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Challenges of Customs Law during the Paradigm of "Facility and Security" in International Trade

Abstract: Changing conditions within international trade as well as the implementation of the facilitation and security paradigm have significantly impacted the structure of customs law. Both the SAFE Framework as well as the Trade Facilitation Agreement had indicated the need to maintain a balance between regulations introducing simplifications and those ensuring safety and security. One example of such a solution is the institution of the authorised economic operator (AEO), which grants those entities opportunities to take advantage of a number of simplifications, such as the filing of the simplified customs declaration, making entries in a registry, or performing self-assessments, but, at the same time, maintains the requirement of safety and security (through a detailed audit of the enterprise before AEO certification). However, by allowing authorised economic operators to perform self-assessment in respect of goods that have entered into the customs territory of the European Union and are to be released for trade, EU legislators have created significant challenges concerning the realm of safety and security, especially concerning the institution that is the most important within that area – that of customs controls. Despite all this, its importance to safety and security remains distinctive and may be seen in the emergence of new types of customs controls which concern only this particular sphere.

Keywords: customs control, facilitation, paradigm, security, trade

Introduction

Through the impact of terrorist attacks in the United States followed by others in various parts of the world, the beginning of the 21st century brought about significant changes in the rules governing the international trade of goods. The world of today is both globalised as well as kept apart by regional economic integration organisations, countries' growing economic self-centredness, and considerable threats to international security. These conditions shape the contemporary model of trade policy with an emphasis on two priorities – facility (simplification) and security.[1] This model greatly impacts the shape of contemporary regulations concerning the international trade of goods, including EU customs law. Changes introduced since 2005, first into the Community Customs Code (CCC)[2] and then into the Union Customs Code (UCC)[3], strictly adhere to two basic rules: facilitate trade and ensure security. This is especially visible in the current Union Customs Code, where EU legislators aimed to achieve a balance between institutions simplifying trade and solutions ensuring safety and security.

Taking the above into consideration, the aim of the article is the identification of the established direction of changes within customs law in the context of the trade 'facility and security' paradigm. The above-stated goal inspired the formulation of the following hypothesis: it should be assumed that together with the solutions introducing simplifications in the international trade of goods, EU lawmakers simultaneously established sufficient measures to ensure the security of that trade constituting the realisation of the 'facility and security' paradigm. The realisation of the goal established in the article has become possible thanks to the use of the following research methods: the method for the analysis and critique of literature and the dogmatic method.

1. Trade 'Security and Facility' Model as a Determinant of Changes within EU Customs Law

Within the past several decades the shaping of customs policy and customs law has been closely connected both to events from the economic sphere as well as those dealing with security which have significantly impacted trade. This has caused the

1 W. Czyżowcz, V. Gafrikova, Bezpieczeństwo ekonomiczne i ryzyko celne w przedsiębiorstwie działającym na międzynarodowym rynku towarowym, (in:) S. Wojciechowska-Filipek, J. Klepacki, A. Jackiewicz (eds.) Przedsiębiorczość i zarządzanie w rozwoju ekonomicznym, "Przedsiębiorczość i Zarządzanie" 2017, vol. XVIII, no. 9, part II, p. 309.

2 Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, pp. 1–50).

3 Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, pp. 1–101).

role of the traditional financial-based paradigm governing customs policy and law – a collection of duties and other public levies – to be diminished over the years. Significant in this respect were decisions made on the international forum as early as the end of World War II, first as part of the General Agreement on Tariffs and Trade (GATT) and then through the World Trade Organization (WTO), initiating activities meant to liberalise trade. These began with decisions concerning rules and procedures intended to reduce barriers for the trade of industrial goods, and then, with the conclusion of the Uruguay Round, efforts were made to liberalise other areas of trade (agricultural products, services, aspects of intellectual property).[4] Other than the reduction of customs duties on goods, there were also activities aimed at facilitating trade related to the transparency and effectiveness of international trade procedures. Their goal was to shorten the time needed for and reduce the costs of international trade transactions.[5] Thus, at the end of the 20th century, the activities described above brought about the creation of a new pattern – that of facility and security in trade. Within literature, it is clearly stated that the paradigm of facilitation focuses mainly on the simplification and harmonisation of trade procedures through the reduction of transport costs[6], efficient customs procedures[7], transparent and harmonised regulations, and improved telecommunication infrastructure[8]. Implementation of these aspects was visible in the numerous changes to the Community Customs Code and is continued in the Union Customs Code. It must also be stressed that the introduction of the latter was premised on, among others, the computerisation of customs administrations and its contacts with entities engaged in international goods trading in other countries as well as the simplification of customs law and the standardisation of the service of foreign trade within EU member countries through greater harmonisation of rules for information exchange.[9]

Security of economic interests and fair competition, protection of life and health, support of economic development as well as the need to ensure the safety of people as a result of terrorist attacks occurring in various places in the world has created a necessity of increasing the security of the international trade of goods. Apart from

4 A. Głodowska, Liberalizacja handlu towarami przemysłowymi na forum wielostronnym GATT/WTO. Implikacje dla Polski, (in:) S. Wydymus, A. Hajdukiewicz (eds.) Liberalizacja handlu a protekcjonizm : korzyści i zagrożenia dla wymiany handlowej Polski, Warsaw 2015, pp. 36–39.

5 A. Portugal-Perez, J. S. Wilson, Why trade facilitation matters to Africa, "World Trade Review" 2009, vol. 8, no. 3, pp. 379–416.

6 A. Behar, A. J. Venables, Transport Costs and International Trade, (in:) A. de Palma, R. Lindsey, E. Quinet, R. Vickerman (eds), Handbook of Transport Economics, Northampton 2011, pp. 97–115.

7 P.A. Messerlin, J. Zarrouk, Trade facilitation: Technical regulations and customs procedures, "World Economy" 2000, vol. 23, no. 4, pp. 577–593.

8 J. Wilson, C. Mann and T. Otsuki, Trade Facilitation and Economic Development: Measuring the Impact, The World Bank, Washington 2003, p. 6

9 E. Gwardzińska, M. Laszuk, M. Masłowska, R. Michalski, Prawo celne, Warsaw 2017, pp. 17–18.

activities facilitating international trade, measures have also been taken to ensure its security ('facility and security' paradigm). This necessitated the development of global norms[10] which would ensure the safety and security of the supply chain.

Changing conditions within international commerce did not lead to the elimination of implemented conveniences and simplifications. They continued to be applied but now with consideration for the need of ensuring safety and security. The establishment of the Framework Standards to Secure and Facilitate Global Trade (SAFE Framework)[11] drawn up by the World Customs Organization (WCO) in 2005 and intended to advance facility while maintaining the greatest possible level of security was a consequence of the above-mentioned transformations. This document falls within the area of *soft law*.

The SAFE Framework is supported by two pillars. The first devotes particular attention to the cooperation between customs administrations based on commonly accepted standards aimed at maximising security and facility in trade. The second rests on the need for customs authorities to establish partnerships with the business sector through the creation of an international system for the identification of enterprises that provide a high level of guarantees for the safety and security of the international trade supply chain. These companies are treated as partners and have been classified as 'authorised economic operators' entitled to numerous measurable benefits.[12] The first pillar includes the introduction of risk management or advanced technology for information exchange, while the second pillar encompasses the institutions of authorised economic operator, simplified customs procedures, and customs self-assessment. At the level of the EU, these solutions find their basis within the Union Customs Code and earlier, to a limited degree, in the Community Customs Code.

The above solutions have also found confirmation in the Trade Facilitation Agreement (TFA) concluded during the Ninth WTO Ministerial Conference (Bali, 2–6 December 2013) that became binding on 22 February 2017. Its goal was the establishment of harmonised trade security and facility norms.[13] The Agreement contains resolutions facilitating the transport, exemption and clearing of goods, including those covered by transit procedures. Just like at the WCO level, the above-mentioned Agreement emphasises the need for the introduction of a safety

10 H.M. Wolffgang, C. Dallimore, The World Customs Organization and its role in the system of world trade: an overview, "European Yearbook of International Economic Law" 2012, vol. 3, p. 628.

11 http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/tools/safe_package.aspx (10.03.2021).

12 M. Danet, A framework of standards to secure and facilitate global trade, https://www.porttechnology.org/wp-content/uploads/2019/05/PT25–15.pdf (11.03.2021).

13 WTO, Trade Facilitation Agreement (TFA), https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (12.03.2021).

and security declaration before the goods are brought in, the use of risk analysis, and an audit after customs clearance (post-import control) as well as facilitation of formalities for authorised operators. Attention was also drawn to the necessity for electronic payment and the use of pre-shipping inspections. Measures for the effective cooperation between customs authorities and other applicable authorities in respect to trade facilitation and issues connected with the observance of customs law with the simultaneous maintenance of introduced facilities were also defined. The implementation into practice of the above resolutions was intended to aid the improvement of transparency, increase possibilities for participation in global supply chains, and limit opportunities for the spread of corruption.[14]

Both the Framework of Standards to Secure and Facilitate Global Trade (SAFE Framework) and the Trade Facilitation Agreement (TFA) very clearly identify the need to maintain a balance between regulations providing simplifications and those ensuring security. At the same time, they have strengthened within customs law the paradigm of 'facility and security' in which both issues are treated on an equal footing and complement one another. In referring to the international agreements specified above and emphasising the multicentric conditions of the institution of customs law, it is necessary to point out that these agreements have had an immense impact on the solutions incorporated into EU customs law. This is especially visible in the Union Customs Code. Established resolutions provide entities that trade in goods several simplifications with the simultaneous observance of requirements connected to security.

One example of an institution of customs law that maintains a balance between facility and security is the institution of the authorised economic operator (AEO).[15] The AEO scheme tries to reach a balance between simplifying trade and the safety and security of the supply chain through the use of sent-in-advance pre-arrival information, risk assessments and benefits granted to programme participants. The customs controls – one of the most important institutions within customs law – is another example. Despite the inclusion of numerous simplifications, there is a special emphasis on security, resulting in the establishment of a new type of customs control – the security control.[16] The notion of security should be understood not only as that of ensuring security and public order but also the protection of life and health of

14 W. Zysk, Umowa Trade Facilitation Agrement (TFA) szansą rozwoju eksportu produktów fair trade, "Studia i Prace WNEIZ" 2018, no. 53, p. 91.

15 E. Gwardzińska, Świadectwo AEO jako gwarant bezpieczeństwa usług celnych międzynarodowym łańcuchu dostaw, (in:) K. Pieniak – Lendzion,T. Nowogródzka (eds) Współczesny marketing i logistyka-globalne wyzwania, Siedlce 2014, pp. 165–182.

16 M. Czermińska, Strategiczne działania usprawniające i zwiększające bezpieczeństwo w transgranicznym ruchu towarowym w Unii Europejskiej – elektroniczny system celny, "Studia i Prace WNEIZ" 2015, no. 41, p. 274.

people and animals, environmental protection, and the protection of EU business (EU market).

2. Directions of Change in EU Customs Law Related to the Facilitation of Trade

The implementation of the paradigm of trade facilitation contributed to the significant expansion of the system for trade facilitation within the Union Customs Code. The Community Customs Code contained only regulations that referred to a simplified customs declaration. The UCC on the other hand includes a wide array of solutions facilitating the international exchange of goods. This is the result of simplifications introduced by the WCO and confirmed by the WTO concerning the facilitation of international trade.

The customs code of the EU displays a clear progression in these simplifications. An analysis of its regulations shows a graduation from solutions having the smallest scope and reducing the obligation of the declarant (simplified customs declaration) to those having the greatest effect and providing the declarant with great simplifications (customs self-assessment). The criterion which decides the scope of simplifications is the fulfilment by the applying entity of conditions stipulated through the law. Among the simplifications, it is possible to identify those relating to legal solutions exemplified by simplified procedures (simplified versions of customs declarations) as well as those concerning legal and organisational solutions (such as the centralised clearance).[17]

Simplifications that have functioned the longest are the simplified customs declaration and the entry into the declarant's records. These simplifications allow the declarant to provide less information or documentation during product declaration or even to place the goods under customs procedure on their own. However, through the introduction of the institution of a supplementary declaration, EU legislators implemented guarantee measures. This declaration is not an independent act but is an integral part of the customs declaration.

In referring to the above it must be emphasised that the regulations of customs law allowing the placing of goods under customs procedure and their clearing without the submission of required data create a situation of legal fiction. They allow for the occurrence, in a predetermined manner, of legal effects of a given factual state based on an agreement between entities applying the provisions of customs law. The placing of trade goods under customs procedure takes place with an incomplete

17 M. Laszuk, Uwarunkowania kontroli celnej w multicentrycznym systemie prawa, Warsaw 2019, p. 155.

customs declaration (missing some information or presented documents or an entry made by the declarant himself into a registry which is maintained by that entity).[18]

The furthest-reaching simplification is the institution of self-assessment, which consists of providing the entrepreneur importing the goods with a possibility of carrying out controls under customs supervision. The right to perform customs controls results directly from article 185, par. 1 of the Union Customs Code. This simplification, therefore, consists of the authorisation of the economic operator, as a trusted entity, to perform certain duties assigned to customs authorities, including that of customs controls. This method, as implemented by EU legislators, may raise doubts not only in the context of safety and security but also in respect to the legal definition of customs controls contained in article 5, pt. 3 of the UCC, where entities who may realise customs controls have been clearly defined. It should also be underlined that this solution is characteristic only to regulations of customs law. Similar solutions have not been utilised in tax, administrative or any other area of law, nor do the legal systems of other EU member states contain analogous resolutions. The only other examples include the United States and Canada, which utilise the Customs Self-Assessment programme. These types of solutions are meant to maximise the observance of customs law regulations and other regulations concerning the international trade of goods by importers with the simultaneous facilitation of bringing goods onto the territory of a given country. This, however, concerns only low-risk shipments and does not find reflection in regulations of EU customs law.[19]

At this point, it is necessary to refer to systemic and teleological interpretations. The goals of regulations of customs law are mainly to establish rules for the import and export of goods into the customs territory of the European Union as well as ensuring the compliance of operations connected to this area with those regulations. Adherence is ensured mainly by customs controls, a part of customs supervision. Regulations of customs law do not identify any other type of controls which can be realised on their basis in respect to goods that are imported or exported.[20] In considering, therefore, the legal definition of customs controls we must wonder whether EU legislators did not delineate this particular simplification too broadly.

However, in referring to the currently accepted paradigm of trade facilitation and security it must also be said that in providing the trusted entity (AEO) with the ability to perform self-assessments for goods that have been introduced onto the customs territory of the European Union and which are then to be traded, the EU legislators set themselves a significant challenge in respect to security. Permitting authorised economic operators to carry out control operations, one of the most

18 *Ibidem,* p. 157.

19 https://www.cbsa-asfc.gc.ca/prog/csa-pad/menu-eng.html (2.03.2021).

20 More: M. Laszuk, Uwarunkowania…, *op. cit.*

important verification procedures, allows the question of whether the mechanisms for the verification of AEOs developed while the Community Customs Code was still in effect are sufficient under current legal conditions where simplifications are applied to one of the most significant institutions, that of customs controls, the main guarantee of security within the international trade of goods.

The solutions described above may, therefore, attest to the change in the relationship between customs administration and entities performing the international exchange of goods from traditional control and providing directives to one that is based on trust.[21] Will it, however, ensure the safe and secure trade of goods?

3. The Paradigm of Security in the Regulations of Customs Law

Solutions meant to provide security introduced into the Community Customs Code by regulation 648/2005 were retained and even expanded, with special significance assigned to risk analysis, in the Union Customs Code. It should be stressed that within the last several years, the issue of risk has also appeared in other areas of law in the context of regulations concerning controls.

Maintaining a balance between trade facilitation, standardisation and the unification of procedures within the international supply chain as well as the need for greater control and intervention caused a rise in the significance of risk analysis. This has found reflection in the conditions of customs controls where risk management is of primary importance. It is visible, among others, in the international convention on the simplification and harmonisation of customs procedures or within the Union Customs Code (and earlier, since 2005, in the Community Customs Code). The definition of risk presented in article 5, pt. 7 of the UCC specifies situations conditioning customs controls ("'risk" means the likelihood and the impact of an event occurring, … which would prevent the correct application of Union or national measures, compromise the financial interests of the Union and its Member States, or pose a threat to the security and safety of the Union and its residents, to human, animal or plant health, to the environment or to consumers'). Systematic recognition of risk, also through random controls and the introduction of all necessary means limiting possibilities for its occurrence, is risk management. The EU legislators stipulated the scope of risk management by identifying activities that relate to it, such as gathering data and information, the analysis and assessment of risk, the recommendation and initiation of activities as well as the regular monitoring and review of this process and its results on the basis of international, EU and national

21 J. Liu, Y. Tan, J. Hulstijn, IT Enabled Risk Management for Taxation and Customs: The Case of AEO Assessment in the Netherlands, (in:) M.A. Wimmer, H.J. Scholl, M. Janssen, R. Traunmuller (eds.), Electronic Government 8th International Conference, EGOV 2009, Linz 2009, p. 376.

sources and strategies. They have also implemented two fundamental rules upon which the system of risk assessment is based: the development of binding union-wide criteria and norms for the assessment of risk ensuring uniform utilisation of customs controls and the definition of priority areas of control.

Taking the above into account, current designations for customs controls occur mainly on the basis of risk analysis. The completion of risk analysis before the introduction of the goods onto the customs territory of the EU is possible thanks to the creation of the obligation of filing an entry summary declaration that contains 'safety and security particulars'.[22] It can be considered a transitional measure utilised mainly for non-union goods,[23] which is the primary basis for carrying out a risk analysis related to the safety and security of entering goods and which, at a later stage, can result in a safety and security control. The entry summary declaration, therefore, is not a document that regulates the legal status of the good but is meant to identify a non-union product and determine dangers that impact the safety and security of its entry. The fulfilment of the obligation to provide 'safety and security data' does not, therefore, result in the release from the responsibility to resolve the legal status of goods covered by such a declaration.

This is confirmed by the basic requirements of the summary declaration – reliability of the information and timeliness. In referring to information reliability, EU legislators clearly state that one absolute condition is that the declaration contains data necessary for their identification although it only concerns an intention to import. Time limits for filing the declaration have been precisely indicated with no room for flexibility.

Concluding, it should be said that the aim of the solutions described above was the assurance of better-oriented customs controls through the creation of a common basis for risk analysis and thus the enhancement of the safety and security of the entire European Union. The essence of the analysed customs law institutions is substantiated by the fact that the EU has extended the application of rules concerning safety and security (including the obligation to file a summary declaration) to EFTA states (Norway[24] and Lichtenstein[25]) and to Switzerland[26].

22 M. Laszuk, Kontrola oparta na analizie ryzyka – wybrane problemy, "Monitor Prawa Celnego i Podatkowego" 2015, no. 5, p. 186.

23 K. Lasiński-Sulecki, T. Rudyk, M. Śpiewak, Tytuł III. Przepisy stosowane wobec towarów wprowadzonych na obszar celny Wspólnoty do czasu otrzymania przeznaczenia celnego, (in:) W. Morawski (ed.), Wspólnotowy Kodeks Celny. Komentarz, Warsaw 2007, p. 444.

24 Decision of the EEA Joint Committee No. 76/2009 of 30 June 2009 amending Protocol 10 on simplification of inspections and formalities in respect of carriage of goods and Protocol 37 containing the list provided for in Article 101 (Official Journal of the EU L 232 from 3 September 2009).

25 The agreement with Switzerland is also binding in the Principality of Lichtenstein.

26 Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security

Accounting for the fact that EU member states form an internal market and create a single economic area with EEA countries and that controls at external boundaries often concern only goods, the significance of entry summary declaration and risk assessment for the safety and security of the EU market is especially important. It must also be stressed that within doctrine the summary declaration is described as the most effective EU-level measure of risk management. Its effectiveness, however, depends on very close cooperation between member countries.[27]

The function of the safety and security paradigm in international trade, as well as the solutions implemented within this area (summary declaration, risk analysis), caused the emergence of two types of customs controls: ex ante control (preliminary customs control) and safety and security control. It should be said that the ex ante control also occurs in other types of controls, such as financial controls.

Preliminary (ex ante) control is realised before the initiation of activities connected with the import of non-union goods into the customs territory of the EU. Its character is, therefore, preventative, providing opportunities to stop activities that are contrary to the law.[28] These types of controls allow the assessment of risk that the introduction of goods onto the customs territory of the EU may carry. It very often conditions safety and security controls.

Accounting for the functioning of the safety and security paradigm as well as a significant increase in threats to that safety and security within the international environment, security-related controls have become especially significant. This has allowed the recognition of a new type of control that is an important element of supply chain security. It is important to distinguish that with respect to these types of controls the concept of security is not only to be limited to threats to public safety but should be understood more broadly, as mentioned above. Security control is a control of prohibitions and limitations that are justified by reasons of public morality, public order and protection of life and health of people and animals, protection of the environment, and protection of national heritage and of industrial, intellectual and commercial property.

The authority to conduct customs controls related to safety and security results from the content of article 134, par. 1 of the Union Customs Code, according to which at the moment of import of goods onto the customs territory of the EU (the moment of the actual crossing of the external borders of the EU) they become subject to customs supervision and may undergo customs controls. In identifying the earliest moment at which control of safety and security may be done we must refer to article 139, par. 1 of

measures (Official Journal of the EU L 199 from 31 July 2009, pp. 24–42).

27 L. Gellert, The entry summary declaration in the context of risk management, "Customs Scientific Journal" 2014, vol. 4, no. 2, p. 34.

28 L. Kurowski, E. Ruśkowski, H. Sochacka-Krysiak, Kontrola finansowa w sektorze publicznym, Warsaw 2000, p. 50.

the UCC, which establishes the obligation of the immediate presentation to customs authorities of goods imported into the customs territory of the EU. This is the reason that security controls are most often initiated after the fulfilment of two conditions: entry of goods into the customs territory of the EU and their presentation to customs authorities. This type of control is characterised by a lack of prior notification of its initiation, which is justified by its aims.

Conclusions

Before its accession into the European Union, regulations of Polish customs law mainly focused on defining the rules for the international trade of goods which would ensure the appropriate collection of customs and other public duties. Progressing integration and globalisation caused an increase in the international trade of goods and necessitated the facilitation of that trade.

The establishment of first the paradigm of trade facilitation and its later expansion by safety and security caused several significant changes in the rules governing the international trade of goods. Especially important was the application of solutions meant to ensure the safety and security of that trade in the context of already implemented, far-reaching simplifications. Considering the fact that the instruments used in the area of facility often did not completely agree with those concerning safety and security, the introduction of regulations that could establish an equilibrium between these two aspects required EU legislators to proceed with extraordinary care.

It must be said, however, that to a large degree the introduced legal solutions guarantee the correct function of the trade facilitation and security paradigm. This can mainly be seen in the institution of the authorised economic operator (AEO), which realises the assumptions of both its aspects. EU regulations concerning the AEO include several simplifications (in the area of customs controls, for example) and, at the same time, the legislators establish solutions (the conduction of a detailed audit before issuing a permit) meant to ensure the safety and security of the supply chains of entities granted the status of AEO participating in the trade of goods.

It must be mentioned, however, that solutions introduced into the Union Customs Code may cause doubt about the ensuring of the safety and security of the international trade of goods. This concerns the institution of self-assessment. This solution adopted by EU legislators may breed reluctance regarding the assurance of safety and security but also in respect to the legal definition of customs controls which determines the spectrum of entities entitled to perform them. Legislators have given authorised entities (AEOs) the ability to carry out self-assessment, including that of performing customs controls, for clearing goods that have been imported onto the customs territory of the EU and that are later to be allowed to be traded.

In referring to the above it must be stated that this solution presents a significant challenge regarding safety and security. Transfer of authority to the AEO permitting the carrying out of controls, one of the most important instruments of verification, warrants the question of whether mechanisms for the verification of authorised economic operators developed at the time of the Community Customs Code are indeed sufficient within the current legal state, where simplifications to one of the most important institutions – that of customs controls, the main guarantee of safety and security in the international trade of goods – have been introduced. Confirmation of the significance of customs controls is the clear emergence of new types of controls that are important in respect to safety and security – those of the ex ante control and the security control.

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The Paris Agreement 5 Years Later: The Challenges of Climate Finance and Multilateral Development Banks

Abstract: In all matters regarding climate change, the modern world presents complex challenges which highlight how investments in infrastructure have as of yet been inconclusive. The emission percentages calculated by relevant studies demonstrate the need for long-term investments in infrastructures, to ultimately reduce the impact on the environment and our health. To this end, in alignment with the principles expressed in the Paris Agreement – reducing global warming and incentivising a zero-emission transportation system – and the Sustainable Development Goals (SDGs), these new infrastructures will require a structural change that can be guaranteed by multilateral development banks (MDBs), given their nature, especially within developing countries. MDBs play an important role in supporting local governments, on the one hand creating a prosperous environment for sustainable infrastructures and, on the other, providing innovative financial instruments that could increase the financial sector's participation. In this paper, after a brief excursus on the Paris Agreement's role in the global climatic crisis, there will be an evaluation of the relations between MDBs and climate finance, with a focus on green bonds.
Keywords: climate finance, green bond, multilateral development bank, Paris Agreement

Introduction

"In December 2015, more than 195 countries and several international organizations attended the UN's 21st Conference of Parties (also known as COP 21) held in Paris. As a result of the COP 21, the Paris Agreement represents both a milestone in the international environmental law and a landmark in the multilateral climate change process outlining the most important aspects of the global environmental crisis. In fact, COP 21 led the actors of the *Framework convention on*

climate change to co-sign the Paris Agreement with the aim of regulating greenhouse gas emissions more effectively and decisively. The aforementioned emissions are believed to be one of the root causes of global temperatures rising[1].

The Agreement - which took effect in November 2016 following the approval of 55% of the contracting party[2] - is an international, legally binding treaty, though not all of its provisions are compulsory in nature[3].

The notion of 'sustainable development[4]' contained in the Rio Declaration on Environment and Development[5] claims that the environment is a 'global public resource' and that the main threats to its stability are climate-altering gas emissions. This highlighted the social aspect of the emergency as well, and the need to increase the equity of resource distribution between various geographical locations, since – as

1 Around 70% of man-made polluting gas emissions is due to emissions of CO2 from fossil fuels. Emissions of different climate-altering gases, like methane and nitrous oxide, and deforestation account for the remaining 30%. Cf. UNEP, The Emissions Gap Report 2018, Nairobi 2018, available here: https://www.unep.org/resources/emissions-gap-report-2018 (28.10.2021).

2 A determining factor in reaching the threshold for enforcement (art. 21) was the approval of the EU Environment Council on 4 October 2016. In Italy, the Agreement was approved by law no. 204 on 24 November 2016. Out of the 197 participating countries, those who didn't approve the agreement were Angola, Eritrea, Iran, Lebanon, Libya, Iraq, South Sudan, Turkey and Yemen.

3 Some of its provisions, in fact, only have an authorising function (art. 6), not a prescriptive one, or simply of mere recommendation (art. 7). Surrounding the legal nature of the Agreement, the precedent that can be used as reference is the Durban COP 17 from 2011, when the Durban Platform for Enhanced Action was adopted. On the occasion of the COP 21, this established the adoption of 'a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all parties'. However, as far as the Agreement and especially the reduction of emissions are concerned, a proactive approach has been favoured, along with encouraging individual responsibility from the participating countries, instead of raising the level of commitment. For a more in-depth analysis: cf. D. Bodansky, The Legal Character of the Paris Agreement, "RECIEL" 2016, vol. 25, no. 2. Cf. also S. Nespor, La lunga marcia per un accordo globale sul clima, dal Protocollo di Kyoto all'Accordo di Parigi, "Rivista trimestrale di diritto pubblico" 2016, vol. 1, pp. 120–121.

4 A key tenant of international and national law in many countries, sustainable development is a development model 'that can satisfy the necessities of the present without compromising the ability of future generations to satisfy their own needs'. This principle, however, presents a high level of ambiguity. Undoubtedly, it does point out the necessity of finding a balance between growth and global environmental preservation, but presents no clear way to establish that middle ground. Cf. L. Kramer, Manuale di diritto comunitario per l'ambiente, Milan 2002, pp. 71ff.

5 This Declaration is one of three important documents adopted at the United Nations Conference on Environment and Development (UNCED) held from 3 to 14 June 1992 in Rio de Janeiro with the aim of discussing – among others – new means for combating climate change, depletion of the ozone layer and transboundary air pollution. The other two documents are: Agenda 21 and Statement of Principles on Forests. See F. K. Boon, The Rio Declaration and its influence on International Environmental Law, "Singapore Journal of Legal Studies" 1992, pp. 347–364. From the wide selection of literature that explains what led to the Paris Agreement, cf. S. Nespor, La lunga marcia …, *op. cit.* pp. 81ff.; M. Montini, L'accordo di Parigi sui cambiamenti climatici, "Rivista giuridica ambiente" 2015, vol. 4, pp. 517ff.

is mentioned in principle 7 – the elimination of poverty constitutes 'an indispensable prerequisite for sustainable development'. This approach privileges 'global yet diversified responsibility', which implies that, for the most part, the resources of developed countries would be counted upon to obtain a successful result. As the main cause of global pollution and major holders of financial and technological means, these developed countries have a duty to create a development model for preserving both the planet and its living species.

The aforementioned Declaration contained practically indeterminate propositions, which did not specify any form of engagement or responsibility, to the point where this document has been defined *soft law* by international scholars. The effectiveness of its instrument, for instance, relies exclusively on the governments of the individual states and their willingness to apply them as active policies.[6]

The global financial framework for the environment,[7] as indicated by COP 21, involves a multilateral, international cooperation model. This complex structure features many different, even hybrid channels and methods of funding environmental projects. Along with the financial engagement of 100 million dollars annually till 2020, undertaken already in 2010 in Cancún by various developed countries and confirmed in Paris, there are also bi- and multilateral sources of funding and co-funding by private investors.[8]

As stated in article 2, item (c)[9] read in combination with article 9, point 3 of the Agreement, reaching the goals set to reduce CO2 emissions is reflected by the need to channel international financial investments, in a balanced manner, towards two complementary strategies of climate mitigation and adaptation, supported by a reinforcement of investment capabilities. In particular, as specified in article 2, mitigation and adaptation aims[10] for climate involved three plans of action: first, to maintain the average global temperature to less than +2°C of pre-industrial levels, and to ultimately lower it to +1.5°C above the established threshold; secondly, 'to increase our capacity to adaptation to the adverse impacts of climate change', thus promoting

6 F.B. Weiss, The Evolution of International Environmental Law, "Japanese Yearbook of International Law" 2011, vol. 54, pp. 1–27.

7 Cf. B. Buchner, A. Falconer, M. Hervé-Mignucci, C. Trabacchi, M. Brikman, The landscape of climate finance, "Climate Policy Initiative" 2011, vol. 27, pp. 1–70.

8 Oxfam's recent Climate Finance Shadow Report 2020 featured a detailed evaluation of the progress made by public finance towards reaching the goals set by the Paris Agreement. See also note 17 in this article. Cf.: Oxfam, Climate Finance Shadow Report 2020 – Assessing Progress towards the $100 Billion Commitment, Oxfam International, 2020, available here: https://www.oxfam.org/en/research/climate-finance-shadow-report-2020 (28.10.2021).

9 Article 2, item c): 'Making financial flows coherent with a development process with low greenhouse gas emissions and a resilience to climate change.'

10 Art. 5 indicates a series of mitigation and adaptation instruments more closely related to forests and agriculture. Some of these instruments were provided already in the 1992 Convention (REDD – Reducing Emissions from Deforestation and Forest Degradation).

resilient development[11] to climate and low emissions; and, finally, to channel finances in accordance with measures to cut down on emissions (mitigation) and to defend impoverished nations from climate-change-related catastrophes (adaptation).

Nevertheless, even if the Agreement lay the groundwork for a true energetic transition towards renewable sources and the dismissal of gases and minerals, the objectives contained in the Agreement are still far from being achieved.

Its framework is still loosely binding from a legal perspective – for example, no mention is made of sanctions for individual countries not fulfilling their chosen obligations (art. 28) – and it remains too modest and generic in defining precise courses of action for reducing emissions and de-incentivising carbon fuels, given the larger ambitions required by a global climate crisis of this extent. Therefore, even if no sanctions are mentioned within multilateral environmental agreements (MEAs) – or any other international agreements – for individual countries, there exists international law mechanisms of responsibility of states for internationally wrongful acts which could also be applied in the field of climate change. Indeed, concerning the legal consequences of environmental damage, the literature also suggests the theory of 'international responsibility for a lawful act', a theory whose general norm is, however, impossible to reconstruct. Hence, there is an objective responsibility (relative or absolute) that a state must take charge of in the event of damage produced by one of its lawful activities, which is to say compatible with international regulations, but that could potentially cause prejudicial consequences for other states or for the international community. Despite this, the theory is controversial given the consolidated principle that international responsibility can be attributed only in the event of a wrongful act being committed. Thus, independently from the action's degree of legality, environmental damage always implicates responsibility deriving from a wrongful fact. The slow rise, on a local and global scale, of polluting agents which cause at times irreversible environmental damage, raises cogent questions about the attribution of responsibility, and highlights, within current international law, a gradual abandonment of the distinction between lawful and wrongful acts. To this end, a decisive action on the nations' end would be the adoption and respect of the international rulings of prevention and vigilance, which impose the adoption of precautional measures to prevent environmental damage caused by lawful actions that pose potential environmental risk.[12]

11 Unlike the concept of adaptation, which accepts constant climate change as a fact, resilience indicates a viable response to extreme events, may they be sudden or gradual, which aims to restore original conditions.

12 P. Cuomo, La responsabilità da illecito internazionale in materia di danno ambientale, "Diritto e processo, Derecho y proceso – Right & Remedies" 2020, pp. 335–358.

1. Multilateral Development Banks and Climate Finance

International climate finance applies concrete action in favour of strategies to contain and combat climate change. This requires the synergic and coordinated commitment of all economic actors at a global level.

Multilateral development banks (MDBs) are among the main investors of the infrastructures of developing countries, financing areas like power systems, transportation and urban development – a decisive factor in creating long-term environmental resilience. They are leading investors precisely because they attract a multitude of private capital, involving other financial institutions and offering alignment models that can be replicated on a massive scale. Furthermore, they operate in the political spheres, carrying out research and assistance programmes. Thus, this allows them to orient the political plans of governments, specifically those of developing nations, to ultimately incentivise their environmental actions and the alignment of their investments. Additionally, they promote sustainable development on behalf of their government shareholders, as they manoeuvre in a mostly international sphere, one of the few able to contrast and limit the earth's environmental issues. Finally, they constitute a fundamental link between the general goals of the Paris Agreement and the nationally determined contributions that engage each of the participants, giving them much-needed technical assistance and creating platforms, instruments and specific implementation programmes, in connection with global climate finance.[13]

These features, which define the work and status of MDBs, are essential for facing the climate crisis, especially when coordinated coherently with the initiatives by the other important actors in global finance: governments, bilateral and national development banks, private investors, commercial banks and climate funds.

The plan is to create a stable, structural alignment for multilateral financial governance for the environment with an ambitious but necessary aim: bringing the global energy supply to a zero-emission status by 2050.[14] The need to act quickly in a long-term perspective has become evident. This can be achieved by harnessing validation tools to examine individual programmes funded in all investment areas. The examination is based on criteria aligned with the objective of the Paris Agreement, to mitigate and adapt to climate change.[15]

13 S. Bartosch et al., Toward Paris Alignment. How the Multilateral Development Banks Can Better Support the Paris Agreement, World Resources Institute, 2018, pp. 21–26.

14 An impressive operation which entails shifting investments from fossil fuels to renewable energy, inputting resources into the market in favour of infrastructures and technologies with a low environmental impact and, more generally, including climate needs in decision-making in an organic way.

15 S. Bartosch et al., Aligning Investments with the Paris Agreement Temperature Goal. Challenges and opportunities for multilateral development banks, Germanwatch & NewClimate Institute, 2018.

Another important feature of MDBs is their transparency, and their management of climate risks, on the basis that, as financial institutions, they must adopt high standards of transparency in their criteria for allocating funds, their environmental impact and the financial risks connected to climate change.

Since 2011, MDBs have jointly reported on funding for the environment on the basis of nine common principles[16] of financial monitoring for the mitigation of and adaptation to climate change, developed by MDBs themselves and by the International Development Finance Club (IDFC). This monitoring system employs well-harmonised mitigation categories and components that are relevant to the environment, as well as the high level of standardisation. In general, guiding the accounting model of investment alignment of MDBs are a) their positive value in terms of mitigation, and b) their categorisation of environmental adaptation objectives, which involves an evaluation of the context's vulnerability to climate change.[17]

Before COP 21 in December 2015, six of the main MDBs – African Development Bank (AfDB), Asian Development Bank (ADB), European Bank for Reconstruction and Development (EBRD), European Investment Bank (EIB), Inter-American Development Bank Group (IDBG), World Bank Group (WBG) – co-signed a Joint Statement on 28 November 2015, where they vowed to implement concrete actions aimed at solving the environmental crisis, taking into account all risks and advantages this entailed.

Therefore, there was a desire to take on larger responsibilities in view of reaching a common goal, and to support the results of the Paris Conference, in conformity with the MDBs' mandates. Each bank aimed at increasing its investments towards climate finance in developing countries, with the ultimate goal of reaching 100 billion dollars

16 1. Additionality: tracking is activity-based, and is not focused on the project's purpose or results, nor the origin of the financial resources (i.e. MDBs' own resources or external ones from dedicated climate finance facilities); 2. Timeline: project reporting depends on the timeframes afforded by board approval or commitments; 3. Conservativeness: climate finance should be under-reported rather than over-reported; 4. Granularity: the tracking of mitigation activities should be distinguished from non-mitigation activities within a single project. 5. Scope: mitigation activities or projects can exist on multiple levels: standalone projects, various standalone projects under a larger programme, a component of a standalone project, or a programme financed through a financial intermediary; 6. Results: reporting on the mitigation finance of a project or activity does not imply evidence of climate-change mitigation impacts; 7. Eligibility: not all activities that reduce GHGs in the short term are eligible to be counted towards MDB mitigation finance; 8. Exclusions: activities shall be excluded if unique attributes cause them to not be supportive of climate-related efforts, even if they are on the positive list of qualified activities (examples include hydropower or geothermal plants that release high levels of GHG emissions); 9. Avoiding double counting: reporting should not account for the same funding being devolved to both mitigation and adaptation finance. Cf. Joint Report on Multilateral Development Banks 2018, Climate Finance, 2019, p. 30.

17 R. Weikmans, J. Timmons Roberts, The International Climate Finance Accounting Muddle: Is There Hope on the Horizon?, "Climate and Development" 2017, vol. 11, pp. 97–111.

annually.[18] Notably, AfDB announced it would reach 5 billion dollars annually, tripling its investments; ADB set its goal at 6 billion dollars a year; EBRD declared they would increase their funding quota for the environment from 25% to 40%, thus allocating 20 billion dollars during the following five years, contrasted with the 20 billion dollars invested in the past ten years, reaching a total of 100 billion dollars; EIB set themselves the same goal, and further reinforced the impact of its investments in fragile economies by increasing its financial intervention actions to 35% of total loans; IDBG aimed to double its volume of investments; and, finally, WBG pledged to invest up to 29 billion dollars annually, utilising their multiple levels of co-financing.

In 2019, nine MDBs[19] signed a new Joint Statement on Climate Finance[20] claiming a more decisive engagement on the part of multilateral financial institutions towards climate finance. As shown in Figure 1 (see the following page), between 2011 and 2019 there has been an increase in global finance commitments. Namely, there was a relatively constant trend in the years preceding the Paris Agreement and a steady incline from 2015 onwards.

Indeed, when it comes to the work of MDBs and other actors in global climate finance, not only is it important to evaluate the implementation of financial flows towards positive actions for the environment, but it is also relevant to consider which strategies they adopt to de-incentivise funds from projects that do not respond to the ever-more urgent need to align with the Paris Agreement, especially as far as energy and decarbonisation are concerned.

Each project should thus be examined on the basis of positive or negative environmental instruments (exclusion lists and incentivisation lists), to ultimately judge the project's suitability to their funding plans, and this judgement must be known.[21]

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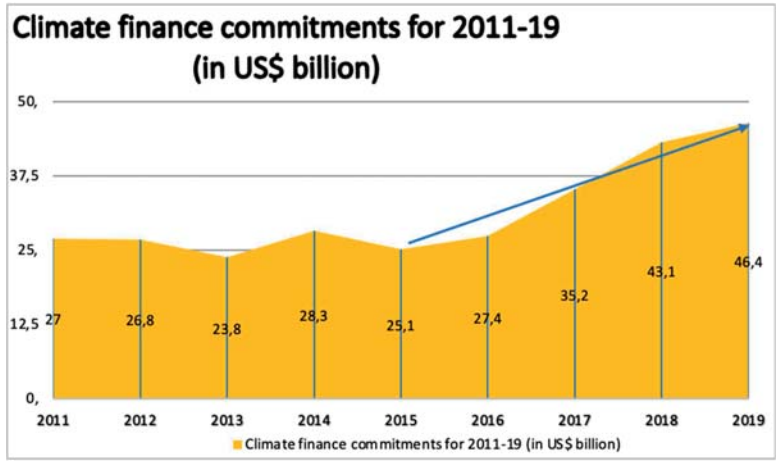
18 Unfortunately, this target has not been achieved by MDBs. Moreover, it is important to stress that in the report of 2019, MDBs changed their reporting approach, creating confusion. For the first time, the report included figures on climate finance to all countries and not, as in the past, to developing countries only. This made it more complicated to understand how MDB climate finance contributes towards the UNFCCC goal of mobilising $100 billion annually for developing countries. See R. D'souza, Can multilateral development banks deliver on promise of US$ 100 billion in climate finance?, Observer Research Foundation, 2020; J. Thwaites, The Good, the Bad and the Urgent: MDB Climate Finance in 2019, World Resources Institute, 2020, available here: https://www.wri.org/insights/good-bad-and-urgent-mdb-climate-finance-2019 (28.10.2021).

19 African Development Bank (AfDB), Asian Development Bank (ADB), Asian Infrastructure Investment Bank (AIIB), European Bank for Reconstruction and Development (EBRD), European Investment Bank (EIB), Inter-American Development Bank Group (IDBG), Islamic Development Bank (IsDB), World Bank Group (WBG).

20 Joint Report on Multilateral Development Banks, 2018, *op. cit.*

21 Cf. J. Stiglitz, Failure of the Fund: Rethinking the IMF Response, "Harvard International Review" 2001, vol. 23, no. 2, pp. 14–18; D. Nieldon, M. Tierney, Delegation of International Organizations: Agency Theory and World Bank Environmental Reform. "International Organization" 2003, vol. 57, no. 2, pp. 241–276; T. Gunter, World Bank Environmental Reform: Revising Lessons from

Figure 1. For the sake of data uniformity, since in reports before 2020 multilateral development banks provided the numbers regarding their involvement in climate finance for developing and emerging economies, all data by 2019 has been adapted



Both ADB and AfDB, since 2009 and 2012, respectively, no longer fund projects related to the exploration of new oil or gas fields, due to associated risks. They will, however, provide assistance for the development of wells, and the transportation and distribution of gas. It is notable that, while the Asian Bank does not directly finance coal projects, it does not explicitly present a policy to exclude coal. The 2009 energy policy states that coal-based projects may only be supported through cleaner technologies and adequate equipment.[22] Furthermore, as stated during the One Planet Summit held in Paris on 12 December 2017, the World Bank Group was to exclude all projects for the exploration, drilling and management of gas or oil wells from 2019 onwards.[23] For instance, the World Bank and EBRD have altogether redefined their investment policies in the coal sector, limiting funding to cases where no other valid energy sources are available.[24] There have been other environmental policies adopted,

Agency Theory, "International Organization" 2005, vol. 59, no. 3, pp. 773–783; A. Dreher, The Development and Implementation of IMF and World Bank Conditionality, Hamburg Institute of International Economics (HWWA) Discussion Paper no. 165, Hamburg 2002; World Bank, Adjustment Lending Retrospective Final Report, Washington D.C. 2001; AA.VV., Aligning Investments with the Paris Agreement Temperature Goal. Challenges and opportunities for multilateral development Banks, Germanwatch & NewClimate Institute, 2018, pp. 22ff.

22 E3G, Asian Development Bank fossil fuel exclusion policies, November 2020, available here: https://www.e3g.org/bank-metrics/fossil-fuel-exclusion-policies-adb/ (28.10.2021).

23 World Bank Group, World Bank Group Announcements at One Planet Summit, 12 December 2017, available here: https://www.worldbank.org/en/news/press-release/2017/12/12/world-bank-group-announcements-at-one-planet-summit (28.10.2021).

24 EBRD, Energy Sector, 2013; World Bank Group, Energy Sector Strategy, 2013.

like the non-eligibility of projects that require the purchase of machinery used for the commercial deforestation of tropical areas.[25]

In 2017, in view of the imminent Climate Change Conference of Parties in Katowice, ten MDBs signed a new Joint Statement.[26] This time, beyond the six MDBs of the 2015 Statement, new parties were included, such as the New Development Bank (NDB), created through interstate agreements during the sixth BRICS Summit in 2014, the Asian Infrastructure Investment Bank (AIIB), the Islamic Development Bank (IsDB) and the Investment Operations Department of IDB Invest, a new body of the Inter-American Development Bank Group (IDBG), which operates in the private sector investing mostly in South America and the Caribbean region.

In this document, the MDBs announced new increases of economic resources without truly specifying the entity of their planned implementation of financial flows for the environment. In addition, they aimed to harmonise in a more forceful manner their individual approaches (thus substantiating alignment plans through interventions on their own internal politics and activities), to begin new collaborations with private investors, and to develop more intense forms of exchange with research institutions, civil society and NGOs.

A new instrument for alignment adopted during COP 24, after three years of preparation, is the so-called Rulebook.[27] This instrument contains technical indications addressed to all those involved in the governance of global climate finance on how to fully execute the dispositions of the Paris Agreement, specifically within the parameters of mitigation and adaptation, transparency in monitoring and accounting for environmental financial flows, and, finally, implementation and compliance. A central theme of the Rulebook is the global stocktake, which is the mechanism through which there could be a 'possible increase in ambition' of the Paris Agreement objectives and a change in the ways that this process is regulated.

This introduces, quite evidently, a broader and more concrete vision of alignment, one which takes into account the speed at which global climate change is evolving, and aims to create more instructive aims and a comprehensive global strategy which can function in the long term.

Scientific evidence suggests that to reach the containment objective for global warming, emissions should reach between 40 and 70% before 2050, to be able to

25 Cf. World Bank Group, Environmental and Social Framework, 2016.

26 EIB, EIB Group Climate Bank Roadmap 2021–2025, 2020, available here: https://www.eib.org/attachments/thematic/eib_group_climate_bank_roadmap_en.pdf (28.10.2021).

27 COP 24 Katowice 2018, Katowice Rulebook, Getting ready for the implementation era, Ministry of the Environment of the Republic of Poland, Bureau of the COP 24 Presidency, Warsaw 2019, available here: https://cop24.gov.pl/fileadmin/DEKLARACJE/Katowice_Ruleboo_E-BOOK_mini.pdf (28.10.2021).

achieve the process of decarbonisation by 2100.[28] According to the report[29]of the Intergovernmental Panel on Climate Change (IPCC) of 2018, human activity is estimated to have caused the earth's temperature to rise by 1.0°C compared to pre-industrial levels, with an interval set between 0.8 and 1.2°C. According to this scenario, there is a high probability of global temperatures rising by 1.5°C between 2030 and 2052, if it keeps rising at its current rate.

The net amount of global CO2 emissions caused by humans would have to reduce by 45% before 2030, reaching a 'net zero' around 2050. The report – which offered a significant scientific contribution during the negotiations of COP 24 in Katowice – also highlighted the fact that the most recent projections obtained by climate models paint a far more catastrophic picture than what had been theorised even five years earlier. This would mean vast and irreparable damage to the ecosystem, to biodiversity, and to the socioeconomic conditions of large amounts of the world's population.

Starting from the first Joint Report, published in 2011, MDBs decided to outline all the sectors in which they operate in order to improve the transparency and coherence of financial flows. This produces more complete insights, and is based on a shared tracing methodology which appraises not only the direct investments in the sustainable development of emerging economies, but also the financial commitments to the environment taken by each MDB. In 2019, the various MDBs invested a total of 63 billion dollars in climate finance, 16 billion towards adaptation projects and 48 billion on mitigation projects (Table 1).

Table 1. Total MDB climate finance in 2019 (in US$ million)

	TOTAL CLIMATE FINANCE		
MDBs	**Adaptation finance**	**Mitigation finance**	**MDB climate finance (sum)**
AfDB	2,016	1,584	3,600
ADB	1,536	5,537	7,073

28 Of the ample literature, cf. for example S. Barrett, C. Carraro, J. De Melo, Towards a Workable and Effective Climate Regime, London 2015; S. Pavoni, Will climate changes cause the next crisis?, "The Banker" 1 September 2017, available here: https://www.thebanker.com/Markets/Commodities-Energy/Will-climate-change-cause-the-next-financial-crisis?ct=true (28.10.2021).

29 V. Masson-Delmotte, P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P. R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J. B. R. Matthews, Y. Chen, X. Zhou, M. I. Gomis, E. Lonnoy, T. Maycock, M. Tignor and T. Waterfield (eds.), IPCC, 2018: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, Intergovernmental Panel on Climate Change, 2019, available here: https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf (28.10.2021).

AIIB*	661	1,081	1,742
EBRD*	582	4,420	5,002
EIB	971	20,687	21,658
IDBG*	1,918	3,040	4,958
IsDB	218	248	466
WBG	7,697	11,109	18,806
Total	15,599	47,706	63,305

**Some of these projects have dual purposes, both applicable to adaptation and mitigation. In the case of AIIB and IDBG, these projects were included in both the mitigation and the adaptation categories – 549 million dollars for AIIB and 942 million dollars for IDBG. EBRD decided to allocate all dual-benefit projects to adaptation finance.*

During the UN's Climate Action Summit, which took place in New York on 22 September 2019, MDBs signed a further Joint Statement[30] where they committed to taking 'urgent actions' and increasing 'substantially environmental investments in both the public and private sectors'. The common goals stated by MDBs for increasing investments by 2025 amount to a total sum of 65 billion dollars annually, of which 50 billion dollars a year is earmarked for weaker economies. For environmental adaptation, the reported goal is 18 billion dollars a year. These collective endeavours would amount to 40 billion dollars annually deployed by private investors, thanks to the introduction of more efficient climate risk strategies and higher transparency. Ultimately, to discourage the use of fossil fuel, and thus help breach the gap between the engagement of various countries to reduce their polluting gas emissions and their concrete implementation, MDBs promise to offer technical assistance to nations and plan on collaborating with other financial institutions to guarantee a quicker transition towards more sustainable and inclusive development models.

The true innovation presented by 2020 in the sphere of global climate finance, in view of a true breakthrough towards a green economy, are the so-called green bonds: debt instruments associated with the funding of environmentally friendly projects, and that require the alignment of investments to the Green Bond Principles[31] established by the International Capital Market Association (ICMA). This is a market estimated on a global level at nearly 650 billion dollars, constantly expanding, and which aims to help guide post-pandemic financial recovery. As shall be explored in

30 High Level MDB Statement for publication at the UNSG Climate Action Summit, 22 September 2019, available here: https://www.adb.org/sites/default/files/page/41117/climate-change-finance-joint-mdb-statement-2019–09-23.pdf (28.10.2021).

31 ICMA, Green Bond Principles Voluntary Process Guidelines for Issuing Green Bonds, June 2018, available here: https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/Green-Bonds-Principles-June-2018–270520.pdf (28.10.2021).

the next section, this new financial instrument in favour of the environment and sustainable development is consolidating and amplifying itself in Europe. Even though most MDBs launch new green bond emission plans every year, EIB has earned a prominent place. Recognised in 2020 as the biggest issuer of green bonds in the past ten years, EIB was one of the winners of the fifth edition of the *Green Bond Pioneer Awards 2020* (GBPA).[32]

2. The Instruments of MDBs: Focus on Green Bonds

The climate finance gap is an obstacle that the international community must overcome in order to address the future challenges posed by climate change. In fact, it poses a growing threat to economies around the world, along with global warming. Climatic events of great impact and extreme meteorological conditions are ever more frequent, posing greater risks to the development of the affected regions. Thus, an effective response to climate-friendly investments is urgently needed. According to the International Finance Corporation,[33] the necessary amount to allocate in climate-smart investments is equal to 23 trillion dollars from 2016 to 2030. Unfortunately, the public sector is able to finance only part of this amount. This has prompted a search for alternative funding.

Since around 2008, alternative mechanisms have been developed to direct private financial resources towards climate change mitigation and adaptation activities. Within this framework, one can see the development of *green bonds.* They arose from the conceit that certain investors could be interested in paying a premium to invest in environmentally friendly activities. MDBs play a key role in this respect; they have been pioneers in the green/climate bond market. The first to issue a green bond was the European Investment Bank (EIB) in 2007, under the name Climate Awareness Bond (CAB). The market has been growing ever since. To date, EIB remains the world leader in green bonds, with more than 33.7 billion euros raised in over 17 currencies, 6.8 billion of which were raised in 2020 alone.

In fact, green bonds are ultimately debt instruments used to finance global action projects which aim at protecting the climate in the fields of renewable energy and energetic efficiency. Notably, they concern wind, hydroelectric, solar and geothermal energy production projects, as well as district heating, cogeneration and building insulation. In addition, as of June 2020, EIB has extended the eligibility of green bonds for the research, development and dissemination of innovative low-carbon

32 EticaNews, Gbpa, BEI prima banca di sviluppo per emissioni di green bond, 10 July 2020, available here: https://www.eticanews.it/in-breve/gbpa-bei-prima-banca-di-sviluppo-per-emissioni-di-green-bond/ (28.10.2021).

33 IFC, Climate Investment Opportunities in Emerging Markets. An IFC Analysis, Washington D.C. 2016.

technologies, as well as electric railway and electric bus infrastructure. In recent years, CAB revenue has contributed to 266 projects in 57 different countries.[34]

Subsequently, other multilateral financial institutions also started to issue their own green bonds: the International Bank for Reconstruction and Development (IBRD) in 2008; the International Finance Corporation and the European Bank for Reconstruction and Development in 2010; the African Bank in 2013; the Asian Bank in 2015; the New Development Bank in 2016; the AIIB in 2019 launched the Asian Climate Bond Portfolio in partnership with Amundi, Europe's largest asset manager; and finally, the Islamic Development Bank also started issuing its own green bond, the *Green Sukuk*, in November 2019.

EIB has considerably boosted the green bond market. While so far this financial instrument has mainly concerned the energy sector, the 'green debt' offer is expected to increase in the future, and aims to cover an increasingly large range of sectors. This will have a notable impact on the global financial market for climate, and increase the spread of a more responsible and dynamic approach by investors.

The current state of the fight against climate change appears to be emerging in Europe with positive prospects for growth and implementation. To analyse in detail the potential of green bonds, it is essential to contextualise them as a financial mechanism and, as such, to focus on their similarities to investment-grade bonds, the only difference being the c.d. clause of 'use of proceeds', which mandates green investments.

One should stress the importance of the Green Bond Principles (GBP) of the International Capital Market Association (ICMA) in determining whether a bond finances environmental projects and/or activities. To this effect, some countries (including China and India) regulate the requirements for a bond to be recognised as 'green', while others, such as the European Commission, are moving towards a proposal for considering the Green Bond Principles as standard.

Furthermore, there is a need for global adaptation efforts, especially in developing countries. Indeed, the number of green bonds currently issued which contribute to potential adaptation activities is very low, representing only sectors such as forestry, water, energy, transport and real estate. In fact, despite the growth of the green market, the size of green bonds represents less than 1% of the total bond market.[35]

In conclusion, the new green market has developed in an uneven, heterogeneous manner; the European Union, the United States and China are the main players in this

34 EIB, EIB Climate Awareness Bonds, Allocations by project for H1 2020, available here: https://www.eib.org/en/investor_relations/documents/eib-cab-projects.htm (28.10.2021).

35 J.A. Ketterer, G. Andrade, M. Netto, M.I. Haro, Transforming green bond markets: using financial innovation and technology to expand green bond issuance in Latin America and the Caribbean, Inter-American Development Bank, 2019.

market, while other countries, such as those in South America and the Caribbean, are lagging behind, and there is even less potential for expansion in the Middle East, Africa and South Asia.[36]

Green bonds are limited in their potential to channel private funding towards climate adaptation projects. Currently, this issue is exacerbated by the low levels of climate risk awareness, as well as geographical misalignments, project sizes and types of activities. This does not mean that green bonds should be abandoned as a mechanism for adapting investments. Rather, they should continue to be issued far more, given the urgent need for investment in climate adaptation.

Conclusion

The outlined scenario, related to the current global financial strategy to contrast climate change, brings about conclusive considerations that are far from comforting. Whilst scientific knowledge unequivocally states that the alarming rate of global warming depends chiefly on man-made polluting emissions, as well as current practices for economic development, international agreements supposed to provide concrete solutions to this phenomenon are left unheeded. The Paris Agreement and the 2030 Agenda aimed to contain, adapt and mitigate climate change in ways far too modest compared to the predictions that experts have made on the phenomenon. The transition towards clean energy sources was delayed considerably by the investments that MDBs continue to allocate to the traditional sectors of petrol, gas and coal, and to infrastructures connected to these energy sources.

Throughout this analysis, it has become apparent that the international judicial system does not enforce enough emission-reduction measures, and lacks an appropriate sanctioning system. Observing the investment policies of the main MDBs operating on the forefront of global climate finance, MDBs that guide significantly the allocation of public and private resources, offering consultancy and assistance for climate risks, the delays on alignment goals seem far more blatant. Despite their Joint Statements, the funds amassed and intended for the future, declarations of efficiency and collaboration, the green investments of MDBs are still just a part of the total financial flow they inject into strategic sectors of global climate finance, like energy sources and resilient infrastructures.

The term *climate finance* is now firmly rooted in the vocabulary of the international political agenda. It is necessary, however, to consider which practices effectively substantiate it. It should indicate a new method of international interaction with the climate-environment issue: shared means of development cooperation, unified approaches to financial policies that include a serious, constant evaluation of

36 H. Tuhkanen, Green bonds: a mechanism for bridging the adaptation gap?, SEI working paper, Stockholm 2020, pp. 19ff.

the environmental impact of all investment sectors, brief and long-term strategies, and a multi-scale planning action that stretches beyond the local or regional context to a national and global one.

If the Paris Agreement has long been acclaimed as a game-changing event capable of opening a new course of action and a renewed momentum for global economic policies, redefining and restarting commitments and obligations in terms of investment and emissions reduction, the event that will be capable of stirring hopes and expectations is actually COP 26, to be held in Glasgow in November. During the conference, presided by the United Kingdom and Italy, all progress aligned to the Paris Agreement will be presented, but the hope is that far more ambitious climate projects will be discussed, as well as new international agreements and engagements. In the meantime, the British government has declared 2020 'the year of climate action', while the United Nations Secretary General, Antonio Guterres, has requested that 'every single country, city, financial institution and company' adopt plans for transitioning to net zero emissions by 2050 and has urged G20 countries to give clear indications of commitment in that direction.

According to an analysis[37] published in December 2020, carried out by Climate, a scientific organisation born of the collaboration between Climate Analytics and New Climate Institute, the increase in average global temperature could be 2.3 degrees Celsius by 2100. This is a value that would just touch on the minimum objective indicated by the Paris Agreement. However, besides being an optimistic forecast compared to other climate scenarios recently developed,[38] it is clear that this could be an attainable goal only if some crucial issues are resolved in Glasgow and be promptly implemented to prevent that new delays and non-compliance will result in this being seen as a missed opportunity (the issues referred to here are the demise of coal and gas markets; the renewal of the nationally determined contributions with more stringent and ambitious reductions; and the implementation of mitigation and adaptation resources in developing countries).

COP 26 will begin its work in a completely different world to the one that negotiated the Paris Agreement, despite little more than five years having passed.

37 Climate Action Tracker, Paris Agreement turning point, Wave of net zero targets reduces warming estimate to 2.1°C in 2100, All eyes on 2030 targets, 2020, available here: https://climateactiontracker.org/documents/829/CAT_2020–12-01_Briefing_GlobalUpdate_Paris5Years_Dec2020.pdf (28.10.2021).

38 Cf. for example this report published by the Met Office, the UK's national meteorology service: Grahame Madge, New global record 'likely' within five years, 30 Jan 2020, available here: https://www.metoffice.gov.uk/about-us/press-office/news/weather-and-climate/2020/decadal-forecast-2020 (accessed 28 October 2021); Veronika Henze, Emissions and Coal Have Peaked as Covid-19 Saves 2.5 Years of Emissions, Accelerates Energy Transition, "New Energy Outlook" 27 October 2020, available here: https://about.bnef.com/blog/emissions-and-coal-have-peaked-as-covid-19-saves-2–5-years-of-emissions-accelerates-energy-transition/ (28.10.2021).

The consequences of climate change have become more evident – record heatwaves, droughts and hydric scarcity, ice caps melting, floods, and violent, sudden atmospheric phenomena – the public is more interested than ever before in finding concrete and efficient solutions. This interest is not limited to pointing out the mistakes that have been made thus far, but also demands pragmatic solutions, resolute decisions, and sustainable recovery instruments, challenging directly both government leaders and the heads of international organisations and multilateral investment banks.

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The Adoption of International Arbitration as the Preferred ADR Process in the Resolution of International Intellectual Property Disputes

Abstract: This article, which is intended for arbitration practitioners, demonstrates that international arbitration as a subset of the field of alternative dispute resolution (ADR) offers a useful toolkit for the expeditious resolution of international intellectual property law disputes. The article demonstrates how the theory and practice of international arbitration is particularly well poised to address some of the specific considerations and requirements of paramount concern to the international intellectual property lawyers and their clients. The article will explain how the inherent features of the international arbitration legal landscape combine to indicate that it should be considered as the preferred method of ADR and explain how each of these features can provide both time and cost efficiencies. The article will identify the legal reasoning behind the benefits inherent to choosing international arbitration and will also address those circumstances when international arbitration may be precluded or otherwise considered unsuitable for intellectual property matters. The article examines several distinct benefits that international arbitration uniquely offers to international intellectual property law users and highlights some areas of the field that require additional caution.
Keywords: ADR, arbitration, commercial law, dispute resolution, intellectual property

Introduction

International intellectual property disputes mostly reside in a nebulous legal space between the domestic law from which the right is derived and the international commercial law from which it is placed into the international marketplace. This article will examine how international arbitration can offer significant benefits to

the intellectual property lawyers and their clients and will place these concerns in an intellectual property business dispute management perspective. This article does not aim to define or delineate the characteristics or qualities of international intellectual property law or delimit the types of transactions that can involve this subject matter. Rather, the article will demonstrate how the theory and practice of international arbitration law is particularly well poised to address some of the specific considerations and requirements that are of paramount concern to the international intellectual property practitioner and their clientele. The article will explain how the inherent features of the international arbitration legal landscape combine to indicate that it should be considered as the preferred method of ADR and explain how each of these features can provide both time and cost efficiencies. The article will identify the legal reasoning behind the benefits inherent to choosing international arbitration and will also address those circumstances when international arbitration may be precluded or otherwise considered unsuitable for intellectual property matters. Lastly, attention will be drawn to the features of international arbitration that are most beneficial and detrimental for practitioners and their clientele in the resolution of international intellectual property matters.

1. International Intellectual Property Law and the Possibilities of Alternative Dispute Resolution (ADR)

Intellectual property is a term utilised to describe a 'seemingly disparate collection of legal rights'.[1] The definition of intellectual property on a universal or international basis presents an inherent problem because the conception of these rights, until recently, was exclusively premised on domestic law. Resultantly, there is a great disparity between the availability and duration of rights depending on the particular circumstances existing in the domestic jurisdiction where protection is sought. The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement)[2] provides an international legal framework for recognition and regulation of intellectual property as well as common definitions.[3] The TRIPS Agreement defines roughly seven distinct types of rights, namely: copyright and

1 C. Waelde et al., Contemporary Intellectual Property: Law and Policy 3rd ed., Oxford 2013, p. 5.

2 TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

3 *Ibidem,* art. 1(2).

related rights[4], trademarks[5], geographical indications,[6] industrial designs[7], patents[8], layout designs[9] and trade secrets[10]. What can be discerned in common amongst all of these types of international intellectual property rights is that they protect moral, social and economic interests.[11] The other common feature of international intellectual property rights is that they uniquely straddle public and private interests, in that there is a public grant of an exclusive private property right of a specified duration and a somewhat qualified private right of self-determination as to how to use and transfer that state-created property. While it is the creator or inventor who provides the definition and substance of the intellectual property right, it is the state that is charged with delivering and delineating the duration, scope and types of available protection.

The possibility for the use of alternative dispute resolution (ADR) in international intellectual property law is not limited to a specific category of rights. Even more importantly, ADR in the field of intellectual property law is not limited to a specific dispute or set of disputes and can deal with whatever scope the parties assign to its authority. Moreover, the use of ADR, dissimilar to a domestic legal system, is not necessarily constrained in geographical or jurisdictional scope and does not necessarily need to utilise and respect traditional conflict of laws rules or the dictates of private international law. ADR as a tool for resolving intellectual property law disputes can be as conceptually wide or as narrow as the parties choose to delineate in their dispute resolution clause or agreements to submit a claim or claims to ADR.[12] This article will demonstrate how alternative dispute resolution, in particular international arbitration, can be utilised to remove intellectual property disputes from the archaic system of domestic peculiarity to a place where bundles of rights and multiple disputes can be simultaneously resolved in a manner that meets the demands of a truly globalised marketplace. 'Intellectual property disputes can scare away potential investors or ruin an acquisition or initial public offering'[13]; however, the strategic use of ADR in the form of international arbitration can help to manage these problems and abate those lasting consequences.

4 *Ibidem,* arts. 9–14.
5 *Ibidem,* 2, arts. 15–21.
6 *Ibidem*, arts. 22–24.
7 *Ibidem*, arts. 25–26.
8 *Ibidem*, arts. 27–34.
9 *Ibidem*, arts. 35–38.
10 *Ibidem*, art. 39.
11 *See* C. Waelde et al., Contemporary …, *op. cit.*, pp. 7–8.
12 W. Fox Jr., International Commercial Agreements: A Primer on Drafting, Negotiating, and Resolving Disputes 3rd ed., The Hague 1998, p. 171.
13 J.C. Milleret et al., The Handbook of Nanotechnology, Hoboken 2005, p. 254 (2005), *referencing* A.E. Silverman, Intellectual Property Law and the Venture Capital Process, "High Technology Law Journal" 1989, vol. 5, no. 1, pp. 157–92.

2. Adopting the ADR Perspective: the Pathway to International Arbitration

A management perspective typically foresees an intellectual property law contract from a purely profit-making motive in that the steps to a successful licensing strategy are: '[F]irst … the identification of a licensable opportunity, which may require the patent owner to sue people, or threaten to sue people, or to license the technology … second … the strategy of how you're going to realize the value from the patents … [a]nd … third … is the implementation … [k]eep[ing] in mind that it's a lot easier to identify the dollar potential of a technology than to identify when licensing revenue is going to come in.'[14]

It is, however, equally vital at the outset of negotiation or contract planning processes to consider that everything will not necessarily run as predicted and legal disputes will occur and perhaps even become commonplace – making it essential to conceptualise *how* and *when* these intellectual property disputes will be resolved, and *what* is the most cost- and time-efficient mechanism on the market. How disputes are resolved and whether enforcement of a judgement in foreign jurisdictions is possible will undoubtedly affect the financial bottom line of all intellectual property transactions. In this regard has been noted that: 'Managing litigation costs for the long term requires the firm to evaluate its portfolio strategically, looking ahead several years at the kinds of products or services it wants to offer in order to determine the evolution of its patent [or other intellectual property rights] position.'[15]

In order to address these strategic and operational concerns, managers of intellectual property can deal with ADR at two distinct levels.

The first level is that of the corporate philosophy or litigation outlook. Entities holding or managing intellectual property must make internal decisions about corporate governance that dictate how the organisation responds to potential or present disputes. As companies holding significant amounts of intellectual property rights move away from being '"product-revenue only" firm[s]' to instead obtain 'significant revenue from licensing … intellectual property' and resultantly the exposure to international contractual disputes increases exponentially, it will become essential to orient the corporate culture towards alternatives to international litigation.[16] For instance, DuPont, a Fortune 500 company[17] and one of the largest proprietary technology companies in the world that presently holds the rights and

14 J.L. David & S. Harrison, Edison in the Boardroom: How Leading Companies Realize Value from Their Intellectual Assets, Hoboken 2001, p. 75.

15 P.H. Sullivan, Value-Drive Intellectual Capital: How to Convert Intangible Corporate Assets into Market Value, United States 2000, p. 71.

16 S.S. Harrison & P.H. Sullivan Sr., United Einstein in the Boardroom – Moving Beyond Intellectual Capital to I-Stuff, United States 2006, p. 62.

17 Fortune Magazine Global 500 2021, http://fortune.com/global500/dupont-320/ (10.05.2021).

accompanying contracts related to a vast catalogue of intellectual property, decided to embark on what it has entitled a 'Sustainable ADR Culture'.[18] Responding to studies and research about the effect of disputes on the corporate bottom line, DuPont's corporate executives' realisation aptly demonstrates the incorporation of a holistic ADR approach at the corporate level into an intellectual property driven environment in that:

> While an intellectual understanding of ADR's benefits is helpful, empowering more than 200 lawyers around the globe to practice high-quality ADR and create a sustainable culture to support it into the future requires nuts and bolts, policies and procedures that are clear, detailed, and practical.
>
> In 2011, we realized that DuPont's multiplicity of cross-border contracts probably had outstripped any updated available internal guidance on how to contract for alternative dispute resolution. My colleague and boss Tom Sager commissioned a Global ADR Team to create what we initially conceived as a short guide for how to craft ADR clauses in contracts worldwide.[19]

That proposed 'short guide' became a 58,000-word manual that is now used across DuPont's offices worldwide.[20] A corporation that has adopted this type of pro-ADR stance should ensure that the dispute resolution clause is not given the typical short shrift at the end of a contractual negotiation and simply boiler-plated into an otherwise well thought out intellectual property agreement. Instead, a corporate-level ADR orientation should ensure that the use of dispute resolution is given priority as part of the organisational psychology and overall daily business framework. Theoretically, this pro-ADR corporate stance will permeate into the climate of overall corporate contracting – placing dispute resolution as a priority at the front end of a contractual relationship – shifting the paradigm of addressing ADR into a period of goodwill and observance during and shortly after initial contract negotiation – rather than having ADR arise in response to an eventual breach as an alternative to proposed litigation.

The second level at which the intellectual property manager should consider ADR is the contractual level. Irrespective of whether a corporate philosophy dictates that ADR should be prioritised, there are distinct protection benefits to be reaped from customising ADR clauses in intellectual property contracts. '[M]anaging uncertainty should be the cornerstone of … negotiation strategy'[21] to ensure that the important nuances of intellectual property rights protection are adequately dealt

18 The DuPont Company's Development of ADR Usage: From Theory to Practice, http://www.americanbar.org/publications/dispute_resolution_magazine/2014/spring/the-dupont-company-s-development-of-adr-usage--from-theory-to-pra.html (3.04.2015).

19 *Ibidem.*

20 *Ibidem. See also*, DuPont Global ADR Guide (Internal Document). This part of the document is not generally available to the public and was disclosed as a result of email correspondence with one of the users.

21 M. Wheeler, The Art of Negotiation: How to Improvise Agreement in a Chaotic World, United States 2013, p. 13.

with so as to prime or customise a proposed arbitration clause to serve as a vehicle for adequate international protection. To achieve this clausal specification, those managing the negotiation of contracts may need to override 'a temptation amongst non-contentious lawyers [whether in-house or outside counsel] to assume that ADR solely concerns litigation and is therefore not within their concern or province' since it is these lawyers that will bear primary responsibility for the drafting of the commercial agreement.[22] Negotiating the dispute resolution clause may for instance ensure that a particular law is designated that is favourable to a particular type of intellectual property to be licensed. It also allows the parties the flexibility to agree that a prospective arbitration should be administered by or held in a particular arbitral institution or to proceed on specific arbitral rules that are oriented towards the resolution of intellectual property disputes.[23] In the absence of any contract or even after a contract is adopted, a manager seeking to submit an intellectual property dispute to ADR must remain seized of potential litigation risks because: 'The ability to know when and how a company is at risk of infringement liability is important. Perhaps of even greater importance is whether potential litigants are infringing upon the firm's intellectual property and whether the competitor has previously signed a non-disclosure agreement or is party to a contract or supplier agreement. All of this information, when correlated, is part of the creation of a viable litigation avoidance capability.'[24]

Part and parcel of this litigation avoidance strategy will be the manager's ability to 'implement an IP enforcement strategy that is proactive',[25] having at hand a viable toolkit containing alternative methods for resolving these complex disputes, whether in the form of submission to arbitration, expert determination, or referral to mediation.[26]

3. From ADR to Arbitration: International Arbitration as the Preferred Form of ADR for International Intellectual Property Disputes

A successfully executed arbitration clause resulting in an international arbitration award has the potential to leave parties in a state of legal certainty that has no modern equivalent in any system of domestic, regional or international law. A matter properly

22 K. Mackie et al., The ADR Practice Guide: Commercial Dispute Resolution, United States 2002, p. 123.

23 *See, e.g.*, WIPO Alternative Dispute Resolution (ADR) for Intellectual Property Offices, https://www.wipo.int/amc/en/center/specific-sectors/ipoffices/ (10.05.2021).

24 P. H. Sullivan, Value-Driven …, *op. cit.*, p. 219.

25 R. D. Ryder & A. Madhavan, Intellectual Property and Business: The Power of Intangible Assets, United States 2014, pp. 119–20.

26 *Ibidem,* pp. 113–18. *Nota Bene:* Reference is made to both mediation and arbitration as possible proactive intellectual property enforcement strategies.

resolved by arbitration not only leaves the matter *res judicata*[27], however; provided it is conducted in a state party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[28] (New York Convention), and it is both international[29] and in writing[30], it leaves the resulting award cognisable and enforceable in 168 reciprocal jurisdictions.[31] The reciprocal recognition and enforcement available in

27 For a more comprehensive discussion on the qualities of finality in international commercial arbitration *see*, T. Cook & A.I. Garcia, Intellectual Property Arbitration, Netherlands 2010, pp. 38–41. *See also*, G.R. Shell, Res Judicata and Collateral Estoppel Effects of Commercial Arbitration, "UCLA Law Review" 1988, vol. 35, p. 623. This article offers a more specific discussion on the relationship between the concept of *res judicata* and the practice of international commercial arbitration.

28 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2519, 330 U.N.T.S. 3 [hereinafter New York Convention].

29 *Nota Bene:* To 'internationalise' arbitration there are two factors to be examined. The first factor is the nationality of the parties. The second factor, the nature of the dispute, must be examined to determine whether there is an obligation imposed by the contract that 'extend(s) beyond national borders' or the very wide definition adopted by the French that it 'involves the interests of international trade'. For a full explanation *see*, R.N. Blackaby et al., Redfern and Hunter on International Arbitration, Student Edition, Oxford 2009, p. 14.

30 New York Convention, *op. cit.*, Article II(2). For a further explanation *see* A. J. van den Berg, The New York Convention of 1958: An Overview, pp. 6–9, http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf (27.04.2015). According the first paragraph of Article II, an 'agreement in writing' encompasses an agreement 'under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them'. This statement has the effect that the New York Convention treats both the submission agreement (*acte de compromis*) by which an already existing dispute is referred to arbitration and the arbitration clause (*clause compromissoire*) by which a possible future dispute shall be submitted to arbitration as having equivalent legal status.

31 The signatory status of the treaty reflects that there are currently 168 states parties to the New York Convention, http://www.newyorkconvention.org/new-york-convention-countries/contracting-states and http://www.newyorkconvention.org/contracting-states/list-of-contracting-states (10.05.2021). While the New York Convention offers the most widespread universal coverage for an arbitration award, parties should also have regard to regional instruments that may provide additional or more nuanced reciprocity. In this connection the website provides references to treaties of interest. In particular, *see also,* 1991: Mercosur Treaties – Treaty Establishing a Common Market Between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, 1979: Montevideo Convention – Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards, 1975: Panama Convention – Inter-American Convention on International Commercial Arbitration, 1972: Moscow Convention – Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation, 1969: Vienna Convention – Vienna Convention on the Law of Treaties, 1965: Washington Convention – Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1961: Geneva Convention – European Convention on International Commercial Arbitration, 1927: Geneva Convention – Convention on the Execution of Foreign Arbitral Awards, 1923: Geneva Protocol – Protocol on Arbitration Clauses http://www.newyorkconvention.org/other-relevant-conventions (10.05.2021).

the New York Convention is a unique feature of the arbitration landscape as there is no international equivalent for a domestically litigated outcome or mediated settlement agreement and there is unlikely to be an equivalent in the foreseeable future. According to the World Intellectual Property Organization, intellectual property disputes tend to share international, technical, urgent, confidential and reputational characteristics accompanied by a need for decisional finality.[32] These features together lend themselves to the use of international arbitration as a primary means of dispute resolution,[33] in particular because arbitration: '[P]rovides a single neutral forum in which intellectual property disputes involving different national markets and parties from different countries can be [conclusively] resolved … [since] neither party is likely to want to litigate in the other party's courts, and a single forum may be preferable to a multiplicity of national court actions for disputes involving different national and regional intellectual property titles covering the same subject matter.'[34]

Moreover, arbitration removes potential disputes from the ambit of the domestic court systems of developing or other countries where the judges are often inadequately trained, inexperienced or overburdened and cannot as such expeditiously or properly adjudicate or opine on matters of intellectual property law.[35] In this way international arbitration offers the intellectual property manager a private contractual alterative to a known public risk.

The type of legal certainty offered by arbitration is particularly crucial for resolving disputes that involve intellectual property rights.[36] All intellectual property rights inherently have strictly constructed timeframe limitations on the grants of exclusivity. Elongated international litigation can undoubtedly affect the ability of the parties to confidently exploit, license, market and use a right which has both a negative private and public impact; the owner cannot exploit their property for profit while society cannot benefit from access to the creation.[37]

In addition to the privileged reciprocal position of international awards, arbitration clauses also benefit from an essential 'separability' from the main contract. The doctrine of 'separability' or '*l'autonomie de la clause compromissoire*'

32 World Intellectual Property Organization, Why Arbitration in Intellectual Property?, available at http://www.wipo.int/amc/en/arbitration/why-is-arb.html (10.05.21).

33 *Ibidem.*

34 R.H. Smit, General Commentary on the WIPO Arbitration Rules, Recommended Clauses, General Provisions and the WIPO Expedited Arbitration Rules: Articles 1 to 5; Articles 39 and 40, (in:) H. Smit (ed.), WIPO Arbitration Rules: Commentary and Analyses, Huntington, NY 2009, pp. 5–6.

35 *See e.g.*, X. Li, Ten Misconceptions About the Enforcement of Intellectual Property Rights, (in:) X. Li & C.M. Correa (eds), Intellectual Property Enforcement: International Perspectives, Northampton, MA 2009, pp. 33–34.

36 R.D. Ryder & A. Madhavan, Intellectual Property …, *op. cit.*, p. 118.

37 R.H. Smit, General Commentary …, *op. cit.*, p. 5.

is a cornerstone of international arbitration. It exists in most jurisdictions including both the UNCITRAL Model Law[38] Art. 16(2) and in the United States[39] to prevent the subversion of the arbitration clause 'by questioning in court the existence or validity of the main contract'.[40] In legal theory 'separability' can be conceived of either a contract that contains an autonomous and 'separable' surviving element or that there is a second collateral contract contained in the arbitration clause. For instance, UNCITRAL Model Law[41] states that 'an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract'. Of all the forms of ADR, 'only in the case of arbitration do parties know that they will obtain a decision'.[42] Resultantly, arbitration is a very dependable and predictable form of dispute resolution since the legal vulnerabilities of the underlying contract are irrelevant to invoking the clause at the point of dispute and needing to succumb to the designated arbitration process contained therein.[43]

Another cornerstone of international arbitration beneficial for the intellectual property law user is the doctrine of competence-competence.[44] This doctrine permits the arbitration panel to rule on the nature and extent of their own jurisdiction. In jurisdictions that have adopted the UNCITRAL Model Law[45] the position of competence-competence is rather clear. The UNCITRAL Model Law expressly affords competence-competence powers to the arbitrators.[46] The UNCITRAL Model Law Art 16(3) also makes available the possibility of simultaneous judicial review[47] enabling parties to save time and money, which are the chief concerns from the business perspective of an intellectual property manager and may be the impetus for choosing a UNCITRAL Model Law country as an arbitral seat.[48]

38 U.N. Commission on International Trade Law, Report on its 39th Session, 19 June-7 July 2006, U.N. Doc. A/61/17 (14 July 2006) [hereinafter UNCITRAL Model Law]. As of this writing, legislation based on the Model Law has been adopted in 67 states in a total of 97 jurisdictions. A detailed jurisdictional breakdown is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (27.04.2015).

39 *See*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). *See also*, Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440 (2006).

40 R.N. Blackaby et al., Redfern and Hunter on International Arbitration, Student Edition, Oxford 2009, pp. 162–63.

41 UNCITRAL Model Law, *op. cit.*, art. 16(1).

42 A. Lloreda, Exploring Alternative Dispute Resolution, (in:) L.G. Bryer et al. (eds.), Intellectual Property Strategies for the 21st Century Corporation: A Shift in Strategic and Financial Management, Hoboken 2011, p. 194.

43 *See*, R. H. Smit, General Commentary …, *op. cit.*, p. 5.

44 *Nota Bene*: Also commonly known by the German 'kompetenz-kompetenz'.

45 *See*, A. Lloreda, Exploring…, *op. cit.* and accompanying text.

46 UNCITRAL Model Law, *op. cit.*, art. 16(1).

47 *Nota Bene*: Judicial review can be commenced at the same time as the arbitration of the substantive claim.

48 R.D. Ryder & A. Madhavan, Intellectual Property …, *op. cit.*, p. 118.

In order to give effect to a qualified possibility of competence-competence doctrine in U.S. law under the Federal Arbitration Act[49], the Supreme Court has artfully navigated the language[50] that assigns the courts the authority to determine whether the parties have in fact agreed to arbitration.[51] Following the decisions in *ATT Corp. v. Communication Workers of America*[52] and *First Options of Chicago, Inc. v. Kaplan*[53] the Supreme Court has established a requirement that an arbitration clause expressly indicates in clear and unmistakable language that the parties intend to delegate the competence to decide issues of arbitrability to the arbitration panel.[54] U.S. courts have found that incorporating arbitration rules that specifically allow for competence-competence into the arbitration clause is sufficient to meet this threshold.[55] In the *Rent-A-Center, West, Inc. v. Jackson* [56] decision, the Supreme Court presented the legal theoretical construction of the delegation clause as being a distinct instrument within the arbitration clause that is considered to have its own element of 'separability', allowing for the arbitration panel to have the competence to decide the ambit of their own jurisdiction independent of concluding the question clausal validity. However, in *Rent-A-Center*, the Supreme Court declined to resolve the exact ambit of a permissible delegation.[57] Resultantly, the rather wide language used by the Supreme Court in *First Options*[58] is open to interpretation by lower courts, some of which have gone as far as allowing parties to, in their arbitration clause, clearly and unmistakably designate that the arbitration panel has the inherent competence to determine the existence and validity of the arbitration agreement itself.[59]

49 U.S. Code > Title 9 Arbitration > CHAPTER 1—GENERAL PROVISIONS (§§ 1–16).

50 U.S. Code > Title 9 Arbitration > CHAPTER 1—GENERAL PROVISIONS (§ 4). Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

51 For a more complete discussion of the evolution of competence-competence in U.S. arbitration law *see* G. B. Born, International Commercial Arbitration in The United States: Commentary and Materials, New York 1994, pp. 231–84.

52 AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643 (1986).

53 First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, p. 943 (1995).

54 AT&T Techs. …, *op. cit.*, p. 649.

55 J.M. Graves, Competence-Competence and Separability – American Style, (in:) S. Kröll et al. (eds), International Arbitration and International Commercial Law: Synergy, Convergence and Evolution, Netherlands 2011, p. 162.

56 Rent-a-Ctr., W., Inc. v. Jackson, 130 S. Ct. 2772, p. 2779 (2010).

57 *Ibidem*. p. 2778.

58 First Options of Chi., Inc. v. Kaplan, *op. cit.*, p. 939.

59 *See, e.g.,* Riley Mfg. Co. v. Anchor Glass Container Corp., 157 F.3d 775, 779 (10th Cir. 1998), *and* Abram Landau Real Estate v. Bevonna, 123 F.3d 69, 73 (2nd Cir. 1997). For a more comprehensive treatment s*ee also*, G. A. Bermann, The 'Gateway' Problem in International Commercial Arbitration, "Yale Journal of International Law" 2012, vol. 1, 37, no.1, p. 39. *Nota Bene*: In footnote 174, Bermann analyses these cases and makes the point that not all lower courts take such a permissive reading of First Options and compared these cases with China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274, 287–88 (3rd Cir. 2003), *and* Sphere Drake Ins. Ltd.

The dependability of having an award that is internationally cognisable and enforceable under the New York Convention, together with the essential doctrines of separability and competence-competence, make arbitration the safest and most predictable method of dispute resolution. Certainly, from an intellectual property perspective, these core unique features of the arbitration landscape combine to make arbitration preferable to mediation, where there is absolutely no certainty that there would be any result and there are inherent issues of cross-border enforceability of any resulting settlement agreement.[60]

4. Arbitrating Intellectual Property Disputes

International intellectual property disputes generally come to arbitration in one of three ways. The way in which intellectual property disputes come to arbitration often affects the nature and scope of the proceedings. It also affects parties' ability to control the content, process and apparatus of the arbitration.

Firstly, some international intellectual property matters can be subject to compulsory arbitration.[61] An example of compulsory arbitration is the ICAAN Uniform Domain Name Dispute Resolution Policy[62], which operates in relation to the resolution of a number of trademark-based domain-name disputes and in particular '[d]isputes alleged to arise from abusive registrations of domain names (for example, cybersquatting) [that] may be addressed by expedited administrative proceedings that the holder of trademark rights initiates by filing a complaint with an approved dispute-resolution service provider'.[63] The push for compulsory arbitration is on the upward trend in the international intellectual property area with disputes over fair, reasonable and non-discriminatory licence obligations for standard-essential patents[64] headed in the direction of referral to compulsory arbitrations.[65]

Secondly, international intellectual property disputes may come to arbitration by a written agreement of the parties to a dispute or disputes that submits them

v. All Am. Ins. Co., 256 F.3d 587, 591 (7th Cir. 2001), where the lower courts held that when parties contested the existence of the arbitration agreement, they were entitled to a judicial hearing. In Sphere there was a special issue of contractual agency that further distinguishes that decision.

60 R.D. Ryder, A. Madhavan, Intellectual Property…, *op. cit.*, p. 118.

61 This article will not deal further with the specific scenarios of referral to compulsory arbitration.

62 Uniform Domain Name Dispute Resolution Policy as Approved by ICANN on 24 October 1999, available at https://www.icann.org/resources/pages/policy-2012-02-25-en (10.05.2021).

63 *Ibidem.*

64 *Nota Bene:* More commonly known by the term 'FRAND Disputes'.

65 *See*, V. Mascarenhas, Using 'Baseball Arbitration' to Resolve FRAND Disputes, "Corporate Counsel" 2015 http://www.kslaw.com/imageserver/KSPublic/library/publication/2015articles/2–11-15_CorpCounsel_Mascarenhas.pdf (5.04.2015). *See also*, G. Blanke, Samsung Electronics offers arbitration commitment under article 9 of Regulation 1/2003, "Global Competition Litigation Review" 2014, vol. 7 no. 2 pp. 27–28.

to arbitration. Typically, this submission agreement will specify, as required, the institution, arbitration law, substantive law, rules, *situs* and any other matters necessary for an arbitration to take place.[66] This type of agreement would be the preferable method of voluntarily consolidating several intellectual property disputes in one or several jurisdictions into a single matter to be decided by a single panel of arbitrators.

Thirdly, a dispute resolution or arbitration clause can be placed in any contract between parties that mandates arbitration for all or some matters that make up the substance of that contractual relationship. The remainder of this article will be focused on this third aspect of the utility of negotiating, optimising and drafting these dispute resolution or arbitration clauses as a pathway to resolving international intellectual property disputes. The category of submission agreements, while having a similar content and effect to contractual arbitration clauses, are rarely if ever drafted in a set of optimal circumstances that will allow for a full customisation of the arbitration schematic to meet all the peculiarities of intellectual property rights.

5. Subject Matter Arbitrability and the Intellectual Property Preclusion

Whether drafting a submission agreement or writing an arbitration clause the issue of subject matter arbitrability must be considered in relation to the domestic law of the intellectual property right that is to become the subject of the arbitration clause. Subject matter arbitrability must also be considered in the designation of the *situs* or law governing the arbitration. To avoid negligence, organisations and management dealing with intellectual property 'should be aware of the risks to its customers or suppliers inherent in business operations'[67] and a poorly drafted or ineffectual arbitration clause is no exception.

To understand the notion of preclusion of certain subject matter from being arbitrable one should turn to the public–private interest dichotomy[68] that is inherent in intellectual property law disputes. This dichotomy is helpful in understanding the nature of disputes that arise in intellectual property law because litigated intellectual property conflicts tend to divide along these bright lines. It must be said at this point that the public–private interest dichotomy can be essential at the outset to understanding when, whether and to what extent it is appropriate or possible to use

66 M.L. Moses, The Principles and Practice of International Commercial Arbitration, Cambridge 2008, pp. 40–42. *Nota Bene*: As a creature of the law of contract, arbitration clauses have 'essential requirements' without which an arbitration clause cannot be executed or take effect.

67 P.D. Shaw, Managing Legal and Security Risks in Computing and Communications, Oxford 1998, p. 70.

68 *See* e.g., C. McSherry, Who Owns Academic Work, Cambridge, MA 2001, pp. 28–32. The author provides examples and a discussion of this dichotomous relationship and public–private tension within the contemporary intellectual property field.

ADR, and in particular international arbitration, in place of recourse to the domestic courts.

Disputes having a public interest character generally arise when the basis or extent of the grant or denial of an intellectual property right is at issue. Disputes having a private interest character generally arise when the owners of a right are seeking to avail themselves of their grants of protection in the marketplace whether assigning, licensing, retaining or preventing unauthorised use of a claimed or established right. For the purposes of arbitration, this public and private law dichotomy often determines or should be considered when determining whether the conflict is one that only a state can render a final valid answer upon or is the type that can be resolved between the parties without the need for a definitive answer from the domestic authorities granting or courts upholding the underlying intellectual property right. Similarly, the choice of law rules of many states have been equally deferent to the territorial nature of intellectual property rights,[69] with the courts reluctant to provide a forum for the resolution of foreign intellectual property matters.[70] While not all states permit intellectual property matters of any form to be arbitrated, at least conceptually, in the case of a contractual breach a matter will clearly be a private matter eminently capable of determination by arbitration. Equally, when the ownership and parameters of an intellectual property right are clear, a matter alleging infringement of a right will be capable of being submitted to arbitration by agreement of the parties to the dispute. An indication of where international arbitration law may be headed can be found in *Lucasfilm v. Ainsworth*[71], where the UK Supreme Court finally recognised the ability in private international law for parties to bring a UK infringement action based on foreign intellectual property law when the issue of validity was clear and there would otherwise be jurisdiction *in personam*. However, the problem of subject matter arbitrability (as with jurisdiction in domestic courts) still remains in a situation where the basis or extent of a right are unclear and for instance a defence is raised to breach or infringement based on the purported invalidity or expiry of a right granted by a state. In this situation the pervasive school of thought remains that it is only the state granting the right that is sufficiently qualified to opine on its validity or existence because in terms of practicality it alone has the power to record or cancel such a right.[72] In addition to validity claims, issues of anti-trust, purported criminal conduct, export controls and

69 C. Waelde et al., Contemporary …, *op. cit.*, pp. 969–70. *See*, British South Africa Co v. Companhia de Mocambique AC 602 (1893) (appeal taken from Eng.).

70 *Ibidem.*, pp. 970–71.

71 Lucasfilm v. Ainsworth (2011) UKSC 39, (2012) 1 AC 208, (2011) 3 WLR 487 (appeal taken from Eng.).

72 *See,* S.A. Certilman & J.E. Lutsker, Arbitrability of Intellectual Property Disputes, (in:) T.D. Halket (ed.), Arbitration of Intellectual Property Disputes, Huntington, New York, 2012, pp. 72–83.

other trade restrictions are intellectual property law matters commonly thought to be legally unsuitable for resolution by international arbitration.[73]

As previously discussed, international arbitration, as such, is predicated on the inherent ability to similarly enforce a single valid award across multiple jurisdictions. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides this mutual enforceability of awards in Article 1 (1), which provides that: 'This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.'

The New York Convention does not provide any explicit limitation on the subject matter of arbitration. However, Article 5 (2) (a) and (b) provides:

'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.'

These additional grounds for refusal of recognition and enforcement of an award, while not outcome determinative, can have a direct effect on the eventual viability of an arbitral award concerning intellectual property subject matter.

Firstly, certain states may designate intellectual property as a subject matter that is 'off limits' to arbitration, meaning that parties cannot legally contract out of the use of the domestic legal system.[74] A state making this designation will not only refuse to recognise and enforce awards made subject to arbitration clauses in contracts subject to their own arbitration laws, but presumably additionally refuse awards made in comparatively similar circumstances in other New York Convention signatory states, especially those awards where the underlying substantive intellectual property law used in the arbitral determination is the law of that state. When the underlying intellectual property right that is the subject matter of dispute is premised on the domestic law of the precluding state and that state has precluded this subject matter,

73 *Ibidem,* pp. 66–87. *Nota Bene:* It should be noted that just because the use of international arbitration may be precluded or enforcement prevented, parties might still be free to settle any dispute using mediation (even if they don't settle the underlying public grant of a right question); however, there is no mutual enforcement mechanism similar to the New York Convention for the resulting agreements.

74 *Ibidem,* pp. 88–95.

there is no conceivable way to change the substantive law of the subject matter to that of another state. This inherent restriction means that nothing can be done to craft or otherwise creatively shape the dispute resolution clauses or submission agreements to circumvent any preclusions in relation to intellectual property matters that a state chooses to put in its arbitration law.

The reality of certain states considering some aspects of intellectual property law as being unsuitable subject matter for arbitration poses an inherent limitation on the use of arbitration in intellectual property contracts and submission agreements and is a circumstance that the contracting parties must be seized of in planning and executing the dispute resolution clauses of their contracts, with particular attention being paid to which states currently maintain this prohibition. Although it is difficult to navigate the prohibitions in all potential jurisdictions, and also inherently restricting, Article 5 (2) (a) provides a limitation that is eminently predictable when writing an arbitration clause.

Secondly, Article 5 (2) (b) provides a general 'public policy' exception to the enforcement of certain awards. It is unquestionable that the range of rights engendered in intellectual property law are matters of public interest and can potentially fall foul of this public policy exception to enforcement under the New York Convention. While case law[75] and academic opinions[76] may provide a useful guide of the typology of intellectual property disputes that may trigger the public policy exception to enforcement in select jurisdictions, even with the best research, they cannot provide a finite list of when Article 5 (2) (b) may be used to prevent enforcement of an arbitral award. Dissimilar to Article 5 (2) (a), the public policy exception is unpredictable and as such presents an inherent vulnerability that must be taken into account by those managing intellectual property rights and assessing the suitability of an arbitration clause. Those intellectual property managers that are reluctant to use arbitration for these reasons might instead consider mediation as an alternative, since mediation is generally not restricted by subject matter. However, mediation settlement agreements, as is the case with regular contracts and court judgements, do not benefit from the automatic mutual recognition and enforcement mechanisms uniquely found in the New York Convention, the reciprocity of which lies at the heart of the attractiveness of the use of international arbitration.

75 For a more complete discussion of exceptions to enforcement *see*, K. Troller, Intellectual Property Disputes in Arbitration, "Arbitration: The International Journal of Arbitration, Mediation and Dispute Management" 2006, vol. 72, pp. 323–24. *Nota Bene*: A discussion of which aspects of industrial property are not arbitrable.

76 *Ibidem.*

6. Cautions and Disadvantages Relating to the use of International Arbitration for International Intellectual Property Disputes

It has been noted that arbitrators lack *imperium*.[77] In other words arbitrators lack the power vested in the court to 'force parties to the arbitration to do something or refrain from doing something'.[78]Arbitrators also completely lack authority over third parties.[79] In order to compel compliance with an arbitral order parties would generally have to seek a judicial remedy, rely on external legislation in the arbitral law of the country, or seek compensation under the institutional rules of arbitration.[80] Interim measures, especially those mandating that a party cease and desist a behaviour such as the unauthorised production, copying or sale of intellectual property, are particularly important to mitigating accruing harm in an intellectual property context. Interim measures are in fact possible in most *situs* and specified in institutional rules.[81] However, absent voluntary compliance, the coercive power stemming from *imperium* can only come from a domestic court.[82] The result is a potentially cumbersome and duplicative process of first getting relief from the arbitral panel and then enforcement from the court. Alternatively, many arbitration laws allow parties to bypass the arbitrators altogether and seek interim relief directly from the court before or simultaneously with the arbitration,[83] the cost and time of which certainly vitiates against the advantage of a streamlined one-stop shop international arbitration process.

International arbitrations are confidential and outside the public eye and are generally not reported in any form.[84] As such, international arbitration awards are a one-off decision that does not set precedent for future arbitrations or law.[85] Even the same arbitrators sitting in another arbitration with identical facts may freely choose a new legal direction on the same subject matter. It might be said that intellectual property law is a vast area filled with legal nuances in need of clarity. Removing these disputes from the public domain prevents the formation of new law. The clarity emerging from this new law can be the understanding that prevents the re-

77 T. Cook, A.I. Garcia, Intellectual …, *op. cit.*, pp. 34–35.
78 *Ibidem.*
79 *Ibidem,* pp. 35–36.
80 *Ibidem.*
81 J. Epstein et al., A Practical Guide to International Commercial Arbitration, Dobbs Ferry 2000, pp. 96–97.
82 *Ibidem*, p. 96.
83 *Ibidem*, p. 97.
84 *Nota Bene*: Some parties may choose to make decisions available. Arbitral institutions may release anonymous decisions in relation to certain parts of arbitration such as disqualification of an arbitrator.
85 T. Cook, A.I. Garcia, Intellectual …, *op. cit.*, p. 36.

emergence of similar disputes by forcing future parties into compliance or ensuring early settlement.

A well-conceived arbitration clause leads parties to an early and inexpensive solution to their intellectual property law dispute. On the other hand, with a poorly drafted clause and a lack of ADR planning, international arbitration can, and often does, lead to prolonged conflict between the parties at even more time and expense than traditional international litigation. Whether forcing a party to arbitration, appointing an arbitrator, obtaining interim relief, seeking a set-aside, or preventing recognition and enforcement, there are many chances that a party will litigate issues before, during and after international arbitration. Although in an optimal scenario international arbitration can offer the best possible alternative to traditional litigation for intellectual property law disputes, there is absolutely no assurance that parties will wind up with a more streamlined process. The successful obtaining of real savings in cost and time will depend on the quality of the preparation, the circumstances of the case including the arbitrators themselves,[86] and most of all on the ADR attitude adopted by the parties.

Conclusion

The possibility for the use of ADR, in particular international arbitration in the field of international intellectual property law, is neither bounded by geography nor by the typology of underlying intellectual property right that becomes the substance of international contracting. However, international arbitration should not be viewed as a panacea for all aspects of international intellectual property transactions but rather viewed pragmatically as a toolkit offering distinct advantages over other forms of dispute resolution. To make optimum use of ADR in respect of international intellectual property transactions, the potential user should embrace the ADR outlook in both corporate philosophy and at the level of contracting. International arbitration will be the preferred method of ADR when an intellectual property entity has embraced the possibility of using ADR as the preferred or default mechanism for resolving international intellectual property disputes, and when a decision has been made to adopt ADR as the preferred approach to intellectual property disputes, users will find that international arbitration has many distinct advantages over other forms of dispute resolution.

A well-conceived international arbitration clause has the potential to resolve an intellectual property dispute by using a single self-contained process that results in a final award that is enforceable in most jurisdictions worldwide. There is no parallel

86 J.D. Wing, International Arbitration and Mediation – The Professional's Perspective, (in:) A. Alebekova, R. Carrow (eds.), International Arbitration and Mediation: From the Professional's Perspective, United States 2007, p. 29.

or equivalent in litigation, mediation or other dispute resolution method to the finality and mutual recognition and enforcement provisions that operate in international arbitration. Because of the time-sensitive nature of intellectual property rights due to their durational exclusivity, finality is of chief importance to the financial bottom line. The possibilities for enforcement under the New York Convention offer distinct possibilities for prompt and efficient recovery of assets wherever they may be located. Otherwise, judgement-proof entities that can shelter themselves from liability in international litigation cannot escape the mutual enforcement possible under the New York Convention. International arbitration clauses generally benefit from the concept of 'separability' and do not rise and fall with the existence of the commercial agreement to which they are appended. With the selection of an appropriate *situs* or with the benefit of a well-drafted arbitration clause, parties can allow for the arbitral panel to decide the nature and extent of their own jurisdiction. The doctrine of competence-competence allows for the parties to resolve most or all issues related to the international arbitration within the context of that single arbitration, preventing extraneous litigation in domestic courts that has a significant time cost to the underlying intellectual property rights.

While there are several ways in which international intellectual property matters can come to be decided by international arbitration, only in the case of an arbitration clause negotiated between the parties to a contract can parties avail themselves of the full spectrum of opportunities open to the intellectual property users. When intellectual property lawyers and their clients have adopted a pro-ADR outlook, they will be able to customise the arbitration clause in several ways that are significant for the management of intellectual property disputes. At the outset of evaluating whether international arbitration is a suitable dispute resolution mechanism, parties must be seized that not every type of intellectual property dispute is well suited for arbitration and certain intellectual property disputes will be wholly precluded from being the subject of international arbitration in respect of the arbitration laws of certain countries. Once parties have done their due diligence in assessing the suitability of international arbitration for the resolution of the probable disputes resulting from their commercial agreement, they should ensure that the arbitration clause has certain *de minimis* characteristics. These essential elements would include a designation of the scope of the subject matter that is to be arbitrated that aligns with the law of the *situs*; an unequivocal statement that arbitration is the only dispute resolution method; and that its results are final and binding. Parties should be acutely aware that an arbitration clause is a legally complex and precise instrument and in the case of intellectual property can contain up to six distinct systems of law, aside from the domestic law, which governs the intellectual property rights that are the subject of the contract. One way of dealing with the legal challenges of drafting a suitable arbitration clause is to rely on 'standard' or 'model' clauses that have propagated by international arbitration institutions. While a party-drafted clause leading to an ad

hoc international arbitration will offer the highest degree of customisable law and process, it is also the most challenging clause to draft and can lead to difficulties in organising the arbitration should a dispute arise. The WIPO has written a model clause for international intellectual property users and offers the WIPO Center for Arbitration as the accompanying administrative facility with an established roster of international arbitrators who specialise in intellectual property disputes. Intellectual property users may also opt to combine the best features of several arbitration institutions by using one institution to provide the rules and host the arbitration and another to provide for the appointing authority for the arbitral panel.

There are three significant ways in which the arbitration clause can be made particularly amenable to the needs of intellectual property users. Parties can heighten the level of confidentiality associated with the arbitration process providing added secrecy and security for their intangible assets, which is especially useful in the case of trade secrets, know-how and proprietary information. Parties gain the ability to select decision makers who have the relevant scientific or specialist knowledge in the field of intellectual property to adequately address the particularities of the anticipated dispute. Finally, parties gain access to an array of possibilities for consolidation and joinder, which is particularly useful for users who anticipate the possibility of litigating the same issue with several parties or litigating several related issues with the same party or dealing with a parent company and its multiple subsidiaries.

There are also significant detriments to using international arbitration. Significantly, arbitrators lack *imperium* and do not have the coercive powers of the domestic courts, especially with respect to third parties. Enforcing interim measures can require side litigation in multiple domestic jurisdictions, significantly vitiating against the cost benefit of arbitration. Arbitration does not lead to precedent or settled law. Issues of importance in international intellectual property law contracting may resultantly remain without definitive answers and international arbitrations may yield inconsistent legal results. Finally, the time and cost savings, which are so important for the intellectual property user, can be easily lost because of failures in the arbitration clause, improper planning, or parties resorting to litigation to try to stall or sabotage the smooth running of an arbitration.

International arbitration can offer the best-case scenario for parties requiring a time- and cost-efficient international dispute resolution mechanism that is customisable and private. This best-case scenario is only achievable if certain optimal circumstances are present; most importantly, that the parties have adopted a proactive and positive attitude towards resolving disputes using international arbitration as the preferred form of ADR. This positive and proactive stance should lead to parties making the fullest and best use of the creative possibilities of the arbitration clause to meet the subject matter peculiarities of international intellectual property law. Realising the full benefit of international arbitration for international intellectual property law is not just a reasoned legal choice but rather an attitudinal

stance to removing these disputes from the anachronistic need for litigation in multiple domestic jurisdictions and placing them in the only alternative and truly international forum that is both adaptable and capable *because* of subject-oriented design.

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The Strengthening Liaison between Data Protection, Antitrust and Consumer Law in the German and Italian Big Data-Driven Economies

Abstract: Nowadays, personal data represent a strategic asset for companies as they can significantly influence their market position. Indeed, the issues arising from the management of large amounts of data (so-called big data) are not only relevant for data protection authorities, since this practice has also induced the intervention of competition and consumer protection authorities. The digital economy has enhanced new forms of abuses of dominant position and unfair practices, which can be performed via the handling of big data. This paper starts by analysing the German antitrust authority vs Facebook decision in which the big-tech platform was sanctioned for having performed an exploitative abuse of dominant position through its data management strategy. Then, it focuses on the Italian antitrust authority vs WhatsApp decision, where WhatsApp was deemed responsible for unfair and aggressive practices aimed at extracting users' consent for data-sharing purposes. These two remarkable cases will be compared and further discussed, outlining the need to rethink the strengthening interplay between data protection, competition and consumer law, as it will entail a closer contact of the respective authorities to ensure the sustainability of digital markets.
Keywords: abuse of dominant position, big data, competition law, consumer law, data protection law, European single market

Introduction

Since the issuance of the General Data Protection Regulation (hereinafter GDPR),[1] privacy matters have gained increasing importance. Indeed, they have given

1 European Parliament and Council Regulation (EU) No. 679/2016 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free

rise to a cultural shift in people's awareness,[2] as they are becoming more sensitive to the personal data management strategies of companies, especially the ones carried out by the internet giants.[3] Even if big-tech firms – which maintain the largest data portfolios – are incorporated outside the European Economic Area (hereinafter EEA), they do not escape from the scope of the GDPR, since it is also applicable to every company wishing to start or carry on a business in the EEA.[4]

In a nutshell, the main goal of the GDPR is to make people able to control their data, giving them more decision-making power related to what data are stored, where they are stored, and who has access to them.[5] The GDPR has led most companies to work diligently to comply with its core principles[6] through a more transparent handling and protection of individuals' personal data.[7]

Although data management is mainly related to privacy matters, a more in-depth analysis shows that personal data are also relevant under competition law and consumer law, considering that large quantities of data (so-called big data[8]) can be unlawfully managed to perform abuses of dominant position as well as unfair and aggressive practices.[9]

This article aims to explore the interplay between data protection, competition and consumer law by comparing two paradigmatic case studies within the German and Italian experience. It is organised as follows: Section 1 will be dedicated to

movement of such data (O.J. UE L 119/1, 4 May 2016).

2 European Commission, Data Protection Regulation one year on: 73% of Europeans have heard of at least one of their rights, 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2956 (16.03.2021).

3 Namely the so-called GAFAM (Google, Amazon, Facebook, Apple and Microsoft).

4 M. Kirsten, Ethical Issues in the Big Data Industry, "MIS Quarterly Executive" 2015, vol. 14, no. 2, pp. 67–85.

5 W. Presthus, H. Sorum, Are Consumers Concerned About Privacy? An Online Survey Emphasizing the General Data Protection Regulation, "Procedia Computer Science" 2018, pp. 603–611. Such control allows further objectives to be pursued, like fairness, and power asymmetries to be addressed.

6 It is also the result of the work carried out by the Data Protection Authorities across different countries to enforce compliance and ensure that the core principles at the heart of the GDPR were met. See P. Breitbarth, The impact of the GDPR one year on, "Network Security" 2019, p. 11.

7 European Data Protection Board, first overview on the implementation of the GDPR and the roles and means of the national supervisory authorities, 2019, p. 7.

8 According to the Oxford Learner's Dictionary, big data are 'sets of information that are too large or too complex to handle, analyse or use with standard methods', https://www.oxfordlearnersdictionaries.com/definition/english/big-data?q=big+data (24.09.2021).

9 The literature on this topic is vast. See, without claim of exhaustiveness, M. L. Montagnani, IP and data (ownership) in the new European strategy on data, "European Intellectual Property Review" 2021, vol. 43, no. 3, pp. 156–163; J. Cannattaci, V. Falce, O. Pollicino (eds.), Legal Challenges of Big Data, Cheltenham 2020; V. Falce, Uses and abuses of database rights: how to protect innovative databases without jeopardizing the Digital Single Market Strategy, (in:) P. Drahos, G. Ghidini, H. Ulrich (eds.), Kritika: Essays on Intellectual Property, vol. IV, Cheltenham 2020, pp. 180–222.

analysing the Bundeskartellamt vs Facebook case, which ended with Facebook Inc. (hereinafter Facebook) convicted for violating German antitrust rules. Section 2 will deal with a similar case in which the Italian Competition Authority applied consumer protection rules against WhatsApp Inc. (hereinafter WhatsApp), a Facebook subsidiary company. In Section 3, these two remarkable cases will be compared and further discussed also in the light of the European proposal for a Digital Markets Act, thus assessing the compatibility of the different measures put in place.

1. Summary and Impact Analysis of the *Bundeskartellamt vs Facebook* Case

In March 2016, the German antitrust authority (the Bundeskartellamt) started an investigation on Facebook's data processing policy. The aim was to assess its legitimacy under the competition law perspective, considering that the extensive data portfolio maintained by the big-tech platform could significantly alter the market balances, to the detriment of its users and smaller digital companies.

The investigation ended with Facebook prohibited from making the use of its social network by private users residing in Germany – including the other corporate services, like WhatsApp, Oculus, Masquerade and Instagram – conditional on the collection of user and device-related data by Facebook and combining that information with the Facebook.com user accounts without users' consent.[10] The decision was based on Sections 19(1), 32 of the German Competition Act (the GWB)[11] and its grounds mainly focused on Facebook's market power and its unfair commercial terms and conditions.

1.1. The Undemanding Assessment of Facebook's Dominant Position

According to the Bundeskartellamt findings, Facebook has a dominant position in the German market for social networks and it should therefore be subject to related control under antitrust rules. In particular, it emerged that Facebook has 2.3 billion monthly active users worldwide, of which 1.5 billion use Facebook daily. In Germany, the number of Facebook users was still increasing at the end of 2018 and amounted to approximately 32 million private monthly active users, of which 23 million were daily active users. The conclusion is that Facebook is the largest social network.[12]

Apart from Facebook, the German market for social networks has been composed of just a few tiny providers that cannot be considered potential competitors since most of them became insolvent or moved to another market. The

10 The Decision of the Bundeskartellamt of 6 February 2019, B6–22/16.

11 The German Act of 26 June 2013 – Against Restraints of Competition (Federal Law Gazette 2018, No. 1, item 1151, as amended).

12 Decision of the Bundeskartellamt, p. 2.

Bundeskartellamt considered that the downward trend in the remaining competitors' user-based market shares is a valid indicator of a market tipping process that will result in Facebook becoming a monopolist.[13] Other companies offering online professional networks or digital services, such as LinkedIn and Xing, likewise some messaging services, such as WhatsApp, cannot be included in the relevant product market since they are not in direct or potential competition with Facebook. The investigations have also shown that although YouTube's business model has some overlaps with those of social networks, its service is not sufficiently comparable to a social network. The same applies to Snapchat, whose core function is a camera automatically opening to take 'snaps' that are deleted after a short while. Even if Twitter, Pinterest and Instagram (a Facebook-owned service) seem to be considered Facebook's rivals, the Bundeskartellamt stated that they are not to be included in the relevant product market either, as they target different users.[14]

Facebook has registered a user-based market share of more than 90% in the German market of social networks. It should be stressed that the Bundeskartellamt assessment of Facebook's market power was not limited to measuring its market share. Other factors were also taken into account, according to Section 18 of the GWB, namely the access to competitively relevant data; the economies of scale based on network effects; the financial strength; the legal or factual barriers to market entry by other undertakings; the behaviour of users who can use several different services or only one service; and the undertaking's access to data relevant for competition. Nevertheless, these indicators confirmed the hypothesis that Facebook maintains a monopolistic position.

1.2. The Enormous Data Combination Power via the Unfair Commercial Terms

From the inquiry conducted by the Bundeskartellamt, it further transpires that individuals had been able to use this social network only by agreeing to Facebook's terms of service; this allows it to collect much data outside of the Facebook website, both on the internet and through other smartphone apps, and to combine them with the respective Facebook user's account. In other words, the data collected on the Facebook website together with those collected on third-party websites and apps[15] could be merged in order to better target Facebook users. Thanks to this combination

13 For further analysis of the tipping process see Ö. Bedre-Defolie, R. Nitsche, When Do Markets Tip? An Overview and Some Insights for Policy, "Journal of European Competition Law & Practice" 2020, vol. 11, no. 10, pp. 610–622.

14 Decision of the Bundeskartellamt, p. 5.

15 The datasets are collected through the application programming interface (API). Notably, if a third-party website has embedded Facebook Business Tools, such as the Like button, Facebook login or Facebook Analytics, data will be transmitted to Facebook in the moment the user has access to that third-party website.

of data, Facebook has been able to build a unique database concerning each individual user that can be exploited (in the best scenario) to profile activities in advertising campaigns. Individuals' data could be collected even if users blocked web tracking in their browser or device settings.

Although it appears that Facebook offers its services free of charge and its users do not suffer a direct financial loss from agreeing to Facebook's commercial terms, the damage lies in a loss of control over their data. They are no longer able to know which data from which sources are combined with data related to their Facebook accounts, or for what purposes. The main problem stems from the fact that a single piece of data is irrelevant in the current data-driven economy, but when combined with other data it gains an economic value that users cannot foresee.[16]

The Bundeskartellamt investigation has also shown that German users tendentially consider the terms and conditions to process data to be crucial, showing awareness of data transfer implications. However, because of Facebook's market power, the only recourse available to users to avoid the combination of their data was to delete their Facebook account.

1.3. The German Antitrust Authority's Milestone Decision

According to the Bundeskartellamt's judgement, the Facebook terms and conditions were not justified under data protection principles or appropriate under competition law standards.

Indeed, suppose a dominant company makes access to its service conditional upon users granting the company extensive permission to process their personal data. This can be taken up by the competition authorities as a case of exploitative business terms, punished under Section 19 (1) of the GWB. These terms also violate the constitutionally protected right to informational self-determination established by Art. 2 of the German Constitution.[17]

As regards the competitive harm caused to the advertising market, the owner of the Menlo Park company, by the combination of third parties' data with Facebook accounts, has gained a competitive edge over its competitors in an unlawful manner. It has increased market entry barriers, which in turn has secured Facebook's market power towards end customers. Consequently, the aggressive data strategy carried out by the dominant supplier of advertising space in social networks has consistently reduced the advertising market's dynamicity.

16 For an explanation of the bizarre internauts' feelings and behaviours about privacy see S. Barth, M.D.T. de Jong, The privacy paradox – Investigating discrepancies between expressed privacy concerns and actual online behaviour – A systematic literature review, "Telematics and Informatics" 2017, vol. 34, no. 7, pp. 1038–1058.

17 The Basic Law for the Federal Republic of Germany ('Grundgesetz') of 23 May 1949 (Federal Law Gazette, No 1, item 404, as amended).

These are the main arguments that led the Bundeskartellamt to prohibit Facebook from combining user data from different sources. After this ruling, Facebook subsidiaries, like WhatsApp or Instagram, have been allowed to keep collecting data for their services. However, Facebook may only combine these data with those of its users if they give voluntary consent to such a practice. This means that if users do not give their consent, Facebook may no longer combine data as described above.

Moreover, the Bundeskartellamt ordered Facebook to adapt its terms of service and data processing accordingly, ceasing the data combination within twelve months from the decision. Facebook was further obliged to develop an implementation roadmap for such adjustments which was to be submitted to the Bundeskartellamt within four months. In the case of inactivity, the Bundeskartellamt has the power to enforce its decisions through certain measures, such as imposing a fine (maximum 10% of annual turnover) or periodic penalty payments (maximum 10 million euros) at specific intervals (for instance, monthly), according to Sections 31, 81 of the GWB.

The Bundeskartellamt has provided a milestone decision, since it was the first authority applying antitrust rules to data handling issues.[18] It has thus consecrated the link between data protection and competition law. In this perspective, the German legislator has highlighted the relevance of this liaison by classifying access to data as a significant factor for market dominance, as established by Section 18(3a) of the GWB. It follows that data processing strategies could be relevant not only for data protection officers, but also for antitrust ones too, especially if the investigated company operates in digital markets.

2. The Similar (but different!) Autorità Garante della Concorrenza e del Mercato vs WhatsApp Case

Before the issuance of the Bundeskartellamt decision, the interplay between data protection, consumer and competition law was already the subject of a different solution by the Italian antitrust and consumer protection authority, the Autorità Garante della Concorrenza e del Mercato (hereinafter the AGCM) when it fined WhatsApp three million euros for unfair and aggressive commercial practices,[19] pursuant to Arts. 20, 24 and 25 of the Italian Consumer Code.[20]

18 R. Pardolesi, R. van den Bergh, F. Weberp, Facebook e i peccati da Konditionenmissbrauch, "Mercato Concorrenza Regole" 2020, no. 3, p. 534, qualifying it as a pioneering decision. This also represents the first case of exploitative conduct sanctioned by a national competition authority in the digital world, as noted by M. Botta, K. Wiedemann, Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision, "Journal of European Competition Law & Practice" 2019, vol. 10, no. 8, p. 465.

19 The Decision of the AGCM of 11 May 2017, PS10601.

20 The Legislative Decree of 6 September 2005 – Consumer Code (consolidated text Journal of Law 2020, as amended) defines an aggressive practice as 'a commercial practice which, in the

The AGCM investigation started when WhatsApp suspiciously updated its terms of service after being acquired by Facebook. The authority took into account that Facebook Messenger and WhatsApp hold two top positions in the market for instant messaging services.

The main concern of the AGCM stems from the fact that after 25 August 2016, all WhatsApp users were asked to entirely accept the new terms of service by means of a huge 'Accept' button. Conversely, in the case of partial acceptance or refusal, users were required to open another page containing the new terms and conditions; there, they had to untick a pre-ticked checkbox related to a clause which allowed WhatsApp to share its information with Facebook in order to 'improve users' experience with the parent company's products and advertising'.[21]

Even if WhatsApp denied any aggressive behaviour, sanctioned under Art. 24 of the Italian Consumer Code, as well as any coercion or undue influence on its users, forbidden by Art. 25 of the aforementioned Code, the AGCM pointed out that the initial screen with the big 'Accept' button and the pre-ticked checkbox rendered the option to refuse the data sharing with Facebook more complex than accepting it. It goes without saying that this complicated and cumbersome procedure pushed ordinary users to give the consent requested on the first page to get immediate access to the service, rather than opening the second page, reading all the terms and conditions, and unticking the specific box to prevent the data sharing between the two leading instant messaging service companies.[22]

Thus, the insidious nature of the extraction of consent affected consumers' freedom of choice, which led the AGCM to sanction WhatsApp for unfair and aggressive commercial practices and undue influence, considering its special responsibility as a dominant firm in the market.

3. Comparison of the Italian and the German Grounds of Decisions

Although this conduct was sanctioned under a different legal basis from that of the Facebook case, they are both connected to the issue of data combination. In

specific case, taking all the characteristics and circumstances of the case into account, through harassment, coercion, including the use of physical force or undue conditioning, restricts or is likely to considerably restrict the freedom of choice or behaviour of the average consumer in relation to the product and therefore induces or is likely to induce him to take a commercial decision that he would not otherwise have taken'.

21 For some interesting comments see N. Zingales, Between a rock and two hard places: WhatsApp at the crossroad of competition, data protection and consumer law, "Computer Law & Security Review" 2017, vol. 33, no. 4, pp. 553–557.

22 For further analysis see O. Linskey, F. Alves, Da Costa Cabral, Family Ties: The Intersection between Data Protection and Competition in EU Law, "Common Market Law Review" 2017, vol. 54, no. 1, pp. 21–22.

this regard, the AGCM, as it is competent for enforcing both antitrust and consumer protection rules, was able to choose the best relevant regime. It seems reasonable to believe that the Italian authority applied the Consumer Code because there was no prior decision allowing the application of legal competition categories to prohibit specific data handling acts. Indeed, WhatsApp's conduct might also be considered as an unlawful exploitative practice, since it indirectly imposed unfair trading conditions, prohibited by Art. 3, let. a) of the Italian Antitrust Law[23] as well as Art. 102, let. a) of the Treaty on the Functioning of the European Union (hereinafter TFEU). In contrast, the Bundeskartellamt could not make this choice due to its lack of jurisdiction in consumer protection law. Therefore, it was obliged to assess Facebook's conduct under competition law,[24] for which it was strongly criticised.[25] However, this should be considered a milestone decision because it reveals the commissioners' awareness of the technological (r)evolution of the market, requiring an evolutionary interpretation of the current legal frameworks that have otherwise left millions of internet users without adequate protection.

Conclusions

As it emerged from the analysis of the two above-mentioned decisions, big data are now essential for companies' market strategies. The Covid-19 pandemic has increased their importance even further, given that the lockdown has fostered digital relationships more than ever.[26] Thus, the question of how companies handle the personal data of their current and potential users is even more legitimate, not only under data protection rules, but also and especially under competition law and consumer protection law.

The German and Italian decisions cited here are remarkable for at least two reasons: firstly, because of the unexpected authorities involved, considering that the competent authority for data-handling questions is typically the national data protection authority (the German Bundesbeauftragte für den Datenschutz und die Informationsfreiheit and the Italian Garante per la protezione dei dati

23 The Italian Act of 10 October 1990 – Competition and market protection rules (consolidated text Journal of Law 2017, as amended).

24 M. Botta, K. Wiedemann, The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey, "The Antitrust Bulletin" 2019, vol. 64, no. 3, pp. 428–446.

25 G. Colangelo, M. Maggiolino, Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case for the EU and the U.S., "International Data Privacy Law" 2018, vol. 8, no. 3, pp. 224–239.

26 For major insights see M. Kenney, J. Zysman, COVID-19 and the Increasing Centrality and Power of Platforms in China, the US, and Beyond, "Management and Organization Review" 2020, vol. 16, no. 4, pp. 747–752.

personali) instead of the antitrust or consumer protection authority (the German Bundeskartellamt, competent for enforcing antitrust rules, and the Italian Autorità Garante della Concorrenza e del Mercato, responsible for enforcing both antitrust and consumer protection rules); secondly, because of the discovery of a strong liaison between data protection, competition and consumer law which would most likely be boosted over the following years. Indeed, the management of big data may be regarded as potential offensive conduct on multiple levels, given that a single act is able to jeopardise various interests, namely privacy, the competitiveness of the market, and consumers' trust.

In the Facebook decision, the Bundeskartellamt followed the reasoning adopted by the Federal Court of Justice in Pechstein vs International Skating Union.[27] This stated that Section 19 of the German Competition Act, aimed at contrasting unfair exploitative business terms, must be applied any time a contractual party is sufficiently powerful to dictate their own terms of the contract, and practically de facto abolishing the contractual autonomy of the other party. This conduct could have also been relevant under Art. 102, let. d) of the TFEU, since Facebook has made the conclusion of the contract (for gaining access to its social network) conditional on the acceptance by the counterparties of the supplementary obligation to agree with the combination of their data with data collected via other channels, having no direct connection with the main subject of the contract. The combination of personal data with personal data from any other services is also prohibited by Art. 5, let. a) of the proposal for a Digital Markets Act,[28] which provides the specific obligations that gatekeepers (including Facebook) must fulfil to ensure the fairness and the contestability of the European digital single market.[29]

Moreover, if Facebook had used the collected data for broader purposes than those ones expressed in its terms and conditions, it would also have been responsible under data protection law; indeed, Art. 5, par. 1, let. b) of the GDPR sets out the purpose limitation principle, according to which personal data must be collected for specified, explicit and legitimate purposes, and they should not be processed further in contradiction of those purposes.

The same multi-perspective reasoning can be applied to the Italian case study, considering that even if the AGCM sanctioned the misleading practice adopted by

27 The Judgement of the German Federal Supreme Court of 7 June 2016, Case KZR 6/15. For further discussion see R. Podszun, The Pechstein Case: International Sports Arbitration Versus Competition Law. How the German Federal Supreme Court Set Standards for Arbitration, "SSRN Electronic Journal" 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3246922 (17.03.2020).

28 European Parliament and Council Proposal of Regulation (EU) COM(2020)842 final of 15 December 2020 on contestable and fair markets in the digital sector.

29 For a primer review of the proposal see A. De Streel (ed.), The European proposal for a Digital Markets Act. A first assessment, Brussels 2021.

WhatsApp under a different legal regime, this practice is pluri-offensive too. Notably, it could be relevant as unlawful exploitative conduct under antitrust rules, bearing in mind that WhatsApp's users were indirectly committed to accepting the new terms of service. It could also have been relevant as a data breach under data protection law, if it turned out that the instant messaging provider had managed such data outside of the objectives initially set.

In sum, it is true that with big data comes big responsibility. Nonetheless, the main concern related to these cases is the risk of a double, or triple, sanction applied for the same conduct: as a matter of fact, companies managing personal data risk being fined by antitrust, consumer protection and data protection authorities, at national and at EU level. Indeed, the corresponding interests protected by each administrative body must also be respected in the digital environment. However, since such interests have become more intertwined than ever before, the intervention of the respective competent authorities must be coordinated to avoid disproportionate sanctions that could likewise affect the market. To fit all these pieces of the puzzle together, there is, certainly more than before, a need for a fruitful horizontal dialogue between competent national authorities as well as a vertical multi-level dialogue between competent EU authorities and national ones. Each regulation has its remedies in the case of violations of the protected values/interests. Otherwise, there could be the risk of overlapping interventions.[30] One of the main issues is the misuse of antitrust law as a 'gap filler'[31] when sector regulations are not enforced. To this purpose, the doctrine has pointed out that under the large umbrella of the abuse of dominant position, the antitrust authority may abuse itself of the antitrust instruments when there is no real harm to the market.[32] It is thus required that competition watchdogs intervene only when there is solid evidence of an effective prejudice of the market.[33] Nonetheless, there is a policy trend in conferring new powers to antitrust authorities to intercept market alterations which are typical of the cyberspace.[34]

30 M. Midiri, Le piattaforme e il potere dei dati (Facebook non passa il Reno), "Il Diritto dell'Informazione e dell'Informatica" 2021, no. 2, p. 111.

31 G. Colangelo, Enforcing copyright through antitrust? The strange case of news publishers against digital platforms, "Journal of Antitrust Enforcement" 2021, referring to the enforcement of the new related right for press publishers introduced by Art. 15 of the Directive 790/2019/UE.

32 R. Pardolesi, R. van den Bergh, F. Weberp, Facebook e i peccati da Konditionenmissbrauch, "Mercato Concorrenza Regole" 2020, no. 3, p. 535.

33 M. Stojanovic, Can competition law protect consumers in cases of a dominant company breach of data protection rules?, "European Competition Journal" 2020, vol. 16, no. 2–3, pp. 531–569.

34 Apart from the Proposal of the DMA, see the Tenth Amendment to the German Competition Act published 18 January 2021 on the Federal Law Gazette which gives new powers to the Bundeskartellamt when dealing with large digital platforms. For an interesting comment of the new tool see J.U. Franck, M. Peitz, Digital Platforms and the New 19a Tool in the German Competition Act, "Journal of European Competition Law & Practice" 2021, vol. 12, no. 7, pp. 513–528.

In conclusion, the sustainability of digital markets[35] in the current data-driven economy requires the strong interplay between data protection, antitrust and consumer law to be rethought, as it entails closer and more coordinated contact amongst the respective authorities to prevent market failures and to ensure a fair European big data-driven market.

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35 According to the definition provided by the Skoll Foundation, Sustainable Markets page, 2015, http://www.skollfoundation.org/issue/sustainable-markets/ (24.09.2021), sustainable markets can be loosely defined as those that contribute to stronger livelihoods and more sustainable environments. Referring to digital markets, sustainability can be intended as the ability to preserve consumers' trust and allow new businesses to flourish.

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Peace Agreements as International Legal Acts Protecting National Minorities: The Scope Ratione Personae

Abstract: The issue of the protection of national minorities is regulated by acts of international law, frequently arising from international agreements that have been concluded to end armed conflicts or to regulate directly their consequences. Peace treaties concluded between states are governed by the rules set out in the Vienna Convention on the Law of Treaties. More and more peace agreements are, however, concluded by non-state actors. As indicated in Article 3 of the Convention, it cannot be excluded that these too would be international agreements, having effects in the sphere of international law. Such acts are concluded, inter alia, by insurgents or belligerents. In some cases, agreements ending non-international armed conflicts are concluded by domestic entities that are not subjects of international law. Such acts may reflect solutions that have been adopted as standards in international practice and in the provisions of international law. These do not necessarily have to be legally binding standards. They can also be framework solutions, including measures relating to the protection of national minorities, which are formulated and offered as proposals for specific regulations.
Keywords: international agreements, national minorities, peace agreements

Introduction

Ethnic conflict has been a major source of insecurity in the world since time immemorial. This salutary fact was recognised in the preamble of the first universal

document on the protection of minorities. The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities states that 'the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live'.[1] Similarly, the Framework Convention for the Protection of National Minorities provides that 'the protection of national minorities is essential to stability, democratic security and peace in this continent'.[2] Consequently, the inclusion of general human rights protections and references to minority rights in peace agreements and post-conflict constitutions is common today.

The purpose of this article is to analyse selected peace agreements with regard to provisions concerning national minorities. Such provisions – similar to provisions concerning refugees, migration and citizenship – are usually included in a part of a peace treaty regarding the population. Particular focus will, however, be placed on provisions concerning national minorities. Selected peace agreements will be analysed in this respect in order to make possible an assessment of the position of national minorities when such agreements are concluded. Additionally, the possibility of peace agreements being concluded by national minorities will be the subject of a legal analysis.

The aforementioned objectives will be achieved mainly by using two methods: legal dogmatic and comparative. The first method is used to discuss the provisions of peace treaties in respect to the protection of national minorities. The comparative method is used to compare the position of national minorities in peace treaties concluded after the end of the First World War and treaties concluded at the end of the twentieth century.

1. Definition of a Peace Treaty

International law does not contain a legal definition of a peace treaty. There are, however, numerous proposed definitions in legal writings. Not all of them, however, are precise and they do raise doubts. *Wielka encyklopedia prawa* [*The Great Encyclopaedia of Law*], published at the beginning of the 21st century, defines peace treaties as 'agreements ending a state of war between states, [to] regulate relations related to the restoration of peace and liquidation of the consequences of war'.[3]

1 Preamble of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (A/RES/47/135), 3 February 1992.

2 Preamble of the Framework Convention for the Protection of National Minorities, done at Strasbourg, 1 February 1995.

3 D. Bugajski, Traktaty pokoju, (in:) B. Hołyst, R. Hauser (eds.), Wielka encyklopedia prawa, J. Symonides, D. Pyć (eds.), Prawo międzynarodowe publiczne, vol. IV, Warsaw 2014, p. 508.

This definition is defective in that it focuses solely on states as being parties that are entitled to enter into international agreements of this kind.

L. Vinjamuriand and A. Boesenecker define a peace agreement more broadly, as a 'formalised legal agreement between two or more hostile parties – either two states, or between a state and an armed belligerent group (sub-state or non-state) – that formally ends a war or armed conflict and sets forth terms that all parties are obliged to obey in the future'.[4] According to C. Bell, peace agreements are 'documents produced after discussion with some or all of a conflict's protagonists with a view to ending violent military conflict'.[5] In this case, the proposed definition encompasses both actual agreements, as well as other documents, such as resolutions of the UN Security Council, the aim of which is to end armed conflicts.

The definition proposed by R. Rybicki would seem to be the most pertinent. In his opinion, 'a peace agreement (peace treaty) is an international agreement concluded between hitherto warring parties, the purpose of which is to end the armed conflict in a final and permanent manner, establish peace and to restore normal relations between them'.[6] Two elements of this definition are significant from the point of view of international law. First of all, it recognises that not only states but also other subjects of international law, including entities with limited legal subjectivity (such as insurgents or belligerents), may be parties to a peace agreement. Secondly, a peace agreement is a source of international law, whether or not it was concluded between states alone or between states and other subjects of international law, or only between other subjects of international law. In this case, the issue of the legal force of such agreements has been addressed in Article 3 of the Vienna Convention on the Law of Treaties. This establishes that the fact that the Convention itself does not apply to international agreements concluded between states and other subjects of international law or between such other subjects of international law, shall not affect the legal force of such agreements and the application to them of any of the rules set forth in the Convention to which they would be subject under international law independently of the Convention.[7] Such a solution is, undoubtedly, useful for the assessment of the legal status of peace agreements, as practice in recent decades confirms that international conflicts conducted by states alone are in a decided minority. Conflicts involving states and other entities without a clear legal and international status are much more frequent.

4 L. Vinjamuri, A. Boesenecker, Accountability and Peace Agreements Mapping Trends from 1980 to 2006, Geneva 2007, p. 6.

5 C. Bell, On the Law of Peace. Peace Agreements and the Lex Pacificatoria, Oxford 2008, p. 53.

6 R. Rybicki, Porozumienia pokojowe po 1945 roku z perspektywy prawa międzynarodowego, Warsaw 2019, unpublished doctoral dissertation, p. 44.

7 Article 3 of the Vienna Convention on the Law of Treaties, signed on 23 May 1969 (1155 U.N.T.S. 331, 8 I.L.M. 679).

Over the centuries, the catalogue of entities subject to international law has been gradually expanded. When assessing the capacity to enter into peace treaties, insurgents and belligerents merit particular attention as being entities of a limited legal personality. The subjectivity of these groups in each case is, of course, dependent on their being acknowledged as insurgents or belligerents in the international arena.[8] In turn, when analysing the situation of national minorities, it is worth noting that at no stage in the development of international law have they been regarded as a subject of international law, which in consequence is tantamount to denying them the capacity to enter into peace agreements. In practice, however, certain changes in the position of national minorities may be observed in this respect.

For the purposes of this article, firstly, the terms 'peace agreement' and 'peace treaty' are used interchangeably. Secondly, the term 'national minorities' covers both minorities included in peace treaties signed after the First World War and ethnic minorities referred to by the authors of international legal instruments when referring to their protection within the universal system.

2. Entities Concluding Peace Agreements

The position of national minorities on the international scene has changed significantly over the last century, which is reflected in the provisions of the peace treaties discussed below. An increased interest in national minorities, together with the development of the international system for their protection, can be observed after the end of the First World War. Peace treaties undoubtedly played a significant role in this regard. G. Janusz observes that three solutions were taken into consideration when the treaty-based system of protection of national minorities was being established. First of all, the peace treaties signed by Austria, Bulgaria, Hungary and Turkey[9] provided for special protection clauses for minorities. Secondly, protection of national minorities was ensured in the form of separate treaties on the protection of minorities, which were annexed to the peace treaties proper. An example of such a treaty is the so-called Little Treaty of Versailles,[10] which was imposed on Poland

8 W. Góralczyk, S. Sawicki, Prawo międzynarodowe publiczne w zarysie, 16th ed., Warsaw 2015, p. 136.

9 Treaty of Peace between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration (St. Germain-en-Laye, 10 September 1919); Treaty of Peace between the Allied and Associated Powers and Bulgaria and Protocol and Declaration signed at Neuilly-sur-Seine, 27 November 1919; Treaty of Peace between the Allied and Associated Powers and Hungary and Protocol and Declaration, signed at Trianon, 4 June 1920; Treaty of Peace with Turkey signed at Lausanne, 24 July 1923.

10 Minorities Treaty between the Principal Allied and Associated Powers and Poland, signed at Versailles, 28 June 1919.

on 28 June 1919.[11] Thirdly, the submission of declarations confirming the respect of the rights of national minorities was provided for in the case of states interested in acceding to the League of Nations. Such declarations were made by Finland on 27 June 1921 and Latvia on 7 July 1923.[12]

Particular attention should be given to the first solution, namely protection clauses contained in peace treaties. The first two peace treaties concluded with Austria and Bulgaria regulated the issue of protection of national minorities in a virtually identical way. Each of these treaties contained separate chapters entitled 'Protection of Minorities'. The authors of the agreements did not, however, use the concept of a national minority in any of them. Three concepts were used in the treaties concluded in Saint-Germain-en-Laye and in Neuilly-sur-Seine: all residents of Austria/Bulgaria, and citizens of Austria/Bulgaria belonging to racial, religious or linguistic minorities. The material scope of protection of minorities under both these treaties was identical. The rights guaranteed to minorities included: the prohibition of discrimination, recognition of civil and political equality, linguistic rights, the right to education in the mother tongue, the right to freedom of association, support for the activities of minorities of an educational, religious or charitable purpose out of public funds, and rights regarding citizenship. The prohibition of adopting internal regulations by the Austrian or Bulgarian authorities contrary to the provisions of Chapter V of the Treaty of Peace with Austria and Chapter IV of the Treaty of Peace with Bulgaria, respectively, is also one of the significant provisions. The possibility to place treaty obligations under the guarantee of the League of Nations was also secured and, in the event of a national dispute, the jurisdiction of the Permanent Court of International Justice was recognised.

The issue of the protection of minorities was regulated in a similar manner in the Treaty of Peace with Hungary. The lack of provisions concerning support for the activities of minorities out of public funds should be noted as a difference between them. It turn, the right to establish, manage and control, at their own expense, charitable, religious and social institutions, schools and other educational establishments was guaranteed.[13]

11 The League of Nations viewed the discontented minority groups in Poland and Czechoslovakia as a 'threat to peace and stability', thus forced these states to sign minority protection treaties with the Allied Powers. According to the Permanent Court of International Justice, these treaties focused, on the one hand, on achieving equality between minorities and other nationals of the state, and on the other hand, on ensuring for the minority groups suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics, for the overall objective of ensuring a peaceful and amicable coexistence and cooperation of minorities with other nationals. Minority Schools in Albania, Advisory Opinion, 1935 P.C.I.J. (ser. A/B), No. 64 (6 Apr.), paras. 48–51.

12 G. Janusz, Ochrona praw mniejszości narodowych w Europie, Lublin 2011, p. 260.

13 Article 58(5) of the Treaty of Peace between the Allied and Associated Powers and Hungary and Protocol and Declaration, signed at Trianon, 4 June 1920.

In turn, as regards the third category of persons subject to protection, the authors of the Treaty of Peace with Turkey applied a completely different concept from that used in the three preceding peace agreements. This time, only those citizens of Turkey belonging to non-Muslim minorities were regarded as a minority. In consequence, the application of the religious criterion, instead of the nationality criterion, contributed to Kurds, Circassians and Azerbaijanis not being recognised as minorities. The material scope of the definition of 'minority' under discussion was also modified. The treaty guaranteed full protection to churches, synagogues, cemeteries and other religious establishments of non-Muslim minorities. With regard to the above-mentioned minorities, the Turkish government also undertook to take, as concerns family law or personal status, measures to enable these matters to be dealt with in accordance with the customs of those minorities. The scope and principles in regulating these customs were to be assessed by special Commissions composed of representatives of the Turkish government and of representatives of each of the minorities concerned in equal number.[14]

The scope *ratione personae* for this type of treaty was limited exclusively to the states. In the last thirty years, peace agreements in classical inter-state conflicts have been a minority. More and more conflicts have an internal dimension. Consequently, peace agreements are also signed by non-state parties. In such situations, a question arises as to what legal status, if any, such agreements have. According to the Vienna Convention, international agreements between states and other subjects of international law or between such other subjects of international law can be legally binding international agreements. Norms of customary law apply to such agreements. It is worth adding that the authors of the above-mentioned convention, whilst using the concept of subjects in international law when determining the legal force of treaties, did not present its conceptual scope. Peace treaties should, therefore, be assessed on a case-by-case basis taking into consideration the solutions adopted in international law concerning subjectivity under international law.[15]

C. Bell notes that among the entities that most frequently sign such treaties are three main groups that potentially could become subjects of international law, namely

14 Article 42 of the Treaty of Peace with Turkey, signed at Lausanne, 24 July 1923.

15 K. Karski, Zasięg podmiotowy Konwencji wiedeńskiej o prawie traktatów, (in:) Z. Galicki, T. Kamiński, K. Myszona-Kostrzewa (eds.), 40 latminęło: Praktyka i perspektywy Konwencjiwiedeńskiej o prawie traktatów, Warsaw 2009, pp. 53–88; K. Karski, The International Legal Status of the Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and of Malta, "International Community Law Review" 2021, vol. 14, no. 1, pp. 19–32. See also: T. Kamiński, K. Karski, Effective Application of the Rule on Fundamental Change of Circumstances to Treaties Contravening the 1997 Polish Constitution, "International Community Law Review" 2015, vol. 17, no. 1, pp. 68–94.

armed opposition groups, indigenous peoples and political and military leaders of minority groups with secessionist claims in autonomous areas.[16]

In many peace agreements signed by armed opposition groups, the non-state signatories were 'subjects of international law' – based on the recognition of such groups under international law. Examples of such agreements are: the agreement between the government of Angola and União Nacional para a Independência Total de Angola (UNITA) from 1994[17]; the agreement between the government of Burundi and armed opposition groups and political parties from 2000[18]; the agreement between the government of Guatemala and Unidad Revolucionaria Nacional Guatemalteca (URNG) from 1996[19]; the agreements between the Israeli government and the Palestine Liberation Organization (PLO) since 1993[20]; the agreement between the government of Mozambique and RENAMO from 1992[21]; the agreement between the government of Rwanda and the Rwandese Patriotic Front from 1993[22]; and the agreement between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF) from 1999[23].

It is worth noting that the above-mentioned agreements do not contain provisions concerning protection of the rights of national minorities. They establish or confirm mechanisms for demilitarisation and demobilisation, elections and legal and human rights institutions and create a new constitutional structure addressing issues of governance.

16 C. Bell, Peace Agreements: Their Nature and Legal Status, "American Journal of International Law" 2008, vol. 100, no. 2, p. 380.

17 Lusaka Protocol, 15 November 1994, Angola – União Nacional para a Independência Total de Angola (UNITA), UN Doc. S/1994/1441, available at: https://reliefweb.int/report/angola/lusaka-protocol-introduction-1994 (31.03.2021).

18 Arusha Peace and Reconciliation Agreement for Burundi, 28 August 2000, available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/BI_000828_Arusha%20Peace%20and%20Reconciliation%20Agreement%20for%20Burundi.pdf (31.03.2021).

19 Agreement on a Firm and Lasting Peace, 29 December 1996, Guat.-Unidad Revolucionaria Nacional Guatemalteca (URNG), UN Doc. A/51/796, S/1997/114, available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/GT_961229_AgreementOnFirmAndLastingPeace.pdf (31.03.2021).

20 Israel-Palestine peace agreements, 1993–present, available at: https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Declaration%20of%20Principles%20-%20Main%20Points.aspx (31.03.2021).

21 General Peace Agreement for Mozambique, 4 October 1992, available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/MZ_921004_MozambiqueGeneralPeaceAgreement.pdf.

22 Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, signed on 4 August 1993, available at: https://peacemaker.un.org/rwanda-peaceagreementrpf93 (31.03.2021).

23 Peace Agreement between the Government of Sierra Leone and the RUF (Lomé Peace Agreement), signed on 7 July 1999, available at: https://peacemaker.un.org/sierraleone-lome-agreement99 (31.03.2021).

It should be stressed, however, that by allowing that the insurgents or warring party meet the conditions for recognition under international law, the scope *ratione personae* of peace treaties is extended.

Indigenous peoples are the second group of subjects who sign peace agreements and can arguably claim to be 'subjects of international law'. Various agreements have been signed with or on behalf of indigenous groups. Some of these concern situations involving armed violence, as part of what was commonly accepted as a peace process.[24] For example, agreements were signed between the Chiapas people (through the Zapatista National Liberation Army (EZLN)) and the Mexican government,[25] between Bangladesh and the indigenous peoples of the Chittagong Hills Tract[26] and between the Guatemalan government and Unidad Revolucionaria Nacional Guatemalteca concerning indigenous groups.[27]

An examination of treaty practice between states and indigenous peoples living within them shows that the treaties either fall under national law or are considered to be of a *sui generis* nature. They are not, however, regulated by international law.[28]

Of most interest is the situation of the third of the above-mentioned groups, namely national minorities, which therefore merits more detailed consideration.

3. Do National Minorities Conclude 'Peace Agreements'?

International agreements and declarations which regulate the protection of the rights of national minorities do not contain a definition of 'national minority'. States have, therefore, broad powers with regard to recognising a given group as a national minority and determining their rights. Abuses of the rights of minorities or failing to offer them state protection are often the reason for ethnic conflict. Some of these conflicts may end with the signing of a peace agreement with national minorities.

In international law, the attribution of legal personality involves the capacity to perform legal acts in the international area. The capacity to make international agreements/treaties as well as the capacity to make claims for breaches of international

24 C. Bell, Peace Agreements …, *op. cit*., pp. 381–382. See also: A. Tahvanainen, The Treaty-Making Capacity of Indigenous Peoples, "International Journal on Minority and Group Rights" 2005, vol. 12, no. 4, pp. 397–420.

25 Actions and Measures for Chiapas Joint Commitments and Proposals from the State and Federal Governments, and the EZLN, available at: https://www.peaceagreements.org/wview/214/Actions%20and%20Measures%20for%20Chiapas%20Joint%20Commitments%20and%20Proposals%20from%20the%20State%20and%20Federal%20Governments,%20and%20the%20EZLN (31.03.2021).

26 Chittagong Hill Tracts Peace Accord, signed on 2 December 1997, available at: https://www.satp.org/document/paper-acts-and-oridinances/chittagong-hill-tracts-treaty-1997 (31.03.2021).

27 Agreement on Identity and Rights of Indigenous Peoples signed on 31 March 1995, available at: http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/guat12.pdf (31.03.2021).

28 A. Tahvanainen, The Treaty-Making …, *op. cit*., p. 418.

law, to enjoy the privileges and immunities from national jurisdictions, and to be a member in an international organisation helps to determine the international subjectivity of the entity.[29]

National minorities have not been attributed legal personality in international law. According to Article 1 of the Framework Convention for the Protection of National Minorities, 'the protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights'. The Convention guarantees persons belonging to national minorities the possibility of exercising the rights arising therefrom individually or in community with others.[30] The authors of the Convention often use the term 'national minority' but when indicating specific rights, they define them as rights of persons belonging to a minority and not of a minority understood as a group.

Modern international law recognises two collective human rights of minorities: the right to physical existence and the right to preserve a separate identity.[31] Unlike indigenous peoples, minorities do not exercise the right to self-determination in terms of external recognition. This seems obvious at least for two reasons. First, the right to self-determination of national minorities has not been guaranteed in any of the international documents concerning the protection of these minorities. Secondly, according to the United Nations Charter and the UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the right to self-determination belongs to 'peoples' and not to 'minorities'.[32] However, the internal self-determination of national minorities is widely accepted in the international legal discourse. For example, A. Cassese wrote that the right to internal self-determination meant, inter alia, that ethnic, racial or religious minority groups within a state have a right not to be oppressed by the central government.[33] M. Seymour, analysing internal self-determination and secession, goes further by stating, 'unilateral secession can be justified in the case of colonies, oppressed peoples and when the state does not secure internal self-determination for its internal minorities'.[34]

29 T. Kamiński, K. Karski, Treaty-making capacity of components of federal states from the perspective of the works of the UN International Law Commission, "Polish Review of International and European Law" 2016, vol. 5, no. 2, pp. 9–43.

30 Article 3 of the Framework Convention for the Protection of National Minorities, signed on 1 February 1995 (ETS 157), available at: https://rm.coe.int/16800c10cf (31.03.2021).

31 D. Ike, Ethnic Groups and the Right to Self-Determination, "Nigerian Law Journal" 2018, vol. 21, no. 2, pp. 331–332.

32 See: P. von Chamier-Cieminski, A Look at the Evolution of the Right to Self-determination in International Law, "Białostockie Studia Prawnicze" 2012, vol. 25, no. 3, pp. 117–132.

33 A. Cassese, Political Self-Determination: Old Concepts and New Developments, (in:) A. Cassese (ed.), UN Law: Fundamental Rights, Two Topics in International Law, Alphen aan den Rijn 1979.

34 M. Seymour, Internal self-determination and secession, January 2013, https://www.researchgate.net/publication/292030160_Internal_self-determination_and_secession (31.03.2021).

This means that even though minorities may, in certain cases, have a legitimate claim to being a separate people, nevertheless the scope of the status of national minorities as subjects of international law is similar to that attributed to individuals,[35] and not to national minorities per se.

Nevertheless, C. Bell states that political and military leaders of minority groups with secessionist claims in autonomous areas can sign peace agreements and have some basis for claiming the status of subjects of international law. As examples of these agreements, she offers those concluded between Georgia and Abkhazia[36], Moldova and Transnistria[37], parties on the island of Bougainville and Papua New Guinea[38], and Russia and Chechnya[39].

None of the above-mentioned agreements confirms the subjectivity of the secessionist groups that are parties to these agreements, although some of them confirmed the selected rights of these groups on the international arena. For example, according to the peace agreement between Moldova and Transnistria, the latter had the right to establish unilaterally and maintain international contacts in the economic, scientific-technical and cultural spheres, and in other spheres by agreement of the parties.[40] However, entities such as Transnistria, Abkhazia or South Ossetia are described as 'de facto territorial regimes' and their independence aspirations are largely recognised by the science of international law as groundless.[41]

35 In the doctrine of international law, the issue of the international legal subjectivity of an individual is debatable. The status of individuals as subjects of international law is closely connected with the development of individual complaints procedures and with the criminal responsibility of individuals under international law. K. Karski, Osoba prawna prawa wewnętrznego jako podmiot prawa międzynarodowego, Warsaw 2009, pp. 215–267.

36 The full texts of the Georgia–Abkhazia agreements are available at: https://peacemaker.un.org/document-search?field_paregion_tid=All&field_paconflict_tid=All&field_pacountry_tid=Georgia&keys= (31.03.2021).

37 Memorandum on the Bases for Normalization of Relations between the Republic of Moldova and Transnistria (The Moscow Agreement), 8 May 1997, available at: https://peacemaker.un.org/moldova-moscowagreement97 (31.03.2021).

38 Lincoln Agreement on Peace Security and Development on Bougainville, 23 January 1998; Bougainville Peace Agreement, 30 August 2001, both available at: https://peacemaker.un.org/document-search?field_paregion_tid=All&field_paconflict_tid=All&field_pacountry_tid=Papua%20New%20Guinea&keys= (31.03.2021).

39 Russian–Chechen Truce Agreement: Principles for Determining the Fundamentals of Relations between the Russian Federation and the Chechen Republic, 25 August 1996, available at: https://peacemaker.un.org/document-search?field_paregion_tid=All&field_paconflict_tid=All&field_pacountry_tid=Russian%20Federation&keys= (31.03.2021).

40 Para. 3 of the Memorandum on the Bases for Normalization of Relations between the Republic of Moldova and Transnistria.

41 M. Perkowski, Koncepcja 'non-state actors' a umiędzynarodowienie regionów, "Białostockie Studia Prawnicze" 2012, vol. 2, p. 100.

In addition to the above-mentioned agreements, the Ohrid Framework Agreement (OFA) and the Arusha Peace and Reconciliation Agreement for Burundi merit special attention. They were signed by national minorities, albeit indirectly.

The Ohrid Framework Agreement put an end to the armed conflict between the ethnic Albanian National Liberation Army (NLA) and the armed forces of the Republic of Macedonia in 2001. In fact, the agreement was signed by representatives of the two biggest ethnic Macedonian parties (the Internal Macedonian Revolutionary Organisation–Democratic Party of National Unity (VMRO-DPMNE) and the Social-Democratic Union of Macedonia (SDSM)), the two biggest ethnic Albanian parties (the Democratic Party of Albanians (DPA) and the ethnic Albanian Party of Democratic Prosperity (PDP)), as well as the President of the Republic of Macedonia. It was also witnessed by the special representatives of the USA and the EU.[42] Due to the use of violent methods by the NLA and its illegal status, no NLA representatives received an invitation to the negotiations. The Macedonian negotiators recognised that a political solution to the problem could be achieved by negotiating with the legitimately elected representatives and political parties of the Albanians in Macedonia.[43] The Ohrid Framework Agreement introduced provisions for special procedures in parliament, decentralisation, non-discrimination, just and equitable representation, use of languages and the protection of the identity and culture of the communities in the country, in particular the Albanian community. The Macedonian parliament ratified the agreement on 16 November 2001. As part of the OFA, Macedonia amended its constitution and enacted a series of laws in the years following the agreement.

The second agreement, the Arusha Peace and Reconciliation Agreement for Burundi, also known as the Arusha Accords, was signed on 28 August 2000 and ended 12 years of civil war and a cycle of massacres. After long and difficult negotiations, the agreement was signed by the government of Burundi, the National Assembly, the coalition of seven Hutu parties (also known as the G7) and the coalition of ten Tutsi parties (also known as the G10).[44] Other rebel groups, such as the CNDD-FDD and the Palipehutu-FNL, were not among the signatories. It is noteworthy that the peace agreement was unable to secure an immediate ceasefire as a result of the absence of these groups.

42 Framework Agreement concluded at Ohrid, Macedonia, and signed at Skopje, Macedonia, on 13 August 2001, available at: https://www.refworld.org/pdfid/3fbcdf7c8.pdf (31.03.2021).

43 See: D. Marolov, Understanding the Ohrid Framework Agreement, (in:) S.P. Ramet, O. Listhaug, A. Simkus (eds.), Civic and Uncivic Values in Macedonia, London 2013, pp. 134–154.

44 The agreement signing ceremony was attended by, among others, Nelson Mandela, US President Bill Clinton, UN Secretary General Kofi Annan, OAU Secretary General Salim Ahmed Salim, French Cooperation Minister Charles Josselin (also acting as the EU representative) and the presidents of the Democratic Republic of Congo, Ethiopia, Kenya, Rwanda, Tanzania, Togo, Uganda and Zambia.

The Arusha Accords consists of five protocols, five annexes and two appendices. The document is largely focused on minority protection organised through the political and military representation of minority groups. Additionally, agreement introduced insulation against military coup d'états by introducing, inter alia, the gradual correction of ethnic imbalances in the composition of the defence and security forces.[45]

Generally, in the literature on the subject, it is accepted that the Arusha Accords, similarly to the Ohrid Framework Agreement, can be described as a political agreement.[46] Both agreements can be defined as negotiated, written and publicly available accords between two or more parties that seek to end political violence within a state through institutional reform.[47] The two agreements fulfil the requirements contained in the proposed definition: that they were signed as a result of negotiations and are publicly available in the Peace Agreements Database of the UN Peacemaker support tool. Nevertheless, this is not a definitive statement. Certain provisions of peace agreements contain elements resembling international treaties. For example, according to Article 6 of the Arusha Accords, the French text, being the original, was deposited with the Secretary-General of the United Nations, the Secretary-General of the Organization of African Unity and the Government of Burundi, and certified true copies thereof were transmitted by the government of Burundi to all the parties thereto. In practice, the issue of the application of international or constitutional law to agreements of this kind remains highly debatable.

Conclusions

States usually focus their attention on the protection of national minorities as a consequence of armed conflict. Frequently, the first obligations in this respect appear already in the treaties ending the hostilities. At the beginning of the last century, agreements of this kind were concluded between states that were parties to armed conflict, and their provisions concerned linguistic, religious or cultural issues. The incorporation into peace treaties of provisions concerning the protection of minorities was not an obligation on the parties but a matter of their goodwill, as a universal treaty or customary norm imposing the obligation to protect national minorities did not exist in international law, let alone in peace agreements.

45 See: K.P. Apuuli, The Arusha Peace and Reconciliation Agreement (2000) and the Current Political Crisis in Burundi, "Insight on Africa" 2017, vol. 10, no. 1, pp. 54–72, available at: https://journals.sagepub.com/doi/full/10.1177/0975087817738659 (31.03.2021).

46 S. Vandeginste, Burundi's crisis and the Arusha Peace and Reconciliation Agreement: Which way forward?, "Analysis and Policy Brief", no. 17, December 2015.

47 G. Fontana, A. Kartsonaki, N.S. Neudorfer, D. Walsh, S. Wolff, C. Yakinthou, The Dataset of Political Agreements in Internal Conflicts (PAIC), Conflict Management and Peace Science, 21 August 2020, available at: https://doi.org/10.1177/0738894220944123 (31.03.2021).

It is certainly the case that peace treaties concluded between states should be qualified as international treaties, constituting a source of international law. However, since the 1990s the number of interstate conflicts, especially ethnically motivated ones, has increased considerably. They also frequently end with the signing of peace agreements. In such cases, however, questions arise as to the legal status of agreements concluded by the state on the one hand and by non-state actors (e.g. insurgents, belligerents) on the other. If these non-state actors satisfy the requirements laid down in international law and are recognised as subjects of international law, then pursuant to Article 3 Vienna Convention on the Law of Treaties, it cannot be ruled out that peace agreements concluded, inter alia, by non-state actors could be international agreements.

The peace treaties analysed within this category significantly differ, as regards the protection of national minorities, from peace treaties concluded only between states. For example, treaties concluded after the First World War contained separate chapters setting out the rights of minorities and the related obligations of the states being parties thereto. In turn, peace agreements concluded with, among others, non-state actors very rarely refer to issues related to the protection of national minorities, focusing mainly on actions aimed at ending the conflict.

The minorities whose rights have been set out in the Ohrid Framework Agreement (OFA) and the Arusha Peace and Reconciliation Agreement for Burundi have found themselves in a very advantageous position. These political agreements were signed by a number of domestic actors and international co-signatories. Unlike most peace agreements, they were not signed by the parties to the conflict but only by parliamentary parties, and their key contents were implemented through constitutional reform rather than by coming into force directly. Due to the lack of international legal subjectivity, minorities cannot be a party to legally binding peace treaties, and it does not seem possible that states will change their position in this respect in the near future. Perceiving national minorities as posing a threat to state integrity and stability, in the best case they will undertake the obligation to protect the rights of persons belonging to a minority and not of a minority understood as a group.

The above-mentioned agreements would, therefore, seem to offer the only effective solution when attempting to end ethnic conflict. This way both sides can achieve their objective: the national minority receives guarantees regarding the increased protection of its rights, and the state maintains its territorial integrity and stability. Whilst the status of national minorities has not changed, from the point of view of international law, in practice one may risk the statement that during the last century, as far as the conclusion of peace agreements is concerned, national minorities are not only the *ratione materiae* of such regulations but also (albeit in an indirect way) the subject (*ratione personae*) thereof. It should be noted, however, that agreements of this type do not form sources of international law.

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The Abolition of the Concept of "Causa" in French Civil Law

Abstract: Causa is a subjective motive that determines the content of the obligation or material interest, which encourages the party to the trade to enter into an obligation taking on the associated burdens. In the countries of continental (mainland) Europe that belong to the Romano-Germanic law system, such as Germany, France, and Italy, the goal (objective) of the parties to the trade, causa, is legally significant. In the theory of the Civil law of the Romano-Germanic system, there is a general principle – any obligation arises for some purpose, which is called the basis of obligation. Causa is an individual interest that meets the requirements of the legal system. France was one of the last European countries that did not recognise the contingency theory as a basis for regulating the binding force of a contract. In practice, the courts have faced criticism of the concept of causation from both doctrine and law enforcement practice. In 2016, there was a significant reform of the French law of obligations. Legal science, undeservedly, did not attach due importance to one of the most noticeable innovations within the framework of the mentioned reform – the abolition of the concept of "causa" (reason, basis) of the contract, which until recently was one of the most original features of the French law and originated from Roman law, which was fixed in the Napoleonic Code. In this article, the theoretical provisions for the abolition of the concept of causa in French civil law, within the framework of the reform of the Civil Code, were investigated, and the corresponding conclusions were drawn.
Keywords: causa, contract, exception, obligation, stipulation, transaction

Introduction

The word "*causa*" is translated from Latin as "reason" or "ground". Causa is a subjective motive or ground that determines the content of the obligation, or a material interest that prompts us to enter into an obligation, taking on the associated

burdens. Since Roman law, the concept of "*causa*" has prompted a different response from the public.

In the theory of civil law of the German-Roman system, there is a general principle – any obligation arises for some purpose, which is called the basis for the occurrence of the obligation.

In the continental European jurisprudence of the 19th century, two main approaches to the causa, and its significance for the civil contract, were formed:

1) the causal theory of a contract, which originated in the French law,
2) the objective concept of the causa (purpose) of a contract in the German law.

1. The Occurrence of the Causa of a Contract

In Roman law, there is no holistic doctrine of the institution of the causa of a contract. In Roman law, only certain types of transactions were subject to claiming protection. In other words, a certain "reason" was required for the legal recognition of the transaction. These included stipulations, and furthermore, obligations in a special form: special ritual phrases were pronounced, all real contracts (a promise in return for a grant), as well as four types of consensual contracts (including sale and purchase).

Other agreements, called pacts, were initially not enforceable. Subsequently, some types of pacts (for example, the obligation to pay someone else's debt) received such protection and, in contrast to the so-called "naked pact" (*nudum pactum*), which had no protection, they began to be called "clothed pacts" (*pacta vestita*).

But, if there is no ground (*causa*), the obligation cannot arise by virtue of the agreement. Thus, solely from the pact, an obligation does not arise, but an exception arises – a reference to a circumstance that makes it wrong to satisfy the claim, even if the intention of the claim (*intentio* – the claim of the plaintiff) is justified.[1]

At the same time, for real contracts, causa meant the provision of the other party (transfer of money in the loan agreement, etc.), in the consensual agreement – the counter obligation of the other party, in the pact – the circumstances with which the law connected the possibility of legal protection of the current pact.

Stipulations (*stipulatio*), the features of which were subsequently inherited in a certain way by the bill, as obligations, in fact, had a one-sided character.[2] A stipulation is an oral agreement concluded through an oral question of the creditor and the answer of the debtor regarding what he was asked about.[3]

1 И.Б. Новицкий, В.С. Перетерский, Римское частное право, М., Волтерс Клувер, 2010, С. 68, 407 (I.B. Novicky, V.S. Peretersky, Roman private law, M., Wolters Kluwer, 2010, p. 68, 407).

2 *Ibidem.*

3 *В.А. Белов*, Сингулярное правопреемство в обязательстве, М.: ЮринфоР, 2007. С. 47 (V.A. Belov, Singular succession in an obligation, M., 2007, p. 47).

In this case, causa was considered to be compliance with the necessary formalities. The specific quality of the stipulation was the fact that it was an abstract contract, the validity of which depended not on the basis, but on the observance of the established form.

Consequently, the basis was not included in the composition of not only essential, but also accidental, elements of stipulation, which distinguished it from the overwhelming majority of other contracts of Roman law, which, in the absence of a basis, did not acquire legal force and therefore could be called causal contracts.[4]

However, in certain situations, the law recognized the admissibility of non-fulfilment of such obligations, for example, a solemn promise to return money to the creditor was made in connection with the assumed receipt of a loan from him, but the loan was never provided by the lender. In such cases, they also spoke about the absence of a causa.

This is how the Roman lawyer Ulpian (D. 2,14,7 pr. 2) described the problem of the causa of a contract: Agreements based on the law of peoples sometimes give rise to claims, sometimes – to an acceptance.

§ 1. Those agreements that give rise to claims do not remain with their (common) name (pacta), but are designated by the name assigned to this type – "contracts": these are the purchase and sale, hiring, partnership, loan, storage, and other similar contracts.

§ 2. But if the given matter is not included in any contract, but its essence remains, then, according to the correct answer of Arista Celsus, there is an obligation. For example, I gave you a thing to give me another thing, I gave you something to do; this is a synallagma, and hence the civil obligation is born.[5]

Thus, causa means an agreement reached about an interest in receiving something in return for something.

Since the 18th century, the understanding of the causa in European legal science has actually degraded. According to some jurists, causa is a rather complex legal institution and its function in the process of concluding a transaction is not, in all cases, sufficiently clear.[6]

The lack of understanding of the modern doctrine of the meaning of the general category of the contract and its application in classical Roman law largely depends on

4 О.С. Иоффе, В.А Мусин, Основы римского гражданского права, Л.: Изд-во ЛГУ, 1975. С.117–118 (O.S. Ioffe, V.A. Musin, Fundamentals of Roman Civil Law. L.: Publication LGU, 1975, pp. 117–118.)

5 Л.Л. Кованов (ред.), Дигесты Юстиниана. М., 2002, С. 261 (L.L. Kovanov (ed.), Digests of Justinian, M., 2002, p. 261.)

6 J.M. Smits, Contract Law: A comparative introduction. Cheltenham, UK; Northampton, MA, USA 2014, p. 78.

the often-manifested inability by novelists to understand what the operation of the contract is in general.[7]

Currently, there are opponents of the doctrine of *causa*, who argue that causa in the Roman law meant nothing more than any ground or reason for action. The word *causa,* in its application to the law of contracts, had a number of different meanings in Roman law itself: in the case of formal contracts, it was the observance of the prescribed legal formalities, in the case of consensual contracts – the consent of the parties, and in the case of real contracts – to promote or nominate.[8]

Thus, the causa is absent in the Roman law when it comes to absolutely heterogeneous cases of non-recognition of certain types of transactions by law. The expression "there is no causa", in Roman law, was synonymous with the expression "the law does not provide a transaction with legal protection". The rules for providing legal protection were different for different types of transactions and determined the meaning of the concept of "causa" in relation to this category of transactions.

2. Causa in the German Law

In the Germanic pandectics, which adheres to the volitional theory of the transaction, causa is reduced to general types of expression of will:

1) *causa dandi* – basis for transfer of ownership,
2) *causa credendi* – basis for entering into an obligation,
3) *causa solvendi* – basis for fulfilment of an obligation.

Back in the 19th century, one of the founders of the German Civil Code, B. Windscheid, discusses the authenticity of the expressed will as a requisite (necessary factor) of the legal force of the transaction (§§ 75–81). Thus, speaking about an error, he emphasizes that only a significant error serves as the basis for the nullity of an act. The first among the essential points in the expression of will, he calls "the nature of the established legal relationship".[9] It was exactly reflected in the age-old tradition of European legal *sciencen, which gave the world a developed doctrine of the causa of the transaction.*

In German civil law, developed on the basis of the key theories of B. Windstein and P. Ertmann, the doctrine of "falling away of the ground of the transaction"

7 C.A. Cannata, Contratto e causa nel diritto romano. Causa e contratto nella prospettiva storico-comparatistica: II Congresso internazionale ARISTEC, Palermo, 7–8 giugno 1995, p. 43.

8 E. Lorenzen, Causa and consideration in the Law of Contracts. Hain Online, 1919, p. 624. http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5569&context=fss_papers (10.05.2021).

9 Б. Виндшайд, Учебник пандектного права, Т. I. Общая часть. Пер.под ред. С.В. Пахмана, С. Петербург 1874, С. 173 (B. Vindshayd, A Textbook of Pandectic Law, (in:) V.S.S. Pahman, T. I. General part., S. Petersburg 1874, p. 173.)

(*Störung der Geschäftsgrundlage*) is essentially a development of the causa doctrine.[10] The theory of the development of the ideas of the causal transaction of B. Windstein was that during the conclusion of the contract, the parties have certain assumptions about the performance of the contract and the result of connections or ideas about certain circumstances that must necessarily take place and under the influence of which each of the parties concludes the transaction.[11]

In the development of B. Windstein's ideas, the scientist P. Ertmann stated that the basis of the transaction is the transactions that took place at the conclusion of the transaction, recognized by the counterparty in their significance and not contested representations of one of the parties or both parties about the presence or occurrence of certain circumstances underlying the transaction.[12]

All legal systems agree that for the emergence of a valid contractual relationship, capable parties are required, their mutual consent to conclude a contract that does not contradict the law, and a physically possible subject of the contract. In addition, a special form may be required for the validity of certain types of contracts. In Germany, these requirements are the only ones.

Article 134 of the German Civil Code states that a transaction that violates a statutory prohibition is void unless the law provides otherwise. With regard to the cases of violation of the prohibition, when the subjective goal is adequate, applying the provisions of the aforementioned article, the category of circumvention of the law is, in fact, unnecessary if the purpose and meaning of the prohibition established by law is taken into account when assessing the validity of the transaction. That is, the mentioned article already includes the cases of circumvention of the law.[13]

Thus, in the countries of the Romano-Germanic legal group, the subjective goal of the participants in the transaction is assessed. However, in the countries of the German legal group, causa is not a prerequisite for concluding an agreement.

3. Causa in the French Law

The development of the causa originates in the scientific research of J. Domar and R.-J. Pottier. Domar distinguished four types of contracts:

1) contracts in which the parties mutually exchange things;

2) in which each party does something for the other party;

10 К. Цвайгерт, Х. Кётц, Введение в сравнительное правоведение в сфере частного права, Т.2, М,: Международные отношения, 2000. С. 265–266 (K. Cvaygert, H. Ketc, Introduction to comparative law in private law, T.2, M., International relations, 2000, pp. 265–266.)

11 А.В. Кашанин, Кауза сделки в гражданском праве, 2003, С. 26 (A.V. Kashanin, Civil Law Transaction Causation, M., 2003, p. 26.)

12 *Ibidem*, p. 191.

13 W. Däubler, BGB kompakt. Allgemeiner Teil – Schuldrecht – Sachenrecht. 3. Auflage. München: Beck-Rechtsberater 2008, p. 460.

3) in which one party provides something in return for the services of another;
4) gratuitous provision and donation.[14]

Accordingly, in bilateral contracts, the causa for one party is expressed in the grant offered by the other party. In one-sided contracts, the causa is expressed in the obligation to return the previously provided property and pay interest. In gratuitous contracts, causa relies on a reasonable and fair desire to do something worthwhile. Such an idea of the causa, the types of which are limited to certain variants of the subject of the contract, and, accordingly, to certain types of contracts regulated by law, fits into the framework of the causal (objective) theory.[15]

Pottier also expressed his vision in a similar way, dividing all contracts into two groups:

1) non-gratuitous, in which causa is expressed as described by Domar;
2) gratuitous, in which causa was expressed in the generosity of one party in favour of the other.[16]

Pottier formulated the legal meaning of a causa according to the concept that if an obligation has no causa, or if the causa is feigned, the obligation is invalid, as well as the contract from which it arose.

Unlike Roman law, in the Code of Napoleon, all types of agreements received legal protection, with the exception of specially stipulated cases. This eliminated the notion of the "naked pact" with which the Roman concept of causa was associated. Nevertheless, the authors of the French Civil Code (FCC) considered it necessary to maintain the concept of causa (the basis of the contract), without which the contract is not considered valid.

The purpose of the causa (*cause finale*) is what the parties want to achieve through the transaction. This goal can be objective or subjective. An objective goal is usually understood and evaluated by its counter execution, which is received by the transaction party. For example, the objective goal of a seller under a purchase contract is to receive payment for the property, while the buyer's goal is to receive the property itself.

A subjective goal is usually understood as the personal motives of the participant(s) of the transaction. An objective target is usually used when evaluating a transaction for a renumeration, while an assessment of a subjective goal is most

14 И.А. Полуяхтов, К вопросу о делении сделок на абстрактные и каузальные. Цивилистическая практика, Вып. 4, Екатеринбург 2002, С.104–107 (I.A. Poluyahtov, To the question of dividing transactions into abstract and causal. Civilistic practice, vol. 4., Yekaterinburg 2002, pp. 104–107).

15 *Ibidem,* p. 106.

16 *Ibidem,* p. 107.

often needed when evaluating transactions without any renumeration, in which, in the absence of counter execution, it is impossible to assess an objective goal.[17]

There are also distinguished two main functions of the causa:

1) Inadmissibility of concluding a contract, the performance of which is objectively impossible;
2) It is forbidden to conclude a contract with an illegal or immoral purpose.[18]

Thus, the transaction is invalid if the counter execution contradicts the criteria established in Article 1133 of the FCC (for example, remuneration for the use of political pressure, trading of a human body or organs, etc.)

According to the existing doctrine of France, there is a basis of the law of obligations (*causa efficiens*), similar to a tort and the basis of the obligation itself is considered the contract itself and its purpose.

The practical consequences in France (where the causa was previously a requisite of the contract) and in Germany (where the causa was ignored) were so similar that attention to this category was significantly reduced.

4. Abolition of the Concept of Causa

The presence of a causa in FCC was one of the most original features of French law and was considered a necessary condition for the recognition of a contract as being valid. However, the French jurisprudence on the causa was ambiguous, and in many cases, the causa conditions could overlap with other legal conditions, for example, delusion and deception.[19]

Therefore, for many years in France, works have been underway to reform the Civil Code in the field of contract law, within the framework of which three relevant draft amendments were prepared. On February 12, 2015, the French Constitutional Council recognized that amendments to a number of laws, including the FCC, were not contradicted by the Constitution of the French Republic.[20] As a result, the government was instructed to take the legislative measures necessary to change the structure and content of the FCC – not only to modernize, simplify, and improve the text, but also to strengthen the availability of general provisions on contracts, rules on obligations, and provisions on evidence.

17 A. Schäfer, L'illicéité des prestations et ses consequences. Mémoire. CF.,Université d' Auvergne, 1995, p. 14.

18 J.M. Smits, Contract Law: A Comparative Introduction Cheltenham Northampton: Edward Elgar Publishing, 2014, pp. 87–89.

19 А.В. Кашанин, Кауза сделки в гражданском праве, М., 2003, С. 88 (A.V. Kashanin, Civil Law Transaction Causation, M., 2003, p. 88)

20 Décision n° 2015–710 DC du 12 février 2015. https://www.conseil constitutionnel.fr/decision/2015/2015710DC.htm.

On October 1, 2016, a new version of the FCC entered into force, including a comprehensive reform of the law of obligations.[21] It should be recognized that most of the changes are actually a codification of judicial practice that has developed over the past 200 years, combining in one complex all the functions that the causa has been endowed with by the judicial practice. One of the most notable innovations was the abolition of the concept of causa (reasons, grounds) of the contract. This innovation is a fundamental change in the foundations of the rule of law and civil law in general.

During the period of preparation of the reform, a significant sector of jurists was not ready for a radical departure from the two-century tradition. Thus, in one concept of the reform, the concept of the causa of a contract occupied its traditional place of honour, and the number of articles devoted to it increased. However, in the version adopted by the French government, there was no longer any causa in the conditions of the validity of the contract, thus inclining towards the international unification of law, and not towards the maintenance of traditions.

The reform is intended to achieve greater legal certainty by relieving the courts of the necessity to interpret the meaning of the term *causa*. At the same time, useful functions previously associated with the causal doctrine are performed in the new edition of the FCC with the help of other tools, for example, through the concept of a transaction that violates the requirements of the law, etc. However, if you study the changes in depth, you can ascertain that they are not as radical as may seem at first glance.

In the first edition of the corresponding norms of the FCC, which existed unchanged from 1804 until 2016, the validity of the agreement was formulated as follows. According to article 1108, the validity of the agreement is determined by four essential conditions:

- the consent of the party undertaking the obligation;
- the ability to conclude an agreement;
- the presence of a certain subject that constitutes the content of the obligation;
- existence of a legal basis in the obligation.[22]

Article 1131 determines that an obligation that has no basis or has an apparent or unlawful basis cannot be valid.[23] Subsequent application practice has clarified this rule as follows. There is no causa of a contract if the parties did not have a serious intention to create a contractual relationship (for example, the contract was concluded as a joke). There is also no causa if the execution of the contract is impossible (for example, the subject of the contract died before the conclusion of the contract).

21 French Civil Code 2016, https://www.trans-lex.org/601101/french-civil-code-2016/.

22 В. Захватаев (пер.), Гражданский кодекс Франции, *Киев,* Изд-во «Истина», "Истина", 2006, С. 374, 378. (V. Zahvataev (transl.), French Civil Code, Kiev, Publication "Truth" 2006, p. 374, 378).

23 *Ibidem*, p. 378.

The causa of a contract is considered "false" if the parties believed that the transaction had a certain legal basis, but in fact there was none (for example, an agreement to pay off a debt that did not actually exist). However, the expressions "has no basis" and "has false grounds" are often used synonymously.

In relation to an impermissible causation, according to the FCC, the ground is impermissible when it is prohibited by law, when it is contrary to good morals or public order.

The basis of the obligation, enshrined previously in the FCC, performed certain functions, which from then on were assumed by the new provisions included in the project. In the final version, the new rule on the terms of the validity of the contract is as follows. Article 1128 states that for the validity of the contract the following is required:

- consent of the parties;
- their ability to enter into a contract;
- permitted and defined content.[24]

Since the consent of the parties is one of the conditions for the validity of the contract its absence due to an error, deception, or violence, when they are such that if they were not admitted, the parties would not have concluded an agreement or would have concluded it on substantially different conditions, entails a relative invalidity of the contract (Articles 1130 and 1131 FCC).

The new provisions of the FCC on violence as a ground for the invalidity of the contract replace the rules of Articles 1111–1115. According to Article 1140 of the FCC, violence exists if one party accepts an obligation under pressure from the opposing party, which makes it fear that significant damage will be caused to the party itself, its condition, or the condition of its relatives. Violence is a ground for invalidity, regardless of whether it was used by a party or a third party (Article 1142). But the threat of the use of legal means is not violence, unless the legal means is used for a purpose other than it was intended, or when the legal means is invoked or used to obtain obviously significant benefits.

According to Article 1178 of the FCC, the invalidity of the contract is recognized by the court or can be established by the mutual agreement of the parties. This allows in the simplest cases not to apply to court.

The FCC also distinguishes between absolute and relative invalidity of an agreement; the new rules provide a systematic regulation of each of these two types of invalidity. However, in the provisions of the FCC itself, in some norms it is explicitly stated that with the existing defects, the contract is absolutely or relatively invalid. For example, Article 1147 establishes that failure to conclude a contract is a ground of

24 French Civil Code, 2016, https://www.trans-lex.org/601101/french-civil-code-2016/.

relative invalidity, while others simply refer to the invalidity of the contract (Article 1169).

Article 1179 states that invalidity is absolute if the violated norm is aimed at protecting common interests. Invalidity is relative if the sole purpose of the violated norm is a private interest.

Absolute invalidity can be declared by any interested person, as well as by a public ministry. It cannot be overcome by confirmation of the contract (Article 1180).

Relative invalidity can only be declared by the party to whose protection the law is directed. It can be overcome by confirmation. If several rightsholders are entitled to a claim of relative invalidity, the refusal of one of them does not impede the actions of the others (Article 1181).

Confirmation is an act by which the one who could invoke invalidity refuses to do this. Such an act should indicate the subject of the obligation and the defect of the contract. Confirmation can only follow after the conclusion of the contract. The voluntary performance of the contract by those who know about the grounds for invalidity is equated to confirmation. In the event of a violation, confirmation can follow only after the violation has ceased. Confirmation entails the rejection of those arguments and objections that could be relied on, without nevertheless affecting the rights of third parties (Article 1182).

The party also has the right to:

1) request in writing from the party that could take advantage of the invalidity,
2) confirm the contract,
3) declare a claim to be invalid within six months on pain of forfeiture to a subsequent appeal to the court.

The written document must explicitly state that without filing a claim for invalidity, after six months the contract will be considered confirmed (Article 1183).

Let us also consider some of the new edition rules, codifying the rules that were previously derived by courts from the concept of causa.

Article 1162 states that a contract cannot violate the foundations for the rule of law either by its terms or by its purpose, regardless of whether the latter was known to all parties.

Article 1169 states that a compensated contract is invalid if, at the time of its conclusion, the counter-provision, which the party to the contract agreed to accept, is illusory or insignificant.

Article 1170 states that any provision that makes the debtor's primary obligation meaningless is considered unwritten. This rule is also known as the "Chronopost

doctrine" in a case in which the principle of contracts without foundation was formulated, with reference to Article 1131 on contracts without foundation.[25]

Article 1194 of the FCC, as well as Article 1135, provides that contracts are binding not only in terms of what is reflected in them, but also in terms of the consequences that justice, custom, or law associate with them. However, the rule of Article 1195 of the FCC is fundamentally new, which states that if a change in circumstances that could not be foreseen at the time of the conclusion of the contract makes the performance much more difficult for a party that did not assume such a risk, it has the right to demand negotiations from its counterparty to revise the contract. This party continues to fulfil its obligations during the negotiations.

In case of refusal of negotiations or their failure, the parties have the right to agree to terminate the contract on the date and on the conditions that they define, or, by mutual agreement, apply to court to make the necessary changes to the contract. In the absence of such consent, the court, at the request of the party, changes or terminates the contract on the date and in accordance with the conditions at its discretion.

Thus, the causa of the transaction did not disappear from the FCC, in them the causa is present in the form of codification of the rules about the reason, the grounds for the contract.

Conclusions

1) Starting with Roman law, jurists have never come to a common understanding of whether the causa (ground) is the identical purpose of the contract.
2) The abolition of the causa concept in French law did not entail significant changes in the relations between the parties to contracts, the functions of the previously used causa doctrine were redistributed between other legal concepts.
3) The definition of a causal deal as a deal, the validity or invalidity of which is determined by the presence or absence of a causa, leads to a dispute about what a causa is in relation to a particular contract, and whether it is or it is not in this case. The authors of the reform described the invalidity of contracts of transactions in more understandable terms, harmonizing this with judicial practice.
4) It is quite possible that the concept of a certain and permissible content of a contract will be used in court practice as a causa.
5) The legal institution of causa did not disappear; rather, it was modified and received a unifying legal form about the purpose and content of the contract.

25 Case Société Banchereau v. Société Chronopost Subsequent developments, 1997, https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1134 (10.05.2021).

As a result of the reform, the objective and subjective causa of the previous doctrine is conveyed by the formalized law enforcement categories of "permissible content" and "legitimate purpose" of the contract.

6) Owing to the changes, the German legal institution Geschäftsgrundlage and the Romanesque causa have come closer together in the context of the development of a common terminological framework with the aim of harmonizing and unifying the civil law of the European Union.

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Civil Unions (Non – Registered Partnerships) and Patients' Rights: Problematics and the Future Perspective

Abstract: Unlike the institution of matrimonial law, which has developed over several hundred years and thus has a solid legal basis, the legal framework for non-registered partnerships is a relatively recent legal phenomenon, which therefore also means that the legal framework in those countries where it is applied is not uniform and there are significant differences between different legal systems. The legal framework of non-registered partnerships is influenced by the traditions, history, culture, religion, and other factors of the country and its population. With the development of non-registered partnerships, new challenges are emerging in various fields, including healthcare in terms of ensuring patients' rights. This results in a situation where there is a lack of regulation in society to protect all families, regardless of whether the family is based on a registered or non-registered partnership. The purpose of the article is to clarify the role, and importance, as well as crucial problematics of non-registered partnerships from the patients' point of view. The methodological basis of the research includes general theoretical principles of scientific knowledge. This knowledge provides various aspects in the study of non-registered partnerships and the patients' rights in healthcare. The scientific novelty is to identify the essence and importance of the fundamental rights of each person and to clarify the legal problematics of the non-registered partnership institution that influence patients' rights in the decision-making process.
Keywords: decision making, healthcare, non-registered partnerships, patients' rights

Introduction

In life situations, when the state of health of one of the spouses is rapidly deteriorating and medical action must be decided upon, the decision is made by their spouse or first-degree relative – parents, children, sister, or brother. However, there are often cases where a non-registered partner, who is in fact the closest person to the patient, is formally denied any right to information about the patient's state of health, including the right to be involved in decisions regarding further treatment. The presence of family and the sense of security it provides are important to people, as it is one of the most important preconditions for a successful outcome. When studying the issue examined in the article, it can be concluded that the concept of family is used in a narrow sense. The legal nature and form of the relationship play a more important role than the institution of family. Non-registered partnerships are one of the cases when patients' rights and partner's rights are restricted and contrasted with the legal status of spouses.

Non-registered partnerships also create new challenges in the healthcare process directly related to human rights issues. In order to identify the issues affecting the non-registered partners problems in the context of healthcare, the article will study both the essence of partnerships and their historical development in Latvia, and Europe. In addition, other forms of partnership will be explored, which will make it possible to compare the role of these forms of cohabitation in the context of ensuring health care and patients' rights.

The methodological basis of the research includes general theoretical principles of scientific knowledge. This knowledge covers various aspects in the study of non-registered partnerships and the patients' rights in health care. It is a scientific novelty to identify the essence and importance of the fundamental rights of each person and to clarify the legal problems of the non-registered partnership institution that influence patients' rights in the decision-making process.

It is necessary to justify the idea and historical aspects of non-registered relationships in order to understand the restrictions connected to the realisation of particular patients' rights. To solve these problems, a systematic approach has been used, which represents the non-registered partnerships institution as a complex family system. The structural and functional analysis allowed the importance of correct understanding of non-registered partnerships and its connection with the patients' rights in the health care decision-making process to be determined.

The method of analysis and synthesis as justification of an integrated approach to the modernisation of a particular institution was used. The method of analogy and structural analysis for the development of proposals has been used. The logical analysis method for systematisation of the steps and procedures of the decision-making process has been used. The method of logical generalisation and systematisation has been used in the formation of conclusions and recommendations.

In the course of research, the national and international legal regulation binding on Latvia was analysed. The regulatory enactments to be described cover almost the entire legal system of Latvia, as they apply to the regulation of both substantive and procedural law; moreover, the regulatory norms can be found in all sub-sectors of law: constitutional, international, public, and private law. Consequently, the analysis covered a lot of normative acts regulating various issues of life in various sub-sectors of law: the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Convention on Human Rights and Biomedicine, Civil Law, Medical Treatment Law, Law On the Rights of Patients, etc.

1. Historical Development of the Nature of Partnerships in Latvia

Historically, in Latvia, after the victory of the Great October Socialist Revolution, inequality in family relations for spouses, children born in wedlock and children born out of wedlock was eliminated, along with the influence of the church in regulating marriage and family relations. There were active discussions and meetings on the possibilities of secession from Russia. The Republic of Latvia was founded on 18 November 1918, and lawyers developed regulations on the transfer of rights from the occupying power in several discussions. On 6 December 1918, the Provisional Government approved the Provisional Regulations on the Courts and Proceedings of Latvia, which provided that the courts and related institutions should apply the Russian laws previously in force. Latvia needed temporary laws and procedures during the period of transition.

The most significant achievement in the field of unification of civil law in this period is considered to be the Law on Marriage adopted by the LSS on 1 February 1921, in the development of which, Swiss law was used as a part of the 1907 Civil Code. The law consisted of 9 chapters and 89 articles. It set the minimum age of marriage at 18 for men and 16 for women. Minors – persons under the age of 21 – were not allowed to enter into marriage without the permission of their parents or guardians. [1]After the end of a woman's previous marriage, she was not allowed to remarry until 300 days had elapsed. This norm was related to the need to correctly determine the paternity of children born during this period and, consequently, their inheritance rights. Judgments of former ecclesiastical courts regarding the prohibition of marriage became invalid, as a result of which freedom of marriage was established in Latvia. A marriage could be conducted by the state registry office or by a clergyman of any church. In general, the law can be assessed as progressive and reflecting the spirit of the era, which removed the confessional restrictions on marriage, determined the freedom of divorce in state courts, providing for mutual

1 Latvijas Republikas likums: Civillikums. "ValdībasVēstnesis", 41, 20.02.1937, https://likumi.lv/ta/en/en/id/225418 (2.01.2021).

obligations of former spouses even after marriage[2]. In civil law, the previous legal regulation, which was formed in separate parts of the Latvian state, was maintained.[3]

This was due, among other things, to the complexity of the provisions of family and inheritance law, the close interrelationship of these areas of law, as well as the great differences in the regulation of family and inheritance relations reliant on the territorial dependency or belonging to a certain social group. Six systems of matrimonial property relations were in force in Latvia at the same time, in different regions of Latvia. Such fragmentation of legal norms created dissatisfaction in society, thus, constant work was carried out on amendments of, and supplements to, the legal norms to meet the needs of society. The year 1934 finally became a turning point, when the intention to revise the existing civil law norms in accordance with the public needs was abandoned, and it was decided to develop a permanent Latvian civil law, which was adopted in its final version on 28 January 1937, and entered into force on 1 January 1938 (Civil Law, 1937). Shortly after, with the decision of 21 July 1940, the "admission" of the Latvian Socialist Soviet Republic to the USSR took place, and the political system, and legal system, were quickly changed – the codes of the Russian Soviet Federative Socialist Republic had to be applied in Latvia. The regulation of the Presidium of the Supreme Soviet of the Soviet Union of 8 July 1944, determined that only a registered marriage creates the rights and obligations of the spouses; thus, the legal institution of common-law marriage was abolished. A rather complicated divorce procedure was introduced. Despite the existing regulations, there were couples who did not want to register their relationship.

It should be noted that historically in the Union of Soviet Socialist Republics (hereinafter referred to as the USSR) in the 1920s, cohabitation of people who have children together was equated with marriage. This is evidenced by the note to Article 1 of the General Provisions of Chapter 1: Marriage of the Law on Marriage, Family and Custody of the Russian Soviet Federative Socialist Republic (hereinafter referred to as the RSFSR): *"Persons who were in common-law marital relations before the issuance of the Decree of the Presidium of the Supreme Soviet of the USSR of 8 July 1944 On the Increase of State Aid To Pregnant Women, Mothers of Many and Single Mothers, Strengthening the Protection of Mother and Child, Establishment of the Honorary Title [...] may formulate their relations by registering marriage and indicating the time of actual cohabitation. [...]*[4]

2 D.A. Lēbers, Latvijas tiesību vēsture (1914–2000), (in:) D.A. Lēbera (ed.), Mācību grāmata juridiskajāma ugstskolām un fakultātēm, Rīga 2000, pp. 200–202.

3 F. Švarcs, Latvijas 1937. gada 28. janvāra Civillikums un tārašanāsvēsture, Rīga 2011, p. 28.

4 KPFSR Laulības, ģimenes un aizbildnībaslikumukodekss. Rīga: Latvijasvalstsizdevniecība, 1949, 1926.g. 19.novembra izdevums (Kr.lik.kr. 192. g., 82. Nr. 612 arvēlākiemgrozījumiem), 7.lpp., http://www.periodika.lv/periodika2-viewer/view/index-dev.html#issue:/g_001_0309065303|issueType:undefined (15.01.2021).

The modernisation of the regulation of cohabitation was found in Lithuania, Estonia, as well as in Latvia. A new stage in Soviet marriage and family law was marked by the foundations of marriage and family law of the USSR and the united republics were approved by the USSR on 27 July 1968. The document formulated the main tasks and principles, as well as scope of relations regulated by marriage and family law.[5]

It must be acknowledged that despite the legal framework, there was a widespread public perception that non-registered relationships were reprehensible, so couples living in partnerships felt great public pressure and registered their marriages. With the change of the ruling regime, the public attitude towards the legalisation of relations altered.

Today, the public attitude has changed, and couples are not in a hurry to legally register their relationship status, despite the fact that there is no legal framework to protect the interests of cohabitating couples. Such relationship between a couple is given a different name in society, such as cohabitation, partnership, or consensual union. All these terms have one thing in common – formation of a family.

At present, the concept of consensual union is not considered a legal term in Latvian law and reflects the essence of a partnership, which currently has no legal basis in Latvia. In the Russian language, on the other hand, there is an explanation for consensual union – consensual union is a close relationship between a man and a woman that is not registered in the registry office.

Legislation of the European Union includes the term 'consensual union'. The text of Commission Regulation (EC) No. 1201/2009 defines 'consensual union' as follows: two persons are considered to be partners in a 'consensual union' when they belong to the same household, and have a marriage-like relationship with each other, and are not married to or in a registered partnership with each other. Interpreting the concept of 'consensual union', it is concluded that the legitimate aim of the concept is equivalent to the institution of marriage, namely, the set of features that must exist for individuals to be considered as partners in 'consensual union' are the individuals belong to the same household, or individuals who have a marriage-like relationship with each other, or they are not married to, or in a registered partnership with, each other[6].

5 D.A. Lēbers, Latvijas tiesību vēsture..., *op. cit.,* pp. 200–202.

6 Commission Regulation (EC) No 1201/2009 of 30 November 2009 implementing Regulation (EC) No 763/2008 of the European Parliament and of the Council on population and housing censuses as regards the technical specifications of the topics and of their breakdowns (Text with EEA relevance) – Publications Office of the EU (europa.eu), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009R1201 (5.01.2021).

From a legal point of view, the concept of consensual union creates too many contradictions and clichés of interpretation, which do not contribute to the legitimate aim of the legal institution of partnership.

It must be noted that at a national level, according to Latvian legislation, the country recognises marriage between heterosexuals. There are no laws regulating registered or non-registered partnerships. Therefore, the question on rights of particular relations involved persons in common, and from the perspective of patients' rights it is complicated and non-regulated.

2. An Overview of Civil Unions (Non-Registered partnerships) From a European Union Perspective

From the above-mentioned, it is clear that the definition and the idea of civil unions in Latvia are complicated and connected with a difficult historical situation. Therefore, the terminology and content of a particular idea can be different from the European Union member states' comprehension.

It must be noted that the application of the institution of partnership or the institution of consensual union varies from one Member State to another. The rights of the subjects of these partnerships also differ. There are several European Union countries, where the person can make his or her partnership official without getting married, with a civil union or registered partnership**.** Civil unions form the European union perspective to allow two people who live together as a couple to register their relationship with the relevant public authority in their country of residence. The same situation exists in Latvia nowadays. But there are several differences between European union countries. The differences include some key aspects that show the criteria of a particular non-similar situation around the Union. The first issue is whether a person can enter into a civil union in a specific country. The second issue is to understand what a civil union in a particular country entitles you to. And the third, is whether a specific country recognises a civil union at the national level and abroad. Usually, the rights coming from a registered partnership in one country may be substantially different in another. And this influence involves a person's rights in different fields, as well as in health care. There can be important consequences for a person's rights as well as obligations as registered partners, such as whether the relations between persons is the be considered a long-term relationship. From a practical and legal point of view, Civil unions (non-registered partnerships) usually provide the couple with some specific rights. These rights are different from those that married couples receive. The difference can be viewed in cases of adopting a child, or in the case of the decision-making process in health care.

3. Other Forms of Partnership

The essence of the concept of partnership is unclear, and the same can be said about the translation of related descriptive terms – living together, trial marriage, consensual union, cohabitation, etc., but there is no doubt that trends of modern life affect national laws. There are different approaches to the definition, and practical recognition, of partnerships in national law and in everyday speech, taking into account aspects of the historical development of the partnership, recognition and dissemination at a national level, as well as the existence and purpose of the regulatory framework. In order to understand the concept better, the authors want to single out the social factors that facilitate the formation of cohabitation: solving of housing issues, economic rationality, emotions etc.. The study Comparative Analysis of Factors Affecting Registered and Unregistered Cohabitation states that family formation has changed from an agreed condition into a condition of individual relationship dynamics – intensification of relationships, initiation of cohabitation, becoming parents, etc., where the quality of the relationship plays the key role.[7] In the author's opinion, it is practically impossible to establish a common definition of partnership in the international space for application in all countries and to establish its legal status in legislation. This can be explained by the specifics of the historical development, culture, and customs of each country.

The terms 'cohabitation' and 'family life' have a significant place in today's society in the sense of the concept of the institution of marriage, because getting married is to some extent associated with the risk of divorce, while after marriage there are already legal consequences. The main reason why partners do not want to marry is that marriage restricts freedom, as well as imposes additional material, and moral (personal), obligations on each other. However, it has been observed that unmarried couples also have disputes over matters arising from family law relations in the event of a break-up. In addition, the cause of breakdowns of partner relationships is frequently the incompatibility of character, religious beliefs, different life goals, and so on.

When analysing European law, the author found the following wording: "Subjects of non-registered partnerships are considered to be two partners of the opposite or same sex who live together in the same household and whose relationship is analogous to that of a husband and wife." [8]It follows from this definition that the subjects of a non-registered partnership are heterosexual, or homosexual, partners. According to the author, the definition legitimises the set of features of the institution

7 LU, Publiskās antropoloģijas centrs "Reģistrētas un nereģistrētas kopdzīves faktoru salīdzinoša analīze", Rīga, 2015, www.antropologija.lu.lv/fileadmin/user_upload/lu_portal/projekti/antropologija/zinas/Petijums_kopdzive-2015.pdf (19.01.2021).

8 A. Diduck, Family law, gender and the state: text, cases and materials, Oxford 2006, p. 66.

of family, because the emphasis is on the existence of cohabitation, and treatment of partners towards each other analogous as to the case of a married couple. Article 6(2) of the Treaty on the European Union requires Member States to respect fundamental rights when applying EU law, including the prohibition of discrimination on grounds of sexual orientation. Therefore, although EU law does not oblige Member States to allow, or recognise, same-sex partnerships or marriages, they do require Member States to treat same-sex couples in the same way as opposite-sex couples when applying EU law (including the law on freedom of movement, migration, and asylum).[9]

Legislation in several countries (e.g., the Netherlands, Hungary, etc.) does not provide a definition of partnership, but establishes a number of criteria for determining the existence of a partnership, and, subject to a certain set of criteria, such a union is recognised as a partnership. And the first one is that the partners are of a different sex, which confirms that a type of partnership prevails that does not exist between individuals of the same sex:

1) The second shows that the relationship has lasted for a certain (long) period of time, and it is of a permanent nature. "A long period of time is one that has lasted so long that a similarity can be seen with the relationship between spouses." It must be noted that the minimum duration of a partnership cannot be unambiguously interpreted and the deep analysis of the situation must be done.
2) Besides, one more criterion is that the partners have a child together or neither of the partners is married;
3) The criteria that show that the partners have reached the minimum age required for marriage, and there are no other obstacles that would prevent the partners from getting married should be noted.

The author of the paper considers that the primary reason for the introduction of the legal regulation of de facto cohabitation is based on the desire of persons for stability. Stability of a relationship is based on the permanence or duration of the relationship. National practices vary with regard to the registration and recognition of partnerships. There are four models. The first is non-registered cohabitation of opposite-sex couples. The second is related to registered cohabitation of opposite-sex couples. The third is based on non-registered cohabitation of same-sex couples and last model is the registered cohabitation of same-sex couples.

9 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on European Union – Protocols – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 – Tables of equivalences. Official Journal C 326 , 26/10/2012 P. 0001 – 0390.

Each country regulates different types of extramarital partnerships, so two types of cohabitation partnership can be distinguished – registered partnership and non-registered partnership. The differences related to the legal status and legal consequences that shows particular status.

A secondary issue in implementing the legal framework for partnerships at the national level is the development of a legally correct definition that would reveal the nature of partnerships. It is important to define the procedure for establishing a partnership and the possible partnership models. The definition of partnership must not conflict with other definitions of partnership in the EU, as EU Member States pursue an open border policy. Mobility, and migration rates, are also growing, increasing the number of cross-border partnerships including people from different jurisdictions[10]. The disagreement over the choice of definition of partnership suggests that there are a number of reasons why a common definition of partnership cannot be established for all countries – due to differences in perceptions of partnerships, partner gender criteria influenced by religious beliefs, historical customs, and so on. Consequently, there can be no single definition of partnership for all countries. For example, a union between a man and a woman is defined as "partnership" (Luxembourg), "non-registered partnership" (Hungary), "male-female partnership" (Peru, Brazil), "opposite-sex partnership" (Spain), "non-registered opposite-sex partner union", "extramarital relationship" (Belgium), etc. It should be noted that these concepts are different, and in other branches of law may refer to different legal institutions. The authors therefore suggest their own *definition* of partnership that states that a partnership could be described as a long-lasting and stable relationship between two people of the opposite sex and, in certain situations, two same-sex cohabitants, having a common household and with a view to establishing a socially significant union between partners and their relatives without marriage.

4. Non-Registered Cohabitation of Opposite-Sex Couples

Analysing the nature and purpose of non-registered partnerships clearly shows that this partnership is established in a free form, which does not require additional formalities. Consequently, it is necessary to establish the legal recognition of such an institution in legal acts in order to strike a balance between the protection of the rights and interests of individuals. Legislation must lay down formal criteria for recognising the existence of a union of individuals as a legal fact which has consequences for interpersonal relationships. In this case, the difference is in the procedure for whether cohabitation is legally recognised at the very beginning, during its existence or after its end, if it meets certain criteria.

10 S. Morano-Foadi, Problems and challenges in researching bi-national migrant families within the European Union, "International Journal of Law, Policy and the Family" 2007, vol. 21, p. 17.

The main difference between registered and non-registered partnerships is that law enforcement institutions provide a minimum level of protection for non-registered partnerships. Significant consequences arise in cases where the partners in a non-registered relationship enter into civil transactions, such as a will, an agreement on the division of property, etc. The legislator has established a procedure for resolving such disputes in cases where persons have entered into marriage.

According to the author, the institution of marriage will not even lose its importance after the introduction of partnership, since the institution of marriage includes not only legal formalities and legal consequences, but also long-standing customary rights that have survived for a long time. The author concludes that the primary goal of the institution of partnership is not to equate with the institution of marriage, but to ensure the most equal possible protection of the rights and interests of individuals, regardless of the form of family formation and related formalities.

The legal norms for the regulation of the institution of partnership do not include a separate normative act that would be binding on all countries at the international level. "There are partners in every country who have chosen to live together permanently without getting married, even though they have no legal or factual obstacles to marriage."[11] Therefore, the responsibility for one's actions remains with the individuals themselves. In Anglo-Saxon law, "cohabitation is living together as husband and wife. Unmarried persons living together as husband and wife are not a married couple."[12] Thus, it can be concluded that the cohabitation of partners without the registration of marriage does not create the obligations that a married couple has. "Cohabitation is a mutual presumption of the partners' rights, obligations, and commitments as spouses, which usually correspond to those of a married couple, including sexual relations." [13]

The legal literature reflects the fact that cohabitation is a fact or in some case condition that confirms the cohabitation of partners as spouses with the one aim related to legitimising sexual relations. [14]Thus, one of the essential aspects of partnership cohabitation is the existence of sexual relations, which allows one to determine the fact of formation of a partnership. Of course, it is debatable how to prove the fact of sexual relations. Even more debatable is the issue of legalisation of same-sex partnerships in national law.

11 V. Jarkina, A. Bitāns, Reģistrētas partnerattiecības un laulība: nereģistrēto partnerattiecību institūts un tā iespējamā attīstība Latvijā, Tiešsaites raksts, Rīga, http://www.tm.gov.lv/lv/documents/konferenchu_materiali/Konferencu_materiali.7z (5.01.2021).

12 H. Black Campbell, Black's law dictionary: definitions of the terms and phrases of American and English jurisprudence, ancient and modern. – St. Paul 1990, p. 260, http://www.republicsg.info/Dictionaries/1990_Black's-Law-Dictionary-Edition-6.pdf (7.01.2021).

13 *Ibidem.*

14 B.A. Garner, Black's Law dictionary, St. Paul 2004, p. 277.

5. Non-Registered Partnerships From the Perspective of Patients' Rights

As previously described, the institution of non-registered partnerships is incomplete and poses some challenges, both in terms of civil law and medical law. When analysing the institution of non-registered partnerships and the right of these persons to agree to or refuse treatment for a patient, attention should be paid to both respect for patients' rights and human rights.

In practice, from the perspective of patients' rights, if the patient is in a non-registered partnership, there can be difficulties with visitation rights. The question arises as to who is able to visit patients in hospitals and what the legal basis is for this. At a national level, regulations can be provided that state who is allowed to visit a patient.

According to Section 5 of the Law On the Rights of Patients, each person has the right to receive medical treatment corresponding to the state of health. This section also states that a patient has the right to a respectful attitude and qualitative and qualified medical treatment regardless of the nature and severity of his or her disease. And with a respectful attitude, we must understand the necessity to protect patients' rights according to this article, and to hear the patient's voice. The attitude must be understood as polite and respectful regardless of the situation. For instance, gender, sexual orientation, or relationship must be considered. It means that the enforcement of the regulation shall not discriminate patients' rights to a respectful attitude according to the relationship. Therefore, if the patient is in hospital, he can choose someone who will be able visit him, even if this person is not a registered partner.[15]

But the most important part is section 5, article 3 of the Law. This article states that a patient has the right to the to be supported by her family and other persons during medical treatment.[16]

The mentioned legal norm in Latvian legislation shows that the patient's right to receive support is sometimes observed during treatment. And in this particular case, the legal status of the visitors or support providers is irrelevant. Namely, the legal norm stipulates that both family members and other persons may visit the patient. Other persons shall mean any third party whom the patient has expressed a desire to see. This also applies to non-registered partners. Thus, the medical practitioner does not have to clarify the status of the visitor if the patient has expressed a wish to

15 K. Palkova, Medical Personnel's Legal Awareness as the Key of Principal Quality of Work with Minor Patients, 12th International scientific conference "Society. Integration. Education", Proceedings of the International Scientific Conference, Rezekne Academy of Technologies 2018, pp. 190–198.

16 Law On the Rights of Patients. Latvian Law, https://likumi.lv/ta/en/en/id/203008 (7.01.2021).

see the particular person. The determining element is the patient's expressed will[17]. On the one hand, there should be no problems with the provision of support by non-registered partners. On the other hand, there are such problems. Their existence is linked to shortcomings in the status of non-registered partners in health care.

Latvian Law On the Rights of Patients states that the main aim of such provision and the protection of patients' rights is to give patients the right to receive health care in comfortable conditions. Besides, comfortable means "high degree" which is not common as far as "hospital conditions" are taken into account. [18] Practice shows that there are situations in the health care area when non-registered partners do not have any signed documents which show that the patient has really agreed to this person's support. It means that, for instance, according to Latvian Law On the Rights of Patient, Section 7, non-registered partners do not have the right to take a decision on medical treatment at large, or any method used in the medical treatment, or refusal from medical treatment at large, or any method used in the medical treatment. [19]

This can be problematic if the non-registered partner does not have a trusted family member who will arrive and make medical decisions. Besides, the role of the decision-making process is more specific and complicated than the issue on mental or physical support of the patient.

According to Latvian regulations there is a specific provision regarding another (third) person's rights to agree to medical treatment or to refuse it, however, only when certain conditions are met. This provision is also applicable to non-registered partners regarding restrictions. According to the Latvian Law on the Rights of Patient, if a patient is unable to take a decision himself or herself regarding medical treatment, due to his or her state of health or age, the spouse of the patient has the right to make a decision on medical treatment in general, any method used in the medical treatment, or refusal of medical treatment, or any method used in the medical treatment, but if such does not exist, the closest adult relative with the capability to act in the following order: the children of the patient, the parents of the patient, the brother or sister of the patient, the grandparents of the patient, or the grandchildren of the patient. Section 7 of the Law on the Rights of Patients, shows persons who are responsible for taking a decision in a particular situation.[20]

The right to make decision is given to particular group of people. According to Section 7 of the Law on the Rights of Patients, when taking a decision on medical treatment or refusal thereof, the spouse or closest relative of a patient, or a person

17 V.M. Pashkov, Problem of Patient Discrimination in Sphere of Health Protection, "Socrates: Rīgas Stradiņa universitātes Juridiskās fakultātes elektroniskais juridisko zinātnisko rakstu žurnāls" (Rīga Stradiņš University Faculty of Law Electronic Scientific Journal of Law) 2018, no. 1 (10), pp. 76–93, https://doi.org/10.25143/socr.10.2018.1.76–93 (7.09.2021)

18 Law On the Rights of Patients. 17.12.2009, https://likumi.lv/ta/en/en/id/203008 (7.09.2021).

19 Law On the Rights of Patients. 17.12.2009, https://likumi.lv/ta/en/en/id/203008 (7.09.2021).

20 Law On the Rights of Patients. Latvian Law, https://likumi.lv/ta/en/en/id/203008 (7.01.2021).

authorised by the patient, as well as the lawful representative of the patient, if the patient is under guardianship or trusteeship (hereinafter – person representing the patient), shall observe the wish previously expressed by the patient in relation to medical treatment [21]. This shows the strong power of those persons who are able to make decisions. Non-registered partners do not belong to this group, and are not included in the particular article in a direct way. Non-registered partners can be representatives of the patients and participate in the decision-making process as a person authorised by the patient. It means that there is no automatic way to participate in the decision-making process, as for instance, the parents of the patients have. On the one hand there is a lack of freedom to choose the representatives, because of such restrictions. On the other hand, patients are protected from different unlawful health care actions. The Convention on Human Rights and Biomedicine shall be mentioned in a particular situation. According to article 6 of the convention, a minor does not have the capacity to consent to an intervention; the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law. The next article of the convention states that if an adult does not have the capacity to consent to an intervention, it may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law.[22]

The general principle in medical treatment requires the individual to give informed consent to treatment. Only in limited cases is the treatment permitted without the patient's consent. [23]The Convention provides a broader mechanism for the national level or for the states to regulate the question on non-registered partners and patients' rights. There are no strict restrictions for a particular group of people.

Besides, article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, states that each person has the right to respect for his private and family life, his home, and his correspondence. And the most important fact is that these rights must be protected by the public authorities. [24] If the non-registered partners live together and fulfil other conditions mentioned in the article mentioned above, they are a non-registered family within the particular understanding of the definition of family. And from the perspective of human rights, their family rights are protected as well. Therefore, in the case of the decision-making process and

21 Law On the Rights of Patients. Latvian Law, https://likumi.lv/ta/en/en/id/203008 (7.01.2021).

22 Convention on the Protection of Human Rights and Dignity in Biology and Medicine – Convention on Human Rights and Biomedicine. Adopted on 4 April 1997. 30.12.2009. LatvijasVēstnesis. 205, https://likumi.lv/ta/lv/starptautiskie-ligumi/id/1410 (9.12.2020).

23 I. Kudeikina, K. Palkova, The Problems in will Expression in Civil Law Transactions and Healthcare in Case of Capacity of Individuals, "European Journal of Sustainable Development" 2020, no. 9(1), p. 173, https://ecsdev.org/ojs/index.php/ejsd/article/view/975 (7.01.2021).

24 Convention for the Protection of Human Rights and Fundamental Freedoms, https://www.echr.coe.int/documents/convention_eng.pdf (9.01.2021).

patients' rights to receive support, or to presume that a non-registered person will be able to take part in the decision-making process, can be obvious. A question of discrimination on the grounds of the legal status of a third person as a non-registered partner can arise.

Conclusions

The question of what are the rights of a patient in an unregistered partnership is very complicated. It is linked to the specific definition of non-registered partnerships and the issues related to determining the legal status of non-registered partnerships. Looking at the nature of non-registered partnerships and their role in ensuring family rights, the question of differences in this status remains open. It should be noted that non-registration of marriage and support of non-registered partnerships pose certain risks in a person's daily life, from which legal problems also arise.

The current legal solution is not in line with the trends of international law. The challenge is to adapt the legal framework for the protection of family life to the needs of society and, at the same time, to human rights' issues. The European Court of Human Rights has indicated that the state can use a wide range of specific measures to protect family, thus recognising that it is the state's competence to choose the means, their types, and content, to ensure these rights.

Within the framework of the article, it was not possible to study the rights and obligations to be granted to persons living in a partnership.[25]Now, married persons are granted rights in the field of public and private law, namely, in the field of public law the relationship between the spouses is defined (rights and obligations), while in the field of private law – their mutual relations. At the international level, as well as at the national level, the understanding of the range and scope of these rights is not equal, and is differentiated. In the field of health care, such limited rights in the context of non-registered partnerships are the rights of the partners to decide on the treatment of the other partner.

In Latvia, at the national level, the issue of the spouse's right to decide on treatment is clearly defined, but with regard to the rights of non-registered partners, the regulation is unclear and instead refers to the restriction of these persons' rights, including the patient's rights.

Looking at the national and international regulation, it can be concluded that it is not possible to assess the scope of rights to be determined for non-registered partners. This issue is regulated at the national level, as it is the competence of the legislator, and therefore there are currently no specific legal criteria that could be

25 Oliari vs Italy, 2015. gada 21. oktobraspriedums, pieteikuma no. 18766/11 un 36030/11, 169 paragrāfs. Available: Europe Index 2015, http://www.ilga-europe.org/sites/default/files/Attachments/side_brainbow_eurpe_index_may_2015_no_crops.pdf (9.01.2021).

the basis for an objective assessment. This is indicated by both the case law of the European Court of Human Rights and international instruments.

At the same time, it should be noted that in order to ensure an equal approach to ensuring partners' rights in health care, including with respect to patients' rights, given the importance of the concept of 'family' in family law, along with the legal regulation of non-registered partnerships, the legislator must ensure the incorporation of said concept into national law. Members of a non-registered partnership must be granted rights that are relatively comparable to those of legal representatives, spouses, and that allow the patient's treatment to be agreed to or refused. This would prevent discrimination and strengthen families as an institution in the broadest meaning in health care. Family can be based not only on registered partnerships, but also on non-registered partnerships when it comes to the broadest understanding of the concept of family. The form of the family is not essential; it is important to ensure the patient's right to family support, safety, and well-being during the provision of health care services.

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Polish, and Slovak, Women in the European Parliament: an Analysis of the Results of the Election Held in May 2019

Abstract: The objective of our paper is to analyse the political activity of Polish, and Slovak, women in EP elections; we aim to determine, among other things: whether gender quotas are a decisive factor for women's electoral success, or do other factors result in an increase/decrease in the number of female candidates and the number of women MEPs? What are the particular characteristics of women representing Poland, and Slovakia, in the EP? What was their path to the EP? Which (conservative, liberal) parties are more willing to put women forward in EP elections? Poland introduced the so-called gender quotas into the electoral system, while Slovakia does not have such legal solutions in place. However, when comparing Slovakia to the situation in Poland, it can be stated that although there is a system of election quotas in Poland, its practical implementation may be purely theoretical. In percentage terms, the number of Slovak women elected to the European Parliament (except 2019) was significantly higher than in Poland, even though there is no quota system in the Slovak Republic. The success of Polish, and Slovak, women in the elections to the EP of the 9th term is the result of many factors, which include so-called electoral engineering (quotas, gender balance, first and second places on lists), electoral strategy of a party, but above all, political and social activity of the women themselves. We consider the last factor to be determinant in this respect.
Keywords: election law, European elections, European Parliament, gender quota

Introduction

Over one hundred years ago, Polish, and Slovak women were granted electoral rights. That entitlement resulted from the activity of women themselves, who were striving for emancipation in every domain of social, economic, and political life. It was also an expression of appreciation for their merits, as they were involved in the struggle for the independence of Poland, and Czechoslovakia, in the 19th and 20th centuries. It should be emphasized that those rights were not of a superficial nature, since 7 Polish women were elected to the parliament in Warsaw in 1919, and 2 Slovak women were delegated to the parliament of Czechoslovakia in Prague in October 1918, and 10 Slovak women were delegated to the parliament in November 1918. In Czechoslovakia, however, women did not gain the right to vote until 1920[1]. Since then, women have exercised the right to vote and to stand as candidates in elections. They were present, albeit with varying degrees of success, in the national parliament, in local self-government bodies, and in the European Parliament (EP). The first EP elections in Slovakia, and Poland, were held in 2004. In May 2019, the fourth elections to the European Parliament (9th term) were held in Poland, and Slovakia, to which 52 members in Poland and 14 members in Slovakia were elected. The objective of our paper is to analyse the political activity of women in EP elections; we aim to determine, among other things: whether gender (electoral) quotas (hereinafter we will use only the phrase "gender quotas")[2] are a decisive factor for women's electoral success, or do other factors result in an increase/decrease in the number of female candidates and the number of women MEPs? What are the particular characteristics of women representing Poland, and Slovakia, in the EP? What was their path to the EP? Which (conservative, liberal) parties are more willing to put women forward in EP elections?

In our paper, we compare two countries, i.e., Poland and Slovakia. In justifying this specific point of reference, it should be pointed out that: first, although the EP is a European Union institution, there is no uniform electoral law in force in all Member States[3]. Although the EU is taking steps to harmonize electoral law (hybrid solution),

1 M. Zemko, Volebný zákon do Poslaneckej snemovne Národného zhromaždenia za prvej Československenskej republiky a strany národnostných menšín, "Historický Časopis" 2008, vol. 56, pp. 81–92; Ľubica Kobová, The Contexts of National adn Gender Belonging: The History of Female Syffrage in Slovakia, (in:) B. Rodríquez-Ruiz, Ruth Ribino-Marín (eds.), The Struggle for Female Suffrage in Europe: Voting to Become Citizens, Brill 2012, pp. 225–241.

2 The use of the phrase "female quotas" can also be found in the subject literature. Due to the fact that the phrase "gender quotas" is more neutral, we prefer to use this phrase.

3 "Although the majority of member states use a specific kind of election quota solutions, each state does so it in its own specific way. Some states adopted "hard" solutions with "frightening" sanctions for noncompliance, whereas others use "soft" quotas with "soft" sanctions or do not impose any sanctions. The value of quotas also varies and consequently effectiveness of the applied mechanism will differ in each case and should be individually assessed. The author's de lege ferenda conclusion is a postulate concerning harmonisation of certain guidelines for the

it is far from adopting a common regulation and establishing one constituency. On the other hand, "[i]n many ways, the EP operates as a microcosm for the comparative study of institutional design in Europe. Although MEPs follow a common set of rules and procedures within the assembly, they are elected via systems that vary widely from country to country, and includes parties that represent the full spectrum of political beliefs present across the continent. Reflective of the EU motto, 'United in Diversity' EP elections provide an interesting empirical example of the various systems and peoples found across the European Union, unified within a singular institution"[4]. Second, Poland, and Slovakia, are post-communist countries that became members of the European Union only in 2004[5]. In addition, they are at a similar level of economic, social, and cultural development. Third, Poland introduced the so-called gender quotas to the electoral system, while Slovakia does not have such legal solutions in place[6]. Despite the absence of legal solutions affirmative of women in the electoral system of Slovakia, Ms. Zuzana Čaputová became the president of that country, elected by direct universal suffrage[7].

In our paper, we have relied on conclusive reports, official documents of electoral administration bodies in Poland (State Electoral Commission) and in Slovakia (State Commission for Elections and Control of Political Party Financing), which are of a public and open nature. Our insight is based on the information and reports of the European Parliament. We also refer to the findings of the legal doctrine, gender studies, as well as to the information contained in the press. The article has been divided into three parts. In the first, we analyse the situation of women in Poland from the perspective of the elections to the European Parliament. In the second part, we outline the situation of women in Slovakia. The third part contains conclusions and summarises the analysis.

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electoral law in terms of enhancing balanced gender representation in the EP, which has already been under consideration for some time" – N. Półtorak, Gender Quotas in the Elections to the European Parliament, (in:) E. Kużelewska, D. Kloza (eds.), Elections to the European Parliament as a Challenge for Democracy, Białystok 2013, p. 85.

4 A.S. Aldrich, W.T. Daniel, The Consequences of Quotas: Assessing the Effect of Varied Gender Quotas on Legislator Experience in the European Parliament, "Politics & Gender" 2020, vol. 16, pp. 738–767.

5 Elections to EP (2004) shows: 'On the one hand, in […] Poland, the percentage of women MEPs was largely similar to the proportion of women in national legislatures. On the other hand, in […] Slovakia […] a much higher proportion of women were elected to the EP than to the national legislatures (a partial exception is Latvia in the 2004 elections)' – see C. Chiva, Gender, European Integration and Candidate Recruitment: The European Parliament Elections in the New EU Member States, "Parliamentary Affairs" 2012, vol. 67, pp. 458–492, at 462.

6 D. M. Farrell, R. Scully, Electing the European Parliament: How Uniform are 'Uniform' Electoral Systems?, "Journal of Common Market Studies" 2005, vol. 43, pp. 964–984.

7 S. Walker, Slovakia's first female president hails victory for progressive values, "The Guardian", https://www.theguardian.com/world/2019/mar/31/slovakia-elects-zuzana-caputova-first-female-president (4.04.2021).

1. Polish Women in the European Parliament

1.1. Gender Quotas in Poland – the Regulation

Before proceeding to a detailed analysis, it should be noted that since 2011, the so-called female quotas have been in place in Poland. Currently, this issue is regulated by Article 211 § 3 of the Electoral Code: "Lists of candidates: 1) shall not include fewer women candidates than 35% of the number of all candidates on the list; 2) shall not include fewer male candidates than 35% of the number of all candidates on the list". This provision obliges election committees (committees are formed by political parties, coalitions of political parties, and by voters) to place women on the lists of candidates, otherwise registration of such a list will be refused. It should be clarified that since the 1990s, women's milieus have called for the introduction of gender balance in the electoral system in Poland. "Eventually, a successful attempt to introduce quotas across the electoral system was made in 2009 on the initiative of the newly founded Women's Congress"[8].

Electoral quotas in Poland directly resulted in the growth of the number of women candidates to the national parliament (Sejm) in 2011: 3,063 women sought a seat in parliament (43.54% of all candidates). The results of those elections (2011) were the best for women since 1980, as they won as many as 110 seats, or 23.91% of all seats. In subsequent elections to the national parliament held in 2015: 3,328 women sought a seat, which is 42.35% of all candidates. That year brought another electoral success for women as they won 125 seats in the Sejm (the general number of Sejm members is 460). Finally, as of January 1, 2019, the Sejm of the 8th term had as many as 131 women, which represents 28.48% of that body[9]. According to last data, as of April 1, 2021, the Sejm of the 9th term had as many as 132 women (28, 69%)[10].

By changing the research perspective and moving on to the European level, the question arises whether such electoral quotas, which strengthened the participation of Polish women in the national parliament, feed through into the electoral success of women seeking a seat in the European Parliament. When searching for an answer to the question thus posed, the legal and political background of the 2019 elections should be outlined, and the results of the 2009 elections (quotas were not applicable) should be compared with the results of the 2014 and 2019 elections (quotas were already in place).

8 See more about the M. Fuszara, Poland – a success story? Political History of Introducing Gender Quota in Post-Communist Poland, "Teorija in Praksa" 2017, no. 2, p. 325; A. Bodnar, A. Sledzińska-Simon, Gender Equality from Beneath: Electoral Gender Quotas in Poland, "Canadian Journal of Law and Society" 2013, vol. 28, pp. 151–155; A. Rakowska-Trela, 100 years of women suffrage in Poland. From the fight for political rights to gender quotas, "Przegląd Prawa Konstytucyjnego" 2018, vol. 46, pp. 261–271, at 269–270; P. Uziębło, Parytety płci i kwoty na listach wyborczych – za i przeciw, „Przegląd Prawa Konstytucyjnego" 2010, vol. 1, pp. 41–49.

9 Data and statistics: National Electoral Commission.

10 Data and statistics: National Electoral Commission.

1.2. Elections to the European Parliament in 2019 – Legal and Political Background

First and foremost, legal issues of the elections to the EP are regulated by the said electoral code of 2011. It divides Poland into 13 constituencies. The right to vote is afforded to Polish citizens who reach the age of 18 no later than on election day and to other citizens of the European Union (non-nationals) who reach the age of 18 no later than on election day and permanently reside in the territory of Poland. In the elections to the European Parliament in the Republic of Poland – the right to stand in elections is afforded to a person who: a) has the right to vote and b) reaches the age of 21 no later than on election day and c) has been a resident of the Republic of Poland or of another Member State for at least 5 years.

Candidates included on a list are put forward by election committees formed by political parties or coalitions of political parties and by voters. As EP elections are based on proportional representation, committees are able to submit one list of candidates in one electoral constituency. The electoral code sets the 5% electoral threshold (a percentage determined by the number of votes achieved by a committee nation-wide), which entitles the committees to participate in the allocation of seats in the districts.

On May 26, 2019, the elections to the 9th EP were held in Poland. In total, only 9 electoral committees participated in the elections. The committees registered a total of 87 lists in 13 electoral districts. There were 866 candidates, including 404 women[11]. The electoral threshold was met only by three election committees: the Law and Justice (Prawo i Sprawiedliwość) election committee, the Robert Biedroń's Spring (Wiosna)[12] election committee and the Coalition Election Committee of the European Coalition (Koalicja Europejska)[13].

The first of them was established by the Law and Justice party, with an absolute majority in the national parliament. After it won the parliamentary elections in 2015, Law and Justice single-handedly formed the government which is implementing an extensive family-oriented social programme. In the traditional classification of parties, it should be located on the right side of the political scene, bringing together – according to publicists – Eurosceptics and populists[14]. The Spring Election

11 Data and statistics: National Electoral Commission.

12 M. Day, Gay atheist politician launches movement to take on Poland's conservative and religious establishment, The Telegraph, http://www.telegraph.co.uk/news/2019/02/03/gay-atheist-politician-launches-movement-take-polands-conservative/ (10.05.2021).

13 European Coalition leaders have signed programme declaration before EU elections, https://tvn24.pl/tvn24-news-in-english,157,m/poland-s-opposition-european-coalition-set-eu-election-campaign-slogan,924544.html (10.05.2021).

14 J. Cienski, Poland's PiS smashes opposition in European election vote, "Politico", https://www.politico.eu/article/poland-law-and-justice-pis-jaroslaw-kaczynski-wins-european-election (10.05.2021).

Committee, on the other hand, is a new political and social formation established by Robert Biedroń, who is actively fighting, for example, for the rights of homosexuals in Poland and for women's right to abortion. It is positioned on the left side of the political scene. The European Coalition Election Committee was formed by the largest opposition parties representing a liberal approach to the state, law, and economy. In the traditional classification of parties, it should be located on the centre-left side of the political scene, grouping Euroenthusiasts together. In fact, the battle for the seats in the EP was fought by the Law and Justice election committee and the committee of the European Coalition.

1.3. The Results of the EP Elections and the Results of Women (2019)

The elections to the EP held in 2019, in Poland, recorded the highest turnout, which reached 45.58% and was twice as high as in the previous periods: 2004 – 20.87%; 2009 – 24.53% and 2014 – 23.83%[15]. Such a state of affairs may result from a strong attachment of Poles to the EU and its values, but it may also stem from the fear of Poland exiting the EU[16].

462 men and 404 women stood as candidates. Women accounted for 46.65% of all candidates seeking a seat in the EP. Poles elected 52 MEPs (one seat will be filled following UK's exit from the EU), including 18 women, which constitutes 34.61% of all MEPs elected in Poland. This is the best election result achieved by women in Poland. Until then, women had not succeeded in taking up 30% of the seats either in the national parliament, or in EP elections. Is such a result of women a consequence of gender quotas?

15 Data and statistics: National Electoral Commission. See more about the political contex of the election; M. Druciarek, B. Łaciak, Kobiety w Parlamencie Europejskim Strategie partii politycznych w wyborach w 2019 roku w Polsce, Warsaw 2019.

16 "The idea of Poland's integration with the European structures was met with a very favourable social reaction at the beginning of the 1990s, recording considerable public support in the polls reaching as high as 80%. Entering into accession negotiations and making the prospects for Poland's membership more realistic, as well as increasing concerns about the effects of accession contributed to a decrease in the number of its supporters. The lowest level of support for membership (53%) was recorded by the CBOS Public Opinion Research Center in July 2001. Upon Poland's entry into the EU, Poles were quickly relieved that bleak scenarios associated with integration did not come to pass, and the 'post-accession shock' anticipated by some did not materialize. Reduced uncertainties and waning concerns related to EU membership, and soon also increasingly more visible positive effects thereof, were the reason why in the first months following accession, public support for membership began to grow, quickly exceeding 70%. In the last 15 years, despite some fluctuations in the level of support for Poland's membership in the EU, it has remained high or very high. Since 2014, support for membership has not dropped below 80% in the surveys of the CBOS Public Opinion Research Center. In March this year, the acceptance of our country's presence in the EU reached a record level of 91%. At present, only one in twenty respondents is opposed to membership (5%)" – see B. Rogulska, 15 lat członkostwa Polski w Unii Europejskiej, „Komunikat z Badań" 2019, vol. 59, pp. 1–27, at 1–2.

An analysis of electoral lists of three committees that met the 5% electoral threshold indicates that:

First, the Law and Justice party (electoral committee) put forth 117 candidates, including 48 women (41.02%). The committee registered 13 lists and assigned 5 first places on the list to women, which constituted 38.46% of all first places on the lists of that committee, and assigned 6 second places on the list to women, which constituted 46.15% of all second places on the lists of that committee. The committee won 27 seats, of which 11 were taken up by women (40.74%). The seats were won by women placed at the head of the list: a) 5 seats were taken up by women candidates placed first, b) 5 seats by women candidates in second position, c) 1 seat was obtained by a candidate placed third place on the list. In total, the victory of women was not solely down to the electoral quota but to their place on the list, i.e., either the first or the second one.

Second, the Committee of the European Coalition, which brings opposition parties together, put forward 130 candidates, including 66 women (50.76%). The Committee registered 13 lists and assigned only 3 first places on the list to women, which accounted for 27.08% of all first places on the lists of that committee and guaranteed 4 second places on the list to women, which represented 30.77% of all second places on the lists of that committee. It won a total of 22 seats, of which 6 were filled by women (27.73%). The electoral success was achieved by female candidates who were placed: a) first on the list – 3 seats, b) second on the list – 1 seat, c) fourth on the list – 1 seat, d) tenth on the list – 1 seat.

Third, the Spring Committee, which brings together the left-wing electorate, nominated 130 persons, including 64 women (50.76%). The Committee registered 13 lists and assigned 8 first places on the list to women, which accounts for 61.53% of all first places, and 5 second places on the list, which represents 38.46% of all second places on the lists of that committee. The committee won 3 seats, one of which was secured by a woman candidate placed first on the list (33.33%)[17].

The above figures may be surprising if juxtaposed with the political scene in Poland and the results of research carried out following the EP elections in 2014. Lühiste and Kenny examined the composition of the 8th EP and came to the conclusion that: 'Overall, left-wing parties are significantly more likely to have a female representative to Brussels than right-wing parties. The magnitude of the effect is quite large, with an MEP being a woman being 18 percentage points higher for the most left-wing party compared to the most right-wing party. Hence, our data confirms the theoretical expectations of left-wing parties embracing more egalitarian ideologies and thus promoting more gender equal representation than other types of parties. While parties which are more Eurosceptic tend to be less likely to have women MEPs than more Europhile parties, these results fail to reach traditional

17 Data and statistics: National Electoral Commission.

levels of statistical significance'[18]. Moreover, Bodnar and Śledzińska-Simon, analysing the Polish political scene, maintained that 'the conservative parties promote the traditional role of women as mothers and homemakers, the left-wing parties treat women's issues instrumentally'[19]. These assumptions cannot stand when confronted with the results of the elections to the 9th EP. In 2019, in Poland, a conservative and right-wing party Law and Justice introduced as many as 11 women to the EP, which constitutes 40.74% of all the seats it gained. Although it placed women on the lists in accordance with the applicable quotas (at least 35%), their participation did not exceed 50% of all candidates of that party (no gender balance). On the other hand, it assigned high positions on the lists to women, which seems to have translated into the electoral success of the women supported by the conservative party[20]. In turn, the Euroenthusiastic European Coalition, composed of liberal and left-wing parties, achieved gender balance (50% of places on the list for men and 50% of places on the list for women). However, it did not award women high positions on the lists. As a consequence, it is impossible to speak of electoral success of women supported by left-liberal parties (only 27.73% of the seats won by the coalition were taken up by women). The last political force which ensured an even division of places on the lists and maintained gender balance, introduced one woman to the EP, also occupying the first position on the electoral list in Greater Poland.

The MEPs of the 9th EP who were candidates placed 4th and 10th on the lists of the European Coalition may be somewhat surprising for observers of EP elections.

18 M. Lühiste, M. Kenny, Pathways to Power: Women's Representation in the 2014 European Parliament Elections, "European Journal of Political Research" 2016, vol. 55, pp. 626–41.

19 A. Bodnar, A. Śledzińska-Simon, Between symbolism and incrementalism: Moving forward with the gender equality project in Poland, "EUI Working Paper Law" 2015, vol. 30, pp. 1–8, at 3. "The female politicians interviewed for this case study confirmed observations from previous studies on women in politics that party ideology has a significant impact on the process of drawing up electoral lists. Left-wing and liberal parties, which focus on women's rights in their programmes, tend to pay attention to women's position on the lists, while conservative parties tend to abide only by the legal requirements imposed on them by gender quotas. At the time of writing this report, political parties' lists for the European elections had not yet been prepared, but parties' policies in previous elections are illuminating. Some left-wing and liberal parties adopted internal rules regarding how electoral lists should be created: as well as 35% gender quotas, which are legally binding, these parties voluntarily applied additional rules, such as zipping, parity among the first places on the list, and an obligation to place at least one woman and one man among the first three positions on the list and at least two women and two men among the first five positions on the list, among other measures'- see K. Mccracken, A. Fitzsimons, S. Marquez, M. Druciarek, Women in political decision-making in view of the next European elections, http://www.europarl.europa.eu/supporting-analyses, p. 1–60, at 42 (10.05.2021).

20 "The Polish PiS opts implicitly against measures that work towards the goal of equality between men and women, as well as against the goal of non-discrimination against LGBTQ" – see G. Falkner, G. Plattner, Populist radical right parties and EU policies: how coherent are their claims?, "EUI Working Paper RSCAS" 2018, vol. 38, pp. 1–37, at 17.

Both women have been members of the EP since 2009. Ms. Danuta Maria Hübner, professor of economics, acted as a commissioner in 2004–2009, and then became a member of the 7th and 8th EPs. She prepared Poland's accession to the EU. In turn, Ms. Elżbieta Łukacijewska, placed last on the list, won the greatest number of votes in her district. She was a member of the EP serving in the 7th and 8th terms. Hard work and a direct campaign addressed to voters was the explanation she gave for her success: 'The MEP asked what she believed to be a recipe for success in the elections replied that 'you work hard from dusk till dawn [...] We have filled out the entire calendar day by day specifying: what we do, where we are, in what group. And we work from dusk till dawn, regardless of the weather – she explained – We meet in the markets, by the greengrocers, on the street, on the buses, we are not afraid of people, and I think people appreciate it' – she added'[21]. Thus, the electoral success of these female members was not ensured by their ranking on an electoral list but by their social position, which is conditioned by the personal characteristics of the members, i.e., diligence, authority, knowledge, and devotion to public issues.

It should also be added that Ms. Danuta Hübner is the oldest member, since she reached the age of 71 in the election year, while the youngest member was born in 1976 and stood as a candidate to the European Parliament at the age of 43. The average age of MEPs is over 55. This implies that a regular female MEP is a mature person who, as a rule, should have considerable life experience. All Polish women in the EP have university education and some hold academic titles and degrees. Two women were Prime Ministers and 7 acted as ministers. 13 women without experience in that body and 5 women who had previously acted as MEPs were elected to the EP. The vast majority of them were members of the national parliament, so they have long been affiliated with the Polish political scene. This confirms that a seat in the EP is a kind of political retirement[22]. However, three MEPs were neither former members of the government nor members of the national parliament. They did not directly engage in the internal policy of the state and entered the EP though the 'back' door. The above concerns Ms. Janina Ochojska, Magdalena Adamowicz, and Sylwia Spurek. Ms. Janina Ochojska (64) is a social activist who organized and provided humanitarian aid to besieged Sarajevo, Kazakhstan, Chechnya, Iraq, Afghanistan, Georgia, Darfur, Sri Lanka, Somalia, South Sudan, and many other countries. At the same time, she is a disabled person with seriously health issues who views her seat 'as an opportunity to show «old Europe» that the «new Europe» is able to actively and effectively contribute to providing help and that there is a great potential in this part of Europe which is worth exploiting, thus creating new development opportunities for the poorest

21 See 'Fakty po Faktach' programme broadcast on TVN 24 on May 30, 2019, http://www.tvn24.pl.

22 S. Hix, M. Marsh, Second-Order Effects Plus Pan-European Political Swings: An Analysis of European Parliament Elections Across Time, "Electoral Studies" 2011, vol. 30, pp. 4–15.

countries'[23]. In turn, Ms. Magdalena Adamowicz, a lawyer and researcher, wife of the tragically murdered Mayor of the City of Gdańsk, Paweł Adamowicz, stated when explaining her decision to run in the elections: 'I am running because of Paweł's death. In the European Parliament, I want to fight against hate speech, to which there is no limit these days. That's why it cannot be ignored but elevated to the level of the most important challenges of the European Union. I want to turn the hatred our family suffered into positive action'[24]. The youngest MEP, Sylwia Spurek, who acted as deputy of the Ombudsman, is an interesting individual. Her political and social activities are centred around reinforcing the principle of equality and measures to minimize discrimination in Poland. She is active in the LGBT environment.

1.4. Women in Elections to the EP

Legislated gender quotas first became applicable during the EP elections held in Poland in 2014. At that time, 723 men and 559 women (44%) stood as candidates. The number of candidates did not directly translate into the electoral success of women since the seats were taken up by 39 men and merely 12 women. In total, women only accounted for 23.53% of all members elected in Poland[25]. Although thirteen election committees registered lists of candidates to the EP, only five committees reached the 5% electoral threshold and participated in the allocation of seats, but only three of them introduced women to the EP[26].

The first of them, the Election Committee of Law and Justice (a Eurosceptic conservative party), obtained 19 seats, of which only 3 were taken up by women (15.79%). It should be noted that the committee registered 13 district lists but placed only one woman first on the list, while on six lists it placed women second. This arrangement of the list translated into the result of women: one seat was taken up by a female candidate placed first, one seat by a woman placed second and one seat by a woman in fourth position on the list.

The election committee of the Civic Platform (Platforma Obywatelska) obtained 19 seats, but as many as 7 seats were filled by women (36.84%). The committee registered 13 district lists and placed six women in first positions and seven in second positions on the lists. All the women candidates placed first took up the seat and only one seat was filled by a candidate placed second.

23 J. Ochojska, Dlaczego kandyduję do Parlamentu Europejskiego, https://www.pah.org.pl/janina ochojska-dlaczego-kandyduje-do-parlamentu-europejskiego (20.05.2021).

24 M. Szymczyk, Magdalena Adamowicz. Czym zajmie się w Europarlamencie? "Newsweek", https://www.newsweek.pl/polska/polityka/magdalena-adamowicz-idzie-do-parlamentu-europejskiego/1wcj51n (21.05.2021).

25 D. Adamiec, R. Wąsowicz, Wybory do Parlamentu Europejskiego 2014. Nowe regulacje, debaty, kampania informacyjna, Warsaw 2014.

26 Data and statistics: National Electoral Commission.

The election committee of the Left gained 5 seats, of which two were taken up by women (40%). The committee registered 13 district lists, including five women in first and six in second places. Two seats were won by the candidates in first place on the list.

In the EP elections held in 2009, no gender quotas were in place. 997 men and 296 women (22.89%) stood as candidates (data: State Electoral Commission, 2009). 40 men MEPs and 10 women MEPs were elected in Poland. In total, women accounted for only 20% of all seats. Twelve election committees registered lists of candidates to the EP. Four committees reached the 5% electoral threshold and participated in the allocation of seats, but only two committees introduced women to the EP.

The election committee of the Civic Platform obtained 25 seats, of which 8 were taken up by women (32%). The committee registered 13 district lists, including only three women candidates placed first and four women candidates placed second. Three seats were won by the candidates in first places, another four seats – by women in second places on the list and one seat was taken up by a woman candidate placed third on the list.

The election committee of the Left obtained 7 seats, of which 2 were taken up by women (28.57%). The Committee registered 13 district lists, of which it assigned only three first places on the list to women and one woman was registered in second place. One seat was filled by a female candidate placed first and by one placed second.

The other two committees which reached the electoral threshold did not have their female representatives in the European Parliament. The conservative Law and Justice party won 15 seats. It registered 107 male candidates and only 23 female candidates (17.69%) in thirteen districts. It awarded women two first places and one second place on its lists, other women candidates were at the bottom of the list. In turn, the people's party won 3 seats. It registered 108 male candidates and 22 female candidates (16.92%) in thirteen districts. None of the women took the first place on the lists and only one woman was a candidate in second place[27].

In summary, only 20% of seats were taken up by women (10 seats) in 2009. Their electoral success was determined primarily by their position on the list, as 9 females stood as EP candidates in first and second places. As for the overall number of women candidates, it should be emphasized that it slightly exceeded 22% of all candidates. The winning women had long-standing political experience in Poland: seven of them had been members of the national parliament and one acted as minister. Two women entered the EP though the 'back' door since they were not professional politicians but social activists, closely associated with their electoral district, enjoying the strong confidence of their electorate.

27 Data and statistics: National Electoral Commission.

2. Slovak Women in the European Parliament[28]

2.1. Gender Quotas in Slovakia – the Lack Regulation

Before 1989, women held between 20 and 30% of parliamentary seats in the parliament of the Czechoslovak Socialist Republic. There was a system of set quotas[29] according to the Communist Party's recommendations and decrees. Although the official policy of the Communist Party pushed for women's quotas in parliament, women only made a so-called 'complementary group'. Women could work in parliament if they met several criteria at the same time: for example, gender, age, or social class (for example, a young woman working as a worker in agriculture)[30]. However, women's involvement in the parliament of the period was more or less formal[31].

Unlike Poland, there is currently no legislation in the Slovak Republic laying down the minimum number of women to be included on the list of candidates for election to the National Parliament (National Council of the Slovak Republic) or the European Parliament. Similarly, there are no quotas setting a minimum number of women for the election of the President or for elections to local authorities. Thus, unlike Poland, we cannot compare how the representation of women in parliament (or other public bodies) has changed after the introduction of quotas[32]. Therefore, in this part of the paper, we will point out how many women were candidates for elections to the national parliament (and other bodies), and how many were successful in the elections.

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28 This part of the article is the output of the grant project APVV–16-0362 Privatization of Criminal Law – the substantive, procedural, criminological, organizational, and technical aspects.

29 The quota system for women's participation in politics is not new. Theoretically, it was addressed by several authors who point to the positive and negative aspects of this system – see more A. Teutsch, Kvótový systém', Aspektin – feministický webzin (2009), http://www.aspekt.sk/aspekt_in.php?content=clanok&rubrika=19&IDclanok=79 (25.05.2021). See also: R.E. Matland, K.A. Montgomery, Women's Access to Political Power in Post-Communist Europe, Oxford Scholarship Online, 2003; M.L. Krook, Quotas for Women in Politics: Gender and Candidate Selection Reform Worldwide, Oxford University Press, 2009; D. Dahlerup, L. Freidenvall, Judging gender quotas: predictions and results, "Policy & Politics" 2010, vol. 38; O. Blažo, H. Kováčiková, Right for Equal Opportunity for Fair Public Contract? Human Rights in Public Procurement, "Bialystok Legal Studies" 2019, vol. 24; A. Breczko, M. Andruszkiewicz, M., The Question of the Value of Human Life in Theoretical Discussions and in Practice. A Legal Philosophical and Theory of Law Perspective, "Bialystok Legal Studies" 2018, vol. 23.

30 J. Filadelfiová, O ženách, moci a politike: úvahy, fakty, súvislosti, (in:) J. Cviková, J. Juráňowá (eds.), Hlasy žien. Aspekty ženskej politiky, Aspekt, Bratislava, 2002.

31 J. Filadelfiová, I. Radičová, P. Puliš, Ženy v politike – dôsledok tranzície verejnej politiky?, Bratislava 2000.

32 "Neither political parties nor public opinion in Slovakia is in favour of introducing voluntary or legislative quotas. None of 8 political parties represented in the parliament has voluntary quotas. Quotas and gender equality are not the important issues for the party leaders, because the party strongly advocates in favour of economic issues" – see S. Porubanova, Gender equality policies in Slovakia. Study, European Union 2017, p. 15.

In 1994, 1,929 candidates ran for the national parliament, while at that time the Statistical Office did not conduct surveys on how many of the candidates were men and how many were women. From the given period we have only information that out of 150 elected parliamentarians, 128 were men and 22 were women, i.e., 14.7% were women. In the 1998 elections, 1,618 candidates ran for parliament, of which 274 were women, which represents 16.9%. Out of 150 MPs, 131 were men and 19 were women, i.e., 12.7% were women. In the 2002 elections, 2,618 candidates stood for parliament, of which 604 were women, representing 23.1%. Of the 150 members of parliament, 121 were men and 29 were women, or 19.3% were women. In the 2006 elections, 2340 candidates ran for parliament, of which 532 were women, representing 22.7%. Of the 150 parliamentarians, 120 were men and 30 were women, or 20% were women. In the 2010 elections, 2,397 candidates ran for parliament, of which 545 were women, representing 22.8%. Of the 150 members of parliament, 136 were men and 24 were women, or 16% were women. There were 2,967 candidates in the 2012 elections, of which 778 were women, which represents 26.2%. Of the 150 members of parliament, 121 were men and 29 were women, or 19.3% were women. There were 2,914 candidates in the 2016 elections, 722 of whom were women, or 24.8%. Of the 150 members of parliament, 121 were men and 29 were women, i.e., 19.3% were women[33].

Based on the above, we can state that during the existence of the Slovak Republic (after the abolition of the quota system), between 12.7% and 20% of seats in the national parliament were occupied by women. Compared to the period before 1989 when the quota system existed in Czechoslovakia, there was a significant decrease in the representation of women in parliament.

On the basis of the above, we can state that at least 16.9% and a maximum of 26.2% of candidates in the six elections to the national parliament were women. In the elections there was always a lower percentage of women elected than the number of women who ran. This is probably due to the fact that women were in the lower, more difficult-to-select, places in the candidate list. Under the law of the Slovak Republic, voters can give preference to several candidates on the list, which will increase the possibility to move higher in the list. However, most voters do not use this option and most often pass a ballot without a preferential vote, which could move (female) candidates from lower places to more easy-to-select higher places. Part of the reasons for the lower share of women elected in the number of candidate women may be the persisting conservatism and traditionalism of part of the Slovak society, according to which politics is a 'male affair'. Fortunately, in recent years, we have also seen changes in this respect. We will discuss this later in this chapter[34].

33 Data: State Commission for Elections and Control of Political Party Financing. See closer at https://www.minv.sk/?ep-vysledky (24.05.2021).

34 Data: State Commission for Elections and Control of Political Party Financing.

2.2. The Results of the EP Elections and the Results of Women (2019)

Similarly to Poland, the European Parliament elections in 2019 recorded the highest turnout ever in Slovakia[35]. Although it was historically the highest turnout in the European Parliament elections in Slovak history, 22.74% is still only half as much as 45.58% in Poland. Although Slovakia's participation was approximately half that of Poland, it was significantly higher than in 2004, or 2014 (2004–16.96%, 2014–13.05%). This increase may have a number of justifications, which are mainly of an internal political nature. The most likely reason for the increase may be the political crisis of the strongest political party so far – SMER – social democracy. In particular, in 2018, several major scandals of this political party were revealed that caused the party to lose credibility. This may also be indicated by the fact that the political party standing in opposition to the ruling party (Koalícia Progresívne Slovensko a SPOLU – Občianska demokracia/Progressive Slovakia and TOGETHER – Civic Democracy Coalition) received the largest number of seats in the elections (4 seats out of 14). The reason may be a slow increase in preferences of the Euro-sceptical political party Kotleba – Ľudová strana Naše Slovensko (Kotleba – People's Party Our Slovakia). It is the majority of the population that is sensitive to this political party, and there is a strong effort to curb its activities. Increasing turnout may also be justified by not gaining the strength of the Eurosceptic political party and the governmental political party SMER – Social Democracy[36].

As mentioned above, in 2019 there were 343 candidates for the European Parliament, and 81 of them were women, which represents 23.6%. A total of 14 members were elected, 3 of whom were women, which represents 21.42%. Such a low result is surprising, because in "Slovakia the rate of women's representation in the EP in 2004 and 2009 was higher than the average for all Member States (31% in the 6th parliamentary term and 35% in the 7th parliamentary term)"[37].

In these elections, 31 political parties stood. Only three of them had a woman in the first – leading position. Given the number of mandates given to Slovakia by MEPs, the first three candidates on the list are most likely to be elected. Of the 31 political parties, only 16 had at least one woman in the first three. Only one party had up to two women in the first three. No political party had three women in the first three. On the contrary, as many as 13 political parties had only men in the first three places.

35 O. Gyarfasova, Public's perception of the EU and turnout in the EP election, (in:) N. Bolin, K. Falasca, M. Grusell, L. Nord (eds.), Euroflections. Leading academics on the European elections 2019, Mittuniversitetet, Demicom, Sundsvall, Sverige 2019, p. 56.

36 Data: State Commission for Elections and Control of Political Party Financing.

37 A. Piekutowska, E. Kużelewska, Participation of V4 Women in the European Parliament and its institutions, (in:) M. Musiał-Karg, E. Lesiewicz (eds.), Women's role and their participation in public life of the Visegrad Countries, Poznań–Ústí nad Labem 2016, p. 44.

An interesting fact is the result of the party that won the elections. Progressive Slovakia and TOGETHER – Civic Democracy Coalition received up to 4 mandates. On its list of candidates, men ranked first and second, women ranked third and fourth. However, only male candidates were elected. Candidates ranked first, second, sixth and seventh were chosen[38].

From the point of view of representation of Slovak women in the European Parliament, it is interesting that in these elections in Slovakia the highest number of votes (of all political parties) was obtained by a woman. She is MEP Monika Beňová, who received 89,472 votes in these elections. Mrs. Beňová has been a Member of the European Parliament since 2004, i.e., since Slovakia's accession to the European Union. Monika Beňová was also at the top of the list of candidates of the current ruling party SMER – Social Democracy. The above-mentioned election result of Monika Beňová may be justified by her relatively high popularity in Slovakia, as well as by voters who otherwise reject the policy of the party SMER – Social Democracy. This paradox may be justified by the fact that Monika Beňová has been based in Brussels for a long time and her person is not associated with the scandals of the ruling political party in Slovakia. Monika Beňová is the only citizen of the Slovak Republic to exercise the mandate of a Member of the European Parliament for the fourth consecutive time.

Another Slovak woman who has worked for a long time in the European Parliament was Anna Záborská. She was a nominee for the Kesťansko-demokratické hnutie (Christian Democratic Movement). She was a Member of the European Parliament for three terms: she was elected in 2004, 2009, and 2014. At the same time, Anna Záborská's presidency of the Committee on Women's Rights and Gender Equality should be mentioned. Several feminist NGOs from Slovakia and other European Union countries protested against her election and some of her statements on gender issues[39]. In 2019, the political party of the Christian Democratic Movement did not include her on its list, and Anna Záborská stood for election on the list of political parties of the Christian Union. However, this political party did not receive any mandate in the European Parliament elections.

2.3. Women in Elections to the EP

In the European Parliament elections in Slovakia, the situation in women's representation does not differ significantly from that in the national parliamentary elections. In 2004 there were 178 candidates, and 50 of them were women, which is 28.08%. A total of 14 members were elected, 5 of whom were women, which represents 35.70%. (An interesting feature of these elections was that one political party called

38 Data: State Commission for Elections and Control of Political Party Financing.

39 J. Filadelfiová, I. Radičová, P. Puliš, Ženy v politike – dôsledok tranzície verejnej politiky? Bratislava 2000.

Active Women had only female candidates on its list. This political party failed in the elections). In 2009, there were 184 candidates for the European Parliament, 52 of whom were women, which represents 28.26%. A total of 13 members were elected, 5 of whom were women, which represents 38.46%. In 2014, there were 333 candidates for the European Parliament, of which 80 were women, representing 24%. A total of 13 members were elected, 4 of whom were women, which represents 30.76%. In 2019, there were 343 candidates for the European Parliament, of which 81 are women, which represents 23.6%. A total of 14 members were elected, 3 of whom were women, which represents 21.42%. It is also significant that women do not occupy the top positions for the European Parliament for the long term (the first three). These prestigious positions are increasingly dominated by male candidates[40].

On the basis of the above, we can state that a slightly higher percentage of women stood in the European Parliament elections than in the national parliament of the Slovak Republic. At the same time, we can also state that there is a slightly higher percentage of women in the European Parliament than in the national parliament of the Slovak Republic. Based on the fact that voter turnouts in Slovakia have been some of the lowest in the whole history of European Parliament elections (2004–16.96%, 2009–19.63%, 2014–13.05%, 2019–22.74%) , it is difficult to correlate the results of the representation of women in the national parliament and the European Parliament. Any finding of a correlation between the number of women in the national parliament and the European Parliament would be speculation.

Conclusion

First, the EP elections (2019) show that the number of Polish women MEPs is increasing. This is a continuing trend, which is confirmed by four electoral periods of 2004, 2009, 2014 and 2019. The last election proved successful for women, who won 34.61% of seats in Poland. The situation in Slovakia is slightly different. In 2004 and 2009, the representation of Slovak women in the EP had an increasing trend and was significantly higher than in Poland. In 2014 and 2019, the representation of women in the EP slightly decreased not only in relation to the Slovak results in the previous period, but also in comparison with the results in Poland. Aldrich and Daniel came to the conclusion that: "we found that national quotas can reduce differences between MEP gender and background qualities and that placement mandates are even more effective at erasing differences between male and female MEPs, in terms of their prior experience. This finding suggests that quotas may remove some barriers to entry that women typically face when deciding to run for office, help to promote women with

40 Data: State Commission for Elections and Control of Political Party Financing.

prior political experience to further positions, and also raise the number of politically experienced representatives at the European level[41]".

Poland: women in European Parliament			Slovakia: women in European Parliament		
2019 gender quotas	404 female candidates	46.65% total candidates	2019 no quotas	81 female candidates	23.6% total candidates
	18 seats	34.61% total seats		3 seats	21.42% total seats
2014 gender quotas	559 female candidates	44%	2014 no quotas	80 female candidates	24%
	12 seats	23.53%		4 seats	30.76%
2009 no quotas	296 female candidates	22.89%	2009 no quotas	52 female candidates	28.26%
	10 seats	20%		5 seats	38.46%
2004 no quotas; first election to the EP	444 female candidates	23.52 %	2004 no quotas; first election to the EP	50 female candidates	28.08%
	7 seats	12.96%		5 seats	35.70%

Source: National Electoral Commission in Poland, own calculations. State Commission for Elections and Control of Political Party Financing, own calculations.

Second, electoral quotas do not translate directly into the electoral success of women. They are merely a reason why the number of women candidates has increased. The success of women is determined by other factors, for example, the analysis of the election results of 2019 and 2014 confirms that first and second positions on the lists are a means to victory. The vast majority of parliamentarians were candidates either in first or second places. The electoral success of the women who stood as candidates in lower places (third, fourth and tenth) was ensured by their personal commitment, as well as by the authority they enjoy among voters. In other words, they won the elections through their hard work and perseverance.

Third, the EP elections held in Poland contradicts the argument that conservative parties are not willing to allow women into the world of politics. The electoral committee of the conservative "Law and Justice" party won 27 seats, out of which 11 were taken up by women, who in the vast majority were placed either first or second on the lists. Only one MEP was a candidate in third position. Her victory was sealed, since as the Minister of Family, Labour, and Social Policy she introduced the popular 500 plus child subsidy programme in Poland. It seems that the electoral strategy of the conservative party was to place on the lists either women MEPs or incumbent female ministers who, after winning the elections, resigned from their government

41 A.S. Aldrich, W.T. Daniel, The Consequences of Quotas: Assessing the Effect of Varied Gender Quotas on Legislator Experience in the European Parliament, "Politics & Gender" 2020, vol. 16, https://nottingham-repository.worktribe.com/output/3020855/the-consequences-of-quotas-assessing-the-effect-of-varied-gender-quotas-on-legislator-experience-in-the-european-parliamentfile, p. 21 (10.03.2021).

posts. In turn, the electoral committee of the liberal-leftist European Coalition won 22 seats, of which only 6 were taken up by women. It is worth emphasizing that it assigned only three first places to women.

The same also applies in Slovakia: the position on the list of candidates is a guarantee of success in the EP elections. The first two or three candidates have the best chance of winning. In principle, it is not important whether the candidate is male or female. The exception is the above-mentioned example of the Progressive Slovakia and TOGETHER – Civic Democracy Coalition, which won the most seats in the given elections (4 seats). On the list of candidates, men ranked first and second, women ranked third and fourth. However, only male candidates were elected. Candidates ranked first, second, sixth and seventh were chosen. This is particularly striking because it is a party that, in its policy statement, builds on the principles of gender equality, and therefore has placed just two female candidates at the forefront. At the same time, whilst voters of this party seem to identify with the programme of 'necessary changes in Slovak politics', they do not fully agree with its policy of 'gender equality'. At the same time, as in Poland, not all conservative political parties are willing to allow women to enter the political world. On the basis of the above, it can be concluded that some generally expressed views may show considerable variations in the practice of particular countries.

Percentage rate of seats taken by women according to party affiliation (%) in Poland			Percentage rate of seats taken by women according to party affiliation (%) in Slovakia		
2019	the right-wing party	40.74% total seats obtained by a party	2019	the right-wing party	20% total seats obtained by a party
	the liberal-wing party	30.70%		the liberal-wing party	50%
	the left-wing party	33.33%		the left-wing party	14.28%
2014	the right-wing party	15.79%	2014	the right-wing party	28.57%
	the liberal-wing party	36.84%		the liberal-wing party	0%
	the left-wing party	40.00%		the left-wing party	25%
2009	the right-wing party	0%	2009	the right-wing party	33,33%
	the liberal-wing party	32%		the liberal-wing party	60%
	the left-wing party	28.57%		the left-wing party	0%

Source: National Electoral Commission in Poland, own calculations.State Commission for Elections and Control of Political Party Financing, own calculations.

Fourth, public opinion polls indicate strong social support for Poland's membership of the EU (90% of the population have a positive view on Poland's membership in the EU), which directly translates into an increase in voter turnout in Poland. On the other hand, a certain paradox may be observed that in a society of

Euroenthusiasts, the elections to the EP were won by a conservative party, known as a party of Eurosceptics. Moreover, high voter turnout in 2019 may indicate that Poles ceased to view the EP elections as second-order elections[42], and that a seat in the EP does not have to be equated to political retirement.

At the same time, support for EU membership is also increasing in Slovakia. According to Barometer surveys from 2018, support for Slovakia's membership in the EU was 77%, which represents a historically clear and growing support. This is also reflected in the increased interest of Slovaks in the EP elections. Although the participation of Slovaks in the elections in 2019 is one of the lowest in the EU, in Slovak terms it was the highest for the whole period of Slovakia's EU membership. Slovak MEPs are largely positively evaluated in Slovakia, and their image is not tainted by scandals (at least not as much as the national parliamentarians).

Turnout in Poland		Turnout in Slovakia	
2019	45.58%	2019	22.74%
2014	23.83%	2014	13.05%
2009	24.53%	2009	19.63%
2004	20.87%	2004	16.96%

Source: National Electoral Commission in Poland. State Commission for Elections and Control of Political Party Financing.

Although there is currently no quota system in Slovakia for either national parliamentary or European parliamentary elections, we can see that after the abolition of the quota system for women (which existed in the national parliamentary elections before 1989), the representation of women in the national parliament has decreased. However, it is surprising that relatively more women were elected in the European Parliament elections than to the national parliament. This fact can be justified, among other things, by the fact that the European Parliament is 'distant' from the internal political problems of the Slovak Republic, which may discourage women from actively participating in Slovak politics.

However, when compared to the situation in Poland, it can be stated that although there is a system of election quotas in Poland, its practical implementation of gender quotas may be purely theoretical. In percentage terms, the number of Slovak women elected to the European Parliament (except 2019) was significantly higher than in Poland, even though there is no quota system in the Slovak Republic. If Polish legislation does not move to the point that it is not enough only to place

42 A. Jackiewicz, Wpływ terminu wyborów do Parlamentu Europejskiego na frekwencję wyborczą- zarys problematyki, (in:) M. Dąbrowski, J. Juchniewicz (eds.), Problemy Konstytucyjne, Olsztyn 2015, p. 112.

a certain number of women on the electoral list, but also to allow them to be placed in an easy-to-elect position, the quota system in Poland remains a gesture without serious changes in practice. By comparing the systems of elections in Poland, and Slovakia, we can see that even without the statutory obligation to allow a specified number of women to stand on the list, the result (in the form of a selected number of women) can be achieved.

In conclusion, gender quotas directly increases the number of female candidates, but other factors also have influence on women's electoral success. Such conclusions derive from comparing the results of elections to the European Parliament in Poland (2019), and Slovakia (2004). In Poland, women constituted almost 47% of all candidates and they obtained 34.61% of seats. In Slovakia, women accounted for 28% of all candidates and won 35.70% of the seats. The success of women in the elections is the result of many factors, which include the so-called electoral engineering (quotas, gender balance, first and second places on lists), electoral strategy of a party, but above all, political, and social activity of the women themselves. We consider the last factor to be determinant in this respect.

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The Universal Right to File Petitions as a Contemporary Challenge for Legal Studies

Abstract: The universality of the right to petition, in terms of both the broad specification of its subject matter and the group of entities entitled to petition, as well as the specification of the accessible formal requirements for filing petitions, is a challenge at the level of both lawmaking and applying the law. The need arises not only to ensure that an extensive group of entities has the opportunity to file a petition, but also to provide a guarantee that the petition will be processed and considered properly. The subject matter of this article is the analysis of the Polish legal regulations on this, as well as a review of the established practices of filing petitions with the Sejm and the Senate, as well as their comparison with the solutions applied in other countries. The findings indicate that this is a tool of a civil society commonly used in the European Union Member States. It should also be noted that the Polish solutions, as well as the practice of their application, are seen to be particularly targeted at increasing social activity and enabling the use of the potential that is inherent in the citizens, groups of citizens and all forms in which they can interact with each other.
Keywords: civil society, entities with the capacity to file petitions, formal requirements of petitions, participatory democracy, subject matter of the petition, the right to petition

Introduction

Legal studies is confronted with many challenges generated, among other things, by the pace of civilisational, social and legal changes and, bearing in mind the right

to petition, these generate a vast field of research. This article addresses the matter of the universality of the right to file petitions, whereby this analysis is based on the regulations addressing the right to file petitions to the individual chambers of the Polish parliament. This is justified by the research being conducted since January 2020 as part of the academic and research internship of the authors at the Polish parliament.

In justifying the title of this article, it should be pointed out that any instrument that reinforces the democratic rights of citizens – and petitions should be perceived as such – is always a challenge for legal studies, which has to search for mechanisms enabling the pursuit of these rights.

Petitions should be viewed as a tool of a civil society, increasing its activity and enabling the use of the potential of the citizens. They are also a way of specifying the change expected by the petitioners. There is no doubt that petitions build a culture of civil engagement. The assurance of universality of the ability to file a petition, in terms of both the broad specification of its subject matter and the group of entities entitled to petition, as well as the specification of the accessible formal requirements for filing petitions, is a challenge at the level of lawmaking as well as applying the law. This is not only related to the assurance of the ability to file petitions,[1] but also the guarantee that they will be dealt with and examined reliably. This is because the mere ability to file a petition does not satisfy the petitioner and, furthermore, does not reflect the objective of establishing this institution. The notion of the right to petition in the broad sense should therefore be construed as the right to file the petition, to have it properly processed, and also to have it resolved.

Therefore, whether the use of the term 'everyone' in the regulation justifies the assertion that a petition may be filed by any person or group of such persons needs to be analysed. The matter of the admissibility of territorial self-government units filing a petition should be given as an example, as the legal doctrine indicates that they are deprived of such a possibility. Furthermore, consideration should be given to whether the formal requirements for a submission that could be classified as a petition limit the ability to take advantage of this institution. In order to determine the above, the legal regulations in force in this area should be analysed and the established judicial practices need to be reviewed and compared with the solutions that are applicable in other countries. The dogmatic law method, the empirical method, the analysis of the literature and – to a justified extent – the comparative law method need to be used with respect to the subject matter of the research defined in this way.

1 M. Florczak-Wątor, Tryb rozpatrywania petycji przez Senat w świetle regulaminu izby i dotychczasowej praktyki, (in:) M. Grzybowski, P. Mikuli, G. Kuca (eds.), Ustroje. Historia i współczesność. Polska – Europa – Ameryka Łacińska. Księga Jubileuszowa dedykowana Profesorowi Jackowi Czajowskiemu, Cracow 2013, pp. 521–522.

1. A petition as a Tool of Participatory Democracy

Petitions constitute a form of direct participation of citizens in the process of governance; they are one of the fundamental human[2] and civil rights.[3] No doubt, petitions are also an important tool of democracy. Democracy is a system which has been the starting point for the aggregation of civil interests in political life since ancient times and has assumed increasingly complex forms, representing a modification of the same approach to this aggregation every time – enabling the citizens to have a greater or lesser influence on political, social and economic life.[4] Democracy is today a near-universal validating principle of the political system.[5] Petitions are certainly a tool of participatory democracy.[6] As scholars of participatory democracy point out, appropriately designed and promoted opportunities for meaningful and effective political participation can create stronger citizens.[7] It can also be argued that petitions are related to the concept of deliberative democracy.[8] This is because petitions increase civil involvement and constitute a voice of the citizens in deliberations – especially when deliberation is viewed in the sense of

2 E. Wójcicka, Prawo petycji w Rzeczypospolitej Polskiej, Warsaw 2015, LEX/el.

3 Prawo petycji w wybranych krajach członkowskich UE i w Rosji, Kancelaria Senatu. Biuro Informacji i Dokumentacji dział Analiz i Opracowań Tematycznych, Warsaw 2008, pp. 6–76.

4 R. Mieńkowska-Norkiene, Demokracja partycypacyjna na poziomie lokalnym jako jeden z aspektów realizacji zasady subsydiarności na przykładzie aglomeracji warszawskiej, p. 166, http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-440a3d48-cf89–4adc-a8e3-e00f74e7f4ad/c/Mienkowska-Norkiene-Demokracja_partycypacyjna_na_poziomie_lokalnym_jako_jeden_z_aspektow_realizacji_zasady_subsydiarnosci_na_przykladzie_aglomeracji_warszawskiej.pdf (26.10.2021).

5 J.S. Dryzek, Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia, "Political Theory" 2005, vol. 33, no. 2, pp. 218–242.

6 Participatory democracy is a process of collective decision-making that combines elements from both direct and representative democracy: citizens have the power to decide on policy proposals and politicians assume the role of policy implementation. E. Aragonés, S. Sánchez-Pagés, A theory of participatory democracy based on the real case of Porto Alegre, "European Economic Review" 2009, vol. 53, no. 1, pp. 56–72.

7 W.R. Nylen, Participatory Democracy versus Elitist Democracy: Lessons from Brazil, New York 2003, p. 28.

8 It should be pointed out that it is desirable and coherent to simultaneously strive towards 'participatory and deliberative democracy', in which citizens participate in collective decision-making through deliberation. More: S. Elstub, Deliberative and Participatory Democracy, (in:) The Oxford Handbook of Deliberative Democracy, https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780198747369.001.0001/oxfordhb-9780198747369-e-5 (9.05.2021). Simultaneously, both participatory and deliberative democracy criticise the current democratic system and seek to reform it by strengthening it. See: L. Carson, S. Elstub, Comparing participatory and deliberative democracy, Newcastle University 2019, p. 1, https://www.newdemocracy.com.au/wp-content/uploads/2019/04/RD-Note-Comparing-Participatory-and-Deliberative-Democracy.pdf (9.05.2021).

a public discussion,[9] or relates deliberative democracy to the concept of democratic government that secures a central place for a reasoned discussion in political life,[10] which has moved beyond the 'theoretical statement' stage into the 'working theory' stage.[11] According to the authors of this article, a petition can be seen as an instrument by which citizens can influence political life, and it is an instrument that strengthens citizens within the structures of a civil society, creating opportunities for citizens to articulate their expectations and to initiate appropriate legislative changes in line with these expectations. Furthermore, the more widespread the ability to file petitions, the greater the participation of the citizens. Additionally, when positioning the issue of petitions in the context of participatory democracy, it should be remembered that a fundamental element of participatory democracy is communication between the citizen and the authorities, as democracy in this model is based precisely on decision-making with the involvement of the citizens. In this context, it should be pointed out that it is precisely the right to petition that remains closely connected with the principle of a social dialogue as the basis of rights in a state, as mentioned in the introduction to the Constitution of the Republic of Poland of 2 April 1997,[12] a dialogue between the public and the authorities that can be used to form the civil society.[13] The notion of a social dialogue should be treated as a reference to the relations between the public authorities and the public based on constant dialogue, especially including the broadly understood involvement of society in making decisions on public matters. Such an approach to the social dialogue assumes that there is active communication between the public authorities and the civil society,

9 Y. Sintomer, Random Selection, Republican Self-Government and Deliberative Democracy, p. 475, https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467–8675.2010.00607.x (9.05.2009).

10 M. Cooke, Five Arguments for Deliberative Democracy, "Political Studies" 2000, vol. 48, no. 5, pp. 947–969.

11 S. Chambers, Deliberative Democratic Theory, "Annual Review of Political Science" 2003, pp. 307–326. Deliberation is also described in a narrow sense, i.e. as a discussion (a structured conversation with a difference of opinions) with the prospect of preference change among its participants (unlike in a debate) that is not conditioned by benefits; the said preference change may be the result of learning from others about their reasons, self-interests, emotions, etc. See: M. Zabdyr-Jamróz, Preventing the Atrophy of the Deliberative Stance: Considering Non-Decisional Participation as a Prerequisite to Political Freedom, "AVANT" 2019, vol. X, no. 1, p. 92. Interestingly, with regard to the concept of deliberative democracy see also: J. Bohman, The Coming of Age of Deliberative Democracy, "The Journal of Political Philosophy" 1998, vol. 6, no. 4, pp. 400–425.

12 Journal of Laws, No. 78, item 483, as amended (hereinafter referred to as the Constitution).

13 R. Piotrowski, Konstytucyjne uwarunkowania prawa petycji oraz pożądanych kierunków zmian legislacyjnych w tym zakresie, (in:) Kancelaria Senatu. Biuro Informacji i Dokumentacji. Dział Analiz i Opracowań tematycznych, Prawo petycji w ustawodawstwie polskim, Warsaw 2008, p. 24 and 29.

including with the help of the right to petition.[14] Petitions can also be seen as a way of ensuring that the communication channels between the civil society and all agencies of public authority are unblocked, as well as being an additional guarantee of respect of human and civil freedoms and rights by those authorities.[15] Petitions also have their axiological basis, as participation is related to the involvement of a member of the community in the political process of exercising public authority and performing public tasks, which is axiologically based, among other things, on respect for human dignity, solidarity and ensuring the common good.[16]

2. The Right to Petition in the Legal Orders of European States

Every political system essentially has the right to file petitions, as the authorities are willing to obtain information from the population demonstrating the state of public sentiment, which translates into the ability to correct shortcomings in the activity of the state apparatus.[17] In analysing the solutions in force in the countries of the European Union, it is worth mentioning the regulations in Germany and Spain, where the right to petition has a particularly long tradition. The current German Basic Law of 1949 guarantees everyone the right to file written requests and complaints ('*Jedermann hat das Recht, sich einzeln oder in Gemeinschaft mit anderen schriftlich mit Bitten oder Beschwerden an die zuständigen Stellen und an die Volksvertretung zu wenden*'), as well as granting a constitutional status to the body that considers such submissions addressed to the parliament, the Petitions Committee.[18] The German Basic Law refers explicitly to this right to petition ('*Das Petitionsrecht*').[19] However, in Spain, the right to petition only received its constitutional status in 1978 ('*Todos los españoles tendrán el derecho de petición individual y colectiva, por escrito, en la forma y con los efectos que determine la ley*').[20]

14 E. Wójcicka, Prawo petycji w Rzeczypospolitej Polskiej, Warsaw 2015, LEX/el, Chapter IV and the literature cited therein.

15 W. Sokolewicz, K. Wojtyczek, (in:) L. Garlicki, M. Zubik (eds.), Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II, Warsaw 2016, LEX/el., Article 63.

16 For these values see: M. Małecka-Łyszczek, R. Mędrzycki, Axiological paradigm of social inclusion intensification – selected remarks, "Review of European and Comparative Law" 2019, vol. 38, no. 3, pp. 82–94.

17 A. Ławniczak, (in:) M. Haczkowska (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warsaw 2014, LEX/el., Article 63.

18 See Article 45c Grundgesetz für die Bundesrepublik Deutschland: Der Bundestag bestellt einen Petitionsausschuß, dem die Behandlung der nach Artikel 17 an den Bundestag gerichteten Bitten und Beschwerden obliegt. Die Befugnisse des Ausschusses zur Überprüfung von Beschwerden regelt ein Bundesgesetz.

19 Article 17a Grundgesetz für die Bundesrepublik Deutschland.

20 Article 29 Constitución Española.

It should also be pointed out that, in the regulations in force in the European Union Member States, the right to petition is quite frequently distinguished from the institution of complaints and motions. The constitutions of Bulgaria, Croatia or Portugal can be mentioned as examples of this. However, the constitutional regulations in most European countries use a collective category of presentations most frequently referred to as petitions.[21] In the Polish legal order, this issue is a subject of discussion, whereby, according to the authors of this article, the position that petitions constitute a separate right is justified, and therefore – despite being jointly regulated in Article 63 of the Constitution[22] – they should be distinguished from the institution of complaints and motions.[23]

It should also be pointed out that the solutions adopted in Europe are also not uniform in terms of the importance of the act in which the issues covered by this article are regulated. Solutions according to which the normalisation of the right to petition is limited to the constitutional level (e.g. Belgium), as well as those in which solutions in this area are included in the Basic Law and the Law on Petitions (e.g. Spain[24] and Lithuania[25]) can be distinguished. Furthermore, a solution is possible where petitions are only addressed in statutes (e.g. Czech Republic[26]).

The European Union Member States have a diverse range of entities which have the right to file petitions. In some countries the right to petition can only be exercised by citizens (e.g. Italy, Spain, Portugal, Lithuania, Romania, Slovenia and Bulgaria), whereas in others it is guaranteed for everyone (e.g. Germany, Slovakia, Greece, the Netherlands, Latvia, Croatia, Cyprus and Luxembourg). There may also be exceptions to petitioning, for example in Germany, where people serving in the armed forces and in alternative service may not file petitions, whereby this restriction only applies to the period of their service. In addition to filing individual petitions, the legal orders of individual countries may also provide for collective petitioning (e.g.

21 M. Florczak-Wątor, (in:) M. Safjan, L. Bosek (eds.), Konstytucja RP. Tom I. Komentarz do art. 1–86, Warsaw 2016, Legalis, Article 63.

22 Article 63 of the Constitution, which indicates that everyone has the right to file petitions, motions and complaints in the public, in their own or another person's interest, with that person's consent, to the bodies of public authority, as well as to social organisations and institutions in connection with their performance of tasks commissioned in the area of public administration.

23 K. Działocha, Prawo petycji w obowiązującym ustawodawstwie i proponowane kierunki zmian, (in:) Kancelaria Senatu. Biuro Informacji i Dokumentacji. Dział Analiz i Opracowań tematycznych, Prawo petycji w ustawodawstwie polskim, Opinie i ekspertyzy OE – 85, Warsaw 2008, pp. 1–2; H. Izdebski (in cooperation with I. Zachariasz), Petycja jako instrument sprawnego rozwiązywania problemów społecznych w jednostkach samorządu terytorialnego – istotne różnice między wnioskiem i skargą, Opinie i ekspertyzy OE- 233, Warsaw 2015, pp. 3–9.

24 Ley Orgánica 4/2001, de 12 Noviembre, regulación del Derecho de Petición.

25 Law on petitions, 7 July 1999, No. VIII–1313.

26 Zákon č. 85/1990 Zb. o petičnompráve.

Belgium,[27] Germany, Slovakia, Spain, Portugal and Greece[28]), although restrictions are also possible in this area (e.g. members of the armed forces in Spain can only file petitions individually[29]).

Petitions in Poland are regulated both by the Constitution and by the Act on Petitions of 11 July 2014,[30] which is dedicated to them, although regulations in this area may also be included in other acts, such as the Act on Municipal Self-Government of 8 March 1990,[31] as well as in other normative acts, in particular – bearing in mind the subject of this article – in the resolution of the Sejm of the Republic of Poland of 30 July 1992 on the Standing Orders of the Sejm of the Republic of Poland[32] and the resolution of the Senate of the Republic of Poland of 23 November 1990 on the Standing Orders of the Senate of the Republic of Poland.[33] It should similarly be noted that regulations on petitions are also included outside the domestic normative order.[34]

3. Right to Petition in the Constitution

According to Article 63 of the Constitution, everyone has the right to file petitions in the public, their own or another person's interest, with that person's

27 Article 28 De Belgishe Grondwet: Iederheeft het rechtverzoekschriften, door een of meerpersonenondertekend, bij de openbareoverheden in tedienen. Alleen de gesteldeoverhedenhebben het rechtverzoekschriften in gemeenschappelijke naam in tedienen.

28 M. Florczak-Wątor, (in:) M. Safjan, L. Bosek (eds.), Konstytucja …, *op.cit.*, Article 63.

29 Article 29 ust. 2 Constitución Española**:** Los miembros de las Fuerzas o Institutos armados o de los Cuerpossometidos a disciplinamilitarpodránejercereste derecho sólo individualmente y con arreglo a lo dispuesto ensulegislación específica.

30 Journal of Laws of 2018, item 870, as amended (hereinafter referred to as the AoP).

31 Given the subject matter of this article, which is limited to petitions processed at parliamentary level, these regulations are not considered. For petitions processed at the level of self-government communities see: R. Cybulska (ed.), R. Marchaj, A. Wierzbica, Skargi, wnioski i petycje w jednostkach samorządu terytorialnego, Warsaw 2020.

32 Official Journal (Monitor Polski), item 1028, as amended (hereinafter referred to as the Standing Orders of the Sejm). For the normative nature of this act, see P. Radziewicz, (in:) P. Tuleja (ed.), Konstytucja Rzeczypospolitej Polskiej, Warsaw 2021, LEX/el., Art. 112.

33 Official Journal (Monitor Polski), item 846, as amended (hereinafter referred to as the Standing Orders of the Senate). See P. Radziewicz, (in:) P. Tuleja (ed.), Konstytucja Rzeczypospolitej Polskiej, Warsaw 2021, LEX/el., Article 124.

34 Article 227 of the Treaty on the Functioning of the European Union, Journal of Laws of 2004 No. 90, item 864/2 as amended, according to which any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly. However, according to Article 44 of the Charter of Fundamental Rights of the European Union, OJ EU 2007/C 303/01, p. 1 as amended, any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

consent, to the bodies of public authority, as well as to social organisations and institutions in connection with their performance of tasks commissioned in the area of public administration, whereby their review is subject to statutory regulation. It should also be noted that there can be no derogations from this right, as it cannot be restricted either in a period of martial law or a state of emergency,[35] or in a period of a natural disaster.[36] It is therefore subject to more intensive legal protection than other rights and freedoms guaranteed by the Constitution.[37] Simultaneously, despite such strong mechanisms of protection, the right to petition is not of an absolute nature and therefore it may be subject to limitations on the conditions arising from the provisions of the Constitution containing the so-called general limitation clauses. Of particular importance here is the regulation contained in Article 31, para. 3 of the Constitution, according to which restrictions of the right to petition can only be established by statute and only if they are necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons and simultaneously may not breach the essence of this right.

Given the position of Article 63 of the Constitution,[38] as quoted above, the systematics of the Constitution justify the inclusion of the right to petition in the group of political rights.[39] This right is also a supplement to other rights, by means of which it is possible for citizens to influence public authorities. It has a broad subjective scope, as it is enjoyed by every natural person, including those who are not Polish citizens, as well as legal persons, whereby – as indicated in the literature – this applies to legal persons who do not exercise public authority, as they are the subjects who are obliged, and not entitled, under the right to petition.[40] It is simultaneously pointed out that all collective entities, incorporated or not incorporated, have the

35 Article 233 ust. 1 of the Constitution.

36 Article 233 ust. 3 of the Constitution.

37 M. Florczak-Wątor, (in:) M. Safjan, L. Bosek (eds.), Konstytucja …, *op. cit.*, Article 63.

38 The regulation of Article 63 of the Constitution has been included in Chapter II of the Constitution entitled 'Freedoms, rights and obligations of a person and a citizen', in the group of political freedoms and rights.

39 R. Stawicki, Prawa i wolności obywatelskie w Polsce po 1918 r. w świetle rozwiązań konstytucyjnych – zarys historyczno-prawny, Opracowania tematyczne OT-607, Warsaw 2011, p. 12.

40 P. Tuleja, (in:) P. Czarny, M. Florczak-Wątor, B. Naleziński, P. Radziewicz, P. Tuleja (eds.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warsaw 2019, p. 213. See also M. Florczak-Wątor (in:) M. Safjan, L. Bosek (eds.), Konstytucja …, *op. cit.*, Article 63. It is simultaneously pointed out that petitions of groups of councillors and other people holding public offices in territorial self-government units should be considered to be constitutionally admissible, whereby they should be treated as petitions of natural persons (cf. P. Czarny, Opiniaprawna w sprawie dopuszczalności składania petycji przez jednostki samorządu terytorialnego, "Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu" 2017, no. 3, p. 67).

right to petition, as the constitutional guarantees of freedoms and rights do not only apply to those entities if this is in conflict with the essence of the given freedoms or rights, which means their lack of enforceability. It is therefore stated that the authors of petitions may be associations, including parties, trade unions, unions of employers, associations, national or ethnic minorities, neighbourhood communities, as well as companies, foundations, cooperatives and any other forms of collective entrepreneurship.[41] Given that Article 63 of the Constitution is included in Chapter II entitled 'Freedoms, rights and obligations of a person and a citizen', it is pointed out that the entities of public authority, including territorial self-government units – not being the addressees of these rights – cannot effectively invoke the content of Article 63 of the Constitution.[42] However, it is pointed out that a general prohibition of the lawmakers to grant the right to petition to other entities, such as territorial self-government units, cannot be argued from the fact that the Constitution guarantees such a right to an individual.[43] It should therefore be emphasised that, by guaranteeing the right to petition to a large group of entities, while simultaneously not making exclusions from the group of entities legitimised for this, the constitutional regulation creates the framework for the universality of this right.

4. The Right to Petition in the Act on Petitions

In accordance with Article 2, para. 1 of the Act on Petitions, a petition may be filed by a natural person, a legal person, an organisational unit that is not a legal person or a group of these entities. As a supplement of the above, it should be pointed out that commercial law partnerships, namely general partnerships, limited partnerships and limited joint-stock partnerships, are, in particular, organisational units that are not legal persons. Reference should also be made to the regulation contained in Article 33 of the Polish Civil Code, according to which organisational units to which the regulations grant legal personality are legal persons. These include territorial self-

41 W. Sokolewicz, K. Wojtyczek, (in:) L. Garlicki, M. Zubik (eds.), Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II, Warsaw 2016, LEX/el., Article 63.

42 A. Karczmarek, W sprawie możliwości składania petycji przez organ stanowiący jednostki samorządu terytorialnego, „Przegląd Sejmowy" 2019 no. 6, p. 155; A. Rytel-Warzocha, Instytucja petycji w Polsce oraz w krajach europejskich – stan obecny i perspektywy, (in:) Kancelaria Senatu. Biuro Analiz i Dokumentacji, Instytucja petycji w Polsce oraz w krajach europejskich – stan obecny i perspektywy, Warsaw 2015, p. 14.

43 A. Karczmarek, W sprawie możliwości składania petycji przez organ stanowiący jednostki samorządu terytorialnego, „Przegląd Sejmowy" 2019 no. 6, pp. 155–156. See also: J. Wilk, Zasady składania i rozpatrywania petycji oraz sposób postępowania organów w sprawach dotyczących petycji, LEX/el. 2015 quoted after: A. Wierzbica, Podmioty wnoszące petycję; przedmiot petycji, (in:) R. Cybulska (ed.) Skargi, wnioski i petycje w jednostkach samorządu terytorialnego, Warsaw 2020, LEX/el.

government units that have legal personality,[44] and this applies to units at all levels of the country's territorial division, namely municipalities, counties and voivodships. This means that territorial self-government units – which are legal persons – are included in the list in Article 2 AoP. There is simultaneously no provision that would rule out their capacity in this respect. Therefore, they may be the authors of petitions addressed, for example, to public authorities with the reservation that they cannot be in a relationship of organisational superiority or subordination with those authorities, or in other words they are not related through control, coordination, supervision or management, which means that they are in a relationship with them that is similar to that which the citizens have with those authorities.[45] In the light of the applicable regulations, there are therefore no objections to the award of the right for territorial self-government units to file petitions with the Sejm and the Senate.[46] Furthermore, this practice has been adopted by the Sejm,[47] as well as by the Senate, which considers petitions filed by the bodies of territorial self-government units, both legislative[48] and executive,[49] which was also the case before the entry into force of the provisions of the AoP.[50]

Article 2, para. 3 AoP indicates that the subject of the petition may be a demand to amend the provisions of the law, make a decision, or take other action on issues that concern the petitioner, collective life, or values that require special protection of the common good, which lie within the tasks and responsibilities of the addressee of the petition. In view of the above, it should be pointed out that this statutory list is not exhaustive, which contributes to exercising the right to petition and prevents its restriction.[51]

Simultaneously, the lawmakers have established the manner of filing the petition and the formal requirements it should meet. In accordance with the statutory

44 Article 165 ust. 1 sentence 1 of the Constitution.

45 S. Gajewski, (in:) S. Gajewski, A. Jakubowski, Petycje, skargi i wnioski. Dział VIII Kodeksu postępowania administracyjnego. Ustawa o petycjach. Komentarz, Warsaw 2015, p. 145.

46 A. Karczmarek, W sprawie możliwości składania petycji przez organ stanowiący jednostki samorządu terytorialnego, „Przegląd Sejmowy" 2019 no. 6, p. 155 and next.

47 For instance, a petition filed by the Municipality of Mirsk BKSP-144–IX–249/20, https://www.sejm.gov.pl/Sejm9.nsf/agent.xsp?symbol=PETYCJA&NrPetycji=BKSP-144–IX–249/20 (9.05.2021) or a petition filed by the County of Nowy Targ BKSP-145–IX–3/19, https://www.sejm.gov.pl/Sejm9.nsf/agent.xsp?symbol=PETYCJA&NrPetycji=BKSP-145–IX–3/19 (9.05.2021).

48 For instance a petition filed by Cracow City Council P9–37/18, https://www.senat.gov.pl/gfx/senat/userfiles/_public/k9/petycje/p93718/material_p9_37_18.pdf (9.05.2021).

49 For instance a petition filed by the Mayor of the Kobylnica Municipality, the Mayor of the Michów Municipality or the Mayor of the Town and Municipality of Sztum PW9 – 06/16, https://www.senat.gov.pl/prace/petycje/petycje-wielokrotne/petycja-wielokrotna-z-24102016-r-uzupelniona-12122016-r-dotycza/(9.05.2021).

50 For instance a petition filed by the Jastrzębie-Zdrój Town Council P-10/09, https://www.senat.gov.pl/prace/petycje/wykaz-tematow-petycji/petycja,15.html (9.05.2021).

51 J. Jaśkiewicz, Ustawa o petycjach. Komentarz, Warsaw 2015, LEX/el., Article 2.

regulations, the petition must be prepared in writing, and may be submitted in writing or by electronic means of communication.[52] Similarly, the lawmakers ruled out the possibility of submitting the petition orally, although such a form of filing the petition is provided for in the provisions of the Administrative Procedures Code, which are applied accordingly to the extent not regulated by the AoP.[53] Furthermore, the lawmakers specified the elements that the petition should[54] contain, indicating that these are the identification of the petitioner,[55] the indication of the petitioner's domicile or seat, as well as correspondence address,[56] the identification of the addressee of the petition[57] and the indication of the subject matter of the petition.[58] It was also stipulated that the petition should be signed.[59] The lawmakers also indicated which of these elements may be supplemented or clarified and in which procedure, as well as the cases in which the petition's shortcomings justify leaving the petition unconsidered.[60]

Given the above formal requirements that the petition needs to satisfy, it should be pointed out that it is the request contained in the submission and not its external form that determines whether the submission is a petition.[61] This means that a submission may be qualified as a petition regardless of the name with which it is labelled. Meanwhile, the obligation in this respect rests with the addressee of the petition. In view of the aforementioned provisions of the AoP, it should be emphasised that the extensive range of the two entities entitled to file a petition and the issues that can constitute its subject matter undoubtedly supports the universal nature of exercising the right to petition.

52 Article 4 para. 1 AoP.

53 Article 63 § 1 k.p.a.

54 Meanwhile, according to Article 4, para. 3 AoP, the petition may contain consent for the disclosure of the personal data of the petitioner in whose interest the petition was filed on the website of the entity considering the petition, or the office handling the petition.

55 Article 4, para. 2, item 1 AoP, which indicates that if the petitioner is a group of entities, the petition should identify each of these entities, as well as the person representing the petitioner.

56 Article 4, para. 2, item 2 AoP, which indicates that if the petitioner is a group of entities, the petition should specify the domicile or seat of each of these entities.

57 Article 4 para. 2 item 3 AoP.

58 Article 4 para. 2 item 4 AoP.

59 Article 4, para. 4 AoP, according to which a petition submitted in writing should be signed by the petitioner and, if the petitioner is not a natural person or if the petition is submitted by a group of entities, by a person representing the petitioner. See also Article 4, para. 5 AoP, according to which a petition submitted by electronic means of communication may bear a qualified electronic signature and should also include the petitioner's email address.

60 Article 7 AoP.

61 Article 3 AoP.

5. The Right to Petition in the Regulations of the Sejm and Senate

Pursuant to Article 9, para. 1 AoP, a petition submitted to the Sejm or Senate is examined by those bodies, unless the Regulations of the Sejm or Senate indicate an internal body that has the responsibility for this.

Therefore, in accordance with the wording of the Regulations of the Sejm that have been in force since 8 July 2015, the Petitions Committee is one of the standing committees of the Sejm.[62] The Marshal of the Sejm refers a petition to that Committee for consideration,[63] simultaneously setting it a deadline for its consideration.[64] It should be noted here that the Marshal of the Sejm may either order petitions to be considered jointly,[65] or to be left unconsidered.[66] The consideration of the petition by the Committee encompasses the presentation of the petition by a specified MP, a discussion, and a decision on how the petition is to be dealt with,[67] whereby the Petitions Committee may request other Sejm committees to express their opinions on the petition under consideration.[68] The manner in which the petition may be dealt with by the designated Sejm committee may include, in particular, the filing of a bill or resolution, the filing of an amendment or motion to a bill or resolution during its consideration by another Sejm committee or during its second reading, the presentation of an opinion to another Sejm committee on a bill or resolution that it is considering, the filing of an application for an audit by the Supreme Audit Office, or the lack of consideration of the request constituting the subject matter of the petition.[69] Regardless of the manner in which the petition is considered, the Petitions Committee informs the Marshal of the Sejm about how the petition was handled or on the appearance of circumstances justifying it being left unconsidered,[70] while the Marshal sends a notice on this to the petitioner.[71]

Moving on to discuss the respective provisions of the Standing Orders of the Senate on this, it should be pointed out that, in order to enable the citizens to exercise

62 Article 18, para. 1, item 1a of the Regulations of the Sejm (R. Sejm). According to the annex to these regulations, entitled Subject Matter of the Activities of Sejm Committees, this Committee is responsible for considering petitions submitted to the Sejm.

63 Article 126b para. 1 the Standing Orders of the Sejm.

64 Article 126b para. 4 the Standing Orders of the Sejm.

65 Article 126b para. 2 the Standing Orders of the Sejm.

66 Article 126b, para. 3 of the Standing Orders of the Sejm, according to which, if a petition fails to meet the requirements specified in the AoP, the Marshall of the Sejm leaves the petition unconsidered or calls upon the petitioner to supplement or clarify the content of the petition in the procedure and on the principles specified in this Act.

67 Article 126c para. 1 the Standing Orders of the Sejm.

68 Article 126c para. 2 the Standing Orders of the Sejm.

69 Article 126c para. 3 the Standing Orders of the Sejm.

70 Article 126d the Standing Orders of the Sejm.

71 Article 126e the Standing Orders of the Sejm.

their right to petition as fully as possible, the Senate amended its Regulations on 20 November 2008, which was almost six years before the Act was enacted and seven before the provisions of the AoP entered into force, providing an appropriate basis for the consideration of petitions addressed to that body.[72] Therefore, as of 1 January 2009, the powers of the Senate Committee on Human Rights and the Rule of Law were extended by the addition of the consideration of petitions addressed to the Senate and its bodies to its activities and, simultaneously, a new Section Xa of the Standing Orders of the Senate entitled 'Consideration of petitions' entered into force, specifying the procedure in which the Committee on Human Rights, the Rule of Law and Petitions works in this area. According to the current wording of the Standing Orders of the Senate, the Committee on Human Rights, the Rule of Law and Petitions is one of the Senate's standing committees.[73] The Marshal of the Senate forwards the petition to the Committee immediately after receiving it,[74] while the Chairman of the Committee either presents it for consideration at a meeting of the Committee or, if he acknowledges that the subject matter of the petition does not fall within the Senate's responsibilities, forwards it to the appropriate public authority and informs the Marshal of the Senate and the Committee members of this.[75] Furthermore, the Chairman of the Committee on Human Rights, the Rule of Law and Petitions notifies the chairmen of the relevant Senate committees of the date of the meeting at which the petition will be considered.[76] Additionally, the Regulations of the Senate provide for the ability of the Committee on Human Rights, the Rule of Law and Petitions to request another committee to give its opinion on the petition under consideration.[77] After considering the petition, the committee in question may submit a motion to the Marshal of the Senate to take a legislative initiative (pass a resolution) together with a bill (resolution), or authorise one of the Committee's members to submit a specific motion of a legislative nature during the discussion on the given item of the Senate's agenda, or present an opinion to the Marshal of the Senate about the advisability of

72 H. Zięba-Załucka, Prawo petycji jako forma społeczeństwa obywatelskiego, "Samorząd Terytorialny" 2011, no. 4, p. 20.

73 Article 15, para. 1, item 6 of the Standing Orders of the Senate. According to the annex to these Regulations entitled Subject matter of the activities of the Senate's committees, the subject matter of the activities of this Committee are civil rights and liberties and their institutional guarantees, matters related to the functioning of the judiciary and public safety, the observance of the law, the observance of human rights, civil society institutions and non-governmental organisations, as well as the consideration of petitions addressed to the Senate and its bodies.

74 Article 90a the Standing Orders of the Senate.

75 Article 90b, para. 1 of the Standing Orders of the Senate. However, at the request of a member of the Committee – as referred to in Article 90b, para. 2 of the Standing Orders of the Senate – a petition that the Chairman has forwarded to the appropriate body of public authority is considered at a meeting of the Committee.

76 Article 90b para. 3 the Standing Orders of the Senate.

77 Article 90c the Standing Orders of the Senate.

the Senate or its body exercising the powers laid down in the Constitution, an act of law, or the Senate's Regulations,[78] or take no such action, informing the Marshal of the Senate of the reasons for doing so.[79] Regardless of the decision made by the Committee on Human Rights, the Rule of Law and Petitions, its Chairman notifies the petitioner of the action taken or the reasons for not taking any action.[80]

The above Regulations have the same solutions on the continuation of proceedings on petitions at the end of the term of office of a parliamentary chamber. This is because, as indicated in the Regulations of the Sejm, if the proceedings on a petition are not completed before the end of the term of office of the Sejm, they are conducted by the Sejm Committee for Petitions during the next term of office.[81] A similar solution on this is provided for in the Senate's Regulations, assuming that work continues after the end of the Senate's term of office. This is because petitions not considered before the end of the given term of office are considered by the Committee on Human Rights, the Rule of Law and Petitions of the Senate's following term of office.[82] Furthermore, the committee may decide to resubmit the motion to pass a legislative initiative (resolution) if the proceedings on this legislative initiative (resolution) were not completed during the Senate's previous term of office.[83]

6. Review of the Statistics on Petitions Filed with the Sejm and Senate

It follows from the above that, in the current legislative framework, the group of entities that have the capacity to file petitions to the Sejm or Senate is large. The subject of the petition has been defined just as broadly, while many of the formalities related to the procedures for considering the petition have been removed. Therefore, of key importance to the implementation of the postulate of universality of the right to petition is the acknowledgement by the Marshal of the Sejm or, in the case of petitions filed with the other chamber of the Parliament, by the Marshal of the Senate that the submission is a petition and therefore the notification of the initiation of proceedings on this.

The Sejm received 40 petitions from the moment the AoP entered into force, namely from 6 September 2015, until the end of 2015, of which the Marshal of the Sejm referred 26 to the Petitions Committee for consideration and left two unconsidered, whereas, in the case of 12 petitions, as of 31 December 2015, the

78 Article 90d para. 1 the Standing Orders of the Senate.
79 Article 90d para. 2 the Standing Orders of the Senate.
80 Article 90e the Standing Orders of the Senate.
81 Article 126g the Standing Orders of the Senate.
82 Article 90g para. 1 the Standing Orders of the Senate.
83 Article 90g para. 2 the Standing Orders of the Senate.

Marshal of the Sejm had not yet made a decision as to their further course.[84] The Sejm received 134 petitions in 2016, of which the Marshal of the Sejm referred 125 to the Petitions Committee for consideration and left two unconsidered, whereas, in the case of nine petitions, as of 31 December 2016, the Marshal of the Sejm had not yet made a decision as to their further course.[85] In 2017, the Petitions Committee reviewed 160 petitions filed with the Sejm, of which 155 were individual and five were multiple, while one petition was left unconsidered by the Marshal of the Sejm.[86] In 2018, the Petitions Committee considered 126 petitions, of which 121 were individual petitions and five were multiple petitions, while three were left unconsidered by the Marshal of the Sejm.[87] In 2019, the Petitions Committee considered 162 petitions, of which 161 were individual petitions and one was a multiple petition, while two were left unconsidered by the Marshal of the Sejm.[88] The Petitions Committee considered 129 petitions at 27 meetings between 1 January and 31 December 2020, of which 127 were individual petitions and two were multiple petitions.[89] These statistics show that a comparable number of petitions were considered by the Sejm in the individual years in which the provisions of the AoP have been in force.

A more extensive study of this is possible with respect to petitions filed with the Senate. Research conducted with respect to the years when the legal basis for filing petitions was limited to the Constitution and the Regulations of the Senate has demonstrated that a narrow understanding of the subject of such petitions can significantly restrict the right to petition. The justification for this argument is, as M. Florczak-Wątor points out, the practice of considering petitions by the bodies of the Senate, and in particular by the Marshal of the Senate, in the years 2009–2011, as statistical data from that period justifies the doubts that the narrowing of the understanding of petitions by the Second Chamber of the Parliament to submissions containing legislative motions restricts the right to petition to that chamber to an extent that breaches its essence.[90] Meanwhile, it transpires from

84 http://orka.sejm.gov.pl/petycje.nsf/nazwa/informacja_roczna_2015/$file/informacja_roczna_2015.pdf (9.05.2021).

85 http://orka.sejm.gov.pl/petycje.nsf/nazwa/informacja_roczna_2016/$file/informacja_roczna_2016.pdf (9.05.2021).

86 http://orka.sejm.gov.pl/petycje.nsf/nazwa/informacja_roczna_2017/$file/informacja_roczna_2017.pdf (9.05.2021).

87 http://orka.sejm.gov.pl/petycje.nsf/nazwa/informacja_roczna_2018/$file/informacja_roczna_2018.pdf (9.05.2021).

88 http://orka.sejm.gov.pl/petycje.nsf/nazwa/informacja_roczna_2019/$file/informacja_roczna_2019.pdf (9.05.2021).

89 https://www.sejm.gov.pl/Sejm9.nsf/page.xsp/informacje_pet (9.05.2021).

90 It arises from the annual reports of the Committee on Human Rights, the Rule of Law and Petitions analysed by M. Florczak-Wątor that the vast majority of submissions sent to the Petitions and Correspondence Department of the Office of Social Communication of the Senate Chancellery were not processed further in the petition procedure, as they did not contain any legislative

the research conducted by the authors of this article that these statistics were also similar in subsequent years, while a change in this respect may be noticed since 2017, namely only after the third year of application of the provisions of the Act on Petitions. And so, in 2012, 151 submissions received the title of 'petition' or contained motions and proposals to amend provisions of the law, whereby following the analysis of these submissions, 18 were entered into the petition procedure.[91] In the following year, 673 submissions filed with the Senate received the title of 'petition' or contained motions and proposals to amend the provisions of the law. Following their analysis, 18 petitions were prepared,[92] whereby, of the correspondence bearing the title of 'petition', their number had more than quadrupled in 2013 compared to 2012. In 2014, 451 submissions received the title of 'petition' or contained motions and proposals to amend provisions of the law, whereby 24 petitions were processed on their basis.[93] In analysing the submissions registered in 2015 in the Petitions and Correspondence Department of the Office of Social Communication, it should be noted that 381 submissions received the title of 'petition' or contained motions and proposals to amend the provisions of the law, whereby 13 petitions were prepared after their analysis: nine in the eighth term of office of the Senate and four in the ninth term, including one multiple petition.[94] The analysis of submissions registered in 2016 in the Petitions and Correspondence Department of the Office of Social Communication showed that the petitioners gave 1,721 submissions the title of 'petition' or included motions and proposals of amendments to the provisions of the law in them. After their analysis, 69 petitions were prepared, of which six were multiple petitions. In analysing the impact of petitions in 2016, it should be emphasised that their number increased more than five-fold compared to the

motions, while their authors presented their individual cases before the judicial authorities or bodies, or expressed a discussion or dissatisfaction with rulings and decisions that had been made. As a result of the above, the majority of submissions addressed to the Senate bearing the word 'petition' were not considered in the procedure that is appropriate for such submissions, which – as the author pointed out – constituted a material limitation of the ability of the entitled entities to exercise their constitutionally guaranteed right to petition. For example, she pointed out that, in 2010, the Senate received 155 submissions bearing the word 'petition' or containing motions and proposals to amend provisions of the law, but following their analysis, 21 of them were processed further in the petition procedure, which constituted approximately 13% of those that had been filed as petitions. In 2011 – as mentioned by the author – the Senate received 183 petitions of this type, while the petition procedure was implemented with respect to just 17 of them, which constitutes approximately 9% (see M. Florczak-Wątor, Tryb..., *op. cit.*, pp. 514–523).

91 https://www.senat.gov.pl/prace/petycje/sprawozdanie-komisji-praw-czlowieka-praworzadnosci-i-petycji-z-/ (9.05.2021).

92 https://www.senat.gov.pl/prace/petycje/sprawozdanie-komisji-praw-czlowieka-praworzadnosci-i-petycji13/ (9.05.2021).

93 https://www.senat.gov.pl/prace/petycje/sprawozdanie-komisji-praw-czlowieka-praworzadnosci2014/ (9.05.2021).

94 https://www.senat.gov.pl/prace/petycje/sprawozdanie-2015/ (9.05.2021).

number of such submissions addressed to the Senate in 2015 and almost three-fold compared to 2014.[95] 2017 brought 54 petitions, of which one was a multiple petition supported by 1,101 individuals and collective entities, out of 144 submissions (excluding multiple petitions) filed with the Senate.[96] In analysing the submissions registered in 2018, it was found that the authors gave their submissions the title of 'petition' in 129 cases (excluding multiple petitions), whereas, following an analysis of the incoming petitions, 84 petitions were referred to the Commission, including two multiple petitions, of which PW9–01/18 was supported by 1,367 individuals and collective entities.[97] In 2019, 91 petitions out of 147 submissions filed as 'petitions' with the second chamber of parliament, including 77 individual and 14 collective petitions, were processed further. No multiple petitions were received in that year.[98] The Marshal of the Senate referred 134 petitions to the Committee on Human Rights, the Rule of Law and Petitions in 2020, of which 116 were individual petitions, 17 were collective petitions and one was a multiple petition.[99]

The analysis of the petitions filed with both chambers of parliament showed that representatives of all entities with such capacity, including territorial self-government units, exercised this right, with a relatively large proportion of petitions filed by natural persons being noted. Furthermore, it arises from this analysis that the subject matter of the petitions applies to almost all aspects of activity of society, while the demands to introduce statutory changes submitted to date referred, among other things, to the problems of civil liberties and rights, public finance, the administration of justice, territorial self-government, the activities of state bodies, internal security and national defence, social insurance, healthcare, people with disabilities, social welfare, family matters, education and science, labour issues and unemployment, housing, industry, services, trade, culture and mass media, infrastructure, environmental protection, agriculture and forestry, sport and fitness, foreign and Polish community affairs, veterans' affairs and war benefits, as well as relations between the state and churches.

Conclusions

From the analysis of the petitions filed with the two chambers of parliament, both individual and collective petitions, submitted by natural persons, as well as legal persons and organisational units without legal personality, can be distinguished. It

95 https://www.senat.gov.pl/prace/petycje/sprawozdanie-komisji-praw-czlowieka-praworzadnosci-i-2016-z/ (9.05.2021).

96 https://www.senat.gov.pl/prace/petycje/sprawozdanie-komisji-praw-czlowieka-praworzadnosci-i-2017/ (9.05.2021).

97 https://www.senat.gov.pl/download/gfx/senat/pl/senatdruki/10322/druk/1214.pdf (26.10.2021).

98 https://www.senat.gov.pl/prace/druki/?nr=159&kadencja=10 (9.05.2021).

99 https://www.senat.gov.pl/prace/druki/record,11519.html (26.10.2021).

should be emphasised that this institution is also used by territorial self-government units acting through their governing bodies, whereby petitions filed by these bodies account for a significant proportion of petitions filed in order to introduce changes in the applicable territorial self-government regulations.[100] However, this right is exercised most extensively by natural persons, while the scope of their demands to introduce statutory amendments applies to almost all aspects of life of society.

The above quantitative schedules of petitions filed with the two chambers of parliament, the manner in which the entities with the capacity to file petitions have been specified, the broad subject matter of the petitions, and the informal nature of this institution, justify the conclusion that the right to petition is universal in Poland's reality. This is because this institution is accessible to a greater extent than other tools, which can be used to indicate social expectations as to the shape of the law, such as the civil legislative initiative referred to in the Act on citizens exercising the legislative initiative of 24 June 1999.[101] It should also be emphasised that petitions addressed to one of the chambers of the parliament can be an impulse for their addressee to undertake legislative activities, even in the situation when the petitioner has failed to propose specific normative solutions. Meanwhile, in addition to the accessibility of this institution, this makes petitions an attractive and relatively frequently used approach.[102]

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100 See: M. Małecka-Łyszczek, K. Małysa-Sulińska, Petycja do Senatu RP jako instrument urzeczywistniania prawa do dobrego samorządu, (in:) M. Stec, K. Małysa-Sulińska (eds.), Prawo do dobrego samorządu – perspektywa obywatela i mieszkańca, Warsaw 2021.

101 Act on citizens exercising the legislative initiative of 24 June 1999, Journal of Laws of 2018, item 2120, as amended.

102 See the legislative initiative of the Senate of the Republic of Poland of the 10th term of office (form 310) submitted in connection with the desire to prevent situations in which the petitioner in a given matter simultaneously addresses the petition to multiple entities with the powers to consider it. A petition is frequently simultaneously submitted on the same issue to the Senate and to the Sejm, as well as to individual ministries. This results in the unreasonable need to involve several institutions in the consideration of the same matter and the duplication of the work on the examination of the petition. That is why the introduction of a regulation is proposed in order to limit the ability of the same person simultaneously submitting a petition on the same problem to several addressees.

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Human Rights in the Light of the Process of Financialisation

Abstract: The article deals with the challenges resulting from financialisation, in which we observe an increasing impact of the financial sphere in man's everyday life. It also considers the effect of this process on the functioning of societies and concludes that the process of creating and applying financial market law must be redefined and human rights issues taken into account. In addition to the activity of the UN and the European Union in promoting the concept of business and human rights, the experiences of recent years show that combining human rights with financial market regulation is possible. To achieve this, however, many actors must be involved and a specific understanding of human rights and values must be adopted, and their protection should constitute the core of the legislator's activity.
Keywords: common good, dignity, financialisation, financial market, human rights

Introduction

Financialisation, which is a process where everyday life is influenced by the increasing impact of the financial sphere, prompts one to reflect on the need for and ways of creating mechanisms that would effectively safeguard the interests of the weaker parties, and particularly the interests of the customers of the financial market, as they often become victims of unethical actions of entities operating in it. Looking at this issue from the perspective of legal science, it seems worth considering the use of hard or soft forms of pressure exercised on financial institutions. While the former category includes legislative measures taken by law-makers and financial market regulators, among the soft forms of pressure there are all kinds of recommendations and standards, as well as initiatives, from the self-regulatory area. Particularly noteworthy are the activities of the United Nations concerning

the promotion and implementation by Member States of the concept of business and human rights, through which both governments and private entities (including financial institutions) are recommended to integrate into their activities also aspects related to human rights. Although a question may be asked about the possibility of combining these two seemingly contradictory elements – human rights and financial markets – this objective is nevertheless feasible and achievable. What is more, in the author's opinion such a combination is particularly important nowadays, when the financialisation of everyday life has become a reality and, while sometimes stigmatised, it may, when based on ethical principles and respecting the dignity of the human being, serve development rather than destruction.

The aim of this article is to initiate a discussion on financialisation seen through the prism of the concept of human rights, with particular emphasis on aspects related to the functioning and regulation of contemporary financial markets. The deliberations will focus on three extremely broad areas: the process of financialisation, human rights and financial markets. Aware of the challenges faced by this kind of research, which implies a variety of concepts, data and sources as well as an interdisciplinary character of the research, the author will limit his considerations to one aspect only and will highlight the essence of dependencies that arise in the relationship between financialisation and human rights.

These challenges should not, in the author's opinion, prevent this kind of research from being undertaken. Even more so since the literature so far has not dealt with the issue of the relationship between human rights and financial markets on a larger scale. This might be due to the fact that both areas are characterised by a multitude of concepts, theories and ways in which they may be understood. What is more, bearing in mind the universality related to this problem, there is a concern about the formulation of conclusions that will be applicable internationally. Therefore, in order to keep the argumentation clear, human rights will be presented here in the perspective of the international legal paradigm which also constituted the source of the concept of business and human rights, a concept that is crucial from the point of view of this article. Its aim was to create a specific set of standards embedded in the idea of human rights which understandably, due to their complex nature, cannot be studied in detail here. However, it should be noted that the common element that constructs human rights, and a kind of golden rule present in all societies, cultures and religions, is the principle of doing no evil to another human being. A human being possesses natural and inalienable dignity, and respect for this dignity means, to quote Immanuel Kant, first of all, treating man as an end and not as a means to achieve the ends of others. This statement is still valid today, especially if we relate it to the activities of the financial market and the relationship between the stronger (financial institutions) and the weaker (consumers). This phenomenon is also seen in other areas of the economic sector, especially in the employer–employee relationship, or the relationship between multinational corporations and local communities.

What is important, however, is that its existence has become a catalyst for change, resulting in the aforementioned concept of business and human rights. At this point, it is worth recalling a frequently cited example of the violation of human rights prompted by greed and the desire to gain wealth. This example is all the more important because it concerns practically every person reading these words, who is certainly using technological achievements such as computers or cellular phones on a daily basis. Their production requires coltan, which is an ore of tantalum and niobium, i.e. metals that are essential for the production of, among others, electronic capacitors present in every mobile phone.[1] What is worth noting is that 70% of the world's reserves of this precious ore (and many other rare minerals) are found in the Democratic Republic of Congo, a country that has for many years now been plagued by conflicts that have claimed millions of lives. The wars in this part of the world are financed with means generated by the extraction of these deposits, the exploitation of which is accompanied by violence and the violation of human rights. UN reports confirm all this, pointing to the network of Western corporations that derive enormous profits from the trade in these metals. Similar examples could be presented and, what is important, because of the network of connections (or supplies), they indirectly concern each of us, both in the commercial (using products manufactured in violation of human rights) as well as the financial aspect. It is, after all, financial markets which are a source of credit for companies that multiply capital through investments. But what is the purpose of these investments and do they not violate human rights? Is it not the case that although commercial activities create new jobs and are a source of income for employees, they are carried out in violation of the freedom, dignity, opportunities for development, or access to education of those workers, taking advantage of the weaker position of the other party? Everyday life confirms these concerns, and the process of financialisation that is not based on values may only foster further violations. Knowing these threats, it is necessary to warn against them, but above all to recommend remedies and feasible solutions. Hence, later in this article it will be proposed that human rights have a potential to be used for shaping the architecture of financial markets. This architecture should, on the one hand, ensure the performance of the functions ascribed to financial markets and on the other hand secure the rights and freedoms of entities that directly or indirectly make use of financial services which these markets offer. Human rights in the financial markets must be seen in the traditional, vertical dimension (the relationship between the state and the financial institutions) as well as in the horizontal dimension (the financial institutions and their clients), whereas the right to financial security should become an element of the package of the economic, social and cultural rights achieved by ensuring the stability and security of the financial

1 Values Added. The Challenge of Integrating Human Rights into the Financial Sector, The Danish Institute for Human Rights, pp. 17–18.

market and the protection of its weaker users. Stability and security are determined by investments which are financed by the financial sector, and which, it should be stressed, draws its capital from clients. Therefore, the financial sector must analyse in its decisions the risks of these investments. We should also seek to develop legal solutions that would in the future allow the creation of a system for the assessment of the reputation risk, which could be measured by the scale of activities violating human rights. However, in order to achieve this, it will be necessary to understand certain interdependencies between human rights and the financial market. These issues will be the subject of further analysis presented in this article.

1. The Essence of Financialisation

In 2021, when this article is being published, the world is facing new challenges of political, economic and social nature. The reality around us is becoming increasingly diverse and multifaceted, and its understanding requires narrowing specialisation and an interdisciplinary approach. It is not different in the case of economic phenomena which, measurable and logical as a rule, are more and more frequently interfering in the life of an average person, either directly (e.g. through credit institutions) or indirectly (e.g. affecting the prices of specific consumer goods through sophisticated forms of derivative financial instruments). The advancing economisation of life is primarily the result of the growing strength of financial markets, which, despite sometimes being stigmatised, play an important role in the functioning of the social systems of individual countries, regions and, as the crisis of 2008 showed, also worldwide. Their importance is primarily linked to the functions ascribed to them, and the most frequently mentioned ones are the function of intermediation, the function of accumulation of capital, the function of asset and liability management, and the clearing function. They differ in importance depending on particular sectors of the financial market, and these sectors, through financial innovations, cover still newer areas of activity, eventually becoming of interest to legislators, including EU lawmakers. Examples include shadow banking, algorithmic trading, or financial technologies collectively referred to as 'fintech'. These phenomena increasingly affect the functioning of the real world, contributing to the deepening of the phenomenon that was identified several years ago and termed 'financialisation'. Before an attempt is made at the definition of the term, it should be noted that although it first of all falls within the scope of interest of economic researchers, it should also be reflected in the research conducted in another important discipline of social sciences, namely law. This assertion stems from the conviction about the progressing economisation of law, which involves attributing legal forms to certain economic categories.[2] M. Weralski

2 N. Gajl, Instrumenty finansowe w zarządzaniu gospodarką narodową, Warsaw 1988, p. 27.

identifies it as a process of expansion of economic premises underlying legal and financial regulations.[3] The norms that result from this process shape economic relations using objective economic forces – economic laws and regularities.[4] Pointing to the relations between legal institutions (defined as abstract notions reproduced on the basis of specific legal norms) and economic categories, Weralski identifies the latter and emphasises three characteristics connected with them. One is connected with the fact that economic categories mirror the actual economic relations, and while not being merely the effect of speculative thoughts detached from reality must also take into account the social aspect. Secondly, economic categories must also be seen in their historical context. And thirdly, the categories described are a generalisation of objective economic phenomena, which results from human social practice.[5] Although these economic phenomena as well as objective interdependencies between them exist, the regularities which govern them do not prevent us from shaping their economic reality in a conscious manner. Knowing these phenomena, the interdependencies existing between them and the economic regularities, we are able to utilise them to achieve our goals, and do it with the help of law for example. This in turn leads to the formation and existence side by side of economic categories and legal institutions that at times sound or seem identical.[6] Whether legal or economic, they are most certainly abstract notions, the product of a thought process of a human being who, learning about the surrounding reality and the principles governing it, tries, as Weralski writes, to generalise this reality using legal regulations developed specifically for this purpose.[7] In the case of a financial market, these regulations are created and applied within the framework of the financial market law, which is a relatively young part of financial law. In a broad sense they regulate both private and public law sectors of the financial market. This market is a part of a larger whole, which is a social system composed of the economic and financial system and the financial market. This interdependence is of significance when we consider, for example, the consequences of a crisis which, originating in the financial sector, affects subsequent elements of the system, and thus, at the final stage, also society. These relations may also be found in the relationship between financialisation and human rights implemented in the financial market regulation, which is the subject of analysis in this publication.

3 M. Weralski, Pojęcie instytucji prawno-finansowych i ich systematyka, (in:) M. Weralski (ed.), System instytucji prawno-finansowych PRL, vol. I, Wrocław 1982, p. 43.

4 *Ibidem*, p. 40.

5 M. Weralski, Instytucje prawno-finansowe a kategorie ekonomiczne, (in:) M. Weralski (ed.), System instytucji prawnofinansowych PRL, vol. I, Wrocław 1982, p. 55.

6 T. Nieborak, Tworzenie i stosowanie prawa rynku finansowego a proces ekonomizacji prawa, Poznań 2016, p. 91.

7 M. Weralski, Pojęcie…, *op. cit.*, p. 56.

Key to its understanding is the proper identification of the phenomenon of financialisation.[8] Based on the analysis of literature, financialisation has several common elements, related to its definition, causes, effects and consequences. Its most frequently quoted definition is the one proposed by G. A. Esptein, who describes it broadly in terms of the growing role of financial motives, financial markets, their participants and financial institutions in the functioning of the international economy and the economies of individual countries.[9]

This process clearly affects many aspects of daily life, such as education, social protection, the right to housing, or migration.[10]

One particularly interesting element of the above concept is the category of financial motives, i.e. the sources of specific behaviours on the (financial) market. This category requires, as A. Sibińska rightly believes, identification of the psychological factors that determine general directions and goals in life, shape attitudes towards money and wealth, and affect, directly or indirectly, the decisions taken.[11] This also confirms the thesis on the interdisciplinary nature of financialisation, the thorough understanding of which requires economic and legal as well as sociological and psychological knowledge. The inclusion of psychological elements also directs us towards axiological considerations, taking into account behavioural factors. It is worth mentioning here the works of P. H. Dembinski, whose research also includes financialisation and the role which financial markets played in its emergence. If not properly controlled, these markets may become a source of economic crises. The one of 2008, as Dembinski correctly noted, would not have been possible if it had not been for the accompanying crisis of values and a selfish pursuit of profit maximisation at any price,[12] which led to an unprecedented crisis of confidence that undermined creative thinking and sowed fears about building the future. This, in the long term, affects the dignity of human beings who are losing jobs and life savings and the stability of their daily lives. And it is dignity on the foundation of which the idea of human rights is built. Similarly, the common good, considered in terms of the good as the sum of the well-being of individuals rather than the artificial perspective of *Homo oeconomicus*,

8 A. Adamska, Finansjalizacja a zmiana matrycy instytucjonalnej, "Finanse: czasopismo Komitetu Nauk o Finansach PAN" 2017, no. 1, pp. 45–46.

9 G.A. Epstein, Financialization and the World Economy, UK and Northampton, MA, USA, 2005, pp. 3–5.

10 M. Sawey, What Is Financialization?, "International Journal of Political Economy" 2013, vol. 42, no. 4, pp. 5–18; T.I. Palley, Financialization: What It Is and Why It Matters, Working Paper no. 525 by The Levy Economics Institute and Economics for Democratic and Open Societies Washington, D.C. December 2007, *passim*; M.B. Aalbers, The Variegated Financialization of Housing, "International Journal of Urban and Regional Research" 2017, vol. 41, no. 4, pp. 542–554.

11 A. Sibińska, Charakterystyka zachowań finansowych ludzi młodych, (in:) W. Grzegorczyk (ed.), Marketing w obliczu nowych wyzwań rynkowych. Księga jubileuszowa z okazji 70-lecia Profesora Bogdana Gregora, Łódź 2013, p. 32.

12 P.H. Dembinski, S. Beretta, Kryzys ekonomiczny i kryzys wartości, Crakow 2014, pp. 107–113.

will be replaced by a realistic anthropological perspective of a human being seen in the egocentric, but also relational dimension, as being self-oriented, but also open to others, to the community.[13] The anthropological perspective is an element of further considerations conducted by Dembinski, who analysing the perception of the surrounding reality points to either the perspective of an effective balance, or the common good. In his opinion, the anthropological reference to the former is 'provided by the classical *Homo oeconomicus* – or its grandson *Homo financiarius*. The anthropological foundations of the common good are fundamentally different: the common good refers to a human being, not an individual, and a human being becomes a person through its relations with other human beings. Thus, although an autonomous subject, no one is independent of others. The self develops by constantly entering into relationships with others.'[14] Such an anthropological perspective should also be taken into account in the process of creating and applying financial market law. The lack of reflection in this regard and the creation of regulations that often fail to grasp the existing reality, or are even detached from it, have already resulted in the adoption of norms that ignored its specificity, complexity and sometimes behavioural aspects. According to R. H. Thaler and C. R. Sunstein, the lawmaker should indeed be like the architect of choice, whose duty is not only to organise the context in which people make their decisions, but to give them a nudge towards certain behaviours.[15] In the case of the financial market, this behaviour should concern 'both sides of the barricade', i.e. managers of financial institutions and clients of these institutions. Moreover, this context must take into account the external conditions, including progressive financialisation and its impact on human attitudes. It is rightly believed that the abundance of financial impulses (motives) has turned man into a consumer, while ethical norms have started to be replaced by financial indicators.[16] In the social sphere, attention is also drawn to the growing social stratification that gives rise to numerous conflicts, to crisis of moral values, and to the shallowing of relationships between people, which are now coming to be based on the culture of money and which generate plunderers' forces, as is sometimes seen among representatives of the plutocratic class.[17] Certainly, among the negative effects of financialisation are social change and the associated crises. And yet, this does not mean that there are no positives. One is without any doubt the continual innovative solutions, such as

13 A. Glapiński, Przedmowa, (in:) P.H. Dembinski, S. Beretta, Kryzys…, *op. cit.*, pp. 9–10.

14 P.H. Dembinski, S. Beretta, Kryzys…, *op. cit.*, p. 99.

15 R.H. Thaler, C.R. Sunstein, Nudge: Improving decisions about health, wealth and happiness, London 2009, *passim*.

16 A. Gemzik-Salwach, K. Opolski, Finansjalizacja w świetle wyzwań współczesnej gospodarki, (in:) A. Gemzik-Salwach, K. Opolski (eds.), Finansjalizacja. Wpływ na gospodarkę i społeczeństwo, Warsaw 2016, p. 13.

17 M. Ratajczak, Ekonomia instytucjonalna i jej współczesny podział, "Współczesne Problemy Ekonomiczne" 2012, no. 4, pp. 93–101.

the payment of debts using modern and often safer forms of settlement. Numerous examples can be found in the payment services market, which, for many years, has also been the subject of particular interest of the EU legislator, with the result that regulations are now in place. These include the Payment Services Directive (PSD2), which is based on the philosophy of consumer protection on the one hand and the technological neutrality of new legal regulations on the other. The latter should take into account market innovation and allow the implementation of new technological solutions. What is noteworthy is that this type of innovation is marking its presence not only on developed markets but in the developing world, too. An excellent example are the African countries and their enormous and still untapped growth potential. And it is in Africa that modern and well-functioning micropayment systems exist and are doing very well. On the other hand, however, it is also in Africa where we encounter frequent cases of rogue exploitation of resources by large multinational concerns, which is possible only because their ventures are financed not elsewhere, but on the global financial markets. This situation gave rise to a discussion that led to the creation of the concept of business and human rights, aimed at proposing a platform for potential cooperation that would combine economic activity with the simultaneous implementation of human rights.

2. Human Rights – their Essence

Studying the idea of human rights in a synthetic way is not an easy task because there are many concepts that are related to them, and only when these concepts are taken into account does it become possible to understand their essence. Among the examples of theoretical foundations which shape the study of human rights, there are those of a religious, moral, ethical, biological, sociological, psychological as well as anthropological nature.[18] They are defined as subjective rights to which every human being is entitled, i.e. rights which a given legal subject enjoys in relations with other legal subjects. This means that other subjects must respect these rights, which also implies that they have to refrain from actions which might lead to obstructing the exercise of these rights.[19] If we relate this definition to particular concepts of human rights, we may then distinguish two basic approaches to them: the natural law approach and the deliberative approach.

The first states that human rights accrue to every human being by virtue of being human, without any need for further justification of the fact. Human rights can neither be granted nor taken away. Nor can they be renounced or relinquished. At the source of human rights understood in this way is the inalienable dignity of the human being, which is also the source of all individual rights and freedoms. The essence of

18 D. Shelton (ed.), The Oxford Handbook of International Human Rights Law, Oxford 2012, *passim*.
19 W. Brzozowski, A. Krzywoń, M. Wiącek, Prawa człowieka, Warsaw 2018, pp. 22–27.

dignity is crucial in the transfer of the concept of human rights to the regulation of the financial market, which, in turn, is the main protagonist of the process of financialisation. Dignity and the financial markets have one thing in common: it is difficult to define them. However, to attempt to take up this challenge, and resorting in doing so to the previous achievements of the pursuit of the concept of dignity as the source of all human rights and dignities, first of all their characteristic features must be identified. They are: the inherent nature, inalienability and inviolability.[20] It must also be stressed that dignity should be understood in two ways.[21] Firstly, in its basic meaning (Latin: *dignitas hominis*), which is the most important from the point of view of human rights, of which dignity is considered to be the source, as inherent to every human being entitled to it just by virtue of the fact of being a human being. Thanks to it, man is a person different from other beings. And in the other sense, involving self-worth and self-respect, in which dignity refers to human personality and the development of an individual's potential, which consequently increases this individual's value and worth among others. Human dignity, lying at the root of human rights, is a good of particular importance that reflects the essence of humanity and is an inalienable characteristic inherent in every human being. And while human dignity in the first sense is inalienable, in its other understanding, relating to moral excellence, it may be gained or lost depending on the decisions (or choices) of a given person.[22]

Ensuring its protection and respect is a duty and responsibility of the state. This state responsibility has been pointed to recently, as the social dimension is increasingly frequently emphasised. As A. Krzywoń rightly observes, particular attention is given to the conditions in which human beings live. Thus the state, when protecting human dignity, should on the one hand ensure everyone a minimum level of existence, and on the other hand implement measures preventing social exclusion.[23]

Transferring these assumptions to the subject matter of this publication, it should be noted that nowadays the level of existence, as well as one's position in society, are greatly influenced, directly and indirectly, by the financial sphere, which affects the world of real life. An example may be the pricing of certain commodities which are at the same time the underlying assets and components of instruments (e.g.

20 *Ibidem*, pp. 116–119.

21 M. Piechowiak, Filozofia praw człowieka. Prawa człowieka w świetle ich międzynarodowej ochrony, Lublin 1999, pp. 343–344.

22 A. Kojder, Godność, (in:) M. Boguni-Borowska (ed.), Fundamenty dobrego społeczeństwa. Wartości., Crakow 2015, p. 50; See P. G. Carozza, Human Dignity, (in:) D. Shelton (ed.), The Oxford Handbook…, *op. cit.*, pp. 345–359.

23 W. Brzozowski, A. Krzywoń, M. Wiącek, Prawa człowieka …, *op. cit.*, p. 119. See: R. Sroka, Etyka i prawa człowieka w biznesie. W poszukiwaniu metody, Warsaw 2016, pp. 54–61.

derivatives), which sometimes are in practice primary commodities, such as cereals (rice) on commodity exchange markets.[24]

The transactions on the commodity exchange as well as the speculation which sometimes accompanies them, through the 'butterfly effect' have an impact on the existence of people who work and live from the cultivation of these commodities. 'Playing' with the price of these commodities and pushing it down must obviously affect the income and therefore the living conditions and the very existence of certain people. The whole world heard about the dramatic situation of Indian farmers who had been forced to take out loans to continue their increasingly unprofitable agricultural production, and the subsequent inability to meet financial obligations eventually pushed many to suicide. On the other hand, an example of the direct influence of the financial sphere on the financial (and therefore social) situation of a human being and the person's dignity is when the financial system offers support such as a loan based on transparent and fair principles. It is obvious that such an instrument should not be offered to people with uncertain creditworthiness and frequently without adequate knowledge of financial matters. It is therefore essential that the state takes measures to create financial awareness among the public and ensures that there are legal solutions which safeguard the interests of the clients of financial market services. These actions also have positive effects on the financial sector, reinforcing in the long term confidence in it.[25]

The other approach to human rights, i.e. the deliberative approach, is critical of the natural law approach and recognises that the idea of human rights is not self-evident in itself, but is subject to evolution, fostered by increasing social and political awareness. It asserts that all human rights can be grounded in the claim that their source is human dignity. Moreover, supporters of this concept draw attention to the differences in the perception of human rights depending on factors such as geographical location, religion and culture.

This universal character of human rights derived from human dignity should not be identified with the protection of the daily existence of the individual reduced merely to a guarantee of safety of a person's everyday life. Human rights should be seen in a broader context, also referring to the position of an individual in a confrontation with large and often more organised structures, such as the state or the financial market, which may limit these rights through their actions. These entities must recognise the human element (dignity) in man, and not treat him

24 See: Center for Human Rights and Global Justice, Every Thirty Minutes: Farmer Suicides, Human Rights, and the Agrarian Crisis in India, NYU School of Law, New York 2011; C. Golay, Legal analysis on the rights of peasants and other people working in rural areas. The Right to Seeds and Intellectual Property Rights, Geneva Academy of International Humanitarian Law and Human Rights, Geneva 2016, *passim*.

25 T. Nieborak, Creation and enforcement of financial market law in the light of the economisation of law, Poznań 2016, pp. 95–99.

purely instrumentally as an element of a game aimed at maximising profit. Such an approach however will require a change in the way of thinking about human rights in a broader, horizontal sense, and as W. Osiatyński writes, as a relative principle that applies to specific relationships between private parties. The idea accompanying this way of viewing human rights was one rooted in economic and social rights that are supposed to provide a minimum of economic security, without which an individual cannot participate in social life or claim his or her rights in a dignified manner.

An important element favouring the acceptance of these rights is consensuality and thus their validity is determined by common consent. Thus, as long as they are based on consensus, the expression of which is a certain right, they should be observed and respected. This kind of approach implies another important element, namely that the catalogue of human rights is not closed.[26]

This evolutionary character of human rights is also reflected in the theory of the generation of human rights, proposed in the 1970s by French lawyer K. Vašák, who distinguished their three generations. The first one covers fundamental, collective rights that result from human nature and are independent of legal regulations of a particular state. Examples of these are the right to life, to personal freedom, to information, but also equality before the law. The second generation of human rights includes economic, social and cultural rights, by means of which the individual is ensured physical and spiritual development or social security. In this catalogue we find the right to work, to social security, and to remuneration. Finally, the third generation of human rights includes collective, solidarity rights, such as the right to a healthy natural environment, the right to personal data protection, or the right to development. The analysis of the rights that make up the different generations of rights leads to the conclusion that all of them are present in the financial market, which is part of a larger whole, namely the social system.[27] In spite of the widespread popularity of this concept, there are voices which recognise its organisational and didactic qualities, but at the same time question its validity and applicability. Creating categories, classes or generations of human rights implies a belief in their gradation, and thus differentiates their validity. However, human rights are indivisible and interdependent, and their integrity means that one cannot ensure only selected ones. Here we must fully agree with the thesis formulated by W. Brzozowski that all human rights are mutually reinforcing and conducive to a fuller realisation of human dignity.[28] Human rights are universal and belong to all people living in society, and their fundamental nature means that they should not be justified by reference to

26 W. Brzozowski, A. Krzywoń, M. Wiącek, Prawa człowieka …, *op. cit.*, p. 28.

27 M. Piechowiak, Filozofia praw człowieka. Prawa człowieka …, *op. cit.*, p. 65 et seq. Also see K. Vašák, A 30-year struggle. The sustained efforts to give force of law to the Universal Declaration of Human Rights, "UNESCO Courier" November 1977, pp. 29–33.

28 W. Brzozowski, A. Krzywoń, M. Wiącek, Prawa człowieka …, *op. cit.*, p. 30.

any other rights.[29] When considering their relation to the financial market, it seems reasonable to base them on the natural law approach rooted in human dignity and constituting a universal paradigm of human rights. At the same time, one should agree with the concerns formulated by M. Piechowiak about the progressing changes in the underlying basis of understanding human rights, particularly with regards the inherent nature and objective character of dignity as the basis of human rights, which today is being replaced by the grounding of human rights in culture. Piechowiak rightly believes that a 'change in the very foundations modifies everything that is based on them, and even a small change can have very far-reaching consequences'.[30] The same is true about issues related to the functioning of financial markets and their impact on people's daily lives. The consequence of moving away from justifying human rights that arise from natural law (which emphasises the dignity of a human being) and favouring new concepts of these rights resulting from a specific cultural and social environment creates a potential danger that this narrative will be used by more powerful entities such as financial institutions, for example. This in turn prompted a discussion on the necessity of incorporating human rights in the regulation of economic activity and this activity itself, and led to the creation of the concept of business and human rights, some elements of which may also be used on financial markets.

3. Is there a Place on the Financial Market for Human Rights?

The answer to the above question should be preceded by a determination of the role the financial markets play in modern man's life. Apart from their normal functions indicated above, the role of these markets should be viewed from a broader perspective, through the prism of ethics and morality. The reason behind this proposal is the fact that financial markets constitute a natural environment that is conducive to the abuse of rights granted to financial institutions by virtue of the specificity of this segment of the economy. It should also be stressed that financial markets are a part of a larger whole and, as a part of the financial system, they are naturally embedded in the social system. This is of fundamental importance in practice, since any turbulence in the financial sector ultimately affects, to a greater or lesser extent, the whole society, an effect known as contagion.[31] Cyclical crises have been frequent in the history of

29 W. Osiatyński, Prawa człowieka i ich granice, Crakow 2011, p. 1.

30 M. Piechowiak, Godność w Karcie Praw Podstawowych Unii Europejskiej – destrukcja uniwersalnego paradygmatu ujęcia podstaw praw człowieka, "Themis Polska Nova" 2012, vol. 2, no. 1, pp. 126–146.

31 R.W. Kolb, What Is Financial Contagion?, (in:) R.W. Kolb (ed.), Financial Contagion. The Viral Threat to the Wealth of Nations, New Jersey 2011, pp. 3–9.

the financial markets, with examples including 2008, 1929 and the sixteenth-century Tulipmania.[32]

Therefore, keeping in mind the impact of modern financial markets on people's lives, it is necessary to see these markets in a broader, axiological dimension, especially when looking at them from a legal point of view. They should always be analysed in a manner similar to that in which human rights are studied. The common elements appearing in this kind of approach include the common good and related human dignity as well as the possibility of discussing these issues within the realms of financial market law, where the process of the creation and application of law should also take into account the observance of human rights. The protection of certain values should constitute the determinant for the legislator who creates the architecture of financial markets, and who should treat the market as a common good. This thesis finds its justification in the events of the last few years and the specifics of the changing world. As R. Balakrishnan rightly observes, the recent crises have highlighted the gap, particularly seen between the economic policy and the idea of human rights.[33] The reason for that has been the focus put on building the market's value, increasing efficiency, and generating profits, with a mistaken belief that economic growth would provide the tools for the more effective enforcement of human rights, and would lead to the elimination of poverty and limitation of the exploitation of certain poorer regions, and thus improve people's lives or curb their exclusion. However, if we look at the current situation, where the rich are getting richer, the poor regions continue to stagnate, and where economic operators are becoming increasingly profit-driven, it is clear that recalling the common good (including the global good) has not lost any of its relevance.[34]

The common good, although intuitively understood universally, proves to be a challenge when an attempt is made to define it precisely. The encyclopaedic meaning of the common good reduces it to a collective value achieved by human communities in connection with the development of the natural potential of their

32 The history of financial markets proves that crises similar to that of 2008 occurred in the past as well. They have been frequently analysed and described in the literature. The most spectacular crises include the one of 1929 and the South Sea Bubble scandal, or Tulipmania. More in: T. Nieborak, Historyczne aspekty wykorzystywania instrumentów pochodnych na przykładzie Tulipanomanii, "Rynek Terminowy" 2004, no. 2, pp. 100–110; P.M. Garber, Tulipmania, "Journal of Political Economy" 1989, vol. 97, no. 3, p. 543 et seq. R.P. Flood, P.M. Garber, Speculative Bubbles, Speculative Attacks, and Policy Switching, Cambridge 1994, p. 59 et seq.; C. Mackay, Extraordinary Popular Delusions and the Madness of Crowds & J. de la Vega, Confusión de Confusiones, New York 1996, *passim*.

33 R. Balakrishnan, D. Elson, Economic policies and human rights obligations: An introduction, (in:) R. Balakrishnan, D. Elson (eds.), Economic Policy and Human Rights. Holding Governments to Account, London 2011, pp. 1–27.

34 D.G. Arnold, Human rights and business: an ethical analysis, (in:) R. Sullivan (ed.), Business and Human Rights. Dilemmas and Solutions, London 2003, pp. 69–81.

members, the satisfaction of their individual interests, or respect for their individual rights. At the same time it seeks to bring the whole community closer to its proper goals.[35] In the discussion on the concept of the 'common good' there are reflections on the differences resulting from the arrangement of the phrases 'common good' and 'shared good', and are manifested in the words 'common' and 'shared'. When these concepts are analysed, the underlying reasons which drive a person to pursue them should be considered. While in the case of the common good the accent is placed on the universal objective aspect (so that the actions undertaken are for the benefit of a wider group of people), in the case of the shared good it is believed that actions are taken primarily to improve one's own (and possibly several other subjects') situation.[36] In the 'common good' the optics focuses on the state – its welfare – and the actions of the members of the community constituting it are to serve the state. The situation in the case of the concept of the 'common good' is different when related to the classical tradition. In that tradition, according to Piechowiak, in order to know what this good is, it is necessary to have knowledge of what serves human development. Hence it is necessary to know who that person is, to look at the person through the prism of extra-legal reality, and to make laws based on this observation. Thus law and the state are meant to serve man.[37] This concept is particularly important for the law that regulates the financial market, which, when viewed instrumentally and therefore a complex phenomenon, must take into account various factors. It is after all the financial market which is a source of capital in the broadest sense of the term, and capital is necessary to ensure certain human needs (housing, subsistence etc.) as well as investment, both of which are interrelated. Without investment there is no work, without work there is no pay, and without pay there is no decent life. This is why it is so important to include ethical (moral) elements in the construction of regulations relating to the economic or business activity. In the case of legal and financial regulations, they should be related to human rights which do not result from political will, but from their natural existence and inscription in the dignity of the human person, being an element of the instrumental aspect of the common

35 The entry "common good", (in:) Wielka Encyklopedia PWN, vol. VII, Warsaw 2002, p. 233; also see M.T. Cyceron, O państwie, o prawach, Kęty 1999, p. 74; M.A. Krapiec, Struktura bytu. Charakterystyczne elementy systemu Arystotelesa i Tomasza z Akwinu, Lublin 1963, p. 285.

36 Z. Stawrowski, Dobro wspólne a filozofia polityki, (in:) W. Arndt, F. Longchamps de Bérier, K. Szczucki (eds.), Dobro wspólne. Teoria i praktyka, Warsaw 2013, pp. 14–15.

37 M. Piechowiak, Prawne a pozaprawne pojęcia dobra prawnego, (in:) W. Arndt, F. Longchamps de Bérier, K. Szczucki (eds.), Dobro wspólne. Teoria i praktyka, Warsaw 2013, p. 25; Compare: M. Piechowiak, Dobro wspólne jako fundament polskiego porządku konstytucyjnego, Warsaw 2012, p. 28 et seq.; W. Brzozowski, Konstytucyjna zasada dobra wspólnego, "Państwo i Prawo" 2006, vol. 11, pp. 19–20.

good.[38] This is the good which, when ensured, will contribute to the protection of the human person's dignity and development, and will ensure public order.[39]

The common good may be regarded as the common denominator of human rights and financial markets. Without ensuring compliance with the former, it will be impossible to ensure the development of the community for which the capital derived from the financial market is essential. Therefore both elements should be viewed 'structurally' and not separately. Together they create the social conditions for the development of society, contributing to its common good. However, we must also be aware of situations in which their influence on each other is destructive. This happens when the financial markets, through their actions, violate human rights, for example by taking advantage of their dominant position and by creating and imposing disadvantageous conditions on individuals, often affecting their dignity. This was the case during the financial crisis of 2008, at the root of which was the greed and dishonesty of financial institutions, hitherto perceived as institutions of public trust. Their irresponsible actions, granting credit to individuals who lacked creditworthiness or trading risks by way of derivatives, led thousands of people to the brink of poverty and homelessness. These experiences should constitute an element of reflection on the current perception of human rights, dominated by their vertical aspect, which sadly, in this case, failed. States should have protected their citizens because the states had sufficient supervisory instruments to do so, but they did not react properly. What is more, as it turned out later, the states provided aid to the financial sector and rescued it, also with the taxes of citizens, many of whom were abandoned by their state when in need. Therefore it is necessary to consolidate efforts to incorporate human rights into the sphere of financial markets. First, by adding to the list of economic, social and cultural rights the right to financial security. And second, by promoting the protection of this right by ensuring it by legal regulations both vertically (the state and the financial market) and horizontally (an individual and a financial institution).

In the case of the financial sector, this concept may be transposed to three levels: macro (the state–the financial market), mezo (self-regulation of financial institutions) and micro (the financial institution–consumer relationship). At each, the common denominator currently supported by the EU legislator will be security and stability and a reduction of the negative aspects of the financial risk, all these leading to a greater confidence in the financial market. At this point, a doubt may arise as to whether the presented construction is at all possible. Certainly it is, but it must be accompanied by a reflection on the nature of financial markets, their role and the values that they should respect.

38 F. J. Mazurek, Godność osoby ludzkiej podstawą praw człowieka, Lublin 2001, p. 106.

39 R. Sroka, Etyka …, *op. cit.*, pp. 58–60.

It is therefore reassuring that issues of human rights seen in the light of business activity are within the interests of the EU legislator. In the Communication of the European Parliament and the Council on The Human Rights and Democracy Agenda (2015–2019) 'Keeping human rights at the core of the EU agenda'[40] (hereinafter: the Joint Communiqué) there is a direct reference to the idea of human rights, and more specifically to the United Nations document 'The UN Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework',[41] contemporarily recognised as the source of the 'business and human rights' conceptions.[42] In their Joint Communiqué, the Commission and the Council emphasise the need to promote and spread the awareness of human rights in the EU economic and social space, as well as in individual Member States, which should strive to develop and implement national action plans through which the idea of human rights will permeate the economic sphere, and thus the financial market. The understanding of 'human rights' is not defined, being rightly assumed that in the European space they constitute a universal value, commonly accepted (although not always respected), and their sources go back to the European tradition.

This contributes to financial awareness, which should be considered an important step towards the protection of human rights, which, in turn and as has been shown above, are believed to be a necessary element of financial markets and markets in general. As a matter of fact, this is already happening, an example being Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services.[43]

40 Joint Communication to the European Parliament and the Council, Action Plan on Human Rights and Democracy (2015–2019) "Keeping human rights at the heart of the EU agenda," at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/action-plan-on-human-rights-and-democracy-2015–2019_en.pdf (14.07.2021).

41 Published at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; the document has received an unofficial Polish translation thanks to the initiative of the Polish Institute of Human Rights and Business, which is available at: http://pihrb.org/wp-content/uploads/2014/10/Wytyczne-ONZ-UNGPs-BHR-PL_web_PIHRB.pdf (14.07.2021).

42 J.G. Ruggie, The social construction of the UN Guiding Principles on Business and Human Rights, (in:) S. Deva, D. Birchall (eds.), Research Handbook on Human Rights and Business, Cheltenham 2020, pp. 63–87.

43 Regulation of the European Parliament and the Council (EU) 2019/2088 of 27 November 2019 on disclosure of information related to sustainable development in the financial services sector (OJ L 317, 9.12.2019, pp. 1–16).

4. Business and Human Rights Concept

In recent years, the concept of business and human rights has received increasing attention in the human rights literature.[44] Among the many examples that have given rise to its development, many point to the tragic events at the root of which was the profit motive of multinational corporations pursued at the expense of adequate safety measures that took place in the 1980s. The most frequently cited include Bhopal (the explosion at the Union Carbide pesticide plant, India, 1984), Deepwater Horizon (the oil rig explosion in the Gulf of Mexico, 2010) or Rana Plaza (the construction disaster in Shabhar, Bangladesh, 2013). It is estimated that in the case of the first of the above disasters, the leakage of about 80 tons of methyl isocyanate was responsible for the deaths of about 20,000 people, while a further 500,000 victims suffered from after-effects. These data indicate that the explosion in Bhopal was much more deadly in terms of victims than the accident at the Chernobyl nuclear power plant,[45] although it certainly received less media coverage. In both instances, a technical fault was the cause of the incident, but the Indian disaster would not have occurred if earlier warnings had not been ignored and excessive savings made to increase the company's profits.

These and other similar incidents (including Shell in the Ivory Coast, BP in Colombia or Nike in Vietnam)[46] contributed to the initiation of a discussion on the responsibility of business and its duty to respect and protect human rights and related to it 'corporate social responsibility', which sees companies as important participants in society. This discussion continues to this day and is constantly accompanied by the same dilemmas and questions about this social responsibility of individual market participants. According to M. Robinson, the most frequent questions that arise in this context are:[47]

How far should companies be expected to go in defining and promoting global standards in areas such as corporate governance, financial accounting and reporting, ethics, environmental impacts, consumer rights, labour conditions and human rights?

44 S. Deva, D. Birchall (eds.), Research Handbook on Human Rights and Business, Cheltenham 2020, *passim*.

45 D. Augenstein, The Crisis of International Human Rights Law in the Global Market Economy, EUI Working Paper, RSCAS 2014/118, pp. 5–8. Also see S. Deva, Bhopal: the saga continues 31 years on, (in:) D. Baumann-Pauly, J. Nolan (eds.), Business and Human Rights. From Principles to Practice, London 2016, pp. 22–27.

46 See for example O. Amano, Human rights, ethics and international business: the case of Nigeria, (in:) A. Voiuculescu, H. Yanacopulos (eds.), The Business of Human Rights. An Evolving Agenda for Corporate Responsibility, London 2020, pp. 188–213.

47 M. Robinson, Foreword, (in:) R. Sullivan (ed.), Business and Human Rights. Dilemmas and Solutions, London 2003, p. 11.

Is legal compliance sufficient in countries where governments are administratively weak or deemed to be corrupt or illegitimate by their citizens?

Does business have any business in poverty alleviation? If so, how does it tackle this change in an innovative and profitable manner?

How do companies avoid 'letting governments off the hook' or substituting the government with the company in terms of meeting people's needs and aspirations?

They also accompanied the formation of the business and human rights concept, which is now commonly identified with a document developed within the United Nations, entitled 'The UN Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect, Remedy" Framework' (hereinafter: UNGPs). The introduction to the UNGPs describes the process of arriving at their final version, which was unanimously endorsed by the UN Human Rights Council in 2011. Before that, however, the recognition of the need to integrate business and human rights into global policy frameworks prompted an expert subsidiary body of the UN Commission on Human Rights to produce a document in 2005 called 'Norms on Transnational Corporations and Other Business Enterprises'. The purpose of this document was to force business entities to comply directly, under international law, with the human rights obligations to which states that had ratified international treaties committed themselves. This initiative resulted in a heated debate and strong opposition, ultimately leading to its abandonment. Despite this, the UN Commission on Human Rights decided to continue its efforts to integrate the concept of human rights into business and in the same year established a mandate, subsequently extended in 2007, for a Special Representative of the UN Secretary-General for Human Rights and Business, and appointed John Ruggie to the function.

Years of effort and painstaking work by Ruggie and his team, covering hundreds of meetings, dozens of conferences, and incorporating views of thousands of stakeholders, ultimately led to the development and endorsement on 16 June 2011 of the UNGPs referred to above. Its 31 principles created global standards for preventing the risk of human rights violations in business activities and rest on three pillars:

I. State duty to protect against human rights abuses.

II. Corporate responsibility to respect human rights.

III. Need of greater access by victims of corporate abuse to effective remedies.

What is important though is that from a legal point of view, the UNGPs should not be regarded as a source of law (e.g. treaty law). Rather, their normative contribution stems from the clarification of existing standards and practices for states and businesses, and the integration of these into a single logically coherent and comprehensive model allowing the shortcomings of the current system to be

identified and addressed.[48] As we read in the UNGPs, 'The Guiding Principles are not intended as a tool kit, simply to be taken off the shelf and plugged in. While the Principles themselves are universally applicable, the means by which they are realised will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises. When it comes to means for implementation, therefore, one size does not fit all.'[49]

It would be pointless to analyse all 31 principles of the UNGPs at this point. However, referring to the previously mentioned regulatory aspects of human rights, it is worth pointing out two of them. Principle 3 refers to the implementation of human rights protection duties by the state, which should, among other things, ensure that other laws and policies governing the creation and ongoing operation of business enterprises such as corporate law or banking regulations do not constrain respect for human rights. As if to complement this principle, Principle 8 points to the need that states should ensure that governmental departments, agencies and other state-based institutions that shape business practices are aware of and observe the state's human rights obligations when fulfilling their respective mandates, also by providing them with relevant information, training and support.

These principles may certainly be applied to the financial market and its regulation, and the role of the state in this respect. An example of their realisation is the inclusion of the ethical quality criteria discussed earlier in the banking regulations, as well as the promotion of the concept of responsible lending that accounts for the ethical and human rights elements in the credit assessment of business entities. This approach is prompted not least by the concept of corporate social responsibility (CSR) that the EU has been advancing for some time already and which is also reflected in the accounting regulations. The role of states in promoting the UNGPs should also be exercised through the development of national action plans, which the European Union Member States are encouraged by the European Commission to produce.[50]

Therefore, when it comes to implementing the business and human rights concept in the area of financial market operations, it is reasonable to assume that there are three levels of interaction between the financial system and human rights:[51]

48 Wytyczne dotyczące praw człowieka i biznesu. Wdrażanie Dokumentu Ramowego ONZ "Chronić, Szanować i Naprawiać", Polski Instytut Praw Człowieka i Biznesu, Częstochowa 2014, p. 15.

49 *Ibidem*.

50 Also see B. Faracik, Implementation of the UN Guiding Principles on Business and Human Rights, European Parliament, Policy Department, 2017.

51 Human Rights and Sustainable Finance. Exploring the Relationship, Institute for Human Rights and Business, UNEP, 2016, Inquiry Working Paper, pp. 7–8. Also see P. Drahn, Adoption of EU Business and Human Rights Policy. The Use of Discretion in the National Transposition of the EU Directives, Cham 2020, *passim*.

1. The systemic level – focusing, inter alia, on the need to ensure stability of the financial system both at the macro (the role of the central bank) and micro levels complementing each other in the implementation of the stabilisation tasks.
2. The client level – meaning that financial institutions should identify the risk of human rights violations caused by their investments, and to this end, at the stage of the feasibility study they should implement the concept of the ESG triumvirate (environment, society and governance). This is because often the principles of corporate governance, intentionally or not, ignore the consequences which business activities have on the environment and society, and thus in a broader sense on human rights.
3. The consumer level – in this concept, consumer protection is considered broadly and is related to financial inclusion. The financial system has an important developmental role that should be exercised through financing innovations that contribute to the development of societies, but also allow their members to take out micro-loans or micro-insurance. Moreover, the participants of the financial market should strive to raise ethical standards and prevent practices such as mis-selling or unfair lending.

These three levels and their inclusion in the process of implementing business and human rights in the financial market will certainly require a change in the current perception of human rights and relating them solely to the vertical dimension, i.e. connected with relations between the state and private entities (financial institutions). Initiating a horizontal enforcement of human rights involving a new approach of financial institutions towards their clients will certainly require time and a change in thinking, particularly of their managers. This may be achieved in two ways: hard and soft. The hard way could be for example incorporating properly defined human rights into regulations in, say, the field of accounting or, more specifically, reporting, or prudential regulations on risk assessment, which in this case would be reputational risk. As Benjamin Franklin said: 'It takes many good deeds to build a good reputation, and only one bad one to lose it.' The necessity to report investments that violate human rights would certainly not remain without any impact on managerial decisions. A soft implementation of the business and human rights idea on the other hand might involve self-regulatory initiatives taken directly by financial institutions.[52] A certain analogy can be found nowadays in activities aimed at environmental protection and the promotion of low-emission solutions, in which successive entities boast about their zero CO2 emission achievements. While respect for human rights should obviously be natural and not subject to promotion, it seems

52 See for example N. Bernaz, Business and Human Rights. History, law and policy – Bridging the accountability gap, New York 2017, pp. 209–228.

that in the world of financialisation, the soft forms will prove to be effective. This is especially so if supported by the awarding of certificates to financial institutions, as practised in the fair trade movement. Such certificates could be issued by financial supervision entities or non-governmental organisations.

Conclusions

Modern times are characterised by an unprecedented speed of development in all areas of activity, bringing many innovations which certainly make our life easier, but at the same time pose various challenges, particularly in the economic sphere. This materialises in the course of financialisation, giving rise to certain types of risk, including a potential infringement of individual rights (human rights). Therefore, it is essential that human rights are always kept in mind and promoted when conducting responsible (ethical) business,[53] as has recently been reflected in the business and human rights movement. This concept of business and human rights cannot just be a slogan used by companies in their marketing activities, but ought to be an element of everyday reality, allowing consumers to make informed choices of (ethical) services offered by the financial sector. Unethical or immoral activity undermines customers' dignity and the common good, and weakens customers' confidence and trust in the financial market, its stability and its security. This, in turn, may lead to a crisis, the effects of which, as experience shows, are borne by society, particularly by the most vulnerable individuals, who are often deprived of the protection of their rights in the first place.

As it has been shown, such a possibility exists, and may have a significant influence on the implementation of the concept of business and human rights in the architecture of contemporary financial markets, both locally and globally. The presence of human rights on financial markets must be seen both in the traditional vertical dimension and in the horizontal one, which in this case refers to the relationship between financial institutions and their clients. These relationships must be built through legal requirements as well as self-regulatory activities of financial institutions. Furthermore, the extension of the catalogue of economic, social and cultural rights should be proposed to include the right to financial security, achieved by ensuring the stability and security of the financial market and the protection of weaker participants in the market. Additionally, ethical investments that do not violate for example the dignity of individuals performing certain types of work should be promoted. This philosophy is consistent with that of human rights, which takes into account not only individual interests but also the community interests that

53 J. Kacprzak, Odpowiedzialny biznes a prawa człowieka, (in:) XI Seminarium Warszawskie. Prawo do godnego życia w świetle Europejskiej Konwencji Praw Człowieka i innych standardów międzynarodowych, MSZ, Warsaw 2018, pp. 56–59.

materialise in many individual interests, including those protected by the common good.[54] It should be remembered that the development of the world today is based on capital, raised in financial markets and coming from their clients. In this way, financial institutions have an enormous power and can contribute to the change of the modern world while improving at the same time their own reputation and image. Is this an idealistic approach? Perhaps it is. But it might be worth taking the trouble to implement some changes.[55] For, as J. Donnelly wrote: 'Human rights are the best – I would say, the only effective – political instrument that human ingenuity has invented to protect the dignity of the individual from the omnipresent perils of contemporary society [including the financial market –TN].'[56]

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54 W. Osiatyński, Prawa …, *op. cit.*, p. 268.

55 See K. Byttebier, The Unfree Market and the Law. On the Immorality of Making Capitalism Unbridle Again. Cham 2018, pp. 213–283.

56 Quoted after W. Osiatyński, Prawa …, *op. cit.*, p. 234.

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The Electronic Bill of Exchange Concept from an International Perspective

Abstract: The aim of the article is to examine the structures of electronic bills of exchange. It also includes an analysis of the proposed shape of an electronic bill of exchange prepared for the needs of the Polish legal system by the Working Group for distributed registers and blockchain, operating at the Ministry of Digitalization. The comparative and dogmatic methods were used for the analysis. According to the hypothesis put forward by the author, the introduction of the construction of an electronic bill of exchange to the Polish and foreign legal systems is necessary to maintain the functioning and importance of bills of exchange among securities that are traded in the economy. However, the implementation of an electronic promissory note requires appropriate legislative changes, as the current legal status does not allow for an unambiguous statement of the possibility of issuing them.
Key words: bill of exchange, Blockchain, electronic value papers

Introduction

Bills of exchange have been used in business since the 13th century[1]. In Poland, this matter was regulated in the Act of April 28, 1936, – Bill of Exchange Law[2]. It should also be emphasized that the content of the Bill of Exchange Law is the result of Poland's fulfilment of international obligations resulting from Poland's accession

1 J. Łaski and others, Weksle elektroniczne w technologii blockchain, Warsaw 2019, p. 2, https://www.gov.pl/web/cyfryzacja/blockchain (7.11.2021).
2 Act of April 28, 1936 – Bill of Exchange Law (unit text Journal of Laws of 2016, item 160).

to the Geneva Convention[3]. One of the basic features of a bill of exchange obligation is scriptability. It consists in the fact that the bill of exchange is a security on a money order and, most importantly, it must be made in writing[4]. Thus, bills of exchange can only be in documentary form and must contain the handwritten signature of the issuer. Along with the progressive dematerialization of securities, which has already been covered by, inter alia, stocks and bonds, documentary form began to stand in the way of maintaining the current status of the bill of exchange as one of the most commonly used securities in economic trading. The implementation of the concept of an electronic bill of exchange into the legal systems, including the Polish legal system, could turn out to be helpful in this matter.

1. Construction of an Electronic Bill of Exchange in Foreign Legal Systems

The concept of an electronic bill of exchange has been considered in many jurisdictions around the world. This topic troubled representatives of the world of science, including in the UK[5], Italy[6], Romania[7], Iran[8], Iraq, and Egypt[9]. It is worth noting, that, so far, comprehensive regulation relating to electronic bills of exchange has only been introduced to the Japanese legal system[10].

The above-mentioned regulations are based on the following assumptions. First, it should be pointed out that Japanese legislation provides for the registration of every claim based on the construction of an electronic bill of exchange. Moreover, as the name of this instrument indicates, all records of claims are made in electronic form. Moreover, in order to ensure the stability of the electronic bill of exchange issuing system, a special trading company was established to keep the register – the

3 Convention providing a uniform law for bills of exchange and promissory notes (Journal of Laws of 1937 No 26, item 175).

4 R. Woźniak, Wprowadzenie do prawa papierów wartościowych, Warsaw 2019, p. 55.

5 L. Gamertsfelder, Electronic Bills of Exchange: Will the Current Law Recognise Them?, "University of New South Wales Law Journal" 1998, vol. 21 no. 2, pp. 566 –577.

6 A. Ponza, S. Scannapieco, A. Simone, C. Tomazzoli, Envisioning the Digital Transformation of Financial Documents: A Blockchain-Based Bill of Exchange, in: J. Prieto, A. Pinto, A. Das, S. Ferretti (eds.), Blockchain and Applications, Basingstoke 2020, pp. 81–90.

7 S.L. Cristea, From the Format Paper Bill of Exchange to the Electronic Bill of Exchange. Credit Title or Payment Instrument?, "Analele Stiintifice Ale Universitatii Al. I. Cuza" 2017, vol. LXIII, no. II, pp. 155–172.

8 M. Sardooeinasab, A. Taheri, A Study of Legal Rules Applicable to Electronic bill of exchange, "Islamic Law Research Journal" 2014, vol. 15 no. 39, pp. 59–90.

9 M.M.K. Al-Ibrahimi, The concept of electronic trading bill of exchange (comparative study), "Risalat al-huquq Journal" 2017, vol. 9 no. 2, pp. 501–525.

10 Electronically Recorded Monetary Claims Act of June 27, 2007, Act No. 102, http://www.japaneselawtranslation.go.jp/law/detail/?id=2043&vm=2&re=02 (19.07.2021).

Electronic Monetary Claim Recording Institution. The company is under the control of state authorities. The regulation issued to the above-mentioned act regulates in detail the technical requirements for keeping the register and storing the collected data. The register records all activities undertaken in connection with the issuing and trading of electronic bills of exchange. The register also contains data of authorized and obligated persons from issued electronic bills of exchange, amounts of liabilities, and their payment dates. These data include, at least, the names and surnames of these persons, and their addresses. It is also important that entries in the register are made at the request of interested persons. However, it should be emphasized, that the entities supervising the register are obliged to verify the correctness and validity of the data submitted for entering. In the event of irregularities being found, these persons have the power to refuse the entry. Registry operators are also required to supervise the order in which entries are made when more than one application relating to the same claim is submitted. In the event of failure to exercise due diligence by the persons entering the register, the institution which keeps the register is obliged to compensate for the damage caused by making an incorrect entry in the register.

It should also be noted, that legal regulations in Japan also provide for appropriate mechanisms for the transfer of rights resulting from issued electronic bills of exchange. This can be done using a special assignment procedure, which is also done using an electronic protocol. The provisions of the law regulated by the Electronically Recorded Monetary Claims Act also protect the interests of the heirs of persons entitled to an electronic bill of exchange. For this circumstance, a detailed regulation was provided for the rules governing the entry into the right of the rightsholder by persons who acquired an inheritance thereafter. In this context, it is also important that any subjective and objective changes in the scope of claims arising from a specific electronic bill of exchange are effective only if they are recorded by authorized persons in the register. Making changes in any other form has no legal effect.

In addition to the mechanisms related to the transfer of rights from electronic bills of exchange, the regulations also provide for the possibility of surety by third parties for liabilities under bills of exchange. For this purpose, also using a special electronic protocol, it is possible to appoint a guarantor. The guarantor entered in the register shall be liable for the payment of receivables to the same extent as the person who issued the electronic bill of exchange. It is also possible to establish a pledge on receivables resulting from an electronic bill of exchange.

It is also worth noting that the regulations in Japan provide for a three-year limitation period for claims arising from electronic promissory notes. The provisions of the law are restrictive in this respect, as after this period the rights from electronic bills of exchange expire.

To make the assessment of legal regulations in Japan, it should be noted that the solutions applied in this legislation are very interesting. The mechanisms in the

field of issuing and trading in documentary bills of exchange have been successfully transferred to the electronic sphere. An important element of Japanese regulation is that a state institution oversees the functioning of the entire electronic bills of exchange market. This allows for the stability of the market and the safety of its participants. The main disadvantage of the solutions applied in Japan is that all transactions must be registered through the institution keeping the register. This means that for the emergence of rights and obligations arising from electronic bills of exchange, it is necessary to make an electronic entry in the register. The participants of economic transactions are not able to effectively create electronic bills of exchange on their own. This significantly limits the efficiency of issuing and trading electronic bills of exchange. Summing up, it should be pointed out that the legal regulations concerning electronic bills of exchange in Japan, at the time of their introduction to the legal system, were innovative and unique on a global scale. However, from the current perspective, they are not so attractive. They do not provide for the use of the latest technologies that enable more efficient creation and trading of electronic bills of exchange. Modern technologies allow for greater participation in these processes by the participants of economic transactions themselves and for reducing the participation of state authorities in them.

2. Concepts for Implementing an Electronic Bill of Exchange into the Polish Legal System

The concept of implementing bills of exchange in an electronic, dematerialized form has already been presented in Polish legal literature. A study in this area appeared, for the first time, several years ago[11]. One of the basic problems reported in the literature was the issue of creating a secure IT infrastructure that allows for issuing bills of exchange in electronic form. It was considered, for example, how to solve the problem of distinguishing the original document from its copy in the case of creating duplicates of the file, in which the bill of exchange was saved[12]. The lack of such a possibility creates the risk of multiplying the liability resulting from the issued bill of exchange. The doctrine suggested the creation of a closed system of issuing and trading electronic bills of exchange as a remedy in this case. On the one hand, this was to prevent the copying of bills of exchange, and on the other, to enable the change of the person entitled to the rights incorporated in them[13]. Initially, it was

11 G. Wierzbicki, S. Kotecka, Koncepcja elektronicznego weksla własnego w obrocie gospodarczym, „E-biuletyn Centrum Badań Problemów Prawnych i Ekonomicznych Komunikacji Elektronicznej", Wrocław 2009.

12 *Ibidem*, p. 4.

13 F. Zoll, Klauzule dokumentowe. Prawo dokumentów dłużnych ze szczególnych uwzględnieniem papierów wartościowych, Warsaw 2004, pp. 35–36.

proposed to base the system of electronic bills of exchange on IT infrastructures of commercial banks. Each bank that would implement the system would be able to offer its clients electronic bill of exchange trading services[14]. The main disadvantage of the presented concept of an electronic bill of exchange was, that the participants of business transactions could only issue bills of exchange. Furthermore, it did not provide for the possibility of issuing some types of bills of exchange. Moreover, this concept was very general and did not provide for specific solutions of a technical nature. Consequently, it did not find a very broad response.

A real revolution in the field of trading in electronic material goods was brought about by the creation of the first cryptocurrency – Bitcoin. Trading in this digital currency was based on an extremely innovative Blockchain system. Using Blockchain technology, it is possible to create a distributed ledger, the so-called transaction book. It stores information that the users of a given group have access to. All new activities (entries or changes) are recorded in it by a predefined network protocol[15]. Due to the fact that all transactional activities are performed in one place, it is possible to recreate the sequence of events and reach the original content of the document. Thus, the use of Blockchain technology allows the elimination of the basic problem that has been tried for years as part of the consideration of the concept of an electronic bill of exchange.

Based on the use of Blockchain technology, the Working Group for distributed registers and Blockchain operating at the Ministry of Digitization developed a concept for the implementation of electronic bills of exchange into the economic market, including legal and technical solutions[16]. In this article only the legal aspects of implementation of electronic bills of exchange to the Polish legal system will be analysed.

One must agree, that the basic argument in favour of recognizing the admissibility of issuing electronic bills of exchange in the realities of the Polish legal system is that in Polish law the concept of a document also includes electronic documents[17]. According to Article 77^3 of the Polish Civil Code, a document is an information carrier that makes it possible to read its content [18]. However, as stated in art. 77^2 of the Polish Civil Code, to maintain the documentary form of a legal transaction, it is sufficient to submit a declaration of will in the form of a document in a manner enabling the identification of the person submitting the declaration. Therefore, there should be no doubt that a document that is issued in the form of an

14 G. Wierzbicki, S. Kotecka, Koncepcja elektronicznego weksla własnego w obrocie gospodarczym, „E-biuletyn Centrum Badań Problemów Prawnych i Ekonomicznych Komunikacji Elektronicznej", Wrocław 2009, p. 8.

15 J. Łaski and others, Weksle elektroniczne w technologii blockchain, Warsaw 2019, p. 2.

16 *Ibidem*.

17 *Ibidem*, p 10.

18 Act of 23 April 1964 – Civil Code (uniform text Journal of Laws 2020, item 1740, as amended).

electronic record and allows the identification of the person who signed it may have legal effects. Thus, in the light of the provisions of the Polish Civil Code, there are no obstacles to implement the construction of an electronic bill of exchange into the Polish legal system.

However, this does not mean that in the current legal situation it is allowed to issue electronic bill of exchange in Poland. The regulations provided for in the Act of April 28, 1936, – Bill of Exchange Law should also be taken into account. It has been indicated in the literature that the meaning of art. 1 of the Bill of Exchange Law leaves no doubt, that with regard to the issuance of a bill of exchange, the act requires a written form[19]. Moreover, in the current legal state the signature of the promissory note issuer must be handwritten, which results from the essence of the signature and the lack of regulation providing for the possibility of its mechanical reconstruction[20]. Already at this point it should be noted that rethinking the above-mentioned view should trigger the introduction of the EU Regulation eIDAS[21] and the possibility of making qualified signatures. In the new reality, they could meet the requirement of signing a promissory note in the electronic environment, which at the same time would be unique in the blockchain technology. Another argument in favour of the impossibility of issuing electronic bills of exchange is the fact that the legislator differentiates between the pages of a document on which appropriate annotations are made[22]. An example of such a regulation is, inter alia, art. 13. sec. 2, according to which, the endorsement is valid only if it was written on the reverse side of the bill of exchange or on an extension. Another example is the content of art. 25 sec. 1 sentence 3, of the bill of exchange law, which indicates that the signature of the drawee on the front side of the bill of exchange means acceptance. Another regulation in this respect is art. 31 sec. 3, which states that the signature on the front side of the bill of exchange shall be deemed to be a surety. The last example is art. 88 sec. 1, according to which, the protest should be written on the reverse side of the bill of exchange or on a separate card combined with the bill of exchange. The examples indicated above, prove that the intention of the legislator was that the bill of exchange be issued in a document (paper) form. The last barrier preventing the issuance of bills of exchange in electronic form in the current legal status are the rules for the transfer of rights from them, which provide for the transfer of possession of the document on which the bill of exchange was written[23]. In the author's opinion, all the above-mentioned

19 J. Jastrzębski, M. Kaliński, Komentarz do ustawy – Prawo wekslowe, (in:) J. Jastrzębski, M. Kaliński, Prawo wekslowe i czekowe. Komentarz, commentary on art. 1, thesis 3, SIP LEX 2014.

20 *Ibidem*.

21 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, Official Journal of the European Union No L 257/73.

22 J. Łaski and others, *Ibidem*, pp. 10–11.

23 *Ibidem*, p. 11.

arguments support the assumption that issuing electronic promissory notes in Poland will be possible only after introducing the necessary legislative changes.

Due to the necessity of a comprehensive remodelling of the rules of issuing and trading in bills of exchange, it would be advisable to implement the rewritten act on bills of exchange into the Polish legal system. It is noteworthy that the implementation of this postulate is not possible at the moment, because changing the content of the Bill of Exchange Law would first require a change to the Geneva Convention. Apart from the above-mentioned difficulties in implementing the postulate of amending the bill of exchange law, the changes introduced to the act could also improve the legibility of the act. The current law was passed in 1936, and the language in which it was written is not adapted to the present reality. Moreover, in the light of the generally progressing dematerialisation of securities, it would be worth considering the withdrawal from the documentary version of bills of exchange. The Polish legislator has taken the same step recently in relation to bonds and shares. Preparation of relevant transitional provisions under the new act would allow for securing the interests of the current participants of trading on the bills of exchange market. On the other hand, it would allow a gradual transition to a new stage, in which bills of exchange would be available only in electronic form.

As regards detailed solutions, it would be advisable to maintain the existing legal solutions regulating the principles of trading in bills of exchange in Poland. Regulations concerning bills of exchange, such as the content of a bill of exchange, the principles of transferring rights resulting from them, the principles of guaranteeing bills of exchange, as well as the rules of payment of receivables resulting from them, have been working for almost a hundred years. It would only be necessary to adapt them to the needs and possibilities of the electronic space. In this regard, the solutions proposed by the Working Group on distributed ledgers and Blockchain should be welcomed[24]. Basing the technological infrastructure on the distributed ledger system seems to be the most modern and, at the same time, the safest possible solution. Referring to the idea[25] basing the law on UNCITRAL Model Law on Electronic Transferable Records[26] it must be pointed out that this is, in principle, the right direction. However, the concept of the authors of the report, according to which legal regulations introducing the construction of electronic bills of exchange would allow the freedom to choose the technology on the basis of which it would be possible to issue them, should be criticized. This could lead to destabilization of this market and failure to guarantee an adequate level of security for its participants. It is particularly important to regulate this issue in the case of promissory notes, as the obligations

24 J. Łaski and others, *Ibidem*, pp. 14–33.

25 *Ibidem*, p. 34.

26 UNCITRAL Model Law on Electronic Transferable Records, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf (19.07.2021).

arising from promissory notes are abstract in nature. Thus, a promissory note may be the only evidence of a liability. Therefore, it seems necessary to precisely regulate the conditions in which such obligations may be created. It seems more justified to clarify all technical issues in subordinate acts, i.e., regulations. It would allow for the establishment of clear and stable rules for issuing and trading electronic bills of exchange. However, a barrier in this respect may be the specificity of Blockchain's functioning as a decentralized network and variable by definition. In this context, it also seems justified to leave control over the promissory note trading system to the state. The Blockchain technology ensures the proper functioning of the system based on the actions of the participants of electronic bill trading themselves. However, public authorities should have specific control instruments that would allow for the elimination of abuses in this area. It should be emphasized that for the reasons indicated above (decentralization of the Blockchain system), these two goods (the benefits of using Blockchain technology and the control of this system by public authorities) unfortunately contradict each other. Therefore, basing the system of issuing electronic bills on the Blockchain technology, unfortunately the state authorities will be deprived of any control over this system.

Conclusion

Summing up, it should be noted that the concept of electronic bills of exchange is widespread all over the world. Unfortunately, it has so far been the subject of considerations of representatives of science and is not reflected in the legislation of individual countries. In view of the progressive dematerialisation of securities, this situation causes a decline in the importance of bills of exchange in trading.

A pioneering legal regulation in this area was introduced by Japan. The solutions applied in Japanese legislation are very interesting and are based on classic concepts of bill trading, and at the same time have been adapted to the needs of the electronic environment. As already indicated above, the biggest disadvantage of the solutions applied in Japan is the too extensive role of the entities remaining under state control. Trading in electronic bills of exchange depends on entries made by these entities in the relevant register. This solution, in the face of technological progress, ceased to be exemplary and worth following.

With regard to the Polish legal system, it should be noted that in the current legal state, the issuance of electronic promissory notes raises serious doubts. The provisions of the bills of exchange law stand in the way, forcing the bills of exchange to function only in the documentary form. Therefore, in order to introduce electronic bills of exchange to trading in Poland, it is recommended to prepare a completely new, comprehensive act. It seems reasonable to completely dematerialize bills of exchange and base their issuance and trading on the structure of dispersed registers. Following

the example of Japanese regulations, it should be considered to grant certain control powers over the system to public authorities. However, it should be emphasized, that these powers should be limited only to the supervision of the proper functioning of the system. On the other hand, the activities related to the issuance of promissory notes and trading in them should be performed autonomously by the participants of such trading. Finally, it should also be pointed out that in the face of the progressive dematerialisation of securities, implementation of the concept of electronic bills of exchange into the Polish legal system is a necessary step for this sector of the financial market.

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Enforcement of the Obligation to Maintain Contact with a Child

Abstract: A child needs contact with both parents to be able to live normally and develop properly. This contact is ensured when the parents are living together. In the event that the parents are separated, and in the event of disagreement as to maintaining contact with the child, the contact is determined by the courts. Sometimes, however, in order to enforce this contact, it is necessary to threaten or impose a financial sanction. The question arises whether such forced contact with the child fulfils its role and serves the child's well-being.
Keywords: contact with a child, enforcement of contact, enforcement proceedings, role of financial sanctions, welfare of a child

Introduction

A child needs contact with both parents. The right and obligation to maintain contact with a child only becomes relevant when the family breaks up. However, when the parents of the child are separated, it is not always possible to maintain this contact. The purpose of maintaining contact with the child is to ensure the proper emotional development of the child, which is to serve the child's well-being. Only an extremely reprehensible attitude of the parents can justify the prohibition or limitation of this contact. In most cases, the child lives with one of the parents, usually the mother, while the other parent is granted the right and the obligation to keep in touch with the child. In this way, everything seems to be order. In practice, however, communication with the child does not always take place as determined in a court ruling or agreed upon by the parents. In order to prevent such situations, the legislator

introduced rules to force parents to maintain contact with the child under the threat of financial sanctions. We must not lose sight of the fact that it is not a matter of the well-being of the parent who wants or does not want to keep in touch with the child, but the well-being of the child. However, a question arises as to whether the threat of a financial sanction is the right tool by which the right relationship between parents and children can be ensured. This issue – important for the protection of the well-being of a child – poses a serious challenge for both the legislator responsible for the development of legal standards, as well as for courts responsible for implementing these standards in practice. The Ombudsman for Children, in his annual reports on the state of observance of children's rights submitted to both houses of parliament, repeatedly raised objections to the jurisprudence in the field of contact procedures and the effectiveness of applying financial sanctions to enforce compliance with judgements regarding the implementation of established contact.

To elaborate this issue, the following methods were used: dogmatic, appropriate for the analysis of legal provisions and judicial decisions, and a critical analysis of the literature on the subject in the range of the functioning of the institution of compulsory performance of the obligation to maintain contact with a child. Thanks to this, it was possible to verify the normative guarantees with the practice of their application, which allowed for the formulation of extensive final conclusions.

1. The Right to Maintain Contact with a Child

According to Article 113 § 1 of the Law of 25 February 1964, the Family and Guardianship Code, 'Independent of parental authority, parents and their child have the right and obligation to maintain contact with each other.'[1] Rules concerning relations between parents and children are applied mutatis mutandis to contact with siblings, grandparents, kin in the direct line, as well as other persons, provided that they had custody for a longer period of time (Article 113^6 FGC). The right and the obligation to maintain contact essentially applies to the maintenance of the relationship between parents, as well as others, and the child in ways set out in Articles 113–113^6 FGC in the event of a family break-up. In such a case, this right acquires a new, much broader dimension in relation to the mutual relations existing between the child's parents, which boils down to the fact that the claim to exercise the right of contact with the child by one parent corresponds to the obligation of the other parent not to disturb this contact. It follows that parents have the right and duty to maintain contact with the child, both to the child himself and to each other, especially when they are living apart.

1 The act of 25 February 1964 Family and Guardianship Code, unified text Dz. U. 2020, item 1359 (hereafter FGC).

The right and obligation to maintain contact with the child is natural, resulting from the parental bond. This means that they do not expire or cease as long as this bond lasts. Maintaining contact with the child is an expression of the closeness between parents and a child. It derives from an emotional bond that cannot be violated. This bond is not only a prerequisite for the proper development of a child and satisfies a natural instinct which cannot be denied to any of the sides of the relationship, but is also one of the fundamental factors in the upbringing of the child and their ability to develop future relationships in adult life. Behaviours related to maintaining contact with a child have the same content as other behaviours constituting components of caring for a child, in particular upbringing. Therefore, it is necessary to maintain contact with the child, which is a necessary condition for proper educational activities.[2] According to the social psychology theory of attachment styles, the relationship between a child and the parents influences the relationships the child develops as an adult. The kind of relationship thus determines the future way of establishing and building human relations and broadly understood socialisation. This observation is important because the rules of law in this case support mechanisms which are something natural in the family, and yet not always present. Moreover, a child's lack of contact with one of the parents may not only stifle the need to be close to that parent, but it is also likely that, as an adult, the child will duplicate a relationship shaped in this way with their children.[3] It follows that maintaining contact with both parents is a condition for the proper development of a child. A lack of contact or disrupted contact has a decisive negative impact on the child's mental development, his or her socialization, and his or her assimilation of correct attitudes and social roles.

'Contacts with a child include, in particular, being with the child (visitations, meetings, taking the child away from their habitual place of residence) and direct communication, maintaining correspondence, using other means of distance communication, including electronic means of communication' (113 § 2 FGC).[4] This means that the relationship between parents and children is not only a manifestation of the personal rights of the parents, but above all the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. This is determined by the wording of Article 9.3 of the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November

2 T. Sokołowski, Charakter prawny osobistej styczności rodziców z dzieckiem, "Kwartalnik Prawa Prywatnego" 2000, z. 2, p. 282

3 J. Zajączkowska-Burtowy, Kontakty z dzieckiem. Prawa i obowiązki, Rozdział I. Zagadnienia ogólne związane z problematyką kontaktów z dzieckiem. 1. Istota oraz cele instytucji. 1.1. Istota instytucji, Warsaw 2020, LEX/el. 2021 .

4 This provision contains an open catalogue of ways to maintain contact with the child, which means that contact can also be made in forms other than those specified in its content.

1989, requiring States Parties to respect this right. Consequently, courts conducting proceedings concerning contact between parents and children are obliged to apply this perspective in the course of proceedings and to rule in such a way that the child is not treated as an object in the hands of the parents, but as a separate, rightful individual.[5] In passing, it should be noted that although the child is a kind of 'subject of proceedings' in contact cases, this does not translate into his or her position in court proceedings concerning his or her person.[6] In this context, it is also worth adding that there is a risk of using the provision of Article 113 § 1 FGC by applying some kind of coercion against the child, justified by his or her welfare, that is, 'making him or her happy by force', while de facto this is only done for the benefit of the parent who is anxious to have contact with the child. A child's reluctance to maintain contact with a parent who wishes to exercise this right of contact is usually due to the behaviour of the parents or one of them. Hence, the court's decision to refer both parents to family therapy and, if necessary, the child with them, would be allowed and desirable. Forcing a child to comply with the obligation to maintain contact with an authorised parent is inconsistent with his or her welfare.[7]

The right and obligation to maintain contact is a personal right. It is assumed that personal rights are non-material values, inherent in human beings and their nature, determining their uniqueness and integrity, their dignity and perception in society, enabling them to achieve self-fulfilment and carry out creative activities, which cannot be measured with economic means of measurement. These rights do not depend on human will or sensitivity.[8] Each personal right has two elements: a protected value and a right to demand that others respect it.[9] It is understood that all personal rights, understood as certain intangible assets connected with the existence and functioning of civil law entities, are considered to be significant and therefore worthy of protection.[10] Undoubtedly, the emotional relationship between a parent and a child, regardless of the mutual relationship between parents, is also such a value. A violation of the obligation to maintain contact with a child is a violation of a personal right. It should also be added that a failure to comply with the obligation to maintain contact with a child entails a failure on the part of the parent to make

5 Judgement of the Appeal Court in Katowice of 25 January 2001, I ACa 1258/00, LEX no. 1532490.

6 The issue of parent–child contact from the child's perspective was presented in detail by J. Zajączkowska-Burtowy, Kontakty z dzieckiem rodziców żyjących w rozłączeniu, (in:) M. Andrzejewski (ed.), Status osób małoletnich – piecza zastępcza, kontakty, przysposobienie, Warsaw 2020.

7 W. Stojanowska, Komentarz do art. 113, (in:) W. Stojanowska, M. Kosek, Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 r. i 10 czerwca 2010 r. Analiza. Wykładnia, Warsaw 2011, p. 265 i n.

8 Judgement of the Appeal Court in Białystok of 24 September 2014, I ACa 301/14, LEX no. 1526919.

9 Judgement of the Appeal Court in Katowice of 27 February 2013, I ACa 54/13, LEX no.1294775.

10 Resolution of the Supreme Court of 22 October 2010, III CZP 76/10, LEX no. 604152.

a personal effort to raise the child, which should automatically increase the amount of child maintenance payable to the hands of the parent making personal efforts to raise the child (Article 135 § 2 FGC).

2. Enforcement of Contact with a Child

In case of any hinderance or prevention of contact with a child as specified in a judgement of the court or agreement of the parents, the contact is enforced. The provisions concerning the enforcement of the obligation to maintain contact with the child are laid down in Articles 598^{15}–598^{22} of the Civil Procedure Code of 17 November 1964.[11] Pursuant to Article 598^{15} § 1 thereof, 'if a person who has custody of a child fails to perform or improperly performs the obligations expressed in a court order or a settlement agreement made before the court or a mediator with respect to contact with the child, the family court shall, having regard to the financial situation of such persons, warn the same person that they may be ordered to pay a specified amount of money to the person allowed to contact the child, for each breach of the obligation'. On the other hand, if a person allowed to contact a child or a person prohibited from contacting the child breaches their obligations expressed in a court order or a settlement agreement made before the court or a mediator with respect to contact with the child, the family court shall warn such a person that they may be ordered to pay a specified amount of money to the person who has custody of the child for each breach of the obligation (Article 598^{15} § 2 of the CPC). This means that a violation of obligations may occur both on the part of the person under whose custody the child is and on the part of the person entitled to maintain contact, and in neither of these cases does it have to be a parent of the child. Consequently, the reasons for the court's interference in the implementation of contact with the child are obstruction by the parent with whom the child lives, the exercise of the right of contact by the other parent, and the reluctance of an authorised parent to maintain this contact. In each case, the sum of money goes to the person whose right has been infringed, in the former case to the person authorised to contact the child, in the latter, to the person under whose custody the child is. Thus, the non-monetary obligation in the form of contact with a child is enforced by the threat of a financial obligation. It should be added that the threat of ordering payment relates only to an infringement of obligations relating to contact with the child which are laid down in a judgement or settlement concluded before a court or before a mediator.

11 The act of 17 November 1964 Code of Civil Procedure, unified text Dz. U. 2020, item 1575 as amended (hereafter: CPC). These rules were added by the act of 26 May 2011 on changing the act – Code of Civil Procedure (Dz. U. 2011, no. 144, item 854) and placed in the first part in volume two, title II, chapter 2, section 6 'Matters Concerning Contact with Child'.

The legislator described two aspects which are necessary for the determination of the amount of the compulsory sum for a breach of the obligation to maintain contact with a child; firstly, a failure to perform or an improper performance of the obligations arising out of a decision of the court or from a settlement concluded before a court or before a mediator concerning contact with the child; secondly, the financial situation of the person who fails to perform or who improperly performs the obligations arising from that decision or the settlement. The amount of the compulsory payment corresponds to each infringement on a case-by-case basis, and is calculated for each infringement separately.

The amount of the compulsory sum is not fixed – neither the lower nor the upper limit is determined. Since it is dependent on the financial situation of the person who fails to perform or improperly performs the obligation to maintain contact with a child, the amount should be determined by a court at a level which takes into account the abilities of the obliged person, thereby guaranteeing the effectiveness of the enforcement. It should be noted that although the legislator referred only to the financial situation of the obliged person, the financial situation of the entitled person may also be of significant importance in certain circumstances. Furthermore, the amount of the compulsory sum may also be affected by the nature and character of the non-performed or improperly performed contact; it can therefore be argued that the greater the negative impact of a person's behaviour on the welfare of the child, the stronger the grounds for determining the compulsory amount at a higher level.[12]

'If the person who has been warned by a family court continues to violate their obligations, the family court shall order them to pay the amount due, calculated in proportion to the number of breaches. In exceptional cases, the court may change the amount referred to in Article 598^{15} if circumstances change' (Article 598^{16} § 1 of the CPC).[13] The provisions of § 1 apply mutatis mutandis if a person threatened by a family court with a payment order violates their obligations under a relevant contact order (Article 598^{16} § 2 of the CPC). This means that if the obliged person – despite a prior threat of obligation to pay the determined amount – still fails to comply with the judgement of the court, the person entitled must again appeal to

12 J. Gudowski, Komentarz do art. 598^{15}, punkt 5, (in:) T. Ereciński (ed.), Kodeks postępowania cywilnego. Komentarz. Tom IV. Postępowanie rozpoznawcze. Postępowanie zabezpieczające, Warsaw 2016.

13 'The second sentence of Article 598^{16} § 1 excludes the application of Article 359 § 1 in conjunction with Article 13 § 2 and Article 577 as a lex specialis. If sentence 2 were not the case, the guardianship court could, pursuant to Article 359 § 1 in conjunction with Article 13 § 2, not only amend but also repeal the order referred to in Article 598^{15} § 1 and, moreover, not only in exceptional circumstances, but always in the event of a change in the circumstances of the case. On the other hand, under Article 577, the family court could amend this provision for the benefit of the child, even if the circumstances of the case were not changed.' J. Bodio, Komentarz do art. 598^{16}, punkt 4, (in:) A. Jakubecki (ed.), Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom I. Art. 1–729, LEX/el. 2019.

the court so that it orders the obliged person to pay the amount which is the sum of the amount that the court has warned for each breach and the number of breaches.[14] The number of breaches means separable and countable acts which are contrary to the judgement concerning contact with the child. This means that the determination of the amount of the compulsory payment is calculated by multiplying the number of breaches by the amount indicated in the order which lays out the threat of this fine.[15] Consequently, the order of the payment of the compulsory sum is connected with each individual breach, which means that penalties will accumulate in the case of repeated breaches. The change of circumstances means a change in the financial situation of the person obliged to pay the said amount.[16] The conditions for a change in the compulsory amount are of qualified nature; the legislator requires not only a change in the circumstances, but also makes it dependent on the exceptionality of the case. It is up to the trial court to assess these conditions in each individual case.[17]

The amount of the obligatory payment should constitute significant pain for the obliged person so as to ensure the effectiveness of the correct performance of the obligation to maintain contact with the child in the future. The prospect of a compulsory payment should therefore be a deterrent from undue conduct, and the execution of the payment order, apart from it being painful, should be real (within the limits of the solvency of the obliged person).[18] However, the obligation to take into account the financial situation when determining the amount of the compulsory payment that can be imposed gives rise to dilemmas when the person to whom the sanction is applied has limited financial means. On the one hand, a payment order

14 Justification to the draft of the act of 26 May 2011 on changing the act – Code of Civil Procedure, Dz. U. 2011, no. 144, item 854, Sejm of the Republic of Poland of the sixth term, Sejm print no. 3063.

15 J. Gudowski, Komentarz do art. 598^{16}, point 2, (in:) T. Ereciński (ed.), Kodeks postępowania cywilnego. Komentarz. Tom IV. Postępowanie rozpoznawcze. Postępowanie zabezpieczające, Warsaw 2016.

16 The change in the circumstances referred to in Article 598^{16} §1 of the CPC consists of a change in the financial situation of the obliged person caused by, inter alia, loss of employment, serious illness, retirement or pension, and deprivation of liberty, whereas changes in the amount of the compulsory amount do not justify persistent failure to perform or improper performance of duties by the person obliged to pay, J. Gudowski, (in:) Kodeks postępowania cywilnego…, *op. cit.*, p. 329. A different position was taken by Ms Marszałkowska-Krześ, pointing out that the change in the amount of the compulsory sum from Article 598^{15} of the PCC could also occur in the event of a persistent breach of the obligation, despite several infringements and payments of the imposed amount several times; Komentarz do art. 598^{16} KPC, uwaga 3, (in:) E. Marszałkowska-Krześ (ed.), Kodeks postępowania cywilnego. Komentarz, Legalis 2012.

17 J. Gudowski, Komentarz do art. 598^{16}, point 3, (in:) T. Ereciński (ed.), Kodeks postępowania cywilnego. Komentarz. Tom IV. Postępowanie rozpoznawcze. Postępowanie zabezpieczające, Warsaw 2016.

18 E. Holewińska-Łapińska, Postępowania w sprawach o wykonywanie kontaktów z dzieckiem umorzone na podstawie art. 598^{20} k.p.c., Warsaw 2016, p. 26.

for a very low amount raises the concern that the very threat of it being imposed (or ordered) will not affect the behaviour of the obliged person. On the other hand, imposing a higher amount may call into question the effectiveness of its enforcement.[19]

The payment of the obligatory amount referred to in the court order should be made immediately after it becomes final. From that moment on, the compulsory sum is payable.[20] According to the legislator's intention, the finality of an order is a condition allowing the enforcement of a judicial order for the payment of the compulsory amount. A final court order for the payment of the compulsory amount is an enforceable title without the need to issue a writ of enforcement (Article 598^{16} § 4 of the CPC), which greatly facilitates its execution and the collection of the sanctioned amount, as well as exacerbating the pressure imposed on the obliged person. That means that it can be referred to a bailiff, who has the authority to initiate the execution. The order itself, without the need to give it an executable clause separately, constitutes a writ of enforcement (Article 776, p. 2 *in fine* CPC). The doctrine emphasises that the use of the wording of an enforceable title raises terminological objections because, in the light of Article 776 of the CPC, an enforceable title is an execution title with an enforceability clause. However, Article 598^{16} § 4 of the CPC applies to an execution title without a clause of enforceability.[21] The enforced amount should be executed in the manner provided for cash benefits. The application of enforcement measures should only result in a specific behaviour of the person exercising parental authority over the child.[22] This means that the payment of the determined amount of money constitutes a monetary measure of an indirect coercive, fully corresponding to the enforcement measure of Article 1050^{1} and Article 1051^{1} of the CPC.[23] The court declares the enforceability of the decision of its own initiative (Article 578^{1} § 3 of the CPC).

The proceedings in cases involving the exercise of the obligation to maintain contact with the child are of a two-stage nature. This means that provisions concerning the obligation to keep in touch with a child provide for the grading of financial sanctions. In the first stage, a family court issues a threat of or the payment order

19 E. Holewińska-Łapińska, Sędziowska ocena efektywności stosowania przepisów o wykonywaniu kontaktów z dzieckiem (art. 598^{15}–598^{20} k.p.c.) i ich adekwatności do potrzeb praktyki w świetle wyników badania ankietowego, "Prawo w działaniu. Sprawy cywilne" 2016, no. 25, p. 64.

20 Justification to the draft of the act of 26 May 2011 on changing the act – Code of Civil Procedure, Dz. U. 2011, no. 144, item 854, Sejm of the Republic of Poland of the sixth term, Sejm print no. 3063.

21 J. Bodio, Komentarz do art. 598^{16}, point 6, (in:) A. Jakubecki (ed.), Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom I. Art. 1–729, LEX/el. 2019.

22 Resolution of the Supreme Court of 18 March 2011, III CZP 139/10, LEX no. 738033.

23 M. Krakowiak, Nakaz zapłaty sumy pieniężnej w nowym postępowaniu o wykonywanie kontaktów z dzieckiem, "Transformacje Prawa Prywatnego" 2013, no. 3, p. 68.

of a specified compulsory amount for each breach[24] in the second one, if breaches of the rules of contact with the child persist, a family court orders the payment of a predetermined compulsory amount. In other words, the first stage is to discipline the parent who violates the obligation to maintain contact with their child, while the second stage is already repressive. Article 598[16] § 1 of the CPC uses the words 'continues to breach their obligation', and therefore it means the same obligations as the order with a threat of a compulsory payment. The court is bound to determine the amount of the compulsory payment. The procedure imposing an obligation to pay the said amount is therefore not an independent procedure, but a continuation of the enforcement procedure previously initiated.[25] This means that it is not possible to move towards a stage where the court orders the compulsory payment without a prior order with a threat of an imposition of a compulsory payment. Only after the threat of ordering the payment and a subsequent failure to perform or an improper performance of the obligations arising from a court decision or a settlement concluded before a court or before a mediator concerning contact with the child, will the court order the payment. This means, therefore, that in accordance with the wording of the provisions of Articles 598[15] § 1–2 and 598[16] § 1 of the Code, in the order with the threat of payment of the compulsory amount the court determines the amount for each individual breach of the obligation, whereas in the order for the payment it determines the amount of the sum for which it has been obligatorily imposed based on the number of breaches.

The doctrine emphasises that a threat of an order for the payment of a compulsory amount and then a payment order is an incentive for the person who is obliged to behave in a certain manner. In this way, it becomes a kind of coercion. However, the nature of the compulsory payment is specific; it is not a fine, i.e. a penalty, or a typical means of coercion (coercive fine) applied in enforcement proceedings, especially as it works for the benefit of the entitled person and not the State Treasury. Nor does it constitute a compensation or redress within the meaning of the obligations for a failure to perform or an improper performance of the obligations provided for in the judgement on relations with the child. From the point of view of the person concerned, it is a financial pain, which increases in proportion to their delay and encourages the performance of their obligations. From the point of view of the entitled person, it is a payment that compensates the non-performance or improper performance of the obligation imposed by the court.[26]

24 The first stage can be omitted if the warning of ordering the payment of the compulsory sum was introduced when regulating contact with the child.

25 J. Bodio, Komentarz do art. 598[16], point 1, (in:) A. Jakubecki (ed.), Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom I. Art. 1–729, LEX/el. 2019.

26 J. Gudowski, Komentarz do art. 598[15], point 4, (in:) T. Ereciński (ed.), Kodeks postępowania cywilnego. Komentarz. Tom IV. Postępowanie rozpoznawcze. Postępowanie zabezpieczające, Warsaw 2016.

3. Proceedings in Cases for Contact with the Child

The court solely competent for examining matters relating to contact with a child is a family court of the place of residence or stay of the child (Article 569 § 1 of the CPC). In cases relating to the obligation to maintain contact with the child, the court takes action only on the basis of a petition, since the application of Article 570 of the CPC, providing for the possibility for the court to initiate proceedings of its own motion, is excluded (Article 598^{18} § 1 of the CPC). The petition may be filed by a person concerned (parent, guardian), a prosecutor (Article 7 in conjunction with Article 13 § 2 of the CPC), the Ombudsman (Article 14 point 4 of the Act of 15 July 1987 on the Ombudsman) and the Ombudsman for Children (Article 10 paragraph 1 point 3 of the Act of 6 January 2000 on the Ombudsman for Children). At the same time, the applicant's identity is not required, which means that the prosecutor may ask for a decision with a threat of compulsory payment, and that the parent of the child may apply for an order enforcing the payment.

Such a petition should comply with the formal requirements for petitions with the change that the defendant should be mentioned in the case (Article 511 of the CPC). The petition should be accompanied by a copy of an enforceable court decision or an enforceable settlement concluded before a court or before a mediator on contact with the child. In matters relating to contact with the child, a family court rules with the judge sitting alone (Article 47 § 1 in conjunction with Article 13 § 2 of the CPC). The court decides about the threat of ordering the compulsory payment and ordering the payment in the form of an order which takes effect upon publication and, if there is no notice, at the time of its issue (Article 578 § 1 of the CPC).[27] The order of the payment of the compulsory amount may not be amended or repealed (Article 598^{21} of the CPC). An exception is the case provided for in Article 598^{16} § 1 of the CPC, according to which a court may change the amount of the compulsory sum in a case relating to maintaining contact with a child even when that order is final if there is a change in circumstances.

Before issuing an order, the court shall hear the participants in the proceedings (Article 598^{18} § 2 of the CPC). They are heard, depending on the decision of the court, at a sitting or by making statements in writing (Article 514 § 1 sentence 3 CPC). This does not exclude the possibility of using other evidence, mainly from witnesses and private documents (e.g. the employment certificate and the amount of remuneration of the person obliged to maintain contact with the child). If evidence is necessary, it is mandatory to schedule a hearing.

Proceedings relating to the compulsory exercise of the obligation to maintain contact with a child is one of the guardianship proceedings that fall within the scope

27 An order on the warning of payment of a determined amount of money can be issued either at the same time as a decision regulating contact with the child or as a settlement of a separate case.

of family, guardianship and custody law. It is a sui generis exploratory procedure, but limited to the implementation stage. Unlike proceedings for the collection of a person subject to parental authority or in parental custody, the proceedings relating to contact with the child should not include the settlement stage. This stage is governed by the general provisions on guardianship proceedings.[28] This is a specific procedure introduced into the civil procedure in order to provide more effective solutions for the protection of parents' rights. However, given that the essence of the enforcement procedure is the application of a coercive enforcement measure in the form of a specified payment, it appears that this procedure does not differ significantly from the ordinary enforcement procedure for non-monetary benefits (Articles 1050^1 and 1051^1 of the CPC). As a consequence, proceedings for an enforcement of the obligation to maintain contact have features of enforcement proceedings.[29]

The order on the threat of the compulsory payment and the payment order are subject to a complaint (Articles 598^{15} § 3 and 598^{16} § 3 of the CPC). The content of those provisions means that such a complaint applies only to a positive decision, that is to say, approving the request for the compulsory payment order. However, the Supreme Court ruled that the complaint applies also to a negative order, i.e. dismissing the application for the threat of ordering the compulsory payment and the payment for a person who does not perform or improperly performs duties in relation to contact with the child.[30] The choice of an appeal in the form of a complaint means that the orders in question are treated as other orders of the court of the first instance within the meaning of Article 518 of the CPC. Anyway, it should be added that the court may also decide on the reimbursement of expenses incurred in preparing the contact (costs of travel to the place of residence of the child, purchase of tickets to the cinema, stay of the child, accommodation costs).

The order on the threat of the compulsory payment and the payment order is not a decision on the substance of the case terminating the proceedings referred to in Article 519^2 § 1 of the Code. The nature of the provisions aimed at carrying out the obligations relating to the determined contact with the child leads to the conclusion that such a provision is not an independent decision, but a continuation of the enforcement procedure previously initiated, and therefore does not terminate the proceedings in the case.[31] Only a decision to discontinue proceedings under Article 598^{20} of the CPC is a decision terminating the case initiated under Articles 598^{15} or 598^{16} of the CPC. Proceedings concerning the obligation to maintain contact with

28 Resolution of the Supreme Court of 22 May 2013, III CZP 25/13, LEX no. 1400024; Judgement of the Supreme Court of 8 May 2015, II CNP 5/15, LEX no. 1683405.

29 M. Krakowiak, Nakaz zapłaty sumy pieniężnej w nowym postępowaniu o wykonywanie kontaktów z dzieckiem, "Transformacje Prawa Prywatnego" 2013, no. 3, p. 67.

30 Resolution of the Supreme Court of 22 May 2013, III CZP 25/13, LEX no. 1400024.

31 Judgement of the Supreme Court of 8 May 2015, II CNP 5/15, LEX no. 1683405; judgement of the Supreme Court of August 26, 2016, IV CNP 10/16, LEX no. 2095940.

the child are discontinued only if no further petition has been received on the subject (Article 598^{20} of the CPC) within six months of the last order's validity. However, this does not mean that earlier provisions expire, and consequently, on the basis of them, the compulsory sum can be enforced even after six months.

Conclusions

In conclusion, it should be said that the rules on the obligation to maintain contact with a child have been constructed using an enforcement model in which the threat and subsequent application of financial sanctions play a significant role.[32] The use of a compulsory payment structure in order to force a parent to comply with the obligation to maintain contact with a child is a form of court interference in the exercise of parental authority dictated by the protection of the child's well-being. Such action seems necessary in view of the increasingly serious problem of single-parent families and, consequently, children who are deprived of regular contact with one of the parents. After all, the obligation to keep in touch with a child is primarily meant to serve the child, who needs both a mother and a father to ensure their development, and not the parents, who are often in conflict with each other and who would do anything to make the other's life difficult. The aim of the legislator when threatening with the potential application and then subsequently applying the financial sanction is to enforce the obligation to maintain contact with a child, under a decision or a settlement concluded before a court or a mediator. Sometimes it is only then that many parents realise the needs that a child has.

The threat of the enforcement of a compulsory payment undoubtedly plays the role of a motivating function, so that a parent who has evaded the obligation to maintain contact with a child under a decision or a settlement concluded before a court or before a mediator would find it more beneficial to voluntarily comply with the order than pay the determined sum of money. However, there are doubts whether such forced contact serves its role. Exerting pressure in such a delicate area as feelings can be counterproductive. The essence of the right of contact is the protection of this contact as a form and expression of the closeness that exists between a parent and a child. While financial sanctions may result in parental contact with a child, they must not affect feelings. It is not possible to enforce natural relationships based on love, even with the most severe sanctions. This raises another question, namely whether such forced contact will proceed properly. The only basis for a parent's relationships with a child can be an emotional bond that cannot be forced in any way, since the law is powerless when it comes to feelings. Building the right relationships

32 E. Holewińska-Łapińska, Sędziowska ocena efektywności stosowania przepisów o wykonywaniu kontaktów z dzieckiem (art. 598^{16}–598^{20} k.p.c.) i ich adekwatności do potrzeb praktyki w świetle wyników badania ankietowego, "Prawo w działaniu. Sprawy cywilne" 2016, no. 25, p. 38.

is a long-term process; if it is to be effective, it must be based on an internal need, the root of which lies in the well-being of the child.

An order demanding payment of the compulsory amount does not guarantee the effectiveness of meetings and the reconstruction of relations with the child. Moreover, there is a real danger of replacing the obligation to keep in touch with the child with money. It cannot be ruled out that a parent would rather pay than keep in touch with the child – ipso facto with the other parent with whom the child remained – which he or she does not want to continue. In addition, interference of the court in family relations may result in a conflict between the parents of the child and, consequently, might have a negative impact on the child's well-being.

Therefore, it seems necessary to seek answers to the question of what to do to make sure that the obligation to be in contact with a child is effectively fulfilled. One solution could be to amend the decision on parental authority by entrusting the parent who was previously allowed contact with the child to take direct custody of the child. This would entail a replacement of the current role of the aggrieved parent in terms of contact with the child with this parent who did not perform or improperly fulfilled the obligation to maintain contact with the child. The fear of such a potential role-change could lead to a careful satisfaction of the child's needs. Of course, this is only on the assumption that the parent whose contact with the child was hindered or prevented is interested in such an approach. Another solution may be to link the child's maintenance provisions, paid by the parent who was previously allowed contact with the child to the parent with the status of the primary guardian, with the proper performance of his or her duties in relation to contact with the child. Violations of contact with a child could result in the payment of maintenance being suspended for a given period. However, such a solution would be problematic due to the purpose of the payment of maintenance, which is to meet the legitimate needs of the child. Hence, even properly motivated actions resulting in withholding the payment of this benefit will ultimately be felt by the child, which is difficult to justify in terms of his or her welfare. A further solution is to penalise behaviour consisting of long-term, recurring and deliberate non-compliance with the obligation to maintain contact with the child. It seems that criminal sanctions could have a mobilising effect on a parent who fails to comply with the obligation to keep in touch with their child.

In order to make sure that procedures for compulsory enforcement of the obligation to maintain contact with a child lead to the desired results and make it possible for this contact to be carried out, they must proceed smoothly. The passage of time may have irreversible consequences for the relationship between a child and the parent with whom he or she does not live, without precluding the break-up of their relationship. However, the need to go through two proceedings, namely two court meetings, does not speed up the response to infringements relating to contact with the child. In addition, each decision of the court can be appealed against, which in the realities of the Polish judiciary extends this reaction to at least a few months. On

the basis of an examination of the case law in matters of contact with a child carried out at the Institute of Justice in 2015, it was found that the average duration of such proceedings, calculated from the date of receipt of the petition to the court until the date of the decision to discontinue proceedings pursuant to Article 598[20] of the CPC, was 14 months, whereas from the adoption by the court of the last order on sanctions prior to the decision to discontinue the proceedings pursuant to Article 598[20] of the PCC, the period of 6.4 months elapsed, on average.[33] Our own observations and professional experience show that the situation has not changed since the research, which means that the findings remain up to date and show that the involvement of the courts in the efforts to ensure the right to contact of both parents is ineffective. It seems that due to their executive nature, proceedings in cases concerning compulsory execution of the obligation to maintain contact with a child should be treated as a priority and run much more efficiently, and the taking of evidence should be limited to the minimum necessary so as not to duplicate the examination procedure on the basis of which the decision was issued, which, however, is not implemented in practice. Therefore, despite the undoubtedly right intentions of the legislator, the current shape of the provisions on maintaining contact with a child does not work in practice and in many situations is even contrary to the best interests of the child.

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33 E. Holewińska-Łapińska, Postępowania w sprawach o wykonywanie kontaktów z dzieckiem umorzone na podstawie art. 598[20] k.p.c., Warsaw 2016, p. 28

Stojanowska W., Komentarz do art. 113, (in:) W. Stojanowska, M. Kosek, Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 r. i 10 czerwca 2010 r. Analiza. Wykładnia, Warsaw 2011.

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The Role of Fiscal Expenditure Rules in Maintaining the Financial Stability of the State

Abstract: One of the main challenges which legal science faces nowadays is the creation of legal mechanisms guaranteeing sound public finance. The aim of this article is to assess the role of national fiscal rules in maintaining financial stability. Firstly, to fulfil this aim, the role of fiscal rules and their efficiency was analysed. Next, based on the commonly used tool assessing the quality of national fiscal rules – the Fiscal Rule Index – the quality of expenditure rules in the EU countries was analysed in order to evaluate the Polish stabilising expenditure rule and the escape clause of its application. Therefore, the following research question is to be answered: whether in the face of an unstable financial situation of the state connected with an increasing deficit, deviation from the stabilising expenditure rule should be considered as being right. Research methods based on non-reactive research, i.e., analysis of professional literature, legal acts, and statistical data published by the European Commission, were used in this article. Due to this analysis, it was indicated that expenditure rules are regarded as one of the most effective tools to manage public funds, and therefore any derogations from the application of these rules should be evaluated negatively.
Keywords: deficit, escape clause, expenditure rule, fiscal rules, financial stability

Introduction

One of the main challenges which legal science faces nowadays is the creation of legal mechanisms guaranteeing sound public finance. An essential role in ensuring them is played by legal and financial instruments limiting deficit, and public debt, of the *general government* sector, arising both from national (constitutional or

legislative), and EU, law.[1] Among these instruments, fiscal rules are of fundamental importance, since their task is not only to limit deficit and debt, but mainly to discipline fiscal policy in such a way as to ensure the balance of public finance in the long term[2], which impacts the financial stability of the state. Therefore, fiscal rules are an important instrument serving as countercyclical management of public finance as well as an instrument influencing the credibility of a given government[3]. Fiscal rules may have procedural or numerical character and diverse legal importance from which depends their legal basis and possibilities of derogation from their application.

The aim of this article is to evaluate the role of national fiscal rules in maintaining financial stability of the country. Firstly, to fulfil this aim, the role of fiscal rules and their efficiency was analysed. Next, based on the commonly used tool assessing the quality of national fiscal rules applied in the EU Member States – the Fiscal Rule Index – the quality of expenditure rules in the EU countries was analysed in order to evaluate the Polish stabilising expenditure rule and the escape clause of its application. Therefore, the following research question is to be answered: whether in the face of an unstable financial situation of the state connected with increasing deficit, derogation from stabilising expenditure rule should be considered as being right. Research methods based on non-reactive research, i.e., analysis of professional literature, legal acts, and statistical data published by the European Commission, were used in this article.

1. The Essence and Efficiency of Fiscal Rules

Fiscal rules may be defined in a broad and narrow way[4] and may have procedural or numerical character[5].

1 Legal and financial instruments may directly or indirectly impact limiting public debt and minimising its effects by proper formation of the level of deficit (surplus), expenditure and revenue. More on legal and financial instruments reducing deficit and public debt: E. Lotko, U.K. Zawadzka-Pąk, Prawnofinansowe instrumenty ograniczania deficytu i długu publicznego w Polsce na tle doświadczeń europejskich, Bialystok 2018.

2 M. Postuła, A. Kawarska, Wpływ reguł fiskalnych na strukturę wydatków publicznych w krajach Unii Europejskiej, „Annales Universitatis Mariae Curie-Skłodowska, sectio H – Oeconomia" 2020, vol. 54, no. 4, p. 112.

3 A. Corbacho, T. Ter-Minssian, Public Financial Management Requirements for Effective Implementation of Fiscal Rules, (in:) R. Allen, R. Hemming, B. Potter (eds.), The International Handbook of Public Financial Management, London 2013, p. 38.

4 K. Wójtowicz, Problem konstrukcji optymalnej reguły fiskalnej w warunkach kryzysu finansowego, „Zeszyty Naukowe. Polskie Towarzystwo Ekonomiczne" 2011, no. 10, p. 138.

5 Compare: e.g., J. Ayuso-i-Casals, S. Deroose, E. Flores and L. Moulin, who distinguished three categories of legal and financial instruments reducing deficit and public debt: procedural fiscal rules, numerical fiscal rules and independent bodies supporting the compliance with procedural and numerical rules – fiscal councils. J. Ayuso-i-Casals, S. Deroose, E. Flores, L. Moulin, Policy

Fiscal rules *sensu largo* are a set of legal norms which may shape fiscal policy[6]. In this perspective, they mean all institutional solutions which are constraints applied at every stage of legislative procedure, i.e., during preparation, adoption, and execution of a budget. They shape rights and common relations of budget procedure participants in order to increase the transparency of actions taken, efficiency, and thus responsibility for the state of public finance. Whereas fiscal rules *sensu stricto* mean quantitative limitations of fiscal policy with relatively stable character which are expressed by a selected budget indicator. The rule in this perspective may regard e.g., the level of budget deficit, the level of public debt, the amount of incurred liabilities, revenues, or public expenditure[7]. Therefore, numerical rules introduce quantitative limitations in the scope of fiscal policy of the state. Four categories of these rules may be distinguished: 1) budget-balance rules which are used to constrain balance on an annual basis or in the period of an economic cycle. These rules may be applied to introduce overall balance, to primary balance, or to current balance, 2) debt or financing rules setting the limit of debt to GDP ratio. These rules may also impose restrictions regarding central bank financing or incurring debt in a foreign currency, 3) revenue rules setting constraints to prevent introduction of excessive tax burden or determining the level prompting the receipt of revenue, 4) expenditure rules setting limits for all or selected categories of public finance [8].

However, regardless of the type of rules, it is essential for the rule to fulfil its objective. Therefore, several conditions, connected mainly with its structure, decide about the efficiency of fiscal rules. First of all, the importance of a given rule is determined by the legal standing of the document specifying its use. The higher the standing of the document introducing the rule, the bigger the chances for its proper use and efficiency, which significantly limits the possibility to modify its structure. The effectiveness of fiscal rules is also determined by their possibly constant monitoring, based on reliable data, i.e., available in the proper time and implemented by units which are independent of legislative and executive bodies. Efficiency of fiscal rules is also conditioned by precise determination of budget indicator which the rule concerns as well as its simple and transparent structure. It is also important to state the scope of units subjected to the rule, since the biggest efficiency may be achieved when the whole public finance sector and all significant operations regarding public funds are covered. Another condition is to determine the sanctions for noncompliance with the limits set by fiscal rules, whose introduction increases credibility and chances to

Instruments for Sound Fiscal Policies. Fiscal Rules and Institutions, Brussels, Basingstoke 2009, p. 7.

6 J.M. Poterba, Do Budget Rules Work? NBER Working Paper no. 5550. National Bureau of Economic Research, Cambridge 1996, p. 9.

7 G. Kopits, S. Symanski, Fiscal policy rules, IMF Occasional Paper 162, Washington 1998, p. 3.

8 A. Corbacho, T. Ter-Minssian, Public Financial…, *op. cit.,* pp. 40–41.

respect them, as well as to specify the body authorised to impose those sanctions. Due to the fact that the goal of sanctions should be striving to get back, as soon as possible, to the state where it would be possible to reshape fiscal parameters in accordance with the principles of a given fiscal rule, they may have institutional or personal form. However, regardless of their form, sanctions have to be precisely regulated in the provisions introducing fiscal rules or in the provisions complementing them, they have to be proportionate to derogations and should ensure at least minimal discretionary measures. Moreover, when implementing a fiscal rule, it needs to be determined what procedures will be applied in the case of breaching the rule. The last element influencing the effectiveness of fiscal rules are the possibilities to suspend the application of a rule, i.e., escape clauses. They introduce the possibility to suspend the application of a rule in specific circumstances, such as natural disaster or deep financial crisis. However, derogation from a given rule has to be precisely regulated and should establish the time and manner of return to the rule.[9]

Particular types of fiscal rules may have a different legal form which gives them legal standing. The highest in the hierarchy are the rules included in the constitutional order of particular countries. On the other hand, the lowest in the hierarchy are fiscal rules arising from international law. Fiscal rules of such rank, which are in the EU countries, result from the membership in the EU. Thus, the first transnational fiscal constraints at the EU level were introduced under the Treaty on the Functioning of the European Union (the so-called Maastricht Treaty), pursuant to which excessive debt procedure was established as well as convergence criteria (fulfilment of which conditioned the accession to the European Economic and Monetary Union) obliging only to maintain deficit of the *general government* sector at the maximum level of 3% of GDP, and debt of this sector at the maximum level of 60% of GDP. Another important document for fiscal policy framework implemented by the EU states was the Stability and Growth Pack[10] signed in 1997 which, besides the criteria referring to deficit and public debt established under Maastricht Treaty, introduced the necessity

9 Conditions for fiscal rules effectiveness have been elaborated on the basis of foreign and domestic professional literature : G. Kopits, S. Symanski, Fiscal policy…, *op. cit.;* A. Corbacho, T. Ter-Minssian, Public Financial…, *op. cit.,* pp. 38–62; B. Anderson, J.J. Minarik, Design choices for fiscal policy rules, (in:) Fiscal Policy: current issues and challenges, Research Department Public Finance Workshop, Banca d'Italia 2007, pp. 512–556; S. Franek, Reguły fiskalne w przemianach instytucjonalnych finansów publicznych, „Zeszyty Naukowe Uniwersytetu Szczecińskiego, Finanse, Rynki Finansowe, Ubezpieczenia" 2010, no. 39, pp. 67–68; S. Franek, M. Postuła, Pomiar siły instrumentów fiskalnych oraz ich skuteczność w poprawie stabilności finansów publicznych w krajach Unii Europejskiej, „Materiały i Studia NBP" 2019, no. 334, p. 30; K. Marchewka-Bartkowiak, Reguły fiskalne, „Analizy BAS" 2010, no. 7, p. 3; K. Marchewka-Bartkowiak, Reguły fiskalne w warunkach kryzysu finansów publicznych, „Ekonomia i Praw" 2012, no. 3, p. 48.

10 Stability and Growth Pack includes two Council Regulations: Council Regulation (EEC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 209 of 2.08.1997, p. 1) as well as Council

to comply with medium-term objective of budgetary positions (MTO) close to balance or surplus. However, the provisions of the Stability and Growth Pact were widely criticised[11]. The most questioned issue was the automatic use of the reference value for the deficit criterion as well as the requirement to get close to budgetary balance or surplus without including cyclical variations. This criticism prompted reform of the Stability and Growth Pact conducted under two Council Regulations of 27 June 2005.[12] In these Regulations deficit and public debt limits were confirmed at the level of 3% and 60%, respectively, in relation to GDP, provisions on fair and coherent compliance with these limits in all states were also formulated, the MTO definition was made more precise and the budget balance rule within a business cycle was adopted. Owing to these solutions adaptation mechanisms depending on the phase of the business cycle and were established institutions for monitoring support and evaluation of those rules by independent fiscal bodies were introduced.[13]

Other actions connected with the reform of economic governance, strengthening budgetary surveillance of the Monetary Union and change in the approach to budget balance brought further reforms of the Stability and Growth Pact. This resulted in the adoption of a package of reforms which includes a collection of regulations in the form of "six-pack", "two-pack" and Fiscal Compact (Treaty on Stability, Coordination and Governance – TSCG). Solutions provided in the "six-pack", and in particular Council Directive 2011/85/EU of 8 November 2011, on requirements for budgetary frameworks of the Member States, were a step towards strengthening public finance discipline in the Member States. It allowed determining minimal requirements for budgetary frameworks of every Member State, which include, e.g., the obligation to introduce numerical fiscal rules at the domestic level[14]. On the other hand, "two-pack" regulations, which concern only Euro zone members, focused on increasing the level of economic and budget surveillance in those countries by improved monitoring of the current budget situation with particular focus on strengthening actions reducing

Regulation (EEC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of excessive debt procedure (OJ L 209 of 2.08.1997, p. 1)

11 More on this subject: E. Lotko, U.K. Zawadzka-Pąk, Prawnofinansowe instrumenty…, *op. cit.,* pp. 86–91.

12 Council Regulation No 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and surveillance and coordination of economic policies (OJ L 174 of 7.07.2005, p. 1) as well as Council Regulation No 1056/2005 of 27 June 2005 amending Council Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of excessive deficit procedure (OJ L of 7.07.2005, p. 5)

13 M. Misiak, Pakt Stabilności i Wzrostu w dobie kryzysu fiskalnego w Unii Europejskiej, „Acta Universitatis Lodziensis. Folia Oeconomica" 2010, no. 238, p. 141.

14 M. Tyniewicki, Medium-term budgetary frameworks in the light of Council Directive 2011/85/EU as a basic of multiannual financial planning in member states, „Białostockie Studia Prawnicze" 2014, z. 16, pp. 30–31.

excessive deficit.[15] The above actions did not bring the expected results and the multiplicity of breaking the rules by EU states, as well as the lack of sanctions for noncompliance, resulted in the fact that it was not possible to regard deficit and debt indicators as sufficient and effective to ensure the financial stability of the state[16]. Therefore, on the initiative of the EU institutions and with the consent of the Member States, the majority of the states started to apply structural budget balance rules requiring to maintain the component of structural deficit at the level not higher than 0.5% of GDP, as well as an expenditure rule requiring to shape expenditure increase at the maximal level of medium-term potential economic growth of a given country depending on MTO of the country.

One of the most important elements of the EU fiscal surveillance reform was the necessity to apply national numerical fiscal rules by the Member States. It needs to be emphasised that particular Member States use several rules simultaneously, which is the consequence of introducing international rules as well as of the awareness that a set of fiscal rules brings better results in maintaining financial stability. Therefore, when countries use both international rules (deficit rule and public debt rule) and their own fiscal rules, most often expenditure rules limiting the increase in public spending over set limits, it provides the best outcomes in ensuring financial stability.[17]

2. The Quality of Expenditure Rules in the EU Countries

The objective of expenditure rules is to increase predictability and continuity of fiscal policy in the long term, and boundary conditions set, allowing to them serve as a brake on public spending and to limit the freedom in shaping this policy. Additionally, if they have countercyclical form, i.e., are correlated negatively with economic situation, they may fulfil the function of automatic stabilisers of economic situation.[18]

Therefore, expenditure rules are considered as one of the most effective tools of managing public funds, and which are used more and more often by the EU countries. The majority of expenditure rules are included in domestic legislature, which arises

15 Regulation (EU) No 472/2013 of 21 May 2013 of the European Parliament and the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties in respect to their financial stability in the euro area (OJ L 140 of 27.05.2013, p.1) as well as the Regulation (EU) No 473/2013 of 21 May 2013 of the European Parliament and the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area (OJ L 140 of 27.05.2013, p.11)

16 T. Machelski, European Union financial crisis – austerity or political short-termism to blame? „Białostockie Studia Prawnicze" 2014, z. 16, p. 79.

17 M. Postuła, A. Kawarska, Wpływ reguł…, *op. cit.,* p. 115.

18 R. Mroczkowski, Numeryczne reguły wydatkowe jako instrumenty wzmacniające stabilność fiskalną, (in:) W. Miemiec, K. Sawicka (eds.), Instytucje prawnofinansowe w warunkach kryzysu gospodarczego, Warsaw 2014, pp. 319–320.

from solutions adopted in the "six-pack". In 2019, 17 expenditure rules were binding in the national legislatures of 15 states[19] (in comparison – in 2000, only 8[20]). These rules cover the scope of government administration, the *general government* sector, local government, or the social insurance sector.

Well-structured expenditure rule may efficiently limit pro-cyclical expenditure policy. Due to the fact that public spending rises in the so-called good times and falls in bad times, fiscal rules may be a great tool mitigating this phenomenon and strengthening the financial stability of the state. Whether this is possible or not depends on the broad scope of the rule, its legal standing, an independent system monitoring the compliance with the rule, and a precisely determined system of sanctions for noncompliance[21]. All features assessing the effectiveness of the rule are measured by the Fiscal Rule Index introduced by the European Commission. The basis for the calculation of this index are data sent to the European Commission by every EU country. The index includes five criteria divided thematically, to which are assigned from 0 to 4 points depending on the quality of analysed fiscal rule within a given criterion.[22] It is presented in the table below.

Table 1. Fiscal Rule Index: scoring of each dimension

Criterion 1: Statutory/legal base of the rule			**Criterion 2: Room for setting or revising objectives**
3	Constitutional (including higher than ordinary law)	3	The target of the rule, as defined in in its establishing act, cannot be changed or temporarily suspended by the Government except in well-defined situations (i.e., escape clauses)
2	Legal Act of ordinary nature	1	Subject to parliamentary approval, the Government can either temporarily change the target or it is mandated to decide on the target (in case the target is not defined in its establishing act)
1	Coalition agreement (including Government programme voted in parliament or agreement between government sub-sectors which is not a law)	0	The government can change the target of the rule at any time without parliamentary approval (e.g., the statutory base of the rule merely contains broad principles of the obligation for the government or the relevant authority to set targets)
0	Political commitment by a given authority (central/local government, minister of finance) or an annual budget law		
Criterion 3a: Nature of the body in charge of rule monitoring and the correction mechanism			**Criterion 3b: Real-time monitoring**
3	Monitoring by an independent authority (i.e., fiscal council type of institution	1	Real-time monitoring (quarterly or more frequent) takes place, and the statutory base of the rule specifies corrective actions to be taken during budget execution in case a risk of non-respect of the rule is detected through the real-time alert mechanism

19 The analysis of statistical data in the article covers 15 EU Member States.

20 C. Belu Manescu, E. Bova, Effectiveness of national expenditure rules: Evidence from EU member states, https://voxeu.org/article/effectiveness-national-expenditure-rules (25.05.2021).

21 European Commission, Report on Public Finances in EMU (online) 2019, INSTITUTIONAL PAPER 133, July 2020. Part II Performance of spending rules at EU and national level – a quantitative assessment, p. 61.

22 European Commission, Fiscal rules database https://ec.europa.eu/info/publications/fiscal-rules-database_en (25.05.2021).

2	Monitoring by the court of auditors (if not hosting an independent fiscal council) and/or parliament	0.5	Real-time monitoring (quarterly or more frequent) takes place, but the statutory base of the rule does not specify corrective actions to be taken during budget execution in case a risk of non-respect of the rule is detected through the real-time alert mechanism
1	Monitoring only by the ministry of finance or other government body	0	No real-time monitoring takes place
0	No regular public monitoring of the rule (no report systematically assessing compliance)		
Criterion 3c: Nature of the body in charge of monitoring the correction mechanism in case of deviation from the rule			**Criterion 3d: Independent body providing/endorsing macro/budgetary forecasts**
1.5	An independent authority (e.g., fiscal council or court of auditors endowed with appropriate mandate)	2	If there is an independent body providing or endorsing the official macroeconomic and budgetary forecasts on which the annual budget is prepared
1	The court of auditors and/or parliament	1	If there is an independent body providing or endorsing the official macroeconomic or budgetary forecasts on which the annual budget is prepared
0	The ministry of finance or other government body	0	If there is no independent body providing or endorsing neither the official macroeconomic nor budgetary forecasts on which the annual budget is prepared
0	No specific body in charge of monitoring the correction mechanism		
0	No correction mechanism in place		
Criterion 4: Correction mechanisms in case of deviation from the rule		**Criterion 5: Resilience to shocks or events outside the control of the government** The score of this dimension is simply the sum of the elements defined below:	
4	The correction mechanism is triggered automatically and there are pre-determined rules framing the nature/size and/or timeline of the correction	1/0	Does the rule contain clearly defined escape clauses which are in line with the SGP?
2	The correction mechanism is triggered automatically or there are pre-determined rules framing the nature/size and/or timeline of the correction	1/0	Is there a budgetary margin defined in relation to the rule (i.e., the planned spending targets are set at a lower level than the expenditure ceilings) or a safety margin linked to the MTO which is enshrined in national legislation?
1	The government is obliged to take or present corrective measures before the parliament or the relevant authority, but without a predefined timeline for such action and with no pre-determined rules framing the nature/size and/or timeline of the correction	1/0	Are targets defined in cyclically adjusted terms or do they account for the cycle in any way (e.g., targets defined over the cycle)?
0	The government is not obliged to take or present corrective measures and there are no pre-determined rules framing the nature/size and/or timeline of the correction	1/0	Are there exclusions from the rule in the form of items that fall outside authorities' control at least in the short term (e.g., interest payments, unemployment benefits)?

Source: C. Belu Manescu, E. Bova, National Expenditure Rules in the EU: An Analysis of Effectiveness and Compliance, DISCUSSION PAPER 124, April 2020, https://ec.europa.eu/info/sites/default/files/economy-finance/dp124_en_national_expenditure.pdf (25.05.2021), p. 15; European Commission, Fiscal rules database https://ec.europa.eu/info/publications/fiscal-rules-database_en (25.05.2021).

All national fiscal rules are assessed within particular categories and features according to the assumed method and points determined. After points are assigned, all collected scores are aggregated to calculate the Fiscal Rule Strength Index (FRSI). The obtained results, in the scope of the abovementioned five categories, are firstly standardised in such a way that the median amounts to 0, standard deviation to 1 and final results are close to the average calculated from the points given earlier for particular criteria. Calculations conducted in this way allow the obtaining of one index determining the assessment of the power of impact of every examined fiscal rule. Further, every FRSI is multiplied by scope of impact percentage factor

of the given rule on the public sector. In the case when ,in the same subsector of government, and local government institutions, more than one rule is binding, the rule with the highest FRSI is measured with the factor valued 1, whereas the second and third ranked rules get 1/2 and 1/3 value, respectively. The obtained results are added, and their score makes the FRSI of a given country.[23] The Table below presents FRSI in 15 European countries.

Table 2. FRSI in particular European countries in 2019

Country	Sector	Coverage of GG finances	Criterion											FRSI
			C1	C2	C3a	C3b	C3c	C3d	C4	C5a	C5b	C5c	C5d	
Austria	GG	61.5%	3	3	3	0	1	1	2	0	0	1	1	7.33
Belgium	SS	34.9%	2	3	3	0.5	0	1	2	0	0	0	0	5.53
Bulgaria	GG	100%	3	3	3	0	0	0	4	0	1	0	0	7.3
	LG	26%	3	3	1	0	0	0	0	0	0	0	0	4.27
Denmark	GG	75%	2	1	3	1	1.5	0	4	0	0	0	1	5.97
Spain	LG, CG, RG	45.5%	3	3	3	1	0	1	4	0	0	1	1	8.33
Finland	CG	21.5%	1	0	3	0	0	1	0	0	1	0	1	2.73
Italy	RG	2.0%	2	3	1	0.5	0	1	4	0	0	0	0	6
	GG	100%	3	3	3	0	1.5	1	1	0	0	1	1	6.97
Lithuania	CG, SS	76.6%	3	3	3	0.5	1	1	4	0	1	1	1	8.97
Latvia	GG	100%	2	1	3	0	0	1	0	1	0	0	0	3.57
Croatia	GG	91.5%	2	3	3	0	0	0	0	1	0	0	1	5.13
Netherlands	GG	99.0%	3	1	3	0.5	0	1	1	0	0	1	1	5.37
Poland	GG	90.0%	2	3	2	0.5	0	0	0	1	0	0	1	5
Romania	GG	88.0%	3	3	3	0	1.5	0	4	4	0	1	1	8.2
Sweden	CG, SS	31.7%	2	1	3	1	1	0	4	0	1	0	1	6.33
United Kingdom	GG	54.0%	2	1	3	0	1.5	2	2	0	0	0	1	5.23

GG – General Government
SC – Social Security
LG – Local Government

23 European Commission, Fiscal rules database, https://ec.europa.eu/info/publications/fiscal-rules-database_en (25.06.2021).

RG – Regional Government
CG – Central Government
Source: Own study based on: Fiscal rules database, https://ec.europa.eu/info/publications/fiscal-rules-database_en (25.06.2021).

Table 3. General government expenditure to GDP by function (COFOG) 2010–2019 in %

Country	Time										FRSI in 2019
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	
Austria	52.8	50.9	51.2	51.6	52.4	51.1	50.1	49.3	48.7	48.4	7.33
Belgium	53.9	55.3	56.5	56.1	55.6	53.7	53.1	52.0	52.2	52.1	5.53
Bulgaria	36.3	33.9	34.4	37.9	43.3	40.3	35.0	34.9	36.6	36.3	7.3
Denmark	56.7	56.4	58.0	55.8	55.2	54.5	52.5	50.5	50.5	49.2	5.97
Spain	46.0	46.2	48.7	45.8	45.1	43.9	42.4	41.2	41.7	42.1	8.33
Finland	53.9	53.7	55.4	56.8	57.3	56.5	55.6	53.6	53.4	53.2	2.73
Italy	49.9	49.2	50.6	51.0	50.9	50.3	49.1	48.8	48.4	48.6	6.97
Lithuania	42.4	42.5	36.1	35.5	34.7	35.1	34.2	33.2	33.8	34.6	8.97
Latvia	46.0	40.9	38.6	38.2	38.9	38.7	37.4	38.7	39.4	38.4	3.57
Croatia	48.9	49.4	48.8	48.8	49.2	48.8	47.5	45.3	46.0	47.0	5.13
Netherlands	47.9	46.8	46.8	46.5	45.7	44.6	43.6	42.4	42.3	42.0	5.37
Poland	45.8	44.1	43.1	43.0	42.6	41.7	41.1	41.3	41.5	41.8	5
Romania	40.0	39.6	37.5	37.4	35.3	36.1	34.6	33.5	34.9	36.2	8.2
Sweden	50.4	49.7	50.9	51.6	50.7	49.3	49.7	49.2	49.8	49.3	6.33
United Kingdom	47.3	45.8	45.6	43.9	41.1	42.3	41.5	41.3	41.1	41.0	5.23

Source: https://ec.europa.eu/eurostat/databrowser/view/GOV_10A_EXP__custom_1508184/default/table?lang=en (30.06.2012).

The assessment of the impact of the expenditure rules applied in selected EU countries on the level of public expenditure was made on the basis of an empirical analysis of the examined variables, such as the value of the FRSI in 2019, and the level of public expenditure in 2010–2019. The aim of the analysis was to observe changes in the level of expenditure after the introduction of expenditure rules into national legal systems. Eurostat data show that since 2015, the level of public expenditure has decreased in the vast majority of the analysed countries. From the data presented by the European Commission[24], it arises that expenditure rules with a high index

24 European Commission, Report on Public…, *op. cit.,* pp. 95–96.

(i.e., which fulfil the above criteria) contribute to a bigger extent to the decrease of pro-cyclicality of public spending and ensure greater a predictability of fiscal policy. Expenditure rules do not cause the so-called revenue shock, regardless of whether the times are good or bad. Additionally, fiscal policy is the least pro-cyclical when expenditure rules are strengthened with budget balance rules [25].

3. Stabilising Expenditure Rule

Stable public finance is a key element of macroeconomic stability, in particular in the long term; therefore, it is significant to have proper budgetary frameworks. Polish budgetary frameworks also include, besides public debt rules (also at the local government level), the rule limiting the level of public expenses, i.e., a stabilising expenditure rule.

The objective of the expenditure rule is to limit the increase in expenses of the *general government* sector, excluding expenses fully financed from the EU and EFTA (European Free Trade Association) funds and spending which does not generate high deficit. The task of the stabilising expenditure rule is also to ensure financial stability of the state, both in the long and short terms, as well as to correct possible imbalance by minimising the risk to tighten fiscal policy, especially in the conditions of significant economic downturn and excessive easing during favourable economic climate.[26] This rule is the fulfilment of provisions of the Council Directive 2011/88/EU of 8 November 2011, on requirements for budgetary frameworks of the Member States in the scope of implementing the numerical fiscal rule and fulfilment of obligations under the Treaty in the scope of maintaining the *general government* deficit and debt below 3% and 60% of GDP, respectively. On the other hand, the Stability and Growth Pact obliged the Member States to formulate, and reach in a given time, the so-called medium-term budgetary objective (MTO). Poland established structural deficit of the *general government* sector as its MTO at the level of 1% of GDP[27], and the main tool to assess progress of achieving MTO is the stabilising expenditure rule. Due to the fact that it has a spending character, the mechanism included in it sets the limit of the whole sector expenses increase for the need of annual budgetary acts as well as in the multiannual fiscal planning horizon, being a legally binding limit. In conditions of public finance balance, the limit dynamic of the *general government* sector expenditure is to be a derivative of medium-term rate of GDP growth, and in the situation of excessive deficit or debt, this dynamic is to be automatically lowered, which, as a consequence, should prevent pro-cyclical fiscal policy.

25 C. Belu Manescu, E. Bova, Effectiveness…, *op. cit.*

26 See: E. Lotko, U.K. Zawadzka-Pąk, Prawnofinansowe instrumenty…, *op. cit.,* pp. 142–148.

27 Rada Ministrów, Wieloletni Plan Finansowy Państwa na lata 2021–2024, April 2021, p. 26.

4. Escape Clause of the Stabilising Expenditure Rule Application

The COVID-19 pandemic forced the starting of actions connected with supporting economies of the EU Member States in order to allow ant-crisis actions during the pandemic. The General Escape Clause[28], proposed in March 2020, by the European Commission and accepted by the Ecofin Council, allows the exceeding of expenditure limits determined by the EU Council recommendations on budgetary policies and departure from approved expenditure growth rate. Adoption of this clause into Polish legislature required the amendment of the public finance act[29],which took place on 8 May 2020.

The act amending the public finance act changed the provisions of article 112d which allows for a temporary suspension of the stabilising expenditure rule and applying the escape clause in the situation when the state of epidemic is announced on the territory of the whole country, with simultaneous deterioration of economic situation, i.e., when annual GDP dynamic in fixed prices forecasted in the draft budget act for a given year is lower by more than 2 percentage points from the average GDP dynamic for the previous 6 years provided by the President of the Polish Statistical Office. In the financial year in which the escape criteria are no longer fulfilled, the return clause will be triggered, and the return to the initial assumptions of the stabilising expenditure rule will depend on the GDP level and the pace of economic growth in the year following the year in which the mentioned requirements were fulfilled. The amount of correction, i.e., possibility to spend additional public funds, in particular years after the suspension of the stabilising expenditure rule, will depend on the sum of financial consequences connected with the effects of epidemic borne in the year in which the rule was suspended.

In connection with meeting the requirements included in art 112d of the Act on public finance, the stabilising expenditure rule was suspended. Deviation from the fiscal expenditure rule allowed increased spending of the *general government* sector in 2020 on an unprecedented scale. As a result, the deficit deepened and according to the estimations of the Ministry of Finance amounted to 8.4% of GDP in 2020 (which significantly exceeds the reference value of 3% of GDP).[30] It needs to be emphasised that since the time of preparing budget act in 2015, the main factor determining the level of budgetary expenditure was the stabilising expenditure rule. However,

28 Komunikat Komisji Europejskiej z dnia 20 marca 2020 r. w sprawie uruchomienia generalnej klauzuli wyjścia w ramach *Paktu Stabilności i Wzrostu*: https://data.consilium.europa.eu/doc/document/ST-7102–2020-INIT/pl/pdf (20.05.2021).

29 Act of 28 May 2020, on the amendment of public finance law (J of Laws item 1175) and justification to the draft of the Act on amendment of public finance law, Parliamentary paper no 383.

30 European Commission, Report from the Commission. Poland. Report prepared in accordance with Article 126(3) of the Treaty on the Functioning of the European Union, Brussels, 20.5.2020 COM(2020) 554 final.

the level of spending for 2021 was calculated on the basis of a modified form of this rule, which caused the amount of spending to be increased by a half of the sum of estimated financial consequences on the side of revenues and expenditure arising from discretionary measures directly aimed at stopping the effects of epidemic and at direct support of entities covered by the rule. The proposed approach is to ensure a gradual return to the initial form of the stabilising expenditure rule and in the long term should not threaten financial stability of the state[31]. However, it is important to bear in mind that in connection with the binding general escape clause, in 2021–2022, EU Member States conduct their budgetary policies without including the limits from the EU side regarding the growth rate of the *general government* sector expenditure. Additionally, it is not necessary to annually enhance the structural result of this sector on the adjustment path to MTO[32]. The consequence of the escape clause may be to cover particular Member countries, including Poland, with excessive deficit procedure and therefore to introduce austerity programmes. The table below presents the evolution of the budget balance of selected EU Member States. It should be stated that only Denmark and Sweden met the requirement of fiscal convergence with regard to the deficit. In the remaining countries, the deficit level significantly exceeded the value of 3% of GDP. Thus, there is a clear relationship between the exit clause for applying expenditure rules and the increase in public deficit.

Table 4. General government deficit/surplus to GDP in % on 2010–2020

Country	Time										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Austria	-4.4	-2.6	-2.2	-2.0	-2.7	-1.0	-1.5	-0.8	0.2	0.6	-8.3
Belgium	-4.1	-4.3	-4.3	-3.1	-3.1	-2.4	-2.4	-0.7	-0.8	-1.9	-9.1
Bulgaria	-3.7	-1.7	-0.8	-0.7	-5.4	-1.9	0.3	1.6	1.7	2.1	-4.0
Denmark	-2.7	-2.1	-3.5	-1.2	1.1	-1.2	0.1	1.8	0.8	4.1	-0.2
Spain	-9.5	-9.7	-10.7	-7.0	-5.9	-5.2	-4.3	-3.0	-2.5	-2.9	-11.0
Finland	-2.5	-1.0	-2.2	-2.5	-3.0	-2.4	-1.7	-0.7	-0.9	-0.9	-5.5
Italy	-4.2	-3.6	-2.9	-2.9	-3.0	-2.6	-2.4	-2.4	-2.2	-1.5	-9.6
Lithuania	-6.9	-8.9	-3.2	-2.6	-0.6	-0.3	0.3	0.4	0.5	0.5	-7.2
Latvia	-8.6	-4.3	-1.4	-1.2	-1.6	-1.4	0.2	-0.8	-0.8	-0.6	-4.5
Croatia	-6.4	-7.9	-5.5	-5.5	-5.5	-3.4	-0.9	0.8	0.2	0.3	-7.4

31 Rada Ministrów, Założenia projektu budżetu państwa na rok 2021, Warsaw 2020, pp. 11–13.

32 Rada Ministrów, Wieloletni Plan…, *op. cit.,* p. 27.

Netherlands	-5.3	-4.5	-4.0	-3.0	-2.3	-2.1	0.0	1.3	1.4	1.7	-4.2
Poland	-7.4	-5.0	-3.8	-4.2	-3.6	-2.6	-2.4	-1.5	-0.2	-0.7	-7.1
Romania	-6.9	-5.4	-3.7	-2.1	-1.2	-0.6	-2.6	-2.6	-2.9	-4.4	-9.4
Sweden	-0.1	-0.3	-1.1	-1.5	-1.5	0.0	1.0	1.4	0.8	0.6	-2.8

Source: https://ec.europa.eu/eurostat/databrowser/view/tec00127/default/table?lang=en (22.10.2021).

Conclusions

The analysis conducted in this article leads to the following conclusions:

Firstly, in the EU member states fiscal policy is regulated by national and EU regulations shaping the level of deficit and public debt. The main task of national fiscal rules is to maintain financial stability so that the level of both deficit and debt does not exceed reference values.

Secondly, the basic objective of expenditure rules is to increase predictability and continuity of fiscal policy in the long term and boundary conditions set due to them are to limit public expenditure and freedom of shaping expenditure policy. Additionally, if they are countercyclical, i.e., they are negatively correlated with economic situation, they may fulfil the function of automatic stabiliser. Therefore, expenditure rules are considered as one of the most effective tools of managing public funds.

Thirdly, introduction of the stabilising expenditure rule into the Polish legal order in 2015, whose mechanism includes limiting the level of spending and allows calculation of a legally binding absolute limit of expenditure for a given financial year, should be assessed positively. The more so that as the above analysis indicates, the strength index of the Polish expenditure rule is high and therefore it should be regarded as an effective tool to conduct a stable expenditure policy.

Fourthly, the task of the stabilising expenditure rule is to set limit of the *general government* sector spending at the level guaranteeing to maintain the deficit of this sector below 3% of GDP. The analysis presented in the article showed that the fiscal expenditure rules applied by the governments of individual EU member states have a direct impact on the level of public expenditure and the level of the public deficit. The Escape clause of this rule application means freedom in increasing public expenditure without the obligation of additional receipts to the budget that would balance the spending. This situation was confirmed by the presented data, which show that the deficit level was not exceeded in 2020, in only two countries. A dangerously high increase in the deficit has been observed in the rest of the EU. Thus, the steps taken the by the legislator to temporarily suspend the stabilising expenditure rule may be considered as not being right, since in the current situation financial stability is at

threat. Therefore, one of the main challenges which legal science faces nowadays is to create legal mechanisms guaranteeing sound public finance and not its suspension.

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Niewładcze formy działania administracji publicznej w postępowaniu egzekucyjnym w administracji

Non-ruling forms of activity of public administration in administrative enforcement proceedings

Abstract: The article contains an analysis of the issues related to the application of non-ruling forms of activity of public administration in the performance of public law obligations through administrative enforcement proceedings. In principle, as part of such proceedings, public law obligations, understood as orders or prohibitions within the area of administrative law and other branches of law applied by administrative authorities (tax law, financial law, labor law), are carried out. Non-ruling forms of activity play a major role in administrative enforcement proceedings. The implementation of an enforcement measure may be related to authorized entities taking not only ruling, but also non-ruling actions. In order to apply an enforcement measure (which constitutes an institutionalized form of administrative compulsion), an administrative authority, on occasion, has to take non-ruling activities. Considering, primarily, the significant severity of the compulsion measures that may be applied towards the party obliged under enforcement proceedings, this proceedings should be carried out with respect for the values of a democratic state and with due care for the good of an individual.
Keywords: administrative enforcement proceedings, legal forms of activity of public administration, non-ruling administrative activities, public law obligation, state compulsion, taxes
Słowa kluczowe: postępowanie egzekucyjne w administracji, prawne formy działania administracji publicznej, działania niewładcze administracji, obowiązek publicznoprawny, przymus państwowy, podatki

Wprowadzenie

Postępowanie egzekucyjne w administracji ma na celu doprowadzenie do wykonania obowiązku prawnego, którego zobowiązany dobrowolnie nie wykonuje. Z tego punktu widzenia szczególnie ważna jest skuteczność egzekucji, do której osiągnięcia administracja dąży po to, aby należycie wypełniać swoje zadania. Istotne znaczenie ma przy tym konieczność przestrzegania prawa przez administrację publiczną. Doniosłość tej kwestii nie budzi wątpliwości głównie dlatego, że postępowanie egzekucyjne nacechowane jest elementem przymusu administracyjnego decydującego o uciążliwości dla zobowiązanego podejmowanych przez administrację działań. Administracja ma prawo sięgać po środki przymusu, gdy jest to niezbędne dla zapewnienia wykonania obowiązku, ale nie wolno jej naruszać praw jednostki poprzez nadmierne czy też nieuzasadnione stosowanie dolegliwości. Dzięki użyciu przewidzianych prawem pozytywnym środków przymusu możliwe jest skłonienie zobowiązanego do podporządkowania się obowiązującym regułom albo doprowadzenie do stanu zgodnego z tymi regułami nawet bez działań podmiotu, wobec którego są stosowane.

W nauce oraz orzecznictwie sądowym wskazuje się, że w ramach postępowania egzekucyjnego w administracji realizowane są obowiązki publicznoprawne[1], zaś tylko w drodze wyjątku od tej reguły mogą to być obowiązki o innym charakterze, przekazane do wykonania w trybie tego postępowania. Obowiązek publicznoprawny jest przy tym rozumiany jako nakaz lub zakaz poddany egzekucji administracyjnej, należący do sfery prawa administracyjnego, a także do innych gałęzi prawa stosowanych przez organy administrujące (prawa podatkowego, finansowego, prawa pracy)[2]. Obowiązki o innym charakterze niż publicznoprawny mogą być przedmiotem egzekucji administracyjnej tylko wtedy, gdy przepis prawny wyraźnie poddaje je wykonaniu w drodze tej egzekucji. Mogą być one przekazane do egzekucji administracyjnej jedynie na podstawie przepisu szczególnego (art. 2 § 1 pkt 5 oraz art. 2 § 1 pkt 10 ustawy o postępowaniu egzekucyjnym w administracji[3]). Ich podstawę stanowią inne normy prawne niż normy prawa administracyjnego, na przykład normy prawa cywilnego, jeśli ustawodawca przekaże doprowadzenie do ich wykonania na drogę administracyjną. W doktrynie wskazuje się, że są to zazwyczaj obowiązki pozostające

1 Zob. wyrok NSA z dnia 23 maja 1994 r., IV SA 791/1993, OSP 1996, nr 7–8, poz. 130; wyrok NSA z dnia 11 kwietnia 2001 r., III SA 317/00, ONSA 2002, nr 2, poz. 88.

2 Szerzej na temat obowiązku publicznoprawnego jako przedmiotu egzekucji administracyjnej zob. L. Klat-Wertelecka, Przedmiot egzekucji administracyjnej, (w:) J. Korczak (red.), Administracja publiczna pod rządami prawa. Księga pamiątkowa z okazji 70-lecia urodzin prof. zw. dra hab. Adama Błasia, Wrocław 2016, s. 227–244.

3 Ustawa z dnia 17 czerwca 1966 r. o postępowaniu egzekucyjnym w administracji (tekst jedn. Dz.U. z 2020 r., poz. 1427 ze zm.), dalej: u.p.e.a.

w związku z zadaniami wykonywanymi przez administrację publiczną[4]. Należy zaznaczyć, że obowiązkami publicznoprawnymi są takie nakazy lub zakazy, które wynikają z władczych rozstrzygnięć organów administracji publicznej lub bezpośrednio z przepisów prawa i pozostają „w zakresie administracji rządowej i jednostek samorządu terytorialnego" (art. 3 u.p.e.a.). W przypadku obowiązków o charakterze niepieniężnym każdorazowo należy zbadać, czy mają one charakter publicznoprawny[5]. W sytuacji, gdy obowiązek ma charakter publicznoprawny, przepisy szczególne nie muszą stwierdzać, że podlega on egzekucji administracyjnej, choć czasem tak czynią[6].

Prowadzone w tym opracowaniu rozważania odnoszą się do problematyki prawnych form działania administracji publicznej, która należy do obszarów zainteresowania nauki prawa administracyjnego i ma doniosłe znaczenie na gruncie postępowania egzekucyjnego w administracji. Wielu przedstawicieli doktryny proponowało swoje definicje pojęcia prawnych form działania administracji. Z uwagi na to, że ich szczegółowe omówienie wykraczałoby poza ramy tego opracowania, na jego potrzeby została przyjęta definicja zaproponowana przez Mariana Masternaka, według którego „prawną formą działania administracji publicznej jest prawnie uregulowany, charakteryzujący się zespołem swoistych cech, systematycznie stosowany sposób, w jaki uzewnętrznia się działanie podmiotu powołanego do wykonywania administracji publicznej"[7]. Tak rozumiane prawne formy działania administracji w doktrynie dzieli się na działania władcze i niewładcze[8]. Szczególną uwagę poświęcono w tej pracy zagadnieniu stosowania niewładczych działań administracji publicznej wykorzystywanych w celu doprowadzenia do realizacji obowiązków publicznoprawnych w postępowaniu egzekucyjnym w administracji. Problematyka ta zasługuje na głębszą analizę tym bardziej, że egzekwowaniu tych obowiązków towarzyszy stosowanie przymusu, stanowiącego zwykle poważną dolegliwość dla zobowiązanego. Potrzeba wyróżniania działań władczych i niewładczych administracji jest dość powszechnie akceptowana przez przedstawicieli doktryny prawa administracyjnego[9]. Jako kryterium wyróżniania działań władczych wskazują oni

4 E. Bojanowski, Wykonanie zastępcze w egzekucji administracyjnej, Warszawa 1975, s. 30–31.

5 L. Klat-Wertelecka, Niedopuszczalność egzekucji administracyjnej, Wrocław 2009, s. 160.

6 R. Hauser, Z. Leoński, (w:) R. Hauser, A. Skoczylas (red.), Postępowanie egzekucyjne w administracji. Komentarz, Warszawa 2018, s. 38.

7 M. Masternak, Prawne formy działania administracji publicznej w postępowaniu egzekucyjnym w administracji – refleksje ogólne, (w:) T. Jędrzejewski, M. Masternak, P. Rączka (red.) Prawne formy działania administracji publicznej w postępowaniu egzekucyjnym w administracji, Toruń 2019, s. 23.

8 Szerzej K.M. Ziemski, Podstawy problematyki, (w:) R. Hauser, Z. Niewiadomski, A. Wróbel (red.), System Prawa Administracyjnego, t. 5: Prawne formy działania administracji, Warszawa 2013, s. 53.

9 Szerzej na temat poglądów poszczególnych autorów dotyczących stosowania tego podziału K.M. Ziemski, Indywidualny akt administracyjny jako prawna forma działania administracji, Poznań 2005, s. 117–138.

najczęściej takie cechy, jak jednostronność działania administracji, domniemanie prawidłowości podjętych przez administrację działań oraz przymus bądź dopuszczalność zastosowania przymusu w celu wymuszenia respektowania nakazów czy zakazów wynikających z działań administracji publicznej[10]. Niektórzy przedstawiciele doktryny prawa administracyjnego podnoszą jednak, że jednostronność nie jest cechą charakterystyczną wyłącznie działań władczych administracji, ponieważ jest ona również cechą pewnej grupy działań jednostronnych prywatnoprawnych[11]. Krystian M. Ziemski zauważa, że domniemanie prawidłowości podjętych przez administrację działań wiąże się nie tylko z czynnościami władczymi, ale szerzej – z czynnościami prawnymi i niektórymi czynnościami faktycznymi, dlatego też domniemanie to nie może stanowić samodzielnego kryterium wydzielania działań władczych z pozostałych działań prawnych określanych jako niewładcze[12]. Z tego względu szczególną uwagę zwrócono w tym opracowaniu na kryterium wyróżniania działań władczych odnoszące się do przymusu bądź dopuszczalności zastosowania przymusu w celu wymuszenia przestrzegania nakazów czy zakazów wynikających z działań administracji publicznej.

1. Przymus jako element władztwa administracyjnego

Przymus państwowy stanowi gwarancję realizacji prawa: jest środkiem (instrumentem) działania organów państwa pełniącym istotną funkcję w procesie wykonywania prawa[13]. Przedstawiciele doktryny wskazują, że przymus pozostaje w ścisłym związku z podstawową cechą administracji publicznej, jaką jest dysponowanie władztwem[14]. Przyjmuje się bowiem, iż władztwo administracyjne polega na domniemaniu ważności działania organu i możności przymusowego realizowania jego woli wyrażonej w określonej formie prawnej[15]. Podstawą wykonywania władztwa

10 Szerzej K.M. Ziemski, Podstawy…, *op. cit.*, s. 53.

11 *Ibidem*, s. 54.

12 *Ibidem*, s. 57.

13 J. Radwanowicz, Istota i znaczenie pojęcia przymusu administracyjnego, (w:) J. Zimmermann (red.), Koncepcja systemu prawa administracyjnego. Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego, Zakopane 24–27 września 2006 r., Warszawa 2007, s. 135.

14 J. Borkowski wskazał na przymus państwowy jako jeden z ważnych elementów władztwa administracyjnego, przysługującego podmiotowi spełniającemu organizacyjne funkcje wobec państwa. Zauważył, że „skuteczność czynności prawnych może być zapewniona przymusem państwowym, od czysto potencjalnego zagrożenia jego stosowaniem, aż do bezpośredniego zastosowania"; J. Borkowski, Pojęcie władztwa administracyjnego, AUWr nr 167, PPiA, t. II, Wrocław 1972, s. 46 i n.; J. Borkowski, Określenie administracji i prawa administracyjnego, (w:) System prawa administracyjnego, t. 1, Ossolineum 1977, s. 55.

15 Szerzej J. Radwanowicz-Wanczewska, Przymus administracyjny jako następstwo niewykonania obowiązku prawnego, „Administracja. Teoria–Dydaktyka–Praktyka" 2008, nr 4, s. 105–118.

administracyjnego są normy prawa administracyjnego[16]. Realizując je, uprawniony organ może stosować przymus wobec adresatów tych władczych działań[17]. Chodzi o potencjalną możliwość stosowania przymusu, ponieważ nie musi on być związany z każdym działaniem władczym[18]. Właśnie możliwość zastosowania środków przymusu administracyjnego uznawana jest za podstawowy element konstrukcyjny pojęcia władztwa administracyjnego. W oparciu o kryterium władztwa dokonywany jest podział całokształtu działalności administracji na działania władcze i działania niewładcze. Jan Zimmermann zauważa, iż przyjmuje się na ogół, że: formy władcze to te działania administracji publicznej, które podejmowane są jednostronnie na podstawie unormowań publiczno-prawnych w celu sformułowania nakazów i zakazów jakiegoś zachowania się (np. akt administracyjny). Z kolei formy niewładcze to te działania, które podejmowane są według normy prawa cywilnego (umowy cywilnoprawne) albo wprawdzie ich podstawą jest prawo publiczne, jednak przy ich podejmowaniu sytuacja stron stosunku administracyjnoprawnego ulega pewnemu lub całkowitemu zrównaniu (umowy administracyjne, porozumienia administracyjne)[19]. W literaturze wskazuje się, że podział ten ulega pewnemu zatarciu, ponieważ z uwagi na stopniowalność cechy władczości w ramach działań władczych istnieje możliwość wyodrębnienia działań w pełni władczych i działań o władztwie ograniczonym[20]. Do pierwszej grupy zalicza się działania należące do tzw. policji administracyjnej. Przymus administracyjny może tu być zastosowany bezpośrednio[21]. Do grupy drugiej należą działania, za pomocą których administracja formułuje obowiązki (np. decyzja podatkowa). W tym przypadku przymus administracyjny może być zastosowany pod określonymi warunkami. Do grupy ostatniej zalicza się te formy, które są źródłem uprawnień (np. koncesja). Przymus administracyjny ma tu charakter po-

16 J. Boć przedstawił cechę władztwa jako szczególną cechę prawa administracyjnego, która uwidacznia możliwość jednostronnego rozstrzygania sytuacji indywidualnych, rozstrzygania trwałego i obowiązującego wszystkie podmioty prawne w państwie oraz zabezpieczonego przymusem państwowym, w razie gdy treścią rozstrzygnięcia jest nałożenie obowiązku; J. Boć, Prawo administracyjne, Wrocław 2005, s. 35.

17 W. Chróścielewski jednoznacznie wskazuje, że chodzi o możliwość zastosowania przymusu cechującą działania władcze; W. Chróścielewski, Imperium a gestia w działaniach administracji publicznej (w świetle doktryny i zmian ustawodawczych lat 90-tych), „Państwo i Prawo" 1995, z. 6, s. 50–51.

18 K.M. Ziemski, Indywidualny…, *op. cit.*, s.137.

19 J. Zimmermann, Prawo administracyjne, Zakamycze 2014, s. 324.

20 J. Borkowski, Określenie…, *op. cit.*, s. 55.

21 Tradycyjnie rozumiana „policja administracyjna" obejmuje różnorakie działania reglamentacyjne, prewencyjne i represyjne, skierowane na zapewnienie realizacji przepisów prawa administracyjnego i na ochronę obywatela. Można też mówić o „policji administracyjnej" w znaczeniu podmiotowym, określając w ten sposób, oprócz samej policji, różnorodne służby, inspekcje i straże, a więc wyspecjalizowane organy oraz podmioty administracji państwowej, realizujące funkcję policyjną; zob. J. Zimmermann, Prawo…, *op. cit.*, s. 324 .

tencjalny i będzie stosowany wyjątkowo[22]. Z kolei w odniesieniu do działań niewładczych należy wspomnieć o przypadkach, w których organ zyskuje jednak przewagę nad drugą stroną stosunku prawnego, co ma miejsce, gdy organ administracji publicznej występuje, zwłaszcza w sferze regulowanej prawem cywilnym, z pozycji monopolisty. W takiej sytuacji praktycznie każde działanie tego organu można określić jako władcze[23].

Przedstawiciele doktryny wskazują, że administracja nie musi każdorazowo mieć możliwości ani tym bardziej obowiązku stosowania środków przymusu w każdym przypadku wystąpienia działań niezgodnych z nakazami ustalonymi w drodze działań władczych administracji. Istnienie możliwości stosowania przymusu w odniesieniu do nakazów bądź zakazów wynikających z danej czynności administracji umożliwia zakwalifikowanie jej do działań władczych, jednak niewystępowanie tej cechy w konkretnym przypadku nie decyduje jeszcze o tym, że podejmowana czynność ma być zaliczona do działań niewładczych. Krystian M. Ziemski słusznie zauważa, że skłania to do przyjęcia, iż kryterium dopuszczalności zastosowania przymusu może być stosowane jako pomocnicze, pozwalając na stwierdzenie występowania w przypadku danej czynności istotnej cechy działań władczych administracji[24].

2. Niewładcze formy działania administracji publicznej

Działania niewładcze administracji od dawna stanowią przedmiot zainteresowania przedstawicieli doktryny, ale nie są przez nich jednoznacznie pojmowane[25]. Koncentrując się na współczesnych pracach naukowych, należy zauważyć, że poza Janem Zimmermannem, którego stanowisko zostało już wcześniej przedstawione w tej pracy, również inni autorzy opowiadają się za celowością wyodrębnienia niewładczych form działania administracji. Marek Wierzbowski i Aleksandra Wiktorowska zauważają, iż charakteryzują się one tym, że pozycja organu administracji oraz drugiego podmiotu stosunku prawnego są sobie równe. W przypadku zaś, gdy pewne zróżnicowanie występuje, organ administracji nie zajmuje pozycji zdecydowanie nadrzędnej, jak ma to miejsce w przypadku działań władczych[26]. Janusz Borkowski zaznaczył, że administracja może stosować działania niewładcze, prowadząc

22 *Ibidem*.

23 Szerzej na ten temat: J. Łętowski, Prawo administracyjne. Zagadnienia podstawowe, Warszawa 1990, s. 204–205; W. Chróścielewski, Imperium…, *op. cit.*, s. 59.

24 K.M. Ziemski, Podstawy…, *op. cit.*, s. 59.

25 Szerzej A. Błaś, Niewładcze formy działania administracji, (w:) R. Hauser, Z. Niewiadomski, A. Wróbel (red.), System Prawa Administracyjnego, t. 5: Prawne formy działania administracji, Warszawa 2013, s. 218–234.

26 M. Wierzbowski, A. Wiktorowska, Prawne formy działania administracji, (w:) M. Wierzbowski (red.), Prawo administracyjne, Warszawa 2008, s. 279.

akcję informacyjną lub przekonując do pewnych działań[27]. W odniesieniu do działań informacyjnych podejmowanych jeszcze przed wszczęciem egzekucji administracyjnej należy zwrócić uwagę na zachowanie wierzyciela. W myśl art. 6 § 1b u.p.e.a. przed podjęciem czynności zmierzających do zastosowania środków egzekucyjnych wierzyciel może podejmować działania informacyjne wobec zobowiązanego, zmierzające do dobrowolnego wykonania przez tego ostatniego obowiązku. Powodzenie takich działań może skutkować dobrowolnym wykonaniem obowiązku, dzięki któremu nie dojdzie do stosowania przymusu wobec zobowiązanego.

Wielu przedstawicieli nauki prawa administracyjnego włącza działania niewładcze do kategorii społeczno-organizacyjnej działalności administracji lub do tzw. działań faktycznych. Adam Błaś zauważył, że jeżeli działalność niewładcza pod względem merytorycznym pokrywa się ze społeczno-organizacyjną działalnością administracji, to powinna także czynić zadość wszystkim wymogom stawianym tego typu działalności. Oznacza to, że:

1) „nie może być postrzegana jako działalność pozaprawna,
2) podstawę prawną tej działalności winny stanowić co najmniej normy kompetencyjne,
3) ponieważ działania niewładcze «nie wytwarzają bezpośrednio normy prawnej», przeto dla zapewnienia wskazań zawartych w działaniach niewładczych nie może być stosowana egzekucja administracyjna,
4) jest formą dopełniającą działania podejmowane w innych formach,
5) jeśli działania niewładcze winny być podejmowane na podstawie norm prawa, przeto winny podlegać kontroli z punktu widzenia zgodności z prawem”[28].

W literaturze wskazuje się, że podstawę prawną działań niewładczych stanowią zazwyczaj normy prawne odnoszące się do zadań administracji oraz normy prawne, które określają kompetencje organów administracyjnych[29]. Do działań niewładczych, jak już wcześniej wskazano, należą umowy. W doktrynie wyróżnia się dwa typy umów kwalifikowanych jako forma działania administracji: umowy cywilnoprawne (które są regulowane przepisami prawa cywilnego) oraz umowy administracyjnoprawne, określane też mianem umów publicznoprawnych (które są regulowane przepisami prawa administracyjnego)[30]. Odnosząc się do problemu zawierania umowy cywilnoprawnej, Elżbieta Ura zauważa, że możliwość jej zawarcia przez organ administracji

27 J. Borkowski, Komentarz do rozdziału 7 KPA, (w:) B. Adamiak, J. Borkowski, Kodeks postępowania administracyjnego, Warszawa 2011, s. 390.

28 A. Błaś, Niewładcze…, *op. cit.*, s. 225.

29 *Ibidem*, s. 226.

30 A. Błaś, Prawne formy działania administracji publicznej, (w:) J. Boć (red.) Prawo administracyjne, Wrocław 2005, s. 363; zob. także: D. Kijowski, Umowy w administracji publicznej, (w:) Podmioty administracji publicznej i prawne formy ich działania. Studia i materiały z Konferen-

musi zawsze wynikać z istnienia podstawy prawnej, która pozwala mu na działanie w tej formie. Zawieranie tej umowy przez organ administracji publicznej regulowane jest nie tylko przepisami prawa cywilnego, lecz także przez przepisy prawa administracyjnego, zaś zakres tej regulacji zależy od rodzaju i treści umowy. Poprzez zawarcie umowy cywilnoprawnej organ administracji wykonuje bowiem swoje ustawowe zadania o charakterze publicznym[31].

Wskazany pogląd wiąże się z kwestią umocowania administracji publicznej do zawierania umów. Należy zaakcentować fakt, że treść zawieranej umowy jest zdeterminowana z jednej strony ustawą, zaś z drugiej – wolą stron, i zgodzić się z poglądami przedstawicieli doktryny wskazującymi na istotne znaczenie, jakie dla sfery kontraktowania publicznego ma ścieranie się w tym obszarze dwóch zasad konstytucyjnych[32]. Pierwsza z nich to zasada legalizmu (sformułowana w sposób wyraźny w art. 7 Konstytucji RP[33]). Drugą jest zasada wolności umów, wyprowadzana z przepisów konstytucyjnych dotyczących wolności człowieka, społecznej gospodarki rynkowej, ograniczeń wolności działalności gospodarczej, własności i prawnej ochrony życia prywatnego[34]. Regulacje ustawowe odnoszące się do kontraktowania publicznego powinny uwzględniać obie wskazane zasady. Ziemowit Cieślik zauważa, że treść Konstytucji RP pozwala na stwierdzenie, iż zakres swobody kontraktowania zapewniany administracji publicznej w ustawach zwykłych musi podlegać m.in. ograniczeniom pochodzącym z konstytucyjnej zasady legalizmu[35]. Zasada ta wywodzi się z wyrażonej w art. 2 Konstytucji RP zasady demokratycznego państwa prawnego, która to zasada stanowi normatywne odbicie idei demokratycznego państwa prawnego oraz jest wyrazem dokonania przez ustrojodawcę fundamentalnego wyboru aksjologicznego (i w tym zakresie może zostać uznana za zasadę naczelną, legitymującą także inne zasady prawa)[36].

Zasada demokratycznego państwa prawnego nie została normatywnie zdefiniowana. Jej elementy są określane przez odtwarzanie założeń aksjologicznych systemu prawa lub formułowanie bardziej szczegółowych zasad, które z niej wynikają[37]. Ma ona niewątpliwie zastosowanie także do analizowanych w tym artykule czynności organów egzekucyjnych podejmowanych w ramach postępowania egzekucyjnego

cji Naukowej Poświęconej Jubileuszowi 80-tych urodzin Profesora Eugeniusza Ochendowskiego, Toruń 2005, s. 281 i n.

31 E. Ura, Prawo administracyjne, Warszawa 2010, s. 132.

32 Szerzej Z. Cieślik, Konstytucyjne podstawy kontraktowych działań administracji publicznej, (w:) J. Jagielski, M. Wierzbowski (red.) Prawo administracyjne dziś i jutro, Warszawa 2018, s. 177–189.

33 Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. (Dz.U. nr 78, poz. 483 ze zm.).

34 Szerzej J. Podkowik, Wolność umów i jej ograniczanie w świetle Konstytucji RP, Warszawa 2015, s. 98 i n.; Z. Cieślik, Konstytucyjne…, *op. cit.*, s. 179.

35 Z. Cieślik, Konstytucyjne…, *op. cit.*, s. 181.

36 Szerzej M. Krawczyk, Podstawy władztwa administracyjnego, Warszawa 2016, s. 150.

37 J. Zimmermann, Prawo…, *op. cit.*, s. 82.

w administracji. Jak podkreśla się w orzecznictwie, „ze względu na to, że każde zastosowanie środków wykonania przymusowego stanowi głęboką ingerencję w sferę podstawowych praw i obowiązków obywatelskich, konieczne jest jednak zapewnienie i poszanowanie w tym postępowaniu zasad, które nieodzownie łączą się ze sferą tych praw i obowiązków”[38]. W postępowaniu egzekucyjnym w administracji, zarówno postulat rządów prawa, jak i obowiązek odzwierciedlenia powszechnie uznawanego systemu wartości (na czele z godnością i wolnością człowieka) muszą być uwzględniane. Odstąpienie od przyjętych współcześnie standardów w tym zakresie stałoby bowiem w sprzeczności z ideą państwa prawnego, której podstawową funkcją jest ochrona autonomii jednostki przed nieuprawnioną ingerencją władzy publicznej[39].

3. Działania niewładcze w postępowaniu egzekucyjnym w administracji

W analizowanym w tym opracowaniu postępowaniu egzekucyjnym w administracji zastosowanie znajdują różne umowy. Z uwagi na treść Konstytucji RP wymogom ustalonym przez zasadę demokratycznego państwa prawnego podlegają wszystkie umowy zawierane przez administrację publiczną, zarówno prywatnoprawne, jak i publicznoprawne. Zasada ta dotyczy wszystkich organów władzy publicznej, w tym organów administracji publicznej, i obejmuje wszelkie formy działania stosowane przez nie dla realizacji ich zadań. Jak podkreśla się w doktrynie, obszar zawierania umów jest ściśle wyznaczony przez ustawy, co powoduje, że organ administracji publicznej nie posiada swobody wyboru w zakresie dokonania lub niedokonania czynności prawnej w formie umowy (może on zawrzeć umowę jedynie wtedy, gdy jest ona uregulowana w prawie)[40]. Należy też zwrócić uwagę na normatywne powiązanie treści umowy z ustawą umożliwiające zachowanie tych samych wartości, których przestrzeganie zasada demokratycznego państwa prawnego zapewnia w innych sferach działania władzy publicznej[41]. W myśl polskich przepisów konstytucyjnych działania organów administracji publicznej winny opierać się na przyznanej im kompetencji. Jak zauważa Ziemowit Cieślik, zawierana przez organ umowa jest nie tyle uzewnętrznieniem przysługującej mu swobody kontraktowania, ile prawnie określonym środkiem ograniczenia luzu decyzyjnego przysługującego organowi w związku z wykonywaniem określonej w prawie kompetencji kontraktowej, która wyznacza normatywnie obszar potencjalnych działań organu, wprowadzając

38 Wyrok WSA w Gorzowie Wielkopolskim z dnia 30 października 2008 r., I SA/Go 678/08, Legalis.

39 Z. Cieślik, Konstytucyjne …, *op. cit.*, s. 182–183.

40 J. Boć, Działalność konsensualna (dwustronna i wielostronna), (w:) R. Hauser, Z. Niewiadomski, A. Wróbel (red.), System Prawa Administracyjnego, t. 5: Prawne formy działania administracji, Warszawa 2013 , s. 254.

41 Z. Cieślik, Konstytucyjne …, *op. cit.*, s. 184.

te działania w ramy spójnego porządku prawnego. Powoduje to, że organ, korzystając z takiej kompetencji, wykonuje ustawę w sposób określony przez tę ustawę, czyli w formie umowy (podlegającej później ocenie w świetle normy kompetencyjnej)[42].

Analizując zagadnienie stosowania umów w postępowaniu egzekucyjnym w administracji, należy zwrócić uwagę na etap postępowania związany ze stosowaniem środka egzekucyjnego. W tym przypadku można bowiem zaobserwować istotny związek pomiędzy podejmowaniem przez administrację działań władczych (w których jednostronnie reguluje ona sytuację jednostki, mając przy tym możliwość zastosowania przymusu w sytuacji niepodporządkowania się przez jednostkę ustalonym przez administrację nakazom i zakazom) a wykorzystywaniem przez nią form niewładczych, pozbawionych elementu przymusu[43]. Szczególnie ważna z punktu widzenia egzekucji administracyjnej jest problematyka środków egzekucyjnych, których katalog znajduje się w art. 1a pkt 12 u.p.e.a. Środki te uznawane są za zinstytucjonalizowaną formę przymusu administracyjnego, stosowanego według ściśle określonego trybu postępowania, a skierowanego bezpośrednio na wykonanie obowiązku prawnego[44].

Jeden ze środków egzekucyjnych stosowanych w przypadku realizacji obowiązków o charakterze niepieniężnym stanowi wykonanie zastępcze[45]. Wykorzystanie umowy jako formy działania ma bardzo istotne znaczenie dla stosowania tego środka egzekucyjnego. Znajduje on bowiem zastosowanie w przypadku obowiązków polegających na wykonaniu czynności, które mogą być wykonane za zobowiązanego przez inną osobę, czyniącą to na jego koszt (art. 127 u.p.e.a.). Organ egzekucyjny dokonuje zlecenia z wykorzystaniem formy dwustronnego i niewładczego działania. Należy zauważyć, że zlecenie wykonawcy wykonania czynności za zobowiązanego nie może nastąpić w formie jednostronnego i władczego działania organu egzekucyjnego (aktu administracyjnego), ponieważ oznaczałoby to nałożenie na wykonawcę obowiązku, tak jak na zobowiązanego, mimo że to nie do niego skierowano tytuł wykonawczy[46]. Oznacza to, że ramach stosowania analizowanego środka egzekucyjnego, dla uzyskania skutku w postaci doprowadzenia do wykonania obowiązku publicznoprawnego, celowe jest posłużenie się niewładczą formą działania polegającą na zawarciu

42 *Ibidem*, s. 188.

43 Szerzej J. Radwanowicz-Wanczewska, Umowy w egzekucji administracyjnej, (w:) J. Boć, L. Dziewięcka-Bokun (red.), Umowy w administracji, Wrocław 2008, s. 497–502.

44 J. Jendrośka, Polskie postępowanie administracyjne, Wrocław 2000, s. 162 (zob. także podaną tam literaturę).

45 Szerzej E. Bojanowski, Wykonanie zastępcze w egzekucji administracyjnej, Warszawa 1975; J. Niczyporuk, Zlecenie wykonania zastępczego w egzekucji administracyjnej, (w:) J. Niczyporuk, S. Fundowicz, J. Radwanowicz (red.), System egzekucji administracyjnej, Warszawa 2004, s. 466 i n.

46 E. Bojanowski, Wykonanie…, *op. cit.*, s. 82; zob. też wyrok NSA z dnia 9 października 2007 r., I OSK 1397/06, LEX nr 393211.

umowy. Wskutek wszczęcia postępowania mającego na celu przymusowe wykonanie obowiązku objętego tytułem wykonawczym powstaje stosunek administracyjnoprawny pomiędzy organem egzekucyjnym a zobowiązanym. Z kolei dokonanie wyboru wykonawcy przez organ egzekucyjny prowadzi do nawiązania stosunku cywilnoprawnego między organem egzekucyjnym i wykonawcą, powstającego najczęściej poprzez zawarcie umowy cywilnoprawnej, której przedmiotem jest zlecenie wykonania zastępczego obowiązku podlegającego egzekucji administracyjnej[47]. Wykonawca podejmuje wówczas czynności na podstawie umowy zawartej z organem egzekucyjnym. Istnieje merytoryczny związek pomiędzy obowiązkiem określonym w tytule wykonawczym a realizowanymi zastępczo czynnościami i w związku z tym, w celu uzyskania oczekiwanego skutku, umowa zawarta między organem egzekucyjnym a wykonawcą winna mieć charakter umowy o rezultat[48]. Ten warunek spełniają umowa o dzieło (art. 627–646 Kodeksu cywilnego[49]) oraz umowa o roboty budowlane (art. 647–658 k.c.). Wykonanie zastępcze następuje z reguły na podstawie umowy o dzieło unormowanej przepisami prawa cywilnego[50], a jeśli jest ono realizowane w całości lub w części ze środków publicznych, w grę mogą wchodzić ograniczenia uregulowane Prawem zamówień publicznych[51].

Związek pomiędzy użyciem przymusu administracyjnego (w postaci środka egzekucyjnego) i zastosowaniem działania niewładczego można wykazać także w przypadku realizacji obowiązków o charakterze pieniężnym. Przykładem tego powiązania jest stosowanie środka egzekucyjnego w postaci egzekucji z ruchomości (który polega na zajęciu ruchomości należącej do zobowiązanego oraz jej sprzedaży). Przepisy art. 102 § 1–4 u.p.e.a. dotyczą obowiązków dozorcy (któremu powierza się zajętą rzecz na przechowanie) oraz jego uprawnień do zwrotu koniecznych wydatków związanych z wykonywaniem dozoru, a także do wynagrodzenia za dozór. Z kolei z § 5 analizowanego artykułu wynika, że przepisów § 2–4 nie stosuje się, jeżeli z dozorcą zawarto umowę na podstawie przepisów prawa cywilnego. Jak zauważył Wojewódzki Sąd Administracyjny w Krakowie w wyroku z dnia 11 kwietnia 2019 r. „w stosunkach umownych przechowawca zobowiązany jest do należytego przechowania rzeczy (art. 842 k.c.). Natomiast w sferze stosunków administracyjnoprawnych analogiczny wniosek należy wyprowadzić z brzmienia *ab initio* art. 102 § 1 u.p.e.a., który stanowi, że dozorca obowiązany jest przechowywać zajętą ruchomość z taką

47 T. Jędrzejewski, M. Masternak, P. Rączka, Administracyjne postępowanie egzekucyjne, Toruń 2020, s. 282–283.

48 E. Bojanowski, Wykonanie…, *op. cit.*, s. 84.

49 Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (tekst jedn. Dz.U. z 2020 r., poz. 1740 ze zm.), dalej: k.c.

50 Z. Leoński, (w:) R. Hauser, Z. Leoński, A. Skoczylas, Postępowanie egzekucyjne w administracji. Komentarz, Warszawa 2003, s. 543–544.

51 Ustawa z dnia 11 września 2019 r. Prawo zamówień publicznych (tekst jedn. Dz.U. z 2021 r. poz. 1129 ze zm.).

starannością, aby nie straciła na wartości, oraz wydać ją na wezwanie organu egzekucyjnego lub poborcy skarbowego”[52]. Dozorca ma chronić zajętą rzecz przed uszkodzeniem, zniszczeniem czy zaginięciem. Pozostałe obowiązki dozorcy wynikające z umowy przechowania (art. 835–845 k.c.) to na przykład obowiązek zmiany miejsca i sposobu przechowywania rzeczy, gdy jest to konieczne dla jej ochrony przed utratą lub uszkodzeniem (art. 838 k.c.). Oddający rzecz na przechowanie nie musi być jej właścicielem. Jednak, aby umowa przechowania była skuteczna, konieczne jest oddanie rzeczy przechowawcy[53].

Wnioski

Należy zgodzić się z prezentowanym w doktrynie poglądem, w myśl którego wykonywane w postępowaniu egzekucyjnym w administracji działania, chociaż przybierają postać znanych i badanych przez przedstawicieli doktryny prawnych form działania administracji, są w pewnym sensie specyficzne[54]. Spostrzeżenie to wiąże się z faktem, że działania te są podejmowane w postępowaniu, w którym znajdują zastosowanie środki przymusu państwowego. Akcentowane w tym opracowaniu istotne związki prawa administracyjnego i prawa cywilnego widoczne są wyraźnie przy okazji stosowania środków egzekucyjnych w celu doprowadzenia do wykonania obowiązków poddanych egzekucji administracyjnej. Z przedstawionych przykładów wynika, że niewładcze formy działania odgrywają ważną rolę w postępowaniu egzekucyjnym w administracji. Realizacja środka egzekucyjnego może wiązać się z podejmowaniem przez uprawnione podmioty nie tylko działań władczych, ale i działań niewładczych. Należy zauważyć, że aby zastosować środek egzekucyjny (stanowiący zinstytucjonalizowaną formę przymusu administracyjnego) organ administracji musi czasem podjąć działania niewładcze. Przedstawiciele doktryny wskazują na bliski związek władczych oraz niewładczych form działania. Podnoszą, że władczość nie jest atrybutem tylko nielicznych działań administracji ale wszystkich organów państwa i z tej przyczyny wiąże się ona z wszystkimi działaniami administracji publicznej. Jak podkreślają Jacek Jagielski i Piotr Gołaszewski, działania, które określane są w doktrynie jako niewładcze, nie są pozbawione znamion władczości[55]. Z uwagi na to, że w przypadku postępowania egzekucyjnego w administracji niewładcze

52 Wyrok WSA z dnia 11 kwietnia 2019 r., III SA/Kr 120/19, LEX nr 2647397.

53 Ramy tego opracowania pozwalają na podanie przykładów, ale nie na pełne zaprezentowanie wszystkich umów i innych niewładczych form działania administracji stosowanych w postępowaniu egzekucyjnym w administracji. Szerzej na temat tych form J. Radwanowicz-Wanczewska, Umowy…, *op. cit.,* s. 497–502; M. Masternak, Prawne…, *op. cit.*, s. 11–31.

54 M. Masternak, Prawne…, *op. cit.*, s. 30.

55 J. Jagielski, P. Gołaszewski, W sprawie władczości działań niewładczych administracji, (w:) J. Łukasiewicz (red.), Władztwo administracyjne. Administracja publiczna w sferze imperium i w sferze dominium, Rzeszów 2012, s. 174.

formy działania administracji pojawiają się także jako działania służące realizacji środków przymusu, tym bardziej należy zaakcentować znaczenie ochrony w tym postępowaniu utwierdzonych doktrynalnie i konstytucyjnie wartości. W nauce prawa administracyjnego słusznie wskazuje się, że w działaniach administracji publicznej nie można pomijać wartości państwa demokratycznego podtrzymujących społeczne znaczenie administracji publicznej, które mogłyby być, jak podkreślił Jan Boć, utożsamiane z „nienaruszaniem interesu publicznego, zapewnieniem uczciwości, demokracji, odpowiedzialności i humanistycznego traktowania człowieka, możliwości odejścia od kryteriów wydajności na rzecz budowy zaufania, działań sprawiedliwych i wzrostu przeświadczenia, iż administracja publiczna pomyślana jest dla ludzi i ludziom tym służy”[56]. Postępowanie egzekucyjne w administracji nacechowane jest elementem przymusu służącego wyegzekwowaniu realizacji obowiązku, którego zobowiązany dobrowolnie nie wykonuje. Z uwagi głównie na istotną dolegliwość środków przymusu, które mogą być stosowane wobec zobowiązanego w ramach tego postępowania, powinno być ono prowadzone z zachowaniem wyżej wymienionych wartości oraz odpowiedniej dbałości o dobro jednostki.

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56 J. Boć, Działalność…, *op. cit*., s. 237.

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