution.[13] In both cases, the public was asked to vote for or against the entire amendment blocks, turning the vote into an act of supporting the rulers and strengthening their legitimacy.[14] The local academic literature generally applauds the reforms, stressing their positive impact on state-building processes and the consolidation of democratic nations ruled by law.[15]

Respubliki Kazahstan], accessed January 12, 2024, https://election.gov.kz/rus/news/acts/index.php?ID=7120.

13 "Объявлены окончательные итоги референдума в Узбекистане," Газета.uz, ["Ob″âvleny okončatel'nye itogi referenduma v Uzbekistane," Gazeta.uz], accessed January 12, 2024, https://gazeta.uz/ru/2023/05/01/referendum-final/.

14 Андрей Николаевич Медушевский, "Правовое устройство Средней Азии: стратегии маневрирования между глобальными и национальными приоритетами (новейшие конституционные преобразования в Киргизии, Казахстане и Узбекистане)," *Сравнительное конституционное обозрение* 153, no. 2 (2023): 60 [Andrej Nikolaevič Meduševskij,"Pravovoe ustrojstvo Srednej Azii: strategii manevrirovaniâ meždu global'nymi i nacional'nymi prioritetami (novejšie konstitucionnye preobrazovaniâ v Kirgizii, Kazahstane i Uzbekistane)," *Sravnitel'noe konstitucionnoe obozrenie* 153, no. 2 (2023): 60].

15 E.g., Сергей Ударцев, "Конституционная реформа 2022 года в Казахстане: корректировка модели государства, укрепление правозащитных механизмов массовых беспорядков начала года," *Государственно-правовые исследования* 5 (2022): 59 [Sergej Udarcev, "Konstitucionnaâ reforma 2022 goda v Kazahstane: korrektirovka modeli gosudarstva, ukreplenie pravozaŝitnyh mehanizmov massovyh besporâdkov načala goda," *Gosudarstvenno-pravovye issledovaniâ* 5 (2022): 59]; О.З. Мухамеджанов, "Обновленная конституция Республики Узбекистан: особенность, цели и приоритеты," *Вестник КазНПУ имени Абая серия "Юриспруденция"* 72, no. 2 (2023): 9–16 [O.Z. Muhamedžanov, "Obnovlennaâ konstituciâ Respubliki Uzbekistan: osobennost', celi i prioritety," *Vestnik KazNPU imeni Abaâ seriâ "Ûrisprudenciâ"* 72, no. 2 (2023): 9–16]. For a critical comment, see: Фарход Толипов, "Конституционная реформа в Узбекистане: противоречия и коллизии," CABAR [Farhod Tolipov, "Konstitucionnaâ reforma v Uzbekistane: protivorečiâ i kollizii," CABAR], accessed January 12, 2024, https://cabar.asia/ru/konstitutsionnaya-reforma-v-uzbekistane-protivorechiya-i-kollizii.

Currently, both countries face similar international and domestic challenges – uncertainty in international politics, religious renaissance and the simultaneous adoption of a neoliberal model of the economy, as well as increasingly widespread consumerism and pressure for modernization.

In both cases, the most recent amendments affected more than 50% of the constitution's text, including the provisions on all main state bodies, inclusive of parliaments, presidents, and governments. One can distinguish three separate blocks of amendments: the ideological-axiological block, the social block, and the governance block. Some scholarly sources assert that the constitutional reforms in Kazakhstan and Uzbekistan were inspired by Russia's 2020 constitutional reform, similar to how the initial versions of their constitutions may have been inspired by the Russian constitution of 1993.[16] The Russian reform of 2020 was intended to fulfil three fundamental goals: the "sovereignization" of Russian law by revising the place of public international law in the system of domestic law and suppressing the cosmopolitism of the political elites; the correction of the political system by a return to conservatism and centralism; and the introduction of a new format of the social contract aimed at reinforcing the legitimacy of Russia's peculiar system, referred to by some scholars as "Putinism".[17] As argued in this paper, the most recent amendments to the constitutions of Kazakhstan and Uzbekistan were drafted for other purposes. This assertion contributes to the thesis that, with respect to constitutional law, the general category of "post-Soviet states" has less and less explanatory power due to different development trajectories. Consistently, a common feature of Central Asian states is a neo-patrimonial model of social organization, characterized by

16 Cf. Михаил Александрович Краснов, "Постсоветские государства: есть ли зависимость политического режима от конституционного дизайна?," *Сравнительное конституционное обозрение* 99, no. 2 (2014): 29–45 [Mihail Aleksandrovič Krasnov, "Postsovetskie gosudarstva: est' li zavisimost' političeskogo režima ot konstitucionnogo dizajna?," *Sravnitel'noe konstitucionnoe obozrenie* 99, no. 2 (2014): 29–45].

17 Rafał Czachor, "Reforma konstytucyjna w Federacji Rosyjskiej w 2020 roku," *Przegląd Prawa Konstytucyjnego* 61, no. 3 (2021): 261–76; Richard Sakwa, "Is Putin an Ism?," *Russian Politics* 5, no. 3 (2020): 255–82; Михаил Александрович Краснов and Илья Георгиевич Шаблинский, *Российская система власти: треугольник с одним углом* (Москва: Институт права и публичной политики, 2008) [Mihail Aleksandrovič Krasnov and Il'â Georgievič Šablinskij, *Rossijskaâ sistema vlasti: treugol'nik s odnim uglom* (Moskva: Institut prava i publičnoj politiki, 2008)].

the domination of the presidents over the political systems. The presidents, acting as patrons-in-chief, inspire and push forward the constitutional processes.[18]

1. The Content of Kazakhstan's and Uzbekistan's Most Recent Reforms

1.1. The Ideological Block

For Central Asia, the existence of modern political entities is quite a new phenomenon. This makes it clear why contemporary constitutions play an important role not only in state-building processes but also in nation-building, by consolidating various ethnic and religious groups around state institutions. These tendencies are accompanied by the formation of a new, post-Soviet, identity which involves recalling mythologized "multi-century traditions" of own statehood, embodied by Chinggis Khan in Kazakhstan and Timur Tamerlan in Uzbekistan.[19] Thus, the ideological background of the constitutional reforms features both simultaneous modernization and re-traditionalization. It is emphasized that Kazakhstan's recent reform, which is in line with the "Concept of the Legal Politics of Kazakhstan until 2030" announced on October 15, 2021,[20] reflects "local mentality and legal traditions."[21] The constitutional assumptions were presented by the president of

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18 Henry E. Hale, *Patronal Politics: Eurasian Dynamics in Comparative Perspective* (Cambridge: Cambridge University Press, 2015); Alexander A. Cooley and John Heathershaw, *Dictators without Borders: Power and Money in Central Asia* (New Haven: Yale University Press, 2017); Alexei Trochev and Alisher Juzgenbayev, "Instrumentalization of Constitutional Law in Central Asia." In *Research Handbook on Law and Political Systems*, eds. Robert M. Howard, Kirk A. Randazzo, and Rebecca A. Reid (Cheltenham: Edward Elgar, 2023), 139–68.

19 The current version of the preamble to the Constitution of Uzbekistan refers to "over 3,000 years of experience in the development of Uzbek statehood, and the cultural heritage of great ancestors."

20 Указ Президента РК от 15 октября 2021 г. № 674 "Об утверждении Концепции правовой политики Республики Казахстан до 2030 года," [Ukaz Prezidenta RK ot 15 oktâbrâ 2021 g. № 674 "Ob utverždenii Koncepcii pravovoj politiki Respubliki Kazahstan do 2030 goda"], accessed January 12, 2024, https://online.zakon.kz/Document/?doc_id=39401807&pos=3;-109#pos=3;-109.

21 Кабдулсамих Айтхожин, "Конституционная реформа в Казахстане: реалии и перспективы," *Фемида. Республиканский юридический научно-практический журнал* 322, no. 8 (2022): 6 [Kabdulsamih Ajthožin, "Konstitucionnaâ reforma v Kazahstane: realii i perspektivy," *Femida. Respublikanskij ûridičeskij naučno-praktičeskij žurnal* 322, no. 8 (2022): 6].

Kazakhstan on March 16, 2022 in his speech "A New Kazakhstan – a Way of Renewal and Modernization." He justified the proposed reform by the will to revive "the tradition of the Great Steppe, the basis of national unity" and the need for economic reforms and sustained development.[22] Uzbekistan's 2023 reform is in keeping with the series of previous, minor, constitutional amendments adopted under the program "Strategy of the Development of a New Uzbekistan."[23]

The value of sovereignty and territorial integrity played an important role in the reforms in both countries. A provision was introduced in Kazakhstan's constitution confirming that "the state's independence, unitary character and territorial integrity shall not be subject to revision" (Article 91). In turn, the recent amendment to the constitution of Uzbekistan introduced a provision affirming the existence of "one nation of Uzbekistan" (in the preamble), the purpose of which is to "maintain social harmony, understanding and tolerance between nations and religions." The document also declares "the integration into the world and Islamic civilization" as a state policy goal (Article 61). Initially, the lawmakers had planned to remove the constitutional provisions regulating the autonomous status of Karakalpakstan; however, after violent public protests in Nukus in June 2022, the idea of depriving this administrative unit of a special status was abandoned.[24]

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22 The scope of the reform extended to 10 main areas, including: the president's political position, reorganizing the relations between branches of power, developing the party system, strengthening legal protection mechanisms, strengthening civil society, and decentralization. "Послание Главы государства Касым-Жомарта Токаева народу Казахстана" ["Poslanie Glavy gosudarstva Kasym-Žomarta Tokaeva narodu Kazahstana"], accessed January 12, 2024, https://akorda.kz/ru/poslanie-glavy-gosudarstva-kasym-zhomarta-tokaeva-narodu-kazahstana-1623953.

23 Указ Президента Республики Узбекистан, от 28.01.2022 г. № УП-60 "О стратегии развития нового Узбекистана на 2022–2026 годы" [Ukaz Prezidenta Respubliki Uzbekistan, ot 28.01.2022 g. № UP-60 "O strategii razvitiâ novogo Uzbekistana na 2022–2026 gody"], accessed January 12, 2024, https://lex.uz/docs/5841077; Przemysław Sieradzan, "Reformy społeczno-polityczne w Uzbekistanie w czasie prezydentury Szawkata Mirzijojewa," *Nowa Polityka Wschodnia* 28, no. 1 (2021): 104–27.

24 In its current version, Article 70 states that "the Republic of Karakalpakstan is part of the Republic of Uzbekistan," but the phrase "the sovereign Republic of Karakalpakstan" and the provision that "the sovereignty of the Republic of Karakalpakstan is protected by

On a symbolic level, the constitutional reforms in both countries did not break with the legal and political traditions of the current presidents' predecessors. In both cases, the positive impact and heritage of Presidents Nazarbayev and Karimov in developing constitutionalism and strengthening public institutions was stressed. Nonetheless, there were some critical comments regarding Nazarbayev's model of governance. Indeed, the very idea of a constitutional reform emerged after mass protests related to, among other things, the political legacy of the former president who retained the official title of the First President and Elbasy – "the Leader of the Nation."[25] Under the constitutional reform, the institution of Elbasy was removed from the text of the constitution, after which the relevant bill was deemed unconstitutional. This brought some additional legal consequences since the First President had previously been granted the right to preside over the Security Council and the Assembly of People of Kazakhstan for a lifetime; he was also the head of the ruling party "Nur Otan" and a member of the Constitutional Chamber. In this way, the 2022 constitutional reform ended the period of the dual power of the current and the former president, which started in 2019 with the resignation of Nazarbayev and the election of Tokayev. Further, the amendment to the constitution banned the president's relatives from holding higher state positions (Article 43.4) and established the Supreme Chamber of Auditors to ensure the transparency of public assets and finances. This is how the idea of a "just Kazakhstan,"[26] announced by Tokayev in the above-quoted speech, was implemented. The previous name of Kazakhstan's capital city – Astana – was restored in place of Nur Sultan, marking a symbolic end to the cult of Nazarbayev (Article 2.3).

In Uzbekistan, the cult of President Karimov is formally continued but is seen as a phenomenon of a concluded period of the formation of an independent state. While constitutional norms do not refer directly to political elites related to the former president and his family, the establishment by

the Republic of Uzbekistan" have been deleted. They have been replaced by a provision stating that "the Republic of Karakalpakstan is part of the Republic of Uzbekistan."

25 Rafał Czachor, "Instytucja 'lidera narodu' w republikach Azji Środkowej. Analiza prawno-porównawcza," *Wrocławsko-Lwowskie Zeszyty Prawnicze* 10 (2019): 245–57.

26 "Послание Главы государства." ["Poslanie Glavy gosudarstva"].

the constitutional amendment of the Anticorruption Agency whose members are assigned by the president and answer to the parliament does not seem accidental.

In both cases, the recent constitutional reforms are considered breakthrough moments in the countries' contemporary development, marked by a stage of the state's petrification and a subsequent step towards democratization. It is asserted that Kazakhstan has transitioned from a super-presidential to a presidential model of governance and has introduced a sustained, balanced model of power of "the strong President, influential Parliament and accountable government."

1.2. The Social Block

The constitutional amendments that fit into this category result from the obligations accepted by both countries along with the adoption of general international legal acts on human rights and freedoms and other guarantees that protect social interests.

Kazakhstan's 2022 reform has not brought major changes in this area. It has been declared that the soil, water, and natural resources are the property of the nation (they had formerly been deemed state property; Article 6.3). This has given rise to some controversies among legal scholars since the Constitution recognizes only two forms of property – private property and state property – and contains no references to the "nation's property."[27] One important amendment abolished the death penalty and forced labor (Articles 15.2 and 24.1).[28] Notably, the legal position of the ombudsperson has been strengthened and the Constitutional Court has been restored, with both acting as guarantors of individual rights and freedoms (this is discussed in the section on governance).[29]

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27 М.К. Сулейменов, "Поправки в Конституцию: революционные изменения или косметические улучшения?," [M.K. Sulejmenov, "Popravki v Konstituciû: revolûcionnye izmeneniâ ili kosmetičeskie ulučšeniâ?"], accessed January 12, 2024, https://online.zakon.kz/Document/?doc_id=39137222&pos=6;-109#pos=6;-109.

28 This is a consequence of the ratification in January 2021 of the Second Optional Protocol to the International Covenant on Civil and Political Rights on the abolition of the death penalty.

29 Before the reform, there was a Constitutional Council. Cf. Andrzej Bisztyga, "Pozycja ustrojowa, organizacja i kompetencje Rady Konstytucyjnej Republiki Kazachstanu," *Przegląd Prawa Konstytucyjnego* 18, no. 2 (2014): 41–53, https://doi.org/10.15804/ppk.2014.02.03.

The amendment to Uzbekistan's Constitution declares the country to be "humanistic, democratic, legal, social and secular." Guarantees regarding compliance with international law were announced, including in such areas as respect for the dignity of human persons, inviolability of basic rights, the right to life due to the abolition of the death penalty (Article 24), as well as equality and non-discrimination (Article 37) and *habeas corpus* norms (Article 25). Additionally, the amendment provided for the right to a fair trial, professional legal assistance (Article 26[1]), the *ne bis in idem* principle (Article 26[2]), and political rights. A new norm that stipulates "sustainable social development" was also introduced (Article 14). It should be construed as a basis for the principles of the social state and free-market economy (Article 37).[30]

Improvements in the area of human rights and freedoms are part of a growing trend that began after 2016.[31] Generally, an important component of the Uzbek 2023 reform was the emphasis on the responsibilities of the state toward individuals and their rights and freedoms. These include the state's obligation to respect the dignity of persons, their rights and freedoms, the direct application of provisions guaranteeing individual rights and freedoms, and the constitutional protection of "democratic rights and freedoms" (Article 13). The state is obliged to care for its citizens abroad (Article 22), provide free medical services (Article 40) and higher education (Article 41[1]), enable the development of physical culture and sports, as well as the spiritual and moral development of children and youth (Article 42[1]), sustainable economic development, freedom of economic activity, favorable investment conditions, and free movement of goods, services, employees, and capital (Article 53), among other things. One interesting innovation is granting everyone the right to access the Internet and use

30 Медушевский, "Правовое устройство Средней Азии," 43 [Meduševskij, "Pravovoe ustrojstvo Srednej Azii," 43].

31 Азиз Аминжонович Исматов, "Конституционные права человека в Узбекистане: позитивизм, традиционализм и осторожный разворот в сторону международно-правовых стандартов," *Сравнительное конституционное обозрение* 141, no. 2 (2021): 94–130, https://doi.org/10.21128/1812-7126-2021-2-94-130 [Aziz Aminžonovič Ismatov, "Konstitucionnye prava čeloveka v Uzbekistane: pozitivizm, tradicionalizm i ostorožnyj razvorot v storonu meždunarodno-pravovyh standartov," *Sravnitel'noe konstitucionnoe obozrenie* 141, no. 2 (2021): 94–130, https://doi.org/10.21128/1812-7126-2021-2-94-130].

it freely (Article 29) as well as the right to "a healthy and clean natural environment" (Article 40[1]).

The re-traditionalization and patriarchization of social relations in Uzbekistan are evidenced by the constitutional amendment that regulates the *makhalla* – a traditional local government institution with an elders' council as a lawmaker and conflict-resolution body.

1.3. The Governance Block

The recent constitutional amendments in both countries have brought significant changes in mutual relations among the main state bodies. By no means have these been groundbreaking. Rather, they have clarified the competencies and mechanisms of decision-making and accountability.

In Kazakhstan, the re-shaping of relations between the branches of power has consisted mainly in strengthening the parliament's position, as well as clarifying the mechanism of cooperation between the parliament's two chambers, the competencies of the president, government, and ombudsperson, and restoring the Constitutional Court. The basic constitutional provisions in this area, including the presidential system of governance, in which the president is elected in general elections for one seven-year term (Article 41.1, Article 42.5), have become unamendable after the recent reform (Article 91.2). The reform has strengthened the president's legal position as a representative of the whole nation by prohibiting the president from joining any political party (Article 43.2).

The number of MPs in the first chamber of Kazakhstan's parliament, the Majilis, has decreased from 107 to 98. MPs are now elected in a mixed electoral system of party lists and single-seat districts, and the option for voters to recall their deputies has been introduced as well (Articles 50–52). The structure of the Senate, the parliament's second chamber consisting of 49 members, is still complex: each administrative-territorial unit has two representatives; additionally, the president delegates his own nominees. The number of senators appointed by the president has also decreased from 15 to 10, including 5 appointed at the request of the Assembly of People of Kazakhstan (Article 50). The share of presidential representatives in the Senate has thus decreased from 30% to 20%. Bills are proceeded separately in each chamber. The procedure for adopting legislation has also changed: now the Majilis adopts bills and the Senate approves them

(previously, it was the other way round). The Majilis has gained the right to hear reports of the government and the Audit Chamber twice a year. The Majilis has also obtained the right to override the Senate's legislative veto with a two-thirds majority of votes, and a special commission may be appointed to resolve contradictions in the legislative process (Article 61). The strengthened role of the Senate is confirmed by its right to approve or reject the president's appointment of senior state officials, including the Chairman of the Constitutional Court, the Supreme Council of the Judiciary, the Audit Chamber, the ombudsperson, the prosecutor general, and the right to question candidates for the Chairman of the National Security Committee and the Central Bank (Article 95).

The legal and political position of the Majilis has also been strengthened by a change in one of the sources of Kazakh law – constitutional bills, which regulate the most important issues and are adopted at joint sessions of both chambers of Kazakhstan's parliament (previously, the constitutional bills adopted by the Majilis were approved by the Senate; Article 53). Further, a mechanism for overriding the president's veto on constitutional bills has been introduced as well (Article 53). The government has gained the right to announce, on its own responsibility, binding legal acts equal in power to bills, which are approved or rejected *ex post* by the parliament. These may only concern situations requiring "a quick response to circumstances threatening the life and health of the population, the constitutional order, the protection of social order and the economic security of the state" (Article 61.2–3).[32]

The new constitutional regulations of 2022 also affect the institution of the ombudsperson, which was introduced in Kazakhstan in 2017. Its status has since been upgraded to a constitutional body and regulated in Chapter 7 of the Constitution, together with the judiciary and prosecution. Here, the goal is "cooperation for the rehabilitation of violated human and citizen rights and freedoms, supporting the promotion of human and

[32] This amendment was criticized by some Kazakhstani legal scholars due to the alleged serious violation of the principles of a democratic state. Муслим Ханатович Хасенов, "Реформирование Конституции Республики Казахстан. Часть 2. Анализ конституционной реформы 2022 года" [Muslim Hanatovič Hasenov, "Reformirovanie Konstitucii Respubliki Kazahstan. Čast' 2. Analiz konstitucionnoj reformy 2022 goda"], accessed January 12, 2024, https://online.zakon.kz/m/amp/download/38439767.

citizen rights and freedoms." The ombudsperson is protected by immunity, provided with guarantees of independence in the performance of official tasks and not subordinate to other state authorities (Article 83–1). For the first time, regulations regarding the Prosecutor's Office were introduced to the constitution of Kazakhstan. The former State Budget Performance Control Committee has been transformed into the Audit Chamber.

The constitutional reform of Uzbekistan's governance system is similar. It encompasses changes in the legal position of the bicameral parliament, more detailed regulation of the law-making process, and the introduction of two separate types of bills – constitutional and ordinary. The presidential term has been extended from five to seven years. The range of the president's competencies has been expanded to include creating and heading the Security Council and establishing the president's administration and other constitutional organs (Article 93). The Legislative Chamber, the first chamber of Uzbekistan's parliament – Oliy Majlis – has been granted additional competencies, including establishing the government and exercising its responsibilities like implementing the budget. The Senate has acquired the right to appoint, on the president's request, the Supreme Council of the Judiciary, the prosecutor general, and the heads of anti-corruption and anti-trust institutions, as well as to approve the president's decrees regarding the government's structure (Article 80). Each chamber of the Oliy Majlis can adopt a resolution of self-dissolution by the majority of two-thirds of its members. In the case of the dissolution of the Legislative Chamber, the Senate remains fully responsible for the legislative process. The government, called the Cabinet of Ministers, has also gained new powers and the scope of its duties has increased to include such things as ensuring governance efficiency, fighting poverty, and protecting the natural environment (Article 115). The government's new tasks also comprise implementing youth and family-friendly policies, preserving traditional values, and supporting civil society institutions (Article 98). The government's activities in the field of domestic and foreign policy are defined by the president of Uzbekistan. The head of government is approved by the first chamber of the Oliy Majlis and the candidate is presented by the president. If the parliament rejects a prime minister candidate three times, the president can dissolve the Legislative Chamber (Article 118). The president also has the right to propose to the Senate candidates for Constitutional Court judges, as well as appoint

the head of the Anti-Corruption Agency and other bodies (Article 93). The reform has significantly expanded the range of entities that can initiate legislative procedures by including at least 100,000 citizens, the Senate, the ombudsman and the Central Electoral Commission in this category (Article 98).

The recent constitutional reforms in both countries envisaged the strengthening of local governments. In Kazakhstan, the president has lost the right to repeal legal acts of the *akims* – heads of local executive bodies (Article 44). Their legal acts and decisions may be repealed by the judiciary, the government or higher-level *akims* (Articles 86–88). *Akims* have been included to a greater extent in local government mechanisms since they are no longer appointed directly by the president but elected by *maslikhats*, local decision-making bodies, from among candidates presented by the president or higher-level *akims*. *Maslikhats* have been granted the right to a vote of no confidence in the *akims*. In Uzbekistan, local governments have been strengthened by the above constitutional regulation of the legal situation of *machalla*. The Constitution states that "they are not part of the system of state bodies," which, however, should be construed rather as their independence from the central authorities and local government guarantees (Article 105). The combined functions of *khokims* (local executive bodies) and chairmen of *kengash* (local legislative bodies) have been abolished.

The recent constitutional reforms in both countries have increased the role of the Constitutional Courts. Constitutional justice had not been given due importance during the long period of existence of Central Asian independent states. In Kazakhstan, the Constitutional Court, previously in place between 1992 and 1995, has been restored and has replaced the Constitutional Council. The Constitutional Court reinstated in 2022 comprises 11 judges, 4 of whom are appointed by the president and 3 by both chambers of the parliament. The Chairman of the Constitutional Court is appointed by the president with the consent of the Senate. The term of office for judges is eight years (Article 71). The Court in question is authorized to declare as unconstitutional any binding legal act that violates the Constitution (Article 74). The right to challenge a legal act's constitutionality before the Constitutional Court has been retained by those who had previously been able to do so before the Constitutional Council and has also been

granted to the prosecutor general and the ombudsperson. To safeguard the rights and freedoms of citizens, the institution of a constitutional complaint has been introduced (Articles 71–72). The decisions of the Constitutional Court are final.

While a constitutional judicial body was established in Uzbekistan by the 1992 Constitution, it has been virtually inactive over the past 30 years. The recent reform has introduced the possibility of an individual constitutional complaint (Article 109).

2. Final Remarks

The latest constitutional reforms in Kazakhstan and Uzbekistan should be viewed as a milestone in the two countries' development as independent states, opening new stages in their history by validating the systems of government of the new presidents – Kassym-Jomart Tokayev and Shavkat Mirziyoyev – symbolically and practically alike. The Kazakh reform has brought normative changes aimed at stabilizing the political situation after a serious crisis of legitimacy and the January 2022 protests against government policy that were bloodily suppressed. Nonetheless, the reform has not changed the mechanisms of exercising power. In Uzbekistan, the background of the reforms was not as turbulent. Indeed, they were but an adjustment of the system aimed at ensuring the regime's stability. Overall, both cases should be assessed as an evolutionary transformation of the power model, in contrast with the revolutionary experience of neighboring Kyrgyzstan and its 2021 constitutional reform.

Officially, the reforms in Kazakhstan and Uzbekistan were justified by the need to broadly modernize society and improve the legal mechanisms of the economy and the system of power. Yet, their nature is not easy to assess accurately to answer the question posed in this paper's title. On the one hand, the recent reforms in both countries contained elements typical of global constitutionalism: constitutional confirmation of individual rights and freedoms, democracy, the rule of law and social justice. On the other, they restored institutions specific to local traditions of governance and patriarchalism. It can be argued that the *ratio legis* of the reforms is to adapt the institutional system of the state to new concepts of personalized power, in which the president retains a dominant position above the other bodies of legislative and executive power, thus violating the principle of separation

of powers. The introduction of new regulations as part of the ideological and social blocks, including emphasizing the sovereignty of the state and guarantees of individual rights and freedoms within the specific context of Central Asian constitutionalism, is not in conflict with the authoritarian model of power. Finally, it can be concluded that the constitutional dynamics in both countries are determined not by the power-sharing bargains between the executive and the legislature, but are a byproduct of the ambitions of powerful presidents – chiefs of neopatrimonial pyramids of dependencies that keep the Central Asian social structures alive.

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Digital Competences and Digital Skills in the Legal Regulation of the Digital Transformation of the European Union

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Abstract: In the digital transformation process, the phases focusing on technical and economic aspects were followed by a phase exposing human capital issues. In approximately 3,000 acts of the European Union relating to the digital transformation process published in Eur-lex, as well as in an increasing number of national acts of the Member States, the terms "digital competences" and "digital skills" appear. They occur, *inter alia*, in the context of the financing of development tasks and their achievement indicators. In the application of existing law, it must be taken into account that the scopes and interrelationships of these new terms are framed differently. This ambiguity may have a negative impact on the effectiveness of digital transformation. It is postulated that the terminological consistency of the multi-level regulation should be improved and, in doing so, it should be noted that the prominence of digital skills in prospective acts and the way in which knowledge is captured can affect the use of the potential of universities.

This article provides partial results of research prepared within the performance of contract no. MEiN/2023/CTC/2625 for the task „Model normatywny podnoszenia kompetencji cyfrowych w szkołach wyższych" (in English: "Normative model for raising digital competence in higher education institutions").

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1. Introduction

With the transcription of data into digital form and their automatic processing, a process of "digital transformation" has been initiated, in which the reduction of temporal and spatial barriers to communication and the development of network structures affect values, social relations, political-organizational systems and business models.[1] In the process of digital transformation technical aspects were exposed first, then economic and, in the current decade, personal aspects ("human capital") came to the fore, including the ability of people to steer change in the face of the expansion of artificial intelligence tools.[2]

In European Union law, the terms "digital skills" and "digital competences"[3] (or "digital competence") have been used alongside the traditional term "professional qualifications" for some years now; and have already been used in approximately 3,000 acts.[4] Since 2014, the European Commission has been monitoring the digital progress of the Member States through the Digital Economy and Digital Society Index (DESI) reports.[5]

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1 Brunon Holyst and Roman Hauser, *Wielka Encyklopedia Prawa*, vol. 22, *Prawo informatyczne*, eds. Grażyna Szpor and Lucjan Grochowski (Warsaw: Fundacja „Ubi societas, ibi ius", 2021), 444–5. Cf. Gregory Vial, "Understanding Digital Transformation: A Review and a Research Agenda," *The Journal of Strategic Information Systems* 28, no. 2 (2019): 118–44; Fadwa Zaoui and Nissrine Souissi, "Roadmap for Digital Transformation: A Literature Review," *Procedia Computer Science* 175 (2020): 621–8; Agnieszka Gryszczyńska, Małgorzata Ganczar, and Grażyna Szpor, "Transformacja cyfrowa," in *System Prawa Samorządu Terytorialnego*, vol. 3, *Samodzielność samorządu terytorialnego – granice i perspektywy*, ed. Irena Lipowicz (Warsaw: Wolters Kluwer Polska, 2023).

2 Grażyna Szpor, "The Notion of Digital Transformation," in *Instruments of Public Law: Digital Transformation during the Pandemic*, eds. Irena Lipowicz, Grażyna Szpor, and Aleksanda Syryt (London: Routledge, 2022), e-book; Branden Thornhill-Miller et al., "Creativity, Critical Thinking, Communication, and Collaboration: Assessment, Certification, and Promotion of 21st Century Skills for the Future of Work and Education," *Journal of Intelligence* 11, no. 3 (2023): 54; Jérémy Lamri, *Kompetencje XXI wieku* (Warsaw: Wolters Kluwer Polska, 2021).

3 Cf. Adam Balicki, *Wsparcie rozwoju kompetencji cyfrowych uczniów i nauczycieli. Komentarz*, LEX/el, 2024.

4 In acts published in EUR-LEX as of 22 January 2024: more than 2,800 preparatory documents and approximately 200 legal acts.

5 In accordance with DESI methodological note 2022: Dimension 1 Human capital; Sub-dimension: 1a Internet user skills; Indicator 1a1 At least basic digital skills; 1a2 Above basic digital skills; 1a3 At least basic digital content creation skills; Sub-dimension: 1b Advanced skills and development; Indicator: 1b1 ICT specialists 1b2 Female ICT specialists 1b3 Enterprises

In accordance with the DESI methodological note 2022, "Several improvements have been made in the DESI indicators for the DESI 2022 reports. Under Human capital, the digital skills indicators have been modernized to better reflect the required digital competences of people." Digital competences are understood differently as: 1) the sum of multiple skills (whereby skills alone are not exhaustive)[6]; 2) a component of digital skills; 3) a term with a scope that is disjoint from digital skills ("digital competences and digital skills").

The terms "digital competences" and "digital skills" also appear in the national laws of EU Member States – in Poland in more than 180 acts of various levels.[7] This raises numerous doubts.[8] The Polish "Programme for the development of digital competences", adopted in 2023, defines digital competences as "a harmonious composition of knowledge, skills and attitudes enabling people to live, learn and work in a digital society, i.e. a society using digital technologies in everyday life and work."[9] The Programme delineates, among other things, the tasks of higher education institutions and the authority responsible for science and higher education. In doing so, however, the inconsistency of the conceptual grid becomes apparent. The explicit identification of knowledge as a component of competences makes it possible to unambiguously include pupils, students, teachers, and

providing ICT training. From 2023 onwards, in line with the 2030 Digital Policy Agenda, the DESI is now included in the State of the Digital Decade report (https://digital-decade-desi.digital-strategy.ec.europa.eu/datasets/desi/charts) and used to monitor progress towards digital goals (https://digital-strategy.ec.europa.eu/en/library/digital-economy-and-society-index-desi-2022; https://digital-strategy.ec.europa.eu/en/policies/desi-poland).

6 Cf. Fanny Pettersson, "On the Issues of Digital Competence in Educational Contexts – A Review of Literature," *Education and Information Technologies* 23, no. 3 (2018): 1005–21.

7 Published in LEX Legal Information System as of 22 January 2024.

8 Grażyna Szpor, "Sukcesy i porażki 20-lecia informatyzacji administracji," in *Prawo Nowych Technologii. Księga z okazji jubileuszu 20-lecia działalności Centrum Badań Problemów Prawnych i Ekonomicznych Komunikacji Elektronicznej i Studenckiego Koła Naukowego – Blok Prawa Komputerowego*, ed. Jacek Gołaczyński (Warsaw: C.H. Beck, 2022), 72–87. Also: Grażyna Szpor, "Model podnoszenia kompetencji cyfrowych," in *Internet. Hacking*, eds. Agnieszka Gryszczyńska, Grażyna Szpor, and Wojciech Wiewiórowski, 325–6 (Warsaw: C.H. Beck, 2023).

9 Resolution No. 24 of the Council of Ministers of 21 February 2023 on the establishment of a government program called "Digital Competence Development Programme" (Official Gazette of the Republic of Poland of 2023, item 318), 6.

researchers among the beneficiaries of the Programme. However, it does not solve the problem of implementers who in Polish higher education law should be tasked with raising qualifications.

In the key Polish laws on higher education, the terms digital competences and digital skills do not appear, and the word "qualifications" is used about 1,000 times.[10] In contrast, evaluations of higher education in audit processes[11] and statistical indicators adopted in reports, e.g. DESI, refer to digital competences or digital skills and perform poorly. The results of research conducted in Poland[12] demonstrate, *inter alia*, the problems of violation of the principles of legislative technique,[13] the structure of fund holders for enhancing digital competences,[14] criteria for monitoring the enhancement of digital competences,[15] research into the competitiveness of countries and their positioning in European rankings[16] and the use of the potential of universities.[17] The importance of this issue is also evidenced by the fact that meaning of the term "digital competence" has been the subject of an interest in the English-language literature in recent years, although the conceptual grid used therein is also far from precise,

10 Cf. http://kompetencjecyfrowe.uksw.edu.pl/.

11 Information on the results of the audit of the activities of public administration bodies for increasing digital competence of the society; accessed March 18, 2024, https://www.nik.gov.pl/plik/id,25577,vp,28343.pdf.

12 Szpor, "Sukcesy i porażki 20-lecia informatyzacji administracji," 72–87.

13 Regulation of the Prime Minister of 20 June 2002 on "Principles of Legislative Techniques" (Journal of Laws 2016, item 283). Cf. James J. Morrison, "Legislative Technique and the Problem of Suppletive and Constructive Laws," *Tulane Law Review* 9, no. 4 (1934–1935): 544–65.

14 Resolution No. 24 of the Council of Ministers of 21 February 2023 on the establishment of a government program called "Digital Competence Development Programme" (Official Gazette of the Republic of Poland of 2023, item 318).

15 Cf. Information on the results of the audit of the activities of Polish public administration bodies for increasing digital competence of the society; accessed March 18, 2024, https://www.nik.gov.pl/plik/id,25577,vp,28343.pdf.

16 Since 2014, the European Commission monitors the digital progress of the Member States through the Digital Economy and Digital Society Index (DESI) reports. From 2023 onwards, in line with the Digital Policy Agenda 2030 and used to monitor progress towards digital goals; accessed March 18, 2024, https://digital-strategy.ec.europa.eu/en/library/digital-economy-and-society-index-desi-2022.

17 In the statutory regulation of higher education in Poland, the key terms are professional qualifications, knowledge and skills, whereas the terms digital competence and digital skills do not appear.

reproducing the unclear relationship of competences to skills characteristic for the EU legislator,[18] and even amplifies it, e.g. in the phrase "soft skills competencies", referring to skills such as creativity, critical thinking, collaboration, and communication.[19]

The term "competence" (*kompetencje*) itself in numerous European legal systems, including Poland,[20] is mainly understood as a set of powers and duties of an administrative authority with which it is equipped to perform its tasks[21] and, above all, in this meaning, is of interest to the legal doctrine.[22] However, dictionaries give two meanings of the term "competence" and an extension of the second meaning: "the ability to do something well" is the term "digital competence" (*kompetencje cyfrowe*).[23] In additional, in the context of translation of legal acts into Polish, the use of the word "competence" in the plural in English is controversial (Britannica),[24] whereas, in the Polish language, it is generally accepted to use the word in the plural form (*kompetencje*).[25]

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18 Cf. for example Liisa Ilomäki, Anna Kantosalo, and Minna Lakkala, "What is Digital Competence?," European Schoolnet (EUN), 1–12, accessed March 18, 2024, https://helda.helsinki.fi/server/api/core/bitstreams/088eb0f0-ec4a-4a73-8013-4f31538c31a2/content; Yu Zhao, Ana María Pinto Llorente, and María Cruz Sánchez Gómez, "Digital Competence in Higher Education Research: A Systematic Literature Review," *Computers & Education* 168 (2021): 104212; Eliana E. Gallardo-Echenique et al., "Digital Competence in the Knowledge Society," *MERLOT Journal of Online Learning and Teaching* 11, no. 1 (2015).

19 Thornhill-Miller et al., "Creativity, Critical Thinking, Communication, and Collaboration," 54.

20 Cf. for example Dorota Mazurkiewicz, "Pojęcie kompetencji w prawie administracyjnym," *Państwo i Prawo* 43, no. 3 (1988): 72–82.

21 Dumitru Vieriu, "Legal Requests of the Authority Administrative Act," *Journal of Law and Administrative Sciences* (2015): 813.

22 Mariusz Szyrski, "Teoretyczne zasady podziału zadań i kompetencji organów właściwych w sprawach jawności i jej ograniczeń," in *Jawność i jej ograniczenia. Zadania i kompetencje*, vol. 9, eds. Grażyna Szpor and Bogumił Szmulik (Warsaw: C.H. Beck, 2015), Legalis, § 1, II. Znaczenie podstawowych teoretycznych pojęć – zadanie i cel, kompetencja, właściwość i zakres działania. Zastosowanie pojęć teoretycznych w ustawach o dostępie do informacji publicznej oraz o ochronie informacji niejawnych, 3. Kompetencja.

23 Cambridge Dictionary, "Competence," accessed February 25, 2024, https://dictionary.cambridge.org/dictionary/english/competence.

24 Britannica, "What is the Plural Form of Competence," accessed March 18, 2024, https://www.britannica.com/dictionary/eb/qa/what-is-the-plural-form-of-competence.

25 Słownik Języka Polskiego PWN, "Kompetencje," accessed March 18, 2024, https://sjp.pwn.pl/szukaj/kompetencje.html.

An attempt was therefore made to assess the rationality of the inclusion of terms "digital competence" and "digital skills" in the conceptual grid and their usefulness as keywords for orientation in the fragmented regulation by actors undertaking activities in this field. A structural and contextual analysis was applied in analyzing such possibilities and their limitations, considering the proportions of occurrence, scopes, and interrelationships between terms "digital competences" and "digital skills".

2. Structural and Contextual Analysis

1) The term "professional qualifications" appears in 7,353 EU acts published in Eur-Lex and "digital skills" can be found in 2,445 such acts. The term "digital competences" is used much less frequently (540 acts with the term "digital competence" and 389 acts with the term "digital competences").[26] In national, the proportions are different in Polish law: the term "professional qualifications" occurs in 5,076 acts and the term "digital competences" in 90 acts, more often than "digital skills" (in 15 acts).[27] This tends to be an adaptation of the conceptual grid to the transposed EU act, although there are also deviations, including the introduction of the term competences instead of skills and their definition.[28]

The selection of legal acts for the analysis was made in principle according to the first results displayed in Eur-Lex for the terms "digital skills" and "digital competences" sorted by relevance. This paper analyses EU legal acts of various types (Article 288 TFEU) – both binding regulations and decisions, non-binding recommendations, and declarations.[29]

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26 Published in EUR-LEX as of 22 January 2024.

27 Published in LEX Legal Information System as of 22 January 2024, excluding Official Journal of EU.

28 Cf. http://kompetencjecyfrowe.uksw.edu.pl.

29 Cf. Deirdre Curtin and Tatevik Manucharyan, "Legal Acts and Hierarchy of Norms in EU Law," in *The Oxford Handbook of European Union Law*, eds. Anthony Arnull and Damian Chalmers (Oxford: Oxford University Press, 2015), 107–8; Monika Szwarc, "Akty ustawodawcze i nieustawodawcze w prawie Unii Europejskiej," in *Podstawy i źródła prawa Unii Europejskiej. System Prawa Unii Europejskiej*, vol. 1, ed. Stanisław Biernat (Warsaw: C.H. Beck, 2020).

2) Council Recommendation of 22 May 2018 on key competences for lifelong learning,[30] defines at the outset the relationship between qualifications and key competences, justifying the importance of the latter category. Among the 8 key competences there is digital competence,[31] which:

> involves the confident, critical, and responsible use of, and engagement with, digital technologies for learning, at work, and for participation in society. It includes information and data literacy [in Polish back-translated language version: "information and data skills"], communication and collaboration, media literacy [in Polish back-translated language version: "media skills"], digital content creation (including programming), safety (including digital well-being and competences related to cybersecurity), intellectual property related questions, problem-solving and critical thinking.

Thus, digital competence is understood in the Council Recommendation (EU) of 22 May 2018 as the sum of multiple skills whereby skills alone do not exhaust the scope of the concept.

3) Regulation (EU) 2021/694 of the European Parliament and of the Council of 29 April 2021 establishing the Digital Europe Programme and repealing Decision (EU) 2015/2240[32] established the Digital Europe Programme and identified "general objectives" as well as "specific objectives" covering actions for the development of large-scale computing and artificial intelligence, cyber security and trust, as well as advanced digital skills, deployment and optimal use of digital capacities and interoperability. The preamble emphasizes that these are interdependent as, for example, artificial intelligence (AI) requires cyber-security if it is to inspire trust, large-scale computing (HPC) capabilities play a key role in supporting

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30 Council Recommendation of 22 May 2018 on key competences for lifelong learning (Text with EEA relevance.) ST/9009/2018/INIT (O.J.E.C. C189, 4 June 2018), 1–13.

31 Key competences: 1) Literacy competence; 2) Multilingual competence; 3) Mathematical competence and competence in science, technology and engineering; 4) Digital competence; 5) Personal, social and learning to learn competence; 6) Citizenship competence; 7) Entrepreneurship competence; 8) Cultural awareness and expression competence.

32 Regulation (EU) 2021/694 of the European Parliament and of the Council of 29 April 2021 establishing the Digital Europe Programme and repealing Decision (EU) 2015/2240 (Text with EEA relevance) PE/13/2021/INIT (O.J.E.C. L166, 11 May 2021), 1–34. The regulation entered into force on May 11, 2021, retroactive to January 1, 2021, and expires on December 31, 2027.

learning in the context of AI, and all three capabilities require advanced digital skills.[33]

4) Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 established the Digital Decade Policy Programme 2030, requiring each Member State to submit to the Commission by 9 October 2023 a National Strategic Action Plan for the Digital Decade, consistent with the "General objectives" and the "Digital targets".[34] The European Parliament, the Council, the Commission and the Member States in the digital decade seek, as stated in Article 3, to promote and achieve eleven "general objectives", the first of which is "promoting a human-centred, fundamental-rights-based, inclusive, transparent and open digital environment where secure and interoperable digital technologies and services observe and enhance Union principles, rights and values and are accessible to all, everywhere in the Union." Strengthening the collective resilience of the Member States and bridging the digital divide, achieving gender and geographic balance, aims to promote permanently accessible opportunities for all to develop "basic and advanced digital skills and competencies", including through vocational education and training and lifelong learning, and by supporting the development of highly productive digital capacities within horizontal education and training systems (Article 7(5)). Separately, promoting the adoption and use of digital capabilities, to bridge the digital divide geographically and provide access to digital technologies and data, and ensuring that online participation by all in democratic life is possible and that public services and health and care services

[33] The general objectives of the 2021–2027 program are "support and accelerate the digital transformation of the European economy, industry and society, to bring its benefits to citizens, public administrations and businesses across the Union, and to improve the competitiveness of Europe in the global digital economy while contributing to bridging the digital divide across the Union and reinforcing the Union's strategic autonomy, through holistic, cross-sectoral and cross-border support and a stronger Union contribution." More extensively: Grażyna Szpor, "Gra o cyfrową Europę," in *Internet. Globalne gry. Global Games*, eds. Agnieszka Gryszczyńska, Grażyna Szpor, and Wojciech Wiewiórowski (Warsaw: C.H. Beck, 2022).

[34] The fulfilment of this obligation in Poland is the "Programme for the Development of Digital Competence" adopted by resolution of the Council of Ministers. In addition, Member States may establish regional action plans and integrate them with national action plans to ensure that the overall goals and digital objectives are achieved throughout their territory.

are also available in a trusted and secure online environment for everyone, particularly disadvantaged groups – including people with disabilities and those in rural and remote areas. The final overall objective is to improve resilience to cyberattacks, contributing to risk awareness and knowledge of cybersecurity processes, and increasing the efforts of public and private organizations to achieve at least basic levels of cybersecurity. In Article 3, the phrases "basic and advanced digital skills and competences" appear alongside the term "digital capabilities". In Article 2, such skills are defined.

"Basic digital skill" means the ability to perform, by digital means, at least one activity related to the following areas: information, communication and collaboration, content creation, safety and personal data, and problem-solving (Article 2(10)). Meanwhile, "advanced digital skills" means skills and professional competences requiring the knowledge and experience necessary to understand, design, develop, manage, test, deploy, use and maintain digital technologies, products and services (Article 2(9)).

In the definition in Article 2(9), the relationship between skills and competences is shaped differently (the components of digital skills are knowledge, experience and professional competence) than in Article 3 (the hyphen indicates the separation of the scopes of the component terms of the phrase "skills and digital competences").[35] Thus, to measure the achievement of the objectives, it is important to clarify this element of the conceptual grid of digital transformation within a multi-level regulation framework.[36]

5) European Declaration on Digital Rights and Principles for the Digital Decade of 23 January 2023, proclaimed by the European Parliament,

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35 Additional doubts are raised by previous official definitions, according to which digital competence consists of digital knowledge and skills and the attitudes that integrate them. Szpor, "Sukcesy i porażki 20-lecia informatyzacji administracji," 72–87.

36 Por. Article 2 p. 11 Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030 (Text with EEA relevance) PE/50/2022/REV/1 (O.J.E.C. L323, 19 December 2022), 4–26: "Digital Economy and Society Index" or "DESI" means an annual set of analyses and measurement indicators on the basis of which the Commission monitors the Union's and the Member States' overall digital performance across several policy dimensions, including their progress towards the digital targets set out in Article 4; 5 DESI 2022 Methodological Note, accessed March 18, 2024, https://digital-strategy.ec.europa.eu/pl/policies/desi.

the Council and the Commission[37] is admittedly a non-normative act (Recital 10 of the Preamble), but "the promotion and implementation of the Declaration is a shared political commitment and responsibility of the EU and its Member States within their respective competences and in full compliance with EU law." The declaration complements the "quantitative targets" in Decision 2022/2481 with "qualitative targets",[38] and obliges the Commission to regularly report on progress towards them to Parliament and the Council. In addition, Decision 2022/2481 states that in cooperating to achieve the eleven general objectives set out therein the Member States and the Commission "shall take account" of the digital principles and rights set out in the Declaration, according to which "we aim to promote a European way for the digital transformation, putting people at the centre, built on European values and EU fundamental rights, reaffirming universal human rights, and benefiting all individuals, businesses, and society as a whole." The preamble of the declaration explains that it sets out common intentions and political commitments and recalls the most important rights in the context of digital transformation, and that the declaration should "guide policy makers when reflecting on their vision of the digital transformation" and promote solidarity and social inclusion through, among other things, digital education, training and skills. The individual chapters of the declaration should provide an overall frame of reference (Recital 7 of the Preamble). The conclusions and recommendations contained in 6 chapters[39] include a definition of how things should be, and the content of the commitments made. In Chapter II, entitled "Solidarity and inclusion",[40] one of the 7 sections is "Digital education, training and skills," which states: "Everyone has the right to education, training and lifelong learning and

37 The European Declaration on Digital Rights and Principles for the Digital Decade (O.J.E.C. C23, 23 January 2023), 1–7. The text in Polish often diverges from the meaning derived from the texts in the languages of other Member States, and it is therefore reasonable to compare them for correct analysis and interpretation.

38 Opinion – European Economic and Social Committee – The Digital Decade EESC-2022-00552-AC, June 15, 2022, accessed March 18, 2024, https://webapi2016.eesc.europa.eu/v1/documents/EESC-2022-00552-00-01-AC-TRA-EN.docx/content.

39 1. Putting people at the centre of the digital transformation. 2. Solidarity and inclusion. 3. Freedom of choice. 4. Participation in the digital public space. 5. Safety, security and empowerment. 6. Sustainability.

40 In the Commission's 2022 proposal: "Solidarity and inclusion".

should be able to acquire all basic and advanced digital skills" (Article 4), which entails a commitment to: 1) promoting high-quality digital education and training, including with a view to bridging the digital gender divide; 2) supporting efforts that allow all learners and teachers to acquire and share the necessary digital skills and competences, including media literacy, and critical thinking, to take an active part in the economy, society, and in democratic processes; 3) promoting and supporting efforts to equip all education and training institutions with digital connectivity, infrastructure and tools; 4) giving everyone the possibility to adjust to changes brought by the digitalization of work through up-skilling and re-skilling. Chapter V "Safety, security and empowerment",[41] divided into 3 parts, distinguishes "Protection and empowerment of children and young people in the digital environment",[42] which includes, among other things, a commitment to: "providing opportunities to all children and young people to acquire the necessary skills and competences, including media literacy and critical thinking to be able to navigate and engage in the digital environment actively, safely and to make informed choices."[43] Therefore, in the Europe-

41 In the Commission's 2022 proposal: "Safety, security and empowerment". In its opinion of June 2022, the EESC stressed that "The war between Russia and Ukraine has highlighted the importance of the proper functioning of digital connections and cybersecurity at all levels and in all sectors of society, as well as in international connections. It has also reinforced the need to develop people's skills and the means to recognise and combat disinformation." [4.11.].

42 It proclaims that "Children and young people should be empowered to make safe and informed choices and express their creativity in the digital environment." (Article 20); "Age-appropriate materials and services should improve experiences, well-being and participation of children and young people in the digital environment." (Article 21). Moreover, "Specific attention should be paid to the right of children and young people to be protected from all crimes, committed via or facilitated through digital technologies." (Article 22).

43 The Declaration does not explain the meaning of the term young people, which allows it to include academic youth. However, it is worth noting that in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Decade for Children and Young People: a new European strategy for a better internet for children (BIK+), the upper age limit of the addressees of the postulated actions appears to be the age of majority, although, for example, the category of young people referred to in the context of computer games includes 15–24 year olds. Online games are currently one of the main forms of online activity for children: 73% of children in the EU aged 6–10, 84% of 11–14 year olds and 74% of young people aged 15–24 play video games. Age-appropriate online games can support

an Declaration of Digital Rights and Principles in the Digital Decade of 23 January 2023, as in Decision 2022/2481, there is the phrase "digital skills and competences" and, in addition, the phrase "digital education, training and skills" and the term qualifications.

6) Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021[44] establishes the Recovery and Resilience Facility setting out its objectives, its financing, the forms of Union funding under it and the rules for providing such funding (Article 1). The term "digital skills" is used seven times in it, including 16 in recital, in relation to "reforms and investments in the next generation, children and the youth are essential to promote education and skills, including digital skills, up-skilling, reskilling and requalification of the active labor force, integration programs for the unemployed)", and in footnote 5 of Annex VII "Methodology for digital tagging under the Facility" regarding the clarification of the term "digital skills" in the table:

> This refers to digital skills at all levels and includes highly specialized education programs to train digital specialists (that is technology-focused programs); training of teachers, development of digital content for education purposes and relevant organizational capabilities. This also includes measures and programs aimed at improving basic digital skills.

Thus, in Regulation 2021/241, on the one hand, there are education, skills and re-skilling linked in equal measure and, on the other hand, the digital skills elements are specialized education and training programs.

7) The term "digital skills" was used twice in the Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013[45] with regard to ensuring synergies with the "Digital Europe" program (point 7 of Annex IV "Synergies with other Union Programmes"), *inter alia*, by

meaningful online educational and participatory activities, develop digital skills and competences, and have other social benefits (e.g. therapeutic and cultural).

44 O.J.E.C. L57, 18 February 2021, 17–75.

45 O.J.E.C. L170, 12 May 2021, 1–68.

undertaking "the Programme's initiatives for the development of skills and competencies curricula, including those delivered at the relevant EIT KICs, are complemented by DEP supported capacity-building in advanced digital skills". As can be inferred from this quote, this regulation also uses the term "competence" in connotation with the term "skills" but does not use the term "digital competence". Thus, Regulation 2021/695 uses the term "digital skills" and, in addition, the phrase "skills and competences" without complementing it with the term "digital".

8) In Regulation (EU) 2021/887 of the European Parliament and of the Council of 20 May 2021 establishing the European Cybersecurity Industrial, Technology and Research Competence Centre and the Network of National Coordination Centres[46] reference is made (Article 5(3)(c)) to the "supporting, where appropriate, the achievement of Specific Objective 4 – 'Advanced Digital Skills' as set out in Article 7 of Regulation (EU) 2021/694, in cooperation with European Digital Innovation Hubs". The term "competence" is used as many as 274 times in this act (this significant number is caused by the title of the act incorporating the term "competence", which is subsequently referred to in the text), but the phrase "digital competence" is not used. Although the term "skills" appears in the title of Decision 2023/936, the term "competences" is used 7 times therein, and recital 15 distinguishes knowledge from skills and from competences in the phrase "knowledge, skills and competences".

9) Decision (EU) 2023/936 of the European Parliament and of the Council of 10 May 2023 on a European Year of Skills[47] proclaimed a European Year of Skills with the overall objective of "further promotion of a mindset of reskilling and upskilling in accordance with national competences, law and practice." Among the skills, digital skills were singled out in recital 20, bearing in mind that "the use of digital tools and technologies (…) can create a digital divide" and "[d]igital skills are essential for participation in the labour market, but also for quality of life and active ageing. In the Union, more than 90% of professional roles require a basic level of digital knowledge, while around 42% of citizens in the Union, including 37% of workers, lack basic digital skills." Although even the title

46 O.J.E.C. L202, 8 June 2021, 1–31.

47 O.J.E.C. L125, 11 May 2023, 1–11.

refers explicitly to the term "skills", the term "competence" is used 7 times in the decision, e.g. recital 15, where knowledge is distinguished from skills and from competence: "capable of providing all the necessary knowledge, skills and competences."

10) Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694 (Chips Act)[48] establishes a framework for strengthening the semiconductor ecosystem at Union level, including through the establishment of the Chips for Europe Initiative; setting the criteria to recognize and to support integrated production facilities (Article 1(1)). The term "digital skills" is used four times in this legal act, including in relation to achieving synergies of the Horizon Europe programs "for the development of skills and competencies curricula" with the "Chips for Europe" initiative by complementing the activities supported under this initiative to build capacity "in advanced applied digital skills and competences in semiconductor and quantum technologies" (Article 2(f) of Annex III "Synergy with Union Programmes"). In this legal act, also with regard to the synergy of the "Chips for Europe" initiative with other programs, these terms (in combination) are used twice: "to build training capacity and enhance applied advanced digital competences and skills to support development and deployment of semiconductors by technology development and end-user industries" (Article 2(c) of Annex III "Synergy with Union Programmes"). In Regulation 2023/1781, there is a variable ordering of the terms analyzed in a phrase indicating the distinctness of their scopes – "digital competences and skills" – "digital skills and competences".

11) In the Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation[49] regulates "a uniform legal framework for the use of electronic communication between competent authorities in judicial cooperation procedures in civil, commercial and criminal matters and for the use of electronic

[48] O.J.E.C. L229, 18 September 2023, 1–53.

[49] OJ L, 2023/2844, 27 December 2023, ELI: http://data.europa.eu/eli/reg/2023/2844/oj.

communication between natural or legal persons and competent authorities in judicial procedures in civil and commercial matters" (Article 1(1)). In the context of the impact of electronic communication tools on access to justice, it was pointed out in recital 12 that "Member States should allocate sufficient resources to the improvement of citizens' digital skills and literacy".

3. Summary

In European Union law, the terms "digital skills" and "digital competences" have existed in parallel for several years and their scopes and relationship are ambiguous. This needs to be taken into account in the application of EU legislation and its transposition into national law as it determines: the structure of administrators of funds for improving digital competences or skills, the criteria for control, and the basis for examining the competitiveness of countries and their position in European rankings.

In the European Union law, the relation between the terms "digital competences" and "digital skills" to traditionally used terms such as "qualifications" and "knowledge" is also inconsistent. For example, in the definition of "advanced digital skills", knowledge is indicated as an element of them, but the definition of "basic digital skills" does not include them. In the Decision 2023/936 establishing the "European Year of Skills", the phrase "knowledge, skills and competences" appears, indicating the distinctiveness of the scopes and consequently the independence of "knowledge" as a separate element from "skills" themselves. Meanwhile, the European Year of Skills aims to support "reskilling" and "upskilling", and the explanatory memorandum refers to information provided by the European Commission that more than 90% of professional roles in the EU require a basic level of "digital knowledge", while around 42% of EU citizens lack "basic digital skills".

The analysis leads to the conclusion that the conceptual grid of digital transformation as it relates to human capital development is confusing. Ambiguous terms are found in EU legislation on, among other things, resource allocation, monitoring, and control, which may have a negative impact on the effectiveness of the transformation. This justifies the postulate of a comprehensive structuring of the terms and concepts of multi-level regulation, taking into account the implications of the prominence of skills

and the place assigned to knowledge for realizing the potential of science and higher education in achieving the goals of the "digital decade".

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Suspension of the Main Proceedings and Referral for a Preliminary Ruling. Gloss to the Judgment of the CJEU in Case C-176/22, Bk And ZhP, of 17 May 2023

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Abstract: The preliminary reference as an appeal of the Court of Justice of the European Union presents many complexities and complicated interpretations over time, given that we have a national judge in the scene of the appeal process, often creating problems but also solutions for greater effectiveness of the law of the European Union and respect for domestic law. The preliminary ruling aims to resolve disputes between internal jurisdictions and evaluate compatibility with EU law, especially in the national procedural sector. Ensuring a postponement of the EU and, above all, protecting the rights of individuals in a concrete, complete and effective way is still questionable research, not so much on a theoretical level but also on a procedural one.

1. Introduction

Once again, we refer to a ruling in case C-176/22, BK and ZhP of 17 May 2023 of the Court of Justice of the European Union (CJEU), which was concluded without conclusions by the Advocate General regarding the preliminary ruling. In this regard, the CJEU had to take a position on Article 23 of the Statute of the CJEU, which was to be interpreted by obliging the judge who caused the referral "(…) to suspend the main proceedings as a whole or whether it is sufficient to suspend only the part of said proceedings

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concerning the question referred for a preliminary ruling (…)."[1] The CJEU was asked when the preliminary reference was requested, the judge *a quo* to proceed with the completion of some procedural acts by abstaining from the activity and during the related wait to respond to the requirements requested and then to give a response.

In particular, in the BK and ZhP case, the CJEU took a position declaring that: "(…) does not preclude a national judge who has submitted a request for a preliminary ruling pursuant to Article 267 TFEU[2] from suspending the main proceedings only in so far as concerns the aspects of the latter which may be affected by the Court's answer to that question (…)."[3] If the referring judge deemed it appropriate, the judge could request an authorization to suspend the main proceedings *in partem*. But for how long? Thus, we must analyze and take a position regarding the nature of the innovation that allows us to judge the present case. The aspects of the ruling are innovative with regard to the elements of current law and previous jurisprudence. The indications we have are useful to the national judge to avoid the possibility of proceeding with a suspension even in part of the main proceedings, thus translating the choice of procedure to an even early stage of the proceedings, risking that the requested requirements are subjected to a later moment and maybe retreated.

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1 CJEU Judgment of 17 May 2023, BK and ZhP, Case C-176/22, ECLI:EU:C:2023:416, not yet published, para. 15.

2 CJEU Judgment of 1 June 2016, Niculaie Aurel Bob-Dogi, Case C-241/15, ECLI:EU:C:2016:385, not yet published; CJEU Judgment of 14 November 2013, Marián Baláž, Case C-60/12, ECLI:EU:C:2013:733; CJEU Judgment of 29 January 2013, Ciprian Vasile Radu, Case C-396/11, , ECLI:EU:C:2013:39, above the cases published in the electronic Reports of the cases; CJEU Judgment of 19 September 2018, Criminal proceedings against Emil Milev, Case C-310/18 PPU, ECLI:EU:C:2018:732, published in the electronic Reports of the cases; Hermann-Josef Blanke and Stelio Mangiameli, *Treaty on the Functioning of the European Union. A Commentary* (Berlin: Springer, 2021); Morten Broberg and Niels Fenger, "The European Court of Justice's Transformation of Its Approach Towards Preliminary References from Member State Administrative Bodies," *Cambridge Yearbook of European Legal Studies* 24 (2022): 169–200; Morten Broberg and Niels Fenger, *Broberg and Fenger on Preliminary References to the European Court of* Justice, 3rd ed. (Oxford: Oxford University Press, 2021).

3 CJEU Judgment of 17 May 2023, BK and ZhP, Case C-176/22, ECLI:EU:C:2023:416, not yet published, para. 32.

2. A Partial Suspension of the Main Judgment

With the BK and ZhP ruling, we can speak for a partial suspension of the judgment. First, we must say that the case in question is part of the session of a criminal case which was initiated by Bulgarian police investigators who were accused of accepting bribes. The public prosecutor qualified the relevant facts by contesting them as a type of corruption, and the criminal court approved the possibility of continuing the case under a different crime category. But was it the case? The qualification of the facts and the guarantees of the defense derive from the law of the Union, and the national judge did not complete the taking of evidence, thus listening to the witnesses to examine some audio and video material from wiretaps.

The Bulgarian criminal court followed and considered Article 267 TFEU, following in the CJEU two avenues for preliminary rulings with two important questions.[4] The first concerned a referral relating to Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012[5] relating to the right to information in proceedings and the elements included in Article 47 CFREU.[6] The referring judge asked for a new qualification of the relevant facts and for the accused to have the right to receive the information and to prepare the relevant defenses from the point of view of the requalification. The CJEU has not expressed its opinion, but we only have the conclusions of Advocate General Ćapeta in case C-175/22, BK of 25 May 2023.[7]

The Bulgarian criminal court asked for a second preliminary question and requested the interpretation of Article 23 of the Statute of the CJEU. Completing the preliminary investigation was not easy, nor was referring to the CJEU according to Article 267 TFEU. The court asked for a preliminary ruling and the judge *a quo* to carry out the relevant

4 Jacques Pertek, *Le renvoi préjudiciel. Droit, liberté ou obligation de coopération des jurisdictions nationales avec la CJUE* (Bruxelles: Bruylant, 2021), 246ss.

5 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (O.J.E.C. L142, 1 June 2012), 1–10, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0013.

6 Steve Peers et al., eds., *The EU Charter of Fundamental Rights, A Commentary* (Oxford & Oregon, Portland: Hart Publishing, Nomos, C.H. Beck, 2021).

7 CJEU Judgment of 09 November 2023, BK (Requalification de l'infraction), Case C-175/22, case in progress.

procedural steps without connection to the problems created. The referring judge suspended the entire trial pending a response from the CJEU. The CJEU has decided that Article 23 of the Statute of the CJEU enables to only partially suspend the main proceedings given that the suspension had to be "(…) limited to those 'aspects' of the proceedings which may be affected by the court's response (…)."[8]

By carefully reading the sentence, we understand that it is based on three important and innovative steps. The first refers to the procedural autonomy of the Member States, which is limited by the principles of equivalence and effectiveness.[9] The CJEU took a position reporting that:

> (…) the preservation of the useful effect of the preliminary ruling procedure is not made impossible in practice or excessively difficult by a national rule which allows, between the date on which a request for a ruling is made preliminary ruling to the Court and that of the order or sentence with which the latter responds to that request, to continue the main proceedings to carry out procedural steps, which the referring judge deems necessary and which concern aspects unrelated to the questions raised for a preliminary ruling, namely say procedural acts which are not such as to prevent the referring judge from complying, in the context of the main proceedings, with that order or sentence (…).[10]

3. Completion of Procedural Acts When a Preliminary Ruling Is Pending. What Are the Requirements?

The completion of procedural acts for a pending case has not been a continuous reality since the founding of the CJEU. However, the requirement that the documents must be necessary for the referring judge resorts to the reason to be decided by the CJEU. Assessing the necessity of the act does not have to do with the national judge. According to the CJEU, the actions to be carried out concern "(…) aspects unrelated to the preliminary questions

8 CJEU Judgment of 17 May 2023, BK and ZhP, Case C-176/22, ECLI:EU:C:2023:416, not yet published, para. 32.

9 Ibid., paras. 24–28.

10 Ibid., para. 28.

raised (…)."[11] According to the CJEU, it is specified that the act in question does not prevent the judge requesting the postponement from the relevant confirmation of a final decision and the indications that are provided to the CJEU.

The CJEU continued and noted that it is up to the judge *a quo* to choose the point at which a reference for a preliminary ruling is made. According to the relative exercise of this power, also of a discretionary nature, it allows that "(…) a request for a preliminary ruling can be presented to the court even at an early stage of the main proceedings (…) it must be able to continue such proceedings for procedural documents that it considers necessary and which are not connected to the preliminary questions raised (…)."[12]

As can be understood, the CJEU tried to justify its position by underlining that the reference for a preliminary ruling was made in the main stages of the trial and not afterwards. Thus, it is necessary for the judge to carry out certain actions after the CJEU has been asked to respond. The BK and ZhP ruling clarifies the extent to which preliminary questions are necessary and not connected, i.e. actions carried out by the referring judge without contradicting what was established by Article 23 of the Statute of the CJEU.

The CJEU highlighted this type of position, which was followed implicitly and certainly even earlier in another case, the Euro Box Promotion of 2021 case,[13] where it was stated that:

> (…) the referring judge's decision to suspend the proceedings had been annulled following an internal appeal and that, for this reason, the main proceedings had resumed on issues other than those which were the subject of the request for a preliminary ruling (…) this request was 'admissible', without having deemed it necessary to examine a possible violation of Article 23 of the Statute (…).[14]

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11 Ibid., para. 29.

12 Ibid., para. 30.

13 CJEU Judgment of 21 December 2021, Euro Box Promotion and Others, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, not yet published.

14 CJEU Judgment of 17 May 2023, BK and ZhP, Case C-176/22, ECLI:EU:C:2023:416, not yet published, para. 32; CJEU Judgment of 21 December 2021, Euro Box Promotion and Others,

In the Euro Box Promotion case, the CJEU knew a priori that the preliminary ruling was annulled after an appeal of an internal nature and in the main proceedings, which were resumed, the issues were different from those in the referral. The CJEU has not excluded its jurisdiction to respond and is ruling on related issues that are raised. Thus, it was accepted that the main proceedings continued some aspects that were off track, i.e. outside and unrelated to the reference, even though the preliminary ruling case was still pending.

4. Towards the Solution That Followed the Previous Jurisprudence

The CJEU followed an innovative ruling and some profiles that continue from previous jurisprudence. The EU does not clearly follow the main judgment even though the CJEU was seized according to Article 267 TFEU. In reality, such a position is also taken into consideration in point 23 of the Statute according to this provision.[15]

A provision stating that the request for a preliminary ruling should be notified to the CJEU by the domestic judge and then to the Registrar of the CJEU and to a number of interested persons according to the second paragraph and who may submit relevant written observations in the preliminary ruling case. The act of notification first to the interested parties and then to the CJEU is defined by the first paragraph of Article 23, where it is specified that: "(…) the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice (…)." This sentence does not clarify whether the referring judge must suspend the main proceedings in their entirety and/or in part.

Referring to the procedure considered, a solution follows, which refers to the suspension obligation as a whole, i.e. the main proceeding. Thus, the relative interpretation of the phrasing of Article 23 of the Statute follows in the opposite direction than that of the BK and ZhP case. This is a literal interpretation, which leads to a different interpretative solution. It refers to suspending the procedure where the provision does not specify whether

Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, not yet published, paras. 80 and 141.

15 Bertrand Wägenbaur, "Art. 23 of the Statute of the Court of Justice of the European Union," in Bertrand Wägenbaur, *Court of Justice of the EU. Commentary on Statute and Rules of Procedure* (München, Oxford, Oregon, Baden: C.H. Beck, Nomos, Hart Publishing, 2013), 66ss.

it must be total, limiting the aspects concerning the preliminary ruling. The doubts created cannot be resolved by referring exclusively to the letter of Article 23 of the Statute of the CJEU.

5. A Teleological Interpretation

Suspending the preliminary reference of a main nature follows the aim of avoiding the completion of the relevant procedural acts which prevent the judge *a quo* from complying with the relevant indications provided by the CJEU in its response. And how the prohibition on deciding the main case without waiting for the relevant ruling of the CJEU was included in the purpose. Article 23 of the Statute precluded that procedural documents in this way can have a negative impact because the very logic of the preliminary ruling is thus altered. This does not prohibit the adoption of measures that do not have the objective of preventing the referring judge from being confirmed in the final decision, i.e. the preliminary ruling rendered by the CJEU itself. The BK and ZhP case actually followed this type of interpretation. This type of approach is confirmed by Article 23 of the Statute and Article 267 TFEU. This interpretation provision was introduced by a form of collaboration between judges based on the division of competences between judicial bodies of Member States and of the CJEU according to the old ruling in the Foglia v. Novello case.[16]

These powers do not fall to the judge *a quo* who is, in reality, the only one who can have direct knowledge of the facts in a case and in the main proceedings. Apart from exceptional cases, it is up to the referring judge to assess the necessity and relevance of the question referred for a preliminary ruling. An evaluation which was referred to the evaluation and control of the CJEU. It is up to the judge *a quo* to identify when to turn to the CJEU using the relevant referral order according to the facts and law during the main proceedings. The withdrawal of the request for a preliminary ruling as a choice is also up to the judge a quo. All these positions/choices consider that the judge *a quo* is in a position to make the fundamental choices for the relative functioning of the entire preliminary ruling mechanism.

[16] CJEU Judgment of 16 December 1981, Pasquale Foglia v. Mariella Novello, Case 244/80, ECLI:EU:C:1981:302, I-03045, para. 14.

Control also enters within this context, an evaluation of the need to only partially suspend the main judgment. This choice presupposes direct knowledge of the facts of the case, which is not required according to Article 267 TFEU of the referring court. In this case, the CJEU responds:

> (…) while awaiting the court's response the latter must be able to continue the main proceedings for procedural acts which it considers necessary and which are not connected to the preliminary questions raised (…). Among the discretionary powers that Art. 267 TFEU recognizes that the referring judge must therefore also include the assessment of the need to carry out certain acts, after the court has been seised, and the consequent choice of total or partial suspension of the main proceedings (…).[17] The precise regulation of the acts that said judge can carry out pending the preliminary ruling case is left to the Member States, who enjoy procedural autonomy, of course, within the known limits deriving from the principles of equivalence and effectiveness (…).[18]

As a point of reference, the Recommendations of 2019[19] refer to the attention of national judges related to the presentation of requests for preliminary rulings. Part of the recommendations states that:

> (…) interaction between the reference for a preliminary ruling and the national proceedings (…) although the national judge remains competent to adopt precautionary measures, in particular in the context of a reference for examination of validity, the filing of a request for a preliminary ruling entails the suspension of the national proceedings until the court's ruling (…).[20]

The need to suspend the national proceeding without further clarification contains indications confirmed by the solution accepted in the BK

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17 CJEU Judgment of 17 May 2023, BK and ZhP, Case C-176/22, ECLI:EU:C:2023:416, not yet published, paras. 29–30.

18 Broberg and Fenger, "The European Court of Justice's Transformation," 14ss.

19 Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01), accessed March, 20 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2019_380_R_0001.

20 Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01), para. 25.

and ZhP[21] ruling. The suspension of the main proceedings cannot be total as the judge *a quo* disposes of the internal documents as a precaution, such as implementing acts of sources of the Union on the validity of the CJEU, which had to rule on the matter. More generally, we note the provisional measures that are necessary to avoid the position of one of the parties being irreparably prejudiced in the time required when the CJEU responded to the domestic judge to decide the main case. It is not excluded that the adoption of the measures be requested after the relevant request for a preliminary ruling. If the conditions are met, the judge *a quo* orders precautionary measures even after it has been addressed to the CJEU.

6. Recommendations, Case Law and the BK and ZhP Case

Generally, we can say that the act category is carried out by the judge a quo, and the preliminary ruling case is pending at the CJEU. These acts are deemed necessary and concern aspects unrelated to the questions of a preliminary nature raised. When there are cases requiring precautionary protection, the adoption of an act and its implementation do not preclude the obligation to comply with the response of the CJEU and the referring judge also partially suspends the main proceedings.

Thus, it is clear that the solution proposed in the BK and ZhP case is consistent with the jurisprudential trend. According to what we have noted in the previous paragraphs, we recall the Cartesio case of 2008,[22] where the CJEU ruled regarding: "(…) a state system that allows the appeal of the referral order, the appeal judge can annul this act and order the lower judge to withdraw the request for a preliminary ruling, as well as to resume

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21 CJEU Judgment of 19 June 1990, The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others, Case C-213/89, ECLI:EU:C:1990:257, I-02433; CJEU Judgment of 21 February 1991, Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn, Joined Cases C-143/88 and C-92/89, ECLI:EU:C:1991:65, I-00415, paras. 17, 19; CJEU Judgment of 9 November 1995, Atlanta Fruchthandelsgesellschaft mbH and others v. Bundesamt für Ernährung und Forstwirtschaft, Case C-465/93, ECLI:EU:C:1995:369, I-07361, para. 21; CJEU Order of 24 October 2001, Alexander Dory v. Bundesrepublik Deutschlandin, Case C-186/01 R, ECLI:EU:C:2001:563, I-07823.

22 CJEU Judgment of 16 December 2008, CARTESIO Oktató és Szolgáltató bt., Case C-210/06, ECLI:EU:C:2008:723, I-09641.

the main proceedings (…)."[23] In the Cartesio case, the CJEU reported that it:

> (…) does not exclude that preliminary rulings to the court are subject to the normal means of appeal provided for by domestic law. In the exercise of their procedural autonomy, Member States may allow the party interested in challenging the act with which the national judge suspends the main proceedings and turns to the Court of Justice (…).[24]

7. Procedural Autonomy, Connection Constraints and Respect for the National Judge According to Article 267 TFEU

As we have seen and understood from the previous paragraphs, the BK and ZhP ruling remains consistent with what was previously declared by the Cartesio case as was recalled by the Euro Box Promotion case. In practice, the CJEU stated that:

> (…) the outcome of such an appeal cannot limit the competence, which belongs only to the referring judge, to evaluate the necessity and relevance of the questions referred for a preliminary ruling and to submit these questions to the court (…). This 'autonomous' competence would be called into question if, by reforming the decision ordering the preliminary ruling, making it ineffective and ordering the judge who issued this decision to resume dealing with the suspended proceedings, the appeal judge could prevent the referring judge from exercising the right to refer the matter to the court (…). It is therefore up to the latter to draw the consequences of a sentence pronounced at second instance against the decision ordering the reference for a preliminary ruling and, in particular, conclude that it is necessary to keep unchanged, modify or revoke his request for a preliminary ruling (…) even in the event of annulment, the 'preliminary reference order' therefore continues to produce 'its effects' until it has been revoked or modified by the judge who issued it, because only the latter can decide on such a revocation or modification (…).[25]

The use of domestic law, contrary to the request for a preliminary ruling, occurs in a particular circumstance. The appeal judge annuls the referral

[23] Ibid.
[24] Ibid.
[25] CJEU Judgment of 17 May 2023, BK and ZhP, Case C-176/22, ECLI:EU:C:2023:416, not yet published, paras. 93, 95, 96.

order, but the lower-level judge decides not to withdraw it, thus deeming that the response of the CJEU is necessary to issue the sentence. The main judgment takes up national law and parallels the referral case, which continues before the CJEU. The proceeding will not be suspended since it is main or may only be suspended in part, but the cause of prejudice will continue. This type of approach confirms the partial suspension of the main judgment, which is compatible, and in such situations, this pending case is part of the preliminary ruling case.

It is clear that the BK and ZhP case has innovative elements in two respects. Partial suspension is recognized by the judges of all Member States, while the precedent deals specifically with the Member States that allow the challenge of the request for a preliminary ruling. The ruling in question clarified that the postponement is linked to a partial suspension and cannot be accomplished by any procedural act. The judge *a quo* carries out acts and considers them to be necessary and which: "(…) concern aspects unrelated to the preliminary questions raised, i.e. procedural acts which are not such as to prevent the referring judge from complying, in the context of the main proceedings (…)."[26]

The main proceedings were only partially suspended in all the cases reported above, including the Cartesio case. The acts that can be carried out by the national judge have some limits as was decided in the BK and ZhP ruling.

8. Precautionary Measures and Partial Suspension by the National Judge

It is considered that national proceedings that intend to refer a preliminary ruling to the CJEU must only partially suspend the main proceedings. The possibility of even partial suspension does not lead to hasty choices.

A national judge thinks it is better to raise a preliminary question at an early stage in the proceedings and in the belief that the judgment does not continue the limits of the CJEU. This type of option is considered convenient for the overall duration of the process. The attempt to "get ahead with the work" until the response from the CJEU does not exclude the related reasons that the referring national judge must consider. Thus,

[26] Ibid., para. 28.

the judge *a quo* must consider the position of even a partial suspension and the objective of containing the duration of the main proceedings within a reasonable time for the duration of a trial. The reasonable trial duration represents a fundamental right as recognized by the second paragraph of Article 47 CFREU.

In our view, Article 47 CFREU is considered because its objective is effective judicial protection, where the court of each Member State does not have jurisdiction to annul a sentence that violates EU law after an application, especially by a Member State judge. The CJEU often refers to Article 47 CFREU as a parameter that adds to the compliance of the relevant means of appeal and, according to EU law, is applied to the relevant case. The Member State implements the law of the Union in various matters.[27] Thus, the reference to the CFREU lies in the path of "compliance with an obligation", which is imposed by the European legislation on the matter and which also provides for the relevant remedies for the individual interested parties as well as compliance with the conditions provided for by the EU law and by the internal law applying the EU law. Thus, we can say that the CFREU has the form of a right to a remedy which identifies and concretizes the instrument of protection adequate for a procedural configuration and the effectiveness of the substantial situation, which has as its intention the protection of individuals and the EU law alike.

The jurisprudence of the CJEU was rich until the referral to the CJEU by the national judge.[28] Naturally, nothing excludes what was underlined by the BK and ZhP ruling, where the national judge decided to do so in the main stage of the proceedings. The CJEU addressed national judgments through firm and consolidated jurisprudence, thus underlining the need

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27 For further details see also: Michal Bobek and Jeremias Adams-Prassl, *The EU Charter of Fundamental Rights in the Member States* (Oxford & Oregon, Portland: Hart Publishing, 2020); Hans P. Jarass, *Charta der Grundrecht der Europäischen Union: GRCh* (München: C.H. Beck, 2020); Romain Tinière and Claire Vial, *Les dix ans de la Charte des droits fondamentaux e l'Union europèenne* (Bruxelles: Larcier, 2020).

28 CJEU Judgment of 27 June 1991, Mecanarte – Metalúrgica da Lagoa Ld[a] v. Chefe do Serviço da Conferência Final da Alfândega do Porto, Case C-348/89, ECLI:EU:C:1991:278, I-03277, para. 48; CJEU Judgment of 24 October 2018, XC and Others, Case C-234/17, ECLI:EU:C:2018:853, published in the electronic Reports of the cases, para. 42.

and opportunity to continue with the referral and the national judge to have established the facts by resolving domestic law issues.[29]

The complete ascertainment of the facts in a case and the solution relating to the preliminary questions are associated with the internal regulations that allow the prevention of the risk of preliminary rulings that prove useless at a later time. Of course, the autonomy of the national judge's jurisdiction remains a choice at the time of referral, and the suggestions remain valid in our case under investigation. The national judge is the only one with the relevant knowledge of the facts of a case and the appropriate person to carry out the relevant assessment for the case in question.

9. Concluding Remarks

The referring national judge takes a position from Article 267 TFEU and the related prerogatives confirmed by the consolidated jurisprudence of the CJEU. According to the BK and ZhP ruling, we can add the complete or partial suspension of a main proceeding as a new reference point. In this case, the procedural activity continues within the relevant limits indicated by the CJEU. Only the acts necessary by the referring judge must be carried out because they are acts where their completion does not prevent the national judge from complying with the indications provided by the CJEU in their final decision.

The BK and ZhP case showed us a solution that has also been followed in the jurisprudence of the CJEU and the recommendations for national judges related to the submission of requests for a preliminary ruling recognizing that the pendency of the reference where the national judge must adopt the conditions for the relevant precautionary measures. This solution is consistent with the jurisprudence that prohibits the relevant Member States from following the prevention of the possibility of challenging

[29] CJEU Judgment of 10 March 1981, Irish Creamery Milk Suppliers Association and others v. Government of Ireland and others; Martin Doyle and others v. An Taoiseach and others, Joined cases 36/80 and 71/80, ECLI:EU:C:1981:62, I-00735, para. 6; CJEU Judgment of 16 July 1992, Wienand Meilicke v. ADV/ORGA F. A. Meyer AG, Case C-83/91, ECLI:EU:C:1992:332, I-04871, para. 26; CJEU Judgment of 30 March 2000, Jämställdhetsombudsmannen v. Örebro läns landsting, Case C-236/98, ECLI:EU:C:2000:173, I-02189, para. 31; Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01), para. 13.

the referral order, which excludes the annulment of the order necessarily where the national judge withdraws the preliminary questions. In the case of annulment, the preliminary question submitted under Article 267 TFEU partially restarts the main proceedings. This solution is certainly innovative for the jurisprudential history of the CJEU and the preliminary ruling.

Previous case law[30] has allowed the partial continuation of a main proceeding when the need for precautionary measures and the need to safeguard the powers of the national judge in the event of annulment of the request for a preliminary ruling is defined. The BK and ZhP case indicated partial suspension as an option the referring judge may consider. Generally, the limits referred to in the previous paragraphs have to do with a procedural act carried out after the case has been brought before the CJEU.

The suspension of even only part of the main judgment is an option. Before making a reference for a preliminary ruling, the national judge should first ascertain the facts of the case and resolve preliminary questions of domestic law. This reduces the risk of preliminary questions later proving useless and having to be withdrawn.

The preliminary ruling at the level of interpretation is, above all, a uniform mechanism, ensuring a correct application of the law of the Union, which represents a tool that settles the related disputes between internal jurisdictions and, on the other hand, evaluates the compatibility with EU law, especially of national procedural rules. The objectives of the referral do not significantly impact the protection of individuals from the perspective of Union law. The following judicial path is always open towards a subjective legal position, which can be damaging due to the incorrect application of the EU law. The preliminary ruling provides solutions, protects and reinvigorates the functioning of the European judicial space as a procedural plan of introducing a new means that challenges and simultaneously expands the grounds and foundations of existing jurisdictional appeals. As a compensation obligation, in reality, there is no such thing as a compliant

30 Jaime Rodriguez Medal, "Concept of a Court or Tribunal under the Reference for a Preliminary Ruling: Who Can Refer Questions to the Court of Justice of the EU?," in *European Journal of Legal Studies* 8, no. 1 (2015): 104ss; Dimitris Liakopoulos, "Transnationality and Application of EU Law in National Legislation. Analysis, Critics and Comparison in CJEU Jurisprudence," in *Revista General de Derecho Constitucional*, no. 30 (2019).

application of EU law in practice, especially when conflicting interests and disputes arise at the decision-making table of the judges in Luxemburg. Time will show that there will be reforms at the national level as well, laying the foundations of a path of the principle of equivalence, of the evaluation of the effects of the rulings of the European courts for the protection of the rights of individuals and of the basic and institutive principles of the EU law. This is the past and future history of the preliminary ruling, and it is still a challenge for the coming years.

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The European Citizens' Initiative "One of Us". A Gloss to the Judgment of the CJEU of 19 December 2019 in Case C-418/18 P. Puppinck and Others v. Commission

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Abstract: In December 2019, the Court of Justice issued a judgment in Case C-418/18 P. Puppinck and Others v. European Commission, ending a long-standing dispute between the organizers of the European Citizens' Initiative "One of Us" and the European Commission. Ruling in the appeal proceedings, the CJEU dismissed in its entirety the application to set aside the judgment of the General Court of the European Union of 23 April 2018 in case T 561/14 One of Us and Others v. Commission. The "One of Us" organizing committee requested the repeal of the European Commission's communication following the public initiative on the grounds that it lacked follow-up. The aim of the "One of Us" initiative was to strengthen the protection of dignity, the right to life and the integrity of every human being from conception in the EU's areas of competence. The initiative proposed amendments to three legislative acts on research, humanitarian cooperation and their funding. The judgment under discussion is important for the interpretation of EU law in two areas. First, this is the first judgment that interprets the systemic position of the European Citizens' Initiative in such a comprehensive manner. The case confirms that

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the ECI is an autonomous institution of EU law, whose systemic position is shaped by the principle of institutional balance and participatory democracy. The ECI is a form of emanation of deliberative democracy. Second, the judgment may be considered as confirming the exclusive competence of the Member States in the area of protecting human life at the prenatal stage. On the one hand, this means that EU law cannot impose its own standards on the right to life on Member States. On the other hand, in the area of its competences, it seems that the EU can have its own ethical position, allowing, while respecting the triple lock system, research involving the use of human embryonic stem cells and financing abortions as part of the package of medical assistance offered to the developing countries.

1. Introduction

In December 2019, the Court of Justice of the EU (CJEU) issued a judgment in case C-418/18 P. Puppinck and others v. Commission (EC)[1] ending a long-term dispute between the organizers of the European Citizens' Initiative (ECI) "One of Us" and the European Commission, in which the organizers sought the annulment of a communication of the Commission.[2] Ruling in the appellate proceedings, the CJEU dismissed in its entirety the application to set aside the judgment of the General Court of the European Union of 23 April 2018 in case T 561/14 One of Us.[3] It thus confirmed the compliance with EU law of the communication in which the EC had refused to take follow-up action. The ruling makes an important contribution to the interpretation of a relatively new instrument of deliberative democracy in the EU. It also indirectly consolidates the position of the CJEU in the area of protection of dignity and the right to life at the prenatal stage.

1 CJEU Judgment of 19 December 2019, Puppinck and Others v. Commission, Case C-418/18 P, ECLI:EU:C:2019:1113, hereinafter referred to as the Puppinck judgment.

2 Commission Communication of 28 May 2014 on the European Citizens' Initiative "One of Us", COM(2014) 355 final.

3 CJEU Judgment of 23 April 2018, One of Us and Others v. Commission, Case T-561/14, ECLI:EU:T:2018:210, hereinafter referred to as "One of Us" judgment.

2. Facts

The European Citizens' Initiative "One of Us"[4] was one of the first initiatives[5] submitted to the European Commission for registration and the second to exceed the threshold of one million statements of support. It still remains at the forefront of initiatives with the widest support.[6] It received the highest number of declarations of support in Italy, Poland, Spain, Germany and Romania, collectively exceeding the minimum support threshold in 18 Member States.[7] In Malta, the initiative was supported by 4.4% of the population (2,3017 declarations). "One of Us" is also the only initiative for which the European Commission, after hearing it, refused to take any follow-up measures.[8]

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4 The original language of the initiative was Italian, in which it was entitled "Uno di noi".

5 Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (O.J.E.C. L65, 11 March 2011), 1 (hereinafter the ECI Regulation) has been applicable since April 2012. In May 2012, the first initiatives were successfully submitted. In total, in May, the European Commission accepted 6 applications for registration. Two of these initiatives ("One of Us" and "Right to Water") exceeded the required threshold of 1 million signatures and were classified by the EC as "successful" ECIs. The data is based on information provided by the European Commission, accessed 19 November 2021, https://europa.eu/citizens-initiative/_en.

6 The initiative collected 1,721,626 signatures. Given the technical difficulties in the signature collection process and the late implementation of the electronic system, resulting from the pioneering nature of the "One of Us" ECI, the number of signatories could be much higher, as indicated by Patrick Grégor Puppinck, chairman of the Organising Committee of the Initiative, in a letter addressed to the European Ombudsman in 2014, accessed May 19, 2023, https://www.ombudsman.europa.eu/pl/correspondence/en/56982.

7 Calculated in accordance with the principle of degressive proportionality, the minimum threshold of support from a given country is the product of the number of Members of the European Parliament and the number of MEPs representing individual countries. For an initiative to be admissible, the minimum threshold of support must be exceeded in ¼ of the Member States.

8 Most of the initiatives meeting the requirement of one million signatures met with the legislative actions of the European Commission, which, although to a limited extent, referred to the postulates presented in the applications. In the case of another initiative, "Stop vivisection", which concerned the proposal to create a European legal framework to abolish animal experimentation, the Commission indicated a number of soft measures taken, but still the most visible was the organization of a scientific conference; accessed January 4, 2023, https://ec.europa.eu/citizens-initiative/public/initiatives/successful/details/follow-up/2012/000007/pl?lg=pl; accessed January 4, 2020, https://op.europa.eu/en/publication-detail/-/publication/11f840dc-be3f-11e9-9d01-01aa75ed71a1/language-en. Dissatisfied with the actions of

The citizens' committee of the "One of Us" initiative invited the European Commission to take legislative action to strengthen the protection of dignity, right to life and integrity of every human being from conception in the areas of EU competence. The organizers justified the initiative in particular with the then new Brüstle judgment,[9] in which, in their interpretation, the CJEU confirmed the dignity and integrity of the human embryo and indicated that it constitutes the beginning of the development of the human being.

The Annex to the "One of Us" initiative proposed specific amendments to the three existing or proposed legislative acts. In the first of the regulations, concerning the financial rules applicable to the EU budget,[10] it was proposed to introduce a new article stating that Union funds shall not be used for activities that result in or imply the destruction of human embryos. The planned regulation establishing the framework program for financing research and innovation, Horizon 2020, assumed the inclusion of provisions that would exclude the funding of research in which human embryos are destroyed, research aimed at obtaining stem cells and research using embryonic stem cells in subsequent stages after they are obtained.[11] The third regulation, concerning development cooperation,[12] proposed the inclusion of provisions according to which EU financial assistance could be used, directly or indirectly, to finance abortion.

The initiative was registered on May 11, 2012. After the collection period for statements of support, it was finally submitted to the European

the Commission, the organizing committee of the ECI submitted a complaint to the European Ombudsman (https://www.ombudsman.europa.eu/en/decision/en/78182), which was however rejected.

9 CJEU Judgment of 18 October 2011, Oliver Brüstle v. Greenpeace eV, Case C 34/10, EU:C:2011:669; referred to as the Brüstle case.

10 Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (O.J.E.C. L248, 16 September 2002).

11 Proposal for a regulation of the European Parliament and of the Council establishing Horizon 2020 – The Framework Programme for Research and Innovation (2014–2020), COM(2011) 809.

12 Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation (O.J.E.C. L378, 27 December 2006).

Commission on February 28, 2014. After verifying the number of declarations, the organizing committee was heard by the European Commission on April 9, 2014, followed the next day by a public hearing in the European Parliament (EP).

In a communication adopted on May 28, 2014, the Commission stated that it would not take any follow-up action. The communication consisted of four parts (points). In the first one, the EC introduced the subject matter and purpose of the disputed initiative and the three proposed legal changes. In the second, most extensive part, it presented the legal framework for the protection of human dignity, the right to life and the integrity of the person in primary law (Articles 2 and 21 TEU, CFR) and the CJEU rulings in the Brüstle case. Referring to scientific research on human embryonic stem cells (hESC), the EC indicated their potential use in the treatment of diseases such as Parkinson's disease, diabetes, strokes, heart disease and blindness, emphasizing their value in the development of science and medicine. The EC pointed to the sufficiency of existing "triple lock" system.[13] In the area of development cooperation, the EC indicated that the EU strategy is closely linked to the objectives and commitments of the International Conference on Population and Development and the subsequent agreements to which all Member States are party. Finally, it indicated that EU development assistance is not intended to promote abortion as a method of family planning, but remains available in a broader package of services aimed at addressing the needs of vulnerable and disadvantaged women, adolescent women, single women, displaced and refugee women, HIV-positive women and rape victims.

From the perspective of the division of competences between the Member States and the Union, it is also important that both research and development cooperation are the so-called parallel competences.[14] This means that the actions of the Union do not constrain Member States from legislating in these areas. The principle of preemption or the occupied field theory,

[13] It entails financial support for research projects that (1) comply with national laws and (2) are scientifically and ethically verified; (3) excluding from funding research projects that involve the creation of new stem cell lines or research in which embryos are destroyed to obtain stem cells.

[14] Article 4(3–4) of the Treaty on the Functioning of the European Union (consolidated version 2016) (O.J.E.C. C202, 7 June 2016); hereinafter referred to as the TFEU.

typical for shared competences, does not apply here. In the communication, the EC drew attention to this fact and pointed out that the actions of the EU in the area of development cooperation are in line with those of all Member States, and correspond to the legislation of most of them in the field of research. The EC also indicated that it had conducted public opinion surveys in both areas of competence, which in both cases granted a public mandate to the EC's position.

In the third part, the European Commission set out its reasons why it did not intend to follow up. In the area of the Financial Regulation, the EC indicated that it was adopted with due regard for the provisions of primary law relating to human dignity, the right to life and the right to the integrity of the person. In the area of the then planned "Horizon" program, the EC pointed to the already conducted discussion concerning the admissibility of research on hESC, the inclusion of some issues in line with the ECI's demands (the third stage of the "triple lock") and the final acceptance by the EP and the Council of the compromise arrived at. In the area of development cooperation, on the one hand, it stressed that the scope of support provided is determined at the international level and that the Union acts in respect of the sovereign decisions of the Member States. On the other hand, the EC pointed out that access to abortion that meets minimum medical standards can dramatically reduce maternal deaths and illnesses. The fourth part of the Communication summarizes the position of the European Commission.

The Citizens' Committee of the ECI "One of Us" and its members, dissatisfied with the lack of follow up, brought an action before the General Court for the annulment of the Communication, which, following an examination of the case, was dismissed. Subsequently, the members of the Citizens' Committee filed an appeal with the CJEU.

3. Judgment of the General Court

The complaint, received by the office on July 25, 2014, was prepared by seven natural persons who formed the "One of Us" organizing committee. The action sought the annulment of the EC communication and, in the alternative, sought the annulment of the provisions of the ECI Regulation.[15] However, in

[15] Article 10(1)(c) of the ECI Regulation.

the course of the proceedings, the General Court found that the alternative claim was inadmissible and rejected this part of the complaint. As a consequence, neither the Council nor the Parliament were granted legal standing as parties to the proceedings. However, by the decision of the General Court, they were admitted as outside interveners supporting the position of the European Commission. Two NGOs (International Planned Parenthood Federation and Marie Stopes International), which lobby for the expansion of access to abortion, also applied for outsider-intervener status in support of the EC's position. However, the lobbyists' requests were rejected. The Republic of Poland, on the other hand, intervened on the side of the applicants. The General Court, respecting the special circumstances of the case and its importance, furthermore availed itself of the possibility of referring the case to an extended composition of the court.

Due to the precedent-setting nature, the decision on the merits of the case was preceded by findings regarding the *locus standi* of the complainant and the admissibility of the complaint itself. First, many entities contested the legitimacy of the organizing committee,[16] which was established under the ECI Regulation[17] and did not have a legal personality. In the end, the General Court also refused the "One of Us" committee's legal standing, indicating that judicial capacity belongs to committee members.[18] Second, the European Commission put forward a plea of inadmissibility of the complaint, pointing out that its communication was not an act that could be challenged through an action for annulment pursuant to Article 263 TFEU. However, the position of the EC was not accepted by the Court, which found that the contested communication had binding effects that could influence the interests of the complainants by significantly changing their legal situation.[19] Furthermore, due to the nature of the ECI, the Court granted it broader legal protection as in the case of petitions to the EP,[20] where the EP's position on petitions meeting the conditions of

16 The current solutions provide for the establishment of an organizational unit with legal personality, cf. Article 5 of the new ECI Regulation.

17 Article 3(2) of the ECI Regulation.

18 Pt. 65 of the One of Us judgment.

19 Pt. 77 of the One of Us judgment.

20 Pt. 91 of the One of Us judgment.

Article 227 TFEU "escapes judicial scrutiny".[21] It is worth emphasizing here the position of the Court, which indicated that failure to subject the refusal decision of the European Commission to judicial review would undermine the implementation of the ECI's objective, which is to strengthen EU citizenship and improve the democratic functioning of the Union.[22] The risk of arbitrariness on the part of the Commission would discourage recourse to the ECI mechanism, not least because of the demanding procedures and conditions to which this mechanism is subject.

The complainants raised five pleas of invalidity of the EC Communication.[23] The first and the second one concerned infringement of the provisions of the ECI Regulation[24] and of primary law[25] due to the failure to take up a follow-up action in the form of the preparation and presentation of a draft of a legal act, respectively. The third plea concerned the failure to present separately the political and legal conclusions in the contested communication. The fourth allegation concerned infringement of the obligation to state reasons, and the fifth – errors of assessment committed by the EC.

In the area of the first and second plea, the complainants essentially held the position that the EC, having heard the ECI submitted to it, is under a legal obligation to respond by presenting a legislative proposal implementing the applicants' postulates, and only exceptionally may this obligation be waived.[26] However, the General Court did not share the position of the parties, indicating that the legislative initiative lies within the discretionary power of the EC. The Court pointed to the quasi-monopoly of

21 Pt. 90 of the One of Us judgment.

22 Pt. 93 of the One of Us judgment.

23 Pt. 102 of the One of Us judgment.

24 Article 10(1)(a) c of the ECI Regulation.

25 Article 11(4) TEU.

26 According to the complainants, only one of the three conditions could exempt the EC from its obligation: first, if the provisions proposed by the ECI were no longer necessary because (1) they were adopted in the course of the ECI procedure, or (2) the problem has become obsolete, or (3) it has been satisfactorily resolved. Second, if the adoption of the provisions postulated by this initiative became impossible after its registration. Third, if a given citizens' initiative did not contain a specific proposal for action, but merely communicated the existence of a problem to be resolved, leaving it to the Commission to determine, if necessary, the action that could be taken; see paragraph 103 of the One of Us judgment.

the legislative initiative granted to the EC by the Treaties, which results from the function of promoting the general interest of the Union conferred by primary law and also the total independence under primary law with regard to the tasks to be performed.[27] Another condition highlighted by the Court was the inclusion of an institutional ECI as a means of dialogue with civic associations and civil society (an instrument of participatory democracy).[28] The Court also confirmed the similarity of the ECI with the indirect legislative initiative of the EP and the Council of the European Union, which do not impose an obligation on the EC to submit a legislative proposal.[29]

Finally, the allegation of non-separation of legal and political conclusions was also dismissed. In that regard, the General Court recalled that, although the preamble to the ECI Regulation provided that the Commission should set out its legal and political conclusions separately, that does not mean that the Commission has an obligation in that regard since the preamble to the EU act has no binding force. The operative part of the Regulation does not repeat the obligation to present proposals separately.[30] Furthermore, the Court pointed out that even if such an obligation were legitimate, the failure to comply with it was formal in nature and did not constitute grounds for annulling the Communication.[31]

In examining the fourth and fifth pleas, the General Court reviewed the obligation to state reasons as a procedural requirement and, with reference to the suggested errors of assessment, reviewed the adequacy of the statement of reasons.[32] These pleas were also finally dismissed.

As regards the area of comments on the assessment, the General Court pointed out that the information contained in the contested communication was sufficient to enable the applicants to understand the reasons why the Commission had refused to follow up on the contested ECI. In addition, the Court held that the argument that the Commission had infringed the duty to state reasons by failing to define and explain the legal status

27 Pt. 110–111 of the One of Us judgment.
28 Pt. 112 of the One of Us judgment.
29 Pt. 113 of the One of Us judgment.
30 Recital 20 and Article 10(1)(c) of the ECI Regulation.
31 Pt. 131 of the One of Us judgment.
32 Pt. 146 of the One of Us judgment.

of the human embryo in the contested communication was irrelevant and should be rejected since the sufficiency of the statement of reasons had to be assessed only in relation to the objective pursued by the ECI at issue.

In analyzing the adequacy of the statement of reasons, the Court concluded that, in view of the wide discretion enjoyed by the Commission in the exercise of its powers of legislative initiative, its decision not to submit a proposal for a legislative act to the legislator should be subject to limited review.

First, the General Court held that the Commission had not committed a manifest error of assessment in finding that the Brüstle judgment was irrelevant to the assessment of the lawfulness of the communication at issue, since that judgment concerned only the question of the patentability of biotechnological inventions and did not address the question of the funding of research activities that involve or imply the destruction of human embryos. Second, the Court held that the applicants had failed to demonstrate the existence of a manifest error of assessment concerning the Commission's ethical approach to research on hESC. The Court also rejected the argument that such research was not necessary on the grounds of insufficient justification of the said argument. Third, the Court held that the Commission had not committed a manifest error of assessment when it referred to a publication by the World Health Organization according to which there was a link between unsafe abortions and maternal mortality in order to conclude from this that a ban on abortion financing would hinder the EU achieving the objective of reducing maternal mortality. Fourth, the Court held that the Commission had not committed any manifest error of assessment when it decided not to submit to the EU legislature a proposal to amend the Financial Regulation in order to prohibit the financing of activities which appear to be contrary to human dignity and human rights.

4. Judgment of the Court of Justice

Patrick Puppinck, together with the other six members of the organizing committee of the European Citizens' Initiative "One of Us", applied for annulment of the judgment of the General Court. The applicants put forward five pleas in law which, in their view, constituted grounds for setting aside the judgment.

In the first plea, the applicants alleged that the General Court erred in law by not recognizing the specific nature of the ECI, which manifests itself in the impact on the quasi-monopoly of the EC's legislative initiative. In their opinion, the Commission's discretionary powers in the field of legislative initiative must be limited, and the use of its discretion to block the objectives of the ECI should be considered unlawful.[33] In their view, given the characteristics of an ECI, the costs and the organizational difficulties associated with it, the initiative cannot be equated with a mere "request" to the Commission to take appropriate action, which can be submitted by anyone. However, after interpreting the ECI linguistically and systematically and after indicating the scope of the discretionary power and the principle of institutional balance, the Court of Justice upheld the General Court's position. Furthermore, the CJEU pointed out that the failure to submit a legislative proposal does not affect the effectiveness of the ECI, whose particular, added value lies not in the certainty of its outcome, but in the possibilities and opportunities it creates for Union citizens to launch a political debate within the EU institutions, without having to wait for the start of the legislative procedure.[34]

The second complaint concerned the failure to take into account the obligation, as interpreted by the applicants, to submit legal and political conclusions separately. The CJEU upheld the Court's reasoning pointing to the well-established line of jurisprudence as to the lack of legal force of the preamble to the ECI Regulation, from the wording of which this obligation was interpreted. In addition, the Court interpreted the phrase "separately" used in the preamble, arguing that, as used in recital 20 of that regulation, it should be understood that both the legal and political conclusions of the Commission should be set out in the communication concerning the ECI in question in such a way that the legal and political nature of the reasons given in that communication could be understood. Nevertheless, that term cannot be understood as imposing an obligation to formally separate legal proposals, on the one hand, from policy proposals,

33 Pt. 46 of the Puppinck judgment.

34 Pt. 70 of the Puppinck judgment.

on the other, and that the sanction for breach of that obligation could be the annulment of the communication in question.[35]

In their third plea, the appellants submitted a claim that the General Court erred in law when it held that the communication at issue should be subject to a limited review, only as regards the exclusion of manifest errors of assessment. They took the view, first, that the Court relied on case law not applicable to the ECI mechanism and, second, that it did not propose any criterion enabling it to distinguish between errors which are "manifest" and those which are not.[36]

The Court of Justice upheld the interpretation according to which the wide discretion of the EC results in limited judicial review.[37] According to the CJEU, the purpose of judicial review is to verify, in particular, the sufficiency of the statement of reasons and the absence of manifest errors of assessment.[38] The CJEU further clarified the differences between the petition to the EP and the ECI.[39]

The fourth plea concerned a limited review of the EC's discretion and an incomplete review of the communication, which was limited to determining whether the errors were obvious in nature. First, the "One of Us" organizing committee complained that the Court should have assessed the proposed prohibition of research on hESC on the grounds of the interpretation of the Brüstle judgment, which was proposed by the appellants. In their opinion, this would result in the need to adjudicate inconsistencies between the current legal solutions in the field of hESC and this judgment. According to the applicants, it is possible to infer from that judgment the attribution of the characteristics of a human person to an embryo. Referring to the first of the arguments, the CJEU pointed to an erroneous interpretation of the Brüstle judgment and, consequently, did not find an infringement of the law by the General Court. Second, according to the complainants, the EC should define the legal status of the human embryo in the communication. The CJEU stated that this was an irrelevant issue and

35 Pt. 80–81 of the Puppinck judgment.
36 Pt. 84 of the Puppinck judgment.
37 Pt. 89 of the Puppinck judgment.
38 Pt. 96 of the Puppinck judgment.
39 Points 90–92 of the Puppinck judgment.

could not usefully serve as a basis for annulment of the Communication.[40] Third, the applicants argued that the Court could not assess the triple lock system as adequate. However, the CJEU held that the Court does not assess the legitimacy of the adopted ethical position, but only examines the communication for obvious errors, which are not identified by either instance. Fourth, according to the complainants, the Court took the position that performing abortions financed from the EU budget reduces the number of such procedures, which they considered paradoxical. The CJEU found that the plea was based on a misinterpretation of the Court's judgment and rejected it as unfounded. Fifth, the applicants considered that the General Court had distorted their arguments concerning international commitments under the Millennium Development Goals and the program of action of the International Conference on Population and Development, which, in their view, the EC had wrongly regarded as binding legal obligations. Both the Advocate General[41] and the CJEU found that the disputed communication did not contain such claims.

The fifth plea concerned the parties' claim that it was necessary to define the legal status of the human embryo in order to reject the three proposals contained in the ECI for the amendment of existing or draft EU legislation. As the organizers pointed out, the purpose of the disputed ECI was not only to adopt the three measures proposed to the Commission but mainly to strengthen the legal protection of the dignity, the right to life and the right to the integrity of every human being from the moment of conception.

The organizing committee of the "One of Us" initiative argued that the Commission was required to cooperate with the organizers of the contested ECI and to submit a follow-up legislative proposal. According to them, the General Court erred in law by failing to take into account the specific objective of this ECI when it ruled that the Commission was not

40 Pt. 109 and 110 of the Puppinck judgment and pt. 136 of the opinion of the Advocate General.

41 Opinion of Advocate General M. Bobek delivered on 29 July 2019, Case C-418/18 P. Puppinck and Others v. European Commission, ECLI:EU:C:2019:640; hereinafter referred to as the opinion of the Advocate General.

obliged to take further action.[42] The CJEU considered the General Court's position to be correct.

5. Commentary

The commented judgment is important for the interpretation of European Union law in two areas. First of all, this is the first judgment that interprets the systemic position of the European Citizens' Initiative in such a comprehensive manner. Second, it falls into the category of CJEU judgments confirming that the competence to protect human life at the prenatal stage remains the exclusive competence of the Member States. In the further part of the commentary, the above areas will be discussed separately.

5.1. The Constitutional Position of the European Citizens' Initiative

The CJEU's position in the area of institutional positioning of the ECI does not introduce a significant alternation, but constitutes, in principle, a confirmation of the current systematic interpretation of primary law. However, it stands in significant opposition to the position of the "One of Us" organizing committee, which overestimated the role and position of the ECI.

As intended by the creators of integration processes (Member States), the European Citizens' Initiative is fundamentally different from national initiatives. First of all, the difference lies in the fact that it is not addressed to the EU legislator, but to the European Commission. It is also not binding, but agenda-setting. Changing the addressee of the initiative from the European Parliament to the European Commission seemed to be a *sine qua non* condition for recognizing the new mechanism in primary law. The initiative is an autonomous institution of the European Union system and it is the EU law that sets its legal framework. At the same time, as the "One of Us" organizing committee rightly argued, an ECI signed by a million citizens under a cumbersome formal procedure and at significant costs should have a special status, different from, for example, requests from lobbyists or petitions to the EP.[43]

The position of the Court of Justice, which differentiates between the legal position of the ECI and that of petitions to the European Parliament,

42 Pt. 120 of the Puppinck judgment.

43 Pt. 18 of the Opinion of the Advocate General.

should be assessed as a definitely positive development. In its judgment, the Court already pointed to the fundamental differences between the right of petition and the ECI. The fundamentally different institutional position of the ECI results from the additional conditions imposed on organizers and the procedural guarantees put in place for them.[44] As procedural guarantees, the Court recognized the right to be heard at the appropriate level, the obligation to thoroughly examine the initiative, including a simple, understandable and detailed way of demonstrating the reasons justifying the adopted position, and the obligation to publish the position and communicate it to the organizers. There are no such requirements for petitions to the EP. Due to the detailed nature of the procedure and its complexity, the ECI is also entitled to higher legal protection, which applies not only to the registration of the initiative but also to judicial review of the Commission's follow-up activities or lack thereof. Indeed, unlike a petition, which is subject to the discretionary power of a "political nature",[45] the Commission is required to set out, by means of a communication, its conclusions, both legal and political, concerning the ECI in question, any action it intends to take and the reasons for taking or not taking such action.[46] The CJEU rightly notes that such requirements are intended not only to inform the organizers of the ECI clearly, comprehensibly and in detail of the Commission's position on their initiative but also to enable the Union judiciary to review the Commission's communications.[47]

The CJEU confirms the quasi-monopoly of the European Commission's legislative initiative.[48] It does so based on a linguistic and systemic interpretation of primary and secondary law. First, the CJEU points out that even one million citizens are not a representative group of citizens.[49] Second, the CJEU refers explicitly to the principle of institutional balance, indicating that the legislative initiative is an important manifestation of that principle. And the principle of institutional balance itself is specific to and

44 Paragraph 98 of the One of Us judgment.

45 Pt. 24 of the CJEU Judgment of 9 December 2014, Peter Schönberger v. the European Parliament, Case C 261/13 P, ECLI:EU:C:2014:2423.

46 Pt. 91 of the Puppinck judgment.

47 Pt. 92 of the Puppinck judgment.

48 Pt. 31 of the Opinion of the Advocate General.

49 Pt. 51 of the Opinion of the Advocate General.

characteristic of the European Union. The CJEU concludes that the Commission's "quasi-monopoly" on the legislative initiative, which constitutes an important difference between the legislative process in the European Union and in the nation states, is rooted in the specificity of the institutional architecture of the European Union as an association of states and peoples and is a key element of the "community method".[50] Advocate General M. Bobek justifies the EC's systemic position by: (1) the need to confer the right of legislative initiative on an independent body, able to define the European general interest and not subject to national agendas or divided political factions reminiscent of national political debates; (2) the unequal weight of individual Member States in the European Parliament; (3) the need to rely on the technical capacities of a specialized administration of a supranational (and multinational) nature, equipped with adequate means.[51]

What is important, the Court of Justice has also defined what the effectiveness of an ECI is (*effet utile*). The CJEU points out that the added value of an ECI does not lie in the certainty of its outcome, but in the possibilities and opportunities it offers citizens of the Union to engage in political debate within the institutions of the EU without having to wait for a legislative procedure to be launched.[52] The Advocate General enumerates four levels of the added value of the ECI: (1) promotion of public debate; (2) increased visibility of specific topics or issues; (3) privileged access to the institutions of the European Union, allowing these issues to be effectively debated; and (4) the right to receive a reasoned institutional response facilitating public and political scrutiny.[53]

In a broader systemic context, the CJEU ruling one more time clarifies the framework of the democratic legitimacy of the EU. In its ruling, the CJEU[54] confirms that the basis for the functioning of the European Union is the principle of representative democracy, under which citizens are directly represented at the level of the Union in the European Parliament.

50 Pt. 46 of the Opinion of the Advocate General.
51 Pt. 46 of the Opinion of the Advocate General.
52 Pt. 70 of the Puppinck judgment.
53 Pt. 73 of the Opinion of the Advocate General.
54 Pt. 64 of the Puppinck judgment.

The CJEU further points out that "(…) system of representative democracy was complemented, with the Treaty of Lisbon, by instruments of participatory democracy, such as the ECI mechanism, the objective of which is to encourage the participation of citizens in the democratic process and to promote dialogue between citizens and the EU institutions."[55] In an earlier ruling, the CJEU has already confirmed that the European Citizens' Initiative is an instrument of participatory democracy related to the right to participate in the democratic life of the Union.[56]

The purpose of the ECI is to give citizens of the Union a right of recourse to the Commission, comparable to the right that the European Parliament and the Council have under Article 225 TFEU and 241 TFEU, respectively, to submit any appropriate proposal for the application of the Treaties. However, it follows from both of those Articles that the right thus conferred on Parliament and the Council does not limit the Commission's power of legislative initiative. The Commission may not submit a proposal provided that it informs the institution concerned about the reasons. Therefore, an ECI submitted under Article 11(4) TEU and the ECI Regulation cannot, *a fortiori*, affect that power.[57]

An interesting legal analysis was carried out by the European Commission, which denied the ECI the status of a fundamental right, arguing that the provisions on the ECI are not part of the Charter of Fundamental Rights of the European Union (CFR). On the same basis, the EC concluded that the ECI could not be entitled to legal protection of a "higher order" than the right of petition.[58] The Court pointed to the rather obvious fact that the ECI was established by a legal act that has the same legal force as the Charter of Fundamental Rights[59] and is, therefore, an EU citizen's right.

As an emanation of deliberative democracy, the EC communication should contain a statement of reasons. As the General Court points out,

55 Pt. 65 of the Puppinck judgment.

56 CJEU Judgment of 12 September 2017, Anagnostakis v. Commission, Case C-589/15 P, ECLI:EU:C:2017:663, para. 24. See: Alicja Sikora, "Zagadnienia demokratycznego charakteru Unii Europejskiej," in *Podstawy i źródła prawa Unii Europejskiej*, vol. 1, *System Prawa Unii Europejskiej*, ed. Stanisław Biernat (Warsaw: C.H. Beck, 2020), 502.

57 Pt. 61 of the Puppinck judgment.

58 Pt. 92 of the One of Us judgment.

59 Pt. 99 of the One of Us judgment.

and the CJEU confirms, the EC's obligation to set out in a communication the reasons for taking or not taking action following an ECI is the concrete expression of the obligation to state reasons imposed under the ECI Regulation.[60] The obligation to state reasons becomes even more important where institutions have wide discretionary powers.[61] The communication should be examined from the point of view of justification as an essential procedural requirement, but also from the point of view of its legitimacy.[62]

If the ECI is already recognized as an instrument of deliberative democracy, it should meet the conditions that are imposed on such instruments. The literature on the subject[63] enumerates the following criteria for deliberative-democratic decision-making: (1) provide space for deliberation; (2) take into account the point of view of the interested and competent parties; (3) adopt decisions in accordance with the principle of openness and transparency while preserving the possibility of social control of the process; (4) introduce mechanisms to balance asymmetric relations between deliberative participants (striving for equality of parties); (5) take into account the capacity to adopt binding decisions. It seems that the conditions indicated at the outset should be fulfilled in the perception of the participants in the deliberation, and from this perspective, the ECI is not fulfilling its purpose. Referring to space for deliberation, the organizing committee pointed out that the ECI procedure is highly formalized, cumbersome and costly and, above all, the cost of the initiative is inadequate to its impact on the EU legislative process. In the area of taking into account the point of view of the interested parties, the organizing committee of "One of Us" indicated their dissatisfaction with the manner in which the public hearing had been conducted. As the committee emphasized, the EC received them coldly, and in the EP most of the time allotted for speeches was used by intervening MPs, lecturing rather than listening.[64] This also contributed to the sense of asymmetry of the position of the participants

60 Pt. 143 of the One of Us judgment.

61 Pt. 144 of the One of Us judgment.

62 Pt. 146 of the One of Us judgment.

63 Anne Elizabeth Stie, "Decision-making Void of Democratic Qualities? An Evaluation of the EU's Foreign and Security Policy," *RECON Online Working Paper*, no. 20 (2008): 5–6.

64 Pt. 31 of the Opinion of the Advocate General.

in the deliberation. As the organizers pointed out, the ECI, as interpreted by the General Court, constitutes a "false promise" to the organizing committee.[65]

From the perspective of deliberative democracy, the mere possibility of bringing an action for invalidity to the General Court and appeal against the decision of the Court to the CJEU should be assessed positively. It creates another forum in which the voice of the participants of the deliberations is heard. However, this is not a deliberation *per se*, because what is involved here is a court deciding the case. However, the Advocate General plays a particularly important role from the perspective of a deliberative democracy. Acting as an advocate of the public interest, their task is to present expert opinions to the public, while maintaining complete impartiality and independence.[66]

In this particular case, Advocate General Bobek, referring to the non-binding nature of the ECI, uses metaphors that are rather unusual for legal documents. He states:

> Put bluntly, a kind of purposive switch is suggested, by asserting that the *effet utile* of a rabbit would be lessened if it were not interpreted as being a pigeon. But, unless some genuinely advanced magic is employed, and the audience is successfully induced to believe that the aim and purpose of looking at a rabbit is to see a pigeon, a rabbit remains a rabbit. (…) Closing with the metaphor already introduced, it is for the legislature to decide, if it wishes to, that there shall no longer be a rabbit, but indeed a pigeon, or even a cat or a whale for that matter.[67]

The use of animalistic metaphors and comparisons seems far from the language of deliberation based on the equality of the parties. As a result, the Advocate General's position in this particular case does not strengthen the institutional position of the ECI as a rudimentary instrument of deliberation that builds the democratic legitimacy of the Union but discourages it from entering into dialogue.

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65 Pt. 31 of the Opinion of the Advocate General.

66 Article 252(2) TFEU.

67 Pt. 64 and 85 of the Opinion of the Advocate General.

5.2. Dignity, the Right to Life and the Right to the Integrity of Every Human Being from the Moment of Conception

As indicated by the organizers of the ECI "One of Us", the main objective of the initiative was to strengthen the legal protection of dignity, the right to life and the right to integrity of every human being from the moment of conception.[68] In principle, however, the recognition and development of the scope of protection of the right to life during the fetal stage is the exclusive competence of the Member States.[69] National autonomy in shaping the level of protection of human life at the prenatal stage is recalled, for example, by the Protocol on Abortion in Malta[70] or the Polish Declaration on Public Morality, annexed to the Accession Treaty of 2003.[71] The condition for the ratification of the Treaty of Lisbon by Ireland was that sensitive ethical issues such as abortion would remain within the exclusive competence of Ireland.[72]

In the areas where Member States conferred some of their competencies, in particular in areas mentioned by "One of Us" ECI, the exercise of these powers has its limits. The diversity of ethical approaches among the Member States is reflected in Article 4(2) TEU[73] regarding the principle of respecting the national identity of the Member States.[74] An expression of abiding by the principle of respect for national identity is also demonstrated

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68 Pt. 12 of the Puppinck judgment.

69 Cf. Alberta Sbragia and Francesco Stolfi, "Key Polices," in *The European Union How Does it Work?*, eds. Elizabeth Bomberg, John Peterson, and Richard Corbett (Oxford: Oxford University Press, 2012), 104. See: Ireneusz C. Kamiński and Andrzej Wróbel, "Komentarz do art. 2," in *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, ed. Andrzej Wróbel (Warsaw: C.H. Beck, 2020), Nb 17.

70 Protocol No 7 on abortion in Malta attached to the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (O.J.E.C. L236, 23 September 2003).

71 39. Declaration by the Government of the Republic of Poland concerning public morality attached to the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (O.J.E.C. L236, 23 September 2003).

72 Alina Kaczorowska, *European Union Law* (London–New York: Routledge, 2013), 26.

73 Treaty on the European Union (O.J.E.C. C202, 7 June 2016), hereinafter referred to as the TEU.

74 Proposal for a regulation of the European Parliament and of the Council establishing Horizon 2020 – The Framework Programme for Research and Innovation (2014–2020), COM(2011) 809.

by derogation clauses in areas of competence entrusted to the Union, in particular the derogations from the free movement of goods provided for in Article 36 TFEU.[75] The best-known example of a state invoking derogation clauses on grounds of public morality is the case of Grogan.[76] It is consistent with the commented judgment in as much as it also concerned access to abortion. In 1986, the Irish Supreme Court ruled that assisting Irish women in having abortions by informing them of the identity and location of abortion clinics abroad was incompatible with the Irish Constitution. A number of Irish students' unions provided detailed information about abortion clinics in the UK. This information was provided free of charge. The Society for the Protection of the Unborn Children (SPUC) asked for an obligation that student organizations cease this activity. The students invoked EU law, arguing that their right to freedom of expression had been violated. The CJEU refrained from taking a position on the relationship between the right to freedom of expression and the right to life, showing that since the service was provided free of charge, it falls outside the area of competence of the Union. This position confirms the principle that fundamental rights must be protected only when they fall within the scope of EU law, but not when they fall outside that scope.[77]

In the current state of the law, the principle of applying the EU standard of protection of fundamental rights exclusively to Union matters derives directly from Article 51(2) of the CFR. The Charter expressly provides that the catalogue of rights, freedoms and principles contained therein shall not extend the scope of EU law or the tasks of the Union beyond its

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75 Anna Wyrozumska, "Zasada poszanowania równości i tożsamości narodowej państw członkowskich," in *Instytucje i prawo Unii Europejskiej*, eds. Anna Wyrozumska, Jan Barcz, and Maciej Górka (Warsaw: Wolters Kluwer Polska, 2020), 126.

76 CJEU Judgment of 4 October 1991, The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others, Case C-159/90, ECLI:EU:C:1991:378; see: Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law. Cases and Materials. Second Edition* (Cambridge: Cambridge University Press, 2011), 255. See: Diarmuid Rossa Phelan, "Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union," *The Modern Law Review* 55, no. 5 (1992): 670.

77 See: ibid., 256.

competence, nor alter the competences and tasks defined in the Treaties.[78] Therefore, the EU acts in accordance with the principle of conferred powers and only within the limits of the powers delegated to it by the Member States, as contained in the TEU and TFEU. The EU institutions, including the CJEU, are bound to the full extent by this principle. Thus, the CFR does not bind Member States to the full extent of national law, but in those areas that fall within EU competence.[79]

The organizers of the "One of Us" initiative referred to the Brüstle case, in which the CJEU ruled on the patentability of human embryos,[80] however, withholding decisions on ethical issues.[81] In the interpretation of the organizers, which resulted directly from the description of the initiative's objective, it was clear that in their opinion, recognizing the human embryo in the Brüstle case as the beginning of the development of a human being confirms the recognition of the right to respect for its dignity and integrity in the EU legal system. However, in the commented judgment the CJEU indicated that such an interpretation is incorrect. The CJEU also added that its position in the Brüstle case does not contain any assessment according to which research using human embryos could under no circumstances be funded by the Union.[82]

Also in the case of the ECI "One of Us", the CJEU and the General Court try to refrain from assessing ethical approaches and assess the Commission's justification, the correctness of which is the subject of the question referred for a preliminary ruling, from the perspective of respecting the procedural requirement. The General Court states in its ruling that:

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78 See: Andrzej Wróbel, "Komentarz do art. 51," in *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, ed. Andrzej Wróbel (Warsaw: C.H. Beck, 2020), Nb 69; similarly: Robert Grzeszczak and Artur Szmigielski, "Sądowe stosowanie Karty Praw Podstawowych UE w odniesieniu do państw członkowskich – refleksje na podstawie orzecznictwa Trybunału Sprawiedliwości i praktyki sądów krajowych," *Europejski Przegląd Sądowy*, no. 10 (2015): 11.

79 Edyta Krzysztofik, "Ochrona praw podstawowych w unii europejskiej po Traktacie z Lizbony," *Roczniki Administracji i Prawa* 14, no. 2 (2014): 67.

80 Pt. 40 of the Brüstle judgment.

81 Pt. 30 of the Brüstle judgment.

82 Pt. 107 of the Puppinck judgment.

> The ethical approach of the ECI at issue is the one whereby the human embryo is a human being which must enjoy human dignity and the right to life, whereas the Commission's ethical approach, as it appears from the contested communication, takes into account the right to life and human dignity of human embryos, but, at the same time, also takes into account the needs of hESC research, which may result in treatments for currently-incurable or life-threatening diseases… Therefore, it does not appear that the ethical approach followed by the Commission is vitiated by a manifest error of assessment in that regard and the applicants' arguments, which are based on a different ethical approach, do not demonstrate the existence of such an error.[83]

The General Court also pointed to the "legitimate and laudable" action of the EU in the field of development cooperation, including access to safe abortions.[84]

In conclusion, in all three areas of Union competence that the organizing committee of the "One of Us" initiative demanded to change, i.e. research and humanitarian cooperation and their funding, the CJEU and the General Court see a difference in the ethical approaches of the Commission and the ECI. While the CJEU seems to have more understanding of the ethical approach of the EC, the Court does not question the right of the organizing committee to have a different ethical approach.

The judgment under discussion upholds and confirms the position of the CJEU presented in the case SPUC v Grogan, and currently resulting from the literal interpretation of Article 51 CFR. Leaving the competence to protect the right to life in the fetal stage within the exclusive competence of the Member States is an essential element of respecting the national identity of states and their equality. On the one hand, this means that EU law cannot impose its own standards of the right to life or its own ethical approach on a Member State. On the other hand, in the area of its competences, the Union may have its own ethical position. In this particular case, this means that it is permissible under EU law, respecting the triple lock system, to conduct research involving the use of human embryonic stem cells and to fund abortion as part of the medical aid package offered to developing countries. A significant inconsistency in respecting the equality and

83 Pt. 176 of the One of Us judgment.

84 See: pt. 179 and 180 of the One of Us judgment.

national identity of the Member States is, however, the solidarity-oriented financial participation in the activities of the Union also of those countries which in their national legislation oppose abortion or research on hESC.

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