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FLAGSHIP STUDIES

Camila ACQUARONE* – Giuliana ROTOLA** –
Yana YAKUSHINA***

Space Solar Power: A Sustainable Solution or an Environmental Dilemma?

ABSTRACT: *Space-Based Solar Power (SBSP) involves collecting solar energy in space and transmitting it to Earth, ensuring continuous power generation. Though an old concept, SBSP is gaining renewed interest, with projects such as the European Space Agency's (ESA) SOLARIS targeting deployment by 2030. Consulting firms have confirmed its cost-benefit viability. However, numerous legal, economic, and regulatory challenges arise. Key questions include space environmental considerations, such as orbital light pollution, as well as ground-based environmental concerns, particularly regarding the size of the rectenna required to capture space laser beams. The deployment of massive SBSP systems could also contribute to an increase in space debris if the maintenance and decommissioning of such large structures are not addressed during the design phase. Beyond environmental aspects, the commercialisation of SBSP raises issues concerning the ESA's role as an energy producer, the impact of facility location on energy resale, and the classification of space solar energy or orbital slots for SBSP installation as space resources. These considerations will raise challenges regarding the ownership and business model of the energy produced, in accordance with the provisions of the Outer Space Treaty. International energy distribution presents additional complexities, particularly in ensuring equitable access for developing nations. Within the European Union, SBSP integration would require significant grid upgrades, pose the risk of market saturation, and necessitate navigating diverse national regulations. Despite its transformative potential, SBSP faces significant legal, technical, and economic challenges, all of which are explored in this paper, inviting a transversal and comprehensive reflection.*

KEYWORDS: *space law, solar power, sustainability, energy law, space resources.*

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1. Introduction

The concept of space-based solar power (SBSP) or space solar power (SSP) involves collecting solar energy in outer space using solar power satellites (SPS) and distributing it to Earth.¹ In other words, SBSP systems convert sunlight into another form of energy, such as microwaves, which can then be transmitted through the atmosphere to receivers on the Earth's surface.

The advantages and cost-benefit of SSP projects have been confirmed by several consulting firms, such as Franzer-Nash² and Roland Berger.³ Among the benefits is continuous, 24/7 power generation throughout the year, potentially reaching gigawatt levels for baseload energy and green hydrogen production for the transport sector. These projects promise to enhance security and resilience against political or terrorist actions, ensure long-term fuel supply security, and offer affordable energy for households and industries.

According to the Franzer-Nash Consultancy report,⁴ SBSP can be readily integrated into existing grid infrastructures, providing low intermittency, high predictability, and dispatchable power with a high load factor. It aligns with net-zero goals, with plans for an orbital demonstrator by 2031 and operational systems by 2040, and is scalable to supply a substantial proportion of energy. Additionally, it offers flexible energy solutions, export opportunities, and power for humanitarian disaster relief and space operations.

Space-based solar power has gained significant attention over the past four years; however, the concept itself has longstanding origins. This concept was introduced by K. E. Tsiolkovsky, a Soviet rocket scientist and astronautics pioneer. In his works, he proposed various ideas of reflective surfaces with black, transparent, or mirror coatings to provide maximum or minimum temperatures depending on the task. The mirrors focus on heating boilers, where radiant energy is continuously concentrated, reaching unprecedented temperatures.⁵ Since then, the SBSP concept has continued to evolve and has been implemented in various real-world projects.

Since the 1980s, several space agencies, including the Japan Aerospace Exploration Agency, have initiated the development of SBSP systems.⁶ Significant advancements were observed starting in the 2020s, marking the beginning of a new ambitious era of SSP projects. For instance, the European Space Agency's (ESA) SOLARIS project and plans to deploy a space power plant by 2030 marked notable milestones.⁷ Addi-

1 European Space Agency Space-Based Solar Power, 2022.

2 Franzer-Nash, 2021.

3 Berger, 2022.

4 Franzer-Nash, 2022.

5 Tsiolkovsky, 1933.

6 Japan Aerospace Exploration Agency, n.d.

7 European Space Agency "SOLARIS," n.d.

tionally, recent commercial initiatives such as Virtus Solis aim to develop the world's first commercial SBSP.⁸

Space-based solar power projects are regarded as the future of renewable energy and may play a key role in supporting global and national policies in shifting towards carbon-neutral solutions.⁹ Consequently, the ESA referred to the SBSP concept to support the European Union's (EU) transition to carbon neutrality by 2050.¹⁰ However, is everything as green and sustainable as it appears?

The introduction of such new technologies poses several risks and raises concerns related to potential adverse impacts both on Earth and in space. The ambitious goal of launching the first SBSP system by 2030 is approaching rapidly, requiring thorough consideration of the potential risks associated with such projects, as every new sustainable solution has the potential to introduce new environmental challenges.

Several drawbacks of SBSP projects have been identified and discussed.¹¹

To expand the existing analysis of concerns associated with the deployment of SBSP projects, this paper provides brief insights into the potential environmental and sustainability challenges, thereby contributing to a pragmatic and critical perspective on the deployment of such a project and facilitating discussions on possible risks of such projects among researchers, stakeholders, and experts.

This paper discusses the following aspects of SBSP: (1) potential impacts on the space environment; (2) potential effects on the natural environment on Earth; (3) issues related to the ownership and distribution of the generated energy; and (4) space sustainability concerns. To address these issues, we draw on examples from existing SBSP projects and analyse current political initiatives and regulatory frameworks, using both international and EU regulations to inform the discussion.

2. Space-Based Solar Power: Orbital Environmental Considerations

Pre-phase studies on SBSP projects primarily focus on environmental impacts in the context of climate change, such as an assessment of carbon footprints from energy production, issues related to the potential increase in Earth's temperature and energy efficiency, and space debris mitigation, with other important environmental considerations receiving insufficient attention. Such preliminary reports suggest, for instance, that thousands of SBSP systems delivering approximately 15,000 GW would likely cause a 0.006°C rise in Earth's temperature, which is much smaller than the warming

⁸ Virtus Solis, 2023.

⁹ European Commission, 2019.

¹⁰ ESA, 2022.

¹¹ New Space Economy, 2024.

effects of producing the same power using fossil fuels.¹² However, even minor increases in the Earth's temperature can lead to irreversible changes in the climate, exacerbating the pressures already exerted by existing contributors to climate change.¹³ Therefore, further consideration should be given to minimising potential temperature increases, for example, by reducing the number of solar panel satellites used.

Despite the negative consequences associated with a relatively small increase in temperature, overall, SBSP systems are largely viewed as carbon-neutral energy with a minimal greenhouse gas emission footprint. Another consideration is the mitigation of space debris. The need to include such considerations is driven by current space practices, recommendations, and policy discussions aimed at building more sustainable space activities, complementing the existing international legal framework governed by major treaties, such as the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies – Outer Space Treaty (OST).¹⁴

More specifically, space sustainability concerns are discussed in Section 4. Since most SBSP projects are still in the early stages, the primary focus is on understanding how to ensure manoeuvrability in order to prevent collisions with other space objects or debris and address decommissioning issues. In addition, further research on other environmental impacts that may be caused by SBSP systems is important.

Particular attention should be given to the reflectivity of solar panel satellites, as it may contribute to increased orbital light pollution and may have potential effects on the Earth's environment, including impacts on biodiversity. Orbital light pollution is driven by the rapid commercialisation of outer space, particularly due to the proliferation of numerous mega-constellation satellites launched into Earth's orbit over the past decade. This form of pollution is primarily caused by the high reflectivity of satellite surfaces. As more satellites are launched, the cumulative effect of their combined light reflections results in a noticeable increase in sky brightness.¹⁵

The negative effects of orbital light pollution extend across multiple areas, from its obvious impact on astronomical observations to its potential adverse effects on biodiversity. Obstacles to astronomy include the practical impossibility of ground-based space exploration due to the constant presence of satellite trails. Regarding the impact on biodiversity, studies suggest that visible space objects rapidly moving across the night sky may affect species' orientation and migration patterns, as many species rely on celestial bodies and their movements for navigation.¹⁶

¹² Mankins and Nobuyuki, 2011.

¹³ Intergovernmental Panel on Climate Change, 2018.

¹⁴ European Space Agency (2023).

¹⁵ International Astronautical Union (IAU), Centre for the Protection of the Dark and Quiet Sky from Satellite Constellation Interference, 2024.

¹⁶ Gaston et.al., 2023.

Thus, reflectivity issues should be considered when planning SBSP systems. Solutions include the use of anti-reflective coatings, optimisation of satellite orientation, and implementation of optical shielding. Addressing these concerns ensures efficient energy transmission while minimising environmental and operational risks. In addition, regarding the environmental impacts of SBSP systems, outer space should be considered an integral component of the natural environment. This approach will enable the application of international environmental principles and national environmental legislation to outer space activities, further protecting the outer space environment from impacts such as orbital light pollution and space debris.¹⁷ It will also facilitate the implementation of environmental measures, including binding environmental impact assessments for space projects, concerning not only the Earth's environment but also the outer space environment.

This is already briefly reflected in the provisions of Article 9 of the OST,¹⁸ indicating that countries shall avoid harmful contamination of space and celestial bodies and is more developed in the currently adopted space sustainability recommendations. Considering outer space as a form of the environment will prompt a broader examination of how space objects can impact the natural environment beyond Earth, providing for the application of stricter environmental protection of space.¹⁹ Finally, although it is suggested that overall SBSP production is likely to be environmentally friendly, further studies on the environmental impact across the entire lifecycle of SBSP systems are necessary to prevent potential negative effects on the orbital environment and enable conformity with developing regulatory frameworks.²⁰

3. Space-Based Solar Power: Ground-Based Environmental Considerations

Even though the preliminary study reports consider that SBSP could be a practical tool to “avoid” land allocation for terrestrial technologies (since SBSP rectennas would use only 5m² of land per MWh), the environmental and social impact of deploying such a giant structure on Earth from a practical perspective should be considered. The terrestrial receiver would need to span several kilometres in diameter (approximately 20–35 km), adding complexity and cost to its implementation on the ground, while also potentially generating negative societal externalities.²¹

17 United Nations Office for Outer Space Affairs, 2021.

18 United Nations Office for Outer Space Affairs, 1967.

19 Miraux, Wilson, et.al., 2022.

20 Mankins and Nobuyuki, 2011.

21 Dakora et al., 2021.

Which state would agree to install this rectenna and face potential complaints and legal actions from environmental associations and local residents? Should it be left alone to deal with this complexity? In this context, raising awareness about space-related matters and the benefits of this operation is essential. Second, and more obviously, this giant rectenna will have an environmental impact on the area, which must be considered.²² Large solar power plants already exist, such as the Bhadla Solar Park in India, which covers an area of 57 km² with a production capacity of 2.7 gigawatts.²³ Even if the sizes of the Earth-based receiver and traditional ground-based solar farm are similar, the effects of the different technologies used to transmit space energy (such as microwaves) on flora, fauna, and the atmosphere, as well as carbon intensity, should be understood.²⁴

Additionally, similar to solar panel satellites, it is crucial to consider the reflectivity of receivers, which could potentially contribute to an increase in ground-based light pollution. This pollution is caused by increased, unwanted, and misdirected artificial light at night (ALAN) levels and other sources, including reflective surfaces such as solar panels. Ground-based light pollution has significant adverse effects on biodiversity, habitats, and ecosystems, necessitating the prevention of such effects in future projects. An environmental impact assessment of SBSP systems must be conducted, as with traditional solar power installations, while also considering the coexistence of the rectenna with other productive activities such as agriculture or farming, a best practice that could be imported and democratised for large terrestrial solar power plants, which rarely integrate multiple activities with energy production.²⁵ Answering Elon Musk, who affirms that it is much easier to have solar power on the ground than in orbit, Ian Cash, Chief Engineer of International Electric Company Limited, who is developing the Cassiopeia project, asks, *'Is the easiest place, necessarily the best place?'*²⁶

4. Ownership, Consumption, And Distribution of Photovoltaic Energy

When analysing the central issue of implementing SBSP systems, namely the production of electricity, two aspects must be considered.

First, the ownership of photovoltaic energy, a resource that can be collected both in space and on Earth, raises several issues. On the one hand, it could be argued that this energy is not a “space resource” as such; on the other hand, the slot in the orbit

²² Cash and Eng, 2021.

²³ Futura Science, 2024.

²⁴ Frazer-Nash, 2022.

²⁵ Faucon et al., 2023.

²⁶ 'Agrivoltaics: Advantages and disadvantages of installing solar panels in the field', n.d.

required to build the solar power plants necessary for electricity production could fall within this definition.²⁷

The concept that Earth's orbit is a finite resource is highlighted by the growing congestion in Low Earth Orbit (LEO) and Geostationary Orbit (GEO), as these regions become increasingly crowded with the rising number of satellites.²⁸

In the specific case of the Constant Aperture, Solid-State, Integrated, Orbital Phased Array (CASSIOPEA) Solar Power Satellite, which has a diameter of 2 km—hundreds of times larger than the ISS—it is crucial to consider solar energy and the orbital space where the SBSP system is situated as valuable resources. This consideration is essential for determining the conditions under which the generated electricity can be effectively utilised and sold on Earth.

Space resource activities fall under the category of “use” of outer space, as defined in Article I of the OST. This paper explicitly allows state parties to utilise “outer space, including the Moon and other celestial bodies,” which covers activities such as the direct utilisation of resources in space. While this primarily refers to the in-space use of resources such as fuel, oxygen, or water, it likely extends to the extraction of resources intended for use on Earth once such processes become feasible.²⁹ The potential benefits of utilising space-extracted resources include reducing the energy required to transport additional materials to space for in-situ use and exploring possible applications on Earth.³⁰ As observed, the definitions of “use” and “space resources” can be broad enough to cover energy production activity.

Additionally, Article I stipulates that outer space should be explored and used “for the benefit and in the interests of all countries, regardless of their level of economic or scientific development”; yet, the implementation of these principles remains uncertain and could lead to tensions, though precedents such as the sharing of lunar samples might be interpreted as fulfilling this obligation.³¹

The most significant challenge for space resource activities lies in the principle of non-appropriation outlined in Article II of the OST, which applies equally to governmental and commercial space resource activities and is further reinforced in Article 11(2) of the Moon Agreement, which governs the activities of states on the Moon and other celestial bodies.

The debate over whether a distinction can be made between the appropriation of an entire celestial body and the appropriation of resources extracted from it is central to the legal framework governing space activities. If such a distinction is recognised, then the principle of non-appropriation under Article II of the OST would only prohibit

²⁷ Nozari, 1973.

²⁸ De Man, 2010.

²⁹ United Nations, 1967.

³⁰ McKinsey & Company, 2022.

³¹ de Zwart et al., 2023.

states and private entities from claiming sovereignty over an entire celestial body, rather than extending this prohibition to extracted resources.

This interpretation would open the door to commercial space mining and other resource utilisation activities, making them legally viable. However, the legal status of this distinction remains unsettled, with different states interpreting it differently.

The significance of this distinction extends beyond space mining to other space-based commercial activities such as SBSP. If the principle of non-appropriation is interpreted narrowly – prohibiting ownership of celestial bodies but allowing the use of extracted resources – then questions arise about how similar logic applies to SBSP.

Specifically, if a European SBSP system, such as the SOLARIS project, were to collect and distribute solar energy from space, legal mechanisms would need to be established to ensure equitable access among European member states. This is because SBSP, while technically an extracted resource, could be viewed as monopolising access to solar energy at a particular orbital position, potentially leading to legal and political challenges.

Furthermore, deploying a large-scale SBSP system could raise concerns about the fair allocation of this resource and its alignment with the principles of the OST, which emphasise free access to space for all nations and equitable sharing of space benefits.

If a single entity or group of nations dominates the collection of solar energy from space, it could be argued that this contravenes the OST's intent by creating exclusive control over a space-based resource. Additionally, SBSP could disrupt existing energy markets, which are traditionally regulated at the national level.

This perspective raises numerous questions that could pose significant challenges during the operational phase of SBSP deployment.

For example, can the ESA be considered an energy producer within the framework of the SOLARIS project? In which national market can this energy be sold? Does the location of Earth-based facilities affect the resale of energy on Earth? More specifically, if the facility is located in Spain (or in any other country), must the energy be sold according to Spanish market regulations? How is the price of this electricity determined? Will the energy be sold on the general grid, or can it be purchased by a private or public entity through a corporate power purchase agreement (PPA)?³² These questions become even more technical when we analyse energy distribution at an international level, particularly if the purpose is to ensure that developing countries benefit equally from this “new” space resource, as outlined in the OST.

From a practical standpoint, selling solar energy from space-based facilities across Europe or on a global scale presents several challenges. Grid integration can be difficult because of the large and variable influx of energy, necessitating significant

³² Power Purchase Agreement (n.d.).

upgrades to transmission infrastructure and energy storage systems. Unlike traditional Earth-based facilities, the continuous flow of space-generated energy can create energy storage challenges when solar production exceeds consumption.³³

Economically and commercially, market saturation could lead to price fluctuations, thus affecting the profitability of space-based solar power,³⁴ highlighting the need for political and economic coordination among countries to ensure fair distribution and pricing.³⁵

Navigating the complex regulatory landscape across Europe and other countries is crucial for ensuring compliance with national and EU regulations; however, these challenges are even more pronounced from an international perspective.

Corporate power purchase agreements could facilitate the transfer of SBSP across European countries by providing direct, stable, and flexible contracts between private companies, offering price stability and risk management, both of which are crucial for emerging technologies such as SBSP. As PPAs are private agreements, they can facilitate cross-border transactions and help integrate energy from different sources into a unified market, aligning with European efforts to create a single energy market.

Even if these practical considerations are addressed much later in the development process of SBSP, as the power plant is not yet in space and the first kilowatt may only be produced in ten years, it is important to anticipate the legal framework that will enable the commercialisation of SBSP energy.

5. Space Sustainability vs. Space-Based Solar Power

Space sustainability can be defined as:

“the ability to maintain the conduct of space activities indefinitely into the future in a manner that realizes the objectives of equitable access to the benefits of the exploration and use of outer space for peaceful purposes in order to meet the needs of the present generations while preserving the outer space environment for future generations.”³⁶

This includes minimising the creation of space debris, preventing orbital congestion, and ensuring that space remains accessible for future generations. In this context, SBSP presents both opportunities and challenges for space sustainability.

33 Green Match, 2024.

34 Green Match, 2024.

35 European Network of Transmission System Operators for Electricity, 2024.

36 United Nations Office for Outer Space Affairs, 2021, p. 2.

As discussed above, one of the key sustainability concerns for SBSP is the orbital impact of large structures, as the deployment of massive solar arrays in GEO presents significant challenges given the limited nature of GEO. Indeed, the placement of large SBSP stations in this region could limit the availability of slots for other critical services, such as communications and navigation satellites. Moreover, unlike LEO, where satellites can be spaced apart at different altitudes, GEO satellites must be located on a narrow belt 35,786 km above the equator, resulting in limited available “slots”.³⁷ Any new SBSP system could occupy these valuable orbital positions, creating competition and challenges for allocating these positions under international agreements such as the International Telecommunication Union’s frequency and orbital slot coordination mechanisms. As more nations and private entities enter the space arena, ensuring fair and sustainable access to GEO will require extensive cooperation and further regulation.

Another issue arises from the maintenance and decommissioning of such large structures. Given the remote location and size of SBSP systems, maintaining these systems over their operational lifespan could prove difficult. Unlike smaller satellites, which are occasionally serviced or deorbited at the end of their lifecycle, SBSP systems would require advanced, possibly autonomous, on-orbit maintenance capabilities to ensure that they do not become hazardous. Failure to manage these systems effectively could lead to the creation of large debris if malfunctions or collisions occur, thereby exacerbating the already significant problem of space debris.

The risk of debris production is also particularly relevant, as GEO does not have a natural “cleanup” mechanism such as atmospheric drag, which helps remove debris from lower Earth orbits. If an SBSP system were to fail, it could remain in orbit indefinitely, posing a long-term threat to other operational satellites. Despite collision risks being lower than those in other orbits,³⁸ there is still a pressing need to develop robust end-of-life strategies for SBSP infrastructure, such as moving defunct systems to “disposal” orbits far above GEO to avoid obstructing future space operations.

Finally, as already stated, from a regulatory standpoint, the deployment of SBSP systems will require careful coordination under international space law. The OST obligates countries to ensure that activities in space, whether by governmental or non-governmental entities, do not cause harmful contamination. As SBSP systems would operate in GEO, a limited and valuable orbital region, questions arise about prioritising orbital slots and preventing the monopolisation of GEO resources. Current frameworks such as the United Nations Committee on the Peaceful Uses of Outer Space *Guidelines for the Long-Term Sustainability of Outer Space Activities*³⁹ offer guid-

³⁷ European Space Agency *Types of orbits* (n.d.).

³⁸ Roberts and Bullock, 2020.

³⁹ Roberts and Bullock, 2020.

ance; however, they may need to be adapted to accommodate the unique challenges posed by large-scale SBSP systems.

5.1. Maintenance, reparability, and decommissioning

Maintaining and repairing large-scale SBSP infrastructure is a major engineering challenge. Owing to their large size and complexity, any required maintenance must be conducted remotely, possibly autonomously. This adds layers of technical difficulty, as no current technology offers a comprehensive solution for maintaining such massive structures in GEO. While some advancements have been made in on-orbit servicing (such as Northrop Grumman's MEV-1 mission, which successfully extended the life of a GEO satellite),⁴⁰ these are singular operations and far from the regular, large-scale maintenance that SBSP systems might require, considering that low-cost space transportation also remains a challenge for SBSP's economic viability.⁴¹ Furthermore, decommissioning SBSP systems would be critical to prevent them from becoming long-term debris hazards. Geostationary Orbit satellites are typically moved to "graveyard" orbits when their operational life ends; however, the size of SBSP systems means that they would need specialised end-of-life plans to avoid obstructing future GEO operations.

5.2. Debris mitigation and long-term risks in GEO

The deployment of SBSP systems is strongly associated with long-term risks concerning debris generation. Geostationary Orbit satellites already face increasing risks from collisions with ageing space objects, defunct satellites, and smaller debris, even over a longer time scale than LEO risks from collisions.⁴² However, introducing SBSP systems, which are larger and more complex than most existing GEO assets, increases the likelihood of accidental damage and long-lasting debris fields. Moreover, because SBSP systems are meant to operate continuously over long periods, their failure or fragmentation could lead to widespread debris creation, which, because of the physical characteristics of GEO, could remain there for centuries, posing a threat to vital telecommunications and navigation satellites.⁴³ Therefore, comprehensive debris mitigation strategies are essential.

40 Wikipedia *Mission extension vehicle* (n.d.).

41 National Space Society (n.d.).

42 National Space Society (n.d.).

43 Dongfang et al., 2017.

6. Conclusions

In conclusion, SBSP presents promising opportunities as well as significant environmental and social challenges that require more thorough investigation.

Preliminary research must go beyond simple cost-effectiveness or energy efficiency analyses to encompass broader environmental impact assessments. This should not only focus on Earth's environment but also treat outer space as an integral part of it. The two systems are inherently interconnected, and space projects, particularly on the scale of SBSP, must recognise this relationship.

Impacts such as increased orbital and ground-based light pollution, potential harm to biodiversity, and the long-term sustainability of both orbital and terrestrial environments require critical consideration. The evolving concept of space sustainability requires a shift towards treating Earth and space as interconnected systems. As we venture further into space for energy solutions, it is fundamental to establish environmental frameworks that ensure the protection of both environments. Only by adopting a holistic Earth-space system approach can SBSP systems be truly efficient and sustainable.

Moreover, the concept of space resources should encompass solar energy produced in space, promoting equitable access to this valuable resource. The energy transition should not be an exclusive privilege of wealthy countries but should be of "benefit and in the interest of all countries". A space-based solar power system could provide an opportunity for developing countries to participate in the benefits of space technology and contribute to a global sustainable energy transition. This opportunity should not be missed, and the shared benefits of SBSP should be carefully addressed in the final phase of its development.

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Radka KOPČOVÁ*

Personal Honour and Human Dignity as Fundamental Personal Rights

ABSTRACT: *The right to honour and human dignity is a natural subjective right belonging to every natural person and is classified as a personal right. The author comprehensively analyses these two rights under a single construct in the context of the provisions of Section 11 of the Slovak Civil Code. The author also points to other lex specialis of both private and public law regulating the right to honour and human dignity, particularly special provisions on the protection of honour and human dignity of natural persons under criminal law, labour law, and family law. The author exhaustively exposes the common features and fundamental differences between honour and human dignity, using not only legal but also philosophical theories. In connection with the protection of honour and human dignity during life, the author defines the institute of 'post-mortem protection of human dignity', the essence of which is to provide protection against unauthorised interferences with these rights after the death of a person. The post-mortem protection of a natural person against unauthorised interferences is categorised at two levels according to the object of legal protection. Comparisons are also conducted between the honour of a natural person and the right to a name and good reputation ('goodwill') of a legal person, with the latter regarded as "quasi-personal rights" of legal persons. In this context, she refers to a special legal regulation for the protection of the business name and reputation of an entrepreneur under the law against unfair competition. Then, the author analyses current Czech constitutional case law, according to which legal entities have the right to protect their reputation, similarly to the rights of natural persons.*

KEYWORDS: *personal honour, human dignity, personal rights, post-mortem protection of human dignity, Goodwill of a legal person, reputation of a legal person.*

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1. Introduction

The right to honour and human dignity is a natural subjective right of every natural person, from birth to death. This right applies *erga omnes*, is inalienable and inviolable, and cannot be affected by the execution of a decision. Thus, it represents one of the most valuable rights available to human beings.

The right to honour and human dignity is also one of various personality rights. Personality rights and their protection currently represent basic prerequisites for the functioning of a democratic state, albeit their development was not uniform and went through specific phases as society developed. The first codification works regulating the protection of these personality rights were created as their jurisprudence was being developed. The gradual historical development of these personality rights also led to the stabilisation of their conceptual features and the determination of their essence as we know them today.

Importantly, the legal regulation of personality rights in the Slovak Republic must be understood from an international perspective. The Slovak Republic has been a member of the European Union since 2004, has acceded to many international treaties, and is a member country of various international organisations. This affords the conclusion that the legal protection of personality rights in the country stems from international law, European law, and national law.

The object of our investigation is the personality right of the right to honour and human dignity, which is enshrined in the Constitution of the Slovak Republic (hereinafter, Slovak Constitution), the Civil Code and is partially regulated in other legal regulations. The Slovak legal framework for this right is hence provided by both private law (civil law and intellectual property law) and public law (constitutional law and criminal law) regulations. Using a comparative method, we examine the right to honour and human dignity in the context of national law—primarily civil law—and present the means of legal protection in the event of interference with these rights. In addition to investigating the constitutional and civil law regulations of these two rights, we also probe into the legal regulation in selected *lex specialis*, especially the Criminal Code, the Family Act, and the Labor Code.

In a separate chapter, we exhaustively outline the common features and fundamental differences between human honour and dignity. For a better understanding of both these fundamental human rights, we base ourselves not only on legal but also, and especially so, on philosophical theories. In this regard, we point out, unfortunately, the inconsistent views of the theoretical proposition of the 'absolute-ness' of these rights, which is reflected through inconsistent jurisdiction across countries.

The right to honour and human dignity is also closely related to the institute of 'post-mortem protection of human dignity', the essence of which is to provide a

deceased natural person with protection against unauthorised interference at a time when he/she is no longer alive and therefore cannot defend himself/herself. In a separate chapter, we present two levels of post-mortem protection, namely the general post-mortem protection (i.e. the legal protection of the memory of the deceased person) and the subjective (special) post-mortem protection (i.e. the legal protection of manifestations of a personal nature and assets that a person created during his/her life). In this context, we showcase that the right to pecuniary satisfaction is not preceded by the death of the natural person concerned by his/her heirs or by the death of that natural person. Since this right is, by its nature, closely linked to the natural person, it also expires with the death of that natural person.

A separate chapter presents a comparison of the right to honour of natural persons and the right to a good name and good reputation of legal persons. We briefly define a legal person and the philosophy of its existence and then consider whether personality rights can apply to a legal person. According to Art. 19 (1) of the Slovak Constitution, 'Everyone has the right to the preservation of human dignity, personal honour, good reputation and protection of name'. Based on this article, the following questions arise: does this constitutional right also apply to legal entities? How should the word 'everyone' in the cited provision be interpreted in this case? Does it include every natural person or every person, including legal entities? What is the nature of the rights under Section 19b of the Slovak Civil Code (i.e. right to a good name and right to a good reputation of legal persons)? Regarding the conceptualisation of the legal nature of the right to a good name and the right to good reputation of a legal person, we point out several different legal opinions from Slovak and Czech professional literature, citing both Slovak and Czech case law. We consider the recent jurisprudence of the Czech Constitutional Court (Czech Constitutional Court TZ 6/25) to be significant, according to which legal entities have the right to protect their reputation. As the Czech Constitutional Court states:

"(...) according to Art. 10 par. 1 of the Charter, everyone has the right to preserve their human dignity, personal honour, good reputation and protect their name. Although some of these rights, such as human dignity and personal honour, by their nature belong exclusively to natural persons, this does not mean that the protection of good reputation (and name) cannot be constitutionally guaranteed in relation to legal persons as well."

This study compares the Slovak legal regulation of the 'quasi-personal rights' of legal persons with the Czech legal regulation. We showcase their differences, with a particular focus on the divergence regarding one topic: while the 'right to privacy of a legal person' is enshrined in the Czech Republic, the Slovak legal regulation does not grant such a 'quasi-personal right'.

In a separate chapter, in addition to discussing the protection of the good reputation of a legal entity under Section 19b of the Slovak Civil Code, we also discuss the protection of a 'certain' reputation of a competitor under the law of unfair competition (under Section 48 of the Slovak Commercial Code). We compare the legal protection of a good reputation and a certain reputation under civil and commercial law.

2. The Right to Honour and Human Dignity: The Basic Legal Framework in the Slovak Legal System

The right to honour and human dignity applies *erga omnes* and is a personal, natural, and subjective right belonging to every natural person from birth to death. It is also inalienable, inviolable, cannot be affected by the execution of a decision, and cannot be waived or transferred to another person. This right therefore represents one of the most valuable rights of human beings. In the Slovak Republic, we talk about two legally binding regulations that represent the constitutional basis of personal rights, as follows: Constitutional Act No. 23/1991 Coll., which was introduced by the Federative Assembly of the Czech Republic and Slovak Republic through the Charter of Fundamental Rights and Freedoms; and the Slovak Constitution No. 460/1992 Coll., as amended by constitutional laws.¹

The initial legal framework for the right to honour and human dignity in Slovakia is provided by the Constitution, as the hierarchically highest law of the state. It protects fundamental human rights and freedoms²; by enshrining these rights in the second chapter, the legislator emphasises and highlights their societal significance. According to this second chapter, some fundamental civil rights (e.g. the right to work and right to education) are regulated in other branches of law. In connection with the right to honour and human dignity, which is the subject of our article, there is a provision in para. 1 of Art. 12 of the Slovak Constitution, which states that 'People are free and equal in dignity and rights'. Art. 19 of the Slovak Constitution also states that:

"(1) Everyone has the right to the preservation of human dignity, personal honour, good reputation and to the protection of his name. (2) Everyone has the right to protection against unauthorized interference with private and family life. (3) Everyone has the right to protection against unauthorized collection, publication or other misuse of data about his person."

1 Lazar et al., 2010, p. 128.

2 This concerns in particular Arts. 7, 14 – 16, 19, and 21 of the Slovak Constitution.

From the norms of public law, the right to honour and human dignity is also protected by the norms of the Slovak Criminal Code.³ An example of such protection is the criminal offense of “defamation”, which is specified in Section 373 (1):

“Whoever reports false information about another that is capable of significantly jeopardizing his reputation among fellow citizens, harming him in his employment, business, disrupting his family relations or causing him other serious harm, shall be punished by imprisonment for up to two years.”

As Repa states, the object of this crime is the protection of honour, good reputation, and respectability of a person from defamation, which can seriously disrupt one’s civil coexistence. Honour is distinguished here in the objective sense, referring to the respect that a person enjoys in the minds of other people, and in the subjective sense, referring to the awareness of own value. The subject of defamation can only be applied to an individual, entailing that this criminal law provision does not protect legal entities.⁴ Additionally, according to The Supreme Court of the Czech Republic, the degree of threat to the person concerned must be significant according to the law. This means that the perpetrator’s actions must be capable of significantly endangering the dignity of the injured party (e.g. causing harm at work, disrupting family relationships, etc.). This threat must be more substantial. However, in case 5 Tdo 83/2003, the requirement for a “significant degree” of threat to the dignity of the injured party was not met. (The courts did not push the boundaries of legal interpretation, but rather applied existing rules to a factual situation that, in their assessment, was not sufficient to constitute the crime of defamation.⁵

Importantly, the system of fundamental human rights and freedoms, which forms the general constitutional framework of personality rights and the aforementioned criminal law regulation, must be distinguished from the system of personality rights, the protection of which is enshrined in private law. Specifically, the private law regulations of personality rights can be found *mainly* in the Slovak Civil Code (hereinafter referred to as Civil Code). We have highlighted the word *mainly* because the rights associated with a person’s personality are not regulated exclusively by civil law. An example is the ‘right to health protection’, which is secured by criminal, administrative, and labour law remedies in addition to civil law remedies.⁶ Other partial personality rights can also be found in several important Slovak legal regulations

3 Act No. 300/2005 Coll. (Criminal Code), as amended.

4 Repa, 2018, p. 63.

5 Decision No. Tdo 83/2003 (05.02.2003), Supreme Court of the Czech Republic; Decision No. Tdo 15/2008 (08.07.2008), Supreme Court of the Czech Republic.

6 Vojčík et al., 2012, pp. 118–119.

other than the Civil Code, such as the Labor Code, the Press Act, the Family Act, and the Personal Data Protection Act.

For example, the Slovak Family Act⁷ protects in particular *the dignity of the child*. This protection is enshrined in the provisions concerning the safeguarding of the interests of a minor child as a primary consideration in decision-making in all matters concerning him/her.⁸ According to Art. 5 of the Family Act, when determining and assessing the interests of a minor child, the following should be particularly considered:

“Section 5 (c): ‘protection of the dignity, as well as the mental, physical and emotional development of the child, and endangering the development of the child by interference with his or her dignity and endangering the development of the child by interference with the mental, physical and emotional integrity of a person who is a person close to the child’.

Section 5 (e): ‘threat to the development of the child by interference with his or her dignity and endangering the development of the child by interference with the mental, physical and emotional integrity of a person who is a person close to the child’.”

Section 30 (3) of the Family Act states the regulation of the use of appropriate educational means in raising a child by parents in such a way that the health, dignity, mental, physical, and emotional development of the child is not endangered. In addition to the dignity of the child, the law also protects the dignity in marital relations, as reported in Section 18 of the Family Act: ‘Spouses are equal in rights and obligations in marriage. They are obliged to live together, be faithful to each other, respect each other’s dignity, help each other, take care of children together and create a healthy family environment’.

In the Slovak Labour Code,⁹ the protection of human dignity is mentioned in connection with the adequacy of the performance of employee checks in preventing damage to property, as shown in Section 177 (2):

“To protect its property, the employer is entitled to carry out, to the extent necessary, checks on items that employees bring into or take out of the workplace. The employer shall determine more detailed conditions in the work regulations. During the checks, regulations on the protection of personal freedom must be observed and human dignity must not be degraded.”

7 Act No. 36/2005 Coll. Act on the Family and on Amendments and Supplements to Certain Acts, as amended.

8 Compare with Hassanová, 2020, pp. 21–27.

9 Act No. 311/2001 Coll., Labor Code, as amended.

Importantly, we do not list all the provisions in the special regulations in which the protection of honour and human dignity is enshrined. Rather, the list of laws above is only demonstrative and does not contain all special legal regulations relating to the protection of personality rights. Regarding the relationship between individual legal regulations of the right to honour and human dignity, they feature a subsidiary relationship. Importantly, the demonstratively listed legal regulations, which partially provide protection for the right to honour and human dignity, have the nature of *lex specialis* and supplement the general civil law regulation of personality rights in various areas of social life. They serve to ensure the protection of the constitutionally-guaranteed right to the protection of personality as effectively as possible.¹⁰

Individual means of protecting the right to honour and human dignity are provided by sources of both public and private law, which, in turn, intertwine and complement each other, creating a complex system that protects personality rights. This structure highlights the general nature of the right to honour and human dignity and personality rights and their significance for society. The protection of the right to honour and human dignity hence builds on principles that consider personality rights to be intangible and an absolutely subjective right of every natural person. Furthermore, the civil law protection of personality entails objective liability, meaning that fault or intent are not necessary.¹¹

3. Personal Honour and Human Dignity: Theoretical Aspects, Common Features, and Differences

The *honour* of a person (natural person) is an expression of respect, recognition, and appreciation that a person gradually acquires and enjoys in reflection of his/her attitudes and behaviours. It is an intangible value that a natural person acquires by joining society, entailing that the right to civil honour protects one of the most important aspects of a person, which in various ways conditions his/her application in society. According to Tůma: 'From this perspective, the fundamental right to honour and dignity is applied in several spheres. These are the private sphere, the sociable sphere, the civil sphere and the professional sphere, while the last three can be described as the social sphere.¹² As for the first sphere (the private sphere), it is actually about the protection of privacy, within which the right to honour is undoubtedly applied. However, it is fundamentally up to everyone what and to what extent they release information from this sphere to the outside world.

¹⁰ Švestka et al., 2008, p. 117.

¹¹ Števček et al., 2015, p. 63.

¹² Tůma, 2022, pp. 100–105.

In other words, in this segment, complete informational self-determination usually applies. As for the social sphere (which includes the sociable, civil and professional spheres), this reflects the social nature of fundamental rights. It reflects the fact that an individual lives in a community and enters communication with other members of it, while through his behaviour, and even through his very being, he influences other members of the community. In the social sphere, complete informational self-determination no longer applies. In other words, this sphere can be entered under certain conditions, because facts may occur in it that may be the subject of legitimate public interest.¹³ The concept of honour expresses one's own inner view of self-esteem and his/her attitude towards his/her own elementary life values and ideas. On the contrary, the concept of dignity is more closely linked to the recognition of a person in his/her surroundings, to his/her position in society, and to the demonstration of respect by others. It is practically identical in meaning to the terms of good reputation or a person's good name.¹⁴ As stated by the Czech Constitutional Court in the case of Zeman v. Brezina, compared to dignity, honour can change over a lifetime, but dignity cannot.¹⁵ Throughout history, honour and reputation have been acknowledged as inherent aspects of humanity and perceived as independent interests worthy of protection.¹⁶

Human dignity is different from the institute of honour. Human dignity is the same for all natural persons; thus, unlike for honour, social status is not essential for it. Dignity is given to a human person by existence itself and is not exhausted by the right to life.¹⁷ Or in other words, it is given naturally. The protection of human dignity is enshrined in the Slovak Constitution, specifically in Art. 12, according to which people are free and equal in dignity and rights. On human dignity, Tůma describes that:

“Human dignity can be understood as one of the basic natural values of the human personality, expressing the necessity of maintaining elementary respect for man as a living being endowed with reason and feelings and for his unique human personality, regardless of gender, race, skin colour, language, faith and religion, political or other opinion, national or social origin, membership of a national or ethnic minority, property, gender or other status. Human dignity is manifested in several aspects of human life

13 Decision No. 30 Cdo 3770/2011 (12. 12. 2012), the Supreme Court of the Czech Republic; Decision No. II. ÚS 171/12 (15. 5. 2012) the Constitutional Court of the Czech Republic

14 Tůma, 2022, pp. 100–105.

15 Decision No. I. ÚS 453/03 (11. 11. 2005), the Constitutional Court of the Czech Republic.

16 Bubalo and Čerkić, 2022, pp. 21–34.

17 Moisei, 2018, pp. 23–33.

and in certain ways overlaps with other aspects of the human personality, especially with human freedom or his dignity and honour.”¹⁸

Human dignity is hence not merely a legal category, but primarily a moral–ethical category. Meanwhile, Kateb proposes that dignity is an “existential” value that pertains to the identity of a person as a human being and that human rights are derived from human dignity. Accordingly, dignity is not a moral or legal phenomenon but an existential one.¹⁹ We are inclined to the opinion that every human being is valuable in a unique way; therefore, respect does not depend on any personal characteristics or qualities, and its value is the same for all human beings. According to Collste, every human being has intrinsic value independent of any external circumstances, characteristics, or abilities, meaning that mentally disabled people have the same intrinsic value and human dignity as everyone else, although their capacities for rationality, awareness, and free will are limited to varying degrees.²⁰ Contrarily to these assertions, Gluchman considers it wrong to claim that all moral subjects have the same human dignity. He also states that the principle of human dignity cannot be considered absolute. In seeking an answer to the question of what human dignity consists of, he states:

“It is a much more difficult problem than it seems at first glance. Many believe that it was already solved by Kant or even long before that by Christianity. However, this is only an appearance, because there are probably more questions in connection with human dignity than satisfactory answers.”²¹

Simultaneously, some authors have described the problem of the lack of uniformity in the interpretation of the concept of human dignity. This is because, over time, the concept has varied significantly across jurisdictions, with McCrudden stating the following: ‘instead of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion’.²²

Both honour and human dignity influence the assessment of a person’s status and its application in society. Furthermore, the subject of the right to honour and dignity, as emphasised in the very wording of the law (i.e. ‘civic honour’), is only the natural person. Therefore, the law concerns the honour of a citizen in relation to, firstly,

18 Tuma, 2022, pp. 100–105.

19 Kateb, 2014, p. 5.

20 Collste, 2002, p. 234.

21 Gluchman, 2004, pp. 69–74.

22 McCrudden, 2008, pp. 655–724

society and, secondly, other fellow citizens. Lazar described the following about the topic: 'According to the opinion of the judicial practice, the subject of protection of a citizen is also his honour in professional circles in which he is known for his work and activity'.²³ These descriptions imply that the right to honour and dignity arises at birth or at the conception of a person (*nasciturus*) and evolves and acquires special attributes (e.g. we can speak of the honour of a professor or an artist) as the person develops.

4. Personal Honour and Human Dignity: Slovak Civil Law Regulation

Historically speaking, the right to honour and human dignity has far-reaching roots, going back as far as to Roman law. These rights then developed in direct proportion to the progressive tendency of democratisation and development of freedoms in Europe.²⁴ In the territory of Slovakia, Act No. 108/1933 Coll. on the protection of honour, which was in force in the territory of the then Czechoslovakia, should be mentioned. Before the Civil Code came into effect, the right to honour and dignity of a citizen was protected only in the criminal law area.²⁵

Personality rights are generally defined in Section 11 of the Civil Code, which outlines that 'A natural person has the right to the protection of his personality, in particular life and health, civil honour and human dignity, as well as privacy, his name and expressions of a personal nature'. The rights enshrined in Section 11 of the Civil Code, including the right to honour and human dignity, do not have the similar character of constitutional rights owing to their social significance. Nonetheless, owing to the complex legal regulation and the fullest possible respect afforded to the protection of personality, the legislator expresses the need for their protection by means of civil law. It follows from the above-mentioned amendment of the Civil Code that the enumeration of individual personal rights is only demonstrative, with the legislator using words 'in particular'. Such a demonstrative enumeration of the already-described personality rights in Section 11 of the Civil Code guarantees that Slovak jurisprudence can flexibly respond to new circumstances that appear in a developing society (e.g. in connection with the development of information technologies and artificial intelligence).²⁶

The basic function of Section 11 of the Civil Code is to ensure, at the civil law level, consistent protection of the respect for a person's personality and integrity. This is

²³ Lazar et al., 2010, p. 128.

²⁴ Moisei, 2018, pp. 23–33.

²⁵ Rebro and Blaho, 2003, p. 404.

²⁶ Kolkusová, 2016, pp. 168–192.

because such respect represents a necessary condition for a dignified existence and overall free development of a person in society. The first decision regarding this issue in the territory of Slovakia was implemented in 1967.²⁷ According to this judgment, the law provides protection for personality only in cases where civil honour is seriously violated and this violation interferes with the personality of a citizen. The interference must be objectively capable of causing such harm and must involve an action against moral integrity and a reduction in dignity, respectability, and honour. The action must be directed towards the relationship of the person with fellow citizens and must involve a threat against the position and application of the person in society. Section 11 provides protection only against such interferences capable of causing harm to the integrity of the authorised subject by reducing his/her reputation and dignity and threatening his/her application and position in society. According to Lazar, a violation of the right to honour will therefore not consist, for example, of the presentation of less serious verbal or other insults only done in private, or any action that is not capable of reducing in an objective sense the reputation, reputation, and dignity of a citizen.²⁸

Importantly, the protection of human dignity is legally regulated also in connection with the right to *bodily integrity*. The right to bodily integrity is based on the Slovak Constitution, whose Art. 16 states that everyone has the right to life; that life is worthy of protection even before birth; that no one may be deprived of life;²⁹ that no one may interfere with the physical or psychological integrity of a natural person; and that everyone must refrain from acting if this endangers the life or health of a natural person. However, there is a special law that determines who and under what conditions one may interfere with one's physical integrity. For instance, the Slovak Health Care Act stipulates when investigative and therapeutic procedures can be performed and when they can be performed without the patient's consent. This Act enshrines the right of every patient to the protection of own dignity and the respect for own physical and psychological integrity. It also regulates the conditions for the removal of organs from the bodies of a living donor and the deceased.³⁰ In connection with death, the law enshrines the right of everyone to preserve their bodily integrity even after death. Moreover, an autopsy cannot be performed if the person has demonstrably refused it during their lifetime; exceptions are listed in the Slovak Act on Health Insurance Companies and Healthcare Supervision.³¹

27 Decision No. 10 Co 21/67 (26.01.1967), Regional Court in Banská Bystrica (Slovakia).

28 Lazar et al., 2010, p. 128.

29 Fekete, 2007, p. 63.

30 Section 11 (8a) of the Slovak Health Care Act.

31 Vojčík et al., 2012, pp. 118–119.

5. Post-Mortem Protection of Human Dignity in the Field of Private Law

The institute of the 'post-mortem protection of human dignity', which is an important topic for discussion, is connected to the right to honour and human dignity enshrined in Section 11 of the Civil Code. Post-mortem protection is an absolute personal right, especially in the field of private law. Its essence lies in the provision of protection for a deceased *natural person* against unauthorised interference with his/her personal rights at a time when he/she is no longer alive and therefore cannot defend himself/herself.³² Unlike a dead person, a living person can resist unauthorized interference with his/her personal rights by filing a lawsuit, wherein he/she will assert general or special private law claims as an injured party. Meanwhile, a dead person loses the legitimate opportunity to take care of his/her personal rights and defend them by appropriate means. Post-mortem protection can thus be included in the general protection of the values of the deceased person's personality (*actio popularis*), in response to the general interest in preserving these values even after the person's death.³³

In Slovakia, post-mortem protection, or rather the position of post-mortem advocates, is regulated under Section 15 of the Civil Code. The right to post-mortem protection is entrusted to the spouse and children, unless they are parents. In this context, it is necessary to take a position on one more practical issue, namely whether the right to monetary satisfaction is preceded by the death of the affected natural person to his/her heirs or by the death of this natural person. Since this right is, by its nature, closely linked to the affected natural person, it also expires with the person's death, entailing that the right to monetary satisfaction does not pass to the heirs of the deceased affected natural person.³⁴

Post-mortem protection of a natural person against unauthorised interference can be understood at two levels, as shown in the following points:

1) The first level is the *general post-mortem protection*, which includes the legal protection of the memory (*piety*) of the deceased. The subjects of this protection are the following personal values: the honour, dignity, respectability, good reputation, name, likeness, and body of the deceased.

2) The second level is the *subjective post-mortem protection*, also known as 'special post-mortem protection', in professional literature. The subjects of this protection are

32 Post-mortem protection is attributed only to a deceased natural person. The legal system of the Slovak Republic does not provide for, nor does it derive from, case law and describes that legal post-mortem protection should also apply to the protection of the reputation or name of a legal person after its demise.

33 Ondruš, 2018, pp. 725–734.

34 Fiala and Hurdík and Korecká, 1999, p. 328.

the following personal expressions and goods: those that a person created/acquired during his/her lifetime; those that are closely linked to the personality of a particular person (e.g. diaries, notes, and letters); some expression a person made of his/her personality during his/her lifetime; and objects of creative and artistic activity for which posthumous protection is transferred to the level of copyright. According to Section 18(4) of the Slovak Copyright Act:³⁵

“After the death of an author, no one may appropriate his or her authorship of the work, the work may only be used in a manner that does not diminish its value and the author’s name or pseudonym must be stated, unless it is an anonymous work.”

Some countries do not explicitly regulate the institution of post-mortem protection. For example, in the German legislation, the relevant civil law regulation (*Bürgerliches Gesetzbuch* in German) does not recognise the institution of post-mortem protection. Post-mortem protection is thus imported into Germany by case law of the relevant German and European courts, while the concept of protection is based on a dogmatic approach and established Christian values typical of Germany.³⁶

6. Object of Protection: (Only?) Natural Person

Based on the provisions of Section 11 of the Civil Code, only *a natural person* can be the subject of protection of the right to honour and human dignity, this right belongs only to a specific natural person, and it cannot be a subject of inheritance. After the death of a natural person, the right to protection of his/her personality belongs to the spouse and children; if there are none, it belongs to his/her parents. Moreover, a person becomes the subject of the right to honour and human dignity from an objective fact, which is one’s birth. This includes a conceived child if it is born alive (*nasciturus*). The period of protection lasts until the natural person’s death.³⁷ According to Section 13 (1) of the Civil Code,

“A natural person has the right, in particular, to demand that unlawful interference with the right to protection of his or her personality be stopped, that the consequences of such interference be eliminated and that he or she be given adequate satisfaction.”

³⁵ Act no. 185/2015 of the Slovak Copyright Act, as amended.

³⁶ Compare with Dauster, 2020, pp. 19–32.

³⁷ Fekete, 2007, p. 63.

This provision allows a natural person in proceedings for the protection of his/her personality rights to claim non-pecuniary damage in money. However, it is stated in Section 13 (2) and (3) of the Civil Code that ‘The amount of compensation under Section 2 shall be determined by the court, taking into account the seriousness of the damage suffered and the circumstances under which the right was violated’. It is clear from this provision that the court is not limited by its scope when awarding compensation for non-pecuniary damage. Importantly, the institute of non-pecuniary damage can be considered a newer legal concept, as it only began to be applied in the Czechoslovak legal system after 1989 through Section 13.

General courts assess each case individually, emphasising the uniqueness of each proceeding, which does not mean, however, that there are no limits to the award of non-pecuniary damage in money. Instead, the award should be supported by reasoning, and the rule applies that interferences with a similar set of personality rights will be decided in a similar manner. According to Czech case law, in specific cases, it is (among other things) always necessary to consider that:

“in the event of a conflict between the fundamental political right to information and its dissemination and the right to protection of personality, i.e. fundamental rights that are on the same level, it is necessary to carefully consider, taking into account the circumstances of each of them, whether one right has not been unjustifiably given priority over the other. For this reason, it is necessary to assess, based on the specific circumstances of the given case, whether the ruling in question is appropriate to the specific situation and whether it does not contain such intensity that it interferes with the right to protection of personality.”³⁸

The right to protection of honour and human dignity is closely related to other partial rights of personality protection, and they tend to overlap in practical scenarios. There are examples where several personality rights were interfered with at the same time, such as a case in which the Regional Court in Brno dealt with the violation of *personal honour and human dignity*, the *right to privacy*, the *right to intimacy*, and the *right to expression* of personal appearance. The dispute concerned the publication of erotic photographs of the plaintiff on the Internet after the termination of an employment relationship. Despite the fact that the plaintiff had previously performed services on an erotic video chat voluntarily for two years for remuneration, which already clearly resulted in a reduction of honour and dignity, the Regional Court considered that, after the termination of the employment relationship, ‘taking into account the erotic and vulgar nature of these photographs and the mass availability of the Internet, such

38 Decision No. 3 Cdo 137/2008 (18.02.2010), Supreme Court of the Slovak Republic.

conduct is undoubtedly capable of leading to a significant reduction in the plaintiff's dignity and her respectability in society'.³⁹

Furthermore, we would like to state that the current law does not grant legal persons the right to honour and human dignity. The following chapter discusses a recent opinion of the Constitutional Court in the Czech Republic, according to which even a legal entity, such as a monetary fund or a political non-profit organisation, can suffer, similarly to a person, from non-pecuniary damage and want satisfaction for its mental suffering in money. This was the case despite the legal person not being an actual person.⁴⁰

Even though legal persons do not have 'personality' nor natural rights like natural persons, the law grants them certain rights similar to the personal rights we examine in our article. These rights are granted by the Civil Code and include those outlined herein:

- the right to a good name, also known as 'goodwill'.
- the right to a good reputation.⁴¹

The above rights are also closely related to the right to the reputation of a competitor in economic competition, which is regulated in Section 48 of the Slovak Commercial Code.

7. Goodwill and Reputation of Legal Entities as a Personal Right

A legal person is an artificially created entity representing an organisation of persons or property created for specific, whether business or non-business, purposes. Legal persons acquire the legal personhood and the legal capacity (i.e. the ability to amend, enter into, and transfer rights and obligations) upon their creation, that is, when they are signed in the relevant register (e.g. the commercial register). Section 18 (1) of the Civil Code describes that 'legal persons also have the capacity to have rights and obligations'. Although a legal entity can perform many acts in the same way as natural persons, the applicable law does not grant legal entities the right to honour and human dignity. However, albeit legal entities do not have a 'personality' and do not possess natural rights like natural persons, the law grants them 'quasi-personal rights'.

As we mentioned at the end of the previous chapter, the Civil Code grants legal entities the protection of their goodwill and good reputation. The goodwill and reputation of a legal entity can, in our opinion, fulfill a similar function to the honour of a

39 Decision No. 24 C 48/2004 (31.10.2007), Regional Court in Brno (Czech Republic).

40 Decision No. TZ 6/25. (22.01.2025), Constitutional Court of Czech Republic.

41 Both regulated in Section 19b (2) and (3) of the Civil Code.

natural person. Good reputation is a concept that includes intangible and separately incalculable values associated with a legal entity, including certain moral and qualitative characteristics according to which it is evaluated and accepted by society.⁴² It often even happens that the goodwill and good reputation of a company can have a higher value for an entrepreneur than the property part of the company.⁴³ Specifically, just as is the case with a natural person, the good reputation of a certain legal entity is formed by the opinions, knowledge, and experiences of other persons about its activities, seriousness, responsibility, consistency, professionalism, expertise, and the level of its employees, co-workers, among others. Therefore, according to Vojčík, interference with these attributes of a legal entity may be capable of causing damage to its reputation.⁴⁴ According to Section 19b (1-3) of the Civil Code:

“Legal persons have their own name, which must be determined when they are established. In the event of unauthorized use of the name of a legal person, it is possible to demand in court that the unauthorized user refrain from using it and eliminate the defective condition; it is also possible to demand appropriate satisfaction, which may also be requested in money. Paragraph 2 applies mutatis mutandis to unauthorized interference with the good reputation of a legal person.”

These are absolute rights that provide protection against unauthorised interference if the legal person has suffered damage and if such damage is even threatened. In many instances, it is possible to apply conclusions pertaining to legal persons in relation to the personal rights of a person, for example: regarding the protection of the good reputation of a legal person vs. the protection of the name of a natural person; regarding the protection of the reputation of a legal entity vs. the protection of the honour of a natural person; *the right to privacy of a legal entity* in the Czech Republic vs. the right to privacy of a natural person.⁴⁵

According to Art. 19 (1) of the Slovak Constitution: ‘Everyone has the right to the preservation of human dignity, personal honour, good reputation and protection of name’. Does this constitutional right also apply to legal entities? How should the word “everyone” in the cited provision be interpreted in this case? Does it include every natural person or every person, including legal entities? In addition to these questions, we further ask, what is the nature of the rights under Section 19b of the Civil Code (right to a good name and right to a good reputation of a legal entity)? We hold

⁴² Drgonec, 2002, pp. 1227–1234.

⁴³ Kopčová, 2024, pp. 1–42.

⁴⁴ Vojčík and Miščíková, 2004, pp. 258–260.

⁴⁵ More about the protection of privacy of legal entities in the following explanation (comparison of Slovak and Czech legislation).

the opinion that these are rights similar to personality rights and therefore refer to them as 'quasi-personal rights'.

However, the opinions of experts and case law differ from our opinion. According to Drgonec, the right to protection of the good reputation of a legal entity does not belong to personal rights or 'quasi-personal rights'. He describes the good name and reputation of a legal entity as a 'property right', which is protected by Art. 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. In his opinion, although the protection under the cited Art. 19 of the Slovak Constitution can be considered, it is not necessary to subsume the right to the protection of a good reputation and the right to the protection of a good name under the protection of this norm. This is because the right to the protection of a good reputation represents a fundamental right to own property under Art. 20 of the Slovak Constitution. Thus, the good reputation of legal entities is protected without the rights being qualified as personal rights.⁴⁶ Meanwhile, Lazar states the following on the topic: 'It follows from the nature of the matter that a legal entity does not have the same rights to protection of personality as a natural person. However, it does have similar rights'.⁴⁷ Contrarily, a group of Czech experts considers these rights to be rights of a personal nature: 'The good reputation of a legal entity has – similarly to the name of a legal entity – the nature of a personal right, which is inalienable'.⁴⁸ Slovak case law and Czech case law state the following:

"The good reputation of a legal entity, like the name of a legal entity, is one of several personal rights granted to legal entities by law. In accordance with the generally accepted presumption of the honesty of the actions of legal entities, it is also assumed that a legal entity has a good reputation until the contrary is successfully proven".⁴⁹

In this context, we consider the current interpretation of the Czech Constitutional Court to be very interesting, according to which legal entities have the right to protect their reputation:

"According to Art. 10 par. 1 of the Charter, everyone has the right to preserve their human dignity, personal honor, good reputation and protect their name. Although some of these rights, such as human dignity and personal honor, by their nature belong exclusively to natural persons, this does not mean that

⁴⁶ Drgonec, 2002, pp. 1227–1234.

⁴⁷ Lazar et al., 2010, p. 190.

⁴⁸ Fiala and Hurdík and Korecká, 1999, p. 328.

⁴⁹ Compare with Decision No. 4 Cdo 212/2007, Supreme Court of the Slovak Republic, and Decision No. 30 Cdo 1385/2006, Supreme Court of the Slovak Republic.

*the protection of good reputation (and name) cannot be constitutionally guaranteed in relation to legal persons as well. Legal entities are not just a self-serving legal fiction, but are mainly a tool through which people can fulfill their interests. A good reputation plays a key role for the performance of legal entities in legal relations and for the fulfillment of the rights of individuals who are associated in them, and in the event of unauthorized interference with it, they may suffer pecuniary and non-pecuniary damage.*⁵⁰

It is important to emphasise that the protection of constitutionally-guaranteed rights should not be theoretical and illusory, but rather practical and effective. Considering this assertion, the impossibility of legal entities to demand adequate compensation for non-pecuniary damage represents a legal limitation of their fundamental right to the protection of a good reputation. This is because such impossibility denies them compensation for non-pecuniary damage, which is problematic because they do not have access to other means for sufficiently and effectively protecting their right.

In the Czech Republic, according to Section 135 of the Civil Code,⁵¹ legal protection is provided both for the name and good reputation of the legal entity and its privacy. According to paras. 1 and 2 Section 135 of the Czech Civil Code:

“A legal entity that has been affected by the questioning of its right to a name or that has suffered damage due to unauthorized interference with this right, or that is threatened with such damage, in particular by unauthorized use of the name, may demand that the unauthorized intervention is abandoned or its consequences are removed. The same protection belongs to a legal entity against anyone who interferes with its reputation or privacy without a legal reason, unless it is for scientific or artistic purposes or press, radio, television or similar reporting; however, even such an intervention must not conflict with the legitimate interests of the legal entity.”

9. The Reputation of a Legal Entity in The Context of Unfair Competition

The reputation and good name of a legal entity can also be harmed by interference with its intellectual property, including unfair competition. In fact, there is a special legal regulation under the law against unfair competition (regulated in Section 44 et seq. of the Slovak Commercial Code) on the protection of the business name and

50 Decision No. TZ 6/25 (22.01.2025), Czech Constitutional Court.

51 Act No. 89/2012 Coll. the Civil Code, as amended.

reputation of an entrepreneur.⁵² According to Section 44 (1), 'Unfair competition is any conduct in economic competition that is contrary to good morals of competition and is likely to cause harm to other competitors or consumers. Unfair competition is prohibited'. This mainly concerns facts associated with unfair competition in the form of parasitism on reputation, as outlined in Section 48 of the Slovak Commercial Code:

"Parasitism is the use of the reputation of a company, products or services of another competitor with the aim of obtaining a benefit for the results of one's own or another's business that the competitor would not otherwise have achieved."

Parasitism on the reputation of another competitor can be understood as the effort of one competitor to feed on the successes (or failures) of another competitor; by doing so, it can save its own costs for building a good reputation and ultimately achieve higher profits. Reputation parasitism is specific because it requires intent, hence being a targeted act. To fulfill the factual nature of reputation parasitism, it is not necessary for the benefit from parasitism to actually occur, as the existence of intent per se is already sufficient. Furthermore, the key prerequisite for fulfilling the factual nature of reputation parasitism is the very existence of a 'certain' reputation on which it is possible to parasitise. We deliberately use the word 'certain' here because it is possible to parasitise on things other than a good reputation (used to name 'goodwill', or *der gute Ruf* in German). For example, a legal entity can parasitise on a bad or any reputation that results in a certain connection of the reputation with a specific company, product, or service of a competitor in the relevant market. In general, a good reputation is built over a long period and does not arise automatically with the establishment of an entity (i.e. registration of a business name in the commercial register) nor with the registration of another designation related to a good or service in the relevant register (e.g. a trademark, designation of origin of goods, or geographical indication). Considering these assertions, we can posit that the right to a good reputation is not an absolute right, but rather is a certain "image" of a competitor on the market built up in relation to the public and its operation in a given territory at a given time.⁵³ According to the interpretation of the Czech case law:

"Reputation within the meaning of Section 48 of the Commercial Code represents a set of certain aspects that, in the business sphere, create the overall impression of how a competitor, its products and services appear to the outside world. By acting in accordance with Section 48 of the

⁵² Act No. 513/1991 Coll. of the Slovak Commercial Code, as amended.

⁵³ See: Elias et al., 2007, p. 353; Hajn, 2000, p. 181.

*Commercial Code, it is possible to parasitize not only on the good reputation of a particular competitor; however, it is crucial that the competitor has a certain reputation.*⁵⁴

‘Reputation’ is thus conceived more broadly within the meaning of Section 48 of the Civil Code than within with Section 19b (3) of the Civil Code, which protects the ‘good reputation of a legal person’. As we stated in the previous chapter, legal theory and judicial practice tend to believe that every legal person acquires the good reputation of a legal person *ex lege* upon its establishment, regardless of whether it is a legal person established for the purpose of carrying out business activities or for other purposes.⁵⁵

If this right of a legal entity is unlawfully interfered with, it has the right to protection in the form of a restraining order (i.e. if the unlawful interference persists) or a removal order (i.e. if the negative consequences associated with the unlawful interference persist; e.g. the removal of posters on billboards unlawfully interfering with the right to the name of the legal entity). A legal entity whose reputation has been affected is of course also entitled to compensation for damages and the release of unjust enrichment (provided that all other conditions are met). Additionally, compensation for non-pecuniary damage can be claimed (again, provided all prerequisites are met) through protection against unfair competition.⁵⁶ In claiming compensation for damage (pecuniary or non-pecuniary), the fault of the person who unlawfully interfered with the ‘quasi-personal rights’ of the legal entity must also be given.

10. Conclusion

In this article, we explore two fundamental human rights, namely the right to honour and the right to human dignity, considering them as a single construct. These rights are globally recognised rights that belong to every natural person. Historically speaking, the right to honour and human dignity has far-reaching roots going back to Roman law. However, we focus our investigations on the current legal regulation of these rights in the context of Slovak civil law. We also present the constitutional framework for the legal protection of the right to honour and human dignity, along with some legal regulations that, in the *lex specialis* relationship, protect the honour and human dignity of children or spouses in family law relationships (under the

54 Decision No. 23 Cdo 4384/2008 (28.04.2011), Supreme Court of the Czech Republic.

55 Decision No. 30 Cdo 1385/2006 (18.03.2008), Supreme Court of the Czech Republic.

56 According to the current case law of the Constitutional Court in Prague, it is also possible to seek satisfaction under civil law. Compare with Decision No. TZ 6/25 (22.01.2025), Czech Constitutional Court; Lavický, 2014, p. 713.

Slovak Family Act) and employees in employment law relationships (under the Slovak Labor Code) and provide protection from *defamation* (a criminal offense within the meaning of the Slovak Criminal Code).

We define the terms 'personal honour' and 'human dignity' from legal and philosophical point of views. Both honour and human dignity influence the assessment of a person's status and its application in society. Using comparative analysis, we depict the most important difference between honour and human dignity: while a natural person's *honour* is an expression of the respect, recognition, and appreciation gradually acquired and enjoyed through one's own attitudes and behaviours as one integrates into society, all natural persons have the same *human dignity* (unlike honour). Thus, social status is not essential for human dignity, and dignity is instead given to a human person by one's very existence. We can see a certain connection between human honour and the good reputation of a legal entity in this study. Meanwhile, in synthesising several views on the concept of the right to human dignity, we are inclined to opine that every human being is uniquely valuable, entailing that respect for a natural person does not depend on any personal characteristics or qualities and is the same for all.

Human honour and dignity are rights that both living and dead individuals possess. This consideration brings forth the concept of 'post-mortem protection of human dignity', which provides a deceased individual with protection against unauthorised interference with his/her personality rights at a time when he/she can no longer defend himself/herself. According to the established legal theory, we present two levels of post-mortem protection: general (i.e. the legal protection of the memory of the deceased person) and subjective (special) post-mortem protection (i.e. the subject of protection of the manifestations of a personal nature and goods that a person created during his/her lifetime). Although, in some countries, the institution of post-mortem protection is not legally enshrined, as in Germany, we state that the protection is imported by the case law of the relevant courts. In general, the right to post-mortem protection is entrusted to the spouse and children, unless they are parents. This situation gives emergence to the need for deciding on the practical issue of whether the right to monetary satisfaction is preceded by the death of the affected natural person to his/her heirs or by the death of the natural person. Since this right is naturally closely linked to the affected natural person, it also expires with the death of the affected natural person. This means that the right to monetary satisfaction does not pass to the heirs of the deceased natural person.

In connection with the legal protection in the event of a violation of honour and human dignity, we assess the individual claims that an active natural person can assert in court and draw attention to one of the means of such legal protection: *satisfaction*. Using judicial interpretation, we point out that courts assess each case individually, emphasising the uniqueness of each proceeding, which does not

mean, however, that there are no limits to the amount of non-pecuniary damage in money.

We consider the last part of the article to be very interesting for further discussions. In the context of the right to honour and dignity of natural persons, we compare similar rights guaranteed to legal persons, namely the right to a good name and the right to a good reputation, which are protected by both civil and commercial law. In particular, we present several opinions from Slovak and Czech doctrine and jurisprudence to understand the nature of these rights. The opinions differ: some consider these rights to be property rights, others regard them to be personal rights, and several view them as 'similar to personal rights'. We understand these rights as 'quasi-personal rights', despite some differing legal opinions. We consider the recent jurisprudence of the Czech Constitutional Court (Decision No. TZ 6/25) to be significant in this regard, according to which legal entities have the right to protect their reputation. In the context of the judgment:

"(...) Although some of these rights, such as human dignity and personal honor, by their nature belong exclusively to natural persons, this does not mean that the protection of good reputation (and name) could not be constitutionally guaranteed in relation to legal persons as well."

Although the Constitutional Court indirectly grants personal rights to legal persons, we will still follow further developments in this matter. We also importantly highlight that while the 'right to privacy of a legal person' exists in the Czech Republic, Slovak law does not recognise such a quasi-personal right.

In addition to the protection of the good reputation of a legal entity under Section 19b of the Civil Code, we also discuss the protection of a 'certain' reputation of a competitor under the law of unfair competition (under Section 48 of the Slovak Commercial Code). We define the act of reputation parasitism as an intentional act with the aim of damaging the reputation of another economic entity and compare the legal protection of good reputation and certain reputation under civil and commercial law. Through a comparison, we conclude that 'reputation' as defined in Section 48 of the Civil Code is conceived more broadly in comparison with the conception of the construct in Section 19b (3) of the Civil Code, which protects the 'good reputation of a legal person'.

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- Act No. 89/2012 Coll. the Civil Code of Slovak Republic as amended.

Łukasz PRESNAROWICZ*

Resolutions Adopted on Tax Matters By Local Self-Governments in Poland

ABSTRACT: Article 168 of the Constitution of the Republic of Poland of 2 April 1997 states: 'Local government units have the right to determine the amount of local taxes and fees to the extent specified by law.' This Article grants autonomy to local government units to legislate on the amount of local taxes and fees; however, the Article states that this can be done to the extent indicated in the laws. The laws that contain the issues in question are: Tax Ordinance, the Law on Local Taxes and Fees, the Law on Agricultural Taxes, and the Law on Forest Taxes. An analysis of the laws in question shows that in the current state of the law in Poland, only municipalities are granted certain powers in terms of establishing taxes, but they are not unlimited. Among other things, the tax independence of municipalities is expressed in these statutory powers.

KEYWORDS: tax, fee, resolution, autonomy, local self-government, municipality

1. Introduction

This paper discusses the Acts of local self-government units in Poland on tax matters. To understand the subject more fully, the constitutional issues (which are the foundation of the law in Poland) concerning local government, the independence of local government units, and the provisions concerning the independence of local government units in the imposition of local taxes and fees are analysed. Additionally, the resolution procedure that applies in Poland, within local government units, is analysed. This matter is also discussed as an indication of the need to regulate strictly technical and organisational issues.

This analysis used the dogmatic-legal method to analyse the provisions of generally applicable law in Poland and the judgments of Polish courts.

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2. Constitutional Independence of Local Self-Governments in Poland

Polish language dictionaries define the term “self-government” as ‘an administrative system according to which the citizens of a city or municipality govern themselves at home; autonomy’,¹ ‘a system of organization and management consisting of a group of people independently directing their activities according to rules established by themselves or given to them, through bodies chosen by them’,² or ‘independent and autonomous performance of certain functions of an administrative nature by a certain social organism’.³ This term is also inextricably linked to the term “local government”, which B. Banaszak understands as ‘a form of self-government with compulsory membership, involving all persons residing in the territory of a certain territorial subdivision of the state, consisting in the independent management of the local community’s own affairs from the government administration’.⁴ Owing to the constant change in the conditions in which local self-government must operate, it is a dynamic institution whose modern distinctive feature is to act for the widely understood common good.⁵

Issues concerning local self-government have already been regulated in the legal Act, which is the Constitution of the Republic of Poland of 2 April 1997 (hereinafter: the Constitution).⁶ According to Article 15(1) of the Constitution, ‘The territorial system of the Republic of Poland shall ensure the decentralization of public power.’ Thus, the principle of decentralisation was introduced into the Polish legal order, to which, by placing it in the Constitution, the Constitution continues to have the rank of a constitutional principle. As M. Stec points out,

*(...) it is expressed in such a statutory distribution of public tasks between the structures of power and public administration operating at the central level and functioning in the territorial system, in which there is no hierarchical subordination in any sphere.*⁷

The literature also suggests that the phenomenon of transfer of powers and resources should be called “municipalisation”, and with regard to the transfer of

1 Karłowicz, Kryński and Niedźwiedzki, 1915, p. 23.

2 Doroszewski, 1966, p. 47.

3 Dubisz, 2018, p. 292.

4 Banaszak, 2007, p. 742.

5 Niewiadomski, 2022, p. 45.

6 Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997 No. 78, item 483).

7 Stec, 2022, p. 37.

powers or financial resources, “municipalisation of public finances” (or “financial municipalisation”).⁸

According to Article 164(1) of the Constitution, ‘The basic unit of local government is the municipality’, which performs all tasks of local government not reserved for other units of local government.⁹ In the system of local government in Poland, municipalities,¹⁰ districts,¹¹ and voivodeships¹² can be distinguished. As of 1 January 2023, the administrative division of Poland includes 16 voivodeships, 314 districts, 66 cities with district rights, and 2,477 municipalities.¹³

It should also be noted that Article 165(2) of the Constitution stipulates, ‘The independence of local government units is subject to judicial protection’. The lack of a statutory definition of the concept of “independence” has led to the need to develop it in the doctrine. Following A. Chorążewska, it can be defined as ‘independence in the sphere of the exercise of executive and legislative power within the limits of the decentralization of public power made by law, in the spirit of the idea of exclusively subsidiary action of the central authority’.¹⁴ The constitutional protection of independence can take on the aspect of protection in both negative and positive terms. As D. Bach-Golecka and M. J. Golecki point out,

‘The negative aspect means both freedom from arbitrary interference by other public authorities and obliged to legitimize potential interference in the sphere of action of local government (...). Independence in positive terms means the ability to freely choose the actions taken to implement public tasks; the limit of this freedom is again the Constitution of the Republic of Poland and statutory norms.’¹⁵

The primary objective of the independence of a local government unit is the implementation of public tasks of a local nature.¹⁶ As the Constitutional Court in Poland aptly ruled, the limits of decentralization are also determined by the systemic consequences of the principle that the Republic is the common good of all citizens (Article

8 Ruśkowski, 1997, p. 11.

9 Article 164 § 3 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997 No. 78, item 483).

10 The Act of 8 March 1990 on The Municipal Government (Journal of Laws 2024, item 1465, 1572, 1907, 1940).

11 The Act of 9 March 2023 amending the Act on Municipal Government, the Act on District Government, and the Act on Regional Government, (Journal of Laws 2023, item 572).

12 *Ibid.*

13 Statistics Poland website. Available at: <https://stat.gov.pl/statystyka-regionalna/jednostki-terytorialne/podzial-administracyjny-polski/> (Accessed: 1 November 2023).

14 Chorążewska, 2018, p. 132.

15 Bach-Golecka and M. J. Golecki, 2016, p. 905.

16 Skrzydło-Niżnik, 1993, p. 73.

1 of the Constitution). This implies the necessity of maintaining a balance between the needs and interests of a local nature found in the competencies granted to local communities and the needs and interests of a supra-local nature.¹⁷

The literature suggests that the concept of “decentralisation” has a very broad scope and also includes autonomy, self-government, legal and economic-financial independence.¹⁸ However, despite this wide scope of decentralisation, some of its limits can be distinguished: system-legal, economic, and organisational.¹⁹ According to Article 167 § 1 of the Constitution, ‘Units of local self-government shall be provided with a share of public revenues in accordance with the tasks falling to them’. As M. Kisala points out,

The phrase “shall be ensured” indicates the obligation of the public authorities related to placing at the disposal of local government units a certain share of public income. The basis of financial management is own revenues, within which local government units have the right to determine the amount of local taxes and fees to the extent regulated by law (...).²⁰

3. Defining the Tax Independence Of Local Government in Poland

According to M. Zdyb, speaking of financial independence of local self-government units, it is necessary to have in mind not only autonomy in the creation and establishment of the budget of the local self-government unit, but also income and expenditure independence. In the former case, it will be mainly about the possibility of self-taxation of residents who make up a particular local community, as well as the introduction of local taxes and fees.²¹

However, it should be noted that financial self-reliance cannot be understood as arbitrariness in conducting financial management of the “financially sovereign”.²²

The self-reliance of local government units is treated as a fundamental model feature of local government, and its self-reliance aspects are distinguished, including fiscal independence.²³ Financial self-reliance is also a guarantee of the formal independence of local government and is fundamental to the realisation of the broad

¹⁷ Judgement of the Constitutional Court of 18 February 2003, K 24/02.

¹⁸ Gajl, 1996, p. 20.

¹⁹ Kisala, 2019, p. 65.

²⁰ Kisala, 2019, p. 71.

²¹ Zdyb, 2019, pp. 134–135.

²² Dębowska–Romanowska, 1998, p. 378.

²³ Jakimowicz, 2023, pp. 433–434.

self-reliance of the local government unit.²⁴ The literature generally defines “local government administration” as ‘self-reliant administration’.²⁵

In the literature, the term “tax autonomy” is often used in reference to “tax independence” and “tax authority”; however, all these terms emphasise the power of local government units in shaping taxes flowing into the budget of the local government.²⁶ As E. Ruśkowski points out,

*the tax autonomy of local government units can be regarded as the nucleus of the financial self-reliance (autonomy) of local government, the latter being one of the most essential elements of the decentralization of public finances. In dynamic terms, expanding the tax autonomy of local government units will always mean expanding the financial self-reliance (autonomy) of these units and increasing the decentralization of public finances.*²⁷

The author also points out that the increase in decentralisation itself does not necessarily lead automatically to an increase in the tax authority of the local government unit.²⁸ J. Glumińska-Pawlic points out,

*(...) tax authority is a component part of the broader financial authority, which is an attribute and expression of the sovereignty of the state as a basic public-law entity, which, as a special subject of public finance of a self-contained and primary nature, is not subject to any other external and internal authority.*²⁹

As J. M. Salachna points out, management, on the other hand, is also a decision-making process concerning – at least in principle – influencing the amount of resources (financial authority) and their allocation, which should not be “disturbed” by external entities. At the same time, of course, this cannot mean the absence of control (supervision) over the activities of local government bodies, which results, for example, from the unity of the state system and the principle of legalism.³⁰

Legal guarantees securing the independence of local governments can be divided into external and internal ones. Internal guarantees include the ones contained not

24 Zawora, 2008, p. 19.

25 Piekara, 1998, p. 46.

26 Ruśkowski, 2002, p. 231.

27 Ruśkowski, 1997, p. 235.

28 *Ibid.*

29 Glumińska-Pawlic, 2003, p. 130.

30 Salachna, 2018, p. 254.

only in the Constitution but also in other statutory acts that are also the legal source regulating the financial management of local government, such as the Law on Public Finances, the Law on Income of Local Government Units, or the laws pertaining to individual local government units, which were stated earlier. External guarantees include the principles contained in the European Chart of Local Self-Government,³¹ particularly Article 9, paragraph 1, according to which 'At least part of the financial resources of local communities should come from local fees and taxes, the amount of which the communities have the right to determine to the extent determined by law'.³²

However, it should be emphasised here that 'they cannot constitute their own – indeed local in such a case – taxes, since they do not have general, but only local tax authority'.³³

4. Constitutional Determinants of Tax Independence in Poland

According to Article 217 of the Constitution:

The imposition of taxes, other public tributes, the determination of subjects, objects of taxation and tax rates, as well as the principles of granting reliefs and remissions and the categories of subjects exempted from taxes shall be made by law.

It should be pointed out that, according to the Constitution, taxes can only be imposed by a statutory act. However, according to Article 168 of the Constitution, 'Local government units have the right to determine the amount of local taxes and fees to the extent specified by law'.

As K. Świąch-Kujawska points out, the comparativeness of the cited regulations of Articles 168 and 217 of the Constitution of the Republic of Poland allows the following findings to be made. The provisions of the Basic Law grant the tax authority to the local government and delimit its scope, but only in the sphere of tax lawmaking. The provisions of the Constitution of the Republic of Poland, therefore, do not provide for the other two competencies that make up the tax authority of the j.s.t. In turn, the limits of influencing the amount of tax burdens have been delimited by the provisions of Article 217 of the Constitution of the Republic of Poland and include the possibility

31 Zawora, 2008, pp. 26–27.

32 European Charter of Local Self-Government of 15 October 1985 (Journal of Laws of 1994, No. 124, item 607).

33 Korczak, 2012, p. 222.

of shaping only certain structural elements of taxes and this in the scope and form resulting from the said provision.³⁴

Article 168 of the Constitution, which establishes the type of tax authority of local government units, is a concretisation of the constitutional principle of their independence, and this authority is directly limited to the category of local taxes and fees.³⁵

The scope of tax authority includes the enactment of laws on taxes, fees, or other public revenues; collecting these revenues for its own benefit; and administration of the revenues.³⁶

In accordance with Article 3(1) of the Law of 13 November 2003 on local government revenues,³⁷ the revenues of local government units are own revenues, general subventions, and targeted subsidies from the state budget. Moreover, according to Article 3, paragraph 2 of the aforementioned law, within the meaning of the law, local government units' own revenues are also shares in personal income tax and corporate income tax revenues. Therefore, the classification of 'local government budget revenues' should be analyzed.

According to E. Zielinski, the revenues of the budget of a local government unit are broken down into current revenues and property revenues. Property income includes grants and funds received for investments, income from the sale of property and income from the transformation of the right of perpetual usufruct into ownership. Current income of the budget of a local government unit is understood as budget income, which is not property income.³⁸

However, according to the division based on the possibility of obtaining income, one can distinguish between obligatory and optional income.³⁹ Obligatory revenues can include revenues from taxes established and collected under separate laws; for example, real estate tax, agricultural tax, and forest tax.⁴⁰

The real tax authority of local government units in Poland is limited to municipalities only (although other levels of local government function in Poland, they have not been granted their own tax revenue sources).

34 Świąch-Kujawska, 2018, p. 292.

35 Naleziński, 2019, p. 513.

36 Świąch-Kujawska, 2018, p. 254.

37 The Act of 13 November 2003 on the Revenues of Local Government Units (Journal of Laws of 2003, No. 203, item 1966).

38 Rowicki-Bączek, 2009, pp. 140–141.

39 Zielinski, 2004, p. 45.

40 *Ibid.*

5. Resolution Procedure

According to Article 87(2) of the Constitution, 'The sources of universally binding law of the Republic of Poland are, in the area of activity of the bodies that established them, acts of local law'. As E. Mreńca and P. B. Zientarski point out,

(...) although the Constitution of the Republic of Poland expressis verbis does not oblige the legislator to formulate a detailed statutory authorization to enact acts of local law, this obligation arises from the principle of determinacy of laws derived from the clause of a democratic state of law expressed in Article 2 of the Constitution of the Republic of Poland.⁴¹

According to the Judgment of the Voivodship Administrative Court in Wrocław:

(...) the enactment of acts of local law in violation of statutory delegation constitutes a material violation of the law, justifying the declaration of invalidity of those provisions of local law that were adopted in excess of such delegation. The exceeding of statutory delegation should also be understood as their enactment in a manner inconsistent with the principles of correct legislation.⁴²

As A. Bierć rightly points out,

(...) the legislative procedure, which is supposed to guarantee the rule of law creation (the legal character of legal norms) should appropriately harmonize the requirements of communicative rationality (assuming the necessity of free legislative discourse over the values of the created law) with the requirements of instrumental rationality (assuming the effectiveness of the created law).⁴³

According to Article 40(1) of the Law on Municipal Self-Government, 'On the basis of statutory authorizations, a municipality has the right to enact acts of local law applicable to the territory of the municipality.' This means that acts of local law must not exceed the limits of their local jurisdiction. Moreover, they must have the characteristics of generality and abstractness.⁴⁴ According to the position expressed

41 Mreńca and Zientarski, 2018, pp. 76–77.

42 Judgment of the Voivodship Administrative Court in Wrocław of 20 November 2019, III SA/Wr 425/19.

43 Bierć, 2002, p. 27.

44 Malisz, 2001, p. 21.

in the judgment of the Supreme Administrative Court, the normative nature of an act means that it contains statements that designate a certain way of behavior for the addressees, taking the form of an order, prohibition or entitlement. The general nature means that the norms contained in the act define the addressee by indicating characteristics rather than listing them by name. In contrast, the abstractness of a norm is expressed in the fact that the ordered, prohibited or permitted behavior is to take place in certain, generally repeatable circumstances, rather than in one specific situation. Acts, therefore, must concern repetitive behavior, not consummate through a single application.⁴⁵

The Act on Municipal Self-Government also stipulates that acts of local law are passed by the municipal council in the form of a resolution (Article 41, paragraph 1 of the Act on Municipal Self-Government). However, not every resolution will have the value of a local law act, as one can distinguish among resolutions that are acts of local law, those that are acts of internal law, and those with the characteristics of individual acts.⁴⁶ The enactment of local laws requires an authorisation established *expressis verbis* in the law. This authorisation cannot be presumed, nor can it be inferred by interpretation.⁴⁷ The permissible scope of local lawmaking must consider one of the fundamental principles, namely that acts of local law are always sub-statutory acts (of an executive nature) to the law. An executive regulation can only “execute” the law, and thus supplement it; however, it cannot regulate a matter that was not the subject of the law, because then it loses its executive character, becoming an independent source of law and thus going beyond the limits of statutory authorisation.⁴⁸

As L. Etel and M. Poplawski point out, the drafting of a resolution is a process that involves many issues that directly affect the quality of the law created by municipalities. These problems are significant due to the fact that municipalities do not employ specialists in legislation and can rarely afford, for financial reasons, to use their services. This means that the drafting of the content of resolutions, the determination of their layout, is generally done by the municipality’s tax staff only supervised by legal counsel. Very often a draft resolution adopted in this way is thoroughly amended by councilors during the session. As a result, the legislative level of tax resolutions is very low. This is influenced by a number of factors, the main one being the lack of clear rules that apply to the drafting of legal acts by municipalities.⁴⁹

45 Judgment of the Supreme Administrative Court of 19 June 2019, II OSK 2048/17, (OSK is a case reference number indicating a case concerning a cassation appeal in administrative court proceedings).

46 Dobosz, 2006, p. 378.

47 Judgment of the Supreme Administrative Court of 3 October 2006, I OSK 1035/06.

48 Judgment of the Voivodship Administrative Court in Kraków of 20 April 2010, III SA/Kr 1/09.

49 Etel and Popławski, 2012, p. 261.

The procedure for adopting resolutions is contained in the statute in effect in the local government unit. The statute also specifies the order of actions taken in the resolution process, stipulating, for example, the discussion of the draft resolution, presentation of opinions and motions, presentation of the applicant's position, discussion, and voting on the resolution.⁵⁰ The municipal council may, in the municipal statutes, specify the bodies and entities that are entitled to the initiative of resolution in matters decided by resolution of the council.⁵¹

As M. Szyrski states,

(...) Poland still lacks unambiguous regulations relating to the technical aspects of creating legal norms, which would clearly follow from the constitutional principles of lawmaking for local self-government. Such a conclusion arises from an analysis of the incorrectly constructed provisions of the Ordinance of the Prime Minister of June 20, 2002 on the "Principles of Legislative Technique".⁵²

According to Article 42 of the Law on Municipal Self-Government, the rules and procedure for the promulgation of acts of local law are specified by the Law of 20 July 2000 on the promulgation of normative acts and certain other legal acts.⁵³ According to Article 13.2 of the Act on Announcement of Normative Acts and Certain Other Legal Acts, acts of local law enacted by a municipal body shall be announced in the provincial official gazette, while their entry into force shall take place after 14 days from the date of their announcement, unless the normative act specifies a longer term.⁵⁴

Legal control is one type of social control.⁵⁵ Control over the legality of local laws is carried out in two modes⁵⁶: supervision of local government (carried out by governors and regional chambers of audit) and judicial review (carried out mainly by voivodship administrative courts and the Supreme Administrative Court).

⁵⁰ Walczak, 2013, p. 288.

⁵¹ Judgment of the Supreme Administrative Court of 17 November 1995, SA/Wr 2515/95.

⁵² Szyrski, 2022, p. 64.

⁵³ The Act of 20 July 2000 on the Promulgation of Normative Acts and Certain Other Legal Acts (Journal of Laws 2019, item 1461).

⁵⁴ Article 4, § 1 of the Act of 20 July 2000 on the Announcement of Normative Acts and Certain Other Legal Acts (Journal of Laws of 2019, item 1461).

⁵⁵ Konarski, 2014, p. 201.

⁵⁶ Konarski, 2021, p. 131.

6. Resolutions Adopted by Local Government Units on Tax Matters

Based on the above considerations, it should be noted that only municipalities have real tax authority in the current legal state in Poland. Their authority to issue resolutions derives from the following laws: Tax Ordinance, The Act on Local Taxes and Fees, Agricultural Tax Act, and Forest Tax Act. The authority to issue local laws under the Tax Ordinance concerns: setting compensation for payers and collectors for the collection of taxes constituting income of the municipal budget,⁵⁷ setting a later-than-statutory due date for collectors of local government taxes and fees,⁵⁸ introduction of a grace fee for instalment, or deferment of payment dates for taxes and tax arrears.⁵⁹

The authority to issue local laws under the Law on Local Taxes and Fees applies to: Real estate tax (to determine the rates of real estate tax,⁶⁰ differentiating tax rates,⁶¹ ordering the collection of tax by way of collection, appointing collectors, and determining the amount of remuneration for collection⁶²; determine specimen forms of information and tax returns,⁶³ and introduce other subject exemptions)⁶⁴; tax on means of transportation (to determine the amount of tax rates⁶⁵, vary the rates of this tax,⁶⁶ and introduce other subject exemptions)⁶⁷; and introducing optional fees regulated by the Law, that is, a market fee, a local fee, a resort fee, an advertising fee, and a fee on dog ownership.

The authority to issue local laws under the Agricultural Tax Law involves the following: include certain villages in a tax district other than the one specified for the municipality,⁶⁸ lower the purchase price of rye accepted for the calculation of agricultural tax,⁶⁹ specify specimens of forms for information and declarations for

57 Article 28 § 4 of the Act of 29 August 1997 – Tax Ordinance (Journal of Laws of 1997, No. 137, item 926).

58 *Ibid.*, Article 47 § 4a.

59 *Ibid.*, Article 57 § 7.

60 Article 5 § 1 of the Act of 12 January 1991 on Local Taxes and Fees (Journal of Laws of 1991, No. 9, item 31).

61 Article 5(2), (3) and (4) of the Act of 12 January 1991 on Local Taxes and Fees.

62 *Ibid.*, Article 6 § 12.

63 *Ibid.*, Article 6 § 13.

64 *Ibid.*, Article 7 § 3.

65 *Ibid.*, Article 10 § 1.

66 *Ibid.*, Article 10(2).

67 *Ibid.*, Article 12(4).

68 *Ibid.*, Article 5(3).

69 *Ibid.*, Article 6(3).

agricultural tax,⁷⁰ order the collection of agricultural tax by way of collection and determine the collectors and the amount of remuneration for collection,⁷¹ determine the procedure and detailed conditions for tax exemption of land on which agricultural production has been discontinued,⁷² and introduce exemptions and object reliefs other than those specified in the Law.⁷³

The authority to issue local laws under the Forest Tax Law concerns: lowering the average purchase price of timber as the basis for calculating forest tax,⁷⁴ administering the collection of forest tax by way of collection, and appointing collectors and determining the amount of remuneration for collection,⁷⁵ determining specimen forms of information and declarations for forest tax,⁷⁶ and introducing subject exemptions other than those specified in the Act.⁷⁷

The literature points to a possible subject criterion for the division of the above-mentioned resolutions and distinguishes the following:⁷⁸

- resolutions on setting the rates of taxes and fees,
- resolutions introducing tax exemptions and reliefs,
- resolutions specifying the mode and conditions of payment,
- resolutions introducing fees.

As M. Kotulski states, particularly, the limits of the local government's financial independence are evident in the powers of the local government's decision-making bodies to determine the amount of tax rates – which may involve differentiating their amount both in individual local government units and depending on the subject of taxation. Such powers give the local government's decision-making bodies the opportunity to take into account additional factors that affect the value of the subject of taxation and, consequently, the amount of the tax – which is related to the financial policy of such a local government unit, its expenditures and sources of raising revenue. Thus, when determining the rates, the local government's decision-making body should be guided not only by local conditions, the affluence of citizens, or other non-fiscal goals (e.g., low tax rates for investors), but also by the need to raise budgeted revenues for the tasks implemented by the local government.⁷⁹

⁷⁰ *Ibid.*, Art. 6a § 1(1).

⁷¹ *Ibid.*, Article 6b.

⁷² *Ibid.*, Article 12, § 9.

⁷³ *Ibid.*, Article 13e.

⁷⁴ *Ibid.*, Article 4(5).

⁷⁵ *Ibid.*, Article 6(8).

⁷⁶ *Ibid.*, Article 6(9).

⁷⁷ *Ibid.*, Article 7 § 3.

⁷⁸ Etel, 2004, p. 77.

⁷⁹ Kotulski, 2005, p. 164.

As J. Wyporska points out, 'Despite the fact that the regulations on taxes and fees enacted by the municipal council are not explicitly called municipal regulations, they undoubtedly have the character of field normative acts universally binding.'⁸⁰ D. Wyszowska presents the view that 'Granting the freedom to raise revenue should give the opportunity to reach for tax revenues at the time of increased demand for funds, and at other times to limit the use of taxation (tax base).'⁸¹

7. Conclusions

The autonomy of local government units, ensured by constitutional provisions, obviously also refers to the financial autonomy of these units, within which the literature indicates the possibility of also distinguishing tax autonomy.

Fiscal authority, to which the Constitution also refers, stipulating the possibility of determining the amount of local taxes and fees to the extent specified in the law in the current Polish legal order, is exercised by municipalities. In this regard, the constituting bodies of municipalities, that is, municipal councils, may issue resolutions on the basis of specific laws and only within the authority granted to them by these specific tax laws. As M. Paczocha emphasises, 'The powers of municipal councils to create tax laws are small. It is therefore natural to be tempted to expand them in the practice of making local tax laws.'⁸² Actions taken by municipalities should be placed within the limits of the authority granted to them by law while keeping in mind the fiscal needs of the local government unit.

80 Wyporska, 2004, p. 114.

81 Wyszowska, 2017, p. 375.

82 Paczocha, 2000, p. 25.

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ARTICLES

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Combating Algorithmic Discrimination in the Context of Dependent Employment by Utilising Article 22 of the General Data Protection Regulation

ABSTRACT: *Employers are increasingly using algorithms to automate their decision-making processes. This is true not only for digital labour platforms but also for more traditional companies. By using algorithms, employers aim for faster decision-making and (as a result) a reduction in workload. Algorithms are also considered more objective than human intuition. However, algorithmic discrimination is widely documented. In many cases, anti-discrimination law is ill-equipped to protect employees from such discrimination. This study examines the extent to which Article 22 of the General Data Protection Regulation (GDPR) can be utilised to combat algorithmic discrimination in the context of dependent employment.*

KEYWORDS: *algorithmic discrimination, dependent employment, GDPR*

1. Introduction

Generally, “algorithms” can be defined as ‘formally specified sequences of logical operations providing step-by-step instructions for computers to act on data and thus automate decisions’.¹ They are designed to solve a specific problem. For example, suppose a taxi company is looking to hire a new driver. Applicants who are to be considered for this position must have at least a valid driving licence. Once the applications have been received, the first step is to weed out those applicants who do not meet the minimum requirement. This task can be completed using an algorithm: If the applicant does not have a driving licence, they receive a rejection. Otherwise, their application process continues.

1 Kullmann, 2018, p. 8.

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There is a wide range of potential applications for algorithms in the employment context. During the application process, algorithms can be used to not only automatically pre-sort applications based on certain criteria but also screen, summarise, and analyse the applications to ensure the suitability of the candidate. Algorithms can also be used to automate the allocation of work and to measure employee satisfaction and productivity. Finally, algorithms are also capable of automatically recording keystrokes, telephone calls, attendance, and/or other activities; drawing conclusions about productivity; and even automatically issuing dismissals.² Given the wide range of potential applications for algorithms, employers are increasingly using such technologies to automate their decision-making processes. However, algorithms can also be a source of discrimination, and such algorithmic discrimination is widely documented.³

2. Algorithmic Decision-Making and European Union Anti-Discrimination Law

2.1. Overview

European Union (EU) law contains comprehensive equal treatment provisions both at the Primary and Secondary Law levels. Discrimination on grounds of certain protected characteristics, particularly gender, racial or ethnic origin, religion or belief, disability, age, or sexual orientation, is prohibited unless it can be objectively justified. Other prohibitions of discrimination under EU law exist, such as the prohibition of discrimination against part-time or fixed-term employees and persons exercising their right to freedom of movement pursuant to art. 45 of the Treaty on the Functioning of the European Union. The following regulations prohibit such discrimination: 1) At the Primary Law level are art. 21 of the Charter of Fundamental Rights of the European Union; art. 23 of the Charter of Fundamental Rights of the European Union; art. 18 of the Treaty on the Functioning of the European Union; art. 45 of the Treaty on the Functioning of the European Union; and art. 157 of the Treaty on the Functioning of the European Union. 2) At the Secondary Law level are the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2006/54/EC of the European Parliament and of the

² Auer-Mayer, 2024a, p. 200.

³ Kim, 2020, pp. 1547-1550.

Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC; Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP; and Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance.

2.2. Direct and Indirect Discrimination

First, direct discrimination is prohibited. This means that cases in which a person is treated less favourably than another person is, has been, or would be treated in a comparable situation on grounds of a protected characteristic. This covers all situations in which a protected characteristic is directly linked to the less favourable treatment of the person concerned, compared to persons without the corresponding characteristic.

Additionally, anti-discrimination law also prohibits indirect discrimination. This means ‘apparently neutral provisions, criteria or procedures’ that put persons with a protected characteristic at a particular disadvantage compared to persons without the corresponding characteristic. For example, the focus on performance, speed, flexibility, or absenteeism can result in indirect discrimination against people with disabilities, older employees, or women (particularly regarding caring responsibilities).⁴

2.3. Justification

Both direct and indirect discrimination based on a protected characteristic is prohibited. However, there is an essential distinction between a difference of treatment directly linked to a protected characteristic and a difference in treatment linked to ‘apparently neutral provisions, criteria or procedures’ that put persons with a protected characteristic at a particular disadvantage compared to persons without the corresponding characteristic. This concerns the possibility of justifying the difference in treatment.

In the case of a difference in treatment directly linked to a protected characteristic, there is no prohibited discrimination if,

⁴ Auer-Mayer, 2024b, p. 5.

by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

This means that only occupational requirements that are absolutely necessary to undertake the professional activity in question can justify a difference in treatment directly linked to a protected characteristic. However, the proportionality of the requirements imposed must be ensured.

In comparison to direct discrimination, indirect discrimination does not exist if the disadvantage is ‘objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’. Indirect discrimination can therefore be objectively justified independently of explicitly recognised exceptions. However, the necessity and appropriateness of indirect discrimination in this respect must always be examined on a case-by-case basis.

2.4. Algorithmic Discrimination

The aforementioned prohibition of direct and indirect discrimination (that is, an unjustified difference in treatment directly or indirectly linked to a protected characteristic) also applies in cases where an employer uses algorithms for their decision-making processes.⁵ Although algorithms are considered more objective than human intuition, algorithmic discrimination is widely documented.⁶ Algorithmic decision-making systems that rely directly on protected characteristics in their decision-making exist. However, even if the algorithm does not rely directly on protected characteristics, discrimination can still occur when facially neutral factors act as proxies for protected characteristics. Furthermore, some algorithms simply work less efficiently for certain protected groups. Finally, an algorithm can only be as good as the data with which it works, meaning that discriminatory input data will likely lead to a discriminatory decision. The following real-life examples illustrate that discrimination through algorithmic decision-making systems is not a strictly academic issue.

First, the algorithm that the Austrian Public Employment Service planned to implement in 2020 calculates the probability that a registered jobseeker will be employed for a certain number of days within a certain period in the future. For this purpose, a so-called “chance of integration” is calculated from a total of 13 personal

⁵ Auer-Mayer, 2023, p. 174.

⁶ Kim, 2020, pp. 1547–1550.

characteristics, including age and gender. Based on the calculated chance of integration, jobseekers are divided into three categories: high, medium, and low labour market chances. Support measures are to be concentrated on the group with medium labour market opportunities. The result of the algorithm is supposed to be only a starting point for the Austrian Public Employment Service counsellors. However, they make the final decision. According to the relevant guidelines, the counsellors must consider additional criteria when making their decision, which are not included in the algorithm. These include the jobseeker's motivation and self-help potential, addiction, debts, and housing situation. The main criticism levelled against the algorithm was that its use would lead to the entrenchment of structural discrimination and that the categories used are also too coarse. Besides, it is pointed out that there is a risk of computer-generated results being routinely adopted by the counsellors ("rubber-stamping") due to limited time and resources.⁷

Second, the recruiting software provider Evolv found that employees whose place of residence is less than eight kilometres away from their place of work are 20 % less likely to change jobs. However, the company decided to remove the variable "distance of place of residence from place of work" from its recruiting algorithm. The risk that relying on the (facially) neutral characteristic "place of residence" could lead to discrimination based on ethnicity seemed too high, particularly in the US context, where residential areas are often highly ethnically segregated.⁸

Third, in 2014, Amazon began developing a recruiting tool that would automatically analyse the curricula vitae (CVs) of applicants and rate them using a 5-star system. In this way, the tool was supposed to support Amazon in selecting the most suitable applicants. Initially, the algorithm was trained using the CVs of successful applications from the past ten years. During the training phase, it was supposed to use machine learning to find out what patterns these applications showed. After just one year, it turned out that the recruiting tool favoured men. This was because, first, in the past, mainly men had been recruited. Second, when developing the algorithm, it was assumed that the recruitment decisions of the past were correct. Therefore, the algorithm learnt to recognise references to a female applicant in the CV (e.g. membership of a women's chess club or other certain hobbies) and, as a result, systematically rated this application lower. At the same time, the use of verbs that are predominantly found in the CVs of men (e.g. "execute") led to a better rating.⁹

Fourth, in the platform economy (e.g. Uber), customers often evaluate the quality of the services provided to them with the help of ratings, usually awarding points or stars. This is usually completed with a single or very few clicks on the app used.

7 Tinhofer, 2022, p. 172.

8 Greif and Kullmann, 2021, p. 64.

9 Tinhofer, 2022, p. 175.

In many cases, platforms rely heavily on this form of performance monitoring and draw consequences from it, including sanctioning platform employees if they fall below a minimum rating level. However, if customers give low ratings, it cannot be ruled out that the motive behind this is the disapproval of a characteristic protected by anti-discrimination law (such as gender, ethnicity, or religion) that the platform employee possesses.¹⁰

Although algorithmic discrimination is (as shown in the examples) widely acknowledged, current anti-discrimination law is ill-equipped in terms of protecting employees from such discrimination. Although the EU's anti-discrimination directives contain special provisions regarding the burden of proof, persons who consider themselves discriminated against must first establish facts from which discrimination may be presumed. Only then does the burden of proof shift to the employer. So far, the Court of Justice of the European Union (CJEU) has done little to alleviate these evidentiary difficulties. For example, in the Kelly case (C-104/10), the Court held that an employee could not derive a claim against the employer under EU anti-discrimination law for information with which he could credibly demonstrate discrimination. In the Meister case (C-415/10), the CJEU repeats this statement. Consequently, there is no obligation on employers to disclose any relevant information, and without access to such information, it is nearly impossible to establish facts from which discrimination may be presumed in cases of algorithmic decision-making.

3. Algorithmic Decision-Making and Article 22 GDPR

3.1. Applicability of the GDPR

Since algorithmic decision-making requires automated processing of personal data of the (prospective) employee (e.g. name, age, qualifications, relevant skills), the General Data Protection Regulation 2016/679 (GDPR) is applicable, provided that the personal data are processed in the context of activities of an establishment of a controller (i.e. employer) or a processor (i.e. recruitment agency) in the EU.

Therefore, employers who want to use algorithms to automate their decision-making processes must comply with the principles, prohibitions, and limitations of the GDPR. The GDPR contains several provisions that specifically concern algorithmic decision-making. The most prominent one is art. 22 GDPR, which gives the data subject—in the current context, the (prospective) employee—the right not to be subject to a decision based solely on automated processing, including profiling, which

¹⁰ Risak and Gogola, 2018, p. 438.

produces legal effects concerning him or her or similarly significantly affects him or her. If such automated decision-making takes place, the controller—in the current context, the (prospective) employer—must provide information about the use of the algorithm as well as meaningful information about the logic involved, as well as the significance and envisaged consequences of such processing. This information must be given to the data subject at the time the personal data are obtained from him or her or—if the data are not obtained from the data subject—within a reasonable period after obtaining the data. After this initial information, the data subject has a right of access according to art. 15 GDPR, which also enables the data subject to receive detailed information about the existence of automated decision-making, and meaningful information about the logic involved, as well as the significance and envisaged consequences of such processing. Of particular interest for this paper is art. 22 GDPR and its potential to protect employees from the aforementioned algorithmic discrimination.

3.2. Article 22 GDPR

3.2.1. Overview

According to art. 22 para. 1 GDPR, the data subject has ‘the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her’. The provision seems to be rather straightforward in recognising that algorithms shall not be used to make certain high-risk decisions.

However, art. 22 is subject to multiple layers of exceptions: The right given to the data subject in para. 1 does not apply if the decision is necessary for entering into, or performance of, a contract between the data subject and a data controller (lit. a)); authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests (lit. b)); or based on the data subject’s explicit consent (lit. c)).

However, these exceptions are themselves subject to another exception. According to art. 22 para. 4, the abovementioned exceptions do not apply when the decisions are based on special categories of personal data within the meaning of art. 9 GDPR, that is, personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, as well as genetic data, biometric data, data concerning health, or data concerning a natural person’s sexual life or orientation. However, art. 22 para. 4 GDPR allows automated decision-making based on such sensitive data if the data subject has given explicit consent or if the processing

is necessary for purposes of substantial public interest, based on Union or Member State law.

If a controller relies on the exception of contractual necessity or explicit consent as laid down in art. 22 para. 2 lit. a) and lit. c) GDPR, he or she must implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, which at least include the right to obtain human intervention, to express his or her point of view, and to contest the decision. This is laid down in art. 22 para. 3 GDPR.

To determine whether art. 22 GDPR has the potential to combat the abovementioned algorithmic discrimination, a deeper analysis of the provision is required.

3.2.2. General Prohibition or Right to be Invoked by the Data Subject?

First, the question arises whether art. 22 para. 1 GDPR establishes a general prohibition or gives the data subject a right not to be subject to automated decision-making that needs to be actively invoked. If the provision prohibits automated decision-making, then such systems may only be used if one of the abovementioned exceptions laid down in art. 22 para. 2 GDPR is fulfilled. In this case, data subjects are protected from automated decision-making by default. However, if art. 22 para. 1 GDPR stipulates a right not to be subject to automated decision-making that needs to be actively invoked by the data subject, then such systems can be used until then.¹¹

Interestingly, art. 22 para. 1 GDPR gives the data subject 'the right not to be subject to a decision based solely on automated processing'. Many other language versions of the GDPR use a similar wording: 'das Recht, nicht einer ausschließlich auf einer automatisierten Verarbeitung [...] beruhenden Entscheidung unterworfen zu werden' (German); 'le droit de ne pas faire l'objet d'une décision fondée exclusivement sur un traitement automatisé' (French); 'il diritto di non essere sottoposto a una decisione basata unicamente sul trattamento automatizzato' (Italian); 'tendrá derecho a no ser objeto de una decisión basada únicamente en el tratamiento automatizado' (Spanish). In comparison, art. 9 para. 1 GDPR, for example, states that the processing of sensitive data 'shall be prohibited'. Other language versions of this provision are worded similarly: 'ist untersagt' (German); 'sont interdits' (French); 'È vietato' (Italian); 'Quedan prohibidos' (Spanish). Therefore, the wording of art. 22 para. 1 GDPR speaks in favour of an interpretation as a data subject's right that must be actively invoked.¹²

Furthermore, art. 22 GDPR is placed within Chapter III of the GDPR, which is entitled "Rights of the data subject" and primarily contains provisions that provide such rights, namely the right of access (art. 15 GDPR), the right to rectification (art. 16

¹¹ Tosoni, 2021, p. 146.

¹² Thouvenin, Früh and Henseler, 2022, pp. 188–189.

GDPR), the right to erasure (art. 17 GDPR), and the right to restriction of processing (art. 18 GDPR). All these rights must be actively invoked by the data subject. Additionally, from a systematic point of view, a general prohibition of automated decision-making would have best fitted in Chapter II, which contains “Principles”, such as art. 9 para. 1 GDPR, which states that the processing of sensitive data “shall be prohibited”. Therefore, a case could be made that art. 22 para. 1 GDPR does not establish a general prohibition and only gives the data subject a right that must be actively invoked.¹³

However, the overall scheme of art. 22 GDPR shows that the provision establishes a general prohibition. According to para. 1, the data subject has ‘the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her’. Para. 2 then stipulates that para. 1 shall not apply if the decision is necessary for entering into, or performance of, a contract between the data subject and a data controller (lit. a)); authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests (lit. b)); or based on the data subject’s explicit consent (lit. c)). In cases where the controller relies on the exception of contractual necessity or explicit consent as laid down in art. 22 para. 2 lit. a) and lit. c) GDPR, he or she must implement suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests. These measures must at least include the right to obtain human intervention, to express his or her point of view, and to contest the decision (art. 22 para. 3 GDPR). Given this scheme, interpreting art. 22 para. 1 GDPR as a right to object would – as the Article 29 Data Protection Working Party states in its guidelines on automated individual decision making and profiling – render the exceptions in art. 22 para. 2 lit. a) and lit. c) meaningless:

An objection would mean that human intervention must take place. Article 22 (2) (a) and (c) exceptions override the main rule in Article 22 (1), but only as long as human intervention is available to the data subject, as specified in Article 22 (3). Since the data subject (by objecting) has already requested human intervention, Article 22 (2) (a) and (c) would automatically be circumvented in every case, thus rendering them meaningless in effect.¹⁴

Interpreting art. 22 as a prohibition is also supported by Recital 71 GDPR, which states that decision-making based solely on automated processing “should be allowed” when the exceptions apply. Since the recitals of the GDPR serve as a benchmark for

¹³ Thouvenin, Früh and Henseler, 2022, pp. 190–191.

¹⁴ Article 29 Data Protection Working Party, 2018a, pp. 34–35.

its interpretation, the wording of Recital 71 GDPR suggests that automated decision-making is generally not allowed.¹⁵

To sum up, despite its wording and positioning within the GDPR, an interpretation of art. 22 GDPR, considering the overall scheme of the provision (particularly its para. 2, which specifies the cases in which such automated processing is exceptionally permitted) and Recital 71 GDPR suggests that art. 22 para. 1 GDPR establishes a general prohibition on decisions based solely on automated processing. Therefore, art. 22 para. 1 GDPR generally prohibits decisions that produce legal effects for the data subject or similarly significantly affect him or her from being based solely on automated processing. An infringement of this prohibition does not need to be invoked actively. The CJEU confirmed this opinion in the recent SCHUFA case (C-634/21).

3.2.3. Application of Article 22 GDPR

3.2.3.1. Overview

According to art. 22 para. 1 GDPR, the data subject has ‘the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her’. Therefore, the applicability of that provision is subject to three conditions that must all be met: there must be a “decision”; the decision must produce a legal or similarly significant effect; and the decision must be ‘based solely on automated processing, including profiling’.

3.2.3.2. Decision

Art. 22 para. 1 GDPR does not cover every process based on automated processing, but only “decisions”. The term “decision” is not defined within the GDPR. However, according to Recital 71 GDPR, the term “decision” also includes measures. Therefore, an action aimed at actual success is sufficient, even without an explicit expression of will.

However, considering a recent judgement of the CJEU in the SCHUFA case (C-634/21), it is necessary to go further: According to the CJEU, art. 22 GDPR must be interpreted as meaning that the automated establishment, by a credit information agency, of a probability value based on personal data relating to a person and

¹⁵ Article 29 Data Protection Working Party, 2018a, p. 20.

concerning his or her ability to meet payment commitments in the future constitutes automated individual decision-making within the meaning of that provision, where a third party, to which that probability value is transmitted, draws strongly on that probability value to establish, implement or terminate a contractual relationship with that person.

This means that an act aimed at actual success (e.g. the refusal of an application or the termination of a contractual relationship) and a probability value (“score”) on which such an act draws strongly is considered a “decision” within the meaning of art. 22 GDPR. This significantly broadens the application scope of art. 22 GDPR, particularly in the employment context: Until now, it could be assumed that art. 22 para. 1 GDPR would only apply in the course of an automated ranking of applicants—particularly when there is no meaningful human intervention at this stage—if the final decision (such as which applications are sorted out, who is invited to a job interview, or who is rejected) is also made without sufficient human intervention. However, in light of this recent judgment of the CJEU, it can be assumed that the automated ranking of applications as such must already be regarded as a potentially prohibited automated decision. As such ranking is indisputably based exclusively on automated processing, the question of the necessary degree of human involvement does not arise in this respect. Rather, the latter only plays a role regarding the effects of the decision on the data subject as required by art. 22 para. 1 GDPR.¹⁶

3.2.3.3. Legal or Similarly Significant Effect

Not all automated decision-making processes trigger the application of art. 22 GDPR. The provision only applies to decisions that produce legal effects on the data subject or similarly significantly affect him or her. The GDPR does not define the term “legal effects” or the expression “similarly significantly”. Recital 71 GDPR names the refusal of an online credit application or e-recruiting practices as examples of decisions with a significance similar to a legal effect. Recital 71 GDPR and the wording of art. 22 GDPR suggest that only effects having a serious impact are covered by that provision.

According to the Article 29 Data Protection Working Party, a “legal effect” requires that the decision affects someone’s legal rights (such as the freedom to associate with others, vote in an election, or take legal action), legal status, or rights under a contract. Consequently, automated decisions that result in the cancellation of a contract, the denial of a particular social benefit granted by law (e.g. child or housing benefit), or the denial of citizenship are examples of decisions that produce “legal effects”.

¹⁶ Auer-Mayer, 2024a, p. 204.

However, even if the decision does not influence the person's legal rights or legal status, it still falls within the scope of art. 22 GDPR if it similarly significantly affects that person. Due to the word "similarly", the threshold for significance must be similar to that of a decision producing a legal effect. According to the Article 29 Data Protection Working Party, a decision's significance is similar to a legal effect if it has the potential to significantly affect the circumstances, behaviour, or choices of the individuals concerned, have a prolonged or permanent impact on the data subject, or lead to the exclusion or discrimination of individuals. Examples of decisions with a significance similar to a legal effect are decisions that affect someone's financial circumstances (such as their eligibility to credit); decisions that affect someone's access to health services; decisions that deny someone an employment opportunity or put them at a serious disadvantage; and decisions that affect someone's access to education, for example, university admission.

In the employment context, this means that a decision that results in the termination of an employment contract produces a "legal effect" and falls within the scope of art. 22 GDPR. Decisions that deny someone an employment opportunity (e.g. promotion) are also covered by art. 22 GDPR, although they do not change the person's legal status. They are decisions with a significance similar to a legal effect. Consequently, an employer who uses algorithms to automate the decision-making processes regarding hiring, promoting, and terminating must comply with art. 22 GDPR.¹⁷

3.2.3.4. Based Solely on Automated Processing

Generally, employment decisions must not be based solely on automated processing. Thus, the question arises, in what cases is a decision based "solely" on automated processing? According to Recital 71 GDPR, a decision "without any human intervention" is based solely on automated processing. Therefore, an example of automated decision-making would be a scenario where applicants enter their qualifications in predefined data fields as part of an online recruitment process and automatically receive a rejection because they do not fulfil certain requirements. This means that an application programme that automatically sends rejections to applicants who do not fulfil certain minimum requirements constitutes an automated decision that is generally not permitted under art. 22 para. 1 GDPR (however, an exception may apply).¹⁸

Whenever there is human involvement in the decision-making process, the question arises whether any minimal human intervention, such as the push of a button or

¹⁷ Höpfner and Daum, 2021, p. 481.

¹⁸ Peer, 2024, p. 125.

the ticking of a box, could prevent a decision from being considered solely based on automated processing and therefore circumvent art. 22 GDPR, although the outcome of the decision will still be determined by an algorithm.

However, the Article 29 Data Protection Working Party in its guidelines on automated individual decision-making and profiling states:

The controller cannot avoid the art. 22 provisions by fabricating human involvement. For example, if someone routinely applies automatically generated profiles to individuals without any actual influence on the result, this would still be a decision based solely on automated processing. To qualify as human involvement, the controller must ensure that any oversight of the decision is meaningful, rather than just a token gesture. It should be carried out by someone who has the authority and competence to change the decision. As part of the analysis, they should consider all the relevant data.¹⁹

Therefore, human involvement in the decision-making process must surpass a certain (minimal) threshold. For example, this would be the case when applicants are ranked according to their qualification for an advertised position using an automated procedure, and the employer only uses this ranking as a decision-making aid. The decision concerning the hiring itself would not be based “solely” on automated processing (however, the ranking itself also constitutes a “decision” in the sense of art. 22 para. 1 GDPR).²⁰ Since the involved “human in the loop” must have the authority and competence to change the decision and consider all relevant data, this could prevent algorithmic discrimination in the context of dependent employment.

3.2.4. Exceptions

As stated earlier, art. 22 para. 1 GDPR is subject to some exceptions. However, do these exceptions really ‘significantly weaken the practical efficacy of the specific safeguards [laid down by art. 22 GDPR]’ as Abraha suggests?²¹ The answer to this question lies in a deeper analysis of the exceptions outlined in art. 22 para. 2 GDPR, particularly the exceptions regarding contractual necessity (lit. a)) and explicit consent (lit. c)).

According to art. 22 para. 2 lit. a) GDPR, the right given to the data subject in para. 1 does not apply if the decision is necessary for entering into, or the performance of, a contract between the data subject and a data controller. In its guidelines on

¹⁹ Article 29 Data Protection Working Party, 2018a, p. 21.

²⁰ Goricnik, 2025, p. 8.

²¹ Abraha, 2023, p. 180.

automated individual decision-making and profiling, the Article 29 Data Protection Working Party states that this exception applies in cases where (routine) human involvement is impractical or impossible due to the sheer quantity of data being processed and no other effective and less intrusive means exist. According to the Article 29 Data Protection Working Party, this would apply in a scenario where a business receives “tens of thousands of applications” for an open position:

Due to the exceptionally high volume of applications, the business may find that it is not practically possible to identify fitting candidates without first using fully automated means to sift out irrelevant applications. In this case, automated decision-making may be necessary in order to make a short list of possible candidates, with the intention of entering into a contract with a data subject.²²

Therefore, the exception regarding contractual necessity does not apply whenever the use of automated decision-making would be convenient, but rather only when an exceptionally high amount of data makes human involvement practically impossible or unduly burdensome. In this context, not only is the number of applications relevant, but the existence of reasonable alternatives also depends on the (human) resources (and thus the size of the company). Consequently, contractual necessity will rarely justify automated decision-making in the employment context, although that exception does not apply solely to cases where a business receives “tens of thousands of applications” for an open position.²³

Art. 22 para. 1 GDPR also does not apply if the data subject has given explicit consent to fully automated decision-making. Although many employers rely on this exception, this approach raises several issues. According to art. 4 no. 11 GDPR, consent must be freely given, specific, informed, and unambiguous. Assuming an ‘imbalance of power’, the guidelines of the Article 29 Data Protection Working Party²⁴ and the European Data Protection Board²⁵ on consent deem it problematic for employers to process personal data of current or future employees on the basis of consent as it is unlikely to be freely given:

Given the dependency that results from the employer/employee relationship, it is unlikely that the data subject is able to deny his/her employer consent to data processing without experiencing the fear or real risk of detrimental effects as a result of a refusal. It is unlikely that an employee would

22 Article 29 Data Protection Working Party, 2018a, p. 23.

23 Auer-Mayer, 2024a, p. 203.

24 Article 29 Data Protection Working Party, 2018b, p. 7.

25 European Data Protection Board, 2020, p. 9.

be able to respond freely to a request for consent from his/her employer to, for example, activate monitoring systems such as camera observation in a workplace, or to fill out assessment forms, without feeling any pressure to consent.

Although the Article 29 Data Protection Working Party and the European Data Protection Board state that this does not mean that employers can never rely on consent as a lawful basis for processing, they assume that employees can only give free consent in exceptional circumstances. The European Data Protection Board provides the following (exceptional) example:

A film crew is going to be filming in a certain part of an office. The employer asks all the employees who sit in that area for their consent to be filmed, as they may appear in the background of the video. Those who do not want to be filmed are not penalised in any way but instead are given equivalent desks elsewhere in the building for the duration of the filming.²⁶

As this example shows, in most cases, employee consent cannot be the lawful basis for data processing at work due to the nature of the relationship between employer and employee.

Another point that must be considered in this regard is that data processing in the context of algorithmic decision-making is very complex. The more complex a decision is, the more complex the algorithm used to automate that decision must be. Therefore, it is unlikely that employees subject to algorithmic decision-making can give informed consent as required by art. 4 no. 11 GDPR to such data processing.²⁷

Finally, it should be noted that, according to art. 7 para. 3 GDPR, consent can be withdrawn at any time. In practice, employers will therefore find it difficult to rely on consent as a lawful basis for data processing across their company.²⁸

Consequently, the exceptions regarding contractual necessity and explicit consent as laid down in art. 22 para. 2 lit. a) and lit. c) GDPR will rarely apply to fully automated decision-making in the employment context. Therefore, employers must comply with art. 22 para. 1 GDPR, meaning that fully automated employment decisions without meaningful human intervention are prohibited.

²⁶ European Data Protection Board, 2020, p. 9.

²⁷ Auer-Mayer, 2024a, p. 201.

²⁸ Brodil, 2018, p. 466.

3.2.5. Safeguard Measures

Even in cases where an exceptionally high amount of data makes human involvement practically impossible or where an employee's consent due to exceptional circumstances is freely given and informed, the employer must implement suitable measures to safeguard the employees' rights and freedoms and legitimate interests. Such measures must include, as a minimum, the employee's right to obtain human intervention, express his or her point of view, and contest the decision.

According to the guidelines on automated individual decision-making and profiling of the Article 29 Data Protection Working Party, human intervention is a key element, and the review obtained by the employee due to the implemented safeguards must be carried out by someone who has the appropriate authority and capability to change the decision.²⁹

The Article 29 Data Protection Working Party guidelines also state that the controller must provide a simple way for the data subject to exercise these rights: 'This emphasises the need for transparency about the processing. The data subject will only be able to challenge a decision or express their view if they fully understand how it has been made and on what basis'.³⁰

3.3. Result

In almost all cases, art. 22 GDPR prohibits employers from using algorithms to fully automate their decision-making processes regarding hiring, promotion, and termination. This means that there must be human involvement that surpasses a (minimum) threshold. This safeguard has the potential to limit algorithmic discrimination in the workplace, since a human must oversee the results of algorithmic employment decisions.

4. Conclusion

Although algorithms are considered more objective than human intuition, algorithmic discrimination is widely documented. EU-law contains comprehensive equal treatment provisions both at the Primary and Secondary Law levels, and these regulations prohibiting direct and indirect discrimination (that is, an unjustified difference in treatment directly or indirectly linked to a protected characteristic) also apply

²⁹ Article 29 Data Protection Working Party, 2018a, p. 27.

³⁰ Article 29 Data Protection Working Party, 2018a, p. 27.

in cases where an employer uses algorithms for their decision-making processes. However, current EU anti-discrimination law is ill-equipped in terms of protecting employees from algorithmic discrimination. Although the anti-discrimination directives of the EU contain special provisions regarding the burden of proof, persons who consider themselves discriminated against must first establish facts from which discrimination may be presumed. Only then does the burden of proof shift to the employer. The CJEU has so far done little to alleviate these evidentiary difficulties.

However, since algorithmic decision-making requires the automated processing of personal data of the (potential) employee, the GDPR is applicable. Therefore, employers who want to use algorithms to automate their decision-making processes must comply with the principles, prohibitions, and limitations of the GDPR. Art. 22 GDPR has the potential to limit algorithmic discrimination in the context of dependent employment, because it prohibits employers from using algorithms to fully automate their decisions regarding hiring, promotion, and termination, since a human must oversee the results of algorithmic employment decisions.

However, if the “human in the loop” tends not to make use of his or her authority, and simply confirms the decision made by the algorithm, even the safety measures provided by art. 22 GDPR cannot prevent algorithmic discrimination. The extent to which art. 22 GDPR can prevent algorithmic discrimination in the employment context is therefore limited.

In such cases, the employee can make use of his or her right of access given to him or her by art. 15 GDPR. Although the exact extent of that right regarding algorithmic decision-making is unclear, the employee could possibly utilise the provided data to establish facts from which discrimination may be presumed in accordance with EU anti-discrimination law to shift the burden of proof to the employer.

Overall, the GDPR, specifically art. 22, provides some protection against algorithmic discrimination. However, that protection is limited and does not protect employees in all cases of algorithmic discrimination.

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Presumed Product Defect – the New Dimensions of the European Product Liability Reform

ABSTRACT: *The question of whether the Product Liability Directive¹ (PLD) can fulfil its original purpose and function effectively today has been raised several times. In 1985, the community legislator introduced and popularised a set of rules that created the objective liability of the producer. Since the PLD was adopted, the technological environment has changed radically. Moreover, the small number of product liability cases before the courts (at both the EU and national levels) suggests that the instrument has not achieved, or has not fully achieved, the breakthrough for which it was designed. In response, the Commission of the European Union adopted an important package of proposals in September 2022. A reformed Draft of the Product Liability Directive (hereinafter: Draft, Draft Directive)², as well as a Draft directive to harmonise artificial intelligence with tort (non-contractual) liability, the so-called AI Liability Directive³, was adopted. After an introductory summary of the PLD's current concepts, this study analyses the product liability regime from a sustainability perspective, by contrasting the shortcomings of the current regulatory framework with the novelties of the draft package, particularly in terms of the burden of proof and producer exemption.*

KEYWORDS: *product liability, burden of proof, exemption, development risk*

- 1 The Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC).
- 2 Proposal for a Directive of the European Parliament and of the Council on liability for defective products, 26.06.2023.
- 3 Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) 28.06.2023.

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1. Introduction

For nearly four decades since its creation in 1985, the Product Liability Directive (PLD) has ensured that victims of damage caused by defective products (covered by the objective scope of the PLD) could bring direct, non-contractual tort claims against producers. At the time of its creation, the PLD was a pioneering instrument, since continental law did not have a similar instrument for the enforcement of claims in the area of private law.

Article I of the PLD states, with noble simplicity, that the producer shall be liable for damage caused by a defect in his product. A product is defective if it does not provide the safety normally expected, particularly in terms of its presentation, reasonably foreseeable use, and the time the product was put into circulation.⁴ The date of putting the product into circulation is particularly important. On the one hand, this marks the beginning of the limitation period for the producer's liability for the product; on the other hand, it is relevant that the product cannot be considered defective simply because, after putting it into circulation, an improved product was placed on the market.⁵ The term "damage" means the death, personal injury, or damage to the health of the injured party and the damage caused by a defective product in any item of property with a lower threshold of 500 ECU⁶, if the property is for personal use and private consumption and was also used by the injured person for his own private use or consumption.⁷ Examining the concept of a product in the PLD, it could be concluded that the subject of a product liability's "legal relationship" could be movable property only. Real estate does not fall within the scope of product liability; however, movable property, which later becomes a component part of another thing (such as real estate), retains the character of a product, so that product liability could be applied to components⁸

In the event of a defective product causing damage, a claim for damages could be made against the manufacturer of the product. The producer of a product is the person or legal person who produces the final product, raw material, sub-product, as well as the person or legal person who identifies himself as the producer of the product with his name and trademark placed on the product.⁹ It is a multi-step and multi-player process before the producer's product ultimately reaches the consumer. To facilitate the enforcement of injured parties' claims, the EU legislator

4 Article 6 of the PLD.

5 Article 6(2) of the PLD.

6 After the replacement of the European Currency Unit (ECU) by the Euro, it has been 500 EUR since 1 January 1999.

7 Article 9 of the PLD.

8 Shapo (1993), p. 281 and Article 2 of the PLD.

9 Article 3 of the PLD.

assumes as a guarantee rule that, in case of difficulty or even unidentifiability of the manufacturer, the distributor's so-called subsidiary liability comes into view. Under Article 3(3) of the Directive, all suppliers and importers shall be treated as producers until they inform the injured party through a request about the producer within a reasonable time.¹⁰ The liability of the importer or distributor is only potential, as he can “release” from the legal relationship of product liability by naming the manufacturer.

The concepts contained in the PLD, which were unambiguous in 1985, have now become somewhat questionable, as the technological environment to which the PLD's legal framework was adapted has changed considerably and is still undergoing rapid development-oriented changes. Today's products could be modified, repaired, and refurbished to an increasing extent, essentially without the producer having any influence on it. Several modern products could hardly be included in the 1985 product definition, the existence of which, if not completely stretches the current product definition of the Directive, certainly broadens it considerably.¹¹ In addition to the ability of products to innovate, the increasing autonomy of products due to artificial intelligence is a challenge. In a significantly changing technological environment, product liability jurisprudence (including trends in national and domestic product liability court cases) is pointing towards the need for a possible product liability reform. The lack of product liability court cases (mainly in domestic courts) indicates that the instrument has not yet achieved the breakthrough that the EU legislator intended, although the Commission has assessed it as an effective instrument for the enforcement of claims in the course of periodic reviews.¹² The burden of proof on the injured party, the shifting of the burden of development risk to the injured party, and, in this context, the very limited professional and financial means available for proof on the side of the injured party and the almost unlimited means available on the side of the producer, may create a disproportionate situation. In such a situation, the injured party, overestimating all this, may decide to opt for a different basis for asserting his claim instead of product liability. Consequently, the question often arises whether the European product liability regime should be amended.¹³

10 In this respect, Act X of 1993 on Product Liability gave a deadline of 30 days for the distributor. (4 § (2) as in the case of the regulations currently in force. (Act V of the 2013 Civil Code of Hungary 6: 553. § (4)).

11 For example, the dilemma of whether to categorise software as a service or as a product, in which the Commission ultimately opted for the latter, is worth mentioning. See Kóhidi and Somkutas, 2017, and Fuglinszky, 2015.

12 See: European Commission: Liability for defective products, 7.

13 See for example, Navas, 2020, p. 77–84, Risso, 2019, p. 201–233 and Williams and Fox, 2019.

In response to these changes, the Commission launched a review of the PLD in 2018.¹⁴ The review will include a multi-stage assessment of whether the Directive remains effective in achieving its original objectives, whether it is efficient, coherent with EU law, and functionally covers the scope of technological changes.¹⁵ To examine the impact of modern technologies on the liability regime, the Commission has also set up a specific liability group to explore in detail the effects of these changes.¹⁶ Similar to the review taking place within the Commission, the European Law Institute has identified the main areas for the revision of the Directive as well.¹⁷ The document identifies areas for possible review in nine guiding principles, including the need to redefine products in light of digital technology and the possibilities for reassessing product failure. This review reached an important milestone on 28 September 2022, when the Commission adopted two major draft documents on this subject, already set out in the abstract. The AI Liability Directive sets out the harmonisation of AI and tort liability in the event of non-compliance or breach of the conditions and requirements set out in the Draft AI Regulation adopted on 21 April 2021 (hereinafter, the AI Liability Directive)¹⁸. While the AI Regulation provides a framework for the use of AI and related services by defining the concept of an AI system¹⁹ and setting out the obligations for providers of high-risk AI systems²⁰, the AI Liability Directive aligns the liability issues arising in this context with tort liability rules and sets out the specific conditions for enforcement. Due to space constraints, the AI Regulation and the AI Liability Directive is not discussed in detail in this paper. Instead, I focus on the provisions of the Draft Product Liability Directive. In this context, the paper focuses on the development risk, which is already a crucial point of product liability, as a case of the exemption of the producer and the burden of proof on the injured party. The Draft Directive introduces decisive changes to the current regulatory principles, including a presumption of the existence of a product defect under certain conditions.

14 Evaluation of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 05.07.2023.

15 Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. 05.07.2023.

16 See also on p. 10.

17 Twigg and Flesner, 2022.

18 Proposal for a Regulation of the European Parliament and of the Council Laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts, 28.06.2023.

19 Article 3(1) of the AI Regulation.

20 Articles 6-28 of the AI Regulation.

2. Areas for Review

In this chapter, I address the issues of producer exemption and proof of harm, which are the most critical areas in product liability. In these areas, the imbalance of power between producers and potential victims, in most cases, the consumers, could be most pronounced, and would be significantly affected by a possible product liability reform. In the relationship between producers and victims, it is clear that the party/parties harmed by product damage is/are at a disadvantage compared to producers with incomparably more economic resources. Noteworthy from the point of view of the balance of power between the injured party and the producer is the rule that the burden of proving the defect and damage and the causal link between them lies with the injured party.²¹ In terms of the burden of proof on the injured party, the Civil Code Act V of 2013 (hereinafter, Civil Code), Section 6:554 § (3), which states that ‘the burden of proof of the defect of the product lies with the injured party’, also has a similar provision. The burden of proving harm in product defect cases, which is problematic in some cases²², could make it difficult to enforce claims in the technological complexity of modern products.²³ However, the European legislator is attempting to compensate for the already vulnerable situation of the victim by introducing some rules in the field of product liability regulation that are favourable to the victim. One example is the provision on the exclusion and limitation of liability, according to which the producer may neither exclude nor limit his liability towards the injured party.²⁴ A similar rule, which is favourable to the injured party, is that the legislator sets a limitation period of three years²⁵ – although shorter than the general five years – for the injured party to bring a claim, while at the same time the legislator extends the liability of the producer and sets it at 10 years from the date of placing the product on the market.²⁶

The strict and objective institution of product liability, in terms of the exclusion of limitation of liability and somewhat relaxing the strictness of the time limit for the producer's liability, which is set at 10 years from the date of placing the product on the market, allows the producer to be exempted in many cases. For example, the producer is exempted if he proves that he did not place the product on the market, that he did not manufacture or market the product for non-commercial purposes, or that the defect that caused the damage was not present at the time of placing the product on the market or arose subsequently, and that the defect results from compliance with mandatory rules adopted by the public authorities, in the case of

21 Fazekas, 2007, p. 118 and Article 4 of the PLD.

22 Kóhidi, 2010, p. 305–316.

23 Amato, 2019, p. 77–95.

24 Article 12 of the PLD.

25 Article 10 of the PLD, Civil Code 6:558 § (1).

26 Fazekas, 2007, p. 118, Article 11 of the PLD, Civil Code 6:558 § (3).

the producer of a component part, where the defect results from the design of the product in which the component part is incorporated or the defect is attributable to instructions given by the producer of the product.²⁷ Similarly, Section 7(1) of Act X of 1993 on Product Liability defines the scope of the producer's exemption and defines in Section 6:555 § (1) a)-e) The Civil Code. This list is a taxonomy, since, in the spirit of maximum harmonisation, the omission of any ground for exemption, or the extension of such grounds, thereby making them more burdensome for the producer and more favourable to the injured party, would be contrary to Community law.²⁸

Article 13 of the PLD provides that 'this Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified'. The PLD is generally considered a consumer protection directive and therefore seemed to fit well into the range of consumer protection directives in Community law with minimum harmonisation requirements.²⁹ Consumer directives in Community law mainly set minimum standards³⁰, and the so-called minimum clause gives the national legislator the power to adopt rules that are more favourable to consumers than the requirements of the directive.³¹ It is this "consumer protection character," as well as the unaffectedness of the injured party's contractual, non-contractual, or special liability claims existing at the time of notification of the Directive, as reflected in Article 13, which may lead to the erroneous conclusion that the PLD is also to be understood as a minimum harmonisation requirement.³² The problem of harmonisation of national law in light of Article 13 of the PLD was resolved by the Court of Justice of the European Union (hereinafter, ECJ) in three judgments published on the same day in 2002, which also highlighted the need for maximum harmonisation obligations in terms of product liability. In *Commission v. France*, the ECJ ruled that a national measure allowing claims for damage to property below the threshold of €500 on the basis of product liability was contrary to Community law. The legislation also extended the strict product liability rules to the distributor and further tightened the scope of the producer's exemption, with an additional exclusion of liability only if the producer has taken all necessary measures to prevent or avoid the damage caused by the defective product.³³ In *Commission v. Greece*, the ECJ also found that the measure, which did not contain the €500 threshold, was contrary to

27 Article 7(a) to (f) of the PLD.

28 Machnikowski, 2016, p. 28.

29 Menyhárd, 2010, p. 19–24.

30 Menyhárd, 2000, p. 24–25.

31 Menyhárd, 2010, p. 19–24.

32 Fuglinszky, 2015, p. 589.

33 Judgment of 25 April 2002 in Case 52/00 *Commission v. France*.

Community law.³⁴ In the *González Sánchez* case, the ECJ examined, in the context of Article 13 of the PLD, whether that Article excludes or limits the rights of the injured party under pre-existing contractual or non-contractual liability rules. In the underlying case, the plaintiff received a blood transfusion at the defendant's medical institution and was then infected with the hepatitis C virus. The plaintiff based his claim on an objective form of liability, independent of fault, which was already in force in Spanish law prior to the harmonisation of the PLD. The defendant contested the applicability of the law that favoured the injured party.³⁵ In its judgment, the ECJ explained that the rule in Article 13 does not affect the pre-existing rights of the injured party under other legal rules on contractual or non-contractual liability, but that this exclusion only applies to claims other than those based on warranty or fault and to liability rules of a sectoral nature.³⁶ The ECJ has therefore taken the firm view that, in cases falling within the scope of the PLD, the Article does not allow for the application of forms of liability that are more favourable to the injured party than those provided for in the PLD. In the light of the case-law of the ECJ, it may be concluded that the PLD was adopted in the spirit of maximum harmonisation, under which any derogation from its rules, whether positive or negative, would be contrary to Community law.

In the case of Hungary, the Civil Code. 6:555 § (3) excludes the possibility of exemption from the development risk³⁷ in the event of damage caused by the use of the medicinal product in accordance with the prescription. However, this provision is not in breach of Community law, since the PLD expressly states that, 'where a Member State has already introduced specific liability rules to protect consumers in the field of medicinal products, claims may still be brought on the basis of those rules'.³⁸ In Hungary, such a special liability rule is provided for in Act XCV of 2005 on Medicinal Products for Human Use and other Acts amending the Acts regulating the pharmaceutical market and its Article 21a), b) which provides for the application of the provisions of the Civil Code on damages and product liability, with the exceptions provided for in this Act, to liability for death, disability or damage to health in the event of death or disability caused by the use of medicinal products, and to liability for material damage resulting from non-material damage.

From the cases of exemption, point (e), the case of development risk as a ground for exemption should be highlighted, as it could be said without exaggeration that it is one of the most controversial elements of product liability regulation. Under this ground for exemption, the producer is exempted from product liability claims even

34 Judgment of 25 April 2002 in Case 154/00 *Commission v Greece*.

35 Judgment of 25 April 2002 in Case 183/00 *González Sánchez*.

36 *Ibid*, Menyhárd, 2010, p. 23 and Fuglinszky, 2015, p. 589.

37 Fazekas, Menyhárt, Kóhidi, 2017, p. 280, and Osztoivits, 2014, p. 283.

38 Preamble paragraph 13 of the PLD.

if he proves that the defect was not detectable by the state of scientific and technical knowledge at the time he placed the product on the market. The mentioned exemption, known in the relevant literature³⁹ as development risk or the so-called state-of-the-art clause. It is most commonly referred to in the literature as development risk or state-of-the-art defence/state-of-the-art clause, or also as development risk and state-of-the-art exemption. In addition to the state-of-the-art exemption, the term “development risk” is used several times in the present study to name the exemption, on the grounds that development risk is more widely used and generally accepted in the scientific literature to specify the exemption. Given that the relevant documents (drafts, opinions, position papers) produced in the course of the PLD’s drafting,⁴⁰ as well as the Commission reports⁴¹ resulting from the periodic reviews of the PLD, also use the term development risk as a designation of the exemption. This is why this study also uses the designation of the exemption under the name of development risk.

The reasoning behind development risk is that if the legislator were to place the risk of development on the producer in a one-to-one relationship (not regulated as an exemption), producers would become disinterested in innovation and product development. By keeping the development risk on the producer’s side, it would not be economically profitable to develop newer products, since each product could involve the possibility of potential (damage) claims. Placing the development risk on the producer’s side, or on the side of the consumer, is no longer a purely legal and legislative issue, but also an economic issue of economic efficiency.

39 Inter alia: Fuglinkszky, 2015, p. 655, Wellmann (ed.), 2018, p. 658, Fairgrieve, 2005, p. 320, Machinowsky (ed.), 2016, p. 75, Koziol, Green and Lunney, 2017, p. 542, Fazekas, 2007, p. 119, Fazekas, 2022, p. 142, Surányi, 1994, p. 22, Fairgrieve and Goldberg, 2020, p. 484.

40 Opinion of the Economic and Social Committee, in: Official Journal of the European Communities, C 114, Volume 22, 1979, Document C:1979:114:TOC, COM1976, 372, 17, Opinion of the European Parliament, in: Official Journal of the European Communities, C 127, Volume 22, 1979, Document C:1979:127:TOC, Official Journal of the European Communities, C 127, 21 May 1979, 62.

41 First Report on the Application on the Council Directive on the Approximation of Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1995, Brussels, COM (95) 617; Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products, 2001, Brussels, COM (2000) 893; Third report on the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC of 25 July 1985, amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999); Fourth report on the application of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999., Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of the Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), COM/2018/246.

This exemption could be put in parallel with the PLD's and the other most controversial rule of the European product liability regime, namely the rule imposing the burden of proof on the injured party. Under Article 4 of the PLD, the burden of proving the damage, the defect and the causal link between the defect and the damage lies on the injured party. From the point of view of the injured party, this unfavourable rule of evidence and the reference to state-of-the-art as an exemption – which inevitably leaves much room for manoeuvre – *ad absurdum* may render the whole product liability regime irrelevant. This justifies the essentiality of the review, and foresees the reconsideration of the producer's exemption about development risk and to work out a more proportionate allocation of the burden of proof.

3. The Presumed Product Defect

The Draft Directive puts the provisions on evidence on completely new grounds and thus seeks to alleviate some of the burden of proof on victims in the context of development risk. In this respect, an article with a completely new meaning would be added to the PLD, which is titled "Disclosure of Evidence" in the Draft. In this Article, the EU legislator would regulate the scenario where an injured party (plaintiff) claiming damages for harm caused by a defective product has already presented sufficient facts and evidence to establish the credibility of the claim for damages, he or she may be entitled to have the defendant ordered by the court to disclose the available evidence upon request.⁴² The question may arise as to what effect such a change in the burden of proof in a case of necessity and the imposition of the obligation to provide and disclose evidence on defendants would have on the practice of national courts. Undoubtedly, compliance with this obligation on defendants is not negligible from a data protection perspective, since the obligation on defendants to disclose evidence may also concern data covered by the obligation of business secrets. In paragraph 2 of the same Article, the Draft relaxes what at first sight appears to be a strict rule for the defendant by limiting the disclosure of evidence⁴³ to what is necessary and proportionate to support the plaintiff's claim and by making the interest of the third party concerned in the protection of confidential information and business secrets subject to examination by the national court in this context.⁴⁴ To safeguard business secrets and confidential information, the Draft further provides that when using data and information in this field in court proceedings, the court shall, upon reasoned request from the parties, order

42 Article 8 (1) of the Draft.

43 Article 8 (2) of the Draft.

44 Article 8 (3) of the Draft.

the parties to take special measures to preserve confidentiality, i.e. to use closed processing.⁴⁵

Article 9(1) of the Draft takes over, almost unchanged, the provision of the current Article 4 of the PLD, according to which the burden of proving the damage, the defect, and the causal link between the defect and the damage lies with the injured party. In this respect, no radical change could yet be mentioned in relation to the current rules. The novelties appear as from Article 9(2) of the Draft. Unlike the current rules, Article 9(2) of the Draft sets out the conditions under which the product is presumed to be defective or faulty. The presumption of defectiveness is established by the Draft in the event of a defendant's failure to provide evidence, as set out in Article 8, or in the event of successful proof by the plaintiff. Thus, the product is presumed defective when the defendant has failed to comply with the obligation to provide relevant evidence, the plaintiff proves that the product does not comply with mandatory safety requirements under EU or national law designed to protect against the risk of damage, or the plaintiff proves that the damage was caused by an apparent failure of the product in the normal course of its use or under normal circumstances.⁴⁶

The Draft goes beyond the mere presumption of product defect and extends it to the causal link between product defect and damage, where it is established that the product is defective and the damage is of a nature that is typically compatible with the defect in question (for example, in the case of digital products, digital manufacturing files).⁴⁷ Contrary to the main rule in Article 4 of the PLD currently in force and Article 9(1) of the Draft, by proving the defect of the product and the likelihood of the typicality of the resulting damage, the injured party no longer has to prove causation, since it must be presumed.

4. Conclusions

Based on the rules of the Draft discussed above, we can conclude that the EU legislator from four decades of practice has recognised the most problematic areas of product liability law, that is, the disproportionality between the burden of proof on the injured party and the burden of proof on the producer's side of proving that the defect cannot be detected in the state of scientific and technical knowledge. This unequal situation is compounded by the fact that the professional and financial means available for proof are very limited on the injured party's side and almost unlimited on the producer's side. In response to these circumstances, the EU legislator could alleviate the burden

⁴⁵ Article 8 (4) of the Draft.

⁴⁶ Article 9 (2) (a) to (c) points of the Draft.

⁴⁷ Article 9 (3) of the Draft.

of proof on the injured party by establishing a legal presumption of the existence of a product defect on the one hand, and of a causal link between the product defect and the damage suffered from it on the other. To alleviate the excessive difficulties of proof on the plaintiff's side, the Draft would allow the court to have the discretion to presume the causal link between the defect and the damage, or both, if the technical or scientific complexity of proving the defectiveness of the product creates excessive difficulties for the plaintiff. This would require that the plaintiff prove/make probable that the product contributed to the damage and that it is likely that the product was defective or that the damage was likely caused by the defectiveness of the product.⁴⁸ As a rebuttable presumption in the nature of a *presumptio iuris*, the Draft would allow the defendant to challenge the existence of excessive difficulties of proof on the side of the plaintiff and to rebut any of the presumptions set out in paragraphs (2), (3), and (4) of Article 9.⁴⁹ By applying these rules, the substantive law would regulate and sanction the defendant with the plaintiff's "claim of necessity"⁵⁰ if the defendant breaches its obligation to provide evidence in connection with the successful evidentiary proceedings and fails to rebut the presumption of product defect and causation in this context.

48 Article 9 (4) (a) to (b) points of the Draft.

49 'The defectiveness of the product shall be presumed, where any of the following conditions are met:

(a) the defendant has failed to comply with an obligation to disclose relevant evidence at its disposal pursuant to Article 8(1); (b) the claimant establishes that the product does not comply with mandatory safety requirements laid down in Union law or national law that are intended to protect against the risk of the damage that has occurred; or (c) the claimant establishes that the damage was caused by an obvious malfunction of the product during normal use or under ordinary circumstances." (Article 9(2) paragraph of the Draft), "The causal link between the defectiveness of the product and the damage shall be presumed, where it has been established that the product is defective and the damage caused is of a kind typically consistent with the defect in question." (Article 9(2) paragraph of the Draft), "Where a national court judges that the claimant faces excessive difficulties, due to technical or scientific complexity, to prove the defectiveness of the product or the causal link between its defectiveness and the damage, or both, the defectiveness of the product or causal link between its defectiveness and the damage, or both, shall be presumed where the claimant has demonstrated, on the basis of sufficiently relevant evidence, that: (a) the product contributed to the damage; and (b) it is likely that the product was defective or that its defectiveness is a likely cause of the damage, or both.' (Article 9(2) paragraph of the Draft).

50 Section 184 § (1) of Act CXXX of 2016 on the Code of Civil Procedure provides for a party in a state of necessity, in which case the court may accept the facts of the case as true if it has no doubts as to their truth. The presumptions appearing in the Draft may not result in a one-to-one situation of necessity to prove a claim (with regard to the entire right, the claim for damages), since the situation of necessity to prove under the Code of Civil Procedure refers to the information necessary for the assertion of the so-called secondary facts (see Miczán, 2018, p. 26), the plaintiff must have the information concerning the primary, disputed right; however, this may be reduced to the proof of product damage in certain cases, in accordance with the new rules of evidence appearing in the Draft.

The Draft Directive, which was developed during the revision of the PLD and adopted in September 2022, is a striking testimony that the EU legislator has recognised the gaps and problematic areas in the European regulation of product liability. By rethinking the burden of proof for the injured party and creating a presumption of a causal link between the product defect and the damage, the legislator would reverse the logic of the current rules on proof, and would relieve the plaintiff who provides evidence of the full burden of proof of the development risk (currently imposed on him). However, the extent to which the new rules set out in the draft would facilitate the efficient handling of product liability claims. Would evidence or even counter-evidence in the course of the evidentiary procedure to prove presumptions based on probability and their rebuttal not further complicate the whole legal procedure and create additional obstacles to the effective and smooth enforcement of claims by product liability victims against producers?

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Martin MACH*

EU Member States' Position on Data Protection

ABSTRACT: *The European Union places a strong focus on the protection of personal data through European law. This is an important and sensitive area that requires clear rules through legal regulation. However, within the same legal area, the Member States can act from different positions. For example, in the case of the right to be forgotten, a State, or its institutions, is only the appellate authority, while private companies are the first decision-makers. Conversely, in the case of the European Commission's proposal to combat child sexual abuse, a relatively strong position is expected from the State, which should be able to intervene at its discretion in the privacy, including the personal data, of its citizens. This article thus focuses on the different legal positions of the Member States in the area of data protection and tries to determine whether a stronger or a weaker position of a Member State is better for the protection of personal data.*

KEYWORDS: data protection, GDPR, European Union, member state

1. Introduction

Nowadays, personal data protection is rather associated with European law rather than national law. This is probably partly due to the almost 30-year history of personal data protection of European law, and partly because seems more logical to deal with personal data protection at the level of the European Union (EU) rather than at the individual Member State level. This hypothesis is supported by two facts. First, data protection is currently mainly linked to the Internet and IT systems. Due to the use of modern technologies, it is very difficult to monitor when and if data have crossed national borders and, as the Internet knows no (national) borders, it is more convenient to deal with data protection issues at an international level. Second, there is the need to ensure a uniform approach to data protection. If each Member State were to set its own legal regulation for data protection, the legislative differences would be very difficult to comply with in practice. By contrast, the common rules for EU Member States

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are clear, easier to comply with in practice and the same for all parties concerned. In addition, they reinforce the so-called “Brussels effect” or “Strasbourg effect” that Lee A. Bygrave uses in the context of data protection.¹ This is one of the positive aspects of data protection at EU level, as data protection decisions have a global impact² and the EU has the potential to be a world leader in data protection. At the same time, although legal sources are used in the legislative process involving all Member States and the EU does not legislate as a third party distinct from the Member States, by this delegation, the States voluntarily lose decision-making power in a very sensitive area. Together with the involvement of private companies in data protection, there is the concern that this is a further weakening of the power of Member States. As decisions in this area are taken by the Member States and the EU, it may look like a weakening of the power and sovereignty of the Member States. Is this really the case or is the involvement of Member States in data protection a positive aspect?

2. Personal Data and Their Protection

Nowadays, users’ personal data³ is a “golden egg” for companies who can collect more personal data of a user and predict his behaviour or estimate his character and other characteristics.⁴ As it is becoming more difficult to protect one’s privacy in the digital age and every user leaves a digital footprint, this is a worrying observation. The truth is that whoever has users’ personal data can make money from it. However, the collection of these data can seem unobtrusive. For example, when shopping in an online store, a discount is offered after registration, while physical stores have loyalty cards. An example of the long-term interest and struggle over personal data is the Kiwi vs. Ryanair dispute. The Kiwi flight search engine does not give Ryanair direct contact with the customer, meaning Ryanair cannot send them offers to buy additional services, which form part of the company’s earnings. While in 2021, the Czech Constitutional Court dismissed Ryanair’s 2019 lawsuit,⁵ in 2023, a court in Milan upheld Ryanair in the dispute between the companies.⁶ Such disputes dem-

1 Bygrave, 2021.

2 For example, Latin America. Carrillo and Jackson, 2022.

3 ‘Personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. Art. 4 par. 1 General Data Protection Regulation.

4 Youyou, Kosinski and Stillwell, 2015, pp. 1036-1040.

5 www.expat.cz, 2021.

6 Ryan, 2023.

onstrate how valuable personal data are. Large big tech companies such as Google, Meta,⁷ Amazon and others profit from personal data. Although fines for processing personal data in contravention of the law are in the tens or hundreds of millions of euro,⁸ the fines are still not high enough and big tech companies are profiting from the data breaches despite the fines.⁹

However, the protection of personal data is not primarily based on preventing data trafficking, but on protecting European users and their rights to the protection of their personality and privacy. The EU recognises the importance of protecting personal data to such an extent that it does not even allow the migration of data outside the EU. The concern about the possible misuse of data by other countries, such as China,¹⁰ is understandable, but the US, which has traditionally been a strong cybersecurity partner and ally of the EU, is no exception. This has already been discovered in practice by Meta, which transferred Facebook users' data to the US.¹¹

2.1. Legal Framework

Legislation at the EU level dealing with the protection of personal data existed as early as 1995, namely Directive 95/46/EC of 24 October 1995.¹² This is at a time when Internet search engines already existed, namely Archie (1990), Aliweb and W3Catalog (both 1993), while today's Google (1998), Bing (2009) or Yahoo (1995) did not exist. Additionally, the number of Internet users, and thus search engines, varied widely. Whereas in the year Directive 95/46/EC was issued there were approximately 16 million Internet users (i.e. approximately 0.4 % of the world population),¹³ in the year of the Google v. Spain judgment (2014), there were already 3 035 million (42.3 % of the world population) and this figure is still growing. In 2022, for example, there were 5473 million internet users (69 % of the world population).¹⁴ Therefore, although the 1995 Directive regulated data protection at EU the level, shortly after its entry into force, the Internet and its parts reached such a boom that the Directive failed to offer adequate legal regulation. Five years later, in 2000, the Charter of Fundamental Rights of the European Union was presented at the Nice Intergovernmental Conference and became legally binding, together with the Lisbon Treaty, on 1 December

7 The company that owns Facebook, Instagram and Whatsapp.

8 E.g. Amazon was fined 877m dollars, i.e. approximately 811m Euros. Clark, 2022.

9 In recent years, Google LLC received fines in the order of millions of euros in 2019 (Hanselaer, 2019.), 2020 (Hanselaer, 2020.), or 2022 (Brook, 2022.).

10 Hartmann, 2023.

11 edpb.europa.eu, 2023.

12 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995.

13 www.internetworldstats.com.

14 Ibid.

2009. While the latter contains Article 8 on data protection, it is rather a general provision typical of national constitutions and does not respond to the technological developments since Directive 95/46/EC was issued. As such, the case law applies the Directive to current challenges is important, such as the *Google vs Mario Costeja Gonzales* judgment,¹⁵ where the Court derived the right to be forgotten in 2014. This is an expanded right to erasure in light of the great development of Internet search engines and their ability to make greater inroads into the privacy of individuals. As a result, the new right can only be found in the legal source in Article 17 of Regulation (EU) 2016/679,¹⁶ which did not come into force until 2 years after the judgment. Regulation 2016/679, mainly as General Data Protection Regulation (GDPR),¹⁷ takes over all existing principles of protection and processing of personal data that underpin the EU system and confirms that protection travels across borders at the same time as personal data. It also responds to the latest developments in modern technology and further develops and strengthens users' rights. In the context of GDPR, the most frequently mentioned, and most important big tech company in terms of the right to be forgotten, is undoubtedly Alphabet Inc., which owns the Google search engine. This engine accounted for almost 92 % of all searches from users within the EU last year, with Microsoft's second-ranked search engine Bing accounting for just over 4 %.¹⁸

The development and empowerment of users can be divided into two categories: preventive and remedial. The preventive category includes the possibility for users to obtain information on which of their personal data are processed and for what purpose. The remedial category allows users to seek compliance with applicable legal rules and, where appropriate, seek redress.

These requests are addressed to the counterparty responsible for content on the Internet. The GDPR has introduced the institutes of data controller and data processor,¹⁹ who are responsible for the information disclosed and for any future redress. The institute of the data controller is interesting in that it is not only a guarantor of compliance with the applicable legal rules, but also a first-instance arbitrator in any disputes with the possibility to negotiate redress. These are mostly private big tech companies such as Google, Meta, Amazon or Microsoft and this institute significantly empowers them. As this is a European regulation, one would rather expect an EU body or an EU agency, or even a Member State in the form of a national authority, to be the arbitrator here. The position of private companies with a

15 *Google Spain v. AEPD and Mario Costeja González*, C-131/12.

16 General Data Protection Regulation.

17 Ibid.

18 StatCounter Global Stats.

19 The processor differs from the administrator in that, as part of the activity for the administrator, he can only perform such processing operations that the administrator authorises him to do or that result from the activity for which the processor was authorised by the administrator.

focus on Internet search engine operators has been examined in more detail in *The position of internet search engines as arbitrators of first instance*.²⁰ However, there is also the current proposal of the European Commission to combat child sexual abuse on the Internet, which goes in a different direction from the current trend. Here, not only is the EU body, the EU Independent Centre for Combating Child Sexual Abuse, represented, but the Member States are also involved by having to designate national bodies to review risk assessments. As such, would it be better in the future to have a more active involvement of the EU and Member States in the protection of the personal data of their citizens, or maintain the current strong position of private big tech companies?

Both approaches have advantages and disadvantages. The greater involvement of private companies and the emergence of the institute of data manager has the same advantages as a *public-private partnership* (PPP). One advantage is the expected faster response of the private sector compared to the public sector. The speed of remediation in the area of data protection that is a key factor, as personal data is a highly sensitive matter and, especially for unauthorised disclosure, the situation needs to be remedied as soon as possible. However, there is also a need for proper legal regulation of what a private partner can and cannot do by defining its powers as well as its obligations. The EU addresses this through the GDPR, which some previous studies evaluate positively and consider it a model for other countries.²¹ However, the passage of this procedure in practice remains difficult, for example, in the case of requests for the application of the right to be forgotten by the user in search results through the so-called *watchdog search engines*. These engines draw, among other things, on publicly available information provided by the Member States. In the event of a subject's request for the rectification of personal data disclosed in the search results of watchdog search engines, the data controller is in a situation where it could potentially have to decide on the correctness of a Member State's compliance with the legal rules in the field of personal data. However, this is not legally permissible. The author has addressed this paradox in his research, where he concluded that, in the case of a request by a data subject for redress in the results of a search on a watchdog search engine, where the source of the published information is the State, the accuracy of the information and compliance with the law must again be assessed by the State.²²

The involvement of the Member States in the protection of users' personal data is necessary because, although data controllers have enhanced powers based on the GDPR, they still face certain limits. At the same time, the Member States need to be

20 Mach, 2023a.

21 For example, Mingyu, 2020.

22 Mach, 2023b.

monitored on how they handle personal data,²³ which is why the involvement of EU institutions is also beneficial. As such, the question remains how to appropriately allocate data protection rights and obligations between the Member States and EU institutions?

2.2. Positions of Member States in the Protection of Personal Data

As mentioned above, the protection of personal data is found in the EU legal order. However, the protection of personal data is an area of law also represented in national legal orders. This is also the case in both areas of private and public law. In private law, the protection of personal data can be linked to the right to the protection of personality. This includes, for example, the right to be forgotten, the right to the protection of honour and respectability, the right to the protection of likeness, the right to privacy, and the right to informational self-determination. These are rights guaranteed to the individual as the sovereign of his or her personal sphere. In public law, there are regulatory laws for the protection and processing of personal data. In this case, the State regulates the handling of personal data and, as with any legislation issued by it, is the guarantor in this area. This makes it logical that Member States should be actively involved in personal data protection. Insofar as they guarantee the rights in question, regulating them under national law, it is also up to them to enforce them within their own institutions and, where appropriate, negotiate redress. From this viewpoint, it makes sense to involve the Member States in the protection of personal data to a greater extent, in a way similar to what the European Commission is planning to do in the fight against child sexual abuse.

However, the Member States are limited by EU law in the area of personal data protection for a uniform approach. Specifically, European law defines two approaches to the involvement of Member States, or their authorities, in personal data protection. In the first, the Member State is the first decision-maker in cases of personal data protection breaches, while in the other, it is only the appellate authority. In the second case, the role of first decision-maker is played by private big tech companies on the basis of the GDPR. This involves another type of actor in the protection of personal data. Specifically, apart from the Member State and the EU, there is a data controller,²⁴ usually a large private company falling into the category of big tech companies. However, this competence of big tech companies may seem problematic, especially considering that research points to two facts. The first is the warning of the excessive power of these private companies comparable to that of States. Hongfei Gu

²³ Šotová, 2023.

²⁴ Art. 4 par. 7 General Data Protection Regulation.

even argues that big tech companies have created a “digital empire” that is relatively independent of political authority due to their control of data and monopolisation of technology. In terms of data collection and use, private big tech companies are ahead than Member States and have thus gained their own sovereignty.²⁵ The second fact is that there is a paradoxical situation, where companies that are supposed to decide on data breaches are punished by the EU for doing the same.²⁶

2.3. Position of Big Tech Companies in the Protection of Personal Data: Welcome or Unwanted?

The actual position of big tech companies in the area of data protection in relation to the powers and strength of EU Member States is quite interesting. Have big tech companies been given too much power to be the first arbitrators in data breach assessments at the expense of Member States?

To answer this question, it is necessary to focus on procedural application according to legal norms. When big tech companies are the first arbitrators in data breach assessment cases, this is not a substitution of a private company for a Member State. Member States still figure in the adjudication process, but only in an appellate capacity. However, is this “relegation” to the appellate position really a sign of the strong position of private big tech companies and the weakened position of Member States? Before answering, two facts should be highlighted.

As a first fact, the appellate body is usually superior to the first instance body. This relationship of subordination and superiority is necessary for the decision of the appellate body to be considered legally binding by reason of its superior legal force. It has been hypothesised in academia that the weakened position of Member States is visible in the possibility to decide only on cases where the data subject's request for the erasure of personal data is rejected,²⁷ that is, cases where big tech companies grant applicants' requests are final decisions and there is no possibility to comment or appeal such decisions to delete private data from the Internet. In practice, this means reduced control over cases in which a private company complies. However, this may only be problematic from a State's perspective in the cases mentioned in paragraphs (d) and (e) of Article 17 of the GDPR in the narrower sense, or paragraphs (c), (d) and (e) in the broader sense.²⁸ In the opinion of the author, this is not direct evidence of greater legal power of private companies than that of Member States. One could choose as a counter-argument the assumption of the application of the

²⁵ Gu, 2023.

²⁶ For example, Zandt, 2023.

²⁷ Finck, 2018.

²⁸ Art. 17 c), d), e), General Data Protection Regulation.

principle of *prohibitio reformatio in peius*,²⁹ one of the fundamental principles of the right to a fair trial. However, the author is of the opinion that the current state of affairs is due only to an omission in the procedural definition.

The second fact is related to the first and, in the author's opinion, should be mentioned to be the course of appeal proceedings. In the event of an appeal, the private company, as the first-ranking arbitrator, does not have the possibility for a so-called *autoremedy*.³⁰ Therefore, after the decision and subsequent appeal of the data subject against the rejection of the request, the private company does not have the possibility to reiterate or change the decision. In case of an appeal, the whole process, including the final decision, takes place at the level of the State or its authority. This again, in the author's view, supports the thesis that private companies do not have a stronger position than Member States, although they cannot be denied a strong position in the protection of personal data.

As such, in the author's view, the thesis that private big tech companies have too much power at the expense of Member States in the area of data protection cannot be fully confirmed. However, they do have a significant role in the protection of personal data, especially in the example of procedural involvement in the right to be forgotten mentioned above. This raises the questions of the advantages and disadvantages of involving private companies in the sensitive area as data protection, whether in the end the advantages outweigh the disadvantages and whether the involvement of private companies makes sense.

2.3.1. Benefits

As personal data is a very sensitive area for any data subject (i.e. an individual), this topic must be treated with the utmost seriousness. It is necessary to ensure that the situation is remedied as quickly as possible, so that the interference with personal rights is as short and causes as little damage as possible. It is the speed of the response, coupled with the ability to negotiate a remedy, which, in the author's view, is the strongest argument for the involvement of private companies in the protection of personal data. The GDPR imposes the obligation on the data controller to *erase personal data without undue delay*.³¹ Although the definition of "*without undue delay*"

29 It expresses the prohibition of changing the decision for the worse, that is, to the detriment of the person who was affected by the contested decision and filed the appeal himself or in whose favour the appeal was made.

30 A special possibility of correcting the decision issued by the authority in the first level of decision-making. This usually happens after the decision has been appealed. In the case of the right to be forgotten, this is thus an appeal.

31 Art. 17 par. 1, General Data Protection Regulation.

is a vague legal concept, not a specific timeframe,³² in first instance decision-making practice for requests to apply the right to be forgotten, Google can make a decision within a month of a request to delete personal data.³³ It is precisely the one-month time limit for dealing with requests to remove personal data from the Internet that Member State authorities probably need.³⁴ For completeness, one law firm has stated on its website: 'Unfortunately, search engines often take significantly longer as they are inundated with requests. It is therefore important to seek legal advice as soon as you become aware of the information being available online'.³⁵ However, the author of has not been able to trace these cases and believes that this may be the case with smaller local companies, not large search engine companies to whom the majority of all right to be forgotten requests arrive.

The second half of the quotation is also interesting from the viewpoint of this article, due to mentioning the importance of finding "*legal advice*" as soon as possible. Indeed, the right to be forgotten is well understood, as any individual can apply for it without the need for in-depth legal knowledge. Moreover, this is one of the positives of the involvement of private companies in data protection. In the case of the right to be forgotten, the origin of this right dates back to the judgment of *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*.³⁶ However, only one criterion, or exception, can be found in this judgment, where it is necessary to assess whether there is an "overriding public interest" in the specific information that the data subject wishes to have removed. If the answer is in the affirmative, the information in question is not deleted and the interference with the applicant's fundamental rights is justified by the overriding public interest of society in having access to the information in question.³⁷ The total of six conditions³⁸ and five exceptions³⁹ currently applied are legally defined in the GDPR. As such, this constitutes a significant difference from the single criterion set out in the judgment. However, the first to extend the criteria from the Costeja judgment was not the EU or any public administration representative but a private company, namely Google. On 30 May 2014, just 17 days after the judgment in the Costeja case of 13 May 2014, Google

32 Only the maximum period is traceable. In par. 3 of Art. 12, the maximum period is up to 1 month and in complex cases, up to 2 months.

33 British law firm confirms the decision within weeks and also reports a record for a response from Google within 10 minutes of sending a request. The unwanted material is then removed from the search results that same day. See: www.samuels-solicitors.co.uk.

34 A shorter period can only be considered in cases of the creation of new departments dealing only with this activity, which would incur significant financial expenses.

35 Matthews, 2020.

36 *Google Spain v. AEPD and Mario Costeja González*.

37 *Google Spain v. AEPD and Mario Costeja González*, p. 97.

38 Art. 17 par. 1, General Data Protection Regulation.

39 Art. 17 par. 3, General Data Protection Regulation.

introduced the first web form⁴⁰ available in 25 languages for sending requests for the right to be forgotten from users,⁴¹ as well as an initial scheme for the procedural processing of users' requests for the right to be forgotten.⁴² This made the right to be forgotten available to the general public without the need for legal training or legal representation. The importance of this step can be assessed by comparing it with the USA, that is, if a data subject in the EU and the US were to make the same request. In the US, there is generally very little that an individual can do because they have to disclose which law has been violated. Even a reference to the violated law is a barrier for a layman to make his or her request due to the legal ignorance of the procedure or the law being violated in his or her case.⁴³ Again, one can see the speed of the response from a private company in creating a form, which would probably have been much longer for a public administration. If we look at the US, a great example of this in practice was the creation of a website for the purposes of *The Patient Protection and Affordable Care Act* (PPACA), known as Obamacare.⁴⁴ What the public administration failed to do was to create a functional system, which private companies did in 5 months.⁴⁵

If a big tech Company can work faster than the public administration and can meet expectations in terms of the planned goals, this brings another argument for engaging these companies, namely financial savings. Replacing the big tech company with a Member State institution would mean new costs for salaries, IT equipment, training, energy and more to achieve the same result, but over a longer period of time. This is in direct contrast with the principle of efficiency and economy of each Member State. Alternatively, the State would not have to worry about being replaced by a private company and, thus, losing its power or sovereignty. Member States are still involved in the protection of personal data, even in the case of the right to be forgotten. They serve as an appellate body, which, as previously mentioned, is superior to the first instance. Therefore, the sovereignty or power of the State cannot be construed as being under threat from big tech companies. Conversely, the involvement of public institutions up to the level of the appellate body can be seen as an additional sub-advantage. For the resolution of trivial cases already at the level of first instance decision making, the resulting decisions are obvious and State institutions would be overwhelmed by them. They thus only decide in appeal cases, where there is a presumption of more difficult decisions. Looking at Google's *Transparency*

40 reportcontent.google.com.

41 Par. 22, <https://www.wsj.com/public/resources/documents/google.pdf>.

42 Lee, 2016, p. 1038.

43 Mach, 2023c, p. 648.

44 Patient Protection and Affordable Care Act, Public Law 148, U.S. Statutes at Large 124 (2010): 119-1024.

45 See Contorno, 2014.

Report,⁴⁶ half of the applications are resolved by Google. Assuming that every unsuccessful applicant for the right to be forgotten appeals, the State institution decides on "only" half of the applications. In this way, it is not overwhelmed by applications and can deal with them more quickly at a lower cost. However, the real percentage will be less than 50 % of all requests, as the author considers it unrealistic that every data subject whose request is rejected would actually appeal.

2.3.2. Disadvantages

The previous subsection mentioning the advantages of involving private companies in data protection suggested that their involvement is desirable and necessary. However, to have an overall perspective on the subject, it is also necessary to mention the disadvantages of such involvement. Here, the author's previous published research will also be considered.⁴⁷ In addition to the speed with which a situation can be rectified, the protection of personal data requires that the decisions on these matters be taken in accordance with the applicable legislation. As this is a sensitive area of interference with the personal rights of the individual, it would be desirable to make the decision-making process as transparent as possible, as this also increases trust in the decision-maker. However, for private companies, transparency is not at the level it could ideally be. For completeness, the first instance decision-making process is not completely non-transparent. In addition to the form, Google has also come up with a procedural scheme for decision-making, as already mentioned.⁴⁸ However, there are still too many uncertainties, which should be explained more to the general public. The application process has been briefly but clearly developed, for example, by a collective of authors in *Five Years of the Right to be Forgotten*.⁴⁹ However, it is important that each application is manually assessed by at least one employee of the search engine company. These decisions could still be changed retrospectively by the Google Advisory Council, made up of 10 independent experts.⁵⁰ The problematic fact is that the last traceable meeting of the Advisory Council was in Brussels on 4 November 2014.⁵¹ Since then, there was no further mention of a meeting, as the Google Advisory Council was intended to serve mainly in contentious cases, which should no longer occur, because since 26 November 2014, the EU issued detailed Guidelines on the implementation of the Court Of Justice of the European Union

⁴⁶ transparencyreport.google.com.

⁴⁷ Mach, 2023a.

⁴⁸ Lee, 2016, p. 1038.

⁴⁹ Bertram et. al., 2019, p. 960.

⁵⁰ [archive.google](https://archive.google.com).

⁵¹ www.youtube.com, 2015.

judgment's of the Costeja case.⁵² The final report of the Advisory Council is dated 6 February 2015.⁵³

Transparency was also addressed by Google, in section 5.5 of the Google Advisory Board's final report,⁵⁴ where it was divided into four points:

- 1) transparency to the public regarding the completeness of name searches;
- 2) transparency to the public on individual decisions;
- 3) transparency to the public on anonymised statistics and general search policy;
- 4) transparency to the data subject on the reasons for refusing his or her request.

Peripherally related to the criticised transparency of the decision-making process and concise justification in case of denial of a request is point 4), on which the report further states that '... some experts have suggested that Google is also responsible for providing detailed explanations of its decisions'.⁵⁵ However, these expert recommendations were already redundant and outdated by 6 February 2015 (i.e. at the time of the report's publication), as the Implementation Guidelines of 26 November 2014 already contained a requirement for sufficient justification for the rejection of the request, which would be made available to the national data protection authority in the event of an appeal.⁵⁶ Search engines must thus provide sufficient justification in the event of a refusal and, if this is not the case, which is sometimes criticised, recourse should be made to the national data protection authority, which is also a logical follow-up of the refusal; that is, if the data subject is not satisfied with the outcome of the assessment and the justification does not seem sufficient, an appeal against the decision to the national authority is a procedural step to which he or she has the right. Therefore, the subjective assessment of the sufficiency and completeness of the applicant's reasoning does not change the facts and, as the data subject has the right to appeal the decision, any insufficient reasoning cannot be considered as a denial of the individual's right to be forgotten. However, an objective assessment of the facts must contain sufficient reasons for the decision on the grounds of the right to a fair trial.

The second point of criticism of the transparency of the decision-making process on applications concerning the failure to disclose details of internal procedures. It is, at least as a basic outline, clear how the application is processed and handled. Once the search engine receives it, it is assessed by at least one member of staff on the basis of

⁵² WP225 Guidelines on the implementation of the Court of Justice of the European Union judgment on "Google Spain and Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González" — C-131/12, 2014.

⁵³ The Advisory Council to Google on the Right to be Forgotten, 2015.

⁵⁴ Str. 21, tamtéž.

⁵⁵ Ibid.

⁵⁶ WP225 Guidelines on The Implementation, 2014, p. 15, b).

the criteria given. The request is then either approved, the search results are modified and the third party on whose website the personal information in question appears is informed of the deletion from the search results, or the request is rejected and the applicant is informed of this, along with the reasons why the request was rejected. However, the author of this paper notices an absence of more detailed information about the staff who decide on the requests. This does not mean a list of the names of employees; in administrative proceedings for traffic offences, it is not the name of the official concerned that is important, but his or her professional qualifications for the post. In case of private companies that decide whether to keep sensitive personal data publicly available, it is not known what qualifications or minimum requirements the employees deciding on the applications have. However, the author considers this to be a very important piece of information, because even if the criteria by which applications are assessed are given, this assessment cannot be described as a purely monotonous activity, but also requires a sense of detail, good analytical thinking, knowledge of the law and more. Therefore, it would be useful for the public to know the minimum standards required for these positions and how they are observed.

Greater openness of the requirements for the positions of employees assessing right to be forgotten requests serves, among other things, as good public relations for the companies that own the search engines. Moreover, these individual steps may signify openness and could alleviate the concerns about abuse of the position of private companies, which is the third category of criticism of private companies as first-party arbitrators. These concerns are not specific to the right to be forgotten, and there is significant research on the possible abuse, or proven abuse, of dominance by big tech companies.⁵⁷ Specifically, the right to be forgotten is about the aforementioned paradoxical situation of search engines deciding on the availability of information, but it is on this availability and mediation of information that they have built their business model. Mark Leiser has written extensively on this topic in his paper *Private jurisprudence and the right to be forgotten balancing test*,⁵⁸ which examines how Google approaches the balancing test between the right to be forgotten and the public's right to be informed. This balancing test can also be interpreted as Google's dilemma of whether to delete personal information, thereby applying the right to be forgotten, or to keep it, thereby supporting its business model. Other researchers also conclude that these balancing tests should be carried out by States, but are decided by search engines, which replace the judicial process, thus weakening the role of the State at the expense of the private search engine.⁵⁹ In addition, search engines have their own archives and geological mutations, which may ultimately

⁵⁷ For example, Félix, 2022, p. 137, Dembrow, 2022, Hutchinson, 2022.

⁵⁸ Leiser, 2020.

⁵⁹ Chenou and Radu, 217, p. 76.

raise suspicions of the abuse of their positions, or at least the attempt to circumvent the original meaning of the right to be forgotten. Julia Powles and Enrique Chaparro consider Google's solution of removing only links on its domains to be trivial and undermining the Costeja vs. Google ruling, and Google's decision to create the aforementioned Advisory Board to be tactical. In their view, Google's intention was merely to move the discussion away from the core issue (i.e. the introduction and protection of digital rights), and rather create a conflict between the apparently divergent views of the EU and the US.⁶⁰ However, with all these critical comments, it is important to highlight an important factor that features strongly and has already been mentioned. Search engine companies are primarily set up to make a profit and are, on the one hand, willing to submit to regulation, but on the other hand, will try to operate within the rules so that they can maximise their profits. Therefore, if they are criticised that their procedures and processes are not identical to those of public authorities, this is not such a surprising finding. It is on these differences that the PPP method works, which brings the advantages already mentioned, but there are also disadvantages or risks arising from it.

3. Conclusion

It is already obvious that the involvement of private big tech companies in data protection has its advantages and disadvantages. With the ever-increasing influence of modern technology on our lives, the power of private companies tied to modern technology is also increasing. The more we use the Internet, for example, the bigger the digital footprint we will leave. Companies with a business model built on these digital footprints which contain users' personal information have strong positions in this area and may appear to be becoming adversaries of the State, or certain monsters that need to be defeated. Alternatively, the current trend, to which the author agrees, is that there is the possibility of seeking cooperation between States or the EU and private companies. Big tech companies have strong positions in this day and age, where it is commonplace to be online, and have become an overlooked force that would be too much work to eliminate completely. However, as power increases, so should responsibility. That is, the EU, Member States and big tech companies should all get involved in protecting individuals' personal data. It is thus more beneficial for not only the States and the EU to be involved in the protection of personal data, but also the big tech companies, which can be more effective in the online world than the States themselves.

⁶⁰ Powles, Chaparro, 2015.

However, what needs to be checked in the case of granting powers to these companies is whether they are operating in compliance with the law and it is also necessary to set up an adequate legal framework. If some powers are delegated to private entities because of their strong positions, there is also the need for a strong position of the legislator to ensure that this delegation produces the desired results through appropriate regulation. Moreover, modern technologies are specific due to their current rapid evolution, so developments need to be constantly monitored and new challenges in the form of risks need to be assessed. The EU is trying to respond to current developments with the DMA and DSA legislative proposals, but the question is whether these acts will prove beneficial in curbing abuses of power by large big tech companies. The need for constant monitoring must continue, as big tech companies are in a strong position, meaning that a strong EU or Member States are needed to regulate and set boundaries. This is because the big tech companies, within their business model, are testing the limits of the rules set and interpreting them to their own best advantage.

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Miklós Vilmos MÁDL*

The Evolution of Licensing Electricity Generating Capacity in Hungary

ABSTRACT: *Although the European Union faced significant challenges due to the energy crises, the mild winter and its expeditious response to shortages helped prevent major disruptions for consumers. One of the natural responses to the crises was to pursue greater energy sovereignty, where domestic generating capacities played a key role, although such emphasis was not seen in a long time. This shift warrants a closer examination of the regulations governing the establishment of generating capacities. Accordingly, this article situates the issue within its historical context by tracing the evolution of rules governing electricity generation capacities, beginning with the origins of electricity regulation in Hungary. The article discusses the modern legislation of the 1930s, followed by the regression during the communist era. In the second half of the historical overview, it addresses the legislation adopted after the 1989 regime change and how these reforms were shaped by the developments in European energy legislation. After introducing the legal heritage of the electricity sector, the article shifts focus to the current 2007 Act on Electricity and its regulation of the establishment of electricity-generating power plants. In the final section, the article addresses contemporary challenges of licensing wind turbines and household-size small power plants. The overview of the key developments in Hungarian electricity legislation, with particular emphasis on the regulation of generating capacity, fills a notable gap in the literature and can serve as a foundation for future comparative analysis.*

KEYWORDS: *power plants, licensing, electricity, renewable energy, energy law, historical development.*

1. Introduction

In Europe, cheap energy was long taken for granted, but in recent years, this assumption has been upended, as Europe experienced a severe energy crisis for which it was largely unprepared. The European Union (EU) weathered the initial shocks because

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of a mild winter, swift action to secure alternative gas supplies and well-stocked gas storage facilities ahead of the heating season. Although the EU survived the initial impact of the crises, it had long-lasting economic effects.¹ Although it appears that the surge in energy price primarily concerned Europe, however, this was not the case. To illustrate the global consequences of the energy crises, it is essential to reference the International Energy Agency's World Energy Outlook report,² which states that the proportion of people lacking access to modern energy has been rising for the first time in a decade.³ However, the rise in energy poverty was not pronounced in Europe. When the crises struck, and the EU began importing liquefied natural gas (LNG) as an alternative to Russian gas, member states were willing to pay a premium on these imports, significantly more than what these supplies previously fetched in other parts of the world. By offering a higher price, Europe redirected LNG shipments towards its own market. However, this came at a cost: most original destinations—especially developing nations—were deprived of their expected imports as they could not compete with the prices offered by European nations. Subsequently, massive shortages occurred in countries like Pakistan or Bangladesh, driven by the lack of energy supply.⁴ One of the primary responses by nations to the crises was a renewed focus towards energy security, which was also a key finding in the aforementioned Energy Outlook report.⁵ As a consequence of the energy crises, the previously dominant emphasis on environmental protection within the energy triangle shifted in favour of energy security. To enhance energy security, the most evident solution is to reduce energy dependence by expanding national generating capacity. This response was clearly visible at the European level as states sought to boost their domestic production, often reverting to resources⁶ that had previously been deemed harmful to the environment.

This article seeks to elucidate how new electricity generation capacity is established, a process that faces significant contemporary challenges owing to infrastructural and regulatory constraints. The article provides an overview of the Hungarian electricity sector over the decades, focusing on the evolution of legislation for establishing generating capacity. Next, it delves into the current legal framework. In the concluding section, it addresses two contemporary challenges in constructing generating capacity. An analysis of the development and the current status of the Hungarian electricity sector can serve as a basis for further comparative research on the topic.

1 Official Journal of the European Union (2023) Opinion of the European Economic and Social Committee on the impact of the energy crisis on the European economy, (2023/C 293/02).

2 IAE, 2022, p. 10.

3 Ibid. p. 29.

4 Tayyaba et al., 2023, p. 1.

5 IAE, 2022, p. 30.

6 Eckert and Sims, 2022.

2. Hungarian Energy Mix

Before considering the regulatory issues, it is imperative to discuss the Hungarian energy mix. Firstly, it is important to examine the primary energy sources and reliance on their import from the perspective of energy security. The two most important sources of primary energy are oil and gas, accounting for about 30% of primary energy mix.⁷ In both cases, there is heavy reliance on imports, with around 80% of resources sourced from abroad.⁸

Meanwhile, the third most important primary source is nuclear energy, holding a more than 15% share.⁹ Since the construction of the Paks Nuclear Power Plant, nuclear energy has maintained a stable position in the Hungarian energy mix. The last source worth mentioning is biomass and waste, holding a little more than a 10% share. Other sources, including most renewables, do not represent more than 5% of the primary energy mix, with coal falling into this category, as its significance has been steadily declining. Essentially, in terms of primary energy consumption, Hungary relies on imports for 64% of its needs; the figure would have likely been higher without the contribution of the Paks Nuclear Power Plant.¹⁰

Considering that this article emphasises the electricity sector, it is important to examine how Hungary generates electricity. Anticipatedly, as seen with primary energy sources, the Paks Nuclear Power Plant holds a significant position in Hungary—a role that becomes even more pronounced in electricity generation, where it accounts for 44% of gross electricity generated. This is followed by gas, which represents 25% of the electricity generated, and photovoltaic (PV) energy, which holds a 13% share in electricity generation. However, it is worth noting that the share of PV energy has increased 80-fold between 2014 and 2022.¹¹ Moreover, the data used does not include 2023, but due to a surge in gas prices, a significant amount of new PV capacity has been installed. Accordingly, PV is expected to overtake gas as the second-largest source of electricity generation in the near future. PV is followed by coal with an 8,5% share, although its share has been steadily declining. Meanwhile, biomass holds a 4% share, while wind accounts for a mere 1,7% share.

As in most European states, it is evident that growing concerns of climate issues has influenced Hungary's energy mix, leading to the replacement of the most polluting

7 KSH, 6.1.1.5. A primer energiaszolgáltatás szerkezete (The structure of primary energy use) [%].

8 MEKH, 2.2 Elsődleges kőolaj- és kőolajtermék és másodlagos kőolajtermékek éves ellátása (Annual supply of primary petroleum and petroleum products and secondary petroleum products) 2014-2022, 3.2 Éves földgázmérleg 2014-2023.

9 KSH, 6.1.1.5. A primer energiaszolgáltatás szerkezete (The structure of primary energy use) [%].

10 Ibid.

11 MEKH, 4.2 Bruttó villamosenergia-termelés éves adatai (Annual gross electricity production data) 2014-2023.

sources with carbon-neutral electricity-generating capacities. Regarding Hungary's reliance on energy imports, it can be concluded that the country has increasingly depended on energy imports over the past decades. However, in the case of electricity, the installed generating capacity is relatively close to national consumption by being able to provide approximately 80% of demand.¹²

3. Evolution of the Legal Framework of the Electricity Sector With Emphasis on Establishing Generating Capacity

Following the overview of the physical realities of the electricity sector, the discussion focuses on the legal framework governing Hungary's electricity sector. This section examines the most important aspects of legislation that shaped the structure of the electricity sector, with particular focus on how they have regulated the establishment of generating capacity.

Although energy law is considered a nascent legal area, it actually dates back to as early as the 19th century, with legislation addressing certain energy sources such as coal. This branch of law¹³ has since expanded to other prominent sources, namely oil and gas. The significance of these sources evolved following World War II, with the adoption of new rules on nuclear and renewable sources.¹⁴

Hungary followed a similar path, our initial legislation addressing the electricity sector being introduced as early as 1888.¹⁵ The reason why it is considered ahead of its time is that the first public electricity generating plant in the world—established in New York—became operational just six years before the adoption of the Act.¹⁶ However, considering Hungary's historical position in the early days of public electricity supply, it can be understood as in Temesvár, the first public electricity generating power plant, became operational in 1884.¹⁷ The Act XXXI of 1888 on Telegraphs, Telephones and Other Electrical Installations, as its name suggests, only partially addressed the sector. The reasoning of the Act states that its adoption was driven by the growing prominence of the telegraph, telephone and other electrical installations. However, establishing these solely through state investment would have posed

12 KSH 6.1.1.8. Villamosenergia-mérleg (Electricity balance) [gigawatt hours].

13 There is still no consensus on whether energy can be considered a separate branch of law, or in what other way it should be categorised. It is relatively challenging to simply refer to energy law as it does not reflect its vast nature and the branches of law it covers, from environmental to administrative law. Nevertheless, it is clear that in recent years, it has gained widespread recognition, with various dedicated courses dealing with the issue.

14 Heffron, 2021, p. 1.

15 Szuchy, 2021, p. 1.

16 Kerényi, 1997, p. 121.

17 Gerse, 1994, p. 75.

a significant financial burden given the current economic climate. Therefore, it was essential to create opportunities for private sector investments, while also ensuring regulation and the implementation of a licensing process due to the public interest associated with such infrastructure.¹⁸ Accordingly, the Act provides that primarily, the state has the right to establish and operate the installations mentioned above, and in the event that entities other than the state want to enter the sector, they will be given licences.¹⁹ The Act states that generally, the licensing process comes under the purview of the minister of public works and transport. However, there are certain exceptions, such as those crossing the Hungarian border or those connecting settlements of more than 10.000 people that already have state-owned telegraph offices or telephones. The licensing, in these cases, is channelled to the legislative branch.²⁰ The Act does not specify the process of licensing, nor does it regulate the content of the licence in detail, but establishes certain basic terms such as retaining the state's key position in regulating the sector.²¹ However, it states that private property owners and houses owners must bear, without compensation, the crossing of telegraph, telephone and electrical installations of public interest above their real estate.²² Besides, the installations addressed prior to the Act do not contain specific regulations on establishing generating capacity or licensing. One of the reasons why the rules on the plants could be licensed were not discussed is that, in most cases, the decision to establish public electricity generating capacity was not made by plant operators, but by the cities themselves.²³ For example, Budapest opted for a tendering procedure that resulted in the granting of two concessions. It should be noted that during this period, the development of generating capacity was heavily supported by foreign capital.²⁴

Throughout this Act, it is evident that matters concerning telegraph, telephone and other electrical installations were of great importance to the state, with significant public interest associated with their functioning and development. However, amid financial constraints, the state was unable to exclusively perform this activity, paving the way for the entry of the private sector, but in such a manner that the state retains the key position, not just to establish installations but also licensing procedures.

18 1888. évi XXXI. Act reasoning – Telegraphs, Telephones and Other Electrical Installations, general reasoning.

19 1888. évi XXXI. Act reasoning – Telegraphs, Telephones and Other Electrical Installations, art. 1.

20 Ibid. art. 2.

21 Ibid. art. 3.

22 Ibid. art. 7.

23 Antal, 2014, p. 48.

24 Németh and Lázár, 2005, pp. 7–8.

3.1. 1931 Act on the Development, Transmission and Supply of Electricity

After the initial applications of electricity in Hungary, it became clear that the growth of the sector was unstoppable, and its development gained momentum. Until the Treaty of Trianon—which mutilated Hungary’s territory—there were approximately 200 electricity-generating power plants operating in the country.²⁵ Following the war, the development continued, and owing to the specific nature of the sector by the late 1920s, a monopolistic structure began to take shape, with four companies controlling more than 80% of public electricity generation.²⁶ To enhance development and extend the scope of electrification in Hungary, the 1931. XVI Act on the Development Transmission and Supply of Electricity was adopted, which can be considered the first act to specifically regulate the electricity sector.²⁷ The period during which the Act was adopted was a particularly productive time in Hungarian legal history, making it a modern piece of legislation. A significant achievement of the Act is its clear distinction between the private and public spheres, and establishing for the latter, a system that respects private autonomy.²⁸ This legislation has specifically addressed the issue of licensing electricity-generating capacity; the relevant provisions will be discussed in the following section.

Reflecting its modern perspective, the Act contained separate provisions for power plants intended for self-use and those serving the public. No licensing procedure was needed for power plants that generated electricity for self-use, but when the plant’s power output exceeded 500-kilovolt ampere—or 0,5 MW—it had to be reported to the minister of commerce.²⁹

The second category is public plants. The Act clearly states that to provide electricity for a fee, the generating capacity has to be established through a licence issued by the minister of commerce.³⁰ The first issue that has to be addressed is how the decision-making process to establish public generating capacity was made. Principally, the licensing document can be obtained following a tendering procedure that takes into account the capacity to meet the electricity demands of a specific area in the most favourable condition, as well as the energy economics of the country. The Act strongly commits to hydropower, prioritising it over other energy-generating sources.³¹ The reasons behind the inclusion of this provision in the Act reveals that it stems from the acknowledgment that the country is not very rich in energy sources. Therefore,

²⁵ Antal, 2014, p. 48.

²⁶ Németh and Lázár, 2005, p. 9.

²⁷ Ibid. p. 9.

²⁸ Szuchy, 2018, p. 81.

²⁹ 1931. XVI. Act on the Development Transmission and Supply of Electricity, art. 6–7.

³⁰ Ibid. art. 2.

³¹ Ibid. art. 10.

hydropower is preferred³² to maintain the already scarce resources.³³ The content of the licensing document was relatively simple; it has to include the name of the license holder, location of the plant, capacity, etc., among others, while also addressing the pricing and discounts the licence holder is required to provide for street lighting.³⁴ After obtaining the licensing document, two more steps had to be fulfilled to generate electricity. The first concerns the construction licence, issued with a deadline; however, the minister of commerce, in case of a request, could delay it.³⁵ The second, operation licence, which is related to the transmission and distribution of electricity, can only be issued if the license holder follows the requirements included in the licensing document and the construction licence.³⁶ Finally, it is worth noting that the aforementioned rules can be applied with certain facilitations to plants with a specific output, although the details of the output are not defined either in the Act or its reasoning.

As mentioned in other academic papers discussing the Act, it can be considered a remarkably forward-thinking piece of legislation, bearing notable similarities to current regulatory frameworks.³⁷ Specifically regarding licensing, it can be said that the Act was relatively advanced, particularly in its distinction between private and public spheres. Moreover, the provision for applying simplified requirements to plants below a certain capacity closely mirrors contemporary regulatory frameworks. In hindsight, the Act did not lead to a significant transformation in Hungary's electrification; most of the established capacities were built primarily for industrial purposes.³⁸

3.2. The Electricity Sector Following Communist Takeover

As Soviet troops advanced through Hungary, the nationalisation of the industry began, initially as a form of retaliation against businesses previously owned by Germans.³⁹ Soon after, nationalisation extended to the coal sector⁴⁰ where existing private coal mines were no longer allowed to be managed by their rightful owners.⁴¹ This initial limitation of ownership rights was later extended by assuming ownership

32 Art. 10. stated that other sources, such as lignite and waste coal, also had preferential treatment, but hydropower had priority over these as well.

33 1931. XVI. Act reasoning – Development Transmission and Supply of Electricity, art. 10.

34 1931. XVI. Act on the Development Transmission and Supply of Electricity, art. 11.

35 Ibid. art. 14.

36 Ibid. art. 16.

37 Szuchy, 2018, p. 86.

38 Moreover, World War II also did not help the electricity generation sector, as a significant portion of the existing infrastructure was destroyed. See: Németh and Lázár, 2005, pp. 10–11.

39 Mihályi, 2018, p. 14.

40 Halkovics, 1998, p. 580.

41 12.200/1945. Decree on the State Management of Coal Mines.

for the benefit of the state.⁴² Not long after the coal sector, the electricity sector underwent nationalisation with the adoption of the 1946. XX Act,⁴³ which brought certain electricity sources and their connecting power lines under state ownership. The adoption of the Act was prompted by multiple arguments as to why state ownership of such installations is necessary. First, the reasoning of the Act⁴⁴ states that existing capacities were inadequate as they catered to only 42% of the settlements. Generally, Hungary lagged behind Western countries in terms of electrification, and the devastation caused by the war further worsened the situation. Moreover, it was argued that private plants pursued individual business interests to the detriment of the public. As state intervention in the sector was not adequate—according to them—the equipment was obsolete, and the prices were high, which negatively affected the economy in general. Furthermore, since the electricity sector played a critical role in reconstructing the state after the war, successful development of the sector is only possible by following common guidelines. This justifies the nationalisation of power plants and transmission lines of national importance, and granting state intervention for the operation of plants that are not nationalised.⁴⁵ As observed, the Act devoted considerable effort to justifying the need for significant state intervention in the sector. However, it fell short in addressing the treatment of the previous owners of the nationalised installations. The Act stated that compensation would be provided, the details of which would be regulated in a separate legislation. However, in reality, this promised compensation was not delivered, yet the nationalisation nevertheless proceeded.⁴⁶ The Act did not mark the end of nationalisation; two years later the 1948. XXV Act⁴⁷ was adopted. Although it was primarily aimed at the industry, it also included electricity installations employing more than 100 people since August 1946 as well as every electricity distributing company.⁴⁸ The Act aimed to correct what was seen as a ‘mistake’ of the previous regulation, which effectively divided the economy into two distinct halves—one state-owned and the other remaining in private hands. According to the Act’s proponents, this division hampered economic progress and obstructed the objectives of the three-year plan.⁴⁹

42 1946. XIII. Act on the Nationalisation of Coal Mining.

43 1946. XX. Act on the State ownership of power plants and transmission lines of certain electricity plants and other provisions related to electricity management.

44 1946. XX. Act reasoning – State Ownership of Power Plants and Transmission Lines of Certain Electricity Plants and Other Provisions on Electricity Management.

45 Ibid.

46 This round of nationalisation concerned the power plants with a capacity of over 20.000 kilowatts, which meant by 1947, more than 45% of the public electricity, See Németh and Lázár, 2005, p. 11.

47 1948. XXV. Act on the State Ownership of Certain Industrial Enterprises.

48 Ibid. art. 1.

49 1948. XXV. Act reasoning – State Ownership of Certain Industrial Enterprises.

Regarding this period, it is worth noting that the 1931. XVI Act remained in force, and it took a relatively long time to adopt a new act on the subject.

3.4. Replacing the 1931 XVI Act

As mentioned earlier, the notably forward-thinking 1931 Act⁵⁰ remained in force throughout the nationalisation of the electricity sector and continued to do so long afterward. The change came in the early sixties in the form of the 1962. IV Act on the Generation, Transmission and Distribution of Electricity. As stated in the reasoning of the Act, the previous legislation became obsolete in managing the sector, driven by the shift in market structure towards state ownership. Subsequently, new rules had to be introduced to manage the sector, which had undergone a comprehensive structural change following the communist takeover.⁵¹ The most fundamental principle of the new Act was that an electricity plant supplying consumers could only be state-owned.⁵² This provision reflects the profound structural changes that took place in the sector, while also signalling that, given the social implications of electricity supply, it will remain a state-governed sector.

With regard to establishing generating capacity and licensing of power plants, the text of the Act was rather terse. Nevertheless, similar to the former legislation, it also differentiated between public power plants and those that provided electricity to businesses.⁵³ Regarding the latter, the executing Act⁵⁴ specified that these can only be installed in three cases: if they are intended as backup plants following the failure of public plants; if they are more efficient than their public counterparts; and if waste can be used to power them. According to the executive decree of the Act concerning the establishment and operation of public plants, the provisions governing investments were to be applied, with the ministry of heavy industry responsible for setting the technical details.⁵⁵

This approach departed from the tendering procedure, instead opting for a system that offered no clear pathway for market players to meet the country's energy needs.

50 The reasoning of the new act also acknowledged that in the capitalist system, the 1931 Act was forward-thinking, and it satisfied the needs of the old system. See: *ibid.*

51 1962. IV. Act reasoning – Generation, Transmission, and Distribution of Electricity, general reasoning.

52 *Ibid.*

53 1962. IV. Act on the Generation, Transmission, and Distribution of Electricity, art. 2.

54 40/1962. Government Decree on the Execution of the 1962. IV. Act on the Generation Transmission and Distribution of Electricity, art. 13.

55 *Ibid.* art. 9.

3.5. The First Act on Electricity After Regime Change

Before examining how the 1994. Act on Electricity, adopted after the regime change, influenced the Hungarian electricity sector, it is worth emphasising the impact the communist regime had on the sector's structure. The structure of the Hungarian electricity market was similar to that in the Soviet Union, where a vertically integrated state-owned electricity company was responsible for generation, transmission and distribution—the Hungarian Electricity Works Trust (MVM Trust).⁵⁶ Following the regime change, it became evident that the current infrastructure in the electricity sector was obsolete and more generating capacities were needed. However, MVM Trust was unable to deliver this owing to financial constraints; therefore, the private sector had to be involved.⁵⁷ To prepare for the upcoming market opening, MVM Trust was transformed into a limited liability company, Hungarian Electricity Works (MVM). Although they remained connected, the power plants were granted their own legal personality. Following this significant step, attempts were made to privatise the power plants in 1993; however, since they were unsuccessful, the legislators had to realise that a solid legal base had to be adopted for successful privatisation.⁵⁸ Subsequently, in 1994, the Act on Electricity⁵⁹ was adopted; while it did not aim to establish a fully competitive market, it nevertheless had a profound influence on the future development of the sector.⁶⁰ According to the reasoning of the Act, the goal was to establish a system where market conditions govern the regulation of establishing generating capacity, while the licensing system ensures the protection of interests related to electricity supply.⁶¹

Similar to previous regulations, the Act also differentiated between public and private plants, but this time, the private plants were defined as those generating more than 40% of power for self-use, while public plants generate more than 60% of power for public use.⁶²

Establishing generating capacity begins with the minister of economy, which submits the power plant establishment plan every alternate year either to the government if the capacity of the plant is 200–600 MW or to the Parliament when it is over 600 MW of output or a nuclear plant.⁶³ Besides the minister, the Hungarian Energy Authority is another actor in the licensing procedure. There is a special category of

⁵⁶ Árva et al., 2016, p. 201.

⁵⁷ Kerekes, Szörényi and Diallo, 2019, p. 6–7.

⁵⁸ Rátky and Tóth, 2022.

⁵⁹ 1994. XLVIII. Act on the Generation, Transmission and Supply of Electricity.

⁶⁰ Kerekes, Szörényi and Diallo, 2019, p. 6.

⁶¹ 1994. XLVIII. Act reasoning – Generation, Transmission and Supply of Electricity.

⁶² 1994. XLVIII. Act on the Generation, Transmission and Supply of Electricity, art. 3.

⁶³ Ibid. art. 4.

plants that do not fall under the regular licensing procedure—these include plants with an output capacity below 20 MW.⁶⁴ The Act strictly required that only legal entities can participate in the licensing procedure; moreover, they have to be based in Hungary.⁶⁵ The first stage was the preliminary licensing process, during which the authority could evaluate whether the license application is substantial, well-planned and well-founded. This licensing step is particularly valuable, as it allows the authority—before the establishment license—to determine whether or not the proposed plant is suitable to proceed to the licensing procedure stage. Following the preliminary license, a public hearing is held, which is essential for the granting of future licenses in cases where it is prescribed by law. Following these steps, the two traditional stages of licensing occur in sequence: first, the establishment licence and second, the operation licence, both of which are issued for a limited period.

These were the initial licensing rules in the Act; however, over time, amendments were made, and the licensing procedure changed. Later, the Act was amended to address certain grey areas in the previous legislation. In addition to non-public plants with a capacity below 50 MW from 1995, the Act on Electricity also required operators of public plants with a capacity below 20 MW to notify the Authority of the initial start-up of the plant. This also clarified the scope of the operating licence, explicitly stating that it permits the operation of public plants with a capacity exceeding 20 MW and private plants with a capacity exceeding 50 MW.

Regarding the practical aspects of the Act, it is worth noting that the Hungarian electricity market could not part with the central position of MVM as the market worked on a single buyer basis where only MVM purchased electricity and sold it to suppliers. Although, in certain aspects, the Act was relatively conservative in the electricity sector, it established a strong legal foundation upon which subsequent legislation was built.⁶⁶ The strong foundation also facilitated the privatisation that occurred a year after the adoption of the Act, although not without challenges; the long-term contracts between the new owners and MVM later became obstacles for the creation of a competitive European electricity market.⁶⁷

3.6. 2001 Act On Electricity Adopted in the Spirit of Future EU Membership

Shortly after the 1994 Act was adopted, significant changes occurred in European integration concerning energy. In 1996, the first liberalisation package was adopted, which included the 96/92/EC Directive establishing common rules for

64 Ibid. art. 10.

65 1994. XLVIII. Act reasoning – Generation, Transmission and Supply of Electricity, art. 10–11.

66 Kerekes, Szörényi and Diallo, 2019, p. 6.

67 Vince, 2007, p. 304.

the electricity market. While this article does not delve into details of the package, from the perspective of establishing generating capacity, it is essential to highlight that the Directive provided two ways to establish capacities an authorisation and/or a tendering procedure, granted that these are objective, transparent and non-discriminatory.⁶⁸

Starting from 1990, the fact that countries previously behind the Iron Curtain—among them Hungary—would once be part of European integration became increasingly apparent initially through the Association Agreement⁶⁹ in 1991, then with the Copenhagen criteria in 1993. Subsequently, in 1994, Hungary submitted its application for full membership.⁷⁰ As Hungary was clear about joining the community and as the Copenhagen criteria contained requirements about adopting ‘acquis communautaire’, the first liberalisation package had a significant influence on the Hungarian electricity regulation. To implement the provisions of the 96/92/EC directive, the 2001. CX. Act on electricity was adopted,⁷¹ as the general reasoning of the act stated that adapting to new developments in the electricity sector transcends beyond the scope of the previous Act.⁷² The new Act eliminated the single buyer structure of the previous system, and aligning with the Portuguese example,⁷³ opted for a dual market model where there was a difference between those who purchased electricity from public utility providers and eligible consumers⁷⁴ who could purchase electricity from the power plants or electricity trading license holders. In this model, electricity generators were allowed to freely sell their capacities on both markets beyond what was reserved⁷⁵ by MVM with long-term contracts.⁷⁶ In essence, this meant that the competitive market was positioned only as an alternative to the regulated segment,⁷⁷ although such an approach also had its fair share of reasons.⁷⁸

Regarding the establishment of generating capacity, the government’s previous position has been reduced to legislative functions in the detailing of the licensing

68 Although there were two options, the states, in practice, almost in all cases, opted for the authorisation procedure. See: Fazekas and Németh, 2022, p. 92.

69 In it Hungary declared the intent to become a full member of the European community.

70 Szabó, Kovács and Debisso, 2018, pp. 63–70.

71 Fazekas and Németh, 2022, p. 92.

72 2001. CX. Act reasoning – Electricity, general reasoning.

73 Brzózka, 2012, p. 37.

74 181/2002. Government Decree defined the category of eligible consumers: initially, those consuming over 6.5 GWh were eligible, then the scope was later extended to consumers with lower consumption levels.

75 Such a reservation served the sound functioning of the regulated market so that it has adequate amounts of capacity and does not depend on the decisions of the generators.

76 Fazekas and Németh, 2022, p. 95.

77 Brzózka, 2012, p. 37.

78 The regulated market, especially for certain types of consumers, guaranteed more stability than a model that was entirely market-based.

procedure and the determination of the energy policy requirements of power plant establishment.⁷⁹ Such energy policy requirements are outlined in the executive government decree of the Act, and include the promotion of modern technologies, use of renewables and generation of electricity from waste.⁸⁰ A more prominent role in licensing was assumed by the Authority, which was responsible for issuing, modifying and revoking licenses, as well as for organising tendering procedures for generating capacity.⁸¹ As already mentioned, the 96/92/EC Directive proposed two strategies for licensing, authorisation and tendering, but in practice, almost all countries opted for the authorisation procedure;⁸² so did Hungary. The primary method for establishing power plants was through authorisation, although tendering was also included as an alternative option, which could be invoked if the available electricity supply was insufficient to meet consumer demand.⁸³

The licensing rules in the new Act align with the provisions of the Directive as it emphasises the implementation of a licensing process that is non-discriminatory.⁸⁴ Contrary to the previous concept, the new Act stipulates that a license must be granted in principle, and can only be denied under specific circumstances defined in the provisions.⁸⁵ Regarding the actual stages of power plant establishment, the Act eliminated the preliminary licensing phase and introduced a two-tier licensing system for plants with a generating capacity exceeding 50 MW. For those with capacities below 50 MW but over 1 MW so-called small power plants, the Authority had to be notified of the start of operation, although no license was needed; for plants with capacities under 1 MW, neither licensing nor notification was necessary.⁸⁶ The two-stage licensing procedure established for plants with capacities over 50 MW was intended to only contain requirements necessary for the safe operation of the electricity system and not to promote competition.⁸⁷ Nevertheless, the requirement for the operator to be based in Hungary remained.⁸⁸ The first licence is the power plant establishment licence, which is issued for a limited time.⁸⁹ In this procedure, the applicant must provide a feasibility study and statements of the competent local

79 2001. CX. Act on Electricity, art. 4. paras. e and f.

80 180/2002. (VIII. 23.) Government Decree – on the execution of certain provisions of the 2001. CX. Act on Electricity.

81 2001. CX. Act on Electricity, art. 10. paras. a and h.

82 Fazekas and Németh, 2022, p. 92.

83 2001. CX. Act on Electricity, art. 106. para. 3.

84 Ibid, art. 50. para. 2.

85 2001. CX. Act Reasoning – Electricity, arts. 49–52.

86 In essence, there were three categories: under 1 MW, no licence or notification needed, 1–50 MW notification of operation to the authority, and +50 MW two-tier licensing.

87 2001. CX. Act Reasoning – Electricity, arts. 53–64.

88 180/2002. (VIII. 23.) Government Decree – on the execution of certain provisions of the 2001. CX. Act on Electricity, art. 34.

89 2001. CX. Act on Electricity, art. 53.

authorities,⁹⁰ but it also has to comply with minimum energy efficiency values.⁹¹ Following the establishment licence, the second step is the power plant operation license with which the licensee can begin to generate power.⁹² For power plants that generate electricity on the regulated market, the Act contains special requirements.

As observed, the Act was adopted in the spirit of the liberalisation of the electricity sector. It was intended to ease the requirements and also simplify the procedure of establishing new generating capacities. Moreover, legislation with output limits also promoted the establishment of smaller power plants, which, due to their attributes, entailed the promotion of cleaner energy. As others have observed, the Act diminished the previously significant role of the state in the establishment procedure, shifting the risk of power plant construction on to investors.⁹³

3.7. 2007 Act On Electricity and the Establishment of Fully Open Market

Principally, two key factors must be highlighted to explain why, just six years after the previous Act on electricity, a new Act was adopted. The first reason was the adoption of the second energy package. Shortly after the first package, the commission conducted an inquiry into the functioning of the internal energy market, and their reports⁹⁴ revealed significant discrepancies between member states, resulting in an uneven playing field within the internal electricity market.⁹⁵ To address the gaps in the first package, the second legislative package was adopted with a new Directive on the internal market in electricity.⁹⁶ A significant change in the Directive specifically addressed the establishment of generating capacity, as the authorisation procedure became the default method, while the tendering procedure was limited to three specific circumstances: a) if the capacity achieved through authorisation is not sufficient to provide supply security, b) in the interest of environmental protection and c) for promoting less developed new technologies also only in the case where it cannot be done through authorisation. These and other changes, such as the highly debated third-party access⁹⁷ entailed that the Hungarian legislation had to be changed. The second reason why the new Act was adopted can be found in the dual market

90 Ibid.

91 180/2002. (VIII. 23.) Government Decree – on the execution of certain provisions of the 2001. CX. Act on Electricity, art. 42.

92 2001. CX. Act on Electricity, art. 56.

93 Kerekes, Szörényi and Diallo, 2019, p. 10.

94 COM (1998) 167 final, 16.3.1998, COM (1999) 164 final.

95 Eikeland, 2011, p. 20.

96 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.

97 Johnston and Block, 2012, p. 21.

structure of the 2001 Act. It was intended as an interim step in between the previously fully regulated market and a fully free one, but it soon became clear that it could not fulfil its bridging function. The competitive market was merely an alternative, with eligible consumers switching between it and the regulated market depending on which offered better prices.⁹⁸

Subsequently, in 2007, the new Act on Electricity⁹⁹ was adopted—it still remains in force—that terminated the dual market model and introduced the fully open market.¹⁰⁰ The establishment of the open market entailed the termination of the previously-regulated segment; however, concurrently it introduced the institution of universal supply, which, essentially, assumed the position of a public utility provider. Universal supply meant a system where domestic consumers and small businesses are allowed to purchase electricity from special traders that supply a certain quality of electricity for an equitable price anywhere in the country.¹⁰¹ Such an institution was aimed at protecting certain consumers from abuses.¹⁰² In this new system, distorting competition could only be tolerated in two cases—either to combat the use of a dominant position or to protect vulnerable consumers.¹⁰³

Building on the spirit of the previous Act, this legislation explicitly states that anyone may establish new generating capacity at their own commercial risk, with certain exceptions—such as wind power—which will be mentioned later.¹⁰⁴ Aligning with the Directive's provisions, the Act also mentions the possibility of a tendering procedure for creating generating capacity, but only in three cases specified by the Directive.¹⁰⁵ Furthermore, following the growing attention towards carbon-neutral and sustainable energy sources, the Act introduces support schemes for the establishment of renewable power plants and those generating electricity from waste.¹⁰⁶

With regard to licensing procedures, the regulation distinguishes between two main categories of power plants: small plants with a capacity of 0,5–50 MW and those having capacities over 50 MW. For small power plants, the Act establishes a simplified licensing procedure comprising a combined licence that covers establishment and operation. The construction of such plants can begin only after obtaining the licence; moreover, the licence holder is required to notify the authority and transmission system operator two months before commencing operation. The notification requirement was later supplemented by an obligation to also notify them of the operation 30

98 Fazekas and Németh, 2022, p. 98.

99 2007. LXXXVI. Act on Electricity.

100 2007. LXXXVI. Act Reasoning – Electricity, general reasoning.

101 Fazekas and Németh, 2022, p. 100.

102 Nagy, 2022, p. 300.

103 Szilágyi, 2010, p. 153.

104 2007. LXXXVI. Act on Electricity, art. 7.

105 Ibid. art. 8.

106 Ibid. arts. 9–10.

days after its commencement. The combined licence is issued for a fixed period, but can be extended.

Power plants having capacities over 50 MW previously all had a two-stage licensing process, but in 2011, the Act was amended, and special provisions were introduced for plants having capacities over 500 MW. These plants are first required to obtain the principal licence for a power plant with a significant impact on the operation of the electricity system. This step entails presenting the concept—through an impact assessment—of constructing a plant that would significantly impact the entire electricity system, allowing the Authority to determine the requirements for safely integrating the plant into the Hungarian electricity system.¹⁰⁷ After obtaining this principle licence, the subsequent stages of licensing are the same for every plant with a capacity exceeding 50 MW. Similarly to the previous Act, the two stages of licensing are the establishment license and the operation license. The application for the establishment licence should be submitted to the authority, which issues it for a limited time, although it can be extended once. After obtaining the licence, the licence holder can begin the process of establishing the plant.¹⁰⁸ If the establishment adheres to the licensing guidelines, the licence holder can apply for an operation licence,¹⁰⁹ which authorises the licence holder to produce and sell electricity. The licence initially also permits electricity usage, but that was later removed from the scope of the licence.¹¹⁰

The licensing procedures are similar to those in the 2001 Act, especially regarding output and the two-stage licensing of bigger plants. However, the tendering procedure and the limitations on who can establish power plants differ from the previous Act. Regarding the practical implication of the Act, it can be concluded that in the second decade of this century, there were virtually no big or small conventional power plant constructions; instead, the installation of solar panels increased significantly, driven by the support schemes on renewable energy.¹¹¹

3.7.1. Contemporary Questions of Establishing Generating Capacities

In recent years most attention has been directed towards the environmental aspect of the energy triangle; as a result of which anomalies occurred concerning two renewable energy sources—namely wind and solar.

107 Ibid. art. 80/A.

108 Ibid. art. 81.

109 273/2007. (X. 19.) Government Decree on the execution of certain provisions of the 2007. LXXXVI. Act on Electricity, art. 67.

110 2007. LXXXVI. Act on Electricity, art. 83.

111 Stróbl, 2022, p. 123.

As it was mentioned, there were special rules regarding deploying wind power. For wind turbines and wind farms exceeding the definitional scope of household plants, the Act stipulates that, in view of the electricity system's capacity balance, the government annually determines both the number of licences that can be issued and plant capacity.¹¹² The rules for establishing wind generating capacity are detailed in the 33/2009 Decree, which used a tendering procedure, although in practice, no such tenders were launched. The requirements regarding the establishment of wind turbines and farms were later amended in 2016, introducing a provision in the 253/1997. Government Decree that in a built-up area and over a 12-km radius, no wind turbine or farm (except household-size small power plant), can be constructed.¹¹³ Considering the size of Hungary, the areas where electricity generation from wind would be feasible, and the village structure make it challenging to establish wind capacity. The imposition of such restrictions was not without justification; it was argued that wind farms generate noise pollution, pose danger to birds, and lack visual appeal. Amid these arguments, wind power as expected—but unexpectedly from a general EU perspective—stopped expanding in installed capacity, and even began declining due to retiring old installations. However, as it was already concluded, in the wake of the energy crisis, many states realised the importance of generating power from existing resources, and renewables, such as wind, which offered a feasible solution. The potential benefits of wind energy was also realised in Hungary, and the latest Draft National Energy and Climate Plans that was submitted to the commission in 2023 better emphasised the use of wind in electricity generation. These changes envisaged that by 2030, Hungary's installed capacity would triple, while projecting changes in the legal framework.¹¹⁴ The change occurred at the end of 2023, paving the way for expanding wind power. The new 650/2023. (XII. 28) Government Decree modified multiple legislation concerning wind energy. The modified 253/1997. (XII. 20.) Government Decree reduced the 12-km radius to 700 m.¹¹⁵ Moreover, it repealed the 33/2009. (VI. 30.) Decree that previously regulated the tendering procedure of wind farms. Currently, their establishment is governed by the general rules contained in the Act on Electricity. The change marks a significant shift in the possible future of wind power, aligning with the goals of the national energy and climate plan; however, some are not entirely satisfied with the scale of this expansion.¹¹⁶

112 2007. LXXXVI. Act on Electricity, art.7/B.

113 253/1997. (XII. 20.) Government Decree on national planning and building requirements, art. 10. para. 4.

114 National Energy and Climate Plan, Revised version 2023, p. 26.

115 This 700 m zone can be disregarded in areas where an investment of major economic importance is being or has been carried out.

116 Energiaklub, 2023.

The second issue concerns household-size small power plants.¹¹⁷ According to the 2007 Act on Electricity, ‘small power plants are connected to the low-voltage grid with a connected load not exceeding 50 kVA at one connection point’.¹¹⁸ The establishment of such small power plants received widespread support among EU states, including Hungary, where the balance sheet accounting system provided a particularly favourable support scheme compared to those of other EU member states. Balance sheet accounting refers to a system where, during the accounting period, the amount of electricity purchased is offset by the amount of electricity produced.¹¹⁹ This scheme worked so well that from 2012–2023, the number of installations rose from 1800 to 212000, with their current combined capacity standing at 1800 MW,¹²⁰ which corresponds to the capacity of the Paks Nuclear Power Plant.¹²¹ The volatile nature of these plants previously put enormous pressure on the grids, necessitating upgrades; however, with the energy crises, the price of gas increased significantly, making the establishment of such small plants an even more financially viable option for many households. The significant increase in interest resulted in a situation where the grids could not cope with the ever-increasing new volatile sources. To combat excessive pressure on the grid, the government adopted a decree in October 2022,¹²² which temporarily halted the grid connection of plants whose applications were submitted later than 31 October 2022. Simultaneously, necessary upgrades were made to the grids, and by March 2023,¹²³ a new decree was adopted, which stated that the lifting of the ban on connections should be evaluated by the distribution licence holders, and can be lifted in areas where it is deemed unnecessary. Subsequently in October 2023, a government decree was adopted to lift the ban, starting from January 2024, in the overwhelming part of the country.¹²⁴ Moreover, accounting rules were

117 These small household power plants are, in a vast majority of cases, solar plants.

118 Tóth, 2022, p. 429.

119 This system is beneficial as the electricity usually generated during the day when the consumption of a household is the lowest does not have to be used at that time, but is channelled into the grid and can be used somewhere else. Therefore, by counting how much it charged into the grid it helps to balance out what a household would consume in periods when these plants do not generate electricity. Smart meters must be installed with these plants to count the electricity produced and purchased.

120 This is the installed capacity, but due to the volatile nature of solar energy, the same amount is not produced constantly.

121 MEKH, *Háztartási méretű kiserőművek darabszáma és beépített teljesítménye* (The number and capacity of small household power plants).

122 413/2022. (X. 26.) Government decree.

123 112/2023. (III. 31.) Decree

124 461/2023. (X. 5.) Government Decree on the amendment of the executing 112/2023. (III. 31.) Government Decree of 413/2022. (X. 26.) Government Decree on the termination of the temporary suspension of the possibility of feeding small household power plants into the public grid on the issues of feeding small household power plants into the public grid during emergency situations.

also amended—amid EU pressure—introducing a gross accounting system where the purchased amount is billed in total while the consumer can request to have the produced amount accounted.¹²⁵ Balance sheet accounting was not completely abolished. It remained applicable for those with household-size small power plants no more than ten years old, as well as for those who had applied by 7 September 2023, provided the plant will be put into service by 1 January 2026 at the latest. In essence, the problems associated with these plants were also being resolved.

4. Conclusion

As seen from this overview, the rules for establishing electricity-generating plants have changed significantly over the years. The initial attempts by Hungary to regulate the sector and establish rules for creating new generating capacities were ahead of their time, with provisions such as distinguishing between public and private plants and detailed rules on licensing procedures. The period following the World War II was characterised by a very different economic and social approach. Subsequently, the state established new electricity-generating capacities. Following the regime change, it was evident that capital was lacking in the energy sector; thus, paving the way for the involvement of the private sector. Throughout the development of the legislation following the regime change, two issues significantly shaped the rules for establishing generating capacities. First, shortly after the regime change, significant developments emerged at the European level with the first energy package. The packages, even before Hungary's member state status, have heavily influenced national legislation and, specifically, licensing procedures with measures such as the default use of authorisation procedures in establishing new generating capacities. The second factor that shaped the construction of new capacities is the reduction of the role of the state in the process. Initial attempts at regulating the establishment procedure heavily relied on the central position of the state. However, by 2007, Hungary has reached a point where the establishment of generating capacity was predominantly a business decision, and the state had taken a step back. Notwithstanding this development, in some cases, as with the solar plants the state still intervenes in the procedure in the interest of the whole electricity system.

125 680/2023. (XII. 29.) Government Decree amending the 273/2007. (X. 19.) Government Decree on the execution of certain provisions of the 2007. LXXXVI. Act on Electricity, and amending the 243/2019. (X. 22.) Government Decree on certain aspects of the electromobility service.

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Stronger Member States for a Stronger European Union

ABSTRACT: *When discussing topics such as national sovereignty and the primacy of European Union (EU) law, the main question boils down to the distribution of competences. We must acknowledge both the historical context of the EU and the current trends in its role in the world's geopolitical structure. This study focuses on identifying the extent of the limitations surrounding the EU's power in the Hungarian legislature, how sovereignty is defined, and what aspects of constitutional identity are raised in conversations around this issue. Furthermore, the study aims to present relevant national case law related to the principle of the primacy of EU law and its relationship with Hungary's national sovereignty and compare it with the position of other Member States' national courts. This is a vital part of the discussion at hand, which will hopefully lead to an open conversation regarding the future of the EU, the possible outcome of a Convent, and what the continent will look like in the future. The study hypothesises that Member States will follow the trend of attempting to maintain as much sovereignty as possible via the decisions of their Constitutional Courts, in addition to contradicting some EU measures and resisting certain aspirations. Despite this phenomenon, integration is undoubtedly necessary; therefore, this conflict requires an urgent resolution, which will hopefully draw a line in the sand and ensure that the EU can continue, with stronger Member States working together towards a common goal.*

KEYWORDS: *national sovereignty, case law, European Union, Member States, essential State functions, primacy of EU law*

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1. Introduction

One of the most pressing discourses today revolves around the issue of national sovereignty, particularly in the context of the future of the European Union (EU).¹ The EU started off as an economic integration, with the hope of providing a better life for the citizens of the Member States.² However, over time, the cooperation developed different goals, reaching its current form. The process of integration is headed in different directions: on the one hand, striving towards greater autonomy and less cooperation,³ with Great Britain even leaving the EU,⁴ and on the other hand, going in the direction of possibly becoming a federal EU.⁵ These issues will be discussed in-depth at the upcoming Convent as well, which will include 49 proposals and 326 measures,⁶ as well as new policy objectives and, in some cases, proposals for amendments to the EU's primary legal sources, the Treaties.⁷ In these trying times, we must decide the direction in which we wish to take the integration: are we going to become a stronger EU through stronger Member States or perhaps through a confederation, even a federal State? As the title of this article suggests, I believe that taking a stance on the side of stronger Member States will help ensure a smooth and effective cooperation in the EU during the coming decades. However, what will become of the primacy of EU law? How did the different opinions shape the Member States' view on this matter? The main aim of this study was to present the legislation on the limitations of power in Hungary and the resolution to possible conflicts between the countries' legislations and the acts and legislations of EU institutions. I believe that stronger nations might work together better, keeping their constitutional identity and essential State functions⁸ at the forefront. With this opinion in mind, I shall attempt to provide a balanced view on the current struggles around this issue.

1 Conference on the Future of Europe, 2022.

2 Horváth, 2022, pp. 170–178.

3 Some argue that Article 4(2) of The Treaty on European Union (TEU) provides the possibility for national constitutional courts in occasional situations to set aside EU law on constitutional identity grounds (Capeta, 2021). This previously happened in the PSPP decision, after which more national constitutional court decisions echoed this sentiment (Türstehar, 2022).

4 Kiss, 2020, pp. 30–45.

5 Federal Alliance of European Federalists, 2022.

6 Parliament activates the process to change EU Treaties, 2022.

7 The Commission has published the first analysis of the proposals resulting from the conference on the future of Europe, 2022.

8 Article 4(2) of the Treaty on European Union encloses provisions surrounding these concepts when it states: „*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*”

2. What Is Sovereignty?

The question of sovereignty is of utmost importance when we discuss topics such as this one. There are two differing opinions about whether the concept of sovereignty is a good thing for States.

For Realists, sovereignty involves the territorial inviolability of the State from external interference.⁹ This understanding of the concept is related to broader Realist claims of the centrality of the State in international relations and the reliance on self-help as a means of preserving sovereignty.¹⁰ Therefore, we can say that preserving sovereignty is a vital part of Realist theory, even if classical and structural Realism differ in their opinion of why, with the former emphasising the social contract between citizens and the State.¹¹ John Mearsheimer, a Realist scholar, explicitly related State survival with the maintenance of sovereignty to the point of conflating survival and sovereignty,¹² which Jack Donnelly describes as common among Realist scholars.¹³

In contrast, Critical Security theorists believe that sovereignty constitutes an obstacle to the realisation of security. This directly contradicts Realist claims that security is best achieved through the sovereign power of the State. In reality, Critical Security studies reject the belief that the State is and should be the key guardian of people's security.¹⁴ Some scholars believe that the majority of States create insecurity rather than foster an atmosphere within which stability can be attained and prosperity created.¹⁵ Many believe that the maintenance of internal and external sovereignty obfuscates the possibility for victims of insecurity to be empowered. However, it is interesting that Critical Security shares with Realism a perception that sovereignty will win over competing norms.¹⁶

According to our general understanding today, a sovereign State is one that governs itself independently of any foreign power,¹⁷ and sovereignty itself is defined as a State having inviolable territorial integrity and political independence, the right to freely choose and shape its political, social, and cultural system, and the

9 Makinda, 1998, pp. 101–116.

10 Buzan, 1983, p. 5. Of course, positive sovereignty is also important for Realists as the basis for allowing an escape from the Hobbesian state of nature. It is important to note that negative sovereignty is particularly important in terms of the prioritisation of the State over individuals within it regarding debates concerning human rights and intervention.

11 Weber, 1994, pp. 8–20.

12 Mearsheimer, 1994, pp. 5–49.

13 Donnelly, 2000, p. 54.

14 Booth, 1991, p. 106.

15 Jones, 1995, p. 310.

16 Krause and Williams, 1996, pp. 242–243.

17 Bouvier, 1856.

obligation to fulfil its international obligations in good faith and to live in peace with other States.¹⁸ The internal side of State sovereignty encompasses the ability of the State to create and apply its own legal order, as well as to exercise supreme authority over the persons and things within its territory.¹⁹ The essence of external sovereignty is that the State is an independent actor in international life, there is no other authority above it, and its decisions do not depend on the approval or agreement of others.²⁰ The closeness of the relationship between security, sovereignty, and identity is such that security discourses are partially constructed by actors' conceptions of sovereignty. Those who reject State centrism as a foundation for thinking about security, also, as a corollary, embrace some notion of common security, which conceptualises security as being with rather than against the other.²¹

Giving up some of a State's sovereignty is possible, and even required if they wish to enter into an international treaty.²² Member States gave up some of their sovereignty when they joined the EU.²³ However, this does not mean that the entirety of a country's sovereignty can be at stake due to its participation in the EU.

According to the Hungarian doctrine, State sovereignty, as an essential characteristic of Statehood, is a single concept; however, two sides of it are usually distinguished according to the nature of the sovereignty that is related to the decisions and activities of the State. The internal side of sovereignty, as mentioned before, refers to the capacity of the State to determine and maintain its internal State-legal order autonomously and to exercise sovereignty over natural and legal persons and things within its territory. The external aspect of sovereignty means that the State is independent, that is, it is free and autonomous from any foreign power, and that it participates in international life equally with any other State, irrespective of its actual economic or military power or position. The distinction between the external and internal aspects of State sovereignty is conceptually possible and appropriate, but the two aspects are inextricably linked and form a single entity. The State, as a sovereign power, is the supreme power, not subject to any other external power,

18 Back, 2002, p. 3.

19 Chronowski and Petrétai, 2020, pp. 1–34.

20 Kiss, 2014, pp. 313–322.

21 Jones, 1996, p. 208.

22 Chronowski and Petrétai, 2020, pp. 1–34.

23 For example, the Fundamental Law of Hungary, Article E)(2) states: „*With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.*”

State, or otherwise, which would limit it inwardly in the exercise of its functions. However, it should be noted that this concept is no longer associated with the idea of an unlimited supreme power. State power, although superior to all other powers in the State, is limited: inwardly by constitutional law and partly by international law, and outwardly primarily by international law and partly by constitutional law. In constitutional democracies, the supreme power of the State can be understood as a power constituted by the community of citizens and cannot be considered unlimited: the supreme power of the State is derived from the constitution and limited by the constitution. Therefore, the sovereignty of the State is understood today as a supreme power bound by law. Accordingly, the State is autonomous in its organisation and legal system; however, this is only in accordance with the rules of the constitution and international law.²⁴

Instead of the denial of sovereignty, in today's context, many States are expressing a pronounced defence of sovereignty, which is increasingly being transformed at the European level into a defence of constitutional identity,²⁵ which twists the meaning of sovereignty.²⁶ However, the Fundamental Law of Hungary recognises the primacy of EU law. This, of course, is another facet of the country giving up part of its sovereignty.

In the interpretation of the Constitutional Court, this is linked to the principle of popular sovereignty: sovereignty is enshrined in the Fundamental Law as the ultimate source of powers and not as a competence. Therefore, the joint exercise of powers cannot result in people losing their ultimate control over the exercise of public power (whether joint or individual, in the form of a Member State).²⁷

3. What Does the Primacy of EU Law Mean?

The principle of the primacy of EU law is based on the idea that where a conflict arises between an aspect of EU law and an aspect of law in an EU Member State (national law), EU law shall prevail. If this were not the case, Member States could simply allow their national laws to take precedence over primary or secondary EU legislation, and the pursuit of EU policies would become unworkable. This principle is not enshrined in the EU treaties, although there is a brief declaration annexed to the Treaty of Lisbon regarding the principle.

However, this principle emerged in several cases. In *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62), it was declared that the laws

²⁴ Chronowski and Petrétai, 2020, pp. 13–14.

²⁵ Faraguna, 2017, pp. 1617–1640.

²⁶ Bayer, 2015, pp. 15–17.

²⁷ CCH Decision 22/2016 (XII. 5.), Reasoning [60].

adopted by EU institutions were capable of creating legal rights that could be enforced by both natural and legal persons before the courts of Member States, causing EU law to have a direct effect. In *Costa v ENEL* (Case 6/64), the Court built on this direct effect and introduced the idea that the aims of the treaties would be undermined if EU law could be made subordinate to national law.²⁸ As the Member States transferred certain powers to the EU, they limited their sovereign rights; thus, for EU norms to be effective, they must take precedence over any provision of national law, including constitutions. In the relevant cases, the Court clarified that the primacy of EU law must be applied to all national acts, whether they were adopted before or after the EU act in question. Where EU law takes precedence over conflicting national law, the national provisions are not automatically annulled or invalidated. However, national authorities and courts must refuse to apply those provisions as long as the overriding EU norms are in force. It should be noted that the primacy of EU law only applies where Member States have ceded sovereignty to the EU (in fields such as the single market, environment, transport, etc.). However, it does not apply in areas such as education, culture, or tourism.²⁹

The key issue posed by the primacy of EU law was identified with particular clarity by Advocate General Lagrange in his opinion of 25 June 1964 in the *Costa v E.N.E.L.* case:

„the problem which results from the coexistence within each Member State of two systems of law, domestic and Community, each operating in its own sphere of competence, nor can we avoid the question of what sanction should follow the encroachment by one into the sphere of competence reserved to the other.“

The number of requests for a preliminary ruling in which a court has asked the Court of Justice of the European Union (CJEU) whether an EU legal rule prohibits the application of a national rule in a specific case clearly shows significant deference: since the *Costa v E.N.E.L.* judgment of 15 July 1964, there have been only a very small number of cases in which a court has refused to draw the consequences of a judgment, bearing in mind the thousands of requests for a preliminary ruling, numbering between 200 and 400 per year in recent years. Moreover, in the most significant case, namely the PSCP (Secondary Markets Public Sector Asset Purchase Programme) judgment of 5 May 2020, the German Constitutional Court was keen to stress its

28 Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies of the Union: The primacy of European Union law, 2022, p. 16.

29 <https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html>.

respect for primacy, while basing its refusal to apply the CJEU judgment on the argument that the CJEU had exceeded its jurisdiction.³⁰

The Solange legal theory of the German Federal Constitutional Court (Bundesverfassungsgericht) has developed a framework regarding what it considers may override the application of the consequences of primacy. In a judgment of 29 May 1974, referred to as Solange I, the Constitutional Court accepted jurisdiction to rule on a conflict between Community law and the German Constitution. It was then stated that the German Basic Law should take precedence as long as a level of protection of fundamental rights equivalent to the level offered by German constitutional law was not guaranteed by EU law. In a second judgment of 22 October 1986, referred to as Solange II, the Court refused to carry out a review as long as the applicant failed to prove that the protection of fundamental rights under EU law did not correspond to the protection guaranteed by the Constitution. Afterwards, in its judgment of 12 October 1993 on the law ratifying the Maastricht Treaty, the Constitutional Court added that any review could also include the issue of an extension of the competences of the Union, which was not the case before 2009. In summary, according to this case-law theory, the Constitutional Court accepts the principle of primacy asserted in the *Costa v E.N.E.L.* judgment and considers that there is a presumption of compatibility between EU law and the German Constitution as long as it is not proven that an EU rule is contrary to the fundamental rights protected by the Constitution of 1949, or Article 79(3), which particularly prohibits any threat to the division of the Federation into Länder and the participation of the latter in federal legislation. The Constitutional Court has gradually extended the scope of the constitutional principles that may override the consequences of primacy beyond Article 79 of the Fundamental Law and has started to use the concept of the “constitutional identity” of Germany, which is echoed in Article 4(2) TEU as worded in the Treaty of Lisbon.³¹

According to the European discourse about primacy of EU law and pluralism, the concept of national constitutional identity in Article 4(2) TEU means that the Member States can define its own national identity, but the decision about the compatibility of the national identity with EU obligations since the Treaty of Lisbon is always vested in the CJEU. Under the revised identity clause of Article 4(2) TEU, Member State constitutions can specify matters of constitutional identity, and constitutional courts can apply identity control tests to EU acts. Under certain limited circumstances, Member States are also permitted to invoke constitutional limits on the primacy of EU law. The boundaries of these constitutional limits are embedded in the principle of sincere cooperation (contained in Article 4(3) TEU). However, national constitutional courts

30 Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies of the Union: The primacy of European Union law, 2022, p. 29.

31 Casey, 2023, p. 4.

have different approaches. They allow for the primacy of EU law over national law (including constitutional law) in general, but not over the core of the constitution, which they specify as matters of constitutional identity. As the German Federal Constitutional Court puts it, these constitutional courts retain the authority for ‘safeguarding the inviolable constitutional identity’ of their States. This means that they all reserve the right to review EU law, but only in exceptional cases, and will involve the European Court of Justice (ECJ) via the preliminary reference procedure. So far, they have been reluctant to exercise the review powers that they have claimed for themselves.³²

The relationship between essential State functions and constitutional identity is also a vital question. The former is an inherent part of the latter. While constitutional identity and national identity are often viewed as tools of Euroscepticism,³³ many believe that the word “eurorealism”³⁴ better describes how conservative thinkers view the integration situation. Originally, the EU was supposed to be an economic entity³⁵; however, it has become decidedly political,³⁶ with the possibility of a European Constitution. While the Constitution never came into existence,³⁷ there are still quite a few Federalists who wish to see the EU become a State.³⁸

Constitutional identity as a vital concept related to these issues can be found among the “four corners of the constitution,” meaning that we must start by interpreting the text itself.³⁹ The two components of the concept of constitutional identity, namely the constitution⁴⁰ and identity,⁴¹ should be examined separately. Attempts have already been made to create a constitution for the EU,⁴² which would have provided an actual, written constitutional framework; however, the attempts did not succeed.⁴³

The process of identity formation is brought into existence by the constitution, which serves as the basis of the constitutional system and also embodies it.⁴⁴ This is inseparable from the socio-political community, which is the driving force behind

32 Halmai, 2018, p. 1.

33 Dúró, 2017, pp. 195–210.

34 Steven and Szczerbiak, 2022.

35 Horváth, 2022, pp. 170–178.

36 Pintér, 2017, pp. 341–364.

37 Angyal, 2007, pp. 175–190.

38 Federal Alliance of European Federalists, 2022.

39 Sulyok, 2014, pp. 44–62.

40 According to some views, the constitution creates a new form of sovereignty that is limited from the beginning by the rights of the individual. See: Möllers, 2009, pp. 169–204.

41 The constitution has a core that gives it its identity, which consists of immutable principles, See: Schmitt, 2013, p. 348.

42 Treaty establishing a Constitution for Europe, 2004.

43 Arató and Lux, 2012, pp. 177–200.

44 Tribl, 2020, p. 34.

a constitution.⁴⁵ The constitution, as a concept embodying national sovereignty, is always linked to a specific State.⁴⁶ After the Parliament adopted the 7th amendment of the Fundamental Law on June 20, 2018, Hungary's constitutional identity as a constitutional value to be protected became part of our constitution. Accordingly, the protection of Hungary's constitutional self-identity and Christian culture is now the duty of all bodies of the State.⁴⁷

As stated in Article 4(2) of the Treaty on European Union (TEU), examples of essential State functions are 'ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'. Interestingly, territorial integrity was also a part of what sovereignty means. While the two concepts are also strongly related, essential State functions embody powers derived from sovereignty. One example of essential State functions playing an important role in curbing the growing powers of the EU, as well as a Member State using them as a defence against fulfilling an obligation imposed by the EU, can be found in one of the decisions made by the Conseil d'État (CdE) in December 2020. This body of State has established that the national constitution is the highest norm of the national legal order.⁴⁸ In the view of the CdE, they can "clarify" situations in which EU law does not include guarantees according to national constitutional requirements. In the case mentioned earlier, a gendarmerie non-commissioned officer applied in the CdE procedure to set aside the decision of the Minister of the Interior, based on which Article 6 of Directive 2003/88/EC was not implemented for the operation of the department-level gendarmerie (*gendarmerie départementale*). The aforementioned provision establishes a maximum working time of 48 hours per week. On 17 December 2021, the CdE rejected this motion, basing its decision on the fact that the question of whether the application of the directive not implemented does not endanger the constitutional principle of free disposal of the armed forces, which stems from the consistent practice of the CdE, must be examined. The decision entails that the armed forces must be available at all times and everywhere to protect the fundamental interests of the nation, among which national independence and territorial integrity are prioritised. This is a direct usage of essential State functions to oppose EU law. This shows how important the essential State functions that are laid out specifically have become. I fully believe that the importance of these functions will only grow after the Convent⁴⁹ about to take place in the EU. These concepts are noteworthy in terms of exploring the intricacies of the primacy of EU law.

45 Csink, 2015, p. 137.

46 Trócsányi, 2014. pp. 473–482.

47 Fundamental Law of Hungary, Article R(4) The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.

48 Decision n° 393099, 2021.

49 Parliament activates process to change EU Treaties, 2022.

4. The Position of National Courts

In Hungary, the question of the primacy of EU law has been of utmost importance for some time. Therefore, many relevant cases can be found. The Constitutional Court of Hungary (CCH), in connection with the judgment of the CJEU on the status of foreign nationals staying in the territory of the Hungarian State illegally, based on its interpretation of the Fundamental Law, held that if the exercise of joint competences with the EU is incomplete, Hungary is entitled to exercise non-exclusive competences of the Union in accordance with the presumption of sovereignty, until the institutions of the Union take the necessary measures to ensure the effective exercise of joint competences. However, the Constitutional Court could not examine whether there was a lack of effective exercise of shared competence in the specific case. The Constitutional Court also emphasised that the abstract interpretation of the Constitution cannot be the subject of a review of the CJEU judgment, nor does the procedure in the present case extend to the examination of the primacy of EU law.⁵⁰

The primacy of EU law is an application primacy; however, Hungarian legislation that is contrary to EU law remains in force until it is repealed by the legislator or annulled by the Constitutional Court. Article E(2) and (3) of the Fundamental Law does not even exceptionally provide for the constitutional possibility of extending the scope of EU law to cases that are not affected by EU law (so-called purely national situations). Accordingly, it cannot be excluded that the scope of applicable law in two cases with otherwise similar facts differs merely on the basis of the existence or absence of EU law involvement, and that a different judicial decision is therefore rendered. However, even such a possible difference does not entitle the courts to set aside the Hungarian law in force and replace it with a rule of EU law that is not otherwise applicable to the case in question. A judicial decision that disregards the applicable law without justification is arbitrary, cannot be conceptually fair and is incompatible with the fundamental principle of the rule of law (CCH Decision, Reasoning [60]). In such cases, the Constitutional Court shall annul the challenged judicial decision in view of the manifest violation of Article XXVIII(1) of the Fundamental Law.⁵¹

In 2020 and 2021, four Constitutional Court rulings in EU Member States marked a new era in the relationship between EU law and national constitutions. This era has brought with it an open limitation of the primacy of EU law. The highly controversial PSPP decision of the German Federal Constitutional Court (5 May 2020) ruled on the exclusion of the legal effects of an EU Court judgment considered *ultra vires*.⁵² Romanian Constitutional Court Decision 390/2021 (8 June 2021) explicitly excluded

⁵⁰ CCH Decision 32/2021 (XII. 20).

⁵¹ CCH Decision 16/2021 (V. 13), Reasoning [33] 4.

⁵² PSPP, BVerfG 2 BvR 859/15.

the application of EU law on the basis of constitutional self-identity against constitutional norms, ensuring constitutional self-identity and the delegation of powers to the EU.⁵³

The four decisions are a clear sign that the third era of the increasingly turbulent relationship between EU law and national constitutions has arrived. The first period was that of prospective protection in principle of fundamental constitutional rights from the *Internationale Handelsgesellschaft* case (1970) to the creation of the Union. The second period was that of the prospective protection in principle of national sovereignty (and to some extent constitutional identity), from the German Maastricht decision (1993)⁵⁴ to the Czech Constitutional Court's "Slovak pensions" decision (2012). The latter already marked a period of practical sovereignty protection, with the Czech body considering the CJEU *Landtová* judgment (C-399/09) as an *ultra vires* act.⁵⁵ It was unclear whether the Czech decision would be a turning point or simply an extraordinary development. The decisions highlighted here indicate that a period of practical sovereignty protection by some constitutional courts has indeed begun, in which the principle of limited and conditional primacy has been explicitly substituted for the unconditional primacy of EU law (the possibility of protecting constitutional self-identity, while increasingly emphasised, remains in principle).⁵⁶

In the context of the primacy of EU law, a particular challenge is to determine when a partial, implicit or explicit denial of primacy violates EU law. The reaction to such a decision is one question, but whether it constitutes an EU infringement is another. In weighing this, it should not be overlooked that the primacy of EU law is part of a more general principle of EU law and one of its cornerstones. It is a requirement for the effective enforcement of EU law. The essence of this requirement is – to put it a little more simply – that a Member State must ensure that an EU act can produce in its legal system all the effects that EU law confers on it.⁵⁷ Ensuring that this requirement is fulfilled is one of the main tasks of the CJEU, and in the second subparagraph of Article 19(1) TEU, Member States have expressly undertaken to ensure the effective enforcement of EU law, which is supported by the loyalty clause in Article 4(3) TEU. It is not by chance that the specific provisions of Polish Decision K 3/21 revolved around the interpretation of Article 19(1) TEU. These provisions of the founding Treaties are a necessary counterpoint to the concept of limited and conditional priority.

It is also noteworthy how EU acts are transposed directly into the country's national legislation. In the case of Hungary, the Fundamental Law recognises the

53 The Romanian Constitutional Court's Decision No. 390 of 8 June 2021.

54 Maastricht, BVerfG 2 BvR 2134/92 and 2159/92; BVerfGE 89, 155.

55 Czech Republic's Supreme Courts's Case Pl. ÚS 5/12 (31/01/2012).

56 Orbán, 2020, pp. 174–179.

57 Pl. 9/70 *Grad v Finanzamt Traunstein*, EU:C:1970:78, 5.

source of law of the EU when it states that the EU may, within certain limits (in the context of Hungary's participation as a Member State and within the limits of its membership), lay down a generally binding rule of conduct. However, it does not provide for the primacy of the application of EU law or its place in the hierarchy of sources of law. It merely contains a procedural rule for primary law (founding treaties): the authorisation to recognise the binding force of such an international treaty requires a two-thirds majority of the votes of the members of Parliament. However, the majority requirement for authorisation does not imply a hierarchy between EU law and domestic law, and in Hungary, there is no hierarchical relationship between laws on the basis of the majority required for adoption. It is another matter that there is no reason to subdivide EU law into a hierarchical system of internal sources of law, because conflicts between internal law and EU law can be resolved not on the basis of hierarchy, but on the basis of the primacy of EU law and the scope of the Member States' authorisation as conflict-of-law rules.⁵⁸

The Constitutional Court has excluded EU (Community) law from the rule of the Constitution on international law (Article 7(1)), as it treats it as part of domestic law. It is worth mentioning that the explanatory memorandum to the proposed Constitution confirmed this practice by stressing that EU law is not covered by Article Q of the Fundamental Law of Hungary. In CCH Decision 1053/E/2005, the Constitutional Court stated that 'despite their treaty origin, it does not intend to treat the founding and amending treaties of the European Union as international treaties'. However, this statement does not clarify how it treats EU (Community) law. The idea was only completed in paragraph III/11 of AB 72/2006 (15.12.2006):

*these Treaties, as primary sources of law, and the Directive, as a secondary source of law, are part of internal law as Community law, since the Republic of Hungary has been a member of the European Union since 1 May 2004. From the point of view of the jurisdiction of the Constitutional Court, Community law does not constitute international law within the meaning of Article 7(1) of the Constitution.*⁵⁹

The Constitutional Court has thus created a two-tier system, where Community (EU) law is part of domestic law in the constitutional sense, and international law is

⁵⁸ Vincze and Chronowski, 2018, p. 189.

⁵⁹ In CCH Decision 61/2008 (29.04.2008) (ABH 2008, 546), the Constitutional Court stated: „[u]ntil the conditions for entry into force required by the treaty itself are fulfilled, the Constitutional Court can only assess a new treaty amending the founding and amending treaties of the European Communities as primary sources of law, but which has not yet entered into force, in the light of its international legal origin, and therefore apply the rules of the Constitution and the Abtv. concerning international treaties.“

a side issue, which is subject to a different constitutional assessment.⁶⁰ In contrast, in a tripartite system, Community law is distinct from both internal law and international law and is a separate, autonomous source of law in constitutional terms (e.g. the German Federal Constitutional Court's decision in *Internationale Handelsgesellschaft* (Solange I)⁶¹). This is recognised by the Constitutional Court, which has reclassified them solely in terms of the "exercise of its powers." The Constitutional Court's aim was to remove conflicts of norms between internal law and EU (Community) law from the scope of constitutional questions, whereas paradoxically, the phrase "part of internal law," in its grammatical sense, would imply a very broad power of review. However, the emphasis was that Community law is not international law; therefore, the Constitutional Court did not intend to exercise its power to resolve conflicts between international law and internal law.⁶² According to the Constitutional Court, in the case of conflicts of law under the Fundamental Law, the conflict of Hungarian legislation with EU (Community) law, the adequacy of the implementation of secondary EU legislation and the failure to fulfil a legislative task under EU law are not constitutional issues.

The main issue in terms of harmonising legislation across the EU is that the texts of the directives are equally official in different languages, so that the transposition process requires a comparison of different versions. Where there is consistency between texts in different languages, there may be a problem of terminological differences between the text of the directive and the law of the Member State. This could be resolved by creating terminological consistency between directives. The provisions of directives should be interpreted within their context, bearing in mind the directive as a whole. The interpretation of the general terminology is particularly difficult. The legislation transposing the directives into national law, and national law rules in general, must be interpreted by the courts of the Member State in light of EU legislation.⁶³

Pursuant to Article 82(8)(c) of Government Decree No.152/2014 (VI. 6.) on the Duties and Powers of the Members of the Government (Statute Decree), the Minister of Justice shall coordinate the harmonisation activities for the purpose of compliance with the law of the EU. Within this framework, the Minister shall develop the legal harmonisation programming, organise the legal harmonisation tasks in a legal harmonisation database, and monitor and promote the fulfilment of the legal harmonisation tasks. While the harmonisation obligation typically arises in the case of directives, which explicitly require the adoption of national legislation, it is important to note that other EU acts also require, or may require, legislation

60 CCH Decision 9/2018 (VII.9), Reasoning [31] and CCH Decision 2/2019 (III.5), Reasoning [19]–[20].

61 *Internationale Handelsgesellschaft* (Solange I) 2 BvL 52/71, BverfG 37, 271; (29.05.1974).

62 Vörös, 2011, p. 373.

63 Menyhárd, 2000, p. 24–25.

or implementation at the national level. In particular, EU regulations may require deregulation tasks due to their direct applicability, or additional legislative implementation tasks at the national level. These deserve particular attention because it is often more difficult to detect a legislative task than in the case of directives; however, failure to do so may also lead to infringement proceedings. International treaties concluded by the Union and so-called mixed international treaties concluded jointly by the EU and the Member States may also require legislation at the national level. Finally, the obligation of continuous harmonisation – a kind of passive harmonisation – is also permanent in the sense that all domestic legislations must be drafted with due regard to the obligation to ensure consistency with existing EU law. Failure to comply with the harmonisation obligations in time and in substance may lead to proceedings against the Member State, ultimately resulting in a finding of failure to fulfil its obligations and an order to comply with EU law, or, if the failure persists, to pay a substantial fine. The order of programming of the legislative harmonisation tasks is regulated by Government Decree 302/2010 (XII. 23) on the performance of the legislative preparatory tasks necessary to comply with EU law. The essence of the programming order is that the internal legislative actions resulting from certain EU legal acts are defined and scheduled at the government level within a short period after the adoption of the respective act, from the date of its promulgation.

For each EU act, the harmonisation process will be completed once all the necessary transposing and implementing legislation has been adopted and published. For directives and framework decisions, this also requires the so-called notification obligation to be fulfilled, that is, the European Commission must be notified about the national transposing legislation, along with the text of the legislation. It must be stressed that failure to notify the Commission may give rise to infringement proceedings; therefore, it is necessary to ensure that the Commission is notified about the national legislation within the time limits laid down once it has been adopted. In addition to the continuous monitoring of harmonisation activities by the government, the European Commission, as the “guardian of the Treaties,” also monitors compliance with EU law and regularly publishes information on the transposition of directives on its website and summarises the performance of Member States.

Recently, the Hungarian government set up a Ministry for European Union Affairs,⁶⁴ which will take many competences away from the Ministry of Justice.

64 János Bóka tapped as minister for EU affairs, 2023.

5. Conclusion

The primacy of EU law has been a point of contention for some time now because numerous Member States feel that their sovereignty, constitutional identity, and essential State functions are at risk due to the increasing emphasis on integration. Naturally, the closeness of the EU is vital in terms of implementing policies and ensuring successful cooperation. However, the direction in which the EU is heading also creates questions that must be discussed for successful future cooperation. Issues of harmonisation, the changing status of Constitutional Courts' practice in terms of the primacy of EU law and, in general, the current situation of the EU all make it necessary to start an in-depth discourse about these matters.

In my opinion, the approaching Convent will have an enormous impact on the future landscape of the EU. It is a necessity to stick together in these trying times and coexist as strong Member States, which can all work together towards our common goal of becoming a strong EU.

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Tereza SVOBODOVÁ*

Collection of Local Taxes in Insolvency Proceedings

ABSTRACT: *Local taxes take a very special place in the tax system of the Czech Republic. The process of administering local taxes is the same as for other taxes; however, their administration is not carried out by the tax authorities but by municipal authorities. They are the only part of municipal tax revenue that municipalities can directly influence the efficiency of collection. Today's economically challenging times have resulted in an increasing number of taxpayers being unable to pay their debts and ending up in insolvency. In the case of unpaid local taxes, municipalities become insolvent creditors, and the process of collecting local taxes enters the insolvency regime. This paper aims to identify the position of a municipality as a creditor in insolvency proceedings, which has tax debts against the debtor arising from unpaid local taxes, and find out whether municipalities actively use their right to enforce their claims in insolvency. The paper is based on the hypothesis that the municipality in the Czech Republic has a better position compared to other creditors because its tax debts have a public law character. First, the paper discusses the theoretical background, anchoring the position of the municipality in tax administration. Subsequently, the legal norms that regulate the issue of insolvency claims arising from unpaid taxes are analysed. The Czech approach is supplemented with case law conclusions to provide a comprehensive view of the issue. The results obtained from a questionnaire survey on whether municipalities use the examined tax collection option are presented. Based on the research, the hypothesis is refuted, and the findings are discussed and compared with continental and common law legislation.*

KEYWORDS: *local taxes, municipal authorities, tax claims, insolvency proceedings, order of satisfaction, creditor status*

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1. Introduction

Local taxes occupy a unique position in the Czech tax system. The fact that the Czech law calls them charges, not taxes, even though they are taxes by their very nature, is only one of many specifics. Municipal authorities play a crucial role in the field of local taxes. They act in delegated competence as a tax administrator and in independent competence as a legislator. Thus, they are in a very good position to influence both the setting of the system of local taxes that they introduce in their territory and the efficiency of their collection by carrying out all the tasks associated with their administration. Therefore, they have a direct impact on the tax revenue that is received in local budgets.

In today's difficult economic times, the number of insolvency proceedings in the Czech Republic is increasing. A taxpayer who is obliged to pay local taxes also becomes an insolvent debtor. The enforcement of unpaid local taxes then moves from the level of standard institutions to the insolvency area. In such a case, the municipality is in the position of an insolvency creditor. Since the efficiency of tax collection directly affects the revenues accruing to local budgets, it is necessary to consider the position of local authorities as creditors in insolvency proceedings in the administration of local taxes for fiscal reasons. This paper aims to determine the position of tax claims in insolvency proceedings in the Czech Republic. It is based on the hypothesis that tax claims have a better position in insolvency proceedings than other claims because of their public law character.

This paper is structured as follows: Section 1 discusses the theoretical background of the paper. Section 2 focuses on the position of municipal authorities in the Czech tax system and, using relevant literature, introduces the reader to the position of municipal authorities in relation to local taxes and what local taxes can be introduced in the Czech Republic. Section 3 highlights the importance of local taxes for municipal budget policy. Section 4 discusses insolvency issues. The position of tax claims in insolvency proceedings in the Czech Republic is identified by analysing the legislation and related case law. In Section 5, using the knowledge of taxes not only from a legal but also from a macroeconomic perspective, and using the synthesis method, the author explains why the tax claims of the municipal authority should have a different position in insolvency proceedings than the claims of other creditors. Section 6 concludes the paper by comparing the German legislation, which was a model for Czech insolvency law, and the UK legislation, which takes the opposite approach to the issue and demonstrates that such considerations are necessary. The whole insolvency issue is complemented at the outset by an analysis of data provided by municipalities, with the partial aim of determining whether municipalities are actively filing their tax claims in insolvency proceedings, which either confirms or refutes the relevance of the topic.

2. The Position of Municipal Authorities In the Czech Tax System

2.1. Municipal Authority as a Tax Administrator

The tax system in the Czech Republic is quite fragmented in terms of both legislation and tax administration. Although the priority position in tax administration is held by the tax and customs offices, the tax administrator can also be the courts, cadastral offices, or municipal authorities, which are the subject of this paper.

The law provides that the tax administrator is an administrative authority or other state authority to the extent that it is entrusted by or under the law with the competence in the field of tax administration. An administrative authority means an executive authority, a local authority, another authority, or a legal or natural person that exercises competence in the area of public administration. Municipal authorities act as local tax administrators based on Act no. 565/1990 Coll. on local charges¹ (hereinafter referred to as the “Act on local charges”). The Czech legislation uses the term “tax” extensively; therefore, local charges are also considered a tax and are administered as taxes. The theory in this respect is not entirely uniform, and it is often argued that, generally, charges cannot be equated with taxes, particularly with regard to their equivocability, since the payment of the charge involves some consideration. However, local charges are very different from administrative and judicial charges, since the taxpayer does not receive any direct service in return, but their revenue is used to fulfil public needs. Local charges are therefore based on the principle of non-equivalence and, despite their designation as “charges,” they are essentially tax revenue and can therefore be referred to as “local taxes.”²

The municipal authority thus acts as a tax administrator and conducts the entire process of administration of local taxes in its delegated competence, that is, their assessment, collection, control, and collection actions in the event that local taxes are not duly paid. The procedural rules governing the administration of local taxes are directly regulated by the Act on local charges, which acts as a special regulation in relation to the Tax Code.³ The Tax Code is then used in the subsidiary sense, that is, in areas not covered by the Act on local charges. One of these areas is the collection of arrears. The Tax Code broadens the tax administrator’s options in the area of collection, allowing tax debts to be enforced in four ways: by tax execution, recovery through a bailiff, bidding at a public auction, or in insolvency proceedings.

1 The term “fees” is also often used.

2 This term will be used in this paper.

3 Act. no. 280/2009 Coll., Tax Code.

Thus, the municipalities' filing of their claims arising from unpaid local taxes in insolvency is part of the tax administration process. The procedural capacity of the tax administrator to be a party to insolvency proceedings as a creditor is determined by the law, which provides that it may participate in civil court proceedings, but only in those proceedings that are related to tax administration. Insolvency proceedings are theoretically considered a branch of civil law proceedings.⁴

2.2. Municipal Authority as a Legislator

In tax administration, the municipal authority acts not only as an administrator but also as a legislator. Since the revenues from local taxes go directly to municipal budgets, the appropriateness of the local tax system and the efficiency of its collection are of considerable importance. While the administration of local taxes is carried out by the municipality in a delegated competence, law-making is carried out in an autonomous competence. On the basis of statutory authorisation, municipalities are entitled to issue general binding ordinances, through which they regulate the details of collection of a specific local tax; in particular, they set the rate of the tax, the reporting obligation for the creation or termination of the tax obligation, the due date, concessions or possible exemptions.

The power of a municipality to introduce one or more local taxes is one of the important manifestations of the economic autonomy of a municipality, which is based on, or guaranteed by, Art. 101(3) of the Constitution of the Czech Republic, according to which territorial self-governing units (including municipalities) may have their own property and manage according to their own budget. However, the economic autonomy of a municipality is not and cannot be limitless, as a municipality must also move within the boundaries of the legal system. In the context of the regulation of local taxes, this limitation is based on Art. 11(5) of the Charter of Fundamental Rights and Freedoms, according to which taxes and fees may be imposed only on the basis of law. Therefore, a municipality may only introduce a local tax that is regulated by the current version of the Act on local charges, while at the same time respecting all its current legal limits (e.g. the legal definition of taxpayers or payers, maximum rates). If a local tax is abolished by the Act on local charges or its parameters are changed, the municipality that introduced the local tax must respond accordingly. The Constitutional Court of the Czech Republic decided that the statutory regulation is mandatory and comprehensive; therefore, further rules or obligations imposed by the municipality when introducing local taxes are unlawful.⁵

⁴ Braun, 2019.

⁵ Constitutional Court of the Czech Republic, 2007.

Therefore, local taxes are optional, and it is up to the municipality to decide which statutory system of local taxes to introduce in its territory.⁶ The power of a municipality to levy local taxes generally varies in developed countries. As a rule, a system of local taxes is enacted, from which municipalities may levy specific taxes on their citizens and businesses. However, it is better to use a system of a small number of local (but profitable) taxes so that the collection and administration of taxes is as simple and inexpensive as possible, than a system of many local (but not profitable) taxes, when at the same time such a system is demanding for the administration and collection of these taxes, which absorb a substantial part of the tax revenue.⁷

In the Czech Republic, municipalities may introduce the following local taxes (the law calls them “charges,” as mentioned above) for individuals or legal entities: dog charge, charge for stay, charge for using public places, charge on entrance, charge on communal waste, charge for permission to enter selected places by motor vehicle, charge on evaluation of building land.⁸

3. Position of Local Taxes in Municipal Budgets

In the Czech Republic, municipal budgets represent the lowest level of public budgets in terms of the different levels of government. Their public status can be deduced from the status of local government units. According to the Constitution of the Czech Republic, municipalities and counties are public corporations that manage their own budgets, which are approved at public meetings of their councils. The principle of budgetary management of municipalities is established by Act no. 128/2000 Coll. on municipalities, and in the budget rules under Act no. 250/2000 Coll. on budgetary rules for territorial budgets. The specific features of the budgetary management of municipalities (and regions) reflect the fact that the municipality has its own property and the right to have its own money, which it collects both from the municipal budget and from a special-purpose monetary fund. The municipal budget, as the main financial instrument of the municipality’s management, must express all the financial relations that the municipality has with its economic environment. The municipality also has these relations with the state budget, the budgets of state funds, and other entities, including citizens.⁹ The budgets of municipalities (as local self-government units) are described as decentralised monetary funds, which concentrate both the revenues that the municipality or region receives as a result of their redistribution in the budget system and the revenues generated by their own activities. These are

6 Radvan, 2020, p. 79.

7 Peková, 1997, p. 137.

8 Section 1. Act on local charges.

9 Pařízková, 2008, p. 55.

distributed and used to finance public and mixed goods through the public sector of the local government or through the private sector.¹⁰

Similar to any budget, the municipal budget consists of revenue and expenditure. The revenues of municipalities are diverse and can be further divided broadly into three different groups, namely own budget revenue, state budget and state funds, and other or additional revenue.¹¹

From both the economic and legal point of view, it is important to distinguish between revenues that the local government unit can influence by its decision, its activities, and revenues that it cannot influence because they are decided by the state.¹²

In this paper, the core revenue is own revenue. This includes, apart from, for example, income from the sale of property owned by the municipality and income from its own management or from the management of entities it has established or set up, mainly income of a tax or charge nature, including revenue from local taxes. The main part of the tax revenues of municipalities is made up of so-called shared taxes; in other words, their revenue is distributed in various proportions determined by law between municipalities, regions, and the state (or other monetary fund). These taxes are not administered by municipalities; they are not able to directly influence the process of their lawmaking, and therefore, their actual revenue. A different position is then occupied by the real estate tax revenue, which is fully budgeted by the municipalities. Municipalities can partly influence their revenue based on partial corrective elements entrusted to them by the legislator, but to a very limited extent. They do not administer the tax themselves.

Therefore, in the context of other taxes, it is clear that the revenue from local charges, which, despite their name, represent another tax revenue, occupies a specific position in the field of municipal budgets. Unlike other tax revenues (shared taxes), local charges are fully within the autonomy of municipalities, both in the administration of charges and in the implementation of local charges. Their revenue falls 100 % within the municipal budget. The administration of these taxes is carried out directly by the municipality, or the municipal authority, and the actual lawmaking is its responsibility. Thus, it is an economic instrument that, although it does not represent a major part of the revenue side of the budget for municipalities (usually around 2 % of revenue¹³), but if the composition of the introduced local taxes is chosen appropriately, as well as their effective administration and collection, it complements the municipality's budget composition in a relatively stable way and supports its economic independence.

10 Provazníková, 2015, p. 51.

11 Marková, 2008, p. 49.

12 Mrkývka et al., 2020, p. 122.

13 Mrkývka et al., 2020, p. 127.

4. Municipality as a Creditor in Insolvency Proceedings

The municipal authority, as the administrator of local taxes, performs all acts related to their administration. One of these acts is the registration in insolvency proceedings of tax arrears that have not been paid by the taxpayer who has also become an insolvency debtor. Insolvency law¹⁴ in the Czech Republic distinguishes between three types of bankruptcy resolution – debt relief (for natural persons only), bankruptcy and reorganisation. The method of insolvency resolution plays a role in the actual actions of the municipality as a creditor in insolvency proceedings at certain stages of the proceedings, as it determines the person who has the power to dispose of the assets (the debtor or the insolvency administrator).

4.1. Claims Arising Since the Effective Date of the Bankruptcy Decision

Section 242(1) of the Tax Code provides that tax claims arising from tax obligations that arose between the effective date of the bankruptcy decision and the conclusion of the insolvency proceedings are claims against the estate (Section 168(2) Insolvency Act). The key to determining the nature, or ranking, of a tax claim in insolvency proceedings is when the tax obligation itself arises. The commentary literature¹⁵ on the Insolvency Act states that the decisive factor is not the issuance of payment orders or other decisions on tax assessment, but the creation of tax liability. The Tax Code provides that ‘a tax liability arises at the moment when the facts which are subject to tax under the law or the facts giving rise to such liability have occurred.’ The Supreme Administrative Court of the Czech Republic has also confirmed that the key point is the moment of the taxable fact, irrespective of the fact that the tax liability was decided after the bankruptcy.¹⁶

Claims against the estate shall be filed in written form against a person with dispositive rights, and the creditor shall always notify the insolvency administrator of the claim (Section 203 Insolvency Act). The person with dispositive rights shall satisfy such claims from the estate in full at any time after the decision on insolvency (Section 168(3) Insolvency Act). The claim against the estate is not dependent on whether the person asserting the claim is a registered creditor. Such claims may be asserted by any person who is entitled to assert the claims.

The satisfaction of these claims varies depending on the method of insolvency resolution. In the case of a reorganisation, claims against the estate must be paid

14 Act no. 182/2006 Coll. on Bankruptcy and its Resolution (Insolvency Act).

15 Hásová, 2014, p. 594.

16 Supreme Administrative Court of the Czech Republic, 2016.

before the reorganisation plan is approved or as soon as the reorganisation plan becomes effective, unless otherwise agreed. In the event of bankruptcy, claims against the estate should be paid without undue delay if there are funds in the estate. Otherwise, the creditor may seek payment of the claims through an action against the insolvency administrator, as the insolvency administrator has the right of disposal of the assets. Finally, in the case of debt relief, the debtor is obliged to behave in such a way as to avoid creating further debts. In this case, claims against the estate are asserted directly against the debtor, who is entitled to dispose of the estate and merely notifies the insolvency court and the insolvency administrator of this action. Failure to pay debts incurred during the insolvency proceedings may be grounds for the annulment of the debt relief or its conversion into bankruptcy.

4.2. Claims Arising Before the Effective Date of the Bankruptcy Decision

All creditors, including municipalities, file their claims arising from unpaid tax obligations with a competent insolvency court. This is always the regional court determined according to the debtor's registered office if it is a legal entity and the debtor's permanent residence if it is a natural person. All claims, including accessories that arose from tax obligations for the tax period that occurred no later than the day before the effective date of the bankruptcy decision are subject to registration in insolvency. In the context of the administration of local taxes, the law excludes the application of accessories; therefore, there is no need to address the special regulation of non-contractual penalties under the Insolvency Act, which excludes some of them from satisfaction in insolvency proceedings.

Creditors file applications for claims with the insolvency court from the commencement of insolvency proceedings until the expiry of the time limit set by the bankruptcy decision. The time limit starts to run from the publication of the bankruptcy decision in the insolvency register, and its missing cannot be waived (Section 83 Insolvency Act). Applications filed after the expiry of the deadline shall not be considered by the court, and the claims cannot be satisfied (Section 73(1) Insolvency Act). The application must comply with the general requirements pursuant to Section 42(4) of Act no. 99/1963 Coll., Code of Civil Procedure, and must also contain the legal basis for the claim, that is, the legal facts on which the claim is based (e.g. arrears incurred under the relevant legal regulation) and the amount of the claim being applied for. In the case of local taxes, the claim will often be an enforceable claim, where the enforcement title will be an enforceable payment order or collective prescription list or an enforceable statement of arrears. The advantage is that if such a claim (enforceable) is denied, the insolvency administrator is obliged to act. The possibility that a

claim arising from local taxes would be secured is generally not foreseeable, given the lower amounts involved.

If the application for a claim cannot be examined due to flaws or incompleteness, the insolvency administrator shall invite the creditor to correct or eliminate the flaws within a period that may not be shorter than 15 days. If the creditor fails to do so in time and properly, the insolvency administrator shall propose to the court to issue a decision that the application shall not be considered (Section 188(2) Insolvency Act). A registered creditor may withdraw its application in whole or in part (Section 184 Insolvency Act) at any time during the insolvency proceedings. The tax administrator will do so particularly in cases where the registered tax claim has been extinguished in the meantime (e.g. through payment by a guarantor).

With regard to the effects of the filing of the application from the perspective of the Tax Code, it should be noted that from the date of delivery of the application to the insolvency court, the prescription period for the collection and enforcement of properly registered arrears does not run throughout the insolvency proceedings. However, similar effects also arise in the case of private law claims.

Therefore, it can be concluded that the Czech legislation grants tax claims a certain above-standard status, however, only to those that have arisen since the date of the bankruptcy decision. Tax claims arising before that time have the same status as the claims of the remaining creditors.

4.2.1. Municipalities as Insolvency Creditors – Practice

According to the Freedom of Information Act,¹⁷ the municipal authorities administering local taxes were asked the following questions:

1. What percentage of tax obligations, i.e. local taxes administered by the municipal authority, were not paid by taxpayers in 2018, 2019, 2020, 2021, 2022?
2. Does the municipal authority register in the insolvency proceedings its claims arising from unpaid tax obligations, i.e. local taxes pursuant to Act no. 565/1990 Coll. on local charges, which it administers in accordance with Section 15 of this Act?
3. If yes, what was the total value of the claims so declared in each of the years 2018, 2019, 2020, 2021, 2022?
4. If no, does the municipal authority have technical security to monitor whether the tax debtor has been declared bankrupt?

¹⁷ Act no. 106/1999 Coll. on free access to information.

The city of **Adamov** (approx. 4,500 inhabitants), which administers the dog charge, charge for stay, charge for using public places and charge on communal waste, stated:

Ad 1) 2018–7 %; 2019–5 %; 2020–54 %; 2021–58 %; 2022–8 %

Ad 2) Yes, it does.

Ad 3) In 2018, the claims filed in insolvency totalled CZK 21 700

In 2019, the claims filed in insolvency totalled CZK 10 825

In 2020, the claims filed in insolvency totalled CZK 72 606

In 2021, the claims filed in insolvency totalled CZK 48 294

In 2022, the claims filed in insolvency totalled CZK 58 050

The city of **Brno** (approx. 396,000 inhabitants), which administers charge on communal waste (other charges are the responsibility of individual city districts), stated:

Ad 1) 2018–5,91 %; 2019–7,29 %; 2020–10,68 %; 2021–11,94 %; 2022–11,81 %

Ad 2) Yes, it does.

Ad 3) In 2018, the claims filed in insolvency totalled CZK 874 410,56

In 2019, the claims filed in insolvency totalled CZK 1 473 086,80

In 2020, the claims filed in insolvency totalled CZK 2 083 240,69

In 2021, the claims filed in insolvency totalled CZK 2 266 994,52

In 2022, the claims filed in insolvency totalled CZK 1 636 970,51

In both cases, question 4 was then irrelevant.

The city of **Lelekovice** (approx. 2,000 inhabitants), which administers charge on communal waste and the dog charge, stated:

Ad 1) In 2018–0,4 %; in 2019–0,5 %; in 2020–0,45 %; in 2021–0,49 %; in 2022–0,77 %

Ad 2) The municipality is not filing claims in insolvency proceedings.

Ad 3) Irrelevant in view of the above.

Ad 4) The municipality does not have this type of technical security.

4.2.2. Summary of the Questionnaire Results

The data provided shows that the COVID-19 pandemic played a role in the payment of local taxes in the case of the two larger cities among the three cities examined (the city of Brno and the city of Adamov). While in 2018 and 2019 the proportion of unpaid tax obligations for both municipalities was similar (5-7 %), the COVID-19 years brought significant fluctuation, which was especially enormous in the city of Adamov.

It is clear that the proportion of unpaid claims arising from unpaid local taxes is not insignificant for larger towns and therefore justifies the focus of this paper. The position of the municipality as a creditor in insolvency proceedings has a direct impact on the economic interests of the municipality. Positively, it is evident from the data provided that collection actions through registration in insolvency proceedings are usually actively undertaken by municipalities, even in the case of smaller cities. It is not possible to make any further conclusions from the absolute values of the data without the context of the other information; however, they demonstrate a clear economic interest for municipalities to actively participate in insolvency proceedings as creditors.

The smallest municipality, Lelekovice, is an exception among the three municipalities examined, mainly because of the share of unpaid local taxes, which is completely negligible. It is therefore justifiable that the municipality is not actively involved as a creditor in the insolvency proceedings, or even that it does not have the necessary technical equipment to detect such matters, since securing it would probably be at least as costly as any potential revenue from the insolvency proceedings.

4.3. Case Law of the Highest Courts in the Czech Republic

The Insolvency Act in Section 324(3) establishes a rule according to which, in the context of a bankruptcy resolution by reorganisation, the following applies:

From the moment of publication of the reorganisation plan in the insolvency register, no set-off of the debtor's and creditor's claims against each other is admissible, unless the insolvency court determines otherwise by way of an interim measure. This applies even if the statutory conditions for such set-off have been fulfilled before that time.

Furthermore, the Tax Code in Section 242(2) provides that:

For the purposes of insolvency proceedings, a refundable overpayment is considered to be the property of the tax entity, with the exception that the overpayment arising from tax obligations that arose no later than the day preceding the effective date of the bankruptcy decision shall be used only for the payment of outstanding tax claims that are not claims against the estate, at the latest until their examination at the review hearing.

Simply put, while the Tax Code allows set-off of claims where the conditions were met before the bankruptcy decision became effective, the Insolvency Act prohibits it

in the case of reorganisation, starting from the moment of publication of the proposal for authorisation of reorganisation. The Supreme Administrative Court has repeatedly considered¹⁸ whether the Tax Code or the Insolvency Act should be prioritised in this case and has concluded that the Insolvency Act has priority. The Supreme Administrative Court found that the Tax Code allows for an unreasonably broad application of set-off of tax claims beyond the rules on set-off provided for in the Insolvency Act. However, this concept, according to the Court, cannot be approved, as it leads to an impermissible advantage of the tax administrator as a creditor in insolvency proceedings, in which creditors should have the same position in principle. According to the court, the application of the rule contained in the Tax Code would result in an impermissible advantage for the tax administrator as a creditor in insolvency proceedings; therefore, the rule in the Insolvency Act must be considered special.

In this context, the Constitutional Court of the Czech Republic has repeatedly concluded¹⁹ that the arbitrary favouring of public law claims (typically tax claims) over private law claims is inadmissible because the state as an owner does not have a general right to be favoured over other owners. Similarly, the Constitutional Court rejected the favouring of the state as a creditor of a special nature, as this is contrary to the constitutional requirement of equal protection of property rights of all owners.

5. Tax as the Subject of an Insolvency Claim – Is the Tax Administrator Just Another “Ordinary” Creditor?

The above clearly shows that the highest courts of the Czech Republic fundamentally reject any favouring of the tax administrator over other creditors, based on one of the fundamental principles of insolvency law in general – the equal position of all creditors. However, the author believes that the case law fundamentally overlooks the different nature of claims arising from unpaid tax liabilities and therefore the fundamental objective of tax administration, which is to ensure their payment. Those principles must be measured and evaluated based on their consequences. Therefore, it is necessary, in the first place, to deal with the concept of tax itself and, above all, its function, since it determines the importance of its collection.

As has been repeatedly stated, taxes are a revenue of public budgets. This conceptual feature captures the essence of the fundamental function of taxes, which

¹⁸ Supreme Administrative Court of the Czech Republic, 2021.

¹⁹ Constitutional Court of the Czech Republic, 2008.

is to provide revenue for public budgets.²⁰ It is therefore a fiscal function. The funds raised through tax collection constitute the core source of revenue that finances public goods and services. The fiscal function of taxes is also sometimes referred to as the primary function because other functions attributed to taxes²¹ are derived from it. This is why the tax administrator cannot be seen in isolation as a state that would gain certain privileges due to its superior status. It is necessary to realise the economic importance of taxes themselves, which serve to provide funds to pay for public goods, that is, goods that serve all the citizens of the state. The state, represented by the tax authorities as a creditor, thus acts not for itself but for the needs and rights of taxpayers. The taxpayers are entitled to receive the proceeds of the taxes that have accrued by law. In effect, the insolvency creditor is not the tax administrator representing the state, but all citizens who directly and indirectly benefit from tax revenues.

The consequence of the above construction, which views the tax administrator as a representative of the needs and rights of citizens to obtain revenue from legally incurred tax obligations rather than as a representative of the state, has economic consequences. In recent years, the Czech Republic has been facing a severely strained budgetary situation, with the state budget deficit reaching unprecedented levels. Therefore, every step that is taken should also be measured against its fiscal consequences. Although the loss to public budgets cannot be reliably quantified, it is obvious that the strict prioritisation of the principle of equal treatment of creditors also leads to a loss of revenue to public budgets.

The tax, as the subject of the insolvency claim, implies further specifics in the position of the tax administrator as an insolvency creditor. A tax claim differs from a private law claim primarily in that it arises by law and not on the basis of a contractual relationship, whose creation is an expression of the will of the parties involved. The tax administrator is therefore not entitled to “choose” the person of its debtor in any way. A tax entity and a potential insolvency debtor refer to anyone who is subject to the tax liability that is provided for by law. In contrast, a private creditor can choose, through a completely targeted and conscious process, with whom it enters into an obligation relationship. In particular, bank and non-bank lenders often carry out a risk assessment of the customer, on the basis of which they consider the profitability and advantage of a particular commitment. The tax authority, as a creditor, does not have that option. It follows that tax authorities are in a worse position than other private creditors when it is not open to them to choose whether to enter into the commitment. The tax authority is, thus, a “forced creditor.” The impossibility of influencing one’s position as a creditor in the creation of tax debts is also reflected

²⁰ Walker, Long and Fullerton, 1994, p. 209.

²¹ Musgrave and Musgrave, 1994, p. 418.

abroad; however, the approaches chosen to deal with this differ. While the German legislation is strictly based on the equality of creditors, which does not entitle tax claims to priority,²² the Anglo-Saxon legislation represented by the UK gives a better status to tax claims.²³

5.1. Tax Insolvency Claims in the Continental Law System (Germany)

According to the Insolvency Code, Insolvency law is based on the principle of equal treatment of creditors. This means that the creditors participating in the procedure all receive the same proportion of the insolvency estate in relation to their registered claims. If a registered claim has been recognised in the procedure, it must be considered in a quota distribution. The available bankruptcy estate is then distributed to all creditors in equal proportions. This means that creditors with higher claims receive a higher amount than those with lower claims, so that everyone receives the same percentage. It follows that tax claims arising before the insolvency is opened are treated in Germany in the same way as in the Czech Republic and are satisfied on a proportional basis as for other creditors.

However, there are also debts incumbent on the assets, which have a different regime. These claims arise after the insolvency has been opened and must be satisfied in full. These are mainly the costs of the estate and the court costs of the insolvency proceedings, as well as the remuneration and expenses of the provisional insolvency administrator, the insolvency administrator, and the members of the creditors' committee (Section 54 Insolvency Code). Furthermore, these are the claims defined in Section 55 Insolvency Code, which include, among others, taxes, namely value added tax, other import and export duties, federal consumption taxes and pay personal income tax on employees. Unlike in the Czech Republic, not all tax debts arising after the beginning of the insolvency proceedings become debts incumbent on the assets, but only tax debts specified by tax law. Only when these priority claims have been paid in full will the remaining assets of the bankruptcy estate be paid to the bankruptcy creditors, in equal proportions.

It can be summarised that Germany significantly prioritises creditor equality over the economic importance of tax collection. Thus, the state is, in principle, in a similar position to that of other creditors. The exception is tax claims arising after the bankruptcy order, which must be satisfied in full, but even this applies only to certain taxes.

²² Roth, 2020, p. 76.

²³ Conway, 2020, p. 3.

5.2. Tax Insolvency Claims in the Common Law System (UK)

Since 1986, English insolvency law²⁴ has provided for the following order of priority for the payment of claims according to the person of the creditors:

- Secured creditors with a fixed charge
- Preferential creditors
- Secured creditors with a floating charge
- Unsecured creditors
- Shareholders.

The claims of creditors in a particular class are not paid until the claims of creditors in the previous class have been paid in full. There has been a fundamental change in the area of tax claims in recent years. Her Majesty's Revenue & Customs ("HMRC"), as the UK tax administrator, has been classified as an unsecured creditor since 2003 in all its claims. The abolition of preferred creditor status was introduced at the beginning of the millennium to promote business and make insolvency proceedings fairer for all creditors.²⁵ From 1 December 2020, the UK tax authority, HMRC, once again became the preferred creditor in insolvency proceedings in respect of certain taxes, which strengthened HMRC's position at the expense of other creditors. It is important to note that HMRC was given "secondary," not "ordinary," preferential status. The difference is that ordinary preferential creditors include employees who are entitled to arrears of wages, holiday pay, and other statutory payments up to a certain limit. This category also includes deposits that fall under the Financial Services Compensation Scheme (FSCS). Secondary preferential creditors, which are paid after the regular preferential creditors have been paid, currently include those parts of the deposit that do not fall within the protection of the FSCS.

This change will not affect all tax arrears, but only taxes held by a business (this includes individuals and corporations) on behalf of its customers and employees, which are value added tax (VAT) and debts that relate to pay as you earn (PAYE) income tax, employee national insurance contributions (NICs), students loan repayments and construction industry scheme deductions.²⁶

These debts are only preferential if the insolvent business entered a formal insolvency procedure on or after 1 December 2020. With other tax claims (e.g. income tax), HMRC remains in the unsecured creditor class.

The legislator considers the change to be a protection of taxes paid by employees and customers. If a corporation or individual becomes insolvent, the taxes paid by

²⁴ Insolvency Act 1986.

²⁵ Conway, 2020, p. 7.

²⁶ Government UK, 2020.

employees and customers, which were temporarily held by the insolvent corporation, are often not used to pay for public goods but go to pay debts owed to other creditors. In its 2018 budget briefing, the government estimates that this change could raise extra revenue, up to £185 million annually.²⁷ However, it should be added that there are also some concerns about this change. The logical consequence is a reduction in the returns to creditors in the lower categories. For this reason, there are views that the financial market will slow down as lenders will be even more concerned about the solvency of companies when lending (e.g. also about covering their tax liabilities) and there will be pressure to secure loans with fixed charges. This will reduce the willingness to provide finance to businesses that are in financial difficulty, even though the extra cash could help them and save the business.²⁸ There is also a fear of increased influence of HMRC on insolvency processes due to increased decision-making powers.²⁹ The impact of this may be indirectly related to the apathy of unsecured creditors. Even before this change, the amount they received in insolvency from their claim was around 4 %. The potential reduction of the return to zero may remove the interest of unsecured creditors to participate in insolvency processes at all.³⁰

In summary, the UK has made changes in recent years that reflect the economic importance of taxes to public budgets. It has prioritised the positive relevance of fiscal stability over creditor equality. However, the question is whether this disadvantages creditors. The step can also be seen as favouring citizens who benefit from tax revenues and enjoy public goods. The general benefit of higher tax revenues potentially affects everyone, including creditors.

6. Conclusions

Municipal authorities, as tax administrators, are usually active in insolvency proceedings and register their claims arising from unpaid tax obligations, which has been demonstrated by specific data obtained from Czech municipalities of various sizes. This fact has a positive impact on the budgetary situation and the municipality; therefore, it is appropriate to deal with the position of the municipality as a creditor in insolvency proceedings. Czech legislation basically distinguishes two regimes of municipal claims in connection with the administration of taxes. Classification under the relevant regime is based on when the claim arose, not on when it was formally determined by a payment order or other type of tax assessment decision. While claims arising before the date of the bankruptcy order arising from taxes are treated in the

²⁷ HM Treasury, 2018.

²⁸ Conway, 2020, p. 11.

²⁹ Stephenson and Stembridge, 2020, p. 2.

³⁰ Markham, 2019.

same way as other claims, claims arising from unpaid taxes after the bankruptcy decision, together with other statutory claims, are paid out of the estate as a priority. In general, however, the Czech legislation and the case law adhere strongly to the principle of equality of creditors and are inspired by German insolvency law. Thus, it can be concluded that the aim of the paper was fulfilled; however, the hypothesis was refuted.

Czech legislation does not formally provide that the principles of insolvency law are superior to tax law. However, case law has accepted this interpretation without explaining the broader circumstances, despite the indirect factual impact on all tax-payers. Tax can be viewed as a specific “public good,” since its revenues are ultimately the property of all the citizens of the state, or all benefit (in varying proportions at different times) from its revenues. The societal importance of taxes justifies the need to consider the consequences of any change or interpretation of tax law. According to the author, when interpreting the conflict of norms of tax and insolvency law, it should be taken into account that the tax administrator is not only a representative of the state, but above all of all its citizens. At the same time, a reduction in tax revenues is associated with a reduction in public funds to pay for public goods. Finally, the fact that the tax administrator does not have the autonomy of will to enter into an obligation must also be taken into account.

The author believes that all these aspects should be considered when conclusions affecting the position of the tax administrator as a creditor in insolvency proceedings are made.

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Regulation of Water Services in Slovenia

ABSTRACT: *Water is a natural resource of paramount importance for human life and other living beings. Owing to its status as a common good, water is exempt from the concept of private property. The right to clean drinking water has been recognised as a fundamental human right, serving as the foundation for the enjoyment of all other human rights. In Slovenia, the right to drinking water is enshrined in its Constitution. This study examines the provision of drinking water in Slovenia. In Slovenia, the supply of drinking water is organised as a mandatory local economic public service and municipalities are responsible for ensuring the supply of drinking water to residents within the framework of local economic public services. Numerous laws govern this area, and compliance with these laws is mandatory. Crucial to ensuring the delivery of clean drinking water to individuals is the presence of appropriate infrastructure that facilitates the provision of high-quality drinking water services. Despite water being a public good, its supply is not cost-free. Therefore, this study discusses the financing of the drinking water supply system and the allocation of these financial resources. Individuals who are consumers of drinking water services are required to pay for this service. In cases where individuals fail to settle the costs associated with drinking water supply, various sanctions may be imposed, including, as a last resort, the discontinuation of water supply in cases of non-payment.*

KEYWORDS: *drinking water, right to drinking water, Slovenian law, local economic public services, drinking water supply, drinking water cost.*

1. Introduction

Water is one of the most critical resources for humanity. Owing to its significance, it represents a major environmental concern, as without it, human existence would not be possible. Despite the vital role of water in sustaining life on the planet, it is unfortunately often perceived as something taken for granted. Moreover, water is frequently handled with insufficient care. The fact that water covers over 70% of

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Earth's surface may convey the impression that there is plenty of it. However, it is important to remember that only 1% of this is drinkable water, whereas 97% of it is salt water and other 2% is freshwater in the form of ice. As water is a highly limited resource on our planet, it is crucial that access to water is properly regulated, along with its management.

Today, more than 2.1 billion people worldwide continue to lack adequate access to safe and readily available water, despite general advancements in sustainable development.¹ The primary factors contributing to unequal access to water include climate change, demographics, economy, society, culture, infrastructure, technology, water resources, and more.²

1.1. The Right to Safe Drinking Water

Water is a valuable natural resource essential to public health and survival. For people to live with dignity, they must have access to water. Moreover, it is necessary for other human rights to be realised. Everyone has the right to adequate, acceptable, safe, physically accessible, reasonably priced water for home and personal use. This is known as the human right to water. Safe water is essential for cooking, drinking, personal hygiene, and household hygiene needs. It lowers the frequency of water-related diseases and prevents dehydration-related deaths.³

Numerous international documents, including treaties, declarations, and other regulations, have acknowledged the right to water.⁴ Before the UN Committee on Economic, Social and Cultural Rights (CESCR) adopted its General Comment No. 15 on the right to water,⁵ the right to water had been enshrined in various conventions and agreements, such as in Convention on the Rights of the Child and Convention on the Elimination of All Forms of Discrimination against Women. Finally, the right to water was recognised globally with a Resolution adopted by the General Assembly on 28 July 2010⁶ which recognised the right to safe and clean drinking water and sanitation as a human right essential for the complete enjoyment of life and all human rights.⁷

1 See Office of the United Nations High Commissioner for Human Rights, OHCHR and the rights to water and sanitation. Available at URL: <https://www.ohchr.org/en/water-and-sanitation>.

2 United Nations, The Millennium Development Goals Report 2015. Available at URL: [https://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20\(July%201\).pdf](https://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf).

3 General Comment No. 15 (2002), The Right to Water, UN Doc. E/C.12/2002/11.

4 General Comment No. 15 (2002), The Right to Water, UN Doc. E/C.12/2002/11 and Sancin and Juhart, 2023, p. 107.

5 General Comment No. 15 (2002), The Right to Water, UN Doc. E/C.12/2002/11.

6 Resolution adopted by the General Assembly on 28 July 2010: The human right to water and sanitation, A/RES/64/292.

7 Ibidem, p. 2.

The human right to water is inseparably linked to the management of water resources. Only through such an approach the right to water can be consistently implemented in practice, ensuring that individuals have access to drinking water in their places of residence. In addition to important international legal frameworks⁸ regarding the right to water and water resource management at the European Union (EU) level, this study focuses on the regulation of water resource management in Slovenia, including the presentation of public services and payment mechanisms for the provision of this public service.

2. Legal Regulations of the Field

In addition to international legal sources and provisions at the EU level, each individual country has its existing national law, which must be in accordance with both EU law⁹ and international law. In Slovenia, drinking water protection and supply are regulated by various legal acts that are interconnected.

This study presents only the most significant legal acts addressing this topic.

The highest legal act in Slovenia is the Constitution of the Republic of Slovenia¹⁰ (hereinafter, the Constitution), which regulates the management of public goods, including water. According to Article 70 of the Constitution, a special right of use of public goods can be acquired under conditions specified by law. Moreover, the law specifies the conditions under which natural resources can be exploited. In 2016, the Constitution was amended with Article 70.a, explicitly stating that everyone has the right to drinking water and that water sources are public goods managed by the state.

The Constitution holds the highest hierarchical position among the legal acts in the Republic of Slovenia. Therefore, all other legal acts in Slovenia must comply with the Constitution. Despite the amendments made to the Constitution, not all hierarchical

⁸ You can read more about this in the article Sancin and Juhart, 2023, pp. 106–124.

⁹ In this domain, several European directives are of paramount significance. For instance, these include Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast), Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council and Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration. These directives must be duly transposed into national law.

¹⁰ Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121, 140, 143, 47/13 – UZ148, 47/13 – UZ90, 97, 99, 75/16 – UZ70a in 92/21 – UZ62a.

lower legal acts regulating the field of drinking water have been revised. For example, the Environmental Protection Act¹¹ (hereinafter, ZVO-2) mandates obligatory municipal public utility service for environmental protection in the supply of drinking water. ZVO-2 was enacted after the amendment of the Constitution in 2016, and its provisions regarding the supply of drinking water have remained unchanged, even after the constitutional amendment. Nonetheless, these provisions are in accordance with the Constitution, which, in its new Article 70.a, stipulates that the state shall ensure the supply of the population with drinking water and water for household use directly through self-governing local communities and on a not-for-profit basis.¹²

However, despite changes to the Constitution and ZVO-2, the Decree on drinking water supply,¹³ based on ZVO-2, has not undergone any amendments. This decree was established under the previous law, which covered environmental protection in Slovenia before the constitutional amendment. It outlines the tasks conducted within the framework of the public utility service and the conditions for the supply of drinking water.

In practice, it is evident that despite the constitutional amendment, significant revisions in hierarchical lower legal acts have not occurred. Therefore, decision-makers must always make decisions in accordance with the new constitutional provision. In practice, certain difficulties have arisen owing to the absence of harmonisation of national legislation with the constitutional provision. The Constitution stipulates that water resources shall be a public good managed by the state. However, Slovenian legislation does not define the term 'water resource', and different professional fields interpret it according to their respective beliefs. Moreover, the legislation lacks definitions of 'supply of the population with drinking water' and 'water for household'. A clear definition of the terms used in the Constitution is essential to ensure the actual enforcement of the right to drinking water, as guaranteed by Article 70.a of the Constitution. In addition to these definitions, the legislation should regulate the purpose of the use of drinking water supply. Such regulation would enable a distinction between normal household consumption of drinking water and other types of water usage. This distinction should be reflected in the overall legal framework – from pricing policies to the conditions for disconnection of water supply owing to non-payment and similar situations. Currently, the legislation does not prioritise the supply of drinking water to the population or to households. In the event of an actual shortage of drinking water, problems may arise if access to drinking water is granted equally to all users, including economic operators, who may require water for their business activities. Additionally, the transposition of the constitutional provision into

11 Official Gazette of the Republic of Slovenia, No. 44/22, 18/23 – ZDU-10 in 78/23 – ZUNPEOVE.

12 See also Sancin and Juhart, 2023, p. 115.

13 Official Gazette of the Republic of Slovenia, No. 88/12 in 44/22 – ZVO-2.

statutory law should regulate potential restrictions on access to drinking water, as the right to water is not unlimited. Constitutional Court Judge Dr. Knez, in his concurring opinion to the decision No. Up-519/19¹⁴ emphasised that the Constitution does not confer a right to drinking water that would be free from obligations or limitations. Those who behave irresponsibly in their use of water are not granted a right under the Constitution to an unlimited supply of drinking water under all circumstances.

Despite the fact that the legislative framework has not yet been fully harmonised with the constitutional provision, certain aspects of the right to drinking water are already reflected in existing national legislations and subordinate regulations. For example, the Services of General Economic Interest Act¹⁵ (hereinafter, ZGJS), which delineates the modalities for implementing the economic public service in local communities; the Water Act¹⁶ (hereinafter, ZV-1), which prescribes provisions pertaining to water protection areas, specific water use, and their regulations; the Decree on the methodology for determining prices of obligatory municipal public services for environmental protection,¹⁷ which specifies the methodology for determining the prices of drinking water supply services; and the Rules on drinking water,¹⁸ which prescribes the criteria that drinking water must meet.

Provisions concerning drinking water are present throughout numerous laws and sub-legal acts. In addition to the legislation enacted at the national level, regulations have been established by individual municipalities. Municipal ordinances are intended to regulate specific water bodies from which the population is supplied with drinking water. Concurrently, individual municipalities independently regulate this domain exclusively within their territories, potentially resulting in divergences in the regulation of this field among different municipalities.¹⁹

3. Forms of Drinking Water Supply Management

Ensuring the realisation of the right to safe drinking water is of utmost importance, with its management being vital to provide individuals with drinking water that is characterised by availability, accessibility, affordability, quality and safety, and acceptability.

14 Concurring Opinion of Judge Dr Rajko Knez to Decision No. Up-519/19, dated 29 September 2022.

15 Official Gazette of the Republic of Slovenia, No. 32/93, 30/98 – ZZLPPO, 127/06 – ZJZP, 38/10 – ZUKN in 57/11 – ORZGJS40.

16 Official Gazette of the Republic of Slovenia, No. 67/02, 2/04 – ZZdrI-A, 41/04 – ZVO-1, 57/08, 57/12, 100/13, 40/14, 56/15, 65/20, 35/23 – odl. US in 78/23 – ZUNPEOVE.

17 Official Gazette of the Republic of Slovenia, No. 87/12, 109/12, 76/17, 78/19 in 44/22 – ZVO-2.

18 Official Gazette of the Republic of Slovenia, No. 19/04, 35/04, 26/06, 92/06, 25/09, 74/15, 51/17 in 61/23.

19 See also Sancin and Juhart, 2023, p. 115.

Globally, various forms of water resource management exist, categorised into state, collective, and privatised water resource management.²⁰ The forms primarily oriented towards the public interest are state and collective management. State management aims to ensure universal access to water, typically accompanied by affordable pricing. In collective management, community members pool financial resources to make water accessible to all community members. In contrast, privatised water resource management operates in a more market-driven and capitalist manner. This approach often has adverse environmental impacts or affects the population negatively owing to higher water costs, limited accessible water quantities, or inadequate treatment of and contamination in the water supply.²¹

In Slovenia, most drinking water is provided by public water supply systems, which represent state management of water supply. The amendment to the Constitution in 2016 was prompted by concerns over the potential commercial exploitation of drinking water.²² Following this constitutional amendment, the right to drinking water is now constitutionally guaranteed in Slovenia. The new Article 70.a of the Constitution specifies that water resources for drinking water supply in this context are not considered as commodities for trade. They are dedicated primarily to ensure sustainable and adequate drinking water supply for the population and household needs.

The state institutes a distinct regime through economic public services, allowing it to directly regulate its relationship with the providers of economic public services. This arrangement primarily addresses the conditions, procedures, and modalities for the execution of economic public services. The provision of public services is typically ensured within the framework of organised public service activities.²³ The underlying premise of public services, even in various approaches adopted by individual states, is the common general interest, which justifies the state's intervention in specific domains where such activities are conducted.²⁴

Economic public services serve to provide material public goods, such as products and services, the permanent and uninterrupted production of which is in the public interest, secured by the Republic of Slovenia, municipality, or another local community to meet public needs, particularly in cases and to the extent that they cannot be supplied through the market, as stipulated by the ZGJS. Economic public services are determined by laws in the fields of energy, transport, telecommunications, communal and water management, and the administration of other forms of natural resources, environmental protection, as well as laws regulating other areas

²⁰ See Eman and Humar, 2017, p. 120.

²¹ Eman and Humar, 2017, pp. 120, 121.

²² See Pevcin and Rakar, 2017, p. 3.

²³ See Ferk and Ferk, 2008, pp. 38, 39.

²⁴ See Brezovnik, 2008, p. 21.

of economic infrastructure.²⁵ Although it is possible to conduct economic public services within the scope of market activities, doing so would risk the uneven and imbalanced distribution of specific goods and services among the population.²⁶

Moreover, the state, through local self-government communities, ensures the direct and non-profit supply of the population with drinking water and water for household use.²⁷ The local community provides economic public service in any of the following manners: (i) through a direct management operation, in cases where owing to the small scale or nature of the service, establishing a public company or granting a concession would be uneconomical or irrational; (ii) by means of a public economic institution, when providing one or more economic public services that, by their nature, cannot be conducted for profit or are not intended for profit; (iii) through a public company, when offering one or more extensive economic public services, or when the nature of the monopoly activity, as determined by law as an economic public service, necessitates this approach, and the service could be operated for profit, or (iv) by awarding concessions.²⁸ Therefore, the state decides on the establishment and discontinuation of public service provision, sometimes necessitating an evaluation of whether the state is justified in instituting a legal regime for public service in specific activities.²⁹

The supply of drinking water as an obligatory municipal economic public service for environmental protection is conducted by various public service providers. In Slovenia, most cases of drinking water supply are managed by public companies, although, there are a few instances of concessions and direct management operations.

The Decree on Drinking Water Supply defines the types of tasks performed within the obligatory municipal economic public service for drinking water supply and certain conditions for providing drinking water, either as a public service or for personal use. The Decree also sets standards for communal infrastructure that must be fulfilled to conduct the public service. It lays down measures for public service implementation. This includes defining the contents of the environmental protection operational programme related to drinking water supply and the obligations of the municipalities and public service providers in the execution of public service. The execution of public service tasks must be in accordance with the methods and conditions of drinking water supply.

Notwithstanding the prevalence of public companies as the primary mode of drinking water supply, there are cases in Slovenia where water supply is handled by

25 Article 2 of ZGJS.

26 See Trpin, 2004, pp. 1376–1382.

27 Article 70.a of Constitution.

28 Article 6 of ZGJS.

29 See Trpin, 2004, pp. 1376–1382.

concessionaires. One prominent example is Pivovarna Laško in the Municipality of Laško, which obtained a concession in 1998 and extended its contract for an additional 15 years in 2009.³⁰ Prior to the conclusion of the 15-year term, based on an agreement to terminate the concession contract between the concessionaire Pivovarna Laško d.d. and the grantor Municipality of Laško, the execution of the economic public service for drinking water supply was transferred to the Municipality of Laško in 2016. The municipality now provides drinking water supply in the form of a direct management operation.³¹

Notably, in Slovenia, a certain percentage of individuals continue to obtain water from private water supply systems. According to the Decree on Drinking Water Supply, municipalities must ensure public service for the entire area of the municipality. In areas where the municipality does not provide public service, individual water supply or self-supply of a building or engineering structure can be established within settlement areas. It is important to consider that an area with a public water supply system is an area with 50 or more permanent residents and a settlement density exceeding five permanent residents per hectare.³² The same applies to areas with fewer than 50 permanent residents and a settlement density of five or fewer permanent residents per hectare unless self-supply of drinking water or self-supply of a building with drinking water is implemented within the settlement area.³³ In this context, an individual living in an area where a water supply system is already established must connect to the public water supply.³⁴ This implies that individuals cannot self-supply from a private water source in an area within the public water supply system.

4. Water Supply Infrastructure

To ensure adequate and quality drinking water supply, appropriate infrastructure that allows individuals to access water is crucial.

In Slovenia, the construction of water infrastructure is considered a matter of public interest.³⁵ Water infrastructure includes water structures, facilities, or installations intended for water management, particularly flood embankments, weirs, thresholds, reservoirs without the land within the reservoir area intended for occasional water retention, and collection basins, among others.³⁶ Additionally, it includes

³⁰ See Gantar, 2013.

³¹ See Novak, no date.

³² Article 9 of Decree on Drinking Water Supply.

³³ Ibidem.

³⁴ Article 10 of Decree on Drinking Water Supply.

³⁵ Article 44/3 of ZV-1.

³⁶ Article 44 of ZV-1.

water monitoring activities. Detailed provisions concerning water infrastructure are outlined in the Rules laying down water infrastructure.³⁷ According to these Rules, transport pipelines, which are regional or main water supply networks for delivering drinking water from the source to the drinking water distribution network and serve a local purpose, are also considered part of water infrastructure.³⁸

Special status for water infrastructure facilities can be obtained for individual objects based on a decision by the relevant ministry. All necessary permits must be obtained, as without them, the status of water infrastructure cannot be acquired. The status of water infrastructure granted may also be terminated, if the water infrastructure in a specific area becomes unnecessary.³⁹

In most cases, water supply services in Slovenia are provided by public companies. However, it is not mandatory that the drinking water be supplied solely through their water infrastructure; it can also be provided through state-owned infrastructure. The ownership of water infrastructure can either be at the state level or be the responsibility of the public service provider. Notably, water infrastructure, including the land on which it is constructed, is not considered public property, and cannot be obtained through adverse possession.⁴⁰

Local municipalities conduct drinking water supply through public waterworks, which are considered local infrastructure. A public waterworks represents a water supply network that serves the purpose of public service as municipal economic public infrastructure. Additionally, a part of the public waterworks is the external hydrant network for firefighting, which is hydraulically connected to the public water supply, as determined by the Decree on Drinking Water Supply.⁴¹ Waterworks obtains public status only when it is designated as municipal economic public infrastructure for providing public service.⁴²

The state is responsible for transport pipelines and may co-finance the construction of local drinking water supply infrastructure. The financing is facilitated through the Water Fund for intermunicipal or regional projects. Co-financing is not permitted for primary and secondary pipelines.⁴³

In some situations, municipalities take over private water supply systems, primarily when the number of residents who were previously supplied by a private water supply increases in a specific area.

37 Official Gazette of the Republic of Slovenia, No. 46/05.

38 Article 2/2 of Rules laying down water infrastructure.

39 Article 45 of ZV-1.

40 See also *Globevnik*, 2012, p. 110.

41 Article 2(3) of Decree on drinking water supply.

42 I U 1959/2011 at March 15th 2012.

43 Chapter 4 – Water Fund – ZV-1.

Ownership of the water supply system does not impact the eligibility to request payment for services rendered in the public service of drinking water supply. The payment of invoices for drinking water supply is solely determined by whether the entity provides the public service of drinking water supply and whether the individual required to pay the bill can be regarded as a user of the public service.⁴⁴

4.1. *Renewal of Water Supply System*

Adequately maintaining water supply systems is essential for the safe supply of drinking water. In Slovenia, as well as worldwide, the primary challenge in planning, constructing, and managing economic public infrastructure is financing and the long-term reliability of systems. A significant portion of water infrastructure was built over thirty years ago, which means substantial funds will be required for its renovation in the future, although various system improvements are already in progress, primarily to meet environmental requirements.⁴⁵

Thus, establishing proper records in this field is essential; through such records, reliable infrastructure renewal can be conducted, leading to efficient decision-making and reduced maintenance costs.⁴⁶

5. Cost of Water

The price for drinking water supply is determined based on the Decree and on the methodology for determining prices of obligatory municipal public services for environmental protection. In addition to numerous other responsibilities, the founder of the public economic institute decides on the prices or tariffs for the use of public goods.⁴⁷ With this Decree, the authority for price determination has shifted to municipalities, making them the regulatory body for approving prices of communal services.

The cost of drinking water supply includes a network fee ('omrežnina') and a water fee ('vodarina'). The network fee is charged in accordance with the applicable price list and is based on the size of the water meter or the capacity of the connection, if the building is not equipped with a meter for consumption measurement. The network fee is billed monthly and is not dependent on water consumption. It covers the costs of depreciation or leasing of basic assets and equipment that constitute public

44 VSK Sklep I Cp 481/2018 at October 9th 2018.

45 See Pergar and Polajnar, 2013, p. 286.

46 Pergar and Polajnar, 2013, p. 286.

47 Article 21 of ZGJS.

infrastructure, infrastructure maintenance and renewal, compensation expenses,⁴⁸ expenses for connection renewal and maintenance of connections to the public water supply,⁴⁹ compensation for water rights, and financing expenditures within the network fee costs (which include costs associated with debt financing for the construction or renovation of public water supply infrastructure). If public infrastructure for drinking water supply purposes is located outside the municipality, a proportional part of the leasing costs of this public infrastructure is also included in the network fee. The criteria for sharing costs can be based on co-ownership shares or the extent of the use of public infrastructure, as agreed upon by all municipalities as owners. In contrast to the network fee, the water fee covers the costs of providing the public service. This indicates that it includes only those costs that can be associated with providing public service.⁵⁰ The water fee is charged in accordance with the applicable price list and is based on the quantity of water supplied. For buildings equipped with consumption meters, the normative consumption is determined based on the meter's diameter (considering the normative drinking water consumption). For buildings with other types of water meters, the normative consumption is determined proportionally by considering the network fee factors. For buildings without consumption meters, the water fee is calculated based on the connection capacity, considering the normative drinking water consumption. The service provider determines the actual consumption and settles the accounts for the previous billing period with users at least once a year.

In 2019, a Comparative Analysis of the Implementation of Mandatory Municipal Economic Public Services in the Field of Environmental Protection⁵¹ (*Primerjalna analiza izvajanja obveznih občinskih gospodarskih javnih služb varstva okolja*) was prepared by the Institute for Public Services. The study aimed to categorise drinking water supply service providers into groups based on a crucial parameter and

48 This encompasses compensation for servitude, damages caused in connection with the construction, renovation, and maintenance of public service infrastructure.

49 These are costs related to the reduction of income from agricultural activities in accordance with regulations governing compensation for the reduction of income from agricultural activities owing to adaptation to water protection measures.

50 This primarily pertains to specific categories, such as direct material and service costs, direct labour costs, other direct costs, general (indirect) production costs, which include material costs, depreciation of business essential assets, services, and labour; general procurement and sales costs, which encompass material costs, depreciation of business essential assets, services, and labour; general administrative costs, which include material costs, depreciation of business essential assets, services, and labour; interest costs owing to financing the provision of public services, direct selling costs, water compensation costs for the sale of drinking water, and for water losses up to permissible levels of water losses in accordance with the regulation governing the supply of drinking water; other business expenses, and the return on invested business essential assets of the provider (this represents the return of the provider, which must not exceed 5% of the value of business essential assets for the direct provision of individual public services).

51 See Cerkvėnik, 'Inštitut za javne službe', 2020.

comparatively illustrate and analyse how individual service providers achieve selected explanatory parameters. These parameters significantly influence cost levels and explain the positioning of each service provider in a comparative group. As the prices for drinking water supply services are provided at the local level, it was found that the organisation of these services is highly fragmented and cost intensive. Additionally, these services are delivered under varying conditions in different supply areas and are influenced by numerous technical, technological, and local characteristics. All these factors collectively impact the service price.⁵²

In the previously mentioned case of the Municipality of Laško, where the drinking water supply was provided by a concessionaire, residents had to pay up to 30% more than residents in the neighbouring Municipality of Celje.⁵³ This raises legitimate concerns about the privatisation of water sources and restrictions on access to drinking water in many cases.

In Slovenia, the price of drinking water is uniform for all users, irrespective of social status or the quantity consumed. In contrast, countries such as Belgium apply a progressive tariff system, whereby the price increases with consumption, and four tariff levels are established for drinking water. Socially vulnerable individuals are supported through a water levy mechanism, and disconnection from the water supply is not permitted without a prior social assessment and a judicial decision. In France, vulnerable groups may benefit from subsidised access to drinking water or are entitled to a basic quantity of water free of charge. In Slovakia, the price of drinking water is regulated based on the cost of supply, profit margins, necessary investments, and the efficiency of the system. In the Netherlands, the extraction of groundwater is subject to additional taxation to promote the use of surface water. Drinking water supply is exclusively conducted by public entities, as private sector involvement is legally prohibited.⁵⁴ Slovenia, unlike several of these countries, does not implement a progressive pricing model or define a minimum quantity of drinking water as a matter of social entitlement, and lacks institutionalised solidarity mechanisms such as dedicated social water funds.

5.1. Sanctions for Non-Payment of Drinking Water Services

In cases where individuals are connected to a public water supply, Article 5 of the Decree on Drinking Water Supply is relevant. It states that the recording of the amount of water taken from the public water supply, the identification of the payer,

⁵² See Cerkenik, 'Inštitut za javne službe', 2020, p. 55.

⁵³ See Eman and Humar, 2017, pp. 120, 121.

⁵⁴ See Zobavnik, 2020.

and the payment for public service for users of the public service are conducted in accordance with the municipality's regulation governing the public service. Therefore, each municipality has internal regulations specifying the sanctions for non-payment of water charges.

The first sanction for individuals who fail to make payment within the deadline specified on the invoice is the payment of legal late interest. In the older ordinance of the Municipality of Črna na Koroškem, Article 36 of the Ordinance on Drinking Water Supply in the Municipality of Črna na Koroškem⁵⁵ stated that the user must pay the bill within the timeframe specified on the invoice or the bill. If the user fails to settle the water fee within the specified timeframe after receiving the bill, the operator is required to issue a reminder. In the reminder, the operator sets an additional deadline for payment and informs the user about the consequences of non-payment. The consequence of non-payment is legal action. In cases of delay, the user is also charged legal late interest. In this ordinance, the initial sanction was not water disconnection, although the ordinance provided for the possibility of cutting off the water supply. The ordinance allowed for the discontinuation of drinking water supply in cases where the installation was inadequate, or if the user allowed the connection of another user to their internal installation, and when other violations related to the water supply system occurred. Currently effective municipal ordinances, such as the Ordinance on Drinking Water Supply and Wastewater Management in the Municipality of Celje,⁵⁶ the Ordinance on Drinking Water Supply in the City Municipality of Ljubljana,⁵⁷ as well as the Ordinance on Drinking Water Supply in the Municipality of Moravče,⁵⁸ prescribe water disconnection as a sanction for non-payment.

Moreover, a water disconnection case in the Municipality of Moravče was the subject of a legal dispute.⁵⁹ The court reviewed the decision of the first-instance court regarding the water disconnection.

In the Ordinance on Drinking Water Supply in the Municipality of Moravče, the third paragraph of Article 42 states that the operator must issue a reminder to the user who fails to pay the water bill, set an additional 15-day payment deadline, and warn them about the consequences of non-payment. After the payment deadline has passed, water supply can be disconnected without further warning. In addition, Article 45 of the Ordinance on Drinking Water Supply in the Municipality of Moravče states that water may be disconnected if the user does not settle the costs based on the issued bill, even after receiving a reminder before the disconnection within the specified time.

55 Official Gazette of the Republic of Slovenia, No. 92/2009 on November 16th, 2009.

56 Official Gazette of the Republic of Slovenia, No. 9/2010 on February 9th, 2010.

57 Official Gazette of the Republic of Slovenia, No. 59/2014 z dne 1. 8. 2013.

58 'Uradni vestnik Občine Moravče št. 07/05, 02/08'.

59 VSL Sklep I Cp 585/2022 on May 26th, 2022.

Through a temporary injunction, the first-instance court, at the request of the plaintiff, ordered the defendant municipal company to re-establish the previous state of possession at its own expense by reconnecting the water at the user's point, and it prohibited the defendant from interfering with the plaintiff's possession of the property or carrying out any actions that would hinder, obstruct, or impede the water supply at the user's point. In addition, it specified a penalty of EUR 5,000.00, which would increase in the event of a breach of the temporary injunction, until the cumulative penalty reaches EUR 500,000.00. The first-instance court rejected the defendant's objection in this regard. The municipal company appealed against the decision of the first-instance court, and the second-instance court granted the appeal.

The higher court determined that it is undisputed that the plaintiff owed payment for water supply to the defendant. In this specific case, it emphasised that water disconnection to the plaintiff was not an unlawful action because it was based on the third paragraph of Article 42 and Article 45 of the Ordinance on Drinking Water Supply in the Municipality of Moravče. The plaintiff did not argue that the ordinance was unconstitutional. The plaintiff referred to the decision of the Constitutional Court of the Republic of Slovenia, Case No. Up-156/98, dated 11 February 1999. However, it can be inferred from the Constitutional Court's decision, Case No. Up-156/98, that the provisions in the ordinances authorising water suppliers to disconnect water supply in case of non-payment for services rendered are not unconstitutional. Although the activities of the municipal company would not be endangered owing to one user's non-payment, as water supply is not so expensive, the principle of equality must be considered in specific cases. Allowing the plaintiff not to pay her debt owing to her poor financial condition should apply to all users of the defendant's services with similar financial conditions. In this judgement, the Constitutional Court determined that water disconnection is a permissible, appropriate, effective, and necessary measure when it complies with the principle of proportionality. The enforcement process is not an equivalent measure to disconnecting the water supply, which typically results in prompt payment, and no additional debts are incurred during the process (if water supply is not paid in the future). However, the enforcement process is associated with additional costs and is time-consuming. Owing to the plaintiff having an individualised water consumption bill that she did not pay, the intervention is permissible, suitable, effective, and necessary, and it cannot be replaced with a milder measure.

The second case, also related to non-payment for the supply of drinking water, was addressed in the judgement with the reference number VSM Sklep I Cp 989/2016 dated 27 September 2016.⁶⁰ In this legal case, only a part of the costs was settled. The defendant claimed that as a provider of economic public services, they supply the facility with drinking water. They believed that the plaintiff was causing a conflict

60 VSM sklep I Cp 989/2016 on September 27th 2016.

by unilaterally amending and changing the issued bills for water supply, wastewater disposal, and wastewater treatment. The first-instance court, as confirmed by the second-instance court, correctly assessed the defendant's actions through the principle of proportionality. It was established that disconnecting water supply owing to non-payment of water service charges was by no means envisaged for the non-payment of a disputed, smaller portion, amid the undisputed part of these costs.

Although courts, in some cases such as non-payment owing to a disputed portion of the invoiced service, grant requests for the cessation of interference with possession through water disconnection, in some cases, such intervention continues to be permitted. However, the interruption of water supply constitutes an inappropriate measure, particularly considering that this right is enshrined in the Constitution. Inappropriate measures have been highlighted by Vasilka Sancin and Miha Juhart, in their article.⁶¹ They emphasise that the supply of electric energy is not subject to sublegal regulations, such as individual municipal ordinances, and a special procedure for disconnecting electric power is envisaged. It is essential that disconnections of electric energy are separately assessed concerning individuals with special social and life circumstances.

To prevent potential violations of the constitutionally guaranteed right to drinking water, a minimum quantity of drinking water could be secured and ensured to all individuals, irrespective of their ability to pay. The establishment of social funds to support the most vulnerable members of society could further strengthen this safeguard.

Based on comparative solutions applied in other countries, it would be reasonable to introduce legislation stipulating that water disconnection may only occur following an assessment of the individual circumstances. A meaningful safeguard could include mandatory consultation with the Centre for Social Work prior to any disconnection in cases involving non-payment. Furthermore, it could be legally required that disconnection is only permitted based on a judicial decision.

Such measures would contribute to ensuring that the exercise of enforcement mechanisms—such as disconnection—does not result in a breach of the constitutional right to drinking water.

6. Conclusion

The right to drinking water is a fundamental right vital for human existence. Providing suitable access to drinking water to every individual is essential. Although some countries encounter issues with sourcing drinking water, Slovenia, being one of the wealthiest countries in water resources, does not encounter such difficulties.

61 See more in Sancin and Juhart, 2023, p. 121.

Realising this at the national level and managing water resources appropriately is crucial to ensure the well-being of future generations.

Member states of the EU individually regulate the provision of drinking water. The regulation of drinking water is divided across various laws and subordinate acts, which primarily contain general provisions related to the supply of drinking water and how it should be ensured. More specific provisions are left to the discretion of each municipality, within their legal instruments, predominantly in the form of municipal ordinances. These ordinances specify the methods of drinking water supply, responsibilities of involved entities, conditions for connection and discontinuation of water supply, and so on. Considering the constitutional provision regarding the right to access clean drinking water, legislative changes in this area should be implemented, as the enforcement of this constitutional right cannot be left to municipal ordinances.

In Slovenia, municipalities that provide drinking water services generally do so through economic public services. Therefore, municipal councils determine the pricing of these public services based on the Decree on the methodology for determining prices of obligatory municipal public services for environmental protection.

Individuals are required to pay for drinking water supply, despite their constitutionally guaranteed right to access clean drinking water. This cost is partly fixed and not dependent on the quantity of water consumed. Therefore, it is imperative to ensure that aging and deteriorating water supply systems are adequately renewed. Non-payment for drinking water supply can lead to sanctions in the form of water supply discontinuation, which represents an extreme measure. The appropriateness of such measures are debatable.

In Slovenia, the right to access clean drinking water is constitutionally guaranteed. However, the author believes that despite the existing system, there is a need to reform the regulations in a manner that harmonises the provision of drinking water more effectively. In the future, water will become an even more essential resource, making it necessary to establish a comprehensive legal framework for its management.

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The Inclusion of the Social Factor in Polish Criminal Proceedings

ABSTRACT: *This study analyses the inclusion of the social factor in Polish criminal proceedings, focusing on its significance for the principle of publicity and social oversight of the judiciary. It discusses case law concerning the openness of proceedings, highlighting its impact on procedural practice and the interpretation of legal provisions. Moreover, it presents the role of social organisations and social representatives in criminal proceedings, emphasising their competencies and importance in protecting the public interest. Further, it focuses on the institution of lay judges, examining their influence on the functioning of the judiciary and the challenges related to their participation in adjudication. It is emphasised that the social factor enhances the transparency of proceedings and public trust in the justice system. However, its effectiveness depends on appropriate mechanisms ensuring its efficiency and impartiality.*

KEYWORDS: *social factor, transparency, criminal proceedings, lay judges, public oversight.*

1. Introduction

Considering the historical practices in ancient Rome, where the principle of public criminal proceedings was a cornerstone of the justice system and ensured social oversight of judicial processes, modern legal systems, including the Polish legal system, strive to balance transparency with the protection of participants' privacy. The openness of trials plays a crucial role in building public trust in the judiciary; however, its implementation must also consider other values, such as the right to privacy and the protection of personal data. The Polish legislator defines the role of the social factor within the legal system at the constitutional level.

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¹ However, it does not specify which proceedings should be accessible to the public and which may be conducted without public participation, leaving this matter to statutory regulations and judicial rulings.²

However, the mere inclusion of the social factor in the justice system is insufficient to guarantee full transparency in criminal proceedings. The manner in which the legislator defines the scope of trial publicity and the conditions under which it may be restricted is crucial. The principle of openness is a fundamental rule of criminal procedure in the Polish legal system. However, in certain situations, it may be limited owing to other values, such as the protection of private interests, the safety of trial participants, or the necessity to safeguard state secrets. The open nature of court hearings enables social oversight of the judiciary, strengthens public trust in the courts, and helps eliminate potential abuses. However, complete transparency is not always desirable – sensitive information disclosed during proceedings may violate the privacy of the parties involved, influence the course of the trial, or pose a threat to the public interest. Therefore, the legislator has provided for situations in which the publicity of a hearing may be excluded or restricted, with the court having the authority to decide in such cases. Thus, determining the openness of proceedings requires maintaining a balance between the public's right to access information about the trial and the need to protect other legal values.³

An important manifestation of society's participation in the justice system is the presence of social organisations, social representatives, and the institution of lay judges in criminal proceedings. Their role primarily involves strengthening social oversight of judicial processes, supporting the parties involved in proceedings, and ensuring that justice is administered with due regard for the public interest. Their participation serves as a mechanism for the democratisation of the judiciary, ensuring that court rulings consider not only legal aspects but also societal values and expectations. The contemporary debate on their role focuses on their effectiveness, independence, and actual influence on the course of proceedings, raising the question of the optimal model for public engagement in criminal trials.⁴

The contemporary challenges related to the functioning of the social factor in criminal proceedings stem not only from the need to reconcile transparency with the protection of individual rights but also from dynamic social and technological changes. The digitalisation of the judiciary, the development of the media, and growing expectations regarding transparency have brought a new dimension to the principle of openness. Society, as a stakeholder in the proper functioning of

1 Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws 1997 No. 78, item 483).

2 Gerecka-Żołyńska et al., 2022, pp. 70-85; Czarny et al., 2024, pp. 399-402.

3 Jabłońska-Bonca and Zieliński, 1988, pp. 47-49; Wolska-Bagińska, 2018, pp. 23-36; Gerecka-Żołyńska et al., 2022, pp. 318-323.

4 Juchacz, 2016, pp. 155-168; Jakubik, 2014, pp. 101-109.

the courts, increasingly demands greater access to information about legal proceedings, as evidenced by calls for live broadcasts of hearings and broader participation of social representatives in the adjudication process. The role of the social factor in Polish criminal proceedings is not merely a theoretical concept but a tangible element shaping the justice system. However, in practice, questions arise about the effectiveness and actual influence of citizens on the judicial process.

2. The Importance of the Social Factor for Transparency and Social Oversight in Criminal Proceedings

The openness of criminal proceedings and the inclusion of the social factor in the functioning of the justice system are fundamental pillars of a democratic state governed by the rule of law. They influence both the legitimacy of judicial decisions and the manner in which society perceives justice. The public nature of court proceedings enhances the transparency of judicial actions, enables oversight of judicial decisions, and fosters public trust in the institutions of justice. In a state governed by law, where courts must remain independent and free from political pressure or arbitrary decisions, social oversight serves not only a preventive function but also an educational and integrative one. A society that can observe and assess the activities of judicial bodies tends to exhibit greater trust in public institutions, thereby strengthening the values of the rule of law and justice. Moreover, the transparency of proceedings is crucial in the context of protecting individual rights. The public nature of trials allows for the verification of procedural fairness, reduces the risk of abuses by judicial authorities, and increases the accountability of judges and prosecutors for their decisions. Further, it enables the parties and their legal representatives to more effectively defend their interests by ensuring access to case files and participation in key stages of the proceedings. Consequently, transparency serves a protective function, guaranteeing the parties the right to a fair and impartial trial. Simultaneously, it counteracts the judiciary's closed and insular character, allowing for social oversight and ensuring adherence to high procedural standards.⁵

Citizen participation in the functioning of the justice system is a key aspect of the democratisation of judicial processes. Modern legal systems provide for various forms of social participation, which strengthen oversight of the judiciary and enhance its accessibility to the public. In the Polish legal system, the social factor is primarily manifested through the participation of lay judges in adjudication, the activities of social organisations advocating for the protection of the public interest, and the presence of the public and media in court hearings. Each of these forms of

5 Gerecka-Żołyńska et al., 2022, pp. 70-85; Maziarz, 2023, pp. 18-19; Kostro, 2016, pp. 97-110.

participation serves a distinct yet complementary role, contributing to greater transparency in proceedings and reinforcing public trust in the judiciary. The involvement of lay judges in adjudication is intended to enhance oversight of judicial decisions and counteract the excessive insularity of the legal profession. Meanwhile, social organisations participate in court proceedings as entities working to protect the public interest. Their activities primarily focus on areas related to human rights protection, consumer rights, and environmental protection. Moreover, the presence of the public and media at hearings is a crucial element of social oversight in the justice system. The ability of mass media to report on court proceedings contributes to greater transparency and allows the wider public to assess how the judiciary operates. Further, the media serve a preventive function, encouraging judicial authorities to adhere to the highest standards of fairness and impartiality. However, media coverage of trials must maintain a balance between access to information and the protection of the rights of individuals involved in the proceedings.⁶

The principle of transparency in criminal proceedings is enshrined in both constitutional and international legal provisions. Article 45(1) of the Constitution of the Republic of Poland (hereinafter, the Constitution) guarantees everyone the right to a fair and public hearing by an independent and impartial court. This underscores the significance of openness as one of the pillars of a democratic state governed by the rule of law, serving as a mechanism for overseeing the judiciary.⁷ Similarly, Article 182 of the Constitution states that the participation of citizens in the administration of justice shall be determined by statute.⁸ In addition to constitutional norms, the principle of transparency is reflected in the procedural provisions of the Code of Criminal Procedure (CCP).⁹ Article 355 of the CCP establishes the public nature of court hearings as a general principle, stating that any exceptions to this rule may arise only from statutory provisions. Article 356 of the CCP further defines the category of individuals entitled to attend public hearings while also introducing certain restrictions in this regard. According to Article 356 § 1 of the CCP, access to a court hearing is granted only to adults and unarmed individuals. This provision aims to ensure order in the courtroom and eliminate potential security threats. Additionally, Article 356 § 2 of the CCP allows the presiding judge to permit minors and individuals authorised to carry weapons owing to their official duties to attend proceedings. In specific circumstances, the legislator has also provided for the exclusion of the public from hearings. Article 356 § 3 of the CCP excludes individuals whose behaviour is incompatible with the dignity of the court from attending proceedings. This regulation serves to

⁶ Kil, 2021, p. 12; Juchacz, 2016, pp. 155-168.

⁷ Chmielarz-Grochal, 2016, pp. 67-101.

⁸ Kielin-Maziarz, 2024, pp. 69-82.

⁹ The Act of June 6, 1997 – Code of Criminal Procedure (Journal of Laws 1997 No. 89, item 555); Dudka et al., 2023, pp. 816-825.

prevent disruptions during the trial while safeguarding the authority and integrity of the judiciary. Clearly, considering these provisions, the principle of openness in the Polish legal system is not absolute. It is structured in a manner that ensures public access to judicial proceedings while maintaining a balance between transparency and the requirement to protect the dignity and proper conduct of the trial.¹⁰ The doctrine distinguishes two aspects of the openness of court hearings: internal and external transparency. Internal transparency is a principle that applies exclusively to the parties to the proceedings and individuals cooperating with them. It ensures that the parties have access to case files and the ability to participate in evidentiary proceedings. In this context, the principle of openness is closely linked to the right to a fair trial and the principle of due process.¹¹

The solutions adopted in the Polish legal system regarding the transparency of criminal proceedings apply not only to the course of the trial but also to the manner in which the case is concluded and the judgment is announced. The openness of the process cannot be limited solely to the courtroom stage; it should also include the accessibility and public nature of the final ruling. The public announcement of the judgment is as important as the transparency of the proceedings. The pronouncement of a verdict is not merely a matter of reading it aloud in the presence of the parties and the audience in the courtroom. It includes the possibility of accessing the ruling at the court's premises and, in cases of particular significance, its publication in official collections of judicial decisions. Such accessibility serves not only to enhance judicial transparency but also plays an educational role, helping citizens better understand the interpretation of the law and the mechanisms of the justice system. However, notably, not every ruling requires complete public disclosure. Although final judgments should be announced publicly, incidental decisions or rulings that do not directly impact the substance of the case may be communicated in a more limited manner. Not every decision issued during the course of proceedings is of significant public interest, and broad disclosure of purely technical or procedural determinations could lead to an unnecessary accumulation of information.¹²

The trend towards expanding the transparency of court judgments is reflected not only in national legal regulations but also in international standards. European Union regulations and the case law of the European Court of Human Rights (ECHR) emphasise the need to balance access to information on judicial rulings with the protection of individual rights. Particular importance is placed on the publication of judgment justifications, which not only enables the analysis of judicial reasoning and legal interpretation trends but also enhances the predictability of legal application

10 Czarnecki, 2017, pp. 21-37; Koper, 2019, pp. 129-152; Andrzej, 2018, pp. 489-503.

11 Koper, 2019, pp. 129-152.

12 Szczepaniak, 2024, pp. 1-13; Żywucka-Kozłowska and Dziembowski, 2022, pp. 95-103.

and increases public trust in the judiciary.¹³ In Poland, there is a visible process of modernising regulations on the transparency of proceedings, as observed in the increasing availability of court rulings through electronic systems. The digitalisation of judicial databases facilitates both the analysis of judgments by legal scholars and practitioners and citizens' access to current case law, thereby contributing to the improvement of legal awareness in society. Simultaneously, the development of digital media necessitates adjusting regulations to new challenges related to privacy protection for parties to proceedings and procedural security.¹⁴

3. Lay Judges in the Polish Judiciary – Significance, Influence and Challenges

Lay judges play a significant role in the Polish judicial system, serving a social function and reinforcing the democratic character of the judiciary. Their presence in adjudicating panels helps increase transparency in legal proceedings and introduces a civic perspective into the administration of justice. Lay judges embody the constitutional principle of public participation in the administration of justice, which aims to strengthen public trust in judicial institutions. They participate in both criminal and civil proceedings, adjudicating alongside professional judges in cases of particular importance. Their role extends beyond evaluating evidence – they are also involved in deciding on the defendant's guilt and determining the appropriate penalty.¹⁵

According to the Act of 27 July 2001 – Law on the Organisation of Common Courts, the regulations concerning lay judges are specified in Title IV, Chapter 7.¹⁶ The Act specifies, among other aspects, the appointment process for lay judges, the requirements that candidates must meet, as well as the scope of their competencies and duties. The participation of lay judges in adjudication serves to counteract the insularity of the judicial profession and ensures greater representativeness of the judiciary in relation to society. The inclusion of lay judges in judicial panels aligns with the concept of citizen participation in the administration of justice, thereby reinforcing its social character and enhancing public trust in the judicial system.

Despite the formal equality of votes between lay judges and professional judges, their actual influence on the administration of justice remains debatable. On the one hand, their presence in adjudicating panels enhances the legitimacy of court rulings and enriches jurisprudence with extra-legal aspects derived from the professional

¹³ Jaśkowska, 2020, pp. 205-236.

¹⁴ Piekarski, 2023, pp. 103-124.

¹⁵ Grudecki, 2022, p. 138; Ziółkowska, 2014, pp. 69-78.

¹⁶ The Act of July 27, 2001 – Law on the System of Common Courts (Journal of Laws 2001 No. 98, item 1070).

and life experiences of community members. On the other hand, a lack of legal training and unfamiliarity with complex procedures may result in lay judges following the position of the professional judge in practice, raising questions about the actual effectiveness of this institution. This is further influenced by the strong hierarchy within adjudicating panels, where the authority of the presiding judge often determines the direction of the ruling.¹⁷

In addition to concerns regarding the effectiveness of lay judges, this institution faces numerous challenges related to its organisation and functioning. A significant issue is the lack of substantive preparation for lay judges to perform their role. This stems from the absence of mandatory training and limited knowledge of judicial procedures, making it difficult for them to independently analyse evidence or decide in a completely autonomous manner. Another challenge is low attendance and limited engagement, as lay judges often need to take time off work to attend hearings. In many cases, this results in lay judges viewing their role as a mere formality, rather than as an opportunity to meaningfully contribute to the judicial process.¹⁸ Another challenge is the impact of lay judges on the length of court proceedings. Their participation necessitates detailed discussions within the adjudicating panel, which can contribute to prolonging trials. Longer deliberations and the need to explain complex legal issues to individuals without legal education may lead to an increase in judicial backlogs, contradicting efforts to streamline the justice system. Moreover, the selection process for lay judges is a matter of concern. They are appointed by municipal and city councils for a four-year term, which carries the risk of politicising the nomination process. Often, selection decisions are influenced not by actual competence or experience, but by political factors or local social networks. This raises questions about the objectivity and reliability of their participation in adjudication, particularly in cases involving socially controversial issues.¹⁹

In recent years, significant changes have been introduced to improve the quality of candidates for lay judges. The eligibility criteria have been expanded, allowing the nomination of individuals conducting business activities within the relevant municipality, while also specifying that municipal, county and provincial councillors cannot hold this position. Moreover, regulations regarding candidate nominations have been tightened – the number of citizens supporting a candidacy has been increased from 25 to 50, and the required documents have been clarified, including, among others, certificates from the National Criminal Register and medical certificates. Further, the obligation for police background checks of candidates has been reinstated to ensure that lay judges are individuals of impeccable reputation. Additionally, the

17 Kosonoga, 2016, pp. 83-101.

18 Krzyżewski, 2023, pp. 143-148.

19 Ławniczak, 2012, pp. 133-162.

procedure for the dismissal of lay judges has been revised – this is decided by the municipal council at the request of the president of the court, while the lay judge has the opportunity to present their position. The rules regarding the remuneration of lay judges have also been clarified, precisely defining the time during which they perform their duties. Despite these changes, the system of selecting lay judges raises doubts. Numerous proposals for reforming this institution have emerged, including the introduction of an examination for candidates, selection by courts from among local community members, or even the possibility of a random selection process among individuals meeting specific criteria. Another interesting concept is allowing candidates to be nominated by academic circles and public institutions, which could improve the competence and prestige of this role.²⁰

4. The Role of Social Organisations and Social Representatives in Criminal Proceedings

Social organisations play a crucial role in the Polish justice system, acting as social representatives and advocates of the public interest. Their presence in criminal proceedings reinforces the democratic nature of the judicial process by ensuring additional social oversight of the functioning of the justice system. The concept of a social representative is linked to the idea of *amicus curiae* (“friend of the court”), which originates from ancient Rome, where entities external to the trial could present their position in the public interest. In modern times, social organisations are not restricted in terms of the types of cases they may participate in. This allows them to engage in matters crucial to the protection of human rights, civil liberties, and the public interest. Consequently, their role extends beyond passive observation to include active participation in shaping the justice system.²¹

The participation of social organisations and their representatives in criminal proceedings is regulated by Articles 90–91 and 271 of the CCP. According to these provisions, there are two key prerequisites for allowing a social representative to participate in a court trial. The first prerequisite is the protection of the public interest or an important individual interest that falls within the statutory objectives of a given organisation. This may include cases related to the defence of human rights, protection of crime victims, or prevention of abuses of power. The second prerequisite is the interest of the justice system itself, meaning that the presence of a social representative should positively impact the course of the proceedings, contributing

20 ArsLege website [Online]. Available at: <https://arslege.pl/aktualnosci/jakie-zmiany-w-wyborze-lawnika>, 546 (Accessed: 25 January 2025).

21 Rybczyńska and Płoska-Pecio, 2005, pp. 99–115.

to their fairness and transparency. Both of these prerequisites form the basis for the involvement of social organisations in criminal proceedings, emphasising their role as institutions supporting the justice system and safeguarding social interests.²²

The procedural rights of a social representative, as derived from Article 91 of the CCP, encompass several key aspects. First is participation in the trial, which means the ability to have a direct impact on the course of proceedings through their presence in the courtroom. Second is the right to speak, allowing them to present arguments related to the case, which may contribute to a broader perspective on the issue. Additionally, the social representative has the right to submit written statements, enabling them to formally express their position and have it recorded in the case files. These rights grant social representatives an active role in criminal proceedings, allowing them to effectively represent social interests and influence the administration of justice. Beyond direct participation in criminal proceedings, social organisations may also engage in monitoring court proceedings, which constitutes an important element of social oversight of the justice system. Although the Code of Criminal Procedure does not explicitly regulate this function, the principle of trial transparency allows for the presence of observers in the courtroom. Monitoring aims to assess the fairness and correctness of proceedings and identify potential violations of civil rights or judicial procedures. This type of activity aligns with the concept of an open judiciary, which remains subject to social oversight, thereby strengthening public trust in judicial institutions.²³

An important aspect of the activities of social representatives is their ability to collaborate with one of the parties in criminal proceedings, which may take the form of advisory support or assistance in protecting the rights of the accused or the victim. In this context, judicial case law plays a crucial role, particularly the judgment of the Court of Appeal in Kraków dated 29 October 2003, which emphasised that 'it is not the court's role to control how participants in the proceedings exercise their rights, even if a social representative limits their activities to cooperating with the defense attorney of the accused'.²⁴ This means that social organisations can support one of the parties, provided that their actions comply with procedural rules. In practice, this may involve providing expert opinions, assisting the defence counsel of the accused, or engaging in activities aimed at protecting the rights of crime victims. The lack of strict limitations on the participation of social organisations in criminal proceedings allows them to play an active role in shaping the justice system, which is a significant expression of the democratic nature of the rule of law. The discretion granted to courts under Articles 90–91 of the CCP regarding the assessment of the legitimacy

22 Woźniewski, 2016, pp. 163–173; Kulesza and Kuźelewski, 2015, pp. 65–87.

23 Kil, 2022, pp. 50–68; Czarnecki, 2017, pp. 21–37.

24 Judgment of the Court of Appeal in Kraków of 29 October 2003, II AKa 175/03.

of their participation ensures that the mechanisms of cooperation between social organisations and the justice system can evolve in response to changing legal and social realities.²⁵

5. Case Law on the Transparency of Criminal Proceedings – Impact on Procedural Practice and Interpretation of Legal Provisions

The transparency of court proceedings is the foundation of a democratic legal system, playing a crucial role in both the proper functioning of the judiciary and the building of public trust in the courts. The openness of judicial processes not only enhances the public perception of justice but also serves a preventive function, reducing the risk of arbitrariness and abuses by judicial authorities. Public access to court hearings allows citizens, the media, and social organisations to monitor the course of proceedings, which translates into greater oversight of legal enforcement and strengthens the legitimacy of judicial decisions in the eyes of society. The case law of Polish courts of appeal consistently confirms that the transparency of criminal trials supports the realisation of the principle of a fair trial, which is a fundamental standard of European and international law, as expressed in Article 6 of the ECHR.²⁶ This principle guarantees that every accused person has the right to a fair and public hearing of their case by an independent and impartial court. In the context of this principle, restrictions on transparency may only occur in exceptional and justified cases, such as the protection of the privacy of trial participants, state security, or the protection of classified information.²⁷

The Court of Appeal in Szczecin, in its rulings, unequivocally emphasises that the transparency of the hearing is not merely a formal procedural requirement, but above all, a fundamental pillar of judicial transparency, ensuring the fairness of the trial and protecting the rights of the participants in the proceedings.²⁸ In particular, referring to Article 6 of the ECHR, the court emphasises that the principles of a fair trial should apply not only to criminal cases, but also to other proceedings concerning fundamental rights and freedoms of individuals. This interpretation extends the standards of a fair trial to lustration procedures, underscoring the need to provide the accused with genuine opportunities for defence. Regarding access to case files, the court explicitly opposes the practice of automatically classifying documents

²⁵ Woźniewski, 2018, pp. 168-177.

²⁶ Council of Europe, European Convention on Human Rights, as amended by Protocols Nos. 11, 14 and 15, ETS No. 005, 4 November 1950.

²⁷ Langford, 2009, pp. 37-52.

²⁸ Judgment of the Court of Appeal in Szczecin of 6 November 2014, II AKa 198/14.

produced by the communist security services as state secrets. It argues that such actions violate the principle of equality of arms and result in unequal treatment of the parties to the proceedings.

Restricting access to key materials for individuals undergoing lustration may lead to an inability to effectively defend themselves, thereby distorting the outcome of the trial, which is inconsistent with the fundamental standards of a democratic state governed by the rule of law.

The court further emphasises that the principle of transparency should encompass not only the public nature of hearings, but also access to case files, particularly in historical cases, where an open and transparent confrontation with the past is significant. This position aligns with a broader judicial trend advocating for minimising restrictions on the transparency of proceedings and ensuring equal access to evidence and procedural materials for all parties.

Furthermore, the Court of Appeal in Szczecin emphasises the crucial importance of the obligation to deliver a judgment along with its justification, stating that restrictions in this regard may only be applied in situations strictly defined by law. In particular, Article 100 § 5 of the CCP may be applied only when the transparency of the hearing has been excluded under Article 360 § 1(3) of the CCP, which pertains to the protection of classified information. The court unequivocally stresses that restrictions on access to the reasoning of a judgment must be based on specific statutory grounds and cannot be applied arbitrarily. Thus, it highlights the necessity of strictly adhering to the principle of proportionality when limiting trial transparency, ensuring that such limitations do not violate fundamental guarantees of a fair trial. The improper application of restrictions on access to judgment justifications may result in a situation where a party to the proceedings is deprived of the ability to fully oversee the trial process and effectively exercise their right to appeal. In judicial practice, the consistent application of these principles plays a vital role in ensuring the transparency and correctness of proceedings. The position of the Court of Appeal in Szczecin aligns with a broader trend aimed at eliminating unjustified restrictions on transparency and underscores the necessity of adhering to procedural rules as a safeguard for protecting the procedural rights of the parties.²⁹

The Court of Appeal in Gdańsk focuses on the importance of judicial transparency in the context of the public interest, emphasising that the openness of court proceedings not only serves as a guarantee of fairness and correctness of rulings, but also plays a key educational and oversight role in a democratic state governed by the rule of law.³⁰ Public access to information on the course of criminal cases enables societal evaluation of the judiciary's activities, thereby contributing to strengthening

²⁹ Szczechowicz, 2018, pp. 239-247.

³⁰ Judgment of the Court of Appeal in Gdańsk of 8 April 2015, II AKa 79/15.

public trust in the courts and ensuring uniform application of the law. The media play a crucial role in this regard, as they act as representatives of public opinion, not only reporting on proceedings but also helping to prevent potential abuses and arbitrary procedural decisions. The court emphasises that the presence of journalists at hearings and the ability to publicly comment on cases of significant public interest constitute an essential mechanism of democratic oversight of the judiciary. Consequently, judicial transparency serves not only the interests of the parties involved but also society as a whole, which has a right to information on the functioning of the justice system. Simultaneously, the court stresses that restricting the openness of proceedings should be exceptional and applied only when it is absolutely necessary to protect the legitimate interests of the participants. In particular, protecting an important private interest can serve as a basis for limiting transparency only when public disclosure of information could cause significant harm to the individuals involved, such as in cases concerning particularly sensitive personal data, family matters, or the dignity of trial participants. Nevertheless, the court emphasises that even in such cases, a balance must be maintained between privacy protection and the public's right to information about the case and the reasoning underlying the judgment. This means that restrictions on transparency should be applied proportionally and only to the extent necessary to safeguard specific legal interests, without violating the fundamental principle of judicial transparency. In practice, this requires that decisions to exclude the public from hearings must be thoroughly justified, and each case should be assessed individually, considering both the rights of the participants and the public interest.³¹

The Court of Appeal in Warsaw focuses on the issue of restricting the transparency of proceedings, emphasising that any decisions in this regard must be made only to the extent that is necessary and proportionate.³² In its rulings, the court emphasises that the exclusion of transparency may apply only to those parts of the oral reasoning of the judgment and the written justification that directly relate to materials classified as confidential. This means that the complete secrecy of the entire proceeding is not permissible if classified information constitutes only part of it. Such an approach aims to ensure maximum transparency of the judicial process, while simultaneously protecting information covered by state secrecy. Further, the court stresses that every state authority, including courts, has an obligation to protect state secrecy; however, this obligation must not lead to excessive restrictions on a party's right to a public hearing of their case. The principle of judicial transparency is a fundamental guarantee of a fair trial, and its restriction should occur only in situations where it is absolutely necessary and justified by the public interest or the

³¹ Dziembowski and Szczechowicz, 2014, p. 55.

³² Decision of the Court of Appeal in Warsaw of 19 December 2013, II AKz 856/13.

protection of legal rights of the participants in the proceedings. In a second ruling, the court unequivocally states that the principle of judicial transparency, as derived from the Constitution, is significant for the Polish legal system. Every decision to limit transparency must have a direct basis in the provisions of the Constitution and the CCP, and any attempts to expand the scope of secrecy through statutory regulations or judicial practice are impermissible. The Court of Appeal in Warsaw further asserts that excluding transparency should be treated as an exception to the rule, and its application must always be strictly justified and limited to the absolute minimum necessary. Any decision to classify parts of a proceeding must always consider both the public interest and the rights of the parties to a fair trial. In practice, this means that even when it is necessary to protect state secrecy, the court should strive to disclose as much of the proceedings as possible, ensuring that society has access to key information about the case and the reasoning underlying the verdict. Emphasising this principle in case law is crucial for judicial practice, as it prevents excessive classification of cases that lack genuine justification in the public interest or the protection of state secrecy. Thus, the court underscores the need to balance the protection of specific legal interests with the fundamental right of a party to a public hearing, thereby strengthening judicial transparency and safeguarding the core principles of a democratic state governed by the rule of law.³³

Analysing appellate court case law clearly indicates that the transparency of criminal proceedings is a fundamental pillar of a fair trial and a key guarantee of the rule of law. Courts consistently emphasise that judicial transparency supports procedural justice, enabling public oversight of the activities of the judiciary and increasing public trust in judicial institutions. The public nature of hearings allows not only for verification of the correctness of judicial decisions but also for the elimination of potential abuses and arbitrary rulings. Consequently, restrictions on transparency may only occur in exceptional situations, justified by a significant legal interest, and each decision in this regard should be preceded by a thorough analysis and meet the proportionality requirement in relation to the objective it aims to achieve. Appellate courts strongly oppose the practice of excessive restrictions on access to case files and the unjustified classification of historical documents, including materials from communist security services, as state secrets. According to the courts, such practices violate fundamental principles of fair proceedings, including the principle of equality of arms, and limit the procedural rights of participants. Courts stress that access to procedural documentation is not only an integral part of the right to defence but also a key factor in ensuring procedural transparency and enabling a comprehensive assessment of the legitimacy of judicial decisions.

33 Żurawik, 2013, pp. 57-69; Orfin, 2012, pp. 71-83.

The primary message from appellate court rulings is the need to uphold the transparency of criminal proceedings as a general principle and limit any restrictions to the absolute minimum necessary. Appellate courts emphasise that any deviations from this rule must be applied with exceptional caution and must always be preceded by a detailed analysis, considering both the protection of state secrets and the right of the parties to a fair trial. Therefore, judicial practice must strike a balance between public interest and the protection of individual rights, ultimately enhancing transparency and efficiency in the justice system while strengthening its legitimacy in the eyes of citizens.

6. Conclusion

Analysing the role of the social factor in Polish criminal proceedings clearly demonstrates that it constitutes a fundamental pillar of the justice system, influencing its transparency, fairness and public acceptance. The openness of court proceedings, as a foundation of a democratic state governed by the rule of law, ensures social oversight and reduces the risk of arbitrary judicial decisions. Simultaneously, citizen participation in the administration of justice, whether through the institution of social representatives or the role of lay judges, serves as a key mechanism for the democratisation of the judiciary. This participation ensures that the judiciary more accurately reflects societal needs and values.

The principle of public criminal proceedings plays a crucial role in shaping public trust in the judiciary, and its implementation contributes to increased transparency and accountability of judicial authorities. The ability of citizens, the media, and social organisations to observe court proceedings ensures that trials are more transparent and fairer, and their outcomes more socially acceptable. The openness of proceedings is not merely a symbolic expression of judicial transparency; rather, it serves as a mechanism that guarantees respect for the rights of the parties and enables public oversight of the judiciary's functioning.

An equally important element of the social dimension of criminal proceedings is the institution of the social representative, which serves as a bridge between society and the justice system. The social representative not only monitors the course of hearings, but may also support one of the parties in the proceedings, particularly victims, defendants or social groups whose rights are at risk. Social organisations, acting as social representatives, frequently engage in cases of particular social significance, monitoring proceedings and identifying potential abuses. This involvement contributes to strengthening mechanisms for human rights protection and enhancing the quality of the justice system.

A key aspect of public participation in the judiciary is the institution of lay judges, who, by representing diverse social backgrounds, enrich the adjudication process with extra-legal experiences and social values. Their presence ensures a broader range of perspectives in judicial proceedings, further aligning court decisions with society's sense of justice. Moreover, the involvement of lay judges helps prevent the judiciary from becoming insular and disconnected from social realities, serving as an important safeguard against the alienation of the judicial system from society. In the context of ongoing discussions on the evolution of lay judges, there is increasing advocacy for reforming their selection process and reconsidering the reintroduction of jury trials, which were part of the Polish legal system during the interwar period. The growing public interest in citizen involvement in the justice system suggests that the legal framework should adapt to new forms of social participation, which would enhance the democratic legitimacy of the judiciary and strengthen its connection with societal expectations.

In summary, the participation of the social factor in Polish criminal proceedings is not only an institutional manifestation of the democratisation of the judiciary, but also a key mechanism ensuring its transparency and fairness. Both the principle of publicity and the institutions of social representatives and lay judges serve a supervisory function, enhancing the credibility of the courts and their accountability to society. Analysing appellate court case law indicates a clear position that the transparency of proceedings and citizen participation in the judicial process are fundamental to a fair trial and should not be restricted without a clear and justified legal interest. Based on the conducted analysis, it can be concluded that the modern justice system requires continuous dialogue between society and the judiciary to ensure that criminal proceedings genuinely reflect the values, expectations and sense of justice of citizens.

Maintaining a balance between judicial independence and public oversight is crucial for the further development of the Polish justice system, and the consistent strengthening of the role of the social factor is an important element in building a democratic state governed by the rule of law.

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Sale of Goods and Consumer Remedies: A Slovenian Perspective

ABSTRACT: *Buying various goods is part of the average consumer's daily routine. In return for the money, the consumer expects to receive goods that will serve their purpose for a reasonable period after the conclusion of the sales contract. Legal mechanisms should safeguard the principle of equivalence. The dissatisfied position of consumers in Slovenia results from older legal solutions and the implementation of new EU directives. In Slovenia, the new Consumer Protection Act entered into force in December 2022 and became applicable from January 2023. Thus, Slovenia has now fulfilled its obligations to implement Directives 2019/770 and 2019/771. Although the two Directives are complementary, this paper focuses solely on the implementation of Directive 2019/771 into the Slovenian legal order. Under the new Consumer Protection Act, the seller remains liable for any lack of conformity existing at the time of delivery of the goods which becomes apparent within two years of that time. In addition, the new law introduces new concepts (such as subjective and objective requirements for conformity) and explicitly includes goods with digital elements. Owing to the fully harmonising nature of Directive 2019/771, the new Consumer Protection Act provides for the hierarchy of remedies. Under Slovenian law, the liability of the seller is complemented by a "guarantee for proper functioning" of "technical" goods and a voluntary (commercial) guarantee option. The provision of a mandatory one-year guarantee for proper functioning has been preserved from Yugoslavia's legal system to the present day, as the new Consumer Protection Act continues to maintain it. Thus, the Slovenian legal system continues to provide for two (legally) different but parallel mandatory frameworks for the protection of consumer interests.*

KEYWORDS: *consumer protection, sale of goods, Directive 2019/771, lack of conformity, liability of the seller, mandatory guarantee for proper functioning of technical goods, commercial guarantee.*

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1. Introduction

In return for the money spent, the consumer could expect to receive goods that would serve their purpose for a reasonable period after the sales contract was concluded.¹ Legal mechanisms to ensure the protection of consumers' interests are mostly derived from European Union (EU) law. The liability of the seller and the commercial guarantee are part of harmonised aspects concerning the sale of consumer goods at the EU level.² In Slovenia, certain categories of goods – “technical” goods – are additionally covered by a one-year mandatory “guarantee for proper functioning”. To illustrate, if a vacuum cleaner bought from a shopping centre in Ljubljana malfunctions ten months after delivery, the consumer can rely on both the liability of the seller and the mandatory guarantee for proper functioning. Certainly, the consumer must not be unjustly enriched; however, he is free to decide how to pursue his equivalent interest.³ The appeal and practicality of these options will vary based on the specific circumstances of each individual case.

This paper provides an overview of the dissatisfied position of consumers within the Slovenian legal framework, focusing solely on contracts for the sale of goods. The first part explains the Slovenian regulatory framework regarding relevant aspects of consumer sales contracts. Its solutions to the seller's liability and guarantees are strongly influenced by the European approach and Slovenia's own legal tradition. Formerly part of the Socialist Federal Republic of Yugoslavia, the Republic of Slovenia joined the EU in 2004.⁴ The second part outlines the implementation of the seller's liability system at the national level. It defines the chief concepts and provides underlying legislative solutions. The third part of the paper discusses the concept of guarantee. It is further divided according to its two types: mandatory and commercial. The conclusion compares the different options available to the consumer.

1 Možina, 2009, pp. 143–144.

2 Art. 1 (subject matter and purpose) and Art. 4 (level of harmonisation) of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (Directive 2019/771), OJ L 136, 22. 5. 2019.

3 See Možina, 2009, p. 155 and Proposal for the Consumer Protection Act, Explanatory Memorandum to the Art. 94, p. 149. See also Order of the Supreme Court of Slovenia, Case No. II Ips 358/2005, 18. 4. 2007; Judgement and Order of the Higher Court of Ljubljana, Case No. I Cpg 1027/2010, 14. 1. 2011.

4 For more see Možina, 2008, p. 173 *et seq.*

2. Slovenian Legal Framework

In Slovenia, the Obligations Code (sl. Obligacijski zakonik),⁵ as *lex generalis*, provides rules on the conclusion of sales contracts and their consequences, including the seller's liability and associated guarantees. However, the seller's liability and associated guarantees require particular attention, as several different systems apply to different categories of contracts.⁶ The Consumer Protection Act (sl. Zakon o varstvu potrošnikov; ZVPot-1),⁷ as *lex specialis*, regulates both the seller's liability and guarantees in business-to-consumer (B2C) sales contracts.⁸

The original Consumer Protection Act (ZVPot)⁹ of 1998 was amended to implement Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (Directive 1999/44/EC).^{10,11} Following developments in European (consumer) contract law,¹² Slovenia has now adopted a new law. The new Consumer Protection Act (ZVPot-1) entered into force in December 2022 and became applicable from January 2023.¹³ Thus, Slovenia has fulfilled its obligations under Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (Directive 2019/770)¹⁴ and Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (Directive 2019/771).¹⁵ The new law has introduced certain changes, while some solutions remain the same.

The system of consumer protection in B2C contracts for the sale of goods in Slovenia is specific, as it combines both national and European legal solutions.¹⁶ Slovenian law provides that the seller's liability is complemented by a mandatory guarantee for the proper functioning of "technical" goods and a voluntary (commercial) guarantee option. The provisions governing the seller's liability and commercial guarantee have

5 Official Gazette of the Republic of Slovenia Nos. 97/07, 64/16 – odl. US and 20/18 – OROZ631.

6 Možina, 2024, p. 587.

7 Official Gazette of the Republic of Slovenia No. 130/22.

8 Regarding wider application of rights granted under the Subsection II – Mandatory guarantee of ZVPot-1, see Section 4.2.

9 Official Gazette of the Republic of Slovenia Nos. 98/04, 114/06 – ZUE, 126/07, 86/09, 78/11, 38/14, 19/15, 55/17 – ZKot, 31/18 in 130/22 – ZVPot-1.

10 OJ L 171, 7. 7. 1999.

11 For more see Možina, 2008, pp. 176–178.

12 Morais Carvalho, 2019, p. 194.

13 Art. 249 ZVPot-1.

14 OJ L 136, 22. 5. 2019.

15 OJ L 136, 22. 5. 2019.

16 Možina, 2009, 143 *et seq.*

been amended to implement Directive 2019/771. Additionally, Slovenia continues to use the mandatory guarantee. The provision of a mandatory one-year guarantee for “technical” goods has been preserved from the Yugoslav legal system to the present day, although a different system of consumer sales contracts has been introduced at the EU level.¹⁷ Thus, the Slovenian legal system provides for two (legally) different but (partly) overlapping frameworks for the protection of consumer interests.¹⁸

3. Liability of the Seller

With the adoption of ZVPot-1, Slovenia has updated its legal solutions regarding the seller’s liability.¹⁹ Unlike its predecessor, ZVPot-1 establishes a hierarchy of remedies, as Slovenia was one of the five Member States that allowed consumers a free choice of remedies under Directive 1999/44/EC.²⁰ Another important aspect is the introduction of the new concepts of subjective and objective requirements for the conformity of products. The relevant provisions of Directive 2019/771 are transposed in Arts. 71 to 88.

Before discussing the substantial provisions, it is necessary to define the primary concepts: consumer, seller, consumer sales contract, and goods. A consumer is any natural person who acquires or uses goods, services, or digital content for purposes outside that person’s professional or gainful activity.²¹ A seller is defined as a company that enters into sales contracts.²² A consumer sales contract is any contract under which the seller undertakes to deliver goods to the consumer in a manner that ensures the consumer acquires ownership of the goods and, in return, the consumer undertakes to pay the price. Under ZVPot-1, a sales contract also includes any contract the subject of which is goods and related services, if the contract’s primary aim is to transfer ownership of the goods. Contracts between a consumer and a seller for the supply of goods to be manufactured or produced are also considered sales contracts under ZVPot-1.²³

Under ZVPot-1, the concept of goods has been modernised. Goods refer to any movable items, except goods sold by way of execution or other judicial proceeding. Water, gas, and electricity are also considered goods under ZVPot-1 if they are

17 Judgement of the Supreme Court of Slovenia, Case No. II Ips 1001/2008 of 17. 5. 2012, para. 9.

18 Strojjan, 2023, p. 71. For more see Možina, 2009, p. 164.

19 For a comprehensive overview of the buyer’s rights in the event of material defects in the sales contract under the OZ and the late ZVPot, see Možina, 2012, p. 86 *et seq.*

20 Croatia, Greece, Lithuania, Slovenia, and Portugal. See European Commission, 2018, pp. 34 and 68.

21 See Art. 4(18) ZVPot-1.

22 See Art. 4(19) ZVPot-1.

23 Art. 66 ZVPot-1.

sold in a limited volume or set quantity. Goods with digital elements are explicitly included.²⁴

3.1. Conformity of Goods and Liability Period

The seller must deliver goods to the consumer that are in conformity with the contract. This includes subjective and objective requirements for conformity and the absence of incorrect installation of the goods, where applicable.²⁵ The original ZVPot used the concept of the ‘material defect’,²⁶ while the new ZVPot-1 uses the term “non-conformity”. The new law introduces the concepts of subjective and objective requirements for the conformity of goods, in accordance with the main provisions of Directive 2019/771 on conformity assessment criteria.²⁷ The text of Directive 2019/771 has been followed by the Slovenian legislator with minor aesthetic deviations.²⁸

The seller is liable for any lack of conformity of the goods that exists at the time of delivery and becomes apparent within two years of delivery.²⁹ Slovenia has maintained a liability period of two years³⁰ and has not introduced a longer period, although the Directive allows for such an extension.³¹ This period also applies to goods with digital elements.³² In the case of goods with digital elements for which the sales contract provides for the continuous supply of digital content or digital services over a specified period, specific provisions apply.³³ If the sales contract concerns used goods, the seller and the consumer may agree on a shorter period. Nonetheless, this period may not be shorter than twelve months.³⁴

Another important time limit is set in favour of the consumer: any lack of conformity of the goods is presumed to have existed at the time of delivery if it

24 Art. 4(1) ZVPot-1.

25 Art. 5 of Directive 2019/771.

26 The Consumer Protection Act (ZVPot) used the term ‘material defect’ (sl. stvarna napaka); see, for example, Art. 37 of ZVPot, a term which was not contained in Directive 1999/44/EC. For the overlap between the concepts of non-conformity of goods and ‘material defects’ see Možina, 2011, p. 42 (particularly see footnote 10 in the cited work).

27 Morais Carvalho, 2019, p. 198.

28 See Art. 72 (subjective requirements for the conformity of goods), Art. 73 (objective requirements for the conformity of goods), Art. 74 (objective requirements for the conformity of goods with digital elements), and Art. 76 (non-conformity owing to incorrect installation) of Directive 2019/771. See Možina, 2024, pp. 600–601.

29 Art. 78(1) ZVPot-1.

30 The liability period remains unchanged from Art. 37.b(1) of ZVPot. See also Proposal for the Consumer Protection Act, Explanatory Memorandum to the Art. 78, pp. 142–143.

31 Art. 10(3) of Directive 2019/771.

32 Art. 78(2) ZVPot-1.

33 See Art. 78(3) and (4) ZVPot-1.

34 Art. 78(5).

becomes apparent within one year of delivery.³⁵ However, the seller can disprove this presumption. An exception applies if the presumption is incompatible with the nature of the goods or the nature of the lack of conformity.³⁶ In the case of goods with digital elements where the sales contract provides for the continuous supply of digital content or digital services, a specific provision applies.³⁷ Under the original ZVPot, this presumption applied for only six months after delivery.³⁸ Directive 2019/771 has enhanced consumer protection in this respect, although the Slovenian legislator has not introduced the maximum period allowed.³⁹

However, the seller is not liable for the lack of conformity of the goods resulting from non-compliance with the objective requirements for conformity (of “normal” goods or “the goods with digital elements”) if, at the time of the conclusion of the sales contract, the consumer was specifically informed that a particular characteristic of the goods deviates from the objective requirements for conformity and the consumer expressly and separately accepted this deviation when concluding the sales contract.⁴⁰

The seller’s liability for the non-conformity of the goods set by ZVPot-1 may not be limited or excluded by any contractual provision. Any contractual provision that contradicts the provisions of the law is null and void.⁴¹

3.2. Consumer’s Remedies: Hierarchy Introduced

When implementing Directive 1999/44/EC, the Slovenian legislator did not implement a hierarchy of remedies in ZVPot, leaving the consumer free to choose between different remedies.⁴² The buyer who notified the defect could claim from the seller: (1) repair or (2) replacement of the goods, (3) price reduction, or (4) termination of the contract, all in combination with (5) damages, in particular for the cost of materials, spare parts, labour, transfer and transport of the goods.⁴³ However, before termination

35 Art. 80(1) ZVPot-1.

36 *Ibid.*

37 Art. 80(2) ZVPot-1.

38 Art. 37.b(3) ZVPot.

39 See Art. 11(2) of Directive 2019/771.

40 Art. 75 ZVPot-1.

41 Art. 79 ZVPot-1.

42 Art. 37.c ZVPot. On the principle of the prohibition of the abuse of rights as a restriction of buyer’s free choice, see Možina, 2008, p. 177 and Judgement of the Supreme Court of Slovenia, Case No. II Ips 968/93, 6. 4. 1995. See also Weingerl, 2020, p. 131.

43 Art. 37.c ZVPot.

of the contract, the seller had to be given an appropriate additional period to repair or replace the goods.⁴⁴

Owing to the maximum harmonisation nature of Directive 2019/771, ZVPot-1 introduces a hierarchy of remedies.⁴⁵ In this aspect, Slovenia has lowered the level of consumer protection following the implementation of Directive 2019/771.⁴⁶ First, the consumer has the right to require the seller to bring the goods into conformity, free of charge, by repair or replacement. Regarding primary remedies, the consumer is, in principle, free to choose between repair and replacement.⁴⁷ Second, the consumer is entitled to demand a proportionate reduction in the price or to terminate the contract with a refund of the amount paid.⁴⁸ Until the seller fulfils his obligations, ZVPot-1 allows the consumer to withhold payment of any outstanding part of the price or a part thereof.⁴⁹ In addition, the consumer has the right to claim compensation from the seller for any damage, in particular the cost of materials, spare parts, labour, and transfer and transport of the goods, incurred as a result of the exercise of his rights.⁵⁰

3.2.1. Repair and Replacement

Regarding primary remedies, consumers are in principle free to decide between repair and replacement.⁵¹ The consumer's choice is restricted if the selected solution is impossible or would incur disproportionate costs for the seller compared to an alternative.⁵² All relevant circumstances must be considered, in particular the value of the goods if there were no lack of conformity, the significance of the lack of conformity, and whether the alternative remedy could be provided without causing significant inconvenience to the consumer.⁵³ However, the seller can refuse to

44 Regarding the most severe consequence of terminating the contract, Možina states that a reasonable additional period from *lex generalis* applies, since ZVPot remained silent on the matter. See Možina, 2012, pp. 96–97. See also Judgement of the Higher Court of Ljubljana, Case No. I Cp 1194/2022, 9. 5. 2023, para. 5.

45 Cf. Art. 37.c(1) ZVPot and Art. 81(1) ZVPot-1.

46 See Morais Carvalho, 2019, p. 200. See also Mak and Terry, 2020, p. 237.

47 Arts. 81(1) and 82(4) ZVPot-1.

48 Art. 81(1) ZVPot-1.

49 Art. 81(2) ZVPot-1.

50 Art. 81(3) ZVPot-1.

51 See Art. 82(4) ZVPot-1. The fact that repair is not prioritised over replacement and is treated as an equal alternative has generally been criticised in terms of more sustainable consumption and the circular economy, as have some other solutions in Directive 2019/771. See García Goldar, 2022, p. 19; Keirsbilck et al., 2020, p. 18; Maitre-Ekern and Dalhammar, 2019, pp. 419–420; Mak and Terry, 2020, p. 237; Van Gool and Michel, 2021, p. 144, etc.

52 Art. 82(4) ZVPot-1. See also Dudás and Jokanović, 2023, p. 214.

53 Art. 82(5) ZVPot-1.

bring the goods into conformity if repair and replacement are impossible or would impose disproportionate costs on the seller, considering all the aforementioned circumstances.⁵⁴

In principle, the seller is obliged to meet the consumer's request without any charge within a reasonable period from the moment the consumer informs him of the lack of conformity. Repair or replacement should not cause any significant inconvenience to the consumer, considering the nature of the goods and their intended purpose.⁵⁵ The term 'reasonable period of time' is specified in ZVPot-1 as 'no longer than 30 days',⁵⁶ in accordance with Recital 55 of Directive 2019/771.

This period may be extended by the shortest time necessary to complete the repair or replacement, up to a maximum of 15 days.⁵⁷ In determining this extended period, the nature and complexity of the goods, the nature and severity of the non-conformity, and the effort required to complete the repair or replacement must be considered.⁵⁸ Therefore, the period for repair or replacement may, therefore, extend to a maximum of 45 days. Before the expiry of the initial period, the seller must inform the customer of the length of the extension period and the reasons for it.⁵⁹

The goods must be repaired or replaced at no cost to the consumer.⁶⁰ The seller is responsible for covering all essential expenses related to bringing the goods into conformity, including costs associated with shipping, transportation, labour, and materials.⁶¹

The consumer is obliged to make the goods available to the seller.⁶² If it is necessary to replace the goods to bring them into conformity, the seller must take back the replaced goods at his own expense.⁶³ If goods that were installed in accordance with their nature and purpose prior to the non-conformity becoming apparent need to be removed for repair or replacement, the obligation to repair or replace the goods also includes removing the non-conforming goods.⁶⁴ Further, it involves installing replacement or repaired goods or paying the costs for removal and reinstallation.⁶⁵ The consumer is not obliged to pay for the normal use of the product prior to its replacement.⁶⁶

54 Art. 82(6) ZVPot-1. See also Dudás and Jokanović, 2023, p. 215.

55 Art. 82(1) ZVPot-1.

56 Art. 82(1) ZVPot-1.

57 Art. 82(2) ZVPot-1.

58 *Ibid.*

59 *Ibid.*

60 Art. 82(1).

61 Art. 82(1) and (3) ZVPot-1.

62 Art. 82(7) ZVPot-1.

63 *Ibid.*

64 Art. 82(8) ZVPot-1.

65 *Ibid.*

66 Art. 82(9) ZVPot-1.

3.2.2. Price Reduction and Termination of the Sales Contract

Regarding secondary remedies, the customer may request a reduction in price or termination of the sales contract.⁶⁷ The requirements for price reduction or termination of the contract can be summarised in four categories. These reasons comply with Art. 13(4) of Directive 2019/771:

1. The first case occurs when the seller does not repair or replace the goods in accordance with the ZVPot-1 requirements or rejects the consumer's claim for repair or replacement on the grounds that repair or replacement is either impossible or disproportionate.⁶⁸
2. If, despite the seller's attempts to bring the goods into conformity, a lack of conformity still exists, the consumer has the right to request a price reduction or terminate the sales contract.⁶⁹
3. The lack of conformity can be so severe that it justifies an immediate price reduction or termination of the sales contract.⁷⁰
4. The last case covers the seller's unwillingness to honour his obligations under primary remedies. If the seller has stated, or if it is evident from the circumstances, that he will not rectify the non-conformity within a reasonable timeframe or without causing substantial inconvenience to the consumer, the consumer has the right to request a fair reduction in price or termination of the sales contract.⁷¹

The price reduction must be proportional to the decrease in the value of the goods received by the consumer compared with the value the goods would have if they were in conformity.⁷² If a consumer requests a proportional reduction in the price of the goods, the seller must reimburse a portion of the price to the consumer within eight days of receiving the request.⁷³

The consumer may exercise the right to terminate the sales contract through a statement to the seller expressing the decision to terminate the sales contract.⁷⁴ Nonetheless, ZVPot-1 has excluded the option to terminate the contract in cases

67 Art. 81(1) ZVPot-1.

68 Art. 83(1) ZVPot-1.

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*

72 Art. 83(3) ZVPot-1.

73 Art. 86(2) ZVPot-1.

74 Art. 83(4) ZVPot-1.

where the lack of conformity is of minor significance.⁷⁵ The burden of proving whether a non-conformity is only minor lies with the seller.⁷⁶

The situation in which a lack of conformity impacts only some of the goods delivered under the sales contract is specifically regulated. If there is a ground for termination, the consumer may terminate the sales contract only in relation to those goods.⁷⁷ Moreover, the consumer can terminate the contract in relation to any other goods which the consumer acquired together with the non-conforming goods if it is not reasonable to expect the consumer to accept or keep only the conforming goods.⁷⁸

Consequently, upon termination of the contract, the consumer must return the goods at the seller's expense.⁷⁹ The seller must reimburse the consumer the price paid without delay, but no later than eight days after receiving the goods or proof that the consumer has sent them back.⁸⁰

Notwithstanding the existing hierarchy, the Slovenian legislator has included a specific provision to address situations where the lack of conformity of the goods becomes apparent shortly after delivery. If the non-conformity becomes apparent in less than 30 days after the delivery of the goods, the consumer has the right to immediately terminate the contract.⁸¹

Where the seller is liable to the consumer owing to the lack of conformity resulting from an act or omission by a person in previous links of the chain of transactions, the seller is entitled to pursue remedies against the person or persons liable in the chain of transactions. Accordingly, ZVPot-1 regulates the seller's right of recourse.⁸²

3.3. *Obligation to Notify and Inspection of Goods*

The duty to notify is an additional condition of liability for non-conformity of goods with the sales contract.⁸³ Notably, notification under Directive 2019/771 is optional.⁸⁴ Member States were allowed to ensure that consumers have a higher level of protection by not introducing such an obligation.⁸⁵ Nevertheless, the Slovenian legislator

⁷⁵ Art. 83(7) ZVPot-1.

⁷⁶ *Ibid.* See also Dudás and Jokačević, 2023, p. 218.

⁷⁷ Art. 83(5) ZVPot-1.

⁷⁸ *Ibid.*

⁷⁹ Art. 83(6) ZVPot-1.

⁸⁰ Art. 86(1) ZVPot-1.

⁸¹ Art. 83(2) ZVPot-1.

⁸² See Art. 88 ZVPot-1.

⁸³ Art. 84 ZVPot-1.

⁸⁴ See Art. 12 of Directive 2019/771. See also Recital 46 of Directive 2019/771 and Morais Carvalho, 2019, p. 200.

⁸⁵ Recital 46 of Directive 2019/771.

has decided to maintain it.⁸⁶ The draft of ZVPot-1 does not explain the reasoning for this decision.⁸⁷

To benefit from the rights ensured, the consumer must notify the seller of the non-conformity within two months from the date on which the consumer detected the lack of conformity.⁸⁸ The consumer may notify the seller of the lack of conformity in person, for which the seller must issue a confirmation.⁸⁹ The consumer may send the notification to the store where the goods were purchased or communicate it to the representative of the seller with whom he concluded the sales contract.⁹⁰ ZVPot-1 imposes further duties on the consumer. The consumer must describe the non-conformity in detail in the notification.⁹¹ The consumer shall allow the seller to inspect the goods which the consumer claims are not in conformity with the sales contract.^{92,93} If the non-conformity of the goods is disputable, the seller must inform the consumer in writing within eight days of receiving the consumer's claim.⁹⁴

3.4. Loss of Rights

ZVPot-1 prescribes a two-year liability period and an obligation to notify. However, the consumer may successfully exercise his remedies within a two-year cut-off period, beginning from the notification to the seller.⁹⁵

3.5. Seller's Liability: Renewed Legal Solutions

With the ZVPot, the Slovenian legislator opted for no hierarchy, providing the consumer (in principle) with a free choice between different remedies.⁹⁶ ZVPot-1 introduces a hierarchy of remedies. At the level of the EU, this eliminates one of the disparities that previously existed regarding an essential element of the consumer

86 Cf. Art. 37.a(1) ZVPot and Art. 84(1) ZVPot-1.

87 See Proposal for the Consumer Protection Act, Explanatory Memorandum to Art. 84, p. 147.

88 Art. 84(1) ZVPot-1.

89 Art. 84(3) ZVPot-1.

90 *Ibid.*

91 Art. 84(2) ZVPot-1.

92 Art. 84(4) ZVPot-1.

93 About Art. 84(2) and (4) in the context of overly burdensome provisions, see Dudás and Jokanović, 2023, p. 219.

94 Art. 85 ZVPot-1.

95 Art. 87 ZVPot-1.

96 Weingerl, 2020, p. 131.

sales contracts.⁹⁷ Regarding the hierarchy in place, its criticism in the context of the circular economy is noteworthy.⁹⁸

However, where the Slovenian legislator could have increased the level of protection, ZVPot-1 did not fully exploit this opportunity. For example, ZVPot-1 continues to insist on the obligation to notify. Although two months is a reasonable period of time, if the consumer fails to observe this deadline, the consumer loses his rights.⁹⁹ After ZVPot and its six-month period for the burden of proof rule, ZVPot-1 introduced a longer period of one year. Instead of the one-year period, Slovenia could have introduced a period of two years from the date of delivery of the goods. Although the Slovenian legislator did not introduce a maximum period, Directive 2019/771 has improved consumer protection in this respect. ZVPot-1 uses the terminology of Directive 2019/771 on conformity and includes an explicit separation of the conformity criteria into subjective and objective criteria. Several other changes have been brought about by the new law; however, this paper only focuses on selected developments. All changes together have a significant impact on the position of the consumer.

In summary, the number of time limits determines the position of the consumer: If the lack of conformity occurs within the seller's liability period and the consumer notifies the seller, the consumer can benefit from the consumer's rights. They can only be exercised within two years from the date of notification. However, the seller's liability is not the only mandatory system in place for the protection of the consumer's interest in ZVPot-1. Therefore, in the Slovenian context, it is interesting to compare the seller's liability with the existing parallel mandatory system, that is, the guarantee for proper functioning (see Section 4.2).

4. Guarantee

In the Slovenian context, the guarantee system is specific: a guarantee can be commercial (voluntary) or mandatory.¹⁰⁰ While the commercial guarantee is regulated by Directive 2019/771, as well as its predecessor Directive 199/44/EC, the mandatory guarantee is unknown to the European directives.¹⁰¹ ZVPot-1 defines a guarantee as

⁹⁷ See Recitals 6 and 47 of Directive 2019/771.

⁹⁸ See García Goldar, 2022, p. 19; Keirsbilck et al., 2020, p. 18; Maitre-Ekern and Dalhammar, 2019, pp. 419–420; Mak and Terryn, 2020, p. 237; Van Gool and Michel, 2021, p. 144, Weingerl, 2020, pp. 131–132, etc.

⁹⁹ See Strojjan, 2023, p. 83.

¹⁰⁰ Art. 89(2) ZVPot-1. For a broader overview of the types and characteristics of guarantees in ZVPot-1, see Strojjan, 2023, p. 77 *et seq.*

¹⁰¹ For more see Možina, 2009, p. 144 *et seq.*

any obligation undertaken by a seller or producer (guarantor) towards a consumer in addition to the liability of the seller.¹⁰² The guarantor commits to repair or replace the goods free of charge, or to reimburse (in part or in full) the price paid, if the goods do not comply with the specifications or lack the characteristics set out in the guarantee statement or in the relevant advertising.¹⁰³

Section 4 of ZVPot-1 is devoted to the guarantee provisions. The section is divided into general provisions (Arts. 89 to 93) and provisions that apply only to the mandatory guarantee for proper functioning (Arts. 94 to 98). Any guarantee, whether mandatory or commercial, shall be legally binding on the guarantor under the conditions specified in the guarantee statement and related advertising available at the time of, or before, the conclusion of the contract.¹⁰⁴ If the conditions laid out in the guarantee statement are less favourable to the consumer than those set out in the associated advertising, the guarantee shall be binding under the conditions set out in the advertising relating to the guarantee.¹⁰⁵ There is an exception to this rule if the associated advertising has been corrected prior to the conclusion of the contract in the same manner, or in a comparable manner, to that in which it was made.¹⁰⁶

At the latest, the consumer shall receive the guarantee statement at the time of delivery of the goods.¹⁰⁷ The guarantee statement shall be expressed in clear, intelligible language and provided on a durable medium.¹⁰⁸ If the goods are intended for sale in the territory of the Republic of Slovenia, the guarantee statement must be written entirely in the Slovene language.¹⁰⁹ An explicit list of information must be included in each guarantee statement.¹¹⁰ Failure to comply with the requirements of the guarantee statement does not affect the binding nature of the guarantee for the guarantor.¹¹¹ The rights that a consumer can exercise under the guarantee (statement) cease two years after the date on which the consumer exercised those rights.¹¹²

102 Art. 89(1) ZVPot-1.

103 *Ibid.*

104 Art. 90(1) ZVPot-1.

105 Art. 90(2) ZVPot-1.

106 *Ibid.*

107 Art. 91(1) ZVPot-1.

108 Art. 91(3) ZVPot-1.

109 *Ibid.*

110 Art. 91(2) ZVPot-1.

111 Art. 91(4) ZVPot-1.

112 Art. 93 ZVPot-1.

4.1. Commercial Guarantee

In addition to the seller's liability and the mandatory guarantee, the commercial guarantee represents a voluntary undertaking on the part of the guarantor. Thus, the commercial guarantee is a legitimate market tool.¹¹³ It allows market players to compete based on the guarantees they offer.¹¹⁴ From the guarantor's perspective, a commercial guarantee can be used as an important sales tactic.¹¹⁵

For the commercial guarantee, the ZVPot-1's general provisions apply. As aforementioned, they emphasise that the guarantor is bound by the guarantee statement and the associated advertising. The law imposes requirements on the content of the guarantee statement, as well as the requirement that the guarantee must be drawn up in clear, intelligible language and issued on a durable medium. Certain statements must be included, such as a clear reminder that the consumer is entitled by law to remedies from the seller free of charge in the event of lack of conformity of the goods, and that those remedies are not affected by the commercial guarantee.¹¹⁶

Following Directive 2019/771, the new ZVPot-1 introduced a "commercial guarantee of durability". As commercial guarantees can be used to signal durability,¹¹⁷ their potential in this direction has been recognised at the EU level.¹¹⁸ Thus, the concept of durability has been added to the commercial guarantee instrument.¹¹⁹ In ZVPot-1, Art. 92 is devoted to the commercial guarantee of durability. If a producer offers the consumer a commercial guarantee of durability, the producer is directly liable to the consumer for the repair or replacement of the goods for the entire duration of the commercial guarantee of durability, unless more favourable (for the consumer) conditions apply.¹²⁰ The justified criticism of the unsustainability of the replacement with a new product should be noted in this context.¹²¹

113 Malinvaud, 2002, p. 222. See Recital 21 of Directive 1999/44/EC.

114 *Ibid.*

115 Bradgate and Twigg-Flesner, 2011, p. 169.

116 See Art. 91 ZVPot-1.

117 For 'Signalling Theory', see Twigg-Flesner, 2003, p. 54 *et seq.*

118 Van Gool and Michel, 2021, p. 147.

119 'Durability' means the ability of the goods to maintain their required functions and performance through normal use. See the definition of durability in Art. 4(26) ZVPot-1.

120 Art. 92 ZVPot-1 states:

'(1) Under the conditions provided in this Section and without prejudice to the legal protection under other regulations, producers shall be directly liable to consumers throughout the period of the commercial guarantee of durability for the repair or replacement of goods in accordance with paragraphs one, two and seven to nine of Article 82 of this Act if they give to consumers a commercial guarantee of the durability of specified goods for a specified period.

(2) In certificates of a commercial guarantee of durability, producers may offer more favourable conditions to consumers.

121 See Van Gool and Michel, 2021, p. 147.

4.2. Guarantee for Proper Functioning

For the list of “technical” goods, producers must provide a guarantee for proper functioning for at least one year.¹²² The nature of the Slovenian guarantee for proper functioning is different from the commercial guarantee: it is mandatory, similar to the seller’s liability. Therefore, the producer’s liability under a guarantee for proper functioning arises under the law, irrespective of whether a guarantee statement has been made or given to the buyer.¹²³

The seller’s liability and the guarantee are separate systems.¹²⁴ Nonetheless, there is a link between the two, as they both protect the same interest of the buyer.¹²⁵ However, they constitute two separate and distinct legal bases for liability.¹²⁶ The content of the guarantee provision is not the lack of conformity within a certain period, but the faultless operation.¹²⁷ Since conformity with the contract also implies a certain durability of the goods or their performance, in practice, a lack of conformity usually also implies a guarantee case.¹²⁸

Although the guarantee for proper functioning is regulated by the consumer protection legislation, it does not only apply to B2C relationships. The provisions on mandatory guarantee also apply to business-to-business (B2B) contracts for the sale of goods.¹²⁹ Thus, ZVPot-1 establishes an extensive additional legal regime to the seller’s liability.

4.2.1. Mandatory Guarantor: the Producer

The guarantee for proper functioning is an old provision originating from the Yugoslav legal system.¹³⁰ As the Supreme Court of Slovenia has stated, this “relic from the past” has persisted in the Slovenian legal system to this day, despite a differently designed liability regime at the EU level.¹³¹ It was included in ZVPot¹³² and preserved in ZVPot-1.¹³³

122 Art. 94 ZVPot-1. Those ‘technical’ goods are listed in the Rules on goods, for which conformity guarantee shall be issued, Official Gazette of the Republic of Slovenia No. 142/22.

123 Art. 96 ZVPot-1.

124 Brus, 2020, p. 27.

125 Možina, 2009, p. 155.

126 Order of the Supreme Court of Slovenia, Case No. II Ips 358/2005, 18. 4. 2007.

127 Možina, 2009, pp. 155–156.

128 *Ibid.*

129 Art. 98 ZVPot-1 states: ‘The rights referred to in Subsection II – Mandatory guarantee shall also be granted to persons not deemed consumers under this Act.’ Cf. with Art. 21.č ZVPot.

130 See Možina, 2009, p. 146 *et seq.*

131 Judgement of the Supreme Court of Slovenia, Case No. II Ips 1001/2008 of 17. 5. 2012, para. 9.

132 See Arts. 19–21.č ZVPot.

133 See Arts. 94–98 ZVPot-1.

Under the original ZVPot guarantee for a proper functioning regime, the producer was liable alongside the seller.¹³⁴ The content of the producer's guarantee obligation differed from that of the seller, since, in principle, the producer is not in a contractual relationship with the buyer.¹³⁵ With the new ZVPot-1, the seller was removed from the list of mandatory guarantors. The ZVPot-1 proposal states that Directive 2019/771 does not allow for the retention of the mandatory seller's guarantee owing to the maximum harmonisation nature of Directive 2019/771.¹³⁶ However, the ZVPot-1 retains the mandatory producer's guarantee for additional consumer protection.¹³⁷

The law broadly defines the concept of the "producer". The producer refers to the undertaking that manufactures the finished goods or components, or obtains the basic raw materials, or any other person who presents himself as the producer of the goods by placing his name, trade mark, or other distinctive sign on the goods.¹³⁸ A producer is also an importer or distributor of goods not produced in the Republic of Slovenia, a representative office of the producer in the Republic of Slovenia, or any other person who presents himself as the producer by marking the goods with his name, trade mark, or other distinguishing sign.¹³⁹

4.2.2. Buyer's Remedies: Three-level Hierarchy

Legal remedies under the guarantee for proper functioning are essentially the same as in the event of a lack of conformity.¹⁴⁰ The most important difference lies in their hierarchy: under the guarantee for proper functioning, repair has priority, while replacement comes in second place, followed by a reimbursement of the price or its reduction.¹⁴¹

If goods covered by a mandatory guarantee do not comply with the specifications or lack the characteristics stated in the guarantee statement and associated advertising, the consumer may first request the repair of the product.¹⁴² If the product is not repaired within 30 days of the date on which the producer or authorised service centre received the consumer's request, the producer shall replace the goods free of

134 Arts. 19 and 21.a ZVPot.

135 Možina, 2009, p. 157.

136 See Proposal for the Consumer Protection Act, Explanatory Memorandum to Art. 94, p. 149.

137 *Ibid.*

138 Art. 4(20) ZVPot-1.

139 *Ibid.*

140 Wingerl, 2020, p. 132. See also Možina, 2009, pp. 157–159.

141 See Art. 97 ZVPot-1.

142 Art. 97(1) ZVPot-1.

charge with an 'identical, new and faultless good'.¹⁴³ This period can be extended by a maximum of 15 days, bringing the maximum repair period to 45 days.¹⁴⁴

If the producer fails to repair the goods or replace them with identical, new and faultless goods within the referred time limit, the buyer may request a full refund of the price paid or a proportionate reduction in price.¹⁴⁵ If the consumer requests a proportionate reduction in price, this reduction shall be in proportion to the reduction in the value of the goods received by the consumer compared with the value of the goods if they had been intact.¹⁴⁶ Notwithstanding, the consumer may request the producer to refund the paid amount if the problem occurs within less than 30 days from the delivery of the goods.¹⁴⁷

The producer or authorised service provider may provide the consumer with a similar product free of charge for the duration of the repair of the goods covered by the guarantee for proper functioning.¹⁴⁸ If the producer fails to provide the consumer with replacement goods for temporary use, the consumer has the right to claim compensation for the damage suffered as a result of not being able to use the product.¹⁴⁹

The resulting costs (materials, replacement parts, labour, product transportation) are covered by the guarantor.¹⁵⁰ For the replaced goods or their essential parts, the producer shall issue a new guarantee statement.¹⁵¹

4.2.3. *Obligations of Guarantor*

The guarantee for proper functioning is not only a timeframe during which the guarantor must ensure fault-free operation and repair the product free of charge, but also a comprehensive framework¹⁵² entailing rather extensive responsibilities on the part of the producer.

143 *Ibid.*

144 Art. 97(2) ZVPot-1 states: '(2) The time limit referred to in the preceding paragraph may be extended to the shortest time required for the repair to be finished or replacement to be made but for no more than 15 days. In setting the extended time limit, the nature and complexity of the goods, the nature, and seriousness of the non-conformity and the effort required to finish the repair or replace the goods shall be taken into account. The producer shall inform the consumer of the number of days of the time limit extension and the reasons therefor before the time limit referred to in the preceding paragraph expires'.

145 Art. 97(3) ZVPot-1.

146 Art. 97(4) ZVPot-1.

147 Art. 97(5) ZVPot-1.

148 Art. 97(7) ZVPot-1.

149 Art. 97(8) ZVPot-1.

150 Art. 97(9) ZVPot-1.

151 Art. 97(6) ZVPot-1.

152 See Pintar, 2011, p. VII.

The producer of “technical” products must provide a guarantee statement for his goods, which includes all the required elements.¹⁵³ In addition to this obligation, the guarantor must also supply the consumer with assembly and usage instructions for the product, as well as a list of authorised service centres for its repair.¹⁵⁴ The producer is required to appoint an authorised service centre to handle repairs and provide spare parts if the producer does not conduct these activities himself.¹⁵⁵ During the guarantee period, the producer is obliged to offer free-of-charge repairs.¹⁵⁶ The most profound obligation extends beyond the one-year obligatory guarantee period: the producer is obliged, for a minimum of three years following the expiration of the guarantee period, to provide (against payment) repair services, maintenance for the goods, as well as the availability of spare parts and attachments.¹⁵⁷ This can be accomplished either through the producer’s own servicing or by entering into a servicing agreement with a third party.¹⁵⁸

4.3. Old Solutions with Sustainable Potential

The Slovenian mandatory guarantee for “technical” products has been heavily criticised in academia.¹⁵⁹ The mandatory guarantee may appear to be an outdated provision. Historically, it was established owing to the Yugoslav market conditions.¹⁶⁰ Despite the differently designed system of guarantees in consumer sales contracts at the EU level, it has remained in the Slovenian legal system to this day.¹⁶¹ However, despite being outdated, this provision demonstrates significant sustainability potential.¹⁶²

As Možina highlighted, the mandatory guarantee for proper functioning constitutes an additional burden for producers on the Slovenian market that is generally absent in other Member States.¹⁶³ The mandatory guarantee provisions in the consumer legislation peculiarly apply not only to B2C contracts, but also to B2B contracts. He questions the justification for this additional obligation in B2B contracts, as it does not pertain to consumer protection in that context, and warns that the advantage

153 See Arts. 91(1), 95 and 96 ZVPot-1.

154 Art. 95 ZVPot-1.

155 *Ibid.*

156 *Ibid.*

157 *Ibid.*

158 *Ibid.*

159 See Možina, 2011, p. 38 *et seq.* For critical economic analysis see Kovač, 2012, p. 105 *et seq.*

160 See Možina, 2009, p. 145.

161 Judgement of the Supreme Court of Slovenia, Case No. II Ips 1001/2008, 17. 5. 2012, para. 9.

162 Weingerl, 2020, p. 129 *et seq.* Strojjan, 2023, p. 84.

163 Možina, 2011, p. 46.

of providing spare parts and repair services after the guarantee period is only apparent.¹⁶⁴ The guarantor can provide these after-sales services at an exceptionally high cost.¹⁶⁵ From an economic analysis perspective, Kovač fully supports Možina's position. He analyses the mandatory guarantee system through three chief functions: warranty as an insurance policy, as an incentive for product quality, and as a quality signal.¹⁶⁶ Kovač argues that the mandatory guarantee for proper functioning is economically inefficient and should be abolished from a legal and economic standpoint.¹⁶⁷ He advocates for seller's liability, augmented with the opinion of commercial guarantee, which can serve its economic functions (such as signalling, stimulating competition, and providing effective incentives).¹⁶⁸

However, the mandatory guarantee is well-received by the Slovenian public, as consumers are familiar with it owing to their accustomed usage.¹⁶⁹ Moreover, the ZVPot-1 proposal reflects the view that the mandatory guarantee will maintain a high level of protection that Slovenian consumers have enjoyed to date.¹⁷⁰ Although this is not necessarily the case, the mandatory guarantee system does offer certain sustainability-oriented solutions. First, it prioritises repair over product replacement. Second, it includes an obligation to provide spare parts and repair services. Therefore, Weingerl concludes that the guarantee for proper functioning is the most sustainability-friendly measure within Slovenian consumer sales law, apart from the rule excluding the replacement of defective goods with refurbished ones.¹⁷¹ She emphasises the importance of thoroughly evaluating any potential changes in the context of sustainability goals and commitments to a circular economy.¹⁷² Weingerl suggests that this framework could be used as a model for the system of remedies in the case of defective goods.¹⁷³

164 Možina, 2011, pp. 47–48.

165 *Ibid.*

166 Regarding the economic function of warranties see also: Parisi, 2004, p. 407; Schäfer and Ott, 2004, pp. 338–341.

167 Kovač, 2012, pp. 113–114.

168 *Ibid.*

169 See Možina, 2011, p. 46.

170 See Proposal for the Consumer Protection Act, Explanatory Memorandum to Art. 94, p. 149.

171 See Weingerl, 2020, p. 132

172 *Ibid.* See also: Ocepek, 2022, p. 154.

173 Weingerl, 2020, p. 132. Compare Slovenian mandatory guarantee for proper functioning and proposed solutions in Tonner and Malcolm, 2017, pp. 32–34; Van Camp and Bouyon, 2017, pp. 49–52.

5. Conclusion

The position of the dissatisfied consumer in Slovenia is the result of both old Slovenian (Yugoslav) legal solutions and the implementation of new EU directives.¹⁷⁴ Thus, the Slovenian legal system provides for two parallel mandatory systems of consumer protection in certain situations.¹⁷⁵ Compared with the original ZVPot, the new ZVPot-1 has renewed the seller's liability and narrowed the scope of the mandatory guarantee system (the seller has been removed as a guarantor).¹⁷⁶

The liability of the seller covers a period of two years after the delivery of goods. Any lack of conformity which becomes apparent within one year of the time when the goods were delivered is presumed to have existed at the time of delivery. ZVPot-1 provides for a hierarchy of remedies in accordance with Directive 2019/771. In the case of lack of conformity, the consumer is entitled, first, to have the goods brought into conformity by repair or replacement and, second, to a price reduction or termination of the sales contract. To benefit from these rights, the consumer must notify the seller of the non-conformity within two months. However, the mandatory one-year guarantee for proper functioning does not cover the lack of conformity within a certain period, but rather proper functioning. It applies only to the list of "technical" goods. Mandatory guarantors are no longer sellers and producers, but only producers. The mandatory guarantee system provides for a strict three-step hierarchy: first, repair; second, replacement with identical, new and faultless goods; and third, reimbursement of the price paid for the good. There is no obligation to notify. The guarantor has some additional obligations. The most extensive is to provide repair services, maintenance of the goods, and availability of spare parts and accessories for at least three years after the end of the mandatory one-year guarantee.

The ZVPot-1 offers relatively strong protection for consumers in Slovenia with regard to the issues discussed. However, the Slovenian consumer protection system is rather complex as it contains two parallel mandatory frameworks with different conditions. Such double regulation can cause considerable confusion, particularly for consumers, who are primarily intended to be protected.¹⁷⁷ It will be interesting to follow further national implementation of European directives in the field of consumer protection, such as Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828 ('Right to Repair' Directive 2024/1799),¹⁷⁸ and its impact on existing frameworks.

¹⁷⁴ Strojjan, 2023, p. 71.

¹⁷⁵ Možina, 2008, p. 177.

¹⁷⁶ Strojjan, 2023, p. 75.

¹⁷⁷ Možina, 2008, p. 177.

¹⁷⁸ OJ L 2024/1799, 10. 7. 2024.

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Convalidation of Real Estate Contracts Concluded Without Authentic Form in Romania

ABSTRACT: *Generally, in Romania, a real estate contract (i.e. a contract for the sale and purchase of real estate between two parties) can only take the form of an *ad validitatem* contract, which means that it must be concluded by a public notary, an authentic form required by law. Without an authentic form, the contract is absolutely void; however, according to the Romanian Civil Code, 'a contract that is absolutely void will still produce the effects of the legal act for which the conditions of substance and form laid down by law are fulfilled'. Therefore, it can be considered in terms of the convalidation of a real estate contract without an authentic form as a precontract. After Communism, because of the poor economic situation in the country and the lack of land registers, people only concluded real estate sales contracts between themselves, which were called "pocket contracts." This meant that the seller and buyer drafted the text of the contract themselves, writing it by hand. The contract was signed by two witnesses, usually local priests, teachers, or the neighbours of the parties. Obtaining land registers was not only time-consuming but also costly, as the probate procedure is handled by a public notary. This topic also raises several property rights issues.*

KEYWORDS: *property rights, real estate contracts, *ad validitatem* form, land register*

1. Historical Introduction

In Romania, the sale of real estate is subject to special rules. This section presents the specific rules for sales if the *ad validitatem* or *ad solemnitatem* form has not been respected. It was (and still is) quite common for contracts for the sale of immovable property to be concluded between the parties without a notarial form. This is mainly because of the lack of land registers. Romania can be divided into three historical parts: Transylvania, which was part of the Austro-Hungarian monarchy; Wallachia, which was under Turkish rule for a long time and, as a result, developed the land

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register system; and Moldavia, which was under Russian influence. The union of these three parts took place in 1918. A uniform and complete land register system has still not been established. After a historical overview, we will discuss why a complete and uniform land registry system has not been developed for more than one hundred years.

The beginnings of land books can be found in Western Europe as early as the 11th to the 14th centuries and are mainly linked to credit and the guarantees needed to grant it. The ancient German¹ and later Roman law played a decisive role in the development of land books. The competition between these systems of law led to a mixed system, which was consolidated in the French Civil Code. Over time, the mixed system, also known as “the French system,” has been reformed several times.² The basic principles of the land registers first appear, in a clear outline, in the Austrian Civil Code.

In Romania, more precisely in Transylvania, the beginnings of the land register system can be identified in the record of movable assets. Thus, their transmission between the living was done before authorities called “*loca credibilia*,” by a sale process called “*passiones peremales*.” The transaction was carried out in a solemn setting and publicised. This was followed by possession, called “*statutio*.”³ Mortgages were made by handing over the use of the mortgaged property to the creditor for long periods, which could be up to 100 years. In most of the towns in Transylvania, records of changes in ownership of real estate and mortgages were kept.

Before the land registers, the name of the owner of the property and the title of the transfer had to be recorded in a so-called public book register. After 1855, the Austrian Civil Code transferred the keeping of land registers to the district courts in Transylvania.⁴ The land registry system took time to develop, but it was one of Romania’s most effective systems.

After 15 December 1855, the Ministry of Justice issued an ordinance establishing rules for land register procedures and protocol publicity.⁵ The regulation did not become applicable at the same time throughout Transylvania. Thus, on territories such as Banat, Crişana, Maramureş, Satu Mare, incorporated at the time into the Hungarian state, the provisions of the Austrian Civil Code applied.⁶ By the provisions of the Constitution of 1860⁷, the Civil Code was repealed and replaced by the old Hungarian customary law.

1 Sztranyiczki, 2013, p. 7.

2 Nasaudean, 2011, p. 3.

3 Nasaudean, 2011, p. 4.

4 Veress, 2020, p. 440.

5 Mészáros, 1857, p. 12.

6 Nasaudean, 2011, p. 4.

7 Oktoberdiplom.

In 1869, land registers were transformed according to Regulation No. 2579, which outlined procedures involving land registry courts and managers.⁸ The land registry court appointed a commission of a surveyor and a manager to verify the alignment between old and new land registry sheets. After checks, they prepared a report for the mayor's signature to submit to the court.⁹

The land registry court determined the correctness of the work, and the conversion of the land register was deemed definitive.¹⁰ Any claims arising from errors in the conversion procedure could no longer be validated against *bona fide* third parties.

After the aforementioned union of the three parts in 1918,¹¹ the Romanian State issued several decrees with an impact on land registry activities. Decree No. 1 of 24 January 1919 of the Governing Council on the provisional functioning of public services, the application of laws,¹² civil servants, and the use of languages is worth mentioning. Article 1 of this decree states:

The foregoing laws, ordinances, regulations and legal statutes, enacted prior to October, 1918, shall remain in the interest of public order and to ensure continuity of law, until otherwise provided, in provisionally in force, with the exceptions contained in this decree, as and in such other decrees as may be issued.

To implement Decree No. VII, the Ordinance from March 1919 designated the Cluj Court to handle cases involving state property alienated by the Hungarian Government. The Court, led by its president and consisting of five judges, made final and irrevocable decisions, with no option for extraordinary review. Appeals could be made to the Cluj Court of Appeal.¹³ The Hungarian-speaking judiciary was dismissed after unification for refusing to take the oath of allegiance, citing unresolved peace treaty issues.¹⁴

8 Rendeletek Tára II. kiadás [Online]. Available at: URL https://library.hungaricana.hu/hu/view/OGYK_RT_1869/?pg=609&layout=s&query=2579

9 Nasaudean, 2020, p. 441.

10 Zlinszky, 1902, p. 46.

11 The union of Transylvania with Romania was declared on 1 December 1918 by the assembly of ethnic Romanian delegates held in Alba Iulia. The Great Union Day (also called Unification Day), celebrated on 1 December, is a national holiday in Romania that celebrates this event. The holiday was established after the Romanian Revolution and celebrates the unification of not only Transylvania but also Bessarabia and Bukovina and parts of Banat, Crişana, and Maramureş with the Romanian Kingdom. Bessarabia and Bukovina had joined with the Kingdom of Romania earlier in 1918.

12 Gazeta Oficială, 1919, p. 25.

13 Nasaudean, 2011, p. 9.

14 Veress, 2020, p. 568.

After the 1918 unification, Romania was a monarchy under Ferdinand I. Article 1 ratified the provisions of Decree No. VII in February 1919. Following the Trianon Peace Treaty, all former Austro-Hungarian real estate in annexed territories became Romanian state property, leading to Ordinance No. 27067 of 1921, which mandated the registration of these properties.¹⁵ However, the compensation paid in the old Kingdom was higher than that paid in Transylvania (forty times the rent in the old Kingdom, and twenty times that in Transylvania).¹⁶

Authorities' focus on land reform slowed or abandoned cadastral work, resulting in a land register that no longer accurately reflected property conditions. In response, King Charles II enacted Law No. 93 on 12 April 1933 to organise the land cadastre and establish land registers in the Old Kingdom and Bessarabia (Wallachia).¹⁷

Article 72 of the law provided that 'The existing cadastral works in the united territories of the former Austro-Hungarian Monarchy shall remain in force until they can be revised, re-enacted and rectified in accordance with the principles laid down in this law', and Article 75 provided that 'The laws and regulations of the united territories relating to land registers shall remain in force until their revision and unification (...)'.¹⁸ In the meantime, Dobrogea was not drawn up in cadastral plans and complete cadastral works were carried out only in a few communes around the capital. An important step in the legislative approach of the time was Decree-Law No. 478 of 1 October 1938 for the extension of the legislation of the old Kingdom to Bucovina.¹⁹ The law was issued by the Council of Ministers and contains only seven articles.

The most significant point in Article 1 states that the Romanian Civil Code, Civil Procedure Code, and Commercial Code, along with all relevant laws from the old Kingdom, would extend to Bukovina. Upon the decree's enactment, any unifying laws and provisions were repealed.²⁰ Decree No. 115 in 1938 attempted to unify land registers in Romania; however, this proved unsuccessful, as it was only applied in parts of Bukovina (Suceava County).²¹

In 1940, Transylvania became part of Hungary again,²² rendering land registry unification efforts futile until the end of World War II. Even in non-annexed areas,

¹⁵ Nasaudean, 2011, p. 11.

¹⁶ Veress, 2020, p. 570.

¹⁷ [Online]. Available at: <https://lege5.ro/gratuit/g42tanjv/legea-nr-93-1933-pentru-organizarea-cadastrului-funciar-si-pentru-introducerea-cartilor-funciare-in-vechiul-regat-si-basarabia>

¹⁸ [Online]. Available at: <https://lege5.ro/gratuit/g42tanjv/legea-nr-93-1933-pentru-organizarea-cadastrului-funciar-si-pentru-introducerea-cartilor-funciare-in-vechiul-regat-si-basarabia>

¹⁹ [Online]. Available at: <https://legislatie.just.ro/Public/DetaliiDocument/30760>

²⁰ [Online]. Available at: https://www.cdep.ro/pls/legis/legis_pck.http_act_text?id=33569

²¹ [Online]. Available at: <https://legislatie.just.ro/Public/DetaliiDocumentAfis/25>

²² Vienna Diktat.

land registration remained incomplete until the end of the war. Following this war, a weak attempt at unification occurred through Law 241 of 1947.²³ Unfortunately, this law also did not have the desired effect.

After the communist regime was established in Romania, land was removed from civilian control, and the land register reflected land use rather than ownership. Due to incomplete cadastral measurements, the Central Committee of the Romanian Workers' Party addressed the need for a socialist cadastral register in 1954.²⁴ A year later, Decree No. 281 of 15 July 1955 on the establishment of the land registry system was adopted.²⁵

Land registry work occurred in two phases: first, land surveying and owner identification; and second, the creation of the land register, which included the land register, alphabetical indicator, possession sheets, and centralising sheets by owner and use category. It was also supplemented by cadastral plans and a register of removals.²⁶

After the fall of communism following the events of December 1989, a series of legislative changes were required in the field of land registry and real estate advertising. These efforts resulted in Law No. 7 of 13 March 1996 on Cadastre and Real Estate Cadastre publication.

2. General Real Estate Contracts and Land Registry

2.1. General Real Estate Contracts in Romania

First, we discuss the general conditions of the contract for the sale of real estate: a contract for the sale and purchase of real estate between two parties can only take the form of an *ad validitatem* contract, which means that it must be concluded by a public notary, using an authentic form as required by law. Agreements that transfer or establish rights *in rem*, which will be entered in the land register, must be concluded with an authentic instrument, under the sanction of absolute nullity. An authentic instrument is a document drawn up or, as the case may be, received and authenticated by a public notary or other person invested with public authority by the State, in the form and under the conditions required by law.²⁷ As a rule, the solemn act must be concluded in authentic form. Every authentic act is a solemn act, but not in the opposite way. Authentic acts are only one form of solemn acts.²⁸ The requirement of solemn

23 [Online]. Available at: <https://legislatie.just.ro/Public/DetaliuDocumentAfis/43>

24 Nasudean, 2011, p. 14.

25 [Online]. Available at: <https://lege5.ro/gratuit/gm2dgmrwge2a/decretul-nr-281-1955-privind-instituirea-regimului-de-evidenta-funciara>

26 Nasaudean, 2011, p. 15.

27 Ungureanu and Toader, 2022, p. 238.

28 Vasilescu, 2017, p. 402.

form in the case of certain legal acts is intended to protect the interests of the parties, ensure full freedom of consent, or even, in certain cases, protect general interests. The form required for the validity of the legal act must meet the following conditions: the entire content of the civil legal act must be on the solemn form as required by law, and the content of the act must not be determined by reference to a source external to it; the legal act, which is interdependent with a solemn act, must also be on the solemn form, even if it is not a solemn act; according to Article 1243 of the Civil Code, any modification of the contract is subject to the formal conditions required by law for its conclusion, the principle of symmetry of form also applies here; the equivalence of different forms *ad validitatem* is not allowed, that is, when the legislator imposes a certain form, the legal act must be concluded on that form and not on another; the legal act that renders a solemn act ineffective must also take a solemn form.²⁹

Absolute nullity sanctions non-compliance, at the conclusion of the civil legal act, with a mandatory legal rule of public policy. In legal practice and doctrine, absolute nullity is designated by formulas such as: “absolutely void”; “the act is void”; “the act is void as of right”; and “void as of right.”

Absolute nullity may be invoked by any person who justifies an interest protected by law, which is related to the cause of nullity, by way of application or complaint.³⁰ These provisions can be found in Article 1247 paragraph (2) of the Civil Code. The parties to the legal act, the guarantors, other persons who did not participate in the conclusion of the legal act but who justify their own interest, the public prosecutor in certain situations, or other bodies expressly provided for by law have an interest. The court, of its own motion, is obliged to invoke absolute nullity on the basis of the active role (e.g. Article 1247 paragraph (3) Civil Code, or Articles 1560–1561 Civil Code).³¹ Absolute nullity may be pleaded at any time by way of application or complaint, the action for a declaration of nullity not being time-barred. The violated legal norms, which lead to the sanction of absolute nullity, protect a general interest. The violated legal norms, which lead to the sanction of absolute nullity, protect a general interest.³²

2.2. About Land Register in Romania

The implementation of Law No. 7/1996 laid the legal foundations for a topical and unique system of real estate advertising for the whole country, intended to replace the four systems of real estate registry applicable in Romanian law. Law No. 7/1996 only created the normative legal prerequisites for Romania to reach the European

²⁹ Ungureanu and Toader, 2022, p. 240.

³⁰ Boroi and Anghelescu, 2021, p. 259.

³¹ Vasilescu, 2012, p. 432.

³² Ungureanu and Toader, 2022, p. 286.

stage of having a national cadastre and land registers throughout the country, since the preparation of the cadastre and the new land registers is a long-term issue that depends on the allocation of the necessary financial, technical, and human resources to carry out and complete the cadastral works. Subsequently, based on the cadastral documents, land registers, and other land register documents will be drawn up. Without the necessary measurements and cadastral records, it is not possible to move to a real system of real estate advertising in which legal records are kept by property and not by person. The implementation of a general cadastre throughout the country is a topical and important issue because Law No. 7/1996 duly provided for a gradual and progressive extension of the system of real estate advertising based on land registers, as cadastral works are completed in each administrative-territorial unit. This process is about the introduction of land registers at the level of each administrative-territorial unit that would entirely replace the old land registers because Law No. 7/1996, prior to the republication of 3 March 2006, provides for the immediate establishment of land registers for the entire country, which would gradually replace the old registers. The former Article 61 of Law 7/1996 put into effect Law Decree No. 115/1938 across Transylvania, by which the unification of the rules regarding land registers has been achieved. In addition, the laws, ordinances, and local regulations in this area were brought into force, putting an end to the differences in the legal regime of land registers. If a territorial unit is made up of two or more villages, land registers are numbered by village, each having its own land register.

In accordance with Article 4 of Law Decree No. 115/1938, the land register consists of a title and three parts. The title of the land register includes the number of the land register and the name of the commune, town, or municipality in which the property is located.³³

Part I, Property description³⁴: The first part, the property description sheet, describes the property, including the property's order number, topographic number, area in hectares or square meters, and any observations.

Part II, Property ownership³⁵: The second part, the property ownership sheet, records the entries regarding the ownership of the property, including the order number, entries regarding ownership, and any observations.

Part III, Charges³⁶: The third part, the charges sheet, includes the order number, the entries, the amount of debt, and any observations.

In accordance with Article 6 of Law Decree No. 115/1938, the land register itself was supplemented with auxiliary registers:

³³ Chiş, 2012, p. 310.

³⁴ *Foaia de avere*.

³⁵ *Foaia de proprietate*.

³⁶ *Foaia de sarcin*.

Plan: The plan (cadastral map) includes all parcels in a locality, with a topographic number for each parcel. **Records relating to entries:** These records contain the documents that support the entries in the land register. **Entry register:** This register lists all the entries that have been made in the land register.³⁷

In addition to the above, the following existed as well³⁸:

Alphabetical indexes: These indexes contain the names and surnames of the owners, with the number of the land register in which they are registered.

Parcel indexes: These indexes show the topographic number of the parcels, the number of the plan on which each parcel is located, and the number of the land register in which they are registered.

2.3. Regulating the System of Real Estate Registration in the Civil Code

Articles 875–15 of the Civil Code regulate the real estate advertising system through land registers. Through the system of land registers, which is based on the topographical identification of real estate, real estate publicity and the full transmission and establishment of real property rights are achieved.³⁹ Article 876 paragraphs (1)–(2) of the Civil Code provides the following legal definition of land registers:

the land register describes the immovable property and shows the rights in rem relating to this property. In the cases provided for by the law, other rights, facts or legal relationships may also be entered in the land register, if they are related to the properties included in the land register.

Starting from this incomplete definition, but taking into account the provisions of Article 883 of the Civil Code, which enshrines the public nature; Article 885 of the Civil Code, which gives entries in the land register the constitutive or translational effect of rights *in rem*; Article 887 of the Civil Code, which makes it possible to acquire rights *in rem* acquired by inheritance, natural accession, compulsory sale, expropriation for public utility, as well as in other cases provided by law or in the case of compulsory sale; Article 902 of the Civil Code, from which it follows that rights, acts, or other legal relationships become enforceable against third parties exclusively by notarial deeds; and Article 903 of the Civil Code, from which it follows that certain legal acts and deeds may be noted in the land register with the effect of information only, that is, the incapacity or restriction, by operation of law, of the capacity to exercise the right to

³⁷ Sztranyiczki, 2012, p. 22.

³⁸ Chiş, 2012, p. 504.

³⁹ Sztranyiczki, 2012, p. 45.

use the land.⁴⁰ Land registers are drawn up and numbered by communes, towns, and municipalities. Land registers regarding properties in the same commune, town, or municipality form the cadastral register of real estate publicity of that administrative unit.⁴¹ This register is completed with an entry register, a cadastral plan of the properties indicating the cadastral number of the properties and the order number of the land registers in which they are registered, an alphabetical index of owners, and a copy of the records of the acts or legal facts subject to registration.⁴²

The land register itself is composed of a title, indicating its number and the name of the locality, as well as three parts in accordance with the provisions of Article 23 of Law No. 7/1996.

Part I refers to the description of the properties, which includes the following: first, the cadastral number is unique to each property and assigned by the Cadastre and Land Registry Office; second, the area of the property, the destination, the categories of use and, if applicable, the buildings. The area of the land is expressed in current units of measurement, in which, after 1996, the previous areas registered in “jugăre,”⁴³ “stânjeni,”⁴⁴ and “ari”⁴⁵ will be transformed, as appropriate.⁴⁶ The destination and categories of use of the land are those established in accordance with the legal provisions: forest land; land permanently under water; intravilan land; and land with special destinations; third, the description of the property with the neighbours constitutes the annex to Part I of the land register, drawn up in accordance with the regulation approved by the order with the normative character of the general director of the National Agency, which is published in the Official Gazette of Romania.

Part II⁴⁷ refers to the registrations regarding the right of ownership and includes:

- The name of the owner;
- The act or legal fact that constitutes the title of the right of ownership, as well as the mention of the documents on which this right is based;
- The transfer of ownership;
- The servitudes established in favour of the property;
- Legal acts, personal rights, or other legal relationships, as well as actions relating to ownership;

40 Chiş, 2013, p. 885.

41 Sztranyiczki, 2012, p. 46.

42 Article 21 of Law No. 7/1996

43 A unit of measurement for agricultural areas.

44 Unitate de măsură pentru lungime, folosită înaintea introducerii sistemului metric, care a variat, după epocă şi regiune.

45 A unit of measurement for land areas, equal to 100 m².

46 Sztranyiczki, 2012, p. 53.

47 Boroi and Anghelescu and Nazat, 2012, p. 289.

- Any modifications, corrections, or annotations that may be made in the title, in Part I, or in Part II.

Part III⁴⁸ refers to the registrations regarding the dismemberments of the right of ownership and charges, which include:

- The right of superficies, usufruct, use, habitation, concession, administration, servitudes in the charge of the subservient fund, mortgage and real privileges, as well as lease and assignment of debt;
- Legal acts, personal rights or other legal relationships, as well as actions relating to the real rights entered in this part;
- Seizure or pursuit of the property or its revenues;
- Any modifications, corrections, or annotations that may be made with regard to the registrations made in this part.

2.4. Land Registration Procedure in Romania

In the terminology of current land registers, governed by the Civil Code, there are three types of registration, depending on their subject matter: definitive registration; provisional registration (imperfect, non-definitive registration); and registration of legal acts and deeds, personal rights, and legal relationships related to the property.⁴⁹

Registration is the entry⁵⁰ by which a right *in rem* is transferred, constituted, or extinguished, with a definitive title, from the date of registration of the application for registration. The right of subsequent registration is definitive registration and can be considered perfect in that it does not require any subsequent procedure.⁵¹ The registration of a property right, based on a contract of sale, cannot be accepted when that contract does not meet the conditions required by law to be considered valid. The entry in the land register is made on the basis of a notarial deed, a final court decision, a certificate of inheritance, or another document where the law so provides.⁵²

Provisional registration⁵³ is the registration by which a right *in rem* in immovable property is acquired, modified, or extinguished only on condition and to the extent that it is subsequently justified. It is also called prenotation or imperfect

48 Boro and Anghelescu and Nazat, 2012, p. 290.

49 Chiş, 2012, p. 344.

50 *Intabulare*.

51 Sztranyiczki, 2013, p. 70.

52 Chiş, 2008, p. 341.

53 *Înscrierea provizorie*.

registration and takes place in cases where⁵⁴ the real right acquired is affected by a suspensive or resolutive condition or if it concerns or encumbers future construction; in the case of provisional registration having future construction as its object, its justification is made under the conditions of the law; the debtor has consigned the amounts for which the mortgage has been registered; a tabular right, which has been registered provisionally, is acquired; and both parties consent only to the making of provisional registration, and in the other cases provided for in Article 899 of the Civil Code.⁵⁵

Notation⁵⁶ is the process of making rights, facts, or other legal relationships related to tabular rights, that is, information that exists independently of the registration, enforceable against third parties.⁵⁷ Third parties are subject to notation in the land register in 20 cases provided for in Article 902 of the Civil Code, for example, a sale made with reservation of ownership; a preliminary contract and option agreement; and a right of preemption arising from the convention.⁵⁸

Article 906 of the Romanian Civil Code outlines the procedures for registering preliminary contracts and options.

A promise to enter into a contract having as its object the ownership of real estate or any other right related to it may be registered in the land register if the promisor is registered in the land register as the holder of the right that is the object of the promise, and the preliminary contract, under penalty of the rejection of the registration request, provides the term within which the contract is to be concluded. The registration may be carried out at any time within the term stipulated in the preliminary contract for its execution, but not later than six months after its expiration.⁵⁹ The promise will be cancelled if the person entitled has not requested the court to issue a decision that will take the place of the contract, within six months of the deadline for its conclusion, or if, in the meantime, the property has been definitively awarded in the framework of the forced sale to a third party who is to be responsible for the obligations of the promisor. The cancellation will be ordered ex officio if, before the expiry of the six-month period, the registration of the right that was the object of the promise has not been requested, with the exception of the case in which the person entitled has requested the registration of the action in the land register.⁶⁰

54 Sztranzicki, 2013, p. 71.

55 Chiş, 2012, p. 610.

56 *Notarea*.

57 Sztranyiczki, 2013, p. 73.

58 Chiş, 2012, p. 782.

59 Sztranyiczki, 2013, p. 74.

60 Chiş, 2012, p. 908.

3. Convalidation of Real Estate Contracts Concluded Without Authentic Form

Without an authentic form, the contract is null and void, but based on the provisions of the Romanian Civil Code, 'a contract that is absolutely void will still produce the effects of the legal act for which the conditions of substance and form laid down by law are fulfilled'.⁶¹ Therefore, in terms of convalidation, we can consider a real estate contract without an authentic form a precontract.⁶²

The precontract or the promise to contract to sell or buy, respectively, represents an agreement of will prior to the sale by which the parties undertake to conclude the sale in the future or to cause a third party to consent to the sale or purchase. The sale promise represents the agreement of the parties to commit themselves to the conclusion of a sale contract under predetermined conditions from the moment of the conclusion of this promise. In the absence of a contrary stipulation, the sums paid under a sale promise represent a repayment from the agreed price, which, in principle, in the event of a culpable breach of the sale, must be returned, with the exception of a contrary agreement.⁶³

In the case of the so-called "pocket contracts," the parties are objectively prevented from concluding the contract immediately and, therefore, in order to give legal effect to their will, they agree to conclude a synallagmatic sale contract. Such a contract, which is not concluded formally, is "just" a sale promise. In practice, the parties agree on the price and the object of the sale; however, the lack of cadastral works prevents the conclusion of their contract in the authentic form required by law for validity. In such a case, the parties will be content to conclude a synallagmatic promise by which they mutually commit to sell and buy after the completion of the cadastral works.⁶⁴

The legal literature has different views regarding the need for the conclusion in an authentic form of the bilateral sale promise when the authentic form is a condition for the validity of the intended sale; for example, when the parties to the contract agree on the future sale of land.⁶⁵ Some scholars do not share the Italian, Swiss, or German opinion, which refers to the rule of identity of form between the two contracts at a legal or jurisprudential level, that is, an authentic form is not required for the precontracts. In the current Civil Code, there is no express legal provision requiring an *ad validitatem* authentic form for the promise to contract. Where it has been considered

61 Romanian Civil Code, Article 1260

62 Veress, 2020, p. 67.

63 Tăbăraș, 2013, p. 15–21.

64 Dincă, 2013, p. 61.

65 Ionescu, 2012, p. 135.

that an authentic form is required *ad validitatem* for a particular type of promise to contract, for example, promise of gift, this has been expressly provided for.

In reality, people use real estate for 10 years under a precontract and simply wait for usucaption time. Such a procedure requires much less time and is also less expensive.

3.1. Real Estate Usucaption

Usucaption is the mode of acquiring the right of ownership and other principal rights *in rem* by exercising uninterrupted possession of a property, by virtue of and under conditions laid down by law. The institution of usucaption is justified, first, by reference to the situation of the possessor, in the sense that the need for the stability of situations and legal relationships requires, at a given time and with legal effects, the long appearance of ownership, until the transformation of a factual situation into a state of law. Second, usucaption is also a sanction against the passivity of the former owner, who has long been inactive, leaving the property in the possession of another person who has acted as owner or holder of another principal right *in rem*.⁶⁶

Under the terms of the Romanian Civil Code of 1864, usucaption was the only absolute proof of ownership, because it offered the possibility of proving ownership by possession within the legal term and in compliance with the other conditions established by law.⁶⁷ If the fulfilment of the conditions required by law for usucaption to be applicable was proven, from the day on which possession began, an absolute legal presumption of ownership in favour of the usurper operated retroactively, a presumption that could not be overturned.⁶⁸

By usucaption, only the property which formed the object of possession and only the principal right *in rem* corresponding to the possession exercised may be acquired, depending on the *animus* element.⁶⁹ According to the provisions of Article 929 of the Civil Code, property which, before or after the entry into possession, has been declared inalienable cannot be usucaptured. Similarly, according to the provisions of Article 939 of the Civil Code, a person who possesses another person's movable property for 10 years may acquire, by usucaption, the right of ownership.⁷⁰

In addition, only individual private goods, *ut singuli*, that are susceptible to possession, and not legal or factual universalities, can be acquired by usucaption.⁷¹ To be

66 Spanu, 2012, p. 272.

67 Jora and Ciochină-Barbu and Corbu, 2015, p. 294.

68 Stoica, 2017, p. 359.

69 Stoica, 2017, p. 455.

70 Jora and Ciochină-Barbu and Corbu, 2015, p. 295.

71 Jora and Ciochină-Barbu and Corbu, 2015, p. 296.

acquired by usucaption, the main real rights must be over corporeal goods, individually determined, that are susceptible to possession and are in the civil circulation.⁷² Only immovable property over which private property is located can be acquired by usucaption, regardless of whether the holder of this right is the state, a local authority, or a private individual. Inalienable goods and public domain goods cannot be acquired by usucaption.

In the Civil Code, the legislator makes a distinction between tabular and extratabular usucaption. In addition, under the new regulation, movable property can also be acquired by prescription.

Extratabular immovable prescription is regulated by Article 930 of the Civil Code, which provides that the right of property over immovable property and its easements can be registered in the land register, on the basis of prescription, in favour of the person who has possessed it for 10 years, when the owner registered in the land register has died or ceased to exist (in the case of a legal entity), the declaration of renunciation of ownership has been registered in the land register, or the immovable property was not registered in any land register.⁷³ According to paragraph (2) of the same Article, in all these cases, the acquirer can acquire the right only if he has registered his request for registration in the land register before another third party has registered his own request for registration of the right in his favour, on the basis of a legitimate cause, during or even after the expiration of the prescription period.⁷⁴

At the time of the expiration of the prescription period, to acquire the right of property by this means, it is necessary for those who invoke the prescription to register their request for registration of the right in the land register, thereby demonstrating their intention to prescribe and acquire the right.⁷⁵

In accordance with the provisions of Article 931 of the Civil Code, the rights of a person who has been registered, without legitimate cause, in the land register, either as the owner of an immovable property or as the holder of another real right, cannot be challenged if the person registered in good faith has possessed the immovable for five years after the date of registration of the application for registration, provided that their possession is not vitiated.⁷⁶ Paragraph (2) of Article 931 of the Civil Code specifies that it is sufficient for good faith to exist at the time of registration of the application for registration and at the time of entry into possession. The right of ownership is acquired in accordance with the title that is registered in the land register,

⁷² Cantacuzino, 1998, p. 129.

⁷³ Jora and Ciochină-Barbu and Cobru, 2015, p. 297.

⁷⁴ Florea, 2012, p. 173.

⁷⁵ Jora and Ciochină-Barbu and Cobru, 2015, p. 297.

⁷⁶ Jora and Ciochină-Barbu and Cobru, 2015, p. 298.

the date of acquisition being the date of registration of the application for registration of the right in the land register.⁷⁷

Therefore, in practice, there are countless cases in which the parties concluded a “pocket contract” with each other, that is, a preliminary agreement on the basis of which they acquired the ownership right by applying the prescription rules.

The legal landscape is continually evolving, shaped by landmark court decisions that reflect societal values, legal principles, and the dynamics of the judicial system. This paper explores several significant legal cases that have had a profound impact on specific areas of law. By analysing these cases, we can gain insights into the interpretation of laws and their implications for future legal proceedings.

The first case⁷⁸ revolved around a land dispute between a private individual, Tinca, and a municipality. Tinca was claiming ownership of a piece of land adjacent to her property through adverse possession, arguing that she and her family had continuously used the land for over 30 years. However, the municipality maintained that the land was public property and had not been legally transferred to Tinca. In a case concerning adverse possession, Tinca claimed to have openly, continuously, and exclusively possessed a piece of land for over 30 years, a requirement that can lead to ownership under Romanian law. However, the municipality contended that the land was part of its public domain, arguing that Tinca’s possession lacked legitimacy. Additionally, two individuals, Valeria and Alexandru, intervened, asserting that they also utilised the land and challenging Tinca’s claim.

Both parties presented various forms of evidence, including witness testimonies, property documents, and expert reports, to substantiate their arguments. The case raised complex legal questions surrounding property rights, adverse possession, and the interpretation of municipal regulations. Based on the preliminary summary, it appears that the court ruled in favour of Tinca, concluding that her possession was indeed open, continuous, and exclusive for the statutory period required. The court found insufficient evidence to support the municipality’s claim of public ownership and regarded the intervenors’ assertions as lacking credibility, which did not undermine Tinca’s case. Additionally, parts of the municipal regulations regarding the land were declared invalid.

The court’s decision likely hinged on several key factors: the strength of Tinca’s evidence, including compelling witness testimonies and expert reports, contrasted with the municipality’s lack of clear evidence to back its ownership claim. Furthermore, the court may have deemed the intervenors’ claims inconsistent and

77 Florea, 2012, p. 174

78 Sentință civilă 2 din 01.04.2016. Judecătoria Buzău, <https://www.jurisprudenta.com/jurisprudenta/speta-bbsslz4/>

unsupported. Finally, it ruled that the municipal regulation categorising the land as public property was unlawful.

This ruling had significant implications, as it established Tinca's legal ownership of the land, while the municipality had forfeited its potential claim. The case underscores the importance of property rights and highlights the complexities inherent in resolving land disputes.

The second case⁷⁹ involved a real estate claim concerning adverse possession and the connection of possessions. The ruling, which was finalised on 12 May 2022, involved plaintiffs C.V. and C.I. who sued defendants C.M., C.C., C.G., C.Ş., and C.Co. They sought a court ruling to recognise their ownership of a 267 m² plot of land located in the village of Vânători, Galaţi County, asserting the need to establish property boundaries between their land and that of the defendants.

The court acknowledged that a real estate claim allows an owner who has lost possession of their property to seek its recovery from an unlawful possessor. The success of such a claim hinges on the Plaintiff's ability to prove their ownership and that the property is held by another party. The court emphasised the legal obligation of neighbouring landowners to collaborate on property boundary demarcation and shared costs.

Furthermore, the court noted that adverse possession is based on uninterrupted possession for a continuous period, as established by civil law. A successful adverse possession claim requires public, uninterrupted, and peaceful possession under the claim of ownership for a period of 30 years.

In this case, the defendants had possessed the disputed land continuously since 1954. The court also considered the effect of laws enacted in 1974 that removed land from civil circulation, determining that this resulted in a natural interruption of the acquisition prescription. Following the repeal of those laws in 1989, the possession period resumed.

Ultimately, the court found that the defendants had exercised effective possession of the land for a total of 48 years, thus satisfying the 30-year requirement for adverse possession. The court established that the plaintiffs failed to prove that the defendants' possession was not valid or effective. The defendants acted as true owners of the land, which they had maintained and included within their property boundaries.

The ruling concluded that the plaintiffs' passive approach over the years, allowing the defendants to occupy and utilise the land without contest, led to the forfeiture of their ownership rights through adverse possession. As a result, the court rejected the plaintiffs' claim and accepted the defendants' counterclaim, recognising their ownership of the land through adverse possession.

79 Summary of Civil Ruling No. 795 from 3 March 2021, <https://www.jurisprudenta.com/jurisprudenta/speta-19lpwsi/>

4. Conclusion

Based on Article 1674 of the Civil Code, except in cases provided by law or if the parties' intention is to the contrary, ownership is transferred by law to the buyer from the moment the contract is concluded, even if the property has not been delivered or the price has not yet been paid.

In this case, the buyer acts as the owner immediately after the conclusion of the "pocket contract"; however, in reality, it may take several years for the buyer to become the owner of the property.

Therefore, why do people still use "pocket contracts," or why do they not simply enter into a notarial form of real estate sales contracts? After Communism, because of the poor economic situation in the country and the lack of land registers, people only concluded real estate sales contracts between themselves, which were called "pocket contracts." This meant that the seller and buyer drafted the text of the contract themselves, writing it by hand. The contract was signed by two witnesses, usually local priests, teachers, or the neighbours of the parties. Obtaining the land registers was not only time-consuming but also costly, as the probate procedure was handled by a public notary. This is why people tried to make things as simple as possible and simply made a sales contract between themselves, which we can only interpret as a precontract, thanks to the convalidation. People still use this contracting option today, though less frequently.

One of the main reasons for doing so is the lack of land registries. The land registration process itself can take several years, or at least several months, and it is a costly process. The second important reason is that in Romania, real estate sales contracts can only be concluded with a notary, which is also very expensive. Therefore, in poorer rural areas, where agricultural land was mainly exchanged, people tried to solve the matter among themselves with two witnesses, thus saving money. However, this would have negative implications in the future. Even if "pocket contracts" are not common today, the land registration process of "pocket contracts" that have already been concluded poses serious challenges to both the land registration authority and the owner, and in some cases, even to notaries in the case of an inheritance procedure.

The conversion of a contract into a precontract is a genuine hypothesis of conversion and, from a practical point of view, seems to be the preferred field of manifestation of this legal procedure. Thus, it is considered that the expression of intent that is not valid as a contract of sale because of the lack of the authentic form required by the law *ad validitatem* or because of the lack of express consent of one of the spouses, when the sale relates to a piece of land or a building which is common property, or because of a breach of temporary legal inalienability, is considered a precontract or, as the case may be, a unilateral promise of sale.

It has been argued that the possibility of converting the contract into a precontract cannot be based on the idea of the practical equivalence of the effects of the initial act and the subsequent act, since the precontract would be “less” than the contract of sale, but on the idea of the progressive formation of the contract of sale.

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Recognition by the Court of The Legal Effect of a Written Contract On the Transfer of Real Estate

ABSTRACT: *The scope of this article is to consider the validity requirements of effective ownership transfer of real estate through contracts in Hungary. The transfer of movable and immovable property ownership has diverse requirements to be valid in terms of a contract. This article thus determines what regulations and formal criteria need to be met by a seller and a buyer in acquiring the ownership of immovable properties, that is, what makes a contract valid and effective and capable of raising legal consequences and having a binding force. While invalid contracts can also be formulated to be valid and effective in special cases, invalidity rules are diverse, depending on what type of ownership transfer established by the sale contract.*

KEYWORDS: *ownership transfer, invalidity, effectiveness, real estate, property change*

1. Introduction

Article XIII of the Hungarian Constitution¹ states the right to hold ownership by everyone. As a fact, the owner is eligible to hold the power of owning and inheriting. As property, we understand both movable and immovable property. Article XXVIII (1) of the Constitution states, that everyone has the right to exercise his/her (hereinafter, his) rights and obligations in any claim or suit brought against him in the judicial procedure of an independent and impartial court, or tribunal established by law, with fair and public process and within reasonable time. However, in addition to the capability of owning property and the of holding property – possession – the rights of use, of beneficial enjoyment and to dispose over property are also part of the capability. The right of disposition, just like surrendering the possession, use of

1 Fundamental Law of Hungary from 18 April 2011.

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beneficial enjoyment, pledge or encumber or, most importantly for the purposes of this study, abandoning ownership are matters of concern if the disposition of the property transfer is defective. This is because the legal process is subject to formal and substantive obligations in certain cases governed by law.²

In Hungarian private law, legal personalities' private autonomy and positivity are fundamental principles that prevail, especially in the law of obligations. These principles and characteristics have developed alongside the right in rem regime.³ Here, it becomes important to emphasise and highlight that, while the right in rem has a cogent attitude, the law of obligations is more likely to exhibit flexibility. This characteristic of the Hungarian contractual system guarantees that legal personalities – natural and legal persons – are free to dispose of their contractual relations and to choose with who they are being involved in legal relations. However, it is also important to consider that, with private autonomy, individuals – with or without legal representatives – must act with great responsibility and must assume the consequences of their legally effective acts. Similarly, when the other side of a contractual relation claims take the forthcoming judicial procedure, being processed by the court. Liability applies to the right of property ownership and to disposing of the property. Legal acts in our everyday life, even if one sells his immovable property once in a lifetime or does it with frequency, have an impact on others. The way a contract is concluded and the surrounding legal procedure – as previously mentioned – must meet certain formal, substantive requirements, together with the procedure for registering the ownership of real estate. Therefore, the consideration of passing over real estate ownership must be given to morality with a legitimate interest, within legal requirements that mean compliance with regulatory criteria. These circumstances are to be handled within good faith and with legal knowledge.⁴

What can we do if the contract we have entered cannot producing legal effects due to some defect in its binding content or form? How far can we remedy the defect of the contract and with whom and how can we transform our contract into a valid one to fulfil its purpose? What can be done against an arbitrary action challenging our ownership rights? These questions are very important for an ownership acquisition dispute. Infringements are preferably not solved through prohibited arbitrary action but by reasonable agreement between the contracting parties or, as a last step, through judgment thereof.

2 Act CXLI of 1997 on Real Estate Register, Art. 51.

3 Az ingatlan-nyilvántartási joggyakorlat-elemző csoport összefoglaló véleménye, 2016.

4 Referenced acts and national regulations.

2. Real Estate Properties as Regulated in the National Civil Act

A mixed system has been developed in Hungarian law in relation to the acquisition and transfer of ownership rights in general and of real estate in particular case. The valid, effective, and efficient acquisition of ownership rights includes two acts – legal actions – simultaneously. One act is the legal transfer with a contract and the other one is the act of passing over the right of possession. The concept of the acquisition of property means the creation of a right of ownership over a thing – right in rem⁵ – including the acquisition of a new right for new ownership, which is independent of the previous ownership right plus the creation of a right of ownership based on a pre-existing right of ownership. As such, based on this classification, there are two types of acquisition of properties: one which is so-called *original* and one which can be defined as *derivative*.⁶

The original acquisition of property is when a new property right is created, independently from the pre-existing one. Through this type of ownership acquisition, the “new” ownership is independent of the older, pre-existing encumbrances in rem. A separate, new ownership relationship is thus created as a result of legal facts, independent of the rights and obligations of the previous ownership. In this case, there is an acquisition of rights free of any restrictions on the thing – rem – from previous rights or commitments. Derivative acquisition, however, comes when the acquired ownership is based on the pre-existing ownership of the thing. In this case, the new owner inherits and receives the previously existing negative rights and restrictions attached to the newly acquired thing. Real estate property selling, and acquisition are typically derivative acquisition types, where the buyer needs to look after all rights and restrictions attached to the thing which he intends to buy. It can be stated that a real estate acquisition is not only signing a sales contract⁷ – signed by hand or electronic signature⁸ – but also giving over the possession of the property from the seller to the buyer, while meeting all legislative requirements plus proceeding the registration in the national immovable property registration system. The Hungarian system has a constitutive effect by registration; for this purpose, all buyers need to hand in their valid documents – introduced below in sections 2.2 and 4 – to the Hungarian Real Estate Register Office⁹ for constituting a valid ownership acquisition of the ownership right.¹⁰ Besides selling contracts, ownership transfer can

5 Civil Code, Book V, Right in Rem.

6 Lenkovics, 2012, pp. 14–29.

7 Civil Code, Book VI, Law of Obligations, Art. 215.

8 The new regulations are effective from 2024.

9 Hungarian Real Estate Registration Office of the Government Office.

10 Besides ownership rights, other rights can be constituted through the register.

also be established ex-lege for inheritance or widow rights.¹¹ Naturally, these types of ownership need to be registered officially in the same way as an ownership change based on a sales contract.¹²

2.1. Legal Framework Regulating Real Estate Ownership Acquisition

The provisions of rights in rem relating to immovable property are found in Book V of the Civil Code¹³. This section regulates the basis of the Hungarian ownership legal system, the Hungarian regime of property transfer, and the types of ownership rights and limitations. The Law of Obligations regulates the types of property acquisition. The bound normative system of the right in rem and law of obligations differ in that while the previous is a stable system, the other is a dynamic system. The freedom to contract and the freedom to choose the contracting parties are general rules that lead to parties' freedom of contractual actions. The stated principles of land register and the main substantive rules on the creation, modification, and termination of registered rights have been incorporated into the new Civil Code, thus returning to the previous private law solution but bringing it up to date. The Civil Code also serves as a conceptual definition, underlining the integrity and public validation of rights belonging to immovable property with legally relevant facts included in the Code, together with the registered details of the registered owners. However, procedural matters and other detailed rules beyond the Civil Code continue to be governed by it. The article will also introduce these regulations.

2.2. Definition of Real Estate

The main categories of immovable properties are regulated by separate laws and regulations, such as the Act on Certain Rules on the Rental and Disposal of Apartments and Rooms,¹⁴ Act on Transactions of Agricultural and Forestry Lands,¹⁵ Act on Condominiums,¹⁶ Act on the Real Estate Register (hereinafter, Reg. Act). The concept of immovable property is defined in the Reg. Act. The text of the law distinguishes between a plot of land and a separate property other than a plot of land. The definitions

11 Ownership rights besides acquisition Civile Code.

12 Szladits, 1933, pp. 78–82.

13 Civil Code, Book V, Right in Rem.

14 Act LXXVIII on Certain Rules on the Rental and Disposal of Dwellings and Premises.

15 Act CXXII of 2013 on Transactions in Agricultural and Forestry Land.

16 Act CXXXIII of 2003 on Condominiums.

of these terms are found in Act 11§–13§.¹⁷ In the case of real estate acquisition, knowledge of additional legislation is also required, such as the VAT Act and Personal Income Tax Act for fulfilling the eligible procedure from the owner's side.¹⁸

The Civil Code does not contain a definition of immovable property, but in general legal theory, immovable property is defined as property that cannot be moved to another location without damage to its condition or only with a significant loss of value. According to Géza Marton's definition of real estate based on Roman law, "res immobilises"¹⁹ a plot of land – *presidium, fundus* – is a certain delimited part of the land, including its constituent parts, for example, the living plants, the buildings above and underneath the ground, until the limit of the potential utilisation. This is the definition that can be found in the Civil Code.²⁰ However, Article 5:17 of the Civil Code includes limitations in the ownership rights on real estate. Furthermore Article 5:18(1) states that land and the building form parts of the *rem*, with exceptions mentioned in paragraph (2), which states that the land and building can be registered separately in the land register. For the provisions of civil law, immovable property is defined as land that is subject to the land register and everything that is permanently united with the land, that is, permanently connected to it, such as a house, trees, standing crops. As a legal concept, real estate is one of the most important objects of property law; for instance, it is considered a legal *rem*. This is a generic term, derived from the Latin "immobile" standing for things which are land and buildings. Real estate is a spatially and legally delimited part of the land underneath, which in its physical reality, cannot be separated or moved from one place to another at all or, in case of separation, only with substantial damage to its condition. Therefore, its possession is physically bound to a place. In terms of function, it may be considered economically as a means of production in the broadest sense, when it is used as agricultural land for crop production, farming, forestry, or game–wildlife – management. Land can be part of the national strategy and can be, as it has been to a significant extent throughout history, part of the state's revenue in the form of taxes on land. It can also be used as land for private purposes as a residence, as a seat, as a business premises – disposition – and for economic activities and purposes as well.

Property –real estate – can be grouped according to different aspects. It can be distinguished according to the person who owns it, whether it is privately owned and with limitations or state-owned, whether the owner has the right to dispose of it, and what is the purpose of a possible disposition. Property law is the law itself with no

17 Act CXLI of 1997 on Real Estate Register, Art. 11–13.

18 Act CXXVII of 2007 on Value Added Tax, Act XCIII of 1990 on Fee Law, Act CXVII of 1995 on Personal Income Tax.

19 Márton, 1960, pp. 119–121.

20 Civil Code, Book V, Art. 17.

other than the totality of rights and obligations relating to property.²¹ On 18 February 1902, during the analysis of the concepts of movable and immovable properties, the Court of Appeals stated²² that real estate as a subject of civil law belongs to right in rem, as a legal concept which underlies the legal framework. The Court of Appeals in its 8112/1885. judgment stated that buildings belonging to the real estate on which they were built, as acquiring the ownership of the building built on land not owned cannot be established. The Civil Code states in 5:18. § that land and any building built on it can be separated, and legal status is ed as stated under Civil Code 5:19 §,²³ which differs from the old Civil Code.²⁴

2.3. Requirements and Conditions for Concluding Real Estate Ownership Acquisition

When we acquire ownership by sale, we require special attention on who we are contracting with. Contracting parties must possess the following statuses:

- legal capacity as of Civil Code 2:1§ (1) – all persons shall have legal capacity;
- legal competency as of Civil Code 2:8§ (2) – whosoever is competent is entitled to conclude contracts and make other legal statements;
- not being incompetent legally – Civil Code 2:9§ (1).

The following limitations related to a legal person's status are also to be highlighted here as follows:

- minors of limited legal capacity between the age of 14 and 18 who are not incompetent;
- legal statements of minors of limited legal capacity as of Civil Code 2:12§ shall not be deemed valid without the consent of that minor's legal representative;
- legal statements of incompetent minors as of Civil Code 2:14§ (1) whose legal statement shall be null and void, their legal representatives shall proceed on their behalf – aged below 14 or incompetent by authority decision.

Those persons who have the legal capacity to act, can enter contracts and create effective contractual relationships or other juridical acts on their own, but those legal persons who have no legal capacity to act – due to minority or by court judgment on placement under guardianship – will form of their own power only null and void contracts. Therefore, all contracting parties must be aware that acts made by persons who have no legal capacity to act are not null and void in case the content of the act

²¹ Tolnai, 2019.

²² Tolnai and Fónyiné, 2019, II.2.5.

²³ Az ingatlan és az ingatlanjog fogalma I.

²⁴ Act IV of 1959 on the Civil Code of the Republic of Hungary.

implies that the person would have done the same legal act in case of having the capacity to act. This statement is formed by the legislator as an exception to null and void contracts originating from a person's legal capacity. As for juridical acts whose legal capacity is limited due to their minority, consent provided by their statutory representative is required to deem those valid.

The first act of the Hungarian legal framework of real estate acquisition is the Fundamental Law of Hungary, which states both the right to hold ownership and the responsibility arising from ownership right. Then, the Civil Code, Book II states the personal law defining legal capacity and legal competency statuses, as introduced above. Civil Code, Book V then regulates the right in rem and the content of ownership rights in general, specifically and the related limitations. Common rules on the acquisition of immovable property are found in Book VI. The Law of Obligations provides general and specific contract rules, alongside the common rules on the registration process of immovable property at the Land Registration Office. Book VI also deals with the invalidity rules of contracts, including the two broad categories of invalidity: nullity and voidability. The immovable property registration principal and procedure rules are supplemented by Reg. Act and its implementation decree.²⁵ Further, the Transaction in Agricultural and Forestry Land²⁶ belongs to this listing, as these types of lands are also considered real estate within their special rules. Finally, the XXV Principle Civil Decision (hereinafter, Civil Decision) on the validity of immovable property ownership transfer is also a legal source for ownership rights.²⁷

As a contractual obligation, the title of an acquisition – *ius causa, titulus* – is to be determined. The absence or invalidity of the title disqualifies the acquisition of property. The transfer, called tradition or mode of acquisition – *modus* – is the next legal statute that applies. The transfer or mode of acquisition in the case of immovable properties are considered transactions in rem, which conclude with the entry of the change of ownership in the land register. The transfer of ownership does not take place merely by the transfer of the thing, as it must be based on a valid legal title, as previously defined. The importance of the duality of title and transfer mode lies in the fact that title is usually created by a binding contract of obligation, whereas the acquisition and transfer that are distinct from the title are achieved by a transaction in rem which transfers property. It is thus significant which legal acts are subject to the law of obligations and which are subject to the right in rem.²⁸

25 Government Decree No. 109/1999.

26 Act CXXII of 2013 on the Turnover of Agricultural and Forestry Land.

27 Curia, Professional Materials of Civil Collegium, XXV Principle Civil Decision.

28 Civil Decision.

3. Contractual Requirements for Effective Real Estate Ownership Acquisition

Fundamentally, a contract need to meet validity requirements both in terms of its form and content. The Civil Code defines two forms of invalidity types: nullity and contestability. In case of nullity, the fault is considered so serious by the private law regime that its ipso iure renders the legal relationship ineffective meaning by force of law. For contestability, the law requires the validity of the claim's dependent on the rights of the parties. In the case of a successful contestation of the contract, the contract becomes invalid in the part which the parties have contested and from the past. Furthermore, no entitlement can be based on the successfully contested contract, and the risk of damage passes over to the other party upon the performance that has already been provided by the transferring party. The importance of the legal institution of invalidity is that such contracts are not suitable for achieving the legal effect originally intended by the contracting parties. Invalidity essentially behaves as a civil penalty.

3.1. Validity Requirements in Contractual Relations

The Civil Code distinguishes between nullity and contestability from the point of an invalidity sanction. A successfully contested contract with an expression of will is invalid *ex tunc* – from the past – in case of nullity. The contractual will in which the mistake is found, the contractual declaration expressing the will of the parties and the intended legal effect is what the parties intended to achieve. For a contract to be valid, these three elements must meet the effective legal requirements. The formal and substantive requirements are stated in section 6:70 §, while section 6:215 § (2) mentions the requirement of real estate property possession to be passed over additionally alongside a valid contract. Based on these provisions, a simple written form is required, which can be fulfilled through a declaration written by the parties on the minimum content of the contract. In general, no private or public document is needed for a sales contract, but Article 32§ (3) of Reg. Act states that the registration of property rights may only take place based on a public deed or a private deed countersigned by a lawyer – legal advisor – or notary.²⁹ In principle, the land register requires the written recording of the real estate ownership sales contracts; otherwise, there would be no deed or only a complicated procedure to register the acquirer of the property in the land register, which has constitutive power. Documents then

²⁹ Code Civil, Book VI.

must pass and meet all substantive requirements stated in the Reg. Act. A contract for the transfer of ownership of immovable property is in writing if all contracting parties have signed the contract; however, the written contract can be on separate papers, with the signatures of the contracting parties on separate documents as well. The aim and the property must be always defined clearly and identifiable for the land registration process. The validity of the contract is not affected if the declaration of all parties is not contained in the same document but is the result of a mutual and unanimous expression of the parties' scope stated separately by each party. A relatively new Hungarian regulation on real estate registration procedure and³⁰ validity requirement of real estate ownership acquisition contracts is the electronically authenticated e-signature. This is to be placed on the contract in front of the attorney, or notary public, as a high-security electronic signature is based on a qualified certificate or by using a document authentication service traced back to the identification of the signing party.³¹ This new legislation as is based on the Reg. Act and entered into force on 1 February 2024. The e-signature must be created on a form provided for this purpose, which must be authenticated by the affixing of the advanced secure electronic signature based on an AVDH service.³²

3.2. Civil Decision on the Requirements of Real Estate

Beyond the requirements of the Reg. Act. and of the Civil Code, mandatory elements are also defined in the previously cited XXV Civil Decision, which sets mandatory formal and content requirements to be met as binding elements of the acquisition contract. Based on the Civil Decision, it is necessary and enough to include in the contract not only the identity of the parties but also their intention of the transfer of the ownership related to the sellable immovable – real estate – property. In case of a contract containing specifications and considerations on the real estate property – or if the transfer is free of charge – the considerations shall also be determined from the contents of the document. Furthermore, the validity of these ownership change contracts for immovable property do not depend, as a matter of form, on the document being dated, indicating the place and time of conclusion, or on the involvement of witnesses to the transaction, as mentioned above. Section 6:38§ (1) of the Civil Code provides that in case the sales contract is written in several copies on differing documents, the

30 Act C of 2021 on the Real Estate Register.

31 Government Decree No. 179/2023 on the Implementation of Act C of 2021 on the Real Estate Registry, Art. 106.

32 On 15 June 2021, the Hungarian Parliament passed Act C of 2021 on Land Registration that entered into force on 1 October 2024. The meaning and purpose of the new service is the digitalisation of land registry administration in Hungary.

contract is still valid even if each party signs only the copy intended for the other. The signature of the contract is thus a formal condition of validity, as stated in the Decision. Regarding the substantive content of the contract law does not specify the object of the purchase. Therefore, in the absence of a specific provision related to the will of the contracting parties, the immovable property may be recognised if the subject of the sale – the rem – cannot be defined from the deed itself, but it is clear for the parties with no doubt which property is on sale. The XXV Civil Decision gives an example for such cases, using the sentence ‘I sell you my house which is in the 2nd district of Budapest where my parents lived during my childhood’. This definition can only be valid naturally, if both parties are sure on the named property, and if, by determination, no other real estate meets these determinations by the seller. Regarding the aim – will – of the parties, it is sufficient that the content of the deed show that the parties intended to transfer the ownership of the immovable property. For this purpose, sales contracts can also be titled differently – by parties such as natural persons who are not familiar with legal determinations – such as “receipts”, “bonds”. These contracts are also valid if they meet the requirements in content set in regulations.

4. Consequences of Not Complying With Foreseen Regulations

A consequence of not complying with the legal framework is the invalidity of a contract. Other legal effects of invalidity shall be invoked by the court at a party's request, as stated previously. In principle, no right may be established and performance may not be demanded on the basis of an invalid contract.

4.1. Nullity and Avoidance

There are cases that cause nullity and there are absolute cases that cause avoidance. Form defection is the error in the declaration of the legal aim. Defection causes null contracts. The system of invalid contracts by the Civil Code is as follows.

Defection in will: mistake – Civil Code 6:90§, misrepresentation and unlawful threats Civil Code 6:91§, secret provisions and shame contracting Civil Code 6:92§.

Defection in the form of the contract – error in the contractual juridical act – which are to be corrected by the will of the parties as regulated under Civil Code 6:94§. Defection in the intended legal effect would include the following: prohibited contracts, contracts contrary to good morals, usurious contracts, obvious disproportionality, nullity of transferring title as security, consumers statements as waiver, unfair standard contractual terms, and impossible and contradictory contractual aims found under Civil Code 6:95-6:104 §.

Within each group, there are mixed reasons for nullity and contestability. This is defined in the Civil Code as the concept of essential error. It means the error applies to an essential circumstance when the party had known about it or would not have entered the contract with a different content known by him. The legislator does not uphold the rule of error in legal matters. It is also a new provision that the contract cannot be challenged by those who may have recognised their mistake or assumed the risk of making a mistake. The law also defines who is a deceived contracting party as one who is misled in general or is misled by the behaviour of the other contracting party. Under a separate provision, it prohibits the stipulation of fiduciary security, invalidating it. The Hungarian legislation system deals with relative nullity as well. This means nullity based on limited capacity, and incapacity can only be invoked in favour of the person whose capacity is limited or lacking. In cases where a valid contract for the sale of immovable property is not suitable for registration in the land register and the buyer cannot otherwise obtain a suitable document for registration, the court judgment of the dispute between the seller and buyer may be the document that can serve as the basis for registration.

In the case of nullity, the Civil Code states – as an innovation compared to the old Civil Code – that only one party cannot invoke it without a deadline and, when nullity can be invoked, the lawsuit related to it can be initiated only by those who have a legal interest in doing so or who are authorised to do so by law. The legal interest would mean that, due to invalidity, someone acquires a right or is released from an obligation for invoking.

5. Validation of Form-Defective Contracts On the Conveyance of Real Estate

In general, the main legal consequence of invalidity is, that no right can be based on such a transaction. For example, the legal effects intended to reach the parties cannot be achieved. This is a legal consequence that the court must apply *ex officio* in the event of nullity. Such contracts can be invoked, and legal proceedings related to the nullity of the contracts can be initiated by those who have a legal interest in it, in addition to those who are entitled to do so under legal requirements. However, in case of contestability, this general legal consequence exists only for the person entitled to it. A contract must be considered valid until a final judgment declares it invalid. Therefore, lawsuits to establish the validity of a contract are incomprehensible. It is not possible to base a right on an invalid contract and demand the performance of that contract. This fact must be considered by the court *ex officio* in case of nullity. The court only applies the legal consequences of invalidity to a party's request, although the party is not bound by the request in terms of specific legal consequences. The

court may only apply a legal conclusion against which all parties apply. However, the party may not request the invalidity of the contract to apply the legal consequences. An additional legal consequence of invalidity is that the court applies it only based on the party's request, as declared under Civil Code 6:108 § (1)–(2). Other consequences of invalidity contracts are to be listed and introduced. If the cause of the invalidity can be eliminated or has subsequently ceased, the court may declare the invalid contract retroactive to the date of its signature – *ex tunc* from the past. Declaring contract validation is equivalent to restoring the original circumstances. If both would be appropriate, it is at the discretion of the court to decide on the legal consequence of invalidity, as defined under Civil Code 6:110. §. The following consequences can arise from the invalidity of real estate ownership acquisition contracts.

Restoration of the original situation – *status* – is regulated under the Civ. Code 6:112 §. Restoring the original state is possible only in the case of contracts for the transfer of ownership of things – *rem* – which are originally reversible. In the process of a real estate sale, the original state would be the non-change of the ownership right, the reimbursement of the selling price received by the seller, or the return of the real estate possession. In case of originally irreversible services – besides real estate ownership transfer – the restoration of the original situation is conceptually excluded. However, for goods or services, for various reasons, it may later become impossible to return the thing in kind. As an example, subsequent irreversibility may occur in case the purchased thing is resold, processed, or destroyed. The reimbursement of mutually performed services based on an invalid contract can only be done mutually and simultaneously. Only the party who undertakes to reimburse the service provided to him and can do so may effectively demand the service returned to him stated in Civil Code 6:112. § (1). In the name of restoration of the original condition – situation – the claim for reimbursement for the reversible provision of goods is a legal claim in *rem* – *rei vindication* – due to the invalidity of the contract; as such, the other party cannot acquire ownership of the provision of goods. When processing the consequences of invalidity, the court must ensure that the value of the original services is equivalent and maintained, whilst it must also prevent the unjust enrichment of either party. The invalid contract's financial reimbursement means the value of the service provided under the restoration of the original circumstance is not possible in nature or it is possible but it would harm the relevant and essential interest of one of the parties from a legal viewpoint.³³

The legal claim in *rem* can also be asserted against third parties in the case of real estate, within the limits of a cancellation lawsuit. However, the demand for the repayment of the sum of money paid without debt based on the invalid contract is a compulsory demand, as the same amount of money must be returned. As a result, if

³³ Juhász, 2020, pp. 82–98.

the provision of goods is opposed to the provision of money, the temporal possibility of reclaiming the individual services differs, since the compulsory monetary claim expires during the general five-year limitation period. In this case, the ownership claim does not expire but its enforcement is only determined by the acquisition of ownership by possession of the contracting party. The legal consequences of invalidity in the legal relationship of the parties shall be deducted upon request if the performance has already taken place since the invalid contract. If several legal consequences of principle application are possible – for example, in the case of a conspicuous value ratio – the court is entitled to discretion. During its consideration, the court is not bound by the claims or counterclaims of the parties but can decide to apply the different legal consequences of invalidity. Under Civil Code 6:111. §, the contractual aims are confirmed according to which the contract is valid *ex tunc*. If the cause of invalidity is subsequently eliminated by the parties or if it is terminated for another reason, the legislator ensures that the parties, in addition to the court, can decide on the continuation of the contract. As another procedural consequence, if the court has already condemned one of the parties in a service demanded under a contract and did not plead in the lawsuit that the claimant is basing his claim on an invalid contract, he may no longer plead this in a subsequent lawsuit. Judicial practice has established that, in such cases, the court accepts the contract as valid by deciding to contain a penalty based on the contract, as rights can only be based on a valid contract. In such a lawsuit, the obligated would have had the opportunity to plead invalidity, as he would violate contractual security and performance discipline if he would do so later.³⁴

5.1. Recognition of the Legal Effect of a Written Contract For the Transfer of Immovable Property

A contract must be considered valid until a final judgment declares it invalid. Therefore, any lawsuits aimed at establishing the validity of the contract are incomprehensible. Determining the existence or termination of a contract is a different matter, as it takes place on a different legal basis. However, lawsuits to establish the invalidity of contracts are common. It is not possible to base a right on an invalid contract and demand the performance of that contract. The court takes this fact into account *ex officio*. However, the court also applies the legal consequences of invalidity only at the party's request, although it is not bound by the party's request in choosing the specific legal consequence. The court may only apply a legal conclusion against which all parties object. However, a party may also request the invalidity of the contract

³⁴ Tolnai and Fónyiné, 2019, pp. 251–259.

without requesting the application of the legal consequence.³⁵ When the reason for invalidity affects a specific part of the contract, the legal consequences of the invalidity must be applied to this part of the contract. In case of the partial invalidity of the contract, the entire contract is overturned if it can be assumed that the parties would not have concluded it without the invalid part as per Civil Code 6:114. § (1). The word “supposedly” in the named regulation provides the court more discretion in considering all circumstances of the contractual relationship between the parties. The Civil Code after the entry into force of 1/2014. 1/2005 on the procedure to be followed in connection with the ex officio detection of the cause of nullity maintained in force by the civil law unity decision. The VI.15 Civil Collegium Opinion, that is, when the parties do not refer to grounds of invalidity, but the court detects it, the Civil Code maintains that if the grounds for invalidity affect a specific part of the contract, the legal consequences of the invalidity must be applied to this part of the contract. In the case of a partial invalidity of the contract, the entire contract is overturned if it can be assumed that the parties would not have concluded it without the invalid.³⁶ The word “supposedly” gives the court more discretion in considering all circumstances of the contractual relationship between the parties.³⁷

In the Hungarian law on civil procedure, pursuant to section 237§ (3) b, the court agrees to clarify the framework of the legal dispute by informing the parties if, based on the available data, it detects a fact that must be considered ex officio. This can happen if the court notices that the form of the contract is incorrect, conflicts with civil legislation, and so on. Primarily, the preliminary procedure stage is used to clarify such issues, where the party can still relatively freely modify the claim or counterclaim.³⁸

Curia opinion 2/2010³⁹ on certain procedural issues arising from invalidity lawsuits is also maintained by the Court as its opinions such as the party must indicate exactly which legal consequence of the invalidity application of the legal consequence of the invalidity is requested from the court, and with what content, the request for an annulment action – counterclaim – is based on the invalidity of the contract. However, it is not enough to ask the court to restore the original state or to declare the contract effective. Additionally, the court must only recognise an obvious nullity ex officio that can be clearly established based on the available evidence. To establish nullity, the court may not conduct evidence ex officio. In juridical procedures, the court must also detect the non-existence of the contract ex officio prior to examining

³⁵ Kurucz, 2022, pp. 238–248.

³⁶ Art. 114.1.

³⁷ Csehi, 2013, p. 536.

³⁸ Act CXXX of 2016 on Civil Procedure.

³⁹ Curia, Professional Materials of Civil Collegium, 2/2010, Opinion on certain procedural issues in invalidity actions.

the grounds for nullity. The court is also obliged to detect nullity *ex officio* in second-instance proceedings if the existence of the cause of nullity can be clearly established from the data of the first-instance proceedings.

Regarding the question of bindingness to request, it is of great importance that the parties in the invalidity procedure request the annulment of the contract or exercise their rights of contest, often referring to several legal rights. For an invalidity request based on nullity, the court can establish the nullity of the contract – *ex officio* – for a different reason, on the basis of a different legal title than the one indicated by the plaintiff in his claim. In this case, the principle of binding to the application does not apply. If the contract is considered to have been concluded, the court first examines the grounds for invalidity. The court may be the first to establish the existence of a clearly established cause of nullity even without evidentiary procedure. In this way, it becomes unnecessary to examine the cause of nullity raised by the party, which may subsequently need to be proven. Therefore, the court is not bound by the order of the requests presented by the party in the context of the examination of nullity grounds.⁴⁰ The Civil Code only intends to ensure the protection of the perpetuity of the ownership right already acquired. At the same time, during the transfer, the right holder has only a hopeful expectation of obtaining the ownership right based on the contract, as he must validate it with the registration, and the ownership right thus acquired benefits from Civil Code. 5:35§ in the protection provided. Moreover, the decision published under No. 61 states that the continuous possession, use, and burden of the property result in the interruption of the statute of limitations, and this condition exists if the seller disputes the validity of the contract and does not demand back possession of the property.⁴¹

Based on a non-existent contract, no change in ownership can occur, so the owner can use the *rei vindication* claim against the previous owner without a legal basis. However, if a real estate registration transfer or resale has taken place, the original owner can assert a claim against the direct right holder and other authors according to the rules of the cancellation lawsuit. Therefore, as a legal consequence of the transfer of property based on a non-existent contract, the original state is not restored but the basis for the re-arrangement of the performed service of things is re-vindication, possession without a legal basis, and the fact that even in the name of enrichment without a legal basis, and the financial advantage must primarily be returned. As the declaration of validity remedies the invalidity of the contract retroactively to its conclusion, the contract must be considered valid from the time of its conclusion based on the declaration of validity. Therefore, a breach of the contract

40 Csehi, 2013, p. 536.

41 Tolnai and Fónyiné, 2019, pp. 251–259.

is the failure to fulfil any obligation arising from it in accordance with the contract, regardless of whether it is realised before or after it is declared valid.⁴²

6. The Land Register and the Conveyance of Ownership Rights on Real Estate

The land register in Hungary is called the Real Estate Register. Real estate registration is regulated primarily in the Civil Code, Book V, Rights in Rem, after the Ownership and Limited Rights in Rem sections, as the last chapter of the book, with six sections. Besides the Civil Code, the previously cited Reg. Act also introduced governmental implementation regulations listing the obliged content and precise procedural rules of the registration of properties. Opinion 18/2010 of the Supreme Court of Justice explains that the principle of our law on land registration – formerly the Land Registry – has remained unchanged for more than 150 years. This is because the registration of property rights in the Land Registry had a constitutive effect and is also retroactive – *ex tunc* – to the date of the application for registration. The tradition is also included in the provisions of the current Land Registry Act.

The entry in the land register has a constitutive effect. To obtain ownership of real estate, in addition to a valid contract of sale, registration in the land register is required. The registration is a final record of the acquisition of rights in the land register, which, in accordance with its constitutive effect, brings about the change of law directly, irrespective of any further statement by the parties or any confirmation by a third party or authority. The constitutive effect is also strengthened by Civil Code section 5:178 § (5) and (6) extending it not only to the acquisition and creation but also to the transfer, encumbrance, and termination of the right. The registration is retroactive – *ex tunc* – to the date of filing of the application, in accordance with section 5:168 §. The land register is established in Hungary according to the following principles: public access to the real estate register, principle of documentation, principle of registration, principle of ranking, and authenticity of the real estate register found in the Civil Code.⁴³

6.1. The Hungarian Property Registration System and Its Function

The land register is the basic institution for the movement of real estate ownership, containing, for each municipality, the legal data of all real estate in the country and the rights and legally significant facts relating to the real estate. The register also

⁴² Csehi, 2013, p. 537.

⁴³ Civil Code, Art. 160-170.

includes the personal identification and address data of the persons registered therein, as required by law for the purposes of registration. The current land registration system is the result of the merger of two separate registers that existed before the Second World War: the cadastral register, which contained the details of immovable property, and the land register, which was used to record the creation, termination, and modification of certain rights for immovable property. The unified land register fulfils both these roles today. From the viewpoint of private law, the most relevant issues are the impact of land registration on the protection of bona fide authors and the role of registration in the acquisition of property. In real estate registers, all data pertaining to a real property and any associated rights and facts of legal importance, as well as the holders of such rights and the data of right-holders shall be registered, recorded, and updated on the title deed.⁴⁴

7. Conclusions

When considering the legal consequences of invalidity, the court must establish the balance of services and compensation for the parties that existed at the time of the conclusion of the contract. The court must strive to ensure that neither party ends up in a disproportionately more favourable or unfairly heavier financial situation than the other during the settlement of the legal consequences of invalidity, in other words, the unjust enrichment of either party must be prevented. The conclusion of real estate sales contracts requires more care than usual, not only because breaches of the mandatory rules can lead to the contract being invalid or not even result in the buyer acquiring ownership, despite its validity. Caution is also warranted because there is sometimes a longer period of time between the conclusion of the contract and the acquisition of property. Ownership is not acquired by the buyer when the contract is concluded but when the land registry enters the contract into the title deed. For this, the title deed is not enough, as the final and definitive registration of ownership is required. A contract for the sale of immovable property is binding in both form and content, at least in terms of the content and form required by law, which means that a contract may include a clause to the contrary, but must also comply with the conditions required by law. The contract must clearly state the intention to sell and the intention to buy.

44 Szilágyi, 2022, pp. 402–408.

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Michał WAWRZYŃCZAK*

Between Human Rights Protection and Criminal Procedure – Analysis of Approaches to Investigative Interviewing¹

ABSTRACT: *Human rights, including the protection against torture or degrading and inhuman treatment, should be guiding law enforcement agencies' actions. Research shows that a vital moment of either their violation or realization occurs during the interrogation as a procedural activity. This paper will discuss the relationship between the above-mentioned human rights and interrogation in a procedural setting, with particular emphasis on the pre-trial stage.*

THE methodological basis of this paper includes dogmatic-legal, theoretical-legal and partially empirical methods. The central axis of consideration is the evolution of questioning techniques, starting from the analysis of coercive interrogation techniques – with the most popular Reid technique – to non-coercive methods, including the most recent proposal – the Méndez Principles. Besides that, the Author briefly considers model-level solutions on techniques permitted during the procedural activity of questioning.

THE analysis showed that, to date, the most popular method of interrogation – the Reid technique (FBI Method) – does not allow for sufficient protection of fundamental individual rights, even despite procedural guarantees. Effective protection is provided by non-coercive methods, which promote rapport and trust building – also strengthening the relationship between the state and the individual. The most significant impact in this sphere seems to be carried by the latest proposal – the Méndez Principles – which incorporates many individual methods, developed by researchers and practitioners alike, into a single comprehensive model, providing practical guidance addressed to law enforcement and practitioners and lawmakers. This consideration represents a novel

1 This paper is partially based on previous research, published in Wawrzyńczak, M. (2025). Securing Effective Collection of Evidence: An Overview of Various Approaches to Interrogation Techniques. In: B. Janusz-Pohl (ed.), *Effective Justice. International and Comparative Approaches. Volume 2* (V. 39), pp. 371–390. Peter Lang Publishing Group. <https://www.peterlang.com/document/1577095>.

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approach to the issue, as the Méndez Principles have not yet been developed academically in the context of interrogation and human rights issues.

KEYWORDS: *investigative interviewing, Méndez Principles, Human Rights, Prohibition of Torture, Reid's technique, interrogation, Prohibition of inhuman and degrading treatment.*

1. Introduction

The protection of fundamental human rights is multifaceted. The protection of rights in the sphere of the functioning of the judiciary seems most important. Within its framework, criminal justice, where individuals are particularly vulnerable to being violated, is the most interesting for us. In this sphere, a relatively broad spectrum of protection is established by the most important acts of international law in terms of human rights, such as the European Convention of Human Rights (ECHR) or the Universal Declaration of Human Rights (UDHR). These protections include, among others, the right to an effective remedy (Article 13 ECHR; Article 8 UDHR); right to liberty (Article 5 ECHR; Article 9 UDHR); right to a fair trial (Article 6(1) ECHR; Article 10 UDHR) or presumption of innocence (Article 6(2) ECHR; Article 11(1) UDHR). However, a unique position in the human rights catalogue is occupied by the prohibition of torture (Article 3 ECHR; Article 5 UDHR), which, only on the surface, does not seem to fit into the framework of the functioning of justice in democratic states.

In this paper, we focus on the prohibition of torture or degrading and inhuman treatment in a procedural setting. The central axis of consideration is acquiring procedural information through interrogations, which play a crucial role in the pre-trial stage. Although the criminal processes of individual countries have evolved over the years, the exceptional importance of the investigative phase in the entire criminal proceedings cannot be denied. After all, it is the phase that leads to the discovery of the perpetrator and qualification of a given act as a crime, while court proceedings occur based on the evidence gathered during this stage. Thus, naturally, the subject of particular interest should be the process of gathering evidence and, strictly speaking, the questioning of witnesses and suspects, as the human right in question applies only to personal sources of evidence. Consequently, in this paper, we analyse the relationship between interrogation techniques, understood as operational methods of law enforcement officers. More precisely, we focus on interrogation methods, defining the process-acceptable interrogation techniques at the model level, as determined by the shape of criminal procedure adopted in a given country. The relationship between these two elements and the prohibition of torture and degrading and inhuman treatment, as a fundamental human right, creates the main axis of considerations.

2. Model-Level Techniques on Interrogations and Interviews

The term “investigative interviewing” immediately brings several factors to mind. We consider issues primarily related to interrogations, which, though regulated by the provisions of the various criminal procedure codes, set certain impassable frameworks for this activity and do not always sufficiently protect the interrogated persons. Although, in principle, we can agree that interrogation should be free from torture (whether due to the applicability of the ECHR and, more specifically, its Article 3, prohibiting torture, degrading, or ill-treatment), practice shows that the accession of signatory states to the Convention alone is insufficient.² Let us briefly discuss the procedural aspects of interviews and interrogations to fully illustrate the crucial coupling of legislation and law enforcement practice.

Questioning techniques regulated on a model level are coherent during both the pre-trial and trial stages of the proceedings and apply to the law enforcement agencies, the prosecutors’ office, and the court during both stages. Five primary methods are regulated on a model level: 1) method of spontaneous relation; 2) open questions/open answers method; 3) cross-examination method; 4) suggestive questions method; and 5) focused questions method.³ These are model-level solutions as they either result from the accepted organisation of the trial (e.g. the cross-examination method, which is a vital and distinctive feature for the adversarial procedures) or from the solutions accepted by the legislator (e.g. admissibility of suggestive questions). The methods differ in their aims and results obtained from their performance. For example, the cross-examination method, along with the open questions method, provides the greatest amount of information, whereas the spontaneous relation method offers the least amount of information but with the highest accuracy and relevant facts.⁴ More recent studies have found that investigations address the directives of using multiple methods during the questioning to collect the maximum possible amount of relevant and true information.⁵

This introduction to the purely procedural aspect of questioning in the criminal justice system is insufficient. The quality of interrogations deteriorates with time. It is proven that witnesses fall into the trap of false narratives when the interrogated person tries to be a “good witness” at all costs. This includes the “enrichment” of their testimony by including false facts and information aimed to make it seem more credible; also forgetting the elements of the historical event in question due to the

2 See considerations regarding the RDI method, *infra* 43.

3 Although this study was developed based on the Polish Code of Criminal Procedure, these methods are universal. For further elaboration, see Sznajderska, 2014, pp. 59–77 and the literature cited therein.

4 Ibid. pp. 69–73.

5 Ibid. and the literature quoted therein.

passage of time; some elements that may impact the testimony are stress, fear, the mere gravity of a courtroom or presence of an audience during interrogation or the recording of their statements.⁶

At the criminal-procedure-model level, we can also consider interrogations as procedural conventional actions. We refer to the concept of conventional acts proposed by Stanisław Czepita⁷ and adapted by Barbara Janusz-Pohl for the criminal process,⁸ including the concept proposed by Searle.⁹ This concept assumes the existence of two types of rules: conventionalisation (determining validity or invalidity) and formalisation (determining the correctness or incorrectness and effectiveness or ineffectiveness of the performance of a procedural act), which is particularly important in the context of the admissibility of evidence in court proceedings. Although the present issue requires more extensive elaboration, *prima vista*, it seems reasonable to assume that the prohibition on the use of torture by law enforcement is absolute and, as such, is a constitutive rule for the act of interrogation, the violation of which would result in the invalidity of such an act. A similar position is adopted by B. Janusz-Pohl based on the Polish Code of Criminal Procedure (Article 171 § 5).¹⁰

3. From Third Degree to RDI – A Highlight of Highly Coercive American Approaches to Investigative Interviewing

Before the first well-established interrogation technique, law enforcement officers used its precursor and direct inspiration. This refers to the so-called Third Degree method, which consisted of brutal interrogation tactics, including various kinds of psychological abuse.¹¹ It should be pointed out that although the practice of violating the rights of suspects/defendants through torture had been going on in the US since the late 19th century, it was not legal. As early as 1897, the US Supreme Court condemned the use of torture for extraction purposes as part of the pre-trial interrogation process. This is confirmed by both the Fourth and Fifth Amendments to the US Constitution, as well as the US Supreme Court's decision in *Bram v. United States*, which derives its fundamental meaning from the very maxim *nemo se ipsem accusare tenetur*.¹² However, the literature points out that despite the unequivocal

6 Ibid., p. 61.

7 See Czepita, 1996; Czepita, 2006, pp. 9–28.

8 See e.g. Janusz-Pohl, 2017a; Janusz-Pohl, 2021, pp. 241–258.

9 Cf. Wawrzyńczak, 2022, pp. 55–57 and pp. 60–63.

10 Cf. Janusz-Pohl, 2019, pp. 560–562; Janusz-Pohl, 2017b, pp. 456–457.

11 Leo, 2008, pp. 47–70.

12 *Bram v. United States*, 168 US 532 (1897).

position taken by the Supreme Court, in reality, officers cultivated the practices of the Third Degree method while taking utmost care to conceal its application from the public.¹³ In 1949, in *Watts v. Indiana*, the Supreme Court held that the conviction of a defendant on the basis of a confession obtained through torture and degrading and inhuman treatment (held in custody without counsel or advice regarding constitutional rights, degrading sleep conditions, interrogations occurring well past midnight – sleep deprivation) violated the defendant's rights granted by the Fourteenth Amendment and, consequently, such a confession was inadmissible.¹⁴ The consequence of this ruling – and the popularisation of information about the use of the Third Degree method by police officers – was the emergence of a gap in interrogation techniques, which resulted in attempts to develop a new methodology for conducting them.¹⁵

Perhaps the best-known and popularised interrogation technique, The Reid Method – also known as The FBI Technique – filled the gap left by the Third Degree method. According to the organisation that holds the patent to the technique, John E. Reid began working on it as early as 1947,¹⁶ but did not achieve real success until 1955 through his participation in the Darrell Parker case.¹⁷ We will return to this case later in another context; however, it should be pointed out that Reid's obtaining a confession in the present case led to a kind of boom in his services, while his technique became a subject of teaching in police forces, private security companies, the military, the Federal Bureau of Investigations (FBI), the Central Intelligence Agency (CIA), and the Secret Service.¹⁸ The scale of Reid's success is enormous; John E. Reid and Associates (interchangeably: Reid's organisation) indicates that their technique is the most widely used approach to question subjects in the world.¹⁹ A 2014 report by the Office of Legislative Research, Connecticut General Assembly indicated that more than 500,000 people had been trained using Reid's technique.²⁰ It is claimed to be a leading method in at least 28 countries, as indicated on their website.²¹ Given this, the contribution and impact of the Reid technique on interro-

13 Kozinski, 2018, pp. 306–309 and the literature quoted therein.

14 *Watts v. Indiana*, 338 US 49 (1949).

15 Leo, 2008, p. 63.

16 John E. Reid and Associates, no date a.

17 Starr, 2013.

18 *Ibid.*

19 John E. Reid and Associates, no date a.

20 Orlando, 2014.

21 Among these are Germany, Bosnia-Herzegovina, the Czech Republic, the United Arab Emirates, Singapore, Japan, Mexico, Canada, Belgium, Israel, India, South Korea, China, Luxembourg, Africa, Italy, Malaysia, Norway, Philippines, Saudi Arabia, the Netherlands, Brazil, Peru, Jamaica, Ecuador, El Salvador, Iraq, Slovakia. John E. Reid and Associates, no date a.

The list is not incomplete though, as, for example, Poland's leading method taught during police training is the Reid method. See: Załącznik do decyzji nr 272 Komendanta Głównego Policji

gation trends cannot be underestimated; however, it has both positive and negative implications.

Reid's technique constituted the first modern interrogation method – consisting of principles and guidelines – that encompassed all kinds of instructions for officers conducting investigations. The technique included how questions should be posed; however, it extended beyond that. John E. Reid created a whole manual on how to design interrogation rooms, how to behave, and how techniques and psychological methods should be used to create the most interrogator-friendly environment.²²

The technique has three components: Factual Analysis, Behavioural Analysis Interview (BAI), and interrogation.²³ Following the original wording used by Reid's organisation: 'Factual Analysis can be defined as estimating the probability of a suspect's guilt or innocence based on investigative findings'.²⁴ This element consists of five components: Opportunity/Access, Attitude, Motivation, Biographical Information, and Evidence, which are evaluated to narrow down the circle of suspects and select the one most likely to be the perpetrator.²⁵

The second component of the technique is the BAI.²⁶ This phase has ignited a debate between scholars and the Reid organisation, which has engaged in a polemic with academia.²⁷ The core of this heated discussion was not only the essence and mode of BAI but also the matter of the effectiveness of such an approach. Several scholars who conducted studies on human psychology and the possibility of detecting deception and lies during interviews have questioned the efficacy of Reid's BAI,²⁸ with Kassin, Appleby, and Torkildson describing it as '(...) a non-confrontational

z dnia 2 listopada 2017 r., Program nauczania na kursie specjalistycznym z zakresu taktyki i technik przesłuchań (Appendix to Decision No. 272 of the Chief of Police dated November 2, 2017, Curriculum for the specialized course in interrogation tactics and techniques), DZ. URZ. 2017.70. Available at: https://edziennik.policja.gov.pl/eli/DU_KGP/2017/70/ogl/pol/pdf (Accessed: 3 December 2023). It seems that this list of 28 countries only includes those that have acquired the certified training from the organisation, whereas the technique is being taught at a domestic level by certified professionals who are not part of the John E. Reid and Associates organisation, and thus may not certify the graduates.

22 Among the materials to study the technique, John E. Reid and Associates provides various books, e.g. *The Reid Technique of Interviewing and Interrogation*; *Criminal Interrogations and Confessions*; and *Essentials of the Reid Technique: Criminal Interrogation and Confessions*. The books are periodically updated as the socio-legal reality changes; thus, the techniques, methods, or clues evolve. Several positions are available at <https://reid.com/store/products> (Accessed: 3 December 2023).

23 Orlando, 2014.

24 John E. Reid and Associates, 2017.

25 Ibid.

26 For a more detailed analysis of this component of Reid's technique, see Snook et al., 2010, pp. 215–229.

27 See John E. Reid and Associates, 2014.

28 For further reference on this topic, see Kassin, Appleby, and Perillo, 2010, pp. 39–55 and the literature quoted therein.

interview that possibly transitions into an interrogation. The purpose of the interview is to provide a means by which investigators can determine if suspects are lying or telling the truth'.²⁹ Conversely, Reid's organisation characterises BAI as a polygraph-rooted 'non-accusatory question and answer session, involving both standard investigative questions and structured "behaviour provoking" questions to elicit behaviour symptoms of truth or deception from the person being interviewed'.³⁰ Nevertheless, this stage is intended for evaluating the likelihood of the interviewed person being the suspect in a given case and whether the suspect is lying,³¹ if such a conclusion is made, the next phase begins.

The third and final component of the Reid technique is interrogation. During this phase, the investigator follows nine steps, which are aimed at gaining success as a final result. However, it is pointed out that these steps may be essentially reduced to three aspects/principles fundamental to this method: isolation, confrontation, and minimisation.³² The issue with this technique, even at first sight, is its suspect-driven approach. While Reid's organisation would argue otherwise, this method is no longer handy when it comes to interviewing the witnesses, as it aims at obtaining a confession.³³ In other words, although some elements of this technique may be helpful in general interviewing practices, it has a very narrow scope in the broadest range of interrogations. Therefore, it is not feasible for the authorities to obtain several confessions when there is only one perpetrator.

This stage of Reid's technique is highly accusatory, and the steps are calculated to create a confession-friendly environment. The isolation phase aims to create anxiety through various power plays, such as the layout of the interrogation room (described carefully by Reid's organisation), the order of entering the room, or food, drink, and sleep deprivation.³⁴ It does not stop at creating such a psychological and non-verbal atmosphere but also consists of forcing the suspect to acknowledge that their guilt is already well-known to the interrogator, who shall not even allow the suspect to plead his innocence and cut off any possibility of denial.³⁵ The end goal is to create a complete isolation of the suspect's body and mind. Anxiety of loneliness and inevitable fate will arise, preparing the ground for the next phase, which is confrontation. After preparing the ground for vulnerability, the interrogator presents evidence of guilt. It should be undeniable, yet may be non-existent or even fabricated, but its strength shall be so overwhelming that conviction is inevitable and not reliant on a

29 Ibid., pp. 40-41.

30 Orlando, 2014; John E. Reid and Associates, 2014.

31 Snook et al., 2010, p. 217.

32 Moore and Fitzsimmons, 2011, pp. 512-513.

33 Kozinski, 2018, p. 311 and literature quoted therein.

34 Pieters and Frank, 2016, p. 4.

35 Kozinski, 2018, p. 311.

mere guilty plea – which, however, may lead to “bettering” the procedural position of the suspect in terms of leniency.³⁶ Rearranging the perception of the procedural situation of the suspect from hopeless (isolation stage) to one in which there is a distant light in the tunnel (confrontation with suggestions of leniency or preferable treatment in case of confession) prepares the ground for the minimisation phase. In this stage, the interrogator looks for “excuses” regarding the criminal conduct. Various possible crime schemes are presented, and the interrogator pretends to sympathise with the suspect, even going as far as minimising their participation, role and guilt, as well as giving ethical and moral justification for the crime,³⁷ to accustom the suspect to the thought of a guilty plea being their best choice and the greatest chance for leniency.

The interrogation is concluded with two steps (the 8th and 9th steps) for the interrogator to follow. These consist of oral and then written pleas; the interrogator will have the suspect orally relate various details of the offence. Then, the oral confession is transformed into a written (or recorded) plea, and during this final step, the Reid technique provides some guidelines, such as repeating Miranda warnings, avoiding leading questions, and using the suspect’s own language.³⁸ Once the confession is obtained, the interrogation (and usually the case) is deemed closed; the investigation proceeds further to the judicial stage.

However, Reid’s technique has faced much criticism. It is pointed out that its extremely accusatorial – even extractive – nature creates a state of mental coercion,³⁹ often violating the sphere of protection established by the prohibition of torture and degrading or inhuman treatment. Even when the law enforcement officer’s actions do not result in inflicting physical pain, the psychological aspect, such as sleep deprivation or denial of food and drink connected with highly stressful and accusatorial interrogation, often leads to wrongful convictions due to a high number of forced confessions resulting from inhuman and degrading treatment. As mentioned earlier, Reid’s star as a prolific interrogator shone the brightest after the Darrell Parker case, which resulted in the conviction of the accused based on the confession obtained by Reid himself. Ironically, the Darrell Parker case was overturned in 2011, with Darrell Parker being exonerated along with a public apology and compensation for wrongful conviction, as the real perpetrator turned out to be Wesley Peery.⁴⁰ Just in the USA

³⁶ Ibid., pp. 311–312.

³⁷ Coughlin, 2009, p. 1646.

³⁸ John E. Reid and Associates, no date b; Orlando, 2014.

³⁹ On the coercive interrogation methods, including the Reid technique, see Pieters and Frank, 2016, pp. 1–25 and the literature quoted therein.

⁴⁰ Although Parker has brought up the fact that the confession was false and coerced due to the psychological pressure and manipulation from Reid, enhanced by the fact that it was extraordinarily lengthy and tiring and recanted the confession on the next day, he was still convicted for life. Following *Miranda v. Arizona* in 1966, Darrell Parker appealed the conviction based on

alone, a study within the Innocence Project has shown that from 1989 to 2020, almost 30% of the confessions were false; among these 30%, nearly half of the suspects were below 21 years of age.⁴¹ Another research showed that 95% of felony convictions occur through guilty pleas, out of which 18% happen to be false pleas – with a majority of convicts being people of colour.⁴² Considering that the majority of officers in the US – but also worldwide – are trained using Reid’s technique or its variables, this raises serious concerns regarding the prevention of inhuman or degrading treatment.

Another technique widely used by American law enforcement agencies is the one developed within the Rendition, Detention, and Interrogation (RDI) programme, run by the CIA to interrogate terrorist suspects. We will discuss this technique only briefly, as it has a somewhat limited application scope, although it has been widely covered by both the psychological and legal academia, as well as the media and public opinion. We refer here to the interrogations on CIA black sites that were already subject to judgements of, for example, the ECHR, regarding the violation of Article 3 ECHR of the suspects interrogated on the territory of states-parties to the Convention.⁴³ The very essence of the RDI programme is the permissibility of torture to extract information from suspected terrorists, which was meant to provide reliable information on any terrorist activities in a faster and more efficient manner.⁴⁴ Although, as mentioned earlier, European Court of the Human Rights (ECtHR) was very critical in terms of permissibility regarding the preservation of human rights standards under the ECHR, interestingly, there were voices in the academia pleading for the use of torture in the terrorist cases.⁴⁵ This is concerning. The prohibition of torture or inhuman and degrading treatment, to be effective, must be granted an absolute character. Any deviation from this prohibition could result in dangerous exceptions involving increasingly broad groups of people. Although the military used RDI on suspected terrorists for extraction purposes, their reach extended to as many

the coerced confession claim; although the US Supreme Court ruled that Parker was up for a retrial, he took a deal offered by Nebraska to be paroled after serving 10 years. It should be noted that the real perpetrator, Peery, was briefly suspected in the case. Although the fact that Parker was innocent came to light in 1991, the lack of state legislation made it impossible to seek exoneration; the legislative changes in 2009 made it possible, and the state conceded that the conviction was wrongful and coerced. See Starr, 2013; Possley, 2012.

41 Innocence Project, no date.

42 Available at: <https://guiltypleaproblem.org/#stats> (Accessed: 3 December 2023).

43 E.g. cases *Al Nashiri v. Poland*, (appl. no. 28761/11) and *Husayn (Abu Zubaydah) v. Poland*, (appl. no. 7511/13), in which the Court has found violations of: Article 3, 5, 6 § 1, 8, and 13 ECHR, as well as a violation of Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 (abolition of the death penalty) regarding Mr Al Nashiri; *Nasr and Ghali v. Italy*, (appl. no. 44883/09); *Al Nashiri v. Romania*, (appl. no. 33234/12); *El-Masri v. “the former Yugoslav Republic of Macedonia”*, (appl. no. 39630/09).

44 For more information on the programme, see Amnesty International, 2005; Tyler and Epstein, 2022; Schmidt and Sikkink, 2018, pp. 1014–1033.

45 See Rumney, 2005, pp. 465–466 and the literature quoted therein.

as 53 countries cooperating with the US on the programme. Of all 53 countries, only 13 cooperated as transport points for smuggling suspects; in as many as 40 countries, the CIA carried out extraction operations through torture using the RDI method.⁴⁶

The application of the RDI programme has proven to carry threefold consequences. First, we can distinguish the individual dimension – concerning violations of the human rights of individuals. We have discussed this aspect above. Several human rights violations, particularly of the ECHR’s Article 3 prohibition, have been found in cases at the initiative of persons tortured on the territory of ECHR signatory states. The second aspect regards policy-making. Of all 53 countries cooperating with the US RDI programme, 23 are classified as democratic states, while as many as 30 are non-democratic states.⁴⁷ The consequences of this state of affairs again take on a double dimension. In democratic states, we have seen conscious and deliberate acquiescence in violations of fundamental human rights, contrary to the principles of the rule of law, the right to a fair trial, and the prohibition of inhuman and degrading treatment and torture, probably for political reasons.⁴⁸ The second dimension concerns the consequences of a country’s state of human rights. Although cooperation under the RDI programme has not had long-term adverse effects among democratic states, data indicate a deterioration of human rights practices in non-democratic states.⁴⁹ Consequently, human rights violations by the US at the hands of the CIA on the territory of non-democratic states have led to the adoption of progressively worsening practices by these states under a mechanism that can be described as “learning by doing,” in particular, increasing the scale of physical torture (Psychical Integrity Score), the Disappearance Score, and the Political Imprisonment Score.⁵⁰

The third aspect relates to the effectiveness dimension of the use of coercive techniques, such as RDI or Enhanced Interrogation Techniques (EIT). The literature points out that despite the use of torture on suspected terrorists, most of the information obtained was unusable or false.⁵¹ Consequently, a simple calculation of the gains and losses from using RDI and EIT speaks significantly against their use. When combined with the aspect of high coerciveness in the psychological sphere of the interrogated person, the potential for human rights violations to reconcile with ECHR standards appears to be impossible. The marginal amount of truthful information obtained – coupled with the predominant amount of false information, resulting in

46 Schmidt and Sikkink, 2018, p. 1022 and data indicated therein.

47 Ibid.

48 Hassanová, 2023, p. 60.

49 Ibid, pp. 1022–1026. On the worsening of the human rights practices within US Army Units, see Pfiffner, 2014, pp. 147–158.

50 Schmidt and Sikkink, 2018, pp. 1022–1027.

51 For further elaboration on the practices and their effects, see Pfiffner, 2014, pp. 150–151. See also Tyler and Epstein, 2022 and the sources cited therein.

the cost of pursuing empty leads – combined with the economic, social, moral, and political costs dictates the search for alternative interrogation methods.⁵²

4. Human Rights Violations Leading to New Openings: Development of Non-Coercive Investigative Interviewing Techniques

Although the above-described interrogation techniques were formed on the grounds of American law enforcement practice, the problems of coercive methods resulting from the application of the Reid technique or its variants are universal. The problem with high rates of wrongful convictions based on false or coerced confessions was recognised in the UK as early as the 1980s. This provided the impetus for developing the first information-gathering-based method, completely changing the paradigm guiding interrogators. The technique is named PEACE, after five main elements that also create the five stages of interrogation: Planning and Preparation; Engage and Explain; Account; Closure; Evaluation. Instead of seeking confession through pressure on the suspect, it relies on building rapport and trust and gathering information by employing principles of cognitive interviewing.⁵³ Since adopting the model within the UK's legal framework in 1992, the PEACE method has been positively received, resulting in its implementation (also in due variants) in Norway and New Zealand.⁵⁴

The fundamental assumption behind this method is the focus of the investigator's activity of searching for information. Its goal is to avoid emotional involvement in the "accusatorial" model of interrogation, in which the phenomenon of so-called tunnel vision bias is widespread.⁵⁵ Instead, this model supports asking open-ended questions, reducing the engagement of the officer to the role of a journalist rather than an interrogator, encouraging the interviewee to do most of the talking, along with the prohibition of using false and non-existent evidence or deceit.⁵⁶ Although, as mentioned earlier, this technique does not strive for confession, research shows that the confession rates are, in fact, higher than those obtained with Reid's technique.⁵⁷ Crucially, although the confession rates are higher, there is a significant difference in the false confession rates.⁵⁸

52 On the costs of coercive interrogations, see Tyler and Epstein, 2022, pp. 36–39.

53 Moore and Fitzsimmons, 2011, pp. 539–542.

54 Ibid., p. 540.

55 Pieters and Frank, 2016, p. 4 and the sources cited therein; Moore and Fitzsimmons, 2011, pp. 540–541 and the sources cited therein.

56 See, e.g. Pieters and Frank, 2016, p. 18; Moore and Fitzsimmons, 2011, p. 540; Orlando, 2014; Kasin, Appleby and Perillo, 2010, pp. 46–47.

57 Spierer, 2017, pp. 1749–1750 and the literature quoted therein.

58 Ibid. and the literature quoted therein.

However, PEACE is not the only non-coercive model of investigative interviewing. Several techniques may be used at once. Overall, they do not provide a complex structure (much like Reid or PEACE does) but play a significant role in certain aspects of interrogation. Among the alternatives to Reid's technique, we can mention Strategic Disclosure of Evidence, Unanticipated Questions, Cognitive Interview, and KREATIV. Each of these techniques varies; thus, we will only briefly discuss each of them because their essence is universal: refraining from any kind of coercion and building rapport through good practices.

In terms of Strategic Disclosure or Strategic Use of Evidence, much of the interrogation tactic relies on withholding information from the suspect rather than fabricating incriminating evidence.⁵⁹ The main idea of the lie detection technique is catching the lying suspect in the act – instead of forcing them into confession through bogus evidence or presenting them with all facts with a request to elaborate on it; their knowledge and reactions are tested. This allows the investigator to go through all related facts without prior elaboration on them. The technique of Asking Unanticipated Questions refers to joint-involvement crimes. It requires that at least two suspects be concurrently interrogated regarding their participation in the crime. A group of researchers found that it is possible to detect deceit based on the responses to the questions that are unlikely to be discussed between the guilty perpetrators.⁶⁰ Cognitive Interview techniques are twofold: some of them serve to detect lies in the testimonies, while others aim to enhance the reliability and the quality of the testimonies, particularly the eyewitness ones. The first strand of cognitive interviews refers to imposing cognitive load; however, this theory has been tested in academia and has no real impact on the practice of law enforcement agents.⁶¹ The other strand involves cognitive interviews based on memory-retrieval mnemonics.⁶² This approach is also multi-fold, as before the creation of the Cognitive Interview (CI) model in 1985, it was already recommended that the questions should be posed only after the witness has been requested to describe the situation of interest,⁶³ compliant with the method of spontaneous relation evident, for example, in the Polish criminal procedure.

Geiselman et al.'s model relies on four interview stages posed in a particular order. The first one relies on reinstating the context of the incident. The second demands

59 For further elaboration, see Hartwig et al., 2005, pp. 469–484; Luke et al., 2016, pp. 270–278; Hartwig et al., 2006, pp. 603–619.

60 Vrij et al., 2009, pp. 159–166.

61 For further elaboration on this technique, see Moore and Fitzsimmons, 2011, pp. 539–540.

62 A group of US academics developed this method as an alternative to the so-called standard interview practice within US law enforcement. For further elaboration on this method, see Geiselman et al., 1985, pp. 401–412.

63 See Geiselman et al., 1984, pp. 74–80.

reporting everything, all memories regarding the incident, regardless of their perception of their utility. The third asks to recall the event in different orders. The fourth relies on changing perspectives, for example, asking the witness to report the incident from a victim's perspective.⁶⁴ The results of the laboratory study performed by the researchers showed that the Cognitive Interview technique is an effective tool to enhance memory retrieval, particularly in terms of recalling rapidly-happening events, with multiple details.⁶⁵ It has also been proven to be much more effective in comparison with standard interviews, vastly improving the number of recalled details and their accuracy.⁶⁶ However, it has been noted that based on the practices and demands under the given tradition and requirements of law, the impact of using the Cognitive Interview method may be greater or smaller; for example, European law enforcement employed structured interviews instead of standard interviews, contrary to their American counterpart.⁶⁷

The next step in the development of the CI was broadening its application scope to cover the entire interview. This happened through the development of the Enhanced Cognitive Interview (ECI) method, which comprised seven instead of four steps, as in the case of the Cognitive Interview. The phases are as follows: (1) Greeting and establishing rapport; (2) explaining the aims of the interview, exploring the second stage of CI – report everything; (3) initiate a free report through context reinstatement and open-ended questions; (4) questioning, again with report everything stage, through open and closed questions, but without fabrication of evidence; (5) varied and extensive retrieval, employing third and fourth stage of CI, namely changing perspectives and changing the temporal order; (6) summary; (7) closure.⁶⁸ Similarly to its predecessor, ECI also significantly increased the effectiveness of collected testimony.⁶⁹

Finally, let us discuss the Norwegian KREATIV model of interviewing. The acronym reflects the values and principles upon which the method is based: Communication, Rule of law, Ethics and empathy, Active consciousness, Trust through openness, and Information – Vantage point: science.⁷⁰ This model is based on PEACE, essentially being a variable of it;⁷¹ created in 2002, the technique relies on information-gathering techniques and plays an essential role in the basic training of Norwegian law enforcement officers.⁷² Again, the focus is placed on obtaining reli-

64 Gieselmann et al., 1985, p. 404.

65 Ibid., pp. 409–410.

66 Fisher, Chin and McCauley, 1990, p. 11.

67 Ibid., pp. 23–24.

68 Milne and Bull, 1999, p. 40.

69 For a further elaboration, see Schollum, 2005, pp. 61–62.

70 Norwegian Centre for Human Rights, 2020.

71 Ibid.

72 Magnusson et al., 2021, p. 3 and the literature cited therein.

able information instead of seeking confessions. The usage of deceit, fabricated evidence, sleep deprivation, or any other coercive techniques is prohibited; although the same prohibitions exist under Swedish law (which does not use PEACE or KREATIV models *per se*), there was a visible difference in the extent of confrontational/accusatorial interrogation tactics usage compared to KREATIV-trained Norwegian counterparts.⁷³

All techniques described above share similar characteristics. Refraining from any kind of coercion, respect for human rights, and the central role of trust and rapport in effective interviewing play a vital role in each of them, regardless of any noticeable differences. They are much more intertwined, though. It is easily noticeable that each model is based on scientific grounds, namely laboratory or practical studies, contrary to Reid's technique – under which “lie detection” techniques are based on the gut and experience of the investigator instead.⁷⁴ Although these techniques tend to focus on gathering information, the confession and false confession rates are still an important determinant of their effectiveness; however, scholars have stressed that not only “pure” confession fulfils such criteria but also obtaining information that inevitably links the suspect with the perpetration of the crime.⁷⁵

Another factor that must be considered is the relationship between the society/citizens and the law enforcement/judiciary. Fundamental human rights granted under international law aim to provide individuals with much-needed protection; its sometimes-overlooked aspect is that their rigorous preservation also leads to the enhancement of trust towards state agents.

All of the above methods can be considered useful for the criminal procedure. They certainly serve a protective function by modelling safeguards for possible abuses of fundamental rights. Focusing on rapport and trust building makes it possible to minimise the threat of violations of the prohibition of torture as well as degrading and inhuman treatment. Meanwhile, their effectiveness is beyond doubt, as described for each of the methods discussed. Statistically, these methods provide more truthful information than coercive ones. They are also more suited to the interrogation models presented in Section 2. However, it seems that integrating all the key elements and findings of each of these techniques should yield the best results.

⁷³ *Ibid.*, pp. 3 and 11.

⁷⁴ Moore and Fitzsimmons, 2011, p. 541.

⁷⁵ Although such statements are not treated as confessions *per se*, they play a vital role in the work of investigative forces within law enforcement. It is argued that the importance of such evidentiary-tied statements has impacted the significance and placing of information-gathering methods at the centre of investigative interviewing studies. See Bergeron, Fortin, and Deslauriers-Varin, 2023, p. 61.

5. In Search of the Universal Standards for Investigative Interviewing: Méndez Principles

The above information-gathering-oriented techniques were a huge step forward in building an interrogation culture in a trend that corresponds to human rights standards. The next stage of development was the creation of The Principles on Effective Interviewing for Investigations and Information Gathering⁷⁶ (so-called Méndez Principles), which are intended to serve as a universal standard of conduct for law enforcement agents. They have both a theoretical-dogmatical dimension, exposed in the sphere of legislation, where their implementation would lead to the creation of clearly defined procedural standards, and a practical dimension, providing guidance and a basis for training officers to achieve the best results.

These Principles have been drafted by experts in the fields of interviewing, law enforcement, criminal investigations, national security, military, intelligence, psychology, criminology, and human rights from around the world and were consulted with more than 80 experts from 40 countries during the four-year-long working process. Three institutions coordinated the works: the Association for Prevention of Torture, the Norwegian Centre for Human Rights and Centre for Human Rights & Humanitarian Law of the Washington College of Law. The Authors of the Principles were divided into three major groups: the Steering Committee, composed of 15 members, which intertwined academic experience (e.g. Ray Bull, whose numerous contributions helped develop PEACE, CI, and ECI methods and investigative interviewing as a whole), law enforcement practices and legislative/political figures; Drafting Groups; and the Advisory Council, combining the experience of more than 60 experts from all fields and continents, with many contributors to previous research on investigative interviewing practices and techniques.

The Méndez Principles are grounded in science, law, and ethics. They propose a concrete alternative to interrogation methods that rely on coercion to extract confessions, providing guidance on obtaining accurate and reliable information in full respect of the human rights and dignity of all, including through the implementation of legal and procedural safeguards in the first hours of police custody. The principles aim to transform the relationship between States and their citizens. They are intended to change how public authorities conduct interviews and, as a result, improve trust in the State. They also aim to enhance the quality of interrogations – the first interrogation is crucial for information-gathering, as the questions and possible influence of the suggestion may further affect the witness's memory.

⁷⁶ Principles on Effective Interviewing for Investigations and Information Gathering [Méndez Principles], 2021.

The following principles guide the legislators and practitioners in the process of investigative interviewing:

Principle 1: *On foundations* – Effective interviewing is instructed by science, law, and ethics.

Principle 2: *On practice* – Effective interviewing is a comprehensive process for gathering accurate and reliable information while implementing associated legal safeguards.

Principle 3: *On vulnerability* – Effective interviewing requires identifying and addressing the needs of interviewees in situations of vulnerability.

Principle 4: *On training* – Effective interviewing is a professional undertaking that requires specific training.

Principle 5: *On accountability* – Effective interviewing requires transparent and accountable institutions.

Principle 6: *On implementation* – The implementation of effective interviewing requires robust national measures.

Nevertheless, Méndez Principles are more than just a legislative initiative. We can perceive them as a comprehensive guide to the enhanced human rights and law enforcement practices standard, which fully corresponds with the standard under UDHR or ECHR. The ECtHR's stance on the evidence obtained in violation of Article 3 ECHR is rigorous; thus, rapport-based approaches seem to be a natural step forward. The Court consistently expresses the inadmissibility of the evidence obtained by a public official in violation of Article 3 ECHR, which automatically bears a violation of Article 6 ECHR.⁷⁷ UN Convention against Torture sets a similar standard, where tortures always exclude evidence; however, inhuman or degrading treatment automatically does not. Regardless, these exclusionary rules create an essential human rights protection standard; thus, a straightforward shift in the interrogation approach is deemed useful and necessary, at least for all States that are parties to the ECHR. In a case *Ćwik v. Poland*,⁷⁸ ECtHR found that the prohibition of torture, set forth in Article 3 ECHR, constitutes an absolute prohibition and a positive obligation of the state to prevent such behaviour from the 3rd (private) parties. It has also been expressed in academia that evidence gathered by private individuals – regardless of torture or ill-treatment – should be admissible under Article 3 ECHR or the UN Convention against Torture, as it only addresses evidence collected by public officials.⁷⁹

The Principles themselves respond to the realities of the investigative world. Significant contributions from the scholars and bodies participating in developing

77 E.g. ECtHR [Grand Chamber] judgment of 1 June 2010, *Gäfgen v. Germany*, (appl. no. 22978/05), § 166; ECtHR [Grand Chamber] judgment of 13 September 2016, *Ibrahim and Others v. the United Kingdom*, (appl. nos. 50541/08, 50571/08, 50573/08 and 40351/09), § 254.

78 ECtHR judgment of 5 November 2020, *Ćwik v. Poland*, (appl. no. 31454/10).

79 For a further elaboration, see Wąsek-Wiaderek, 2021, pp. 343–374.

various non-coercive techniques have created a unique approach in which multiple research results are combined. The creators of the Principles note that the growing movements to refrain from torture and any coercion during investigations have produced tangible yet reliable results in the form of new non-coercive methods; preservation of safeguards throughout the interview shall enhance the quality of received information and reduce the risks of ill-treatment or any possible human rights violations.⁸⁰ In the sphere of human rights, it is indicated that the initiative's effective application will lead to ensuring the protection of individuals from torture or ill-treatment, protecting the physical and mental integrity of persons interacting with the authorities or enhancing respect for the rights of vulnerable people.⁸¹

Their universality of application also comes from the legal grounds on which the Principles were developed. Contrary to the peculiarity of coercive model application (limited by the grounds of respective procedures of each country), Méndez Principles are based on the standards arising from international human rights law.⁸² Six rights are absolute for the proper functioning of investigative interviewing; under UDHR, they are equal to protection under Articles 5, 7, 9, 10, and 11(1). The creators of the Principles also underline the importance of the right to remain silent and the right to avoid self-incrimination, following Article 14(3) of the International Covenant on Civil and Political Rights (ICCPR). Considering that the UDHR and ICCPR are well-established, global standards of international human rights law, operating on their premises (which must be incorporated into ratified domestic legislations) produces promising universal solutions in the field of investigative interviewing.

Crucially, they combine every positive effect of various non-coercive interviewing methods. They encompass multiple techniques, such as active listening; free report by the interviewee; open-ended questions; application of probing questions only after finishing the open-ended questions stage; avoiding jargon and complicated language to facilitate the interviewee's understanding of the situation; promoting Strategic Use of Evidence; respecting the right to remain silent; building and maintaining rapport; or assessing obtained information⁸³. We can clearly see the intertwining of multiple techniques described in Part 3 of this paper; through Méndez Principles, we apply PEACE, KREATIV, Strategic Use of Evidence, Cognitive and Enhanced Cognitive Interview methods or Conversation Management. This proves that the Principles are highly capable of providing proper guidance to law enforcement officers on creating

80 Méndez Principles, 2021, p. 1.

81 Ibid., p. 2.

82 Most importantly: Universal Declaration of Human Rights (UDHR), General Assembly resolution 217 A (III) of 10 December 1948; the International Covenant on Civil and Political Rights (ICCPR), General Assembly Resolution 2200 A (XXI) of 16 December 1966.

83 Méndez Principles, 2021, pp. 17–27.

such an environment that would enhance the quality and quantity of information collected throughout the interview.

6. Conclusion

The example of the interrogation techniques described above highlights the dangers of using methods based on mental and physical coercion. Interrogators do not have superpowers that allow them to fathom whether a person is telling the truth. In recent years, a growing number of studies have revealed the scale of false confessions while stimulating the need for change. For more than 30 years, there has been a tremendous progression of investigative interviewing, which has resulted in the development of many non-coercive techniques. The choice is vast; the only problem may be incorporating these techniques into officer training programs.

Unfortunately, the findings also highlight the dangers of attempting to reconcile coercive and non-coercive methods of interrogation. It has been found that initially applying the PEACE model and subsequently utilising the Reid method increases the likelihood of obtaining false information and confessions.⁸⁴ Consequently, it is necessary to entirely abandon the use of coercive practices and fully shift to either non-coercive method. While Méndez Principles encompass all of their achievements into one comprehensive model of multi-layered legislative and professional practices, they pose as a perfect solution for states that wish to make a change. Reid's technique is still strong in many countries, as presented in Section 3 of this paper. For example, law enforcement training in Poland primarily relies on Reid's (FBI) technique, just briefly mentioning the existence of the rapport-based ones.⁸⁵ The dominant majority of the practical training utilises this method. Thus, even if the information-gathering models are included in the training programme, their joint application will most likely yield undesirable results, following the abovementioned observation.

As the effectiveness and scientific background of relationship-oriented and trust-building techniques increase, they seem more appropriate for criminal proceedings. The rule of law requires that any procedure be modelled in a way that protects fundamental rights. Among these rights is the prohibition of torture and

⁸⁴ See Gudjonsson and Pearse, 2011, pp. 33–37.

⁸⁵ See Decyzja nr 206 Komendanta Głównego Policji z dnia 12 sierpnia 2021 r. zmieniająca decyzję w sprawie programu nauczania na kursie specjalistycznym dla policjantów służby kryminalnej wykonujących czynności operacyjno-rozpoznawcze [Decision No. 206 of the Commander-in-Chief of the Police of August 12, 2021, amending the decision on the curriculum for the specialized course for police officers in the criminal service performing operational and investigative activities]. Available at: <https://isp.policja.pl/isp/aktualnosci/prawo/16217,Decyzja-nr-206-Komendanta-Glownego-Policji-z-dnia-12-sierpnia-2021-r.html> (Accessed: 3 December 2023).

inhuman and degrading treatment. If law enforcement is focused on obtaining valuable information for a criminal trial (rather than a simple confession), the usefulness and superiority of non-coercive techniques are apparent at first glance.

It should be noted that even within the US, the entities previously permitted to provide certified Reid's method training are shifting away from this approach towards rapport-based methods. In 2017, Wicklander-Zulawski & Associates announced focusing on teaching non-coercive techniques based on, *inter alia*, Cognitive Interviewing, as the risk of false confessions is too great while interrogating under Reid's principles.⁸⁶ Overall, the fate of coercive interrogation methods seems inevitable; there is no place for abuse and false confessions in democratic rule-of-law states, and the recent Méndez Principles present themselves as a perfect alternative. Although the full implementation of the proposal may take long, the non-coercive techniques promoted by Méndez Principles are the *only* way forward in a modern law-abiding society.

86 See Wicklander-Zulawski & Associates, no date; Kozinski, 2018, pp. 304–306.

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