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TABLE OF CONTENTS:

ARTICLES

DISCUSSION PAPERS AND COMMENTARIES

REPORTS

ARTICLES

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INTERNATIONAL TRADE LAW AND EMERGING TECHNOLOGIES – A CONCEPTUAL FRAMEWORK /

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The underlining research of this paper has been conducted within the project "Legal issues of Autonomous Vehicles" (project No. GINOP-2.3.4-15-2016-00003 Center for University-Industry Cooperation at Széchenyi University).

Abstract: *The paper aims to establish a conceptual framework for a relation between technological development and the international trade law. Uncovering the complex interaction between these two areas of the social reality is important today, when we are witnessing an intense period of technological revolution, which transforms not only the trade, but also the whole economy, and at the same time, it also creates challenges to the international trade law. The paper sheds light on the background of these processes and offers an introductory analysis with the aim of mapping the topic and the relevant literature. For this reason, the paper examines the roots of this context, and tries to respond the questions, what are the main challenges this revolution poses to international trade law, and how this area of law can rely upon its infrastructure to respond these challenges.*

Key words: *new technologies; industry 4.0; autonomous vehicles; technology and law; international trade law, WTO*

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1. INTRODUCTION

The complex interaction between international trade law and technological development was observed long before the ongoing "digital industrial revolution" (Schwab, 2015).[1] These challenges posed by the technology were mostly indirect, i.e. the technology primarily affected the trade itself, which reacted on the regulation of international trade. One can think of how the advent of the steamships or the railway changed radically the forms of international trade, creating new cross-border transactions and generating new legal problems (Cottier, 2017; Ciuriak, 2018).

Today, we are witnessing a similarly intense period of technological development that stimulates the transformation of economy, and at the same time, creates challenges to the international trade law. These challenges stem not only from the technological change itself, but also from the fact that technological revolutions have been accelerated considerably in the recent decades. Early technological changes took shape over

[1] The current technological development is frequently called as the 4th industrial revolution.

generations until it became widespread in everyday practice, but as we could observe recently, the transition from the analogue to digital technology took only a few decades. Therefore, not only the extent and complexity but also the dynamic of the technological development has changed radically (Baldwin, 2016; Curiak, 2018).

The emergence and spread of new technologies, digitalization, artificial intelligence, automation, or autonomous vehicles also lead to the spread of new products and new services, shedding light on certain new problems of international trade regulations, such as the application of intellectual property rights and industrial property, or trade adverse effects of standards or technical regulations (Gasser, 2015; Glancy, 2015). Some of these challenges relate to the fact that today, the legal framework for the application of these new technologies is predominantly determined by domestic laws (or, to certain extent, regional integrations, like the EU law), therefore the relevant norms, technical rules, and standards may still differ significantly from each other. Due to the lack of substantial international unification, the diverging national regulations may constitute obstacles to international trade, making the exports and imports of the products and services based on these new technological innovations more difficult.

For this reason, the international trade law should find ways and means of regulating or, where appropriate, standardizing requirements for new technologies. On the other hand, the impact of some new, "disruptive technologies"[2] cannot be neglected either, because they require an entirely new approach of international trade law. Sometimes even new forms of regulations are needed, which are adequately able to create entirely new channels, instruments, transactions and, possibly, even revolutionary financial environments (Burri and Cottier, 2012; Cottier, 1996; Porter and Heppelmann, 2014).[3] In the latter cases, the national regulations are not able at all to address the complex problems the new technologies are posing effectively, therefore, the response of international trade law is often forced to go beyond the task of harmonizing diverse national laws. Consequently, new technologies stimulate not only the harmonization, but also the unification, requiring more intensive cooperation of the countries.

The following paper aims at shedding light on the background of these processes, and tries to establish a conceptual framework covering the current "digital revolution" and international trade regulation. The paper just wants to make the nexus between the technology and international trade law visible and therefore, offers an introductory analysis with the aim of mapping the topic and the relevant literature. For this reason, the paper discusses, after analysing the roots of this context, the main challenges this revolution poses to international trade law, and the way this area of law can rely upon its infrastructure to respond to these challenges.[4]

[2] The new technologies are "disruptive" in a sense that these are now building entirely new structures in a way that, at the same time, "disrupt" or even demolish our traditional social structures, our traditional knowledge etc. (see Manyika et. al., 2013).

[3] See e.g. cryptocurrencies. The development of digital technologies is also drastically transforming the way how trade is handled. Not only the impact of the internet and the various platforms can be realized now, but, e.g. the Internet of Things (IoT) can be used now to trace products from the very beginning of the production process to delivering it to the consumer, which might result in simplification of the customs barriers and safety standards. But the proliferation of artificial intelligence can optimize the trade process, and blockchain technology can contribute to "streamlining" the contractual basis of trade transactions. However, in addition to their fundamental commercial benefits, these technologies will evidently help to reduce the costs of trade.

[4] The paper, however, does not address the nexus between the technology and the so called "private standards". Private actors, like NGOs, industrial associations etc. are setting standards as well, which might shape the international trade, but the following analysis is restricted to the relation of the international trade law and, to certain extent, the domestic laws to the technology (see Cottier, 2017 for 'private standards').

2. INTERACTION BETWEEN TECHNOLOGY, TRADE AND INTERNATIONAL TRADE LAW

In the past, the development of international trade was directly influenced by technological advances of transport and communication, as these technological innovations reduced the costs of international trade drastically. However, the trade also reacted to these processes: the technological development created new trade techniques and instruments, which generated more and more trade. The increasing volume of international trade contributed to better access to national markets, increased the interdependence between domestic markets, and strengthened economic integration. These tendencies have been accelerated in the last century, particularly after the World War II. Even in this period, the development of transport and communication technologies has been the most important vehicle of these processes, which contributed to further cost reductions in international trade (Jacks, Meissner, & Novy, 2018; Hummels, 2007; WTO, 2018.).[5] It is also notable, that the technological development affected positively not only trade, but also the whole economy (Jacks, Meissner, & Novy, 2018).[6]

In addition to this development, structural changes have also been taking place in trade. The technological advances enabled the production and distribution having been detached gradually from the domestic processes, thus creating global value chains (Baldwin, 2016). More recently, the "disruptive technologies" are bringing about even more drastic changes. According to the predictions (WTO, 2018, pp. 35–39.), three major structural changes have been apparent recently. First, online markets are spreading, operating in a global, international space, which is posing special regulatory challenges. Second, new products are emerging (media services, personalized goods and services, etc.) that are demanding an increasing share of international trade. Third, digital international markets are emerging and accompanied by a much wider range of products, and at this point, it is very important that stepping into the digital trade is much easier and also cheaper than competing in traditional trade platforms (Khan, 2019).

As this short historical introduction shows, the technology has always been going hand in hand with the trade. The trade was stimulated by technology and contributed to the development of trade. But what can we say about the role of law and legal regulation? The law has always had a place in this context. It is due to the fact that since the technological development has been an important driving factor, it was not only reflected by the trade, but also by the law itself. Not surprisingly, as the law constantly tries to follow the changing societal environment (Abbott, 1997), therefore, the law also played a major role in the development mentioned above. The new inventions in the field of transport helped in channelling products from local, national markets into international trade much more efficiently, thus the new transport technologies contributed to the expansion of the dimension of the international division of labour and the overall volume of international trade, and the law was an important catalyst in these processes. But what is highly important for the role of the law is that even today, the law could and can not only adopt to the development, but as a catalyst, the law is able to react to the technology and trade as well.

[5] It is estimated that the overall costs of trade have fallen by 16% nominally in the period between 1950 and 2000. For instance, the introduction and spread of containers in maritime freight transport led to a significant reduction in ad valorem transport charges. The rail transport conditions will be significantly improved. The electrification of railways, the spread of high-speed trains and intermodal transport are helping to reduce rail transport costs even today. Moreover, e air freight has also been experiencing rapid growth in the second half of the last century. The communication costs have fallen even faster thanks to the satellites, optical cables, mobile communication devices, etc.

[6] In the second half of the 20th century, the per capita GDP increased annually by 3% on average.

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In other words, the connection of technology to international trade law can be described as a "dialectic relationship" (Cottier, 2017). This concept means that the relationship between these areas is shaped by mutual interaction. On the one hand, the technological development affects the law, and on the other hand, the law itself has implications on technological advance, thanks to the specific infrastructure of international trade law. The technology, however, is not only an external factor influencing the trade and law: a great proportion of products traded internationally are somewhat "technological products", i.e. products representing highly developed technological innovations at the markets. It is true not only for the trade in goods, but also for the international trade in services. It means that both the infrastructures provided by technological advances (e.g. internet) and the revolutionary technological inventions (e.g. international telecommunication services, etc.) are subjects of the trade in services. In other words, international trade law reflects on the technological developments shaping the space in which international trade is taking place, and on the other hand, the law must also respond to the challenges arising from new products and services, which have been created by the technological development.

The role of the law is more palpable, if we think of the fact that the technological progress alone does not automatically guarantee the benefits arising from the expanding trade and specifically, the larger and more predictable global value chains. Rather, the experience of the last two centuries shows that the most favourable trade effects can be achieved if the law regulates and controls the technological development.

Behind these transformations, the law mitigates the risks arising from new technologies, defines the framework for the application of new technologies by introducing technical regulations and standards, and by adopting other sectoral norms. These new norms usually appear first in national law, but differences in the domestic regulatory models and regulations may adversely affect international trade. Therefore, national regulations may constitute a barrier to trade and the international trade law comes into the picture here: it plays an important role to harmonize national standards, possibly even through mutual recognition, and by removing regulatory barriers as non-tariff measures.

In addition to the previous characteristics, another essential feature of this dialectic relationship is that the law itself has major implications on the development of technology. In this respect, domestic norms play an important role in creating legal environment for application and development of technologies, therefore, the specific rules of commercial law, competition law, tax law, or industrial property law might determine the way technology can be applied, and in this context, the way the technology proliferates. Moreover, international trade law is also relevant in this context by setting a framework for these domestic regulations and influencing their application. In other words, an increase in trade associated with technological development is also encouraged by international trade law by extending, where appropriate, certain legal guarantees for the use of technology at global level (see, for example, the role of GATS and TRIPS, etc.). At the same time, the international trade law lays down a framework for restrictive domestic policies as well, namely assesses certain social, health or environmental risks, and says how the member states may justify and approve national restrictions on technology, narrowing down its development indirectly (see, for example, Article XX of the GATT).

It arises from the above concept of dialectic interaction that the technological development affects legal regulation as an essential factor, however, the latter is able to react and determine which technologies are accepted, in which ways these technologies can be used, or conversely, which technologies are not allowed to be adopted.

3. TECHNOLOGICAL CHALLENGES AND THE REACTION OF INTERNATIONAL COURTS

3.1. Methods and instruments of international trade law

We have seen that an interaction between technology and international trade law exists, and now there is a question, in what ways and means the international trade law has been able to respond to the challenges posed by the technological development. One of the main functions of international trade law, as mentioned in the introduction, is to reconcile differing domestic laws in order to prevent national technological standards from making restrictions in the international trade. The methods of international trade law can range from technical cooperation between states, through harmonization of standards, to the development of unified international rules.

The least intensive interaction between different regulatory regimes is recorded in technical cooperation. This type of cooperation does not affect domestic decision-making and regulatory autonomy, but allows for informal and formal exchange of coordination of research and other technology related knowledge, which is important in the implementation mechanisms (e.g. testing, licensing, etc.). Therefore, in practice, the regulatory cooperation means collaboration of research institutions and offices of two or more countries, and these mechanisms enable participating governments to share the data collected in the background research, as well as discuss their proposals on domestic technical regulations and standards, even before the regulations are adopted. This kind of cooperation is usually anchored in bilateral trade agreements, but also multilateral rules lay down similar mechanisms of cooperation between the contractual parties. A striking example of a multilateral mechanism is the WTO Agreement on Technical Barriers to Trade (TBT) reguiring the Member States to provide information and to notify the domestic rules when introducing any standard that may constitute a restriction on trade.[7] The results of the subsequent negotiations or consultations held with other WTO Members should be considered in the course of preparation and adoption of new standards and technical rules. However, cooperation can be successful only if the states concerned are able to reconcile their regulatory priorities, which can easily lead to convergence. Without such mutual understanding, the cooperation alone will not deliver the expected results (Cottier, 1996; Pollack, 2009; Cottier, 2017).

Stronger coherence between different domestic regulatory regimes can be achieved by setting down minimum requirements. In this case, the international trade law (e.g. treaty provisions) lays down obligatory requirements concerning domestic technical regulations, standards, procedural requirements, or other technical norms, which must be adopted by the countries concerned. However, it is not the required unification, it does not limit completely the regulatory leeway of the participating countries, they may adopt additional rules concerning the technologies in question. The WTO legal framework on intellectual property rights is based on this logical setting. The TRIPS Agreement lays down a minimum level of protection and requires Member States to adopt and implement these requirements into the domestic law, but allows them to provide more comprehensive protection, i.e. a higher level of standards are fully compatible with this obligation.[8] The advantage of this method is that the parties can find a compromise on the minimum requirements more easily than they could agree on unified standards.

[7] See TBT 2.9. (For further analysis, see Wolfrum, Stoll, & Seibert-Fohr, 2007).

[8] For instance, TRIPS has been providing patent protection for twenty years, but the Member States may apply stricter rules in the pharmaceutical sector. Some preferential trade agreements comprehensively complement the minimum rules of TRIPS in the so-called "TRIPS plus" provisions.

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Under this process, the international trade law harmonizes directly the domestic regulations, but only to the minimum level. Therefore, the level and content of the requirements may still differ significantly from one country to another, which might pose also trade barriers between the participating countries.

Contrary to the minimum requirements that do not eliminate the risk of trade obstacles, setting down maximum requirements for technology standards operates in a different manner. The adoption of "regulatory caps" can efficiently prevent trade barriers and also support international competition. This approach is applied rarely in the WTO law, one example is the plurilateral GATS obligation on telecommunications services. This covers specific principles laid down in the "Reference Paper",[9] which includes also good practices on the limitations of domestic technology regulations. This category of instruments can be approached also from a wider perspective. Cottier and Oesch argue that all WTO rules should be considered as a certain kind of a technology related "maximum standard" that tightens the regulatory leeway of the WTO members *vis-à-vis* the technology (2005). In this interpretation, e.g. the WTO rules on subsidies and other specific areas of WTO law are covered by this category.

As for the relevant instruments of international trade law, an attention should be paid also to the mutual recognition mechanisms of technology standards. Mutual recognition means an acceptance and application of technical norms, which have been laid down by another country. Mutual recognition can take place without explicit coordination on the basis of reciprocity, but is most often achieved through bilateral mutual recognition agreements (MRAs) (Schroder, 2011). The rules for recognizing MRAs can be assessed as preferences granted to the parties and therefore are forming an exception to the principle of most-favoured-nation treatment (MFN).[10] MRAs are necessarily based on the mutual trust of the parties, in other terms, they show confidence in the certification procedures, the institutions, licensing authorities, etc. of the other contracting party. The countries accept the evidence and facts produced by the other countries´ authorities, and rely upon these concerns when allowing the product arising from the other party to enter their domestic market. In practice, it means that the approval of the products by the authorities of the exporting country is accepted by the importing country. Mutual recognition can considerably facilitate the spread of new technologies in the countries covered by the agreement.

It is important, however, that the acceptance of equivalence of standards differs from the mutual recognition mechanisms. Equivalence of technical specifications means that the requirements for products or manufacturing processes approved by another state are considered to be of equal value despite existing differences. Once a product has been lawfully placed on the market in a country, the importing country recognizes the lawfulness of the marketing on the grounds that foreign rules provide a similar level of protection but are not necessarily defined in the same way. Some examples of equivalence can be found in the regional integrations (see EU internal market and trade in goods covered by the EEA Agreement), but equivalence of standards is not required by WTO law. The TBT Agreement only recommends the parties to apply equivalence, but does not oblige the parties to introduce this approach.[11] The principle of equivalence may also appear in free trade agreements in conjunction with regulatory cooperation between

[9] At this time, 82 WTO Member States joined the Reference Paper. Telecommunications Services: Reference Paper 24 April 1996 Negotiating group on basic telecommunications https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[10] According to Article 6.3 of the TBT.

[11] Cottier, on the other hand, argues that this is tacitly exempting parties from the MFN that are applying the principle of equivalence (2017).

the parties, e.g. by the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union.

Finally, the unification can be highlighted as an important regulatory method. The unification means an adoption and implementation of uniform standards and regulations for specific technologies, which mostly take place within bilateral or multilateral agreements. As a result of the unification, the same standard will apply to all participating countries. As the applicable rules are identical, they will be able to effectively remove the trade barriers and ensuring a level playing field. As far as technologies are concerned, a unified law can also mean the uniformity of standards related to production and marketing, but this method has remained exceptional in the international trade law. The TBT Agreement refers to harmonized standards and the SPS Agreement refers to common food safety standards and provides for the application of those standards in cases where the WTO Members concerned are specifically bound by those uniform provisions (Gruszczynski, 2010).[12] It is important, however, that under WTO law, the Member States retain the power of applying stricter standards, instead of the uniform rules. It weakens the scope of the harmonized standards to certain extent, given that stricter regulation may also constitute a barrier to trade.[13]

However, there is no doubt that greater harmonization in the field of standards and the application of the harmonized standards can have an impact not only on the countries concerned. Where cooperation on standards takes place between markets with higher trade volumes, the regulatory cooperation can also have a spill-over effect, consequently the third countries will also adapt to the standard or technical norm on the basis of a voluntary decision. This process is particularly important in the field of technologies such as autonomous driving vehicles. It is expected that the key players in this sector, like the US and the EU, will be able to determine the basic technical standards that will be applied to the technology in question, and thus even bilateral cooperation can have a global impact. If technical regulations are adopted by more and more third countries, involving even larger markets, the technical rules can be formally raised to multilateral level by international standard-setting bodies, creating new, global standards.

This process is of great importance for further development of technology. The standards that are spreading globally also determine the market and the production, which will shape further directions of the technological development. There is a couple of examples in the past, where spreading technical rules generated a kind of "competition between standards", and the market was to select the standard that was finally adopted and implemented globally. This process is facilitated within the infrastructure of international trade law, therefore this experience can be considered also in the future, when new technologies come into existence. For instance, it might be specifically important to predict possible outcomes of the "competition between standards", because there are plenty of cases in the near past, where ultimately, not the most efficient, not the most consumer-friendly, etc. standard won this competition (Ciuriak & Ptashkina, 2018; Ciuriak, 2019).[14]

[12] Article 2.4 TBT provides that Members shall apply such regulations, where they exist domestically, and the same shall apply to the food safety standards in line with Article 3.1 of SPS Agreement.

[13] The WTO dispute settlement ruling on hormone-treated meat between the US and the EU has explicitly confirmed this possibility, thus reducing the scope for harmonized standards for Member States. DS26: European Communities — Measures Concerning Meat and Meat Products (Hormones). https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm.

[14] We might remember the "war of the video formats" in the '70s, when VHS and BETA standards were in harsh competition, which eventually led to the proliferation of VHS, but some argued that VHS quality was below BETA. One can observe, metaphorically, the "war of standards" at the moment e.g. in the area of technologies

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3.2. Specific instruments of the WTO law

After reviewing the methods of regulation, we will finally examine below the means by which the regulation of the World Trade Organization, as the basis of international trade law, can provide answers to the present technological challenges. Although the core of WTO law dates back a quarter of a century, this regulatory system is also relevant in the context of digitalisation and new technologies, so it would be an exaggeration to say that the technological revolution has been taking place in a "legal vacuum" (Aaronson & Leblond, 2018).[15] These challenges, however, may include the adjustment of existing regulations and the creation of new rules in some areas.

WTO law defines the process of international trade in new technologies through a number of instruments. In this respect, the key principles of the WTO – non-discrimination, most-favoured-nation, national treatment – are also essential in the sectors affected by new technologies, Moreover, in addition to the general rules, specific WTO agreements governing trade in goods, services and intellectual property rights, and other instruments, e.g. provisions on subsidies, technical rules, public procurement or trade facilitation also encompass a number of standards that may affect certain aspects of digital technologies (Burri, 2019).

In addition to the basic standards of the WTO, the Member States have made new commitments in some areas over the last two decades. First, the Information Technology Agreement (ITA) is chiefly relevant to our topic, as it complements the WTO rules of trade in goods in a subsidiary manner in the field of the technologies. The original agreement concluded by WTO members at the Singapore Ministerial Conference in December 1996 entered into force in 1997.[16] The whole set of information technology (IT) products are covered by the agreement, it requires all participants to eliminate the applicable MFN duties. The impact of the agreement is immense, it consists of about 200 tariff groups, including computers, telephones, and other electronic devices, covering not only the IT end-products, but also a large scale of parts and components.

The tariff-free treatment introduced by ITA contributed considerably to the development of information technologies. The agreement played a major role in the expansion of trade in IT products, increasing the trade volume drastically to a four-times higher level in the last two decades.[17] The higher trade and production volumes generated lower costs, which also made the prices cheaper. Even though the technological advance has significantly transformed the IT industry, the range of products covered by the ITA has remained unchanged for a longer time and slightly become obsolete. For this reason, in 2012, six countries (EU, US, Japan, Korea, Taiwan and Costa Rica) began negotiations to expand the scope of the agreement. Later, more countries joined these negotiations,

relevant for the autonomous driving. We are facing this process at the very beginning, it means that we have to overcome several technological uncertainties and problems, therefore at the moment it is still difficult to develop technical regulations that will predictably provide the most optimal regulatory framework of autonomous driving, tackling the technical challenges, questions of the safety and consumer protection, environmental problems, etc. It needs intensive multilateral cooperation of states, otherwise, there is a risk that the future standards of autonomous driving will be determined by partial strategic interests of individual countries or, where appropriate, narrower industry or corporate interests, as it happened to the video formats.

[15] Aaronson and Leblond recall the development of GATS as an early example, i.e. the GATS Council on Services found that much of e-commerce falls within the GATS' scope and that GATS obligations cover measures affecting the electronic delivery of services even in 1999 (2018, p. 7). In contrast to this view, Burri and Cottier argue that no real advance has been made since the Uruguay Round in this area (2012, p. 2).

[16] WTO Ministerial declaration of 16 December 2015, on the expansion of trade in information technology products (06926/2016). The agreement was originally concluded by only 29 WTO members, but now has 82 participants already.

[17] 20 Years of the Information Technology Agreement. Boosting trade, innovation and digital connectivity (2017). Geneva: World Trade Organization, p. 12.

which resulted in an amendment on 24 July 2015 with a new product list covering more than two hundred additional products.[18] Even the original list covered by the original agreement included already vital IT products, and the new list added other essential components and tools, e.g. new generation semiconductors, GPS navigation systems, telecommunication satellites, touch screens, optical lenses used in cameras, ultrasonic sensors, etc. The amendment aims at lifting all tariffs vis-à-vis the products covered by the new list, but not immediately, the parties were required to submit schedules for each product for a maximum 7 years-long transitional period (3 years for standard products, 5 years for sensitive products and 7 years for exceptional cases). At the end of the transitional period, most of the customs duties previously applied on the covered IT products will be abolished. Considering also the long-term commitments made by the parties, the ITA will strengthen the global value chains in the IT industry, facilitating the expansion of technological development. The more favourable environment of digital technologies will definitely contribute to the development of cutting-edge technologies, e.g. the trade of autonomous vehicles, as well (Ciuriak, 2019).

Besides the IT agreement, the ongoing negotiations on e-commerce can be mentioned as an example, where multilateral commitments are expected under the umbrella of the World Trade Organization. The negotiations began in 1998 having arrived at an intensive stage in the last few years,[19] but the parties have not been able to reach a compromise, therefore the negotiations are still ongoing. [20]

Beyond the trade in goods, the level of liberalization in other WTO trade regimes is definitely lower. Trade in services might have significance for the new technologies, but the WTO rules (GATS) still provide less impressive framework. Currently, the rules on the relevant industrial sectors, like telecommunications, computer, audiovisual and financial services differ significantly from certain types of services, which are still strictly regulated and limited in the domestic laws (e.g. content-related services). Looking at the individual commitments of the WTO Member States, it is obvious that the computer services and some related services are relatively liberalized, which might favourably imply new technologies and the development of related services. There is a striking example of the European Union that extended its concession to all IT services covered by GATS (e.g. computer consultancy services; software development; data processing services, etc.), providing wide market access. Even though these are anchored in individual concessions depending on the discretion of individual member states, and not set down in multilateral rules yet, these commitments might affect the trade significantly if key players, like the EU, are committed to open up their markets. Not less importantly, these concessions cannot be modified or recalled unilaterally, therefore leave very little room for the Member States to impose restrictions.

Consequently, certain aspects of new technologies and digitalisation have already their own place in the current structure of the WTO law, but a more common and conceptually coherent approach to the technology is still lacking. Even though the WTO is facing an institutional crisis at this time, the member states are discussing reform

[18] The products on the new list are estimated to have an annual trade turnover of more than $ 1.3 billion, accounting for about 10% of current total global trade. Source: Recommendation of the European Parliament on the draft Council decision on the conclusion, on behalf of the European Union, of an agreement in the form of the Declaration on the Expansion of Trade in Information Technology Products (ITA) (06925/2016 – C8-0141/2016 – 2016/0067(NLE)).

[19] WTO Members Submit Proposals Aimed at Advancing Exploratory E-commerce Work. Bridges 22 (13), April 19. Retrieved from: www.ictsd.org/bridges-news/bridges/news/wto-members-submit-proposals-aimedat-advancing-exploratory-e-commerce.

[20] Joint Statement on Electronic Commerce. WTO press release WT/L/1056, January 25, 2019.

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proposals since 2018 (Evenett, 2018; Hoekman, 2018; Schneider-Petsinger, 2019).[21] This ongoing reform process gives also an opportunity to rethink how the WTO could react to the current technological challenges in a more appropriate way.

4. CONCLUSION

The discourse surrounding the implications of the technological development on international trade law provides a plausible understanding of the nexus between these two components of the social reality. As indicated in the above analysis, the dialectic relationship between technological development and international trade law raises regulatory needs against the latter at several points. Technology alone changes the conditions of international trade, e.g. by contributing to the reduction of trade costs or by introducing new forms of trade, e.g. promoting the creation of online trading spaces. On the other hand, technology also has an impact on the subject of trade, products and services, so it can generate a regulatory need as well. It is important to note, however, that the role of international trade law is in many cases only indirect, i.e. the regulatory needs are settled directly by the domestic law, but the leeway of the national legislator is framed and restricted by international trade law by various means. Even though its direct role is less relevant, it is still palpable, this is typically reflected in regional or bilateral trade law regulations (e.g. in EU law), but it forms rather an exception in multilateral trade law.

Within international trade law, the paper also examined the WTO law, concluding that the current legal infrastructure of the World Trade Organization can also address fundamental challenges arising from issues related to new technologies. Among these rules, it was clear that the general principles governing trade in goods, as well as certain specific standards, in particular the Agreement on Technical Barriers to Trade (TBT), are of greater importance. However, other trade agreements, including agreements regulating co-operation in the field of standards (harmonization, mutual recognition, etc.) and regional trade agreements are of great importance in the field of technical regulations and standards. In this respect, WTO law therefore remains in the background, but by enforcing the WTO general obligations and commitments, it can prevent the member states from raising trade barriers that could constrain the spread of technology and also reduce competition.

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[21] Not unimportantly, the current WTO institutional crisis also has a connection to the technology. The current tensions has been triggered by the Chinese practice towards investors, requiring foreign businesses to share their technologies in exchange for market access. This practice called "forced technology transfer" is seen as not legal under the WTO rules. For the WTO crisis and the Chinese practice, see Evenett, (2018).

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PAYING TAXES IN THE DIGITAL AGE / Matej Kačaljak

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This article is a result of the project implementation:
APVV-16-0499 "Securing the effective tax collection within the context of informatization"/„Zabezpečenie efektívneho výberu daní v kontexte informatizácie".

Abstract: *The paper deals with new trends and new challenges for tax administrations in the digital age. A review of contemporary trends in developed economies and recent academic literature indicates there may be a visible trend of shifting the burden of collection and consolidation of data on e.g. transactions, income and wealth from the taxpayer to the tax administration. The paper identifies several particular areas in the Slovak tax law, where (omitting the factor of current technological capacity on the side of tax administration) there may exist possibility to follow this trend. Primarily doctrinal method and method of analysis of legal norms was employed.*

Key words: *pre-populated tax returns; tax compliance; tax administration; tax morale; tax evasion; tax law; Slovak Law*

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1. INTRODUCTION

While it is still relevant to look for an optimum tax model in theory, in practice "*tax policy also has to pay attention to the administrative and compliance costs of taxation*" (Glenday & Hemming, 2013, p. 417). Furthermore, it must be taken into account that though "*tax administration is tax policy [it is stressed by scholars that] no single strategy is appropriate for all countries and under all circumstances*" (Slemrod, 2015, p. 7). On several levels the notion of digitalisation poses a challenge for tax administration. On the substantive level new business models arise which might threaten the tax bases of countries (see Kerschner & Somare, 2017). These considerations are generally out of scope of this paper, though recently some Slovak aspects were dealt with in the academic literature (see Cibuľa & Kačaljak, 2018). On the other hand, the digitalisation provides an opportunity to rethink the existing compliance models with a potential to reduce the overall administrative and compliance costs of taxation.

Though in the past decades reform efforts have focused on the information technology, the "*gains from adopting new technology, however, have often failed to reach expectations. Successful reform efforts did not simply computerize antiquated processes but re-engineered the whole system*" (Bird & Zolt, 2008, p. 796). As Bird (2015, p. 36) notes, a successful reform of tax administration (to align it with the requirements and possibilities of digital age) requires "*not simply 'computerising' existing forms and*

procedures but rather rethinking, redesigning and streamlining systems and procedures—for example, to eliminate unnecessary and unused information required from taxpayers." The above applies also to the tax environment of the Slovak Republic. Recent analyses aiming at, inter alia, assessment of an impact of the information technology on the effectiveness of tax administration have found that the "*automation and computerisation of services of the Financial Administration of the Slovak Republic did not lead to increase in productivity of the employees and reduction of operating costs. Financial Administration of the Slovak Republic is continuously investing in computerisation of services and the reduction of operating and administrative costs would show only in the following years after necessary organisational changes are implemented*" (IFP, 2016).

The focus of this paper is to identify unique features of the Slovak tax system which may provide for potential for a quick and relatively uncomplicated step up in the effectiveness of tax collection. We have disregarded implications related to the necessary organisational details, existing IT infrastructure and public procurement implications as these are relevant merely with respect to the "when" issue but not "if" or "how".

2. PROCESS IMPLICATIONS OF PAYING TAXES

Firstly, taking into account the importance of tax incomes for public budgets worldwide, it must be acknowledged that tax administration has a crucial role in generating these incomes.[1]

"*The standard economic approach to taxation usually ignores such key administrative issues as evasion and avoidance, administrative and compliance costs, and how the way in which taxpayers and tax officials conceptualize and carry out the process of assessing, collecting, and enforcing taxes may profoundly alter the effects of the tax system*" (Bird, 2015, p. 23). Nevertheless, there have already been efforts to track the practice of tax administrations both in developed and developing countries,[2] and there seems to be a general consensus that "*a tax agency, like other government bureaucracies, should strive to use its resources efficiently and effectively*" (Slemrod, 2015, p. 6).

From a legal perspective, we acknowledge the legislators' "*wide margin of appreciation in taxation matters*" (Baker, 2000, p. 298) is being recognised by the European Court of Human Rights as well as by the constitutional courts.[3] Furthermore, from a constitutional perspective in Slovakia, the tax related obligations are subject to a less strict "rationality test" rather than a "proportionality test" (Kačaljak, 2018). Nevertheless, from the perspective of the taxpayer, we would assume that the state should be seeking the least burdensome model.

Thus, in an ideal model from the taxpayer´s perspective the single obligation imposed upon the taxpayer would be to pay an amount of tax notified to him (along with the necessary payment instructions) by the respective tax agency. It should be noted that e.g. "*Singapore has taken this approach to the extreme by not only enabling most taxpayers to avoid filing anything but even debiting their bank accounts for the taxes the government calculates are due*" (Bird, 2015, p. 25).

Taking into account the above, the distribution of roles between the taxpayer and the tax agency would be as follows:

[1] For general data see World Bank (2018), for more detailed data for Slovakia see IFP (2018).
[2] For a brief review of recent research on the subject see Bird (2015) and Slemrod (2015).
[3] For the review of Slovak and Czech case law see Kačaljak (2018).

Table 1
Distribution of Roles between the Taxpayer and Tax Agency (Ideal)

Taxpayer	Tax Agency
payment	data collection
	data processing
	assessment
	record-keeping
	enforcement

Source: Author

As opposed to the above, in Slovakia, which essentially applies traditional (paper age) processes for most of the taxes, the distribution of roles is as follows:

Table 2
Distribution of Roles between the Taxpayer and Tax Agency (Paper Age)

Taxpayer	Tax Agency
data collection	verification
data processing	audit
(self-) assessment	enforcement
reporting	
record-keeping	
payment	

Source: Author

The above distribution stems from the existing reliance on self-assessment as a means of gathering tax related information by the tax agencies. "*While some countries have done away with filing tax returns for certain individual taxpayers, the majority of [surveyed] countries still require the completion of tax returns or reports*" (Äimä et al., 2018, p. 13).
This, however, poses several problems. In particular:

- A significant administrative burden both for the taxpayer and the tax administration. It must be also noted that the introduction of agents (such as an employer withholding tax from the employee's salary) merely shifts the burden as new compliance obligations are imposed on these agents with positive effects stemming primarily from the economies of scale. Nevertheless, it still applies that if "*a tax policy change places more compliance cost on businesses one can expect that, in equilibrium, the prices they charge to their customers will be higher. Thus, both administrative and compliance costs ultimately burden citizens, although only the administrative costs show up in official budgets*" (Slemrod, 2015, p. 12). In Slovakia there have already been limited scale efforts to measure the administrative burden on the side of tax administration (IFP, 2016). Furthermore, there were also academic efforts aimed at measuring the tax compliance burden (see Poláková & Kútna Želonková, 2018).
- Underreporting, which may have several causes, for example:
    - The income is from illicit activities where the doctrines and case law around the world differ. E.g. in the Slovak Republic the case law has come to some controversial conclusions and this has been already discussed in literature (see Galandová & Kačaljak, 2016, 2017; Šamko, 2017). The

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taxpayer may then be prone not to disclose such income as he (i) may be genuinely convinced that such income is out of scope of taxation; and (ii) may claim that even the tax related data is subject to privilege against self-incrimination.

- The income is deemed "too negligible / untraceable" by the taxpayer. Nevertheless, on a mass scale a sum of such negligible incomes might have significant implications for the government revenues. Furthermore, e.g. in Germany the inability to effectively administer and tax certain income and prevent mass scale evasion presented a constitutional issue on the basis of unjust discrimination (see Masárová, 2018).[4]
- Incorrect (self-) application of law, e.g. exemptions.
- Deliberate tax evasion, which is rather thoroughly discussed in literature (see Allingham & Sandmo, 1972; Andreoni, Erard, & Feinstein, 1998; Slemrod, 2007; for Slovak perspective see Sábo & Štrkolec, 2016). In Slovakia the effects of this "tax lottery" problem are aggravated by unreasonably generous conditions for application of the so-called "effective penitence" in criminal law which enables tax evaders to avoid criminal penalty by simply paying the underreported tax and corresponding administrative penalty even at a developed stage of the criminal prosecution proceedings.[5] Such framework directly creates incentives for deliberate underreporting and effectively turns the criminal prosecution proceedings into the next stage of tax enforcement proceedings.

- Difficult verification. The tax authority may have at its disposal techniques and data to verify the amount of reported income, e.g. through the net worth method (Botha, 2009) or through an analysis of "traces of income" (Slemrod, 2015, p. 13). However, as the gap may be a result of both deliberate underreporting as well as of legitimate exemption, no clear conclusions may be drawn from such an analysis. A simple solution, express claiming of the exemption in the tax return form (as applied e.g. in the Czech Republic) causes additional compliance costs as the taxpayer must both report the exempt income and then expressly claim an exemption.

3. NEW TRENDS AND POSSIBILITIES

Though digitalisation is the principal trend discussed in this paper, its potential with respect to tax administration comes from its connection with several other trends.

Firstly, the world economies are moving away from cash transactions. "*Many jurisdictions have introduced specific measures to encourage a shift away from cash-based transactions to transactions that leave an automatic audit trail, more often than not of a digital nature (such as wire settlements or electronic transfers), which can then be tapped into as a source of information and verification by taxation authorities*" (Evans et al., 2018, p. 15). European Union-wide the 500 euro bank note is already being phased out, with the highest denomination remaining 200 euro (ECB, 2016). This applies also to the Slovak Republic which has imposed limitations on cash payments as from 2013.

[4] See discussions in Germany, Federal Supreme Court, BVerfGE 84, 239 (1991).

[5] Al Capone would literally end up a free man should the USA apply the same rules as are currently being applied in Slovakia (see Kačaljak, 2015; for recent thoughts on the topic from criminal law perspective see Hangáčová, 2018).

Furthermore, there is "*a growing trend towards the partial pre-populating or pre-filing of tax returns for individual taxpayers. Consequently, there is a move away from taxpayer completion and tax authority verification, to a system in which the tax authority provides the information to the taxpayer and the taxpayer verifies the correctness thereof*" (Evans et al., 2018, p. 13). Similarly, late review of practices identified "*several aspects of tax administrations that correlate with high performance: (1) getting taxpayers to file online, (2) pre-population for individual taxpayers and pre-certification for business taxpayers*" (Slemrod, 2015, p. 6).

The electronic filing is being further enhanced through the OpenAPI initiatives (for Slovakia see Slovensko.Digital, 2018) where the respective data requirements can be incorporated directly within the ordinary business processes. In other words, the business will no longer be required to separately produce and submit a certain piece of data if this may be automatically submitted to the tax administrator by its (e.g.) accounting software.

The above then aligns with the new cooperative compliance initiatives (Kirchler, Kogler & Muehlbacher, 2014), where discussions (and arguments) between the taxpayer and a tax authority are anticipated not over the quality of records and evidence but over the core issues of interpretation and application of legal rules.

Finally, the above considerations touch upon the issue of further usefulness of forms in the administration of taxes. Taking into account the historical role of a document form as the prerequisite for mass processing of data, one must not forget that their principal role is to gather the data.

Now, as it is anticipated that the data necessary for evaluation of amount of income or other values relevant for the administration of taxes will be gathered from third parties (ideally through integrated interfaces), forms will become redundant with respect to data collection. In fact, one may reasonably assume that the use of manually filled out forms for data collection presents a significant risk of error.

On the other hand, the forms are still useful in the (self-)assessment stage where the taxpayer makes decisions on e.g. claiming exemptions.

To conclude this part, the above trends provide for redistribution of roles between the taxpayer and the tax agency as follows:

Table 3

Distribution of Roles between the Taxpayer and Tax Agency (Digital Age)

Taxpayer	Tax Agency
(self-) assessment	data collection & processing
(assisted) reporting	record-keeping
payment	audit
	enforcement

Source: Author

4. SLOVAK LAW IMPLICATIONS

There are several legal implications that must be taken into account in the Slovak legal environment. These will be discussed below through the perspective of a pre-populated tax return. Potential legal obstacles as well as potential benefits will be discussed as well.

4.1 Personal Income Tax

As indicated above, pre-populated personal tax returns are becoming a standard in developed countries.

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With the steady progress towards cashless economy and global initiatives aiming at automatic exchange of information on financial accounts (Evans et al., 2018, p. 17; Koroncziová, 2018) the tax administrations will shortly have better overview of the taxpayers financial assets (and indirectly of his income) than the taxpayer.

What is ironic from the Slovak law perspective is that currently the Slovak tax administration does not have at its disposal the same data with respect to Slovak tax resident individuals as (i) it receives with respect to the very same individuals from foreign tax administrations and (ii) that it provides to foreign tax administrations with respect to Slovak tax non-residents. In other words, the Slovak tax administration has at its disposal data on foreign but not domestic financial accounts of a Slovak tax resident individual. This presents a material barrier to implementation of pre-populated personal tax returns in Slovakia.

There does not seem to be a valid reason for this discrepancy. In the Czech Republic there has been recent discussion with respect to automated collection of data from banking institutions (Boháč, 2018), but in our view these situations are not comparable. The Czech case involved provision of data on individual transactions (not aggregates) and, further, the data was not supposed to be used for estimation of tax base of the individual making the payment but instead to verify the correctness of reports of the recipient of the payment.

Furthermore, in the Czech case the Constitutional Court did not rule that automated collection of transaction data is not permissible *per se*, it merely remarked that there does not seem to be valid justification for such a step from the proportionality perspective.

The situation seems easier if we are advocating the pre-populated tax return concept. There would be significant trade-off in the form of shifting the burden (and the risk of error / underreporting) of collection of data on income from the taxpayer on tax administration. Taking into account the economies of scale and the fact that the taxpayer is invariably required to report the same data also under current legislation, there seems to be sufficient justification even under the more strict proportionality test.

Furthermore, shifting the burden to tax administration will have implications also with respect to the exempt income (as this will have to be expressly claimed) and income from illicit sources. The main argument in the Slovak case-law against penalising taxpayers for non-disclosing income from illicit sources was that the taxpayer would be *de facto* forced to self-incrimination (see Galandová and Kačaljak, 2016). In the pre-populated tax return scenario, the situation changes significantly. The income (unclassified as to its source) would already be stated in the pre-populated tax return and the taxpayer will now face the dilemma to either (quietly) pay the tax or exclude such income and risk audit and potential criminal consequences.

Finally, along with the design of framework for pre-populated tax returns, it would be the right time to (i) rethink the existing effective penitence rules, which as was indicated above, incentivise taxpayers to evade taxes, and, instead, (ii) design suitable voluntary disclosure programs on the basis of experience from other jurisdictions (for comprehensive review see Evans et al., 2018).

4.2 Corporate Income Tax

With respect to corporate income tax, the situation is a little different. Pre-populated tax returns do not seem to bring such significant benefits as with respect to individual taxpayers because the emphasis is not on the collection of data on income (standardly the tax base is being assessed from the profit / loss statement which businesses draw up invariably) but on the application of tax related adjustments.

However, the potential lies in holding the relevant book-keeping data with tax administration. In Slovakia the taxpayers are required to submit financial statements along the tax returns, which by itself presents an administrative burden. At the same time, the disclosed financial statements contain only aggregate data and so the record-keeping obligation remains with the taxpayer.

A simple solution in the age of digital communication seems to be in storing the accounting data with tax administration.

There do not seem to be significant obstacles from the legal perspective. Firstly, data on corporations are not subject to data protection rules or constitutional / international law rules regarding protection of privacy.

Secondly, businesses in Slovakia are already under an obligation to produce and maintain accounting records in line with the Slovak accounting rules or the International Financial Reporting Standards. In addition, we would refer to the required records doctrine being thoroughly developed by the US courts and literature (see Salzburg, 1986) under which even with respect to individual's certain data (mainly data generated under a statutory obligation) in principle may not be subject to rules on protection of privacy (as the data is not private in the first place).

Thus, it seems that the reasons why the accounting data was not stored with the tax administrator in the paper age were purely practical. It was less burdensome to keep the records with the taxpayer and provide unlimited access to the tax administrator in case of audit than to submit regular copies of the documentation to the tax administrator. In the digital age this needs to be reconsidered. Infinite digital copies of the entire documentation may be created and stored in multiple places. Moreover, in the age of cloud computing it is possible to access the same document from literally any place on the globe. This is a significant point in discussions regarding the integrity of data being stored in multiple places. The argument may be further developed when taking into account the technological possibilities hinted by e.g. blockchain technology, in particular the distributed ledger (for systematic review see Yli-Huumo, Ko, Choi, Park, & Smolander, 2016; for Slovak perspective see Poláková & Rakovský, 2018).

Furthermore, central digital storage of accounting records would prevent situations where the entire records were (rather conveniently) lost or destroyed.

Finally, in the future there may be potential for cross-verification of accounting records of different taxpayers, which may have implications also from the private law perspective (e.g. in disputes over the existence of certain payment claims).

4.3 Multi-stage Consumption Tax (VAT)

Similar implications as with respect to the corporate income tax apply to the VAT system *mutatis mutandis*. The EU VAT rules already regulate issuance of invoices in digital form, though at the moment the paper and digital form should be considered equal and, thus, no EU Member State may make a digital format mandatory (see Terra & Kajus, 2018, p. 1446).

Simultaneously, several EU Member States, including the Slovak Republic and following up on the Slovak experience also the Czech Republic (see Liška & Snopková, 2015) have already implemented additional reporting obligations as measures to combat VAT frauds. In Slovakia, regular VAT reconciliation statement is filed in addition to a VAT return (which in essence contains only aggregate data). Such statement currently

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requires the taxpayer to report data from the invoices issued and received in the respective period.[6]

Again, when taking into account that the invoice is a document form in itself, what is actually relevant is the data it contains. Thus, the digital invoice does not necessarily have to be a separate document. Rather, it needs to be a consistent set of data required by the applicable law and provided to the counterparty (and to the tax administrator in the reconciliation statement).

At the European Union level, there already exists a technological framework for e-Invoicing (European Commision, n.d.) with the European Electronic invoicing standard being published under reference EN 16931 – 1:2017 and being mandatory for invoices issued as a result of performance of contracts subject to public procurement processes based on the Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement. In the Slovak Republic the act transposing the directive became effective from 1 August 2019 and the actual operation of electronic invoicing system is anticipated in 2021.

What now remains is to deliver the invoicing data to a central interface maintained by the tax administrator. Out of this data the (pre-populated) regular tax return will be generated automatically and the reconciliation statement will become obsolete.

The tax administrator would at the same time receive a benefit of cross-verification in real time (rather than at the end of each tax period) and the burden on taxpayers would also be reduced as now only one taxpayer will have to actively issue the invoice with the recipient merely acknowledging its existence (save for situations when the invoice is disputed in which case it will be anticipated that the recipient actively highlights this fact in the central interface).

As is clear from the above, several crucial elements will already be in place in 2021, namely the common e-Invoicing technological standard and data infrastructure (though at first limited only to public procurement contracts). The focus should then be on designing incentives for the businesses to participate voluntarily in this new e-Invoicing infrastructure as the legislation-based approach is not feasible on the national level without the change of rules on the European Union level.

5. CONCLUSIONS

As discussed in detail above, the Slovak tax administrator may gather some low hanging fruit with the use of information technology provided it reflects recent global trends. There do not seem to be significant legal obstacles to implementation of changes. To the contrary, minor legislative changes may lead to the significant improvement on overall compliance levels. The Slovak tax administration may already build on the best practice of other tax administrations and take into account the existing case law, according to which the move to, inter alia, pre-populated tax returns seem generally feasible. Furthermore, now it seems to be the right time to contemplate the design of incentives for using the e-Invoicing format in business-to-business communication with the ultimate aim of making it a prevalent option in the near future.

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ABOUT NON-POSITIVIST PERSPECTIVE ON LEGAL VALUES IN INTERNATIONAL LAW / Mario Krešić

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Abstract: *The distinction between legal and non-legal values can be made from the aspect of legal system analysis. Since the content of the legal system depends on the identification of norms that establish such content, the problem of the identification is crucial for any kind of consideration of legal values. In discourse of international legal scholars, we can recognize attempts to identify values which are not dependent on the existing social practice. The purpose of this paper is to analyse such an approach to legal values as opposite to the positivistic account of the law and to analyse the main objection to this non-positivist perspective.*

Key words: *theory of law; international law; legal values; peace; rule of law; constitution*

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1. INTRODUCTION

The important conceptual problem for the international law is the determination of the axiological content of the legal system. The attempt to bring some light to this theoretical problem in this research is inspired by the practical considerations. The discourse of international actors often includes values, although it is not always clear whether these refer to the legal values or other sorts of values the implementation of which cannot be demanded by calling for legal consequences. For example, the argumentation for international intervention can, in the event of a massive human rights violation, be perceived as a form of a political discourse, if we demand intervention be taken to stop such an unjust event and political responsibility assumed. On the other hand, the argumentation could be understood as a legal discourse if it is, for example, based on legal values.

In this contribution the basic conceptual problem is divided in two parts. The first is the problem of the classification of different theoretical approaches to legal values and the second is the applicability of these theories to the international law. The analysis of these problems will be focused on two groups of non-positivist theories and, within the scope of this research, they will be addressed in the following manner: a) by applying the analytical tools as defined in this research to those discourses of legal scholars on legal values which are intuitively considered to be of a non-positivist kind and; b) by exposing this non - positivist approach to criticism based on the concepts known in the legal theory. The purpose of this research is to provide a meta-theoretical framework for the clarification of non-positivist perspective to legal values and to indicate the main challenge(s) to this perspective. We claim that some of these theories can be better

understood if looked through the lenses of the analytical tools of legal system, fundamental norms, the inherent values of law and the specific qualities of constitutional norms (first thesis); and that the main challenge for their applicability in the international law comes from the specific classification of different types of communities (second thesis).

The outline of the arguments is the following. The theory of the legal system enables us to define the international legal values by the membership of norms - which contain these values - in the legal system (section 2), but this approach raises a new question of the criteria for membership. The concept of inherent values and constitutional values (section 2) enables us to recognize attempts to respond to this question by elaborating legal values independently of the will of states in the theory of international law, either through the determination of international law's inherent values (sections 3 and 4) or by determination of the international constitution whose content does not depend on the actual practice of states (section 5). Among the objections to these theories (section 6), we will elaborate on the one that seems to be the most challenging. It is based on the thesis that the appropriateness of a methodology for the determination of legal values depends on the type of the community in which the methodology aspires to be applied.

2. LEGAL VALUES IN THE LEGAL SYSTEM

The distinction between legal and non-legal values can be made from the aspect of legal system analysis. We can commence from the assumptions that the concept of the legal system is applicable to international law, that demarcation between legal and non-legal norms in international law is best explained through the concept of law-applying bodies, and finally, that, at determination of its limits, the international legal system is to be considered in the legal as well as in the socio-political and self-understanding criteria perspectives (for these characteristics of the legal system analysis see Dickson, 2012).

2.1 Legal and Non-Legal Values

From the perspective of the legal system, the legal values are values contained in explicit or implicit norms enjoying specific characteristics. Those norms, which we call fundamental norms, can be defined as norms which: a) have specific structure; b) are fundamental; and c) define which legal values belong to the legal system. This stipulative definition of fundamental norms is partially based on the existing insights of legal theorists (e.g. Harašić, 2015; MacCormick & Summers, 2016, pp. 522–525; Padjen, 2006, p. 119; Visković, 1973, p. 198).[1]

[1] What we call fundamental norms is close to what some authors name as "value principles". Žaklina Harašić is proposing to use this term since there is no (clear) border between principles and values. The role of general principles is to provide fundamental values according to which all other legal norms shall be interpreted. According to Nikola Visković the existence of value depends on the existence of the value-principle which defines what is desirable and serves as the measure of the proper behavior. Ivan Padjen has emphasized that principles (and this would consequently include what other authors have named as value-principles) are a kind of norms. When the structural distinction between principle and value as well as that between value and goal (value can exist as a measure of action and as an attained goal) is not important, Padjen is using these concepts interchangeably or together, connected by slash. Neil MacCormick and Robert Summers have stressed the importance of values for interpretation. These values may be considered by an interpreter as objectively belonging to the legal order (in terms of natural law or conventionalist legal positivism) and used to justify "decisions which impute to the legislature the intention to uphold fundamental values because of their fundamental character." The references to the structural difference between values, rules and principles will be exposed in the following note.

Firstly, there is a structural difference between values, rules and principles (MacCormick, 2007, p. 29; Padjen, 2006, p. 119).[2] The fundamental norm containing legal value X can be presented as having the following structure: "the value X ought to be protected" If the value cannot be presented as contained in such a norm but appears in the rules with more precise content as the object of that norm, than it could be more suitable to talk about such values as of a kind of legal objects of norms than as of the legal values enjoying fundamental character. Although there is obvious similarity between fundamental norms containing legal values and other principles regarding the pervasive character of both, the structure of principles will be different as long as they are clustered around the fundamental norms with the aim to help secure the value in the fundamental norm (MacCormick, 2007, p. 29). Secondly, the norm formulated in the abstract way as "the value X ought to be protected" can be perceived as fundamental for two reasons. On the one hand, it is not grounded in other norms with more determined content although some of these norms can be perceived as grounded in other fundamental norms of the same structure. On the other hand, it serves as the ground for other norms of a part or the whole legal system (Guastini, 2011, p. 74).[3]

In this second sense, they are perceived as connected to the identity of a part or the whole legal system, they require from legal bodies to consider legal values in any possible case, and require that all other norms should comply with the values defined by these norms. Thirdly, fundamental norms define which legal values belong to the legal system and in that sense serve as the source of information important, in the first line, for the law-applying bodies. It is generally accepted that law-applying bodies ought to seek solutions for legal problems based on the content of the legal system which, as we propose, also includes fundamental norms containing legal values. From this cognitive aspect of looking on the fundamental norms, especially when having in mind the question of the identity of the legal system, the values contained in these norms can be listed, systematized and presented as a separate part of the legal system which can be called the axiological content of the legal system.[4]

In the context of the legal system analysis, non-legal values can be seen as the content of other kinds of normative systems such as the moral, political, esthetic or

[2] Padjen stressed the following structural differences between values, rules and principles. The structure of a value: "Q is good" (where Q stands for a state of affairs), of a rule: "If P, there ought to be Qe" (where P designates and actor and fact-conditions, if any, while Qe stands for the effect of an action), of a principle: "If Pi, there ought to be Qc" (where Pi designates an actor and a condition that are less determined than conditions of a rule, while Qc stands for the consequence of an action). MacCormick has formulated the concept of value in the following way. "*Since it is good to be fair, good to be wise, good to be efficient, good to be reasonable, we can recognize these concepts as naming 'values' […] Around each we are able to cluster some normative generalizations whose observance helps to secure the value in question. […] Since they are, like the values in question, pervasive, we do not normally find it helpful to structure them in accordance with the formula 'Whenever OF, then NC'. These are norms that bear on decision-making in almost any circumstance, so there is no point in singling out particular circumstances of application. They are what we commonly call 'principles', or indeed 'general principles'.*" Since we consider that legal values have to be normative in the legal system, we propose the structure of the fundamental norm containing legal values: "*the value X ought to be protected*".

[3] According to Guastini any set of norms presupposes some values and principles are those norms which contain such values. The only difference to this view is that we propose concept of fundamental norm (or principle) which firstly posit legal values and these values are then elaborated by (other) principles clustered around legal values. The exposition on fundamental nature of norms positing legal values is following Guastini' s exposition on fundamental character of principles.

[4] The example of the explicit fundamental principle on values is the second article of the Treaty on the European Union: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*" (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01)

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economic system. Such values always remain outside the axiological content of the legal system, as we have described it above. Saying that, it does not mean that they cannot become legally relevant values. But they can become legally relevant only, if the legal system makes values belonging to one of the other systems applicable for resolving legal problems. Law-applying organs are not obliged to consider norms, if explicitly not directed by a legal norm to make decisions based on them (Raz, 1972, p. 844).[5] There is a difference of what can be required from courts and what can be required from legislation (Dworkin, 2011, p. 405).[6]

2.2 Identification of Legal Values in International Law

Since the axiological content of the legal system depends on the identification of the fundamental norms on the protection of values that establish that content, from the perspective of the law as a legal system, the problem of the identification is crucial for any kind of consideration on legal values. We propose to differentiate two approaches to the identification of legal values: positivist and non-positivist.

(1) According to the positivist approach, the legal values in the legal system can be identified in two ways: a) indirect bottom-up model and b) direct up-bottom model (Raz, 1972, p. 844). The indirect bottom-up model of identification of the legal values starts with the reference to the number of particular explicit norms formulated in rules and principles which contains the same value as their object. After that, based on these particular norms of the positive legal system containing the same value, the interpreter identifies the implicit norm on protection of that value as the fundamental norm for a part of or the whole legal system. It remains up to the existing practice of the law-applying bodies whether the fundamental norm can be identified in this way. If this is not the case the identification of the value in existing particular norms serves only as reference to the object protected in those many different norms. This reference is not a legal norm and cannot be used to regulate situations not governed by those rules and principles.

The second positivist way is direct up-bottom model. It consists of direct identification of the fundamental norms of the protection of values for a part of or the whole legal system. These fundamental norms can be explicitly posited in the normative provisions or established through customs. They can also be implicitly contained in the legal system, if the reasoning of their existence is based on other explicit norms or even on doctrinal assumptions on functioning of the particular legal system. This second possibility depends on the practice of the law-applying bodies to develop implicit norms in such a way. Once fundamental norms are identified in this way, values contained in these norms ought to be protected in all cases, even in those not governed by particular rules or principles (Raz, 1972, p. 844).

Following descriptions of these two models, the most plausible way to start with the determination of the axiological content of the legal system is to identify the fundamental norms of the protection of values by researching normative documents or customs. For example, in the international law the most common sources of norms are (traditional) custom and treaties of international law. As mentioned above, the possibility of developing implicit norms depends on the existing practice of law-applying bodies. This method can be considered positivist method as it relies on the existing social practice (which has posited explicit fundamental norms, enabled doctrinal assumptions

[5] According to Raz, courts apply the rules of the legal system, but it is also possible to apply the rules of other systems.

[6] This differentiation of values is based on Dworkin's distinction of political and legal rights. The first relates to what citizens may require from legislation, and the second to what they can demand from the court itself.

or established relevant customs) and depends on the existing social practice (of the law-applying bodies to practice such method).

(2) Non-positivist approach tries to respond to the problem that positivist approach cannot address. The problem is the situation when the existing social practice of the legal bodies seems insufficient for the interpreter to define the axiological content which he/she prefers. This preference can be based on the insight into values which can be identified in the normative systems commonly considered to be law, or in the legal systems of some legal communities. This is, for example, the situation of the deficit of posited fundamental norms in the international law when compared with the municipal law or, at least, some specific municipal legal systems.

In response to the identification problem, we can recognize attempts in the discourse of legal theory to avoid the method of identification of fundamental norms in the existing social practice of the legal bodies, when determining the axiological content of the legal system. In that sense, these methods can be considered as the non-positivist perspective on the legal values. The common characteristic of the non-positivist approaches to the axiological content is that the omission of or a wrong application of the legal values identified by these methods can be interpreted as a "legal error", whereby the bodies are expected to correct such mistakes.

In this research we will deal with two groups of non-positivist methods.[7] We named the first one as the group of theories on inherent values, and the second one as the group of theories on constitutional values. Before presenting the selected discourses of legal scholars who, as we believe, belong to one of these two groups, we will briefly make some general remarks on the concepts of the inherent and constitutional values which can represent a useful analytical tool in understanding how these theories work.

2.3 Inherent Values

The inherent values of law can be defined as values stipulated by given conception of law. As they are important for the functioning of the law itself, without a necessary reference to other purposes outside the law (e.g. economic, political, moral), they can be called the inherent values of law.

The argumentation on the applicability of the inherent values to legal issues is based on the premise that law has specific characteristics (see Dickson, 2012, pp. 27–30; cf. Schauer, 2005, p. 498).[8] These characteristics are not dependent on the specific political, moral or social circumstances of a particular legal system, but on the relevant general practice of humans "living in a society governed by law". Once these characteristics are described, this description can be used by the interpreter in order to deduce the implicit fundamental norms belonging to the particular legal system by the very fact of the existence of the law itself. The values contained in these norms are interpreted as belonging to the axiological content of some legal systems, even if they are not explicitly expressed in any legal provision and accepted by the existing general practice of the legal bodies in a society governed by the law. The practical consideration on the content of law based on the explanatory descriptions of law is manifested in the

[7] The third approach which can be found in some theories is to determine those political values of the international community which, under specific conditions, can be claimed to emerge as legal. The justification for such claim is not based on the existence of the legal norm directing legal application of the political value, but on the theoretical thesis of the existence of the specific political responsibility of law-applying organs to apply these as legal under specific conditions, even when the application of these norms has not yet been manifested in the practice of any law-applying organs.

[8] At least some theorists construct concepts of law with the reference to the real experiences of those "living in a society governed by law". Besides those who prefer the concept of law as it actually exists, there are other theorists who construct the concept of law to include features of law to which a society should steer.

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discussion on what is called the "general principles of law recognized by civilized nations" including the question whether these principles are to be found in the fundamental character of municipal law or in those that are common to all legal systems (Degan, 1997, p. 99; Shiner, 2005).[9]

The different kind of connections regarding these characteristics can be established in different conceptions of law.[10] Some of the characteristics can be explained as necessary elements without which, according to someone's conception of law, law does not exist or at least is not distinguishable from other normative systems. Some of the examples of such characteristics of law recognized in the theory of law are the following: the existence of the norms of creation, recognition and adjudication, or, in a different version of the same idea, the existence of the norms of creation and application of other norms; the compulsory characteristic of the system; the existence of norms which require specific standards to be met by the process and the result of creation and the application of norms; the capability of the system to govern behavior. The other characteristics can be seen as the instrumental ones, contributing to the realization of the necessary characteristics of the concept of law. For example, the efficiency of law can be seen as an instrumental characteristic of law in measuring the capability of law to realize its necessary characteristics. Finally, some of the characteristics can be seen as conditioned. They are contained in the conception of law under the assumptions of the permanent or contingent, but lasting nature of subjects submitted to law. Consequently, under the assumption that humans are vulnerable and want to survive, the conception of law contains additional characteristics regarding the content of the legal norms, including the norms related to control of violence.

2.4 Constitutional Values

Legal values can relatively easily be determined in the legal system as those contained in the explicit or implicit constitutional norms (constitutional values), under the condition that the constitutional norms are ascribed specific characteristics by the legal bodies. The legal theory and doctrine have described the concept of the constitutional norms with specific characteristics based on the practice of the legal bodies in some municipal legal systems. The interpreter of the sources of some legal systems can use this concept as the premise in his argumentation to provide broader meanings of existing fundamental norms, or to stipulate that some norms are implicitly contained in the system as the fundamental norms.

Some of the specific characteristics of the constitutional norms, which are a prerequisite for argumentation on legal values, can be explained if we imagine the interpreter facing problems coming from an "inadequate" concept of the constitutional norms. The following elaboration is based on Riccardo Guastini's description of the different meanings of the constitution (Guastini, 2011, pp. 153–215).

(1) The first problem arises from the concept of the "constitutional norms" reduced only to political facts, because in that case, the existence of the norms is directly dependent on the practices of the political actors. (2) Even if the concept of "constitutional norms" is seen not as a pure political fact, but as a set of norms, the problem remains, if constitutional norms are understood as the result of the agreement between those who accept this set of norms. If "constitutional norms" are perceived as

[9] Vladimir Đuro Degan is advocating the latter approach in which the general principles of law constitute a prerequisite for the existence and operation of a legal order.

[10] The term conception of law is used for broader definitions of the different characteristics of law. The concept of law refers to the necessary characteristics. The concept of law may be included in someone's conception of law.

an agreement, they are directly related to the will and compromise of those who enter the agreement. This problem can be resolved by explaining the concept of "constitutional norms" as a set of norms which oblige its subjects, not because of the constantly confirmed consent of all subjects, but because of their membership in the community. (3) However, even that is not enough to separate "constitutional norms" from the existing social practices of its subjects, if the concept does not provide a hierarchical superiority of "constitutional norms" over other legal norms. (4) Although not a necessary element for claiming such superiority, the absence or malfunctioning of constitutional supervision as the specific social practice aimed at guaranteeing "constitutional norms", still takes us back to the dependence of the norm-values on the existing social practices. (5) Finally, when all these problems are resolved by the appropriate concept, we can still be confronted with the problem of the modest number of "constitutional norms", if the concept is reduced to the normative document or to constitutional custom that contain only 'constitutional norms' of regulation of the law-operative functions.

3. INHERENT VALUE OF INTERNATIONAL PEACE

Hersch Lauterpacht and Hans Kelsen have both elaborated on the connection between peace and international law. In this article, we will only briefly explain why we believe that they assume the value of peace as an inherent value of the law (see Krešić, 2019, pp. 485–501).

Lauterpacht refers to the value of peace in the context of his methodology of law, according to which there is no conceptual difference between the municipal and international law (1978, p. 9). The conflict of the rules of international law with the standards of (municipal) law presents the conflict with "*the general principles of law and the conception of law itself as generally recognized*." (H. Lauterpacht, 2000, p. 431). The practical consequence of his concept of law can be seen in his argumentation intended to be used by international lawyers, with the aim to make the international courts change the existing rule on compulsory adjudication (2000, p. 435). The argument includes the value of peace as "pre-eminently a legal postulate" (2000, p. 438).

Hans Kelsen establishes that connection through his concept of law as coercive order of behaviour. The main change in his approach to the value of peace appears in 1960 when he abandons the value of peace as the necessary element of the concept of law. It can be argued that this conceptual change refers to the stronger peace-keeping function of securing peace through the prohibition of interference into the private sphere of its subjects, while the weaker peace-keeping function of the law remains, in his concept of law, as the coercive order. The practical consequences of his concept of coerciveness can be seen in Kelsen's critique of the UN Charter. Kelsen considers the general international law, before the Charter, as containing the rule of war and reprisals as sanctions against delict. Consequently, the peace-keeping function of the primitive international law provides that any breach of the law for which war was used as sanction could be considered an international delict. The Charter's peace-keeping regime allows sanction to be taken by the UN only for the delict of threat or the use of force by states. Consequently, the Charter "*has the undesirable effect of depriving of their legal character all obligations established by general international law which are not at the same time obligations under the Charter*" (Kelsen, 1952, p. 58).

This problem of decreased content of the law caused by reduced concept of peace is recognized by contemporary international scholars. The solution can be found in the interpretation of the Charter in two ways: a) to interpret the Charter in such a way as to merge the value of peace and the law and b) to interpret the Charter in such a way as to broaden the scope of actions which require a reaction of the Security Council. The

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first kind of interpretation can be found in the attempt of Alexander Orakhelashvili to interpret the meaning of the value of peace as based on the respect towards the fundamental principles of international law and towards international law considered as a condition of peace.

"*This requires viewing peace against the structural background of international law: there will be peace when states can exercise their rights unharassed. Action for peace cannot be validly motivated by contempt for the legal rights of states. If the fundamental rights of a state are essential to peace, then their exercise cannot as such be understood as a threat to or breach of the peace; therefore, from the outset early doctrinal views on the primacy of peace over justice have been articulated inconsistently and constituted a fallacy*." (Orakhelashvili, 2011, p. 19; see also Orakhelashvili, 2008, pp. 181–194).[11]

The second kind of interpretation can be observed in Jochen Rauber's view that, based on the wording of the Resolution 794 on Somalia, the meaning of the value of peace could be broadened to include the request for "*absence of human suffering from the use of force in inter - and - intra state relations - contrary to the strict wording of the Charter.*" (2009, p. 59).[12] If this position would be adopted by the law-applying bodies, the meaning of the value of international peace would be further expanded so that human rights violations represented a violation of the value of peace.

4. INHERENT VALUE OF THE INTERNATIONAL RULE OF LAW

In the theory of law, it is common to think of the rule of law value, or at least some of its parts, as an inherent value of the law, although theories differ in terms of whether they refer to its inherency as a necessity or as an instrumental kind.

4.1 Definition of the International Rule of Law

The value of the "international rule of law" can be understood as a requirement for subjecting decision-making procedures to the general standards of the international community. In the same way as with its two meanings in the national legal systems (Raz, 1979, p. 212),[13] this requirement in international law can be understood as a limitation of arbitrary behavior. The ultimate purpose of these limitations is to enable subjects to behave in accordance with international law. For the law to be capable of guiding, it is necessary that, on the one hand, the general standards have a certain quality and that, on the other hand, they ensure a consistent and non-arbitrary implementation of such standards. These two sides of the same requirement set the two subgroups of values of

[11] Orakhelahvili expressed the view on the broader meaning of the value of peace in Orakhelahvili (2008): "*There is thus no established meaning of peace and security, although there is consensus that this concept relates to more than just absence of war*". The author refers to the value of "peace and security" as a "non-law" and seems to define this concept as something opposite to a clear norm which can produce a direct impact on the rights and obligations of states.

[12] Rauber pointed out that there is an ongoing debate on which philosophical ground of this interpretation can be based. For our purposes, it is enough to show how the value of peace can be determined as a legal value based on the conception of law as application of the international legal norms, i.e. securing the peace through law, whereby the meaning of this value can vary from the minimal to the maximum covering of the interference in the private sphere of its subjects. The justification of interpretation of the value of peace represents a separate issue.

[13] Raz makes distinctions between the broader and the narrower meaning of the notion of the rule of law. "*Taken in its broadest sense this means that people should obey the law and be ruled by it*." This meaning, as Raz says, has been taken over from Jennings and his work The Law and the Constitution (London, 1933). "*But in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it*."

the international rule of law (Raz, 1979, pp. 214–218; 2019, pp. 3, 8–9),[14] that the axiological part of international law contains, if the rule of law is an inherent value of law.

The first group includes values of legality, legal certainty and legal equality that must first and foremost be met by general international standards. The second group includes values referring to the compliance of conduct with the general standards. The legal value of compulsory international adjudication allows states to protect their rights in the event of violation of the general international standards, and it guarantees the values of legal certainty, legal equality and legality.

If we accept that the inherent value of the rule of law includes the value of compulsory international adjudication and that in the international community it does not exist, there emerges an issue of explaining the existing international community as functioning based on the rule of law.

4.2 Theory of Compulsory International Adjudication

The current attitude of the international community towards the legal value of international adjudication is reflected in the *omnis judex* rule of international law, according to which everyone is the judge in its own cause. Both authors, Lauterpacht and Kelsen, have noticed that the rule is confirmed in the advisory opinion in the *Eastern Carelia Case* and both have provided a general argumentation in favour of compulsory adjudication. For the purpose of this research, it is sufficient to focus on their point that this rule is in conflict with the inherent values of peace, legal certainty and equality. For Lauterpacht, this conflict is seen as the incompatibility with "*the general principles of law and the conception of law itself as generally recognized*." (2000, p. 431). He looks at the value of compulsory adjudication from the aspect of efficiency of law, but also from the aspect of its unreplaceable function to preserve some other essential values of law. The *omnis judex* principle confirmed in the above mentioned court opinion has to be, as a matter of law, inquired into and possibly corrected by the new decisions of the courts (Lauterpacht, 2000, p. 435).[15] For Kelsen, the conflict is perceived as the inconsistency with the other principles of general international law and the conception of law with his evolution thesis. He considers the value of compulsory adjudication as instrumental and as contributing to the efficiency of securing other legal values, and also proposes *de lege lata* solutions to replace the *omnis judex* principle.

[14] In his 1979 elaboration on the rule of law, Raz emphasized eight principles which can be grouped in two groups as mentioned here. In his 2019 account on the rule of law principles, he explicitly mentions principles of generality, publicity, non-retroactivity, and stability which are the same as in the previous work. Among other principles mentioned in the later work, some of them (fair and unbiased process of making decisions, opportunities to consider arguments) can be connected with those mentioned in his previous work regarding application of law while few of them represent an addition to the previous considerations (decisions should be related to declared reasons, it should be made by observing the interest of the governed and by acting in the interest of governed, the doctrine of the rule of law should be part of public culture embedded in education and public discourse; Ibid.). Although the application of law by courts is not specifically mentioned as before, from the text it is obvious that Raz is still considering the principles regarding the compliance of law, among others, by courts as belonging to the rule of law. For example, when commenting Lord Bingham' s list of the rule of law principles, Raz says that this list is considerably overlapping with his own with only two omissions in Raz list: protection of human rights and compliance by the state with its obligations in international law. Lord Bingham' s list includes the following principles: laws should apply equally to all, a way of resolving disputes which the parties cannot themselves resolve should be established, the adjudicative procedures should be fair.

[15] "*The international lawyer must not regard himself as being prevented from attempting that task on the ground that the Permanent Court of International Justice has repeatedly expressed the opinion that it is a clear rule of international law that a State cannot be compelled against its will to submit its disputes with other States for international adjudication, and that its jurisdiction is strictly limited by the will of States.*"

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Both authors consider the realization of the value of peace as connected with the realization of the value of compulsory adjudication. Kelsen believes that "*nothing is more dangerous for peace than the unresolved dispute and peaceful settlement of disputes for which no binding action has been provided*." (2008, p. 32). Lauterpacht points out that "*the reign of law, represented by the incorporation of obligatory arbitration as a rule of positive international law, is not the only means for securing and preserving peace among nations. Nevertheless, it is an essential condition of peace*." (2000, p. 437). In the third section, we have seen that both authors consider peace not only as a mere absence of violence. Peace through application of law belongs to their conception of law and compulsory adjudication contributes to the application of law.

According to Lauterpacht, the value of legal certainty is of the essence to law. It is the certainty of the final decision in a dispute by a body other than the parties to the dispute, which cannot be achieved by parties themselves. "*The object of law to secure order must be defeated if a controversial rule of conduct may remain permanently a matter of a dispute. It must remain so as long as no agencies exist capable of determining existing legal rights with finality and without appeal*." (2000, p. 425). Kelsen considers that the establishment of compulsory adjudication in international law "*is a means, perhaps the most effective means to maintain a positive international law*." (2008, p. 45). Obviously, if the law is not maintained efficiently, there arises uncertainty as to how the states should behave.

Finally, the value of equality of states loses its true meaning without international adjudication. For Kelsen, equality is both a "*tautological expression of the principle of legality i.e. the principle that the general rules of law ought to be applied in all cases in which according to their contents, they ought to be applied*" (2008, p. 37) and the equality of the capacity of duties subjected only to international law (2008, pp. 35–36). When he argues that compulsory adjudication is not in contradiction with the legal value of equality, he in fact provides arguments as to why compulsory adjudication can contribute to that value. More meritoriously, he emphasizes that the submission to law guarantees the coexistence of states as equal, while lack of its application leads to anarchy (2008, pp. 31, 49). According to Lauterpacht, "*there is indeed a glaring contradiction in the idea that, in a society of states which are ex hypothesi independent of one another, and in relation of equality to each other, one state may legally claim the right to remain the judge in a dispute in which the rights of another state are involved*." (2000, p. 429). In his view, "*any doctrine which, in relations between States, postulates the individual interest of the single State as the ultimate standard of values and of legal obligation amounts to a negation of international law*." (2000, p. 430).

4.3 Theory of Interactional International Law

Unlike the previously described way of justifying the value of the international rule of law, the theory of Juta Brunée and Stephen Toope on the interactional model of international law (2010) is adapted to the existing institutional gaps in the international community. The theory includes the two values described on the basis of Fuller's general theory of law. The first one is the inherent value of reciprocity, the second one being the inherent value of the rule of law which corresponds to the description provided in the previous section 4.1.

The value of reciprocity can be understood in several ways. Brunée and Toope refuse to attribute to this value the meaning in terms of mere reciprocity between states as a deduction of directly achievable interests, or as a systemic reciprocity according to which states cooperate to uphold a rule of international law only when they anticipate a long-term interaction on the issue, whereby the benefits of defection do not significantly

outweigh those of cooperation. Opposite to such views, Brunée and Toope share Fuller's idea of the value of reciprocity that has a deeper meaning as the fidelity to interaction through fulfilment of duties (2010, p. 38).

Why should international law be in conformity with the values of the rule of law? Since international law is not based on the hierarchy of norms, the criterion of formal validity cannot establish the legal obligation of states. In the international context, this is only possible when a norm a) is legitimate in the eyes of addressees and b) supports the value of reciprocity. A norm is legitimate when it corresponds to the first group of values of the rule of law. The second group of values of the rule of law regarding compliance, support the value of reciprocity. Even though the emergence of the centralized legal agencies is not perceived as a necessary condition, due to the presupposed existence of the value of "reciprocity as fidelity", Brunée and Toope realize that the law must be applied in order to maintain such a value. "*When explicit rules are unrelated to how states and other international actors actually behave, fidelity is destroyed*." (2010, p. 35). Fuller's eighth value of the rule of law, that of congruence between law and official action, is overtaken by the authors in their own model of international law in a specific way. They interpret this value as a requirement of "*congruence amongst the actions of a majority of international actors*." (2010, p. 35). We can conclude that the interactional conception of international law cannot exist without the value of reciprocity as fidelity, and that that value cannot exist without accepting the content of the legal value of the rule of law. The acceptance should include both value groups of the rule of law value: a) the legal values that the general norms have to meet and b) the legal value of compliance conceived as the principle of majority.

Brunée and Toope have found their theory to have practical consequences for the existing norms of international law. After analysing the norm on the prohibition of torture in light of the eight "rule of law" standards, they found a problem with the criteria of clarity and congruence and, although they were "not comfortable with the conclusion", that the norm does not meet the rule of law standards. Even more, they stressed the possibility that "*the formal existence of an absolute prohibition on torture could still become a dead letter*." (2010, pp. 251, 268, 269–270). It might be argued that their analysis was purely descriptive and intended to emphasize the problems of international law. However, if their theory on international rule of law is consistent, the international judges might come to the same conclusions.

5. CONSTITUTIONAL VALUES OF INTERNATIONAL LAW

The theories of the constitutionalization of the international order enable us to find legal values in the constitution of the international community. The problem is how to prove the existence of such kind of constitution that would enable an extensive interpretation in determining legal values? The solution to the problem can be in ascribing the desirable characteristics to the constitutional norms and, subsequently, in ascribing the status of constitutional norm to those international norms for which the interpreter claims to be in line with desirable characteristics. There are two main theoretical approaches to determination of the relevant characteristics. The first one looks for the relevant forms of practices which allegedly produce constitutional norms as opposite to ordinary international norms. The second approach determines the important material content of norms which makes such norms qualified to be ascribed with the status of

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constitutional norms.[16] We can distinguish two versions of the second approach depending on whether the material content is the matter of theoretical thesis on what counts as the material content of any constitution, or it is the matter of interpretation of political responsibility within a specific international community (the second version is out of the scope of this research).[17] Some scholars on constitutional international norms seems to combine the first approach to constitutional norms with the second version of the second approach (Kirchner, 2004, pp. 59–61).[18]

These different approaches can result in the different lists of constitutional international norms. The difference in determination of the constitutional international norms can also appear due to the different background context of the legal practice from which the interpreter is assessing whether or not an international norm has the relevant characteristics for the assignment of the constitutional status to that norm. The interpreter can search for the constitutional norms from the context of international order, particular regime (e. g. EU) and national order.[19]

We will make observations on some of the desirable characteristics of constitutional norms which can be derived from the theory of Bardo Fassbender, one of the leading advocates of the international law constitutionalization (Fassbender, 2009). We will briefly present his theory through five main features which can be compared with the model of constitutionalization as shown in section 2.3.

(1) According to Fassbender, the international constitution is not a political fact but a set of norms. He believes that there already exists a constitutional law of the

[16] Some concepts such as general principles of law, *ius cogens* and *erga omnes* norms can be used by both approaches for discovering constitutional norms. These concepts can be used either by ascribing to the norm the status of *ius cogens*, erga omnes norms or general principles and, consequently, the constitutional status based on findings of the relevant "constitutional" practices (recognized for instance in the specific producing of legal texts or specific customs); or by determination of the important material content of norms (found in the legal system or in non-legal systems) which makes these norms qualified to be ascribed with the status of *ius cogens* norms, *erga omnes* norms or general principles and, consequently, with the status of constitutional norms.

[17] If the second approach to constitutional norms is based on the concept of the political responsibility, we consider it as belonging to the specific non-positivist approach to legal values (see note 7) which will be presented and analyzed in the separate research.

[18] For instance, according to Stefan Kirchner obligation can be considered as having constitutional status if it arises from the UN Charter, general principles of law, *ius cogens* rules and *erga omnes* rules. After that, the author distinguishes those constitutional rules determined by the rules of the international law itself (*lex lata*) and those rules depending on values which are important enough to be considered as protected by constitutional rules. In addition, the international community as a whole is constitution-making power and this power is not only limited to the community states but includes non-state actors (international organizations, NGOs, networks) which are involved in decision - making, often in informal ways and which impact the material content of international law.

[19] If it is accepted that different contexts can provide different results, the first question is which context is the relevant one, and the second question is how to keep the consistency of all three kinds of legal orders (if this consistency is valued as something to be achieved) when interpretation results either in different interpretation of the constitutional international norms, or in the interpretation of different constitutional norms of international order and different constitutional norms of particular regime and/or national order. In the research of Cadi case by Juliane Kokott and Christoph Sobotta we can found how both questions in regard to the rights of the individuals can appear in practice. Firstly, the court of the regional regime has decided (Court of First Instance of the European Communities, Kadi v. Council and Commission, Case T-315/01, Judgement (21 September 2005)) the case based on its interpretation of the constitutional international norms. Lately, the court of the same regime has decided the case (Court of Justice of the European Communities (Grand Chamber), Kadi and Al Barakaat International Foundation v. Council and Commission, Joined Cases C-402/05 P and C-415/05 P, Judgment (3 September 2008)) based on the interpretation of constitutional norms of that regime. The authors provide a theoretical explanation, derived from doctrinal practice of national courts, how this, insisting on constitutional norms of the regime in the second judgement, can be concealed with the need to keep the consistency of international law and the law of that regime (Kokott & Sobotta, 2012).

international community established by the UN Charter and by core conventions around it. The problem of international practice deviating from the international constitution is solved by Fassbender's conceptual difference between the actual and the normative constitution.[20] The Charter, as a normative constitution, should guide and control the actual relationships of power, rather than describe or reflect them.

(2) Unlike the League of Nations' Covenant which resembles more a multilateral treaty, the UN Charter represents the constitution of an international political community within which international law operates. It is obligatory regardless of the will of states to reach an agreement, because it is based on their membership in the community. The Charter also constrains non-member states, because it is both the constitution of the UN organization, in that context procedural norms only bind UN member-states, and because it represents the constitution of the international community as a whole and, therefore, its substantive norms bind all states (Fassbender, 2009, p. 116). The constitution of the international legal community embraces international law in its entirety, and international general law cannot exist as independent of the Charter.

(3) The hierarchical superiority of the international constitution is an important feature for its separation from the will of states. According to Fassbender, it is "*the highest layer in a hierarchy of norms of international law.*" (2009, p. 118).

(4) The shortcoming of international law is that it lacks sufficient judicial review in protection of its norms. According to Fassbender, the discrepancy between constitutional norms and practices, that is, the inefficiency of the normative constitution, is the result of the lack in judicial practice, because the function of the courts is to determine violation of the constitution and to reestablish the constitutional order (2009, pp. 100, 110).[21] Due to lacking international adjudication, Fassbender turns his focus on states. They represent an important agency for preservation of the core of the constitution of the international community.

(5) The problem of the insufficient number of constitutional values in the Charter is facilitated by regarding the constitution not as a single written legal act, but as a substantive constitution regulating a specific type of matter that belongs to the branch of constitutional law. As mentioned before, Fassbender believes that constitutional law includes not only the UN Charter, but also the core conventions around it, such as conventions on international human rights, for example, the international human rights covenants or the Convention on the Prevention and Punishment of Genocide. "*[T]hese treaty and customary rules can be ascribed constitutional quality if, and to the extent that, they characterize in detail, or further develop, the constitutional law of the Charter*." (2009, p. 122).

The proposed theoretical model grants us a valuable source of international legal values. Provided this theory is accepted, the legal science on international constitutional law as a subdiscipline of public international law (Fassbender, 2009, p. 1) can determine the legal values of the international order. The theory can have direct practical

[20] Fassbender also points to a different view of the real and the normative constitution of Karl Loewenstein (Loewenstein, 1957, pp. 148–149). "*[T]o be real and effective, it [a constitution] must be faithfully observed by all concerned; it must have integrated itself into the state society. If this is the case, a constitution may be spoken of as normative: its norms govern the political process, or the power process adjusts itself to the norms*." (Loewenstein, 1957, p. 148). Loewenstein calls the "nominal constitution" the situation when: "*The factual state of affairs does not, or not yet [or, we may add, not anymore] permit the complete integration of the constitutional norms into the dynamics of political life*." (1957, p. 149).

[21] Although the judicial function of the UN is undeveloped, especially because of a lack of compulsory jurisdiction of the Court of Justice, Fassbender emphasizes the importance of the quasi-judicial function of the Security Council. "*Finally, it should be mentioned that the Security Council, in spite of its prevailing political character, also performs a semi-judicial function, in particular when recommending, under Chapter VI of the Charter, terms of settlement of international disputes or situations which might lead to international friction*."

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consequences, for example, when assessing the Security Council's reform proposal. Fassbender wonders whether the decision on a UN reform belongs to a purely political discourse through which states decide what they want or there exist binding legal standards when states consider different solutions. Since such standards cannot be found in general international law, Fassbender finds them in the Charter in capacity of constitution of states. This theory, according to Fassbender, might be useful for solving theoretical problems and for interpreting the Charter (2009, p. 9).

6. CRITICS ON THE THEORIES ON INHERENT AND CONSTITUTIONAL VALUES OF INTERNATIONAL LAW

The critics that challenge the previously mentioned theories of the legal values of international law can be categorized into three groups: a) critics due to conflicts of values, b) critics due to different interpretations of values and c) critics due to the problematic perceptions of the nature of the international community.

The first two groups do not present an unsolvable obstacle. The conflicts of values can be interpreted, as Kelsen and Lauterpacht claim, as an argument to strengthen the thesis on the existence of values of international law: peace and the rule of law. The human rights' values do not have to be a necessary reason for rejecting the value of the international rule of law if an appropriate institutional framework for the protection of human rights is to be established. Also, different interpretations of the inherent and constitutional values of the legal order do not weaken the argument that such values exist. The main challenge for the theories on the existence of inherent and constitutional values comes from the argument that their existence depends on the presupposed features of the legal community.

Although the international law doctrine can use both methodological approaches for the determination of the international legal values - by researching inherent and constitutional values independent from the existing practice, or by determining the values exclusively through researching the practice of the legal bodies – here the question arises which of these two approaches is most suitable for describing international legal values. It seems that suitability of methodology is related to the characteristics of the community we describe. To clarify this suitability thesis, we will use Dworkin's community models.

Ronald Dworkin proposes three models of communities: *de facto* community, rulebook community and community of principles (1986, p. 208). Community models serve as the ideal types for describing the "*attitudes members of a political community would self-consciously take toward one another if they held the view of community the model expresses*." (1986, p. 209). Thus, if the states, that is, their officials and citizens, see the international community just as a factual one, they would have a different kind of expectations of and concerns for other states and for the international community, than if they look through the prism of the other two models.

In the first model, the states have no interest in each other and interaction takes place to the extent necessary to satisfy their own interests, so the possible emergence of common rules and values is limited to immediate interests rather than a long-term cooperation for everyone's benefit. In the second model, relations are established through political compromises with the aim of long-term planning of joint state activities. While in the third model, the states establish relations, not only through negotiations and political compromises like in the rulebook model, but also through common values that feel binding regardless of current compromises.

Accordingly, in the third model the existence and the content of legal values is not solely the result of a political compromise of all or majority of states or the most influential states in the community. It does not appear to be problematic to argue that in

this type of a community, some values inherent to law, such as peace through law or rule of law, exist irrespective of the existing will of its members. Likewise, the argumentation on constitutionalization and international constitutional values, that might include the mentioned inherent values as well as other values important for the community, such as human rights values, can be seen as a contribution to determining the community values which oblige the states and the legal authorities, regardless of their actual practice. What about the correlation between the model of the community and the existence of inherent and constitutional values in the first and the second model?

In the first one, the frail type of community relations, questions the existence of any kind of legal obligation to respect norms, including those containing legal values. If, for example, we say that there is a value of peace in such a community, then it is disputable whether its members feel legally obliged not to cause war, or they avoid war only because they feel it is their will to do so due to political reasons. In the second model, subjects are as selfish as in the first one, but are legally obliged to respect the mutually binding rules, although only those that arise from negotiation and compromise. This general attitude could possibly have one exemption - the *pacta sunt servanda* principle, in which the legal nature according to some authors cannot be explained by consent of states (Franck, 1988, p. 755). Following Dworkin's description of this model, states consider that the content of the rules exhausts their obligations and that rules contain nothing more than what they explicitly agree on, whereby general rules, such as those in treaties, are created in a way that "*each side has tried to give up as little in return for as much as possible*" (1986, p. 210). The argumentation on inherent or constitutional values whose existence and content is not explicitly agreed on in a particular rule or recognized in the current practice, cannot be a persuasive justification for the source of legal obligations (1986, p. 210).[22] Therefore, international agencies authorized for the implementation of law, if they exist at all, would be obliged to make their decisions in the way consistently reflecting the will of the states at application of standards that the states have agreed on. In this context, the order cannot be considered constitutionalized, if this means that we are to separate its norms from the will of states, and an agreement cannot become a constitution. Similarly, the inherent values of law can be disregarded in the international rulebook community as scientific, political or moral concepts but not as legal values to be protected in all cases no matter what legal provisions or practice looks like.

7. CONCLUSION

The analytical framework consisting of the following concepts – legal system, fundamental norms, inherent values and constitutional norms - can facilitate a better understanding of the non-positivist approach to legal values. The legal value can be defined through the legal system analysis. Since the legal system consists of norms, it is obvious that legal value has to be related to some norms in the legal system. This norm, named as fundamental norm, has specific structure ("the value X ought to be protected"), it is fundamental (not grounded in other norms with exception of other fundamental norms and it grounds other norms) and serves as the source of information for the cognition of the set of legal values of the system (axiological content). The non-positivist approach is described as having the following characteristics: 1) Those following this

[22] According to Dworkin, the rulebook community supposes that *"members of political community accept a general commitment to obey rules established in a certain way that is special to that community [...] They have no sense that the rules were negotiated out of a common commitment to underlying principles that are themselves a source of future obligation; on the contrary, they take these rules to represent a compromise between antagonistic interests or points of view."*

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approach try to resolve the problem they think to exist in the international law (some others may not think that this is a problem or that they have to resolve it). The problem is the gap between the existing practice of legal bodies - production of normative documents, customs of states, acts of law-applying bodies – and the axiological content which the interpreter prefers, especially when compared with the axiological content of the municipal law. 2) This gap is considered by the proponents of the non-positivist approach as a legal error which should be corrected by legal bodies. 3) The axiological content of the international law (which reflects the preferences of the interpreter) is determined by using the methods which avoid the existing social practice in the international law. Two of these methods are: a) the identification of the inherent values defined as those stipulated by the given conception of law and b) the identification of the constitutional norms ascribed with the specific characteristics. The summarized presentation of the discourse of selected legal scholars has shown that these characteristics can be recognized in their theories. Each of the theories exposed – theory of the international peace, theory of compulsory adjudication, theory of interactional international law and the theory of international constitutional values – use one of non-positivist methods (characteristic 3); intends, as it has been shown, to have practical consequences in first line for the interpretation of the existing law (characteristic 2) and can be read as the attempt of their designers to "enrich" the axiological content with those fundamental norms which are, according to the opinion of authors, implicitly contained as such in the international legal system (characteristic 1).

In regard to the three kinds of arguments that can be developed in more detail against the presented theories, we have briefly introduced counterarguments for the two of them (interpretation of the values and conflict of the values). That leaves us with the third objection to non-positivist approach based on the idea of different types of communities: *de facto* community, rulebook community and community of principles. The methodology of determining legal values as independent of the existing practice is suitable only if there is a certain type of interconnection in the international community that suits the community of the principles' model. We can formulate a suitability thesis in the following way: the suitability of the methodology to be applied for the determination of legal values depends on the community model that provides the best description of the researched community. The vulnerability of the theories on the inherent and constitutional values arises from the impression that the present international community is still more suited for the rulebook model in which the existing practice of international agencies, whose decisions are binding for all states, as well as the practice of the states themselves, influenced by the most powerful ones, are the main, if not the only source for determining the existence and the content of legal values.

Even if the presented theories are not suitable for the determination of legal values in the model to which the existing international community might belong, there is no doubt that they can easily be used for *de lege ferenda* analysis.[23] We can read them as positing the scientific, moral or political goals of peace through law, rule of law and human rights whose achievement requires the following: a) the broadened definition of the peace and the Security Council's obligation to make decisions by application of law; b) international adjudication established as compulsory instrument for all international disputes and an institutional mechanism introduced for guaranteeing the compliance of states with the international law and; c) the international constitution - with the appropriate characteristics of its norms and the content which includes the values of

[23] As we have seen in the section on constitutional norms, the non-positivist approach can be useful in reforming the existing international law by explicitly formulated more advanced norms.

peace, rule of law and human rights – established as the source of law for the international law-creating and law-applying bodies.

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INTERPRETING LAW THROUGH INTERNATIONAL JUDICIAL DIALOGUE BY POLISH COURTS /

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Abstract: *International judicial dialogue is a new method of law interpretation that gains popularity in analyses of legal scholars and still raises a lot of doubts both on its existence as well as its definition. This paper will deal with the application of this technique by Polish courts. In the first place, it will be explained what international judicial dialogue actually means. Afterwards, the paper will in detail discuss problems connected to the use of this method on the basis of decisions of Polish courts, first, by presenting examples of a proper, decorative and failed dialogue, and then by emphasizing complications caused by this method in the Polish jurisprudence. It will be also explored whether there exists a real dialogue, meaning that not only Polish courts receptively refer to judgments of international and foreign courts, but there is also some level of reciprocity in those references. At the end of the paper, the advantages and disadvantages of this method will be deliberated. In this part, I will suggest some solutions permitting mitigation of some adverse effects s of this technique.*

Key words: *dialogue; international judicial dialogue; jurisprudence; courts; case-law; globalisation; comparative constitutionalism; Polish law*

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1. INTRODUCTION

The progressive internationalisation of every aspect of human life and relations is an undeniable fact. Living in a globalised world has its effect on economic and financial relations, communication, families and, of course, on national laws. Using various instruments, international law encroaches in different ways into domestic legal orders. Nevertheless, the efficiency of international law depends mostly on its application and interpretation by national courts. Moreover, international relations and developments also influence the domestic legal system, as they create new legal problems that need to be solved by national law or its interpretation. In these new problematic areas, national courts, lacking any previous national jurisprudence, might be tempted to look for solutions in foreign legal systems and their case-law.

And here is where the shoe pinches. It is necessary to determine how national courts find a correct and proper application and interpretation of international law, as well as accurate international sources of inspiration for interpretation of new legal problems

arising in domestic laws, especially in the area of human rights (L'Heureux-Dubé, 1998, p. 21, 24-25). It is obvious that this cannot be done by a mere reference to the text of international or foreign law, nor by decoding the text of international or foreign legal norm solely on the basis of the concepts and ideas of national laws or existing domestic jurisprudence, as this interpretation should be as far as possible consistent among courts of different states (Kirby, 2008, p. 172). This analysis requires a more profound exploration of international and foreign law, including case-law, and here is the place for international judicial dialogue as a method of interpretation, as traditional domestic ways of interpreting law do not suffice. This poses a serious question, i.e. whether national courts dispose with necessary tools and preparation to carry out this task correctly while avoiding misunderstanding and misinterpretation.

As the issue at stake is very complicated and might vary among different states, this article concentrates on the practice of the Polish judiciary and its paths, as well as abilities to face new challenges stemming from international law, developments and relations. The first part of this paper will focus on presentation of some general and introductory remarks on international judicial dialogue. Next part of the paper will be dedicated to deliberations on international judicial dialogue before the Polish courts. It includes discussing examples of proper, decorative and failed dialogue performed by different instances of the Polish judiciary. Afterwards, I will assess international judicial dialogue as a method of interpretation used by the Polish courts. This comprises both correctness of this technique as applied by the Polish courts, as well as influence of the Polish case-law on jurisprudence of international and foreign courts. In conclusion, I will point out some advantages and disadvantages of the international judicial dialogue as a method of legal interpretation, as well as possible solutions of minimalizing the risk connected to the application of international judicial dialogue.

2. INTERNATIONAL JUDICIAL DIALOGUE – GENERAL REMARKS

The first question to answer is how we can define international judicial dialogue. The starting point of this exploration will be definitions of dialogue contained in different dictionaries. As the term "dialogue" in all dictionaries has different meanings for diverse uses, I will focus on the definitions connected to the aim of this paper.

In Thesaurus Dictionary "dialogue" is described as "an exchange of ideas and opinions on a particular issue, especially political or religious issue, with a view to reaching and amicable agreement or settlement". Merriam-Webster Dictionary shortly defines "dialogue" as "an exchange of ideas and opinions". According to Cambridge Dictionary "dialogue" is "a serious exchange of opinion, esp. among people or groups that disagree". Another definition is presented in Collins Dictionary where "dialogue" means "a communication or discussion between people or groups of people such as governments or political parties". Finally, Oxford Learner's Dictionary, describes "dialogue" as "a formal discussion between two groups or countries, especially when they are trying to solve a problem, end a disagreement, etc."

One might also point out different definitions of international judicial dialogue in publications of legal scholars. L'Heureux-Dubé noticed that the process of international legal influence changed overtime from reception to dialogue. Reception means only that reasoning of some international and foreign jurisdictions was applied by others, namely domestic courts. Within international judicial dialogue, judges look into numerous sources when deciding how to interpret their constitutions and deal with new problems, they are reading and discussing each other's jurisprudence (1998, p. 17-18, 21).

Relying on the work of L'Heureux-Dubé, Grove defined international judicial dialogue as a possibility for domestic courts deciding on a particular substantive legal

issue to look for interpretative guidance encompassed not only in international treaties but also in decisions of supranational and foreign courts that have addressed similar legal question. This might be connected with a response of an interlocutor, if international and foreign courts facing comparable legal issues refer to domestic courts' decisions. She also underlines that the opinion of international community does not overcome domestic law, it is only a helpful source of inspiration permitting the analysis of legal development of similar issue in jurisprudence of foreign courts (2001, p. 2049, 2052).

In his paper, Kirby defines this dialogue as comparative constitutionalism, meaning invoking decisions of international and foreign courts by national courts which concern both the substance of the law and its doctrines and procedures for conducting trials. He emphasizes that international judicial dialogue does not serve incorporating foreign and international laws into domestic legal system, as it is only an interpretative tool (2008, p. 171-172, 184, 186).

We may also find an opinion that the notion "dialogue" enjoys variety of meanings, depending on circumstances or the author. On the basis of numerous definitions in legal publications, Meuwese and Snel construct their own definition of "dialogue", i.e. a sequel of implicitly or explicitly shaped communications back and forth between two or more actors characterized by the absence of a dominant actor – or at least by a bracketing of dominance -, with the shared intention of improving the practice of interpreting, reviewing, writing or amending constitutions (2013, p. 124-126). Yet it needs to be born in mind that these authors in their paper discussed "dialogue" not only between courts but also between other institutions and bodies. For the purposes of the present deliberations, it is assumed that "dialogue" is limited to judicial bodies, as the study focuses on international judicial dialogue only, other authoritative instances are excluded from the research.

Law and Chang, in general, consider that the notion "dialogue" is conceptually and empirically an inapt metaphor for the comparative analysis performed by constitutional courts. This conclusion is based on the assumption that dialogue is supposed to be inclusive and involve reciprocal engagement of interlocutors in the dispute and this element is usually missing and possible referrals are mostly made to judgments of elite courts (2011, p. 527, 531, 534). Nevertheless, the authors in their paper also included s a definition of international judicial dialogue, constructed on the basis of publications of other legal scholars.[1] According to this definition, this dialogue is the citation of foreign law by constitutional courts that both reflects and fosters the emergence of a common global enterprise of constitutional adjudication (Law and Chang, 2011, p. 523, 528).

From the above mentioned definitions, one may choose elements that might be relevant in creating a definition of international judicial dialogue. Definitely, it is an exchange of ideas and opinions serving solely interpretation of law purpose. As it concerns legal matters, high standard of seriousness is required. Yet, the deliberated issues usually are neither political nor religious, although in some specific areas there might exist political or religious elements in the background of a legal dispute. However, as it will be indicated in the following parts of the paper, it is not necessary that there occurs any disagreement between the discussing subjects, namely between international and national courts, as all of them might represent a similar attitude towards a given problem. Although the dialogue should include an exchange of opinions between interlocutors, in case of international judicial dialogue, this may not always happen. One court may refer to decisions of other courts, yet the reciprocity is not required. Despite the fact that some legal scholars limit the international judicial dialogue only to

[1] However it needs to be emphasized that Law and Chang criticise this definition.

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constitutional courts, it needs to be underlined that it concerns every type and level of courts.

Therefore, in this paper, the notion "international judicial dialogue" should be understood as references and examination of judgments of international courts or domestic courts of other states with the aim of solving a legal problem. On the basis of the examples presented in the following parts of this paper, we may divide the judicial dialogue into four categories:

1. **proper dialogue** – courts refer to accurately collected case-law of other courts and analyse it properly from the methodological point of view;
2. **fake or decorative dialogue** – courts pretend to refer to the case law of other courts but, in fact, they just decorate the reasoning by random references to inappropriately collected and inaptly analysed decisions;
3. **failed dialogue** – courts miss the opportunity to refer to the case law of other courts, where one should reasonably expect that such jurisprudence is presented;
4. **other types of dialogue** – dialogue non-classifiable in other categories (Górski, 2017, p. 235).

A study concerning international judicial dialogue is problematic due to several factors. It is highly restricted by the availability of the research material. Although different courts issue numerous judgments every year, only a very scarce minority of them contains elements of international judicial dialogue. Moreover, not all of them are published and accessible through electronic search engines, including both general ones, like Google, etc. and those available for law professionals. That is why, as suggested by Law and Chang (2011, p. 527), it is inappropriate to use quantitative research methods, meaning statistical citations to foreign law, as they need to be supplemented with qualitative approaches. These authors recommend interviewing judges, however, this study will focus on a deep analysis of the entire texts of judicial decisions that use the technique of international judicial dialogue.

3. INTERNATIONAL JUDICIAL DIALOGUE BEFORE POLISH COURTS

As it was stated at the beginning, the paper will concentrate on the use of international judicial dialogue by Polish courts as a method of interpretation of international and domestic law. The publication is not limited to constitutional dialogue, therefore, I will analyse decisions of all types and levels of the Polish judiciary. In this part of the paper, I will briefly present selected examples of proper, decorative and failed judicial dialogue.

3.1. Structure of the Polish judicial system

Before I start exploration of the application of international judicial dialogue by Polish courts, it is necessary to present, in short, the structure of the Polish judiciary.

In Poland, there are three types of jurisdiction. First of all, the Constitutional Tribunal is empowered to decide on compatibility of legal acts situated at lower levels of hierarchy of sources of Polish law with the acts situated above them (Polish Constitution, Art. 188) and on division of powers between central constitutional organs of the state (Polish Constitution, Art. 189).[2]

[2] A detailed scrutiny of judgments of the Polish Constitutional Tribunal is contained in Skomerska-Muchowska (2017).

Cases concerning criminal law and civil law, including family law, labour and social security law are decided by Polish general courts.[3] A constitutional standard is that cases are decided by two instances. However, in limited areas, they might be decided by the Supreme Court, which acts as a court of cassation. Nevertheless, the Polish law does not classify the Supreme Court as a court being a part of general courts system (Polish Constitution, Art. 175 (1)). For the purposes of this analysis and taking into consideration the value of its judgments for Polish general courts, the Supreme Court shall be considered as such.[4]

Lastly, there are administrative courts, namely the Supreme Administrative Court and 16 Voivodship Administrative Courts (Polish Constitution, Art. 184).[5]

Out of these courts, the Constitutional Tribunal, the Supreme Court, and the Supreme Administrative Court are predestined to use international judicial dialogue as a method of interpretation. It is worth emphasizing that this practice is not limited only to those three courts and the dialogue technique is applied by lower level courts, as well. Main areas of international judicial dialogue used by Polish courts are: human rights, customary international law, European Union law and other non-classifiable areas of law. A very specific area of international judicial dialogue is the preliminary reference procedure before the CJEU. A comprehensive study of this type of dialogue would exceedingly go beyond the scope of this paper, therefore it will not be a subject of deliberations.[6]

3.2. Proper judicial dialogue

A proper judicial dialogue takes place when courts refer to accurately collected case-law of other courts, and analyse it properly from methodological point of view. As much as this situation is the most desirable on one hand, on the other it is, unfortunately, the rarest in decision of the Polish judiciary. Taking into consideration the specificity of the proper judicial dialogue, the analysis contained in this part will be a qualitative assessment of selected judgments. This will allow to show the pattern that should be followed by other judges and courts.

The most deep and profound dialogue with foreign courts should be the domain of the Polish Constitutional Tribunal. This is due to the fact that cases decided by the Tribunal require a detailed and exact analysis of fundamental principles of the Polish Constitution which involve comparative deliberations.

In the area of human rights protection, there are several judgments of the Constitutional Tribunal that properly refer and analyse judgments of international and foreign decisions. One of them is the decision in K 23/11[7] concerning the renegade procedure introduced into the Polish law on aviation.[8] In short, this procedure was created after the 11 September 2001 terrorist attacks on the World Trade Center and it permitted downing of an airplane hijacked by terrorists, even with passengers on board. At the beginning of its deliberations, the Tribunal emphasized that there is no need to re-interpret human rights and freedoms for the purposes of public safety and protection

[3] There are 318 district courts, 45 provincial courts and 11 appellate courts. Cf. Lista sądów powszechnych.
[4] A detailed scrutiny of judgments of Polish ordinary courts is contained in Matusiak-Frącczak (2017).
[5] A quantitative scrutiny of judgments of Polish administrative courts is contained in Krzemińska-Vamvaka (2017).
[6] More on preliminary reference procedure in Czaplińska (2017).
[7] Poland, Constitutional Tribunal, K 23/11 (30.9.2008).
[8] Poland, Law on aviation of 3 July 2002, Polish Official Journal 2002, no. 130/1112.

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against terrorist attacks and it is a dominating opinion of case law of foreign courts.[9] Then it made a study on the standard of protection stemming from the European Convention on Human Rights, as interpreted by the judgments of the European Court of Human Rights concerning right to life.[10] Lastly, the Tribunal made referral and largely cited the decision in similar case issued by the German Federal Constitutional Court in 2006[11] and adopted the reasoning of its own decision to the statement of reasons delivered by the German Court, including the view that a state cannot legalise an intentional killing of innocent people – hijacked passengers, because all lives, regardless their quality, are protected by the right to life and enjoy equal value.

A very comprehensive analysis of judgments of other constitutional courts of the Member States of the European Union was made by the Polish Constitutional Tribunal in case no. K 32/09, concerning the constitutionality of the Treaty of Lisbon.[12] The Tribunal referred to the French Constitutional Council's decision of 2007[13] in which the Council emphasized that dome solutions contained in the Treaty of Lisbon may not be sufficient to prevent transferring competences to the European Union in a manner and scope that would violate fundamental conditions of state sovereignty. Moreover, all provisions of the Treaty of Lisbon concerning areas strictly connected to state sovereignty and already present among European Union competences modifying the rules on decision-making process or replacing unanimous decisions by Qualified Majority Voting and deprive France of the possibility of a protest or transfer powers to the European Parliament that is not an emanation of national sovereignty and deprive France of its own initiative are contrary to the French Constitution. Another referral was made to the judgment of the German Federal Constitutional Court of 2009[14] where the Court stated that the European Union, being a union of sovereign states, cannot lead to deprivation of states of their own political debate on Treaty changes, as it is connected with the principle of constitutional identity. The EU membership does not include an automatic acceptance of transfer of powers to the EU and the constitutional courts cannot be deprived of responsibility for warranting constitutional limits of integration authorisation and constitutional identity that is not subject of transfer of powers. After the Czech Constitutional Court,[15] the Polish Tribunal repeated that after the Treaty of Lisbon the Member States still will be the Herren der Verträge (Masters of the Treaties). The Czech Parliament will be empowered only to accept laws reflecting requirements of the Czech constitutional order, as the EU remains an international organisation and the Member States keep their constitutional identity. Similarly, it was stated by the Hungarian Constitutional Court,[16] which underlined that the constitutional provisions on the EU membership cannot be interpreted as depriving Hungary of its sovereignty and the democratic rule of law. EU law that is contrary to the

[9] The Tribunal based its opinion on the analysis of: House of Lords, A v. Secretary of State for the Home Department [2005] UKHL 71; German Federal Constitutional Court [2006] 1 BvR 357/05; Israeli Supreme Court, Public Committee Against Torture on Israel v. The State of Israel et al., Case HCJ 5100/94; Israeli Supreme Court, The Center for the Defence of the Individual v. The Commander of IDF Forces in the West Bank, Case HCJ 3278/01; Israeli Supreme Court, Marab v. The Commander of IDF Forces in the West Bank, Case HCJ 3239/02; US Supreme Court, Rasul v. Bush, Case No. 03-334, 542 US 466 (2004) 321 F. 3d 1134.

[10] ECtHR case-law: Aksoy v. Turkey, case no. 21987/93, judgment of 18.12.1996; Marcx v. Belgium, Young, case no. 7833/74, judgment of 13.6.1979; James and Webster v. UK, case no. 7601/76, 7806/77, judgment of 13.8.1982; Ergi v. Turkey, case no. 23818/94, judgment of 28.7.1998; Velikova v. Bulgaria, case no. 41488/98, judgment of 18.5.2000; Kelly and Others v. UK, case no. 30054/96, judgment of 4.5.2001.

[11] Germany, Federal Constitutional Court [2006] 1 BvR 357/05.

[12] Poland, Constitutional Tribunal, K 32/29 (24 November 2009).

[13] France, Constitutional Council, 2007-560 DC (20 December 2007).

[14] Germany, Federal Constitutional Court [2009] 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/09, 2 BvR 1259/08, and 2 BvR 182/09.

[15] Czechia, Constitutional Court, Pl. ÚS 19/08 (26 November 2008).

[16] Hungary, Constitutional Court, 143/2010 (12 July 2010).

material constitutional identity and democratic rule of law will not be binding upon Czechia. The Polish Constitutional Tribunal only mentioned decisions of other constitutional courts declaring the Treaty of Lisbon constitutional.[17] From all the enumerated judgments, the Polish Constitutional Tribunal concluded that the Treaty of Lisbon is constitutional, however, the importance of constitutions and statutes of the Member States needs to be emphasized as the membership in the European Union cannot lead to the deprivation of the constitutional identity by Member States.

The best example of a Polish decision made on customary international law is the decision on state immunity. In the 2010 Natoniewski case[18] the Polish Supreme Court was to decide whether the Federal Republic of Germany is protected by state immunity in cases concerning the damage caused during the World War II. The plaintiff, Mr. Natoniewski claimed that there was no possibility to apply state immunity when the state breached jus cogens norm. At that time, there existed opinions claiming that peremptory norm is superior to rules of state immunity and it deprives the rule of state immunity of all its legal effects.[19]

To determine whether Germany could be sued before Polish courts, the Supreme Court referred to numerous international and foreign courts decisions and concluded that there were two opposite approaches to this issue. A lot of foreign courts still considered jurisdictional immunity of state to be absolute, whereas some of them were of the opinion that certain restrictions may apply thereto. From the international instances, the Polish Supreme Court analysed decisions of the European Court of Human Rights,[20] the Court of Justice of the European Union,[21] and the International Court of Justice of 2002 in Democratic Republic of the Congo v Belgium.[22] In this case, the ICJ held that even a violation of jus cogens would not enable the abolition of immunity of the Minister of Foreign Affairs of the Congo while in office. On the other hand, the House of Lords in Pinochet[23] and the French Cour de Cassation in Qaddafi[24] decided that in this situation, a state official is not protected by immunity. At that time, Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) case before the ICJ[25] was still pending and awaiting a final decision. Therefore, the Polish Supreme Court granted state immunity to Germany and emphasized that it is up to the ICJ and not to the Polish Supreme Court to decide, whether serious violations of human rights constitute an exception to jurisdictional immunity of the state.

[17] Latvia, Constitutional Tribunal of Latvia, 2008-35-01 (7 April 2009). Austria, Austrian Constitutional Tribunal, SV 2/08, G 80/08 (30 September 2008).
[18] Poland, Supreme Court, IV CSK 465/09 (29 October 2010).
[19] European Court Of Human Rights, Al-Adsani v. the United Kingdom, app. no. 35763/97 (21 November 2001), joint dissenting opinion of judges Rozakis and Caflish, joined by judges Wildhaber, Costa, Cabral Barreto and Vajić.
[20] ECtHR case-law: Al-Adsani v. the United Kingdom, app. no. 35763/97 (21 November 2001); McElhinney v. Ireland, app. no. 31253/96, 21 November 2001; Kalogeropoulou and Others v. Greece and Germany, app. no. 59021/00, 12 December 2002; Waite and Kennedy v. Germany, app. no. 26083/94, 18 February 1999.
[21] CJEU case-law: judgment of 15 February 2007, Lechouritou, C-292/05, ECLI:EU:C:2007:102; judgment of 21 April 1993, Volker Sonntag, C-172/91, ECLI:EU:C:1993:144.
[22] ICJ, Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), judgment, 2002 I.C.J. Rep. 3 (14 February).
[23] United Kingdom, House of Lords, Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet [1999] UKHL 17.
[24] France, Court of Cassation, 00-87215 Qaddafi (13 March 2001).
[25] International Court of Justice, Jurisdictional immunities of the State (Germany v Italy: Greece intervening, judgment, 2012 I.C.J. Rep. 99, (3 February).

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The Supreme Court examined also decisions of the courts of other states, i.e. of: the United Kingdom,[26] the United States,[27] Italy,[28] and Greece.[29] It is worth an appreciation that the Court did not limit the scope of its research only to decisions of international bodies, but it made a detailed scrutiny of various foreign courts' case law. Such practice is indispensable when deciding a case based on international customary law.

The Supreme Court concluded that the Polish judicial practice grants to foreign states jurisdictional immunity as a part of customary international law, applicable on the basis of Art. 9 of the Polish Constitution. A violation of jus cogens norms does not mean impliedly that a state renounces its own protection granted by immunity.[30] The court accentuated that jus cogens exception is not commonly recognized by the international community.[31]

As it was mentioned at the beginning, international judicial dialogue can be used by domestic courts in cases in which they face a new legal problem, e.g. in the field of financial instruments. As an example, we may point out the decision of the Bialystok Appellate Court,[32] which concerned the contract of the currency option. The Appellate Court started its reasoning by comparing Polish and German laws on the currency option contracts. It found many similarities and decided to analyse in detail the German case law, especially in the area of the bank's informative obligations towards its clients. The Appellate Court found German case-law relevant for interpretation of the Polish regulations and applied the German interpretation to the Polish regulations on currency option contracts.[33]

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[26] United Kingdom, House of Lords, Jones v. Saudi Arabia [2006] UKHL 26.

[27] United States of America, United States Court of Appeals, 9TH Circuit, Liu v. Republic of China [1989] 892 F.2d 1419. United States of America, Supreme Court of the United States, Republic of Austria v. Altmann [2004] 03-13, 541 U.S. 677 (2004) 327 F.3d 1246. United States of America, DC Circuit Court of Appeals, Von Dardel v. Union of Soviet Socialist Republics [1985] 623 F. Supp. 246 (D.D.C. 1985).

[28] Italy, Court of Cassation, Ferrini v. Germany, 5044/2004 (11 March 2004); Civitella, 1072/08 (21 October 2008).

[29] Greece, Special Supreme Court, Perfectory Voiotia v. Germany (Distomo), 111/2000 (4 May 2000); Margellos v. Germany, 6/2002 (17 September 2002).

[30] United States of America, United States Court of Appeals, 9TH Circuit, Liu v. Republic of China [1989] 892 F.2d 1419. United States of America, DC Circuit Court of Appeals, Von Dardel v. Union of Soviet Socialist Republics [1985] 23 F. Supp. 246 (D.D.C. 1985). Greece, Special Supreme Court, Perfectory Voiotia v. Germany (Distomo), 111/2000 (4 May 2000). Italy, Court of Cassation, Ferrini v. Germany, 5044/2004 (11 March 2004); Civitella, 1072/08 (21 October 2008).

[31] United States of America, DC Circuit Court of Appeals, Princz v. Federal Republic of Germany [1994] 26 F.3d 1166; United States of America, District Court (New York), Hirsch v State of Israel and State of Germany [1997] 962 F. Supp. 377; United States of America, United States Court of Appeals, 2ND Circuit, Smith v. Socialist People's Libyan Arab Jamahiriya [1996] 101 F.3d 239; United Kingdom, House of Lords, Jones v. Saudi Arabia [2006] UKHL 26; European Court Of Human Rights, Al-Adsani v. the United Kingdom, app. no. 35763/97, 21 November 2001; McElhinney v. Ireland, app. no. 31253/96, 21 November 2001; Kalogeropoulou and Others v. Greece and Germany, app. no. 59021/00, 12 December 2002; Waite and Kennedy v. Germany, app. no. 26083/94, 18 February 1999.

[32] Poland, Białystok Appellate Court, I ACa 833/12 (21 January 2013). The Court referred to Germany, Federal Tribunal [2011] XI ZR 33/10.

[33] "*It must be added that it results from the judgment of the German Federal Tribunal [2011] XI ZR 33/10, which concerns the scope of information and loyalty obligations of banks towards its clients in connection with contracts of derivate transactions, that a bank should question its client on the investment risk that the client is able to undertake – regardless of client's economic education. The bank should also explain the risk of a 'product', so that the client has the same level of knowledge of a 'product' as a bank itself, it should inform the client about a negative (from their stance), initial pricing of a product, as this pricing itself shows a serious conflict of interests of bank and its client, inform client about the conflict of interests, if the structure of the 'product's' risk is wilfully shifted by bank to the disadvantage of its client. The Federal Tribunal did not connect the information obligations of a bank with a consumer status of its client. Running a business activity by a client*

To sum up this sub-chapter, it needs to be emphasized that a proper judicial dialogue requires profound research into decisions of international and foreign courts. It is not a mere citing, it requires deep analysis and a proper comparison of similarities and differences between foreign laws and Polish law in order to make a decision whether this international and foreign jurisprudence can be a source of inspiration on judging a domestic case. A superficial and trivial examination might lead to simplified and wrong conclusions on the interpretation of domestic law. In the above-mentioned cases, Polish courts managed to fulfil these requirements. Those judgments are extremely exceptional, as mostly, courts do no more than simply cite international and foreign judgments without any further deliberations on their content or even their connection to the case at hand administrative courts also need to interpret international law or EU law. One of the examples of a proper judicial dialogue are judgments on the interpretation of the Model Tax Convention on Income and Capital.[34] Administrative courts needed to interpret the notion of "industrial, commercial or scientific equipment". In numerous judgments[35] the Supreme Administrative Court referred to the report of the Committee of Experts on International Cooperation in Tax Matters and cited numerous judgments that interpret the notion of "industrial equipment".[36] Then, the Court compared them with the factual background of the cases to make a decision on taxes.

3.3. Decorative judicial dialogue

A decorative dialogue means that courts pretend to refer to the case law of other courts, but in fact, they just decorate the reasoning with random references to inappropriately collected and inaptly analysed decisions. They neither analyse this case-law, nor indicate what kind of connection of this international and foreign jurisprudence exists with the domestic case at stake.

has no influence on bank's information obligations. The crucial aspect for bank information obligations is the lack of sufficient client's knowledge on the evaluation of risks of transaction to the level fundamentally close to bank's knowledge, as far as it concerns given transaction. Client's professional skills are principally of no importance. The Federal Tribunal noted that client's professional experience should be actually connected to preparation and conclusion of derivate transactions, so that the client had practical knowledge on the effects of a given transaction, comparable to the bank's knowledge. A general knowledge on transaction is not enough. Assuming that the client was knowledgeable of risks caused by transaction only on this ground, that client had contracts with other bank, lacks justification. A client's experience, justifying resignation from exhausting information about properties and possible effects of transaction should concern exactly the same transactions, but it does not mean only the type or subtype of it. The remarks of the Federal Tribunal are applicable in Polish reality, as the Tribunal solved the case actually on the basis of general rules of liability for damages ex contractu (§ 280 of the German Civil Code), and partially on the basis of the German statute on securities trading (§ 31.1.2 of the German statute on securities trading), which correspond to Art. 471 of the Polish Civil Code and § 6(1) of the regulation of the Ministry of Finance of 28 December 2005 on the terms and procedures for investment firms and trust banks (O.J. 2006.2.8)."

[34] OECD Model Tax Convention on Income and Capital, Paris, 30.7.1963.

[35] Poland, Supreme Administrative Court, II FSK 1395/16 (18 May 2018). Poland, Supreme Administrative Court, II FSK 1477/16 (5 June 2018). Poland, Supreme Administrative Court, II FSK 1540/16 (6 June 2018). Poland, Supreme Administrative Court, II FSK 1773/16 (6 June 2018). Poland, Supreme Administrative Court, II FSK 170/17 (22 January 2019).

[36] Singapore, Supreme Administrative Court, E.2011/1367, K.2013/1281 re DTC Turkey/USA (10 April 2013). *Malaysia, decision in Commissioners for Her Majesty's Revenue and Customs, judgment of 30.5.1996, OA Pte Ltd v. DGIR, case no. PKR 651, IFBD Case Law re DTC Malaysia/Singapore. India, Income Tax Appellate Tribunal Chennai, West Asia Maritime Ltd. v. DIT [2008] 111 ITD 155, judgment of 19.5.2006. Mexico* Décimo Tercer Tribunal Colegiado En Materia Administrativa Del Primer Circuito, case no. D.A. 562/2011-9995, re DTC México/Canada, judgment of 20.8.2012.

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It this area, the decision of the Polish Constitutional Tribunal in K 33/99[37] can be mentioned. This judgment concerned law on road traffic,[38] namely Art. 65 (7), transferring to the ministry the power to decide on the rules on road safety during public assemblies. The Tribunal made only a decorative reference to the ECtHR judgment in *Platform Ärzte für das Leben*,[39] repeating only that states are obliged to take actions to safeguard safety during legal assemblies. It is impossible to say why the Constitutional Tribunal recognized this case as having importance for the legal problem that was placed before the CT, what similarities and differences of this case exist in relation to the domestic case adjudicated by the Tribunal. A mere mentioning of the case by its name did not make the reasoning of the Tribunal any richer and more profound.

Another example of a decorative dialogue of Polish courts was the reference to the Human Rights Committee (HRC) in a decision which concerned family law and the state's obligation to respect one's private and family life, as enshrined e.g. in Art. 17 of the International Covenant on Civil and Political Rights (ICCPR).[40] In its ruling in case no. II CKN 321/99,[41] the Supreme Court made solely a superficial remark, that according to the HRC, the prohibition of unlawful interference in one's private life means that no intrusion is permissible, except for the situations strictly regulated by law. The Court did not indicate any specific decision of the Human Rights Committee on Art. 17 ICCPR relevant to the case at stake. The only purpose of this general reference was to add value to its own reasoning. The Court also shortly mentioned Art. 8 ECHR (the right to respect private and family life) and the Polish Constitution (Art. 31[42] and Art. 47),[43] indicating neither decisions of the ECtHR, nor of the Polish Constitutional Tribunal.

This practice is, of course, incorrect and undesirable Courts refer to randomly selected judgments without justifying their choice, sometimes only by mentioning the name of international or foreign court, without indicating its specific judgment. Judgments of domestic courts would be of the same value, if they had no such a mention at all, as it serves no purpose. It is only a useless decoration of courts' reasoning, without any major improvement as to the merits of the case.

3.4. Failed judicial dialogue

A failed judicial dialogue takes place if courts miss the opportunity to refer to the case law of other courts all over, where one should reasonably expect that such jurisprudence is presented. This means that there is no dialogue at all in the instances in which, without a doubt, it should be applied. Although it is not a desirable situation, it is extremely difficult to recognize such cases of missed chances, as in order to do that one must know that there exists international and foreign case-law that should be cited in a case in issue, yet this jurisprudence was omitted by a court. This can also be portrayed by the following examples.

The Wroclaw Appellate Court's decision[44] on lustration proceedings carefully analysed the decisions of the Supreme Court and of the Constitutional Tribunal. It examined the nature of lustration proceedings to determine whether it is of a criminal character, despite the fact that this issue has been already decided by the ECtHR in

[37] Poland, Constitutional Tribunal, K 34/99 (28 June 2000).
[38] Poland, Law on road traffic of 20 June 1997, Polish Official Journal 1997, no. 98/602.
[39] European Court of Human Rights, Platform Ärzte für das Leben v. Austria, app. no. 10126/82, 21 June 1988.
[40] International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966. (ICCPR).
[41] Poland, Supreme Court, II CKN 321/99 (18 August 1999).
[42] The principle of proportionality.
[43] The right to respect for private and family life.
[44] Poland, Wroclaw Appellate Court, II AKz 542/10 (26 October 2010).

Moczulski v. Poland,[45] and the Appellate Court barely observed that both the Constitutional Tribunal and the ECtHR consider this procedure to be a criminal one.

Although it would seem natural to refer to judgments of foreign courts on Hague Convention on the Civil Aspects of International Child Abduction,[46] as it represents a frequent subject of their holdings, including cases against Poland,[47] the Polish general courts seem to decide on the cases based on this convention by interpreting its provisions solely on the basis of domestic law and case-law.

For example, in I CKN 776/00,[48] the Polish Supreme Court interpreted the notion of the habitual residence of the child with no reference to any case-law at all. In II Ca 217/16[49] the Bialystok Provincial Court made a detailed scrutiny of the judgments of the Polish Supreme Court, whereas, as to the international case law, it made only a decorative reference to the ECtHR's judgment in *Neulinger and Shuruk v. Switzerland*[50] stating that the Hague Convention should be interpreted also taking into consideration the UN Convention on the Rights of the Child.[51] It has to be borne in mind that the meaning of the notion of habitual residence is still being developed. It is a concept taken from an international convention, requiring an analysis to be made on the basis of its international roots, and not solely on the basis of the linguistic interpretation derived from national law. Those Polish courts had a chance to deliberate on the notion of the habitual residence from the perspective of international law, to enter into a dialogue with other courts, especially the European Court of Human Rights, and to participate in the elaboration of principles governing application and understanding of this institution. However, they simply missed the opportunity.

A proper use of international and foreign case-law in domestic judgments requires a higher level of knowledge of the same. This knowledge has to be updated by relevant research. Taking into consideration a variety of material issues that might be decided by a single judge, this requirement can exceed their abilities.

4. ASSESSMENT OF INTERNATIONAL JUDICIAL DIALOGUE AS A METHOD OF INTERPRETATION USED BY POLISH COURTS

Polish courts are learning how to participate in international judicial dialogue. Some of them make use of their chance to contribute to the discourse, while others simply miss the opportunity Even the very citing of foreign jurisprudence is problematic. In this chapter, I will first evaluate the accuracy in referring to the international and foreign case-law, and, subsequently, I will discuss the issue whether or not the Polish courts have any influence on the international and foreign judiciary.

4.1. Correctness

To be accurate, international judicial dialogue needs to fulfil certain criteria. As one can deduct from the previous part, this can be neither a decorative dialogue, nor a failed one.

[45] ECtHR, case no. 49974/08 Moczulski v Poland, judgment of 19.11.2011.
[46] Convention on the Civil Aspects of International Child Abduction, Hague, 25.10.1980.
[47] ECtHR case-law: Oller Kamińska v. Poland, app. no. 28481/12, 18 January 2018; G.N. v. Poland, app. no. 2171/14, 19 July 2016; K.J. v. Poland, app. no. 30813/14, 1 March 2016; R.S. v. Poland, app. no. 63777/09, 21 July 2015; Rouiller v. Switzerland, app. no. 3592/08, 22 July 2014; Özgür Uyanik v. Turkey, app. no. 11068/04, 23 March 2010.
[48] Poland, Supreme Court, I CKN 776/00 (26 September 2000).
[49] Poland, Białystok Provincial Court, II Ca 217/16, 15 April 2016.
[50] European Court of Human Rights, Neulinger and Shuruk v. Switzerland, app. no. 41615/17, 6 July 2010.
[51] United Nations Convention on the Rights of the Child, New York, 20.11.1989.

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Moreover, if a court decides to use the method of legal interpretation, references to international case-law should be exact and precise. Unfortunately, very often this is not the case. For the Polish courts, the most visible problem rests with the adequate citation of international and foreign rulings, sometimes causing even humorous results. The most remarkable example is naming the ECtHR as "the European Court of Human Rights in S." where "S."' stands for "Strasbourg" or "the Court of Justice in L." with "L." meaning "Luxembourg".[52] The citation often lacks dates of judgments, case numbers or names of parties, although there are legal systems worldwide that commonly apply distinction of cases by parties' names.[53] These imprecisions, although they can be easily noticed and corrected, may clearly hamper the judicial discourse.

There is no uniformity in references to international and foreign case-law as there are no general rules of citation. On the one hand, courts use original name of the court in foreign language, on the other, they try to translate courts' names into Polish which sometimes produces disputable effect. The most obvious example of this infamous practice is represented by the names of German courts. Here, e.g. the German Constitutional Court (Bundesverfassungsgericht) is described both as a "Court" and as a "Tribunal", although in German language "Gericht" states for a "Court" while "Tribunal" in German reads "Gerichtshof".

The above-mentioned problems make it sometimes impossible to decipher which judgment exactly a Polish court wanted to address. Subsequently, the verification of correctness of a specific reference might become disputable, even impossible. In consequence, this practice might lead to uncontrolled arbitrariness.

4.2. Influence of Polish case-law on jurisprudence of international and foreign courts

International judicial dialogue as opposed to monologue represents the core subject of this paper. It requires some level of reciprocity in references to international and foreign case-law. One of the aims of international judicial dialogue is participation of domestic courts in the process of formation of international legal rules and standards. Domestic courts should play not only a passive, receptive role in this dialogue. They should also influence interpretation of law made by international and foreign courts. This part is devoted to influence of Polish judgments on case-law of other courts. First, it will be discussed whether Polish jurisprudence had any effect on customary international law, and then it will be presented that it also was a source of inspiration for courts of Central and Eastern Europe.

[52] Łódź Appellate Court, I ACa 931/14 (30 December 2014): "Wprawdzie w orzecznictwie Europejskiego Trybunału Praw Człowieka w S. oraz Sądu Najwyższego, język i forma wypowiedzi prasowych podlegają ochronie, ale jednak w granicach prawa do czci tak jak swoboda wypowiedzi". Białystok Appellate Court, I ACa 617/13 (20 December 2013): "Orzecznictwo Europejskiego Trybunału w S."

[53] For example: Łódź Appellate Court, I ACa 662/12 (1 October 2012): "orzeczenie z dnia 26 kwietnia 1979 r. w sprawie […] v. Wielka Brytania (I), skarga […], LEX nr 80817; orzeczenie z dnia 23 maja 1991 r. w sprawie O. v. Austria, skarga […], LEX nr 81177; orzeczenie z dnia 8 lipca 1986 r. w sprawie L. v. Austria, skarga […], LEX nr 81012". Supreme Court, IV CS 202/13 (28.2.2014): "Sprawa mieści się więc w pojęciu sprawy cywilnej i handlowej, rozumianej w sposób ugruntowany w orzecznictwie Trybunału Sprawiedliwości (por. np. wyrok ETS z dnia 14 listopada 2002 r., C-271/00 Slg. 2002, I-10489)". Warsaw Appelate Court, I ACa 1166/13 (11 March 2014): "tak m.in. wyrok Trybunału Sprawiedliwości z 10 kwietnia 1984 r. w sprawie 14/83 von C., pkt 26; wyrok z 13 listopada 1990 r. w sprawie C-106/89 M., pkt 8; wyrok z 5 października 2004 r. w połączonych sprawach C-397/01 do C-403/01 P. i in., pkt 113 i 115". It is worth noticing that "wyrok Trybunału Sprawiedliwości z 10 kwietnia 1984 r. w sprawie 14/83 von C." means the CJEU case 14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen, judgment of 10.4.1984, which is a very well-known and recognizable judgment of the CJEU.

4.2.1. Customary international law

Polish jurisprudence had influence on customary international law in the area of state immunity, as this matter is mostly regulated by international custom.

The previously mentioned Supreme Court's judgment in *Natoniewski* was noticed by the International Court of Justice in its decision in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening*)[54] and by the European Court of Human Rights in *Jones and Others v the United Kingdom*.[55] The ICJ in its ruling agreed with the Polish Supreme Court that the Basel Convention[56] does not cover the immunity of a state for the acts of its armed forces. Afterwards, the ICJ described in detail the reasons, why the Polish Supreme Court decided that Germany had jurisdictional immunity in cases concerning the acts committed during World War II. The ICJ emphasized that the Polish Supreme Court was one of the bodies presenting opinion that state immunity does not depend on the gravity of the act of which it is accused, or the peremptory nature of the rule which it is alleged to have violated.

The judgment of the ECtHR concerned the right to a fair trial (Art. 6 ECHR). The applicants claimed they had been tortured in the Kingdom of Saudi Arabia by its officials, what constitutes a violation of a peremptory norm, and brought civil claims before the courts of the United Kingdom. The ECtHR was provided by the applicants and the United Kingdom with a comparative material on the practice of 21 Members of the Council of Europe, including also the decision in *Natoniewski*. Yet, for the ECtHR, the decisive factor was the judgment of the ICJ in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*.

However, this is not the first Polish judgment on state immunity referred to by foreign courts. In its judgment in 2 BmV 1/62[57] the German Federal Constitutional Court, in determining customary international law on state immunity, cited the decisions of the Polish Supreme Court in R 133/26,[58] in II C 413/37,[59] in C 365/48,[60] and in II CR 172/56.[61]

4.2.2. Influence on courts of Central and Eastern Europe

Among courts of other states of Central and Eastern Europe Polish courts were referred to by Czech and Slovak Constitutional Courts.

In case concerning judicial review of security clearances,[62] the Czech Constitutional Court analysed the decision of the Polish Constitutional Tribunal in K. 21/99[63] in a very detailed and meticulous way. The Czech court referred to specific paragraphs of the Polish judgment, to the norms of the Polish Constitution, and to the Polish statutory regulations in the investigated area. It came to the result that the right to a fair trial should be also granted to persons subject to security clearance, and those persons cannot be deprived of their right of access to courts.

[54] International Court of Justice, Jurisdictional immunities of the State (Germany v Italy: Greece intervening, judgment, 2012 I.C.J. Rep. 99, (3 February).
[55] ECtHR, case no. 34356/06 and 40528/06 Jones and Others v the United Kingdom, judgment of 14.1.2014.
[56] European Convention on State immunity, Basel, 16.5.1972.
[57] Germany, Federal Constitutional Court [1963] 2 BmV 1/62.
[58] Polish Supreme Court, R 133/16 (2 March 1926), translated into German in Zeitschrift für Ostrecht 1927, p. 275.
[59] Polish Supreme Court, II C 413/37 (31 August 1937).
[60] Polish Supreme Court, C 365/48 (14 December 1948), translated into English in International Law Review 1957, p. 223.
[61] Polish Supreme Court, II CR 172/56 (26 March 1958), translated into English in International Law Review, Bd. 26 (1958 – II), p. 178.
[62] Czechia, Constitutional Court, Pl. ÚS 11/04, (26 April 2005).
[63] Poland, Constitutional Tribunal, K 21/99 (10 May 2000).

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Polish constitutional jurisprudence was also noticed by the Czech Constitutional Court in its judgment on judges' salaries.[64] From the decisions of the Polish Constitutional Tribunal in P 1/94,[65] K 13/94,[66] P 1/95[67] and P 8/00,[68] the Czech Court deduced that judges' salaries must correspond with the dignity of their office and ensure fulfilment of their obligations. Moreover, if the state has budget difficulties, judges' salaries are to be protected from "excessive unfavourable fluctuation" and it is impermissible to lower the pay of judges, which, according to the court, is "exceptionally strongly protected by the Constitution". As a conclusion, the Czech Court noticed that an interference in the material security of judges guaranteed by law may not be an expression of arbitrariness by the legislature, but must be, based on the principle of proportionality, justified by extraordinary circumstances, e.g. by the state's difficult financial situation, and even if this condition is met, account must be taken of the different function of judges and that of representatives of the legislative and executive branches, especially the state administration. Such interference may not create grounds for concerns that it may limit the dignity of judges, or that it may be an expression of constitutionally unacceptable pressure by the legislative and executive branches on the judicial branch.

In case concerning the Treaty of Lisbon I,[69] the Czech Constitutional Court referred to the decision of the Polish Constitutional Court in K 18/04,[70] to the extent that it analysed the limits of the conferral of powers to the European Union. The Czech Court made a critical examination of the Polish judgment and concluded that the Polish Constitutional Tribunal expressly rules out the jurisdiction of the CJEU to evaluate the limits of conferral of competences on the EU. According to the Polish Tribunal, that is a question of interpretation of domestic constitutional law. The Czech Court agreed with this opinion in terms of the dogmatics of domestic constitutional law and to a certain extent. However, according to the Czech Constitutional Tribunal, it is questionable whether it is necessary to formulate this opinion as sharply as the Polish Tribunal did.

Another court of Central and Eastern Europe that makes references to Polish case-law is the Slovak Constitutional Court.[71] Just as the Czech Court, it had to decide on regulations of judges' salaries. In the comparative part, citing the US Constitution, the Court stated that in the Slovak Constitution there is no explicit guarantee of judges' remuneration. In comparison, the Slovak Court emphasized that the Polish Constitution has a more explicit guarantee in Art. 178(2) than the Slovak Constitution, yet the Polish Constitutional Tribunal has accepted, in a limited scope, some modifications of judges' remuneration in decisions in K 12/03,[72] in K 1/12,[73] in K 13/94[74] and in P 8/00.[75]

To sum up this part of the paper, it is worth underlining that international judicial dialogue between states in Central and Eastern Europe may be a way to influence regional and international case-law. These states usually have similar historical background, they have their own experience with socialism. By mutual references between courts of these states, their common voice is more likely to be noticed and taken into consideration by the international community. This would permit Central and Eastern Europe courts to

[64] Czechia, Constitutional Court, Pl. ÚS 11/04, (26 April 2005).
[65] Poland, Constitutional Tribunal, P 1/94 (8 November 1994).
[66] Poland, Constitutional Tribunal, K 13/94 (14 March 1995).
[67] Poland, Constitutional Tribunal, P 1/95 (11 September 1995).
[68] Poland, Constitutional Tribunal, P 8/00 (4 October 2000).
[69] Czechia, Constitutional Court, Pl. ÚS 19/08 (26 November 2011).
[70] Poland, Constitutional Tribunal, K 18/04 (11 May 2005).
[71] Slovakia, Constitutional Court, Pl. ÚS 99/11 (11 December 2013).
[72] Poland, Constitutional Tribunal, K 12/03 (18 February 2004).
[73] Poland, Constitutional Tribunal, K 1/12 (12 December 2012).
[74] Poland, Constitutional Tribunal, K 1/12 (12 December 2012).
[75] Poland, Constitutional Tribunal, K 13/94 (14 March 1995).

change their position among courts of the world from receptive into affecting jurisprudence of other judicial bodies.

5. CONCLUSION

Undoubtedly, international judicial dialogue is a tempting method of interpreting international and national law as it brings new and attractive ideas to national courts. On the other hand, there are characteristics of this method that make its application quite problematic and require solutions permitting minimalizing the risks connected thereto.

First, it needs to be indicated what the advantages of this interpretive method are, as they make it worth a further development and may make courts more inclined to apply international judicial dialogue. This technique can be used by all types and levels of judiciary, including civil, penal and administrative courts, from the lowest level (in Poland district courts or voivodship administrative courts) to the highest one (in Poland: the Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court). International judicial dialogue permits a multidimensional analysis of law and verification and critical analysis of national courts' own views. One needs to remember that it is not always necessary to look forcibly for some new interpretation only to permit national courts to be original in their application of law. If a wheel has already been invented, so if there exists a logical and verified solution to a given legal problem, the best way to solve a problem within the national law framework might be to apply the confirmed international patterns.[76]

Therefore, international judicial dialogue might protect a state from its responsibility at the international level (e.g. before the European Court of Human Rights for violations of fundamental rights enshrined in the European Convention of Human Rights), as it permits verification and application of common standard of interpretation. It also strengthens the rule of law and international cooperation, as well as mutual trust between different jurisdictions, what, on its side, facilitates international commerce and international relations by creating commonly accepted rules.

By taking part in the international judicial dialogue, national courts can equally shape customary international law, interpretation of international agreements and human rights law standards. That reflects a desire of domestic courts to play an authoritative role in the formation of international legal rules and standards (Grove, 2001, p. 2061, 2071). If a court fails to take part in international judicial dialogue, it risks a growing isolation and diminished influence. According to L'Heureux-Dubé, this is exactly the case of U.S. courts, as they situate themselves outside international debates and discussions (1998, p. 37-38).

Nevertheless, drawbacks of this method might seriously hamper its application by national courts. It must be noticed that not all foreign solutions can be adapted to national law standards due to differences in political and social realties, values and traditions (L'Heureux-Dubé, 1998, p. 26). Therefore, solutions stemming from common law countries cannot always be applied in states that have legal systems based on Roman law. Legal solutions existing in Europe might be unsuitable for states in other parts of the world. There are also legal differences between law systems of states in Central and Eastern Europe, formerly having socialist laws, and other European states.

Probably the major weakness of international judicial dialogue is national judges' insufficient knowledge of international law and case-law, and sometimes even of foreign languages (L'Heureux-Dubé, 1998, p. 21). This may lead to very serious consequences, including the inability to verify laws, opinions and interpretations of different jurisdictions

[76] As Kirby noted, good ideas are not necessarily home grown (Kirby, 2008, p. 184).

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and also to misinterpretation of foreign case-law. Since nowadays in the international community, English is the most widely spoken language, both as mother tongue and foreign language, there exists an increased level of probability that common law judgments and interpretations of law will dominate this technique. Moreover, there might occur instances of cherry-picking application of foreign judgments either by a selective choice of national judges, restricted by their knowledge of foreign law and languages, or by a selective choice of foreign judgments made by foreign authorities that decide to translate particular case-law in the most commonly spoken languages like English, French, Spanish, Russian or German. One of the minor consequences hampering international judicial dialogue and verification of information is also an improper citation of foreign judgments which hinders one from finding an adequate source of confirmation of text of foreign case-law, namely the judgments themselves.

One disadvantage is typical for states of Central and Eastern Europe or other states with reliably smaller importance in international community of states. Their own case-law has a very limited influence on international and foreign judgments, whereas the judgments of their own courts are rather receptive,[77] meaning that they adapt their interpretation to the one made by foreign instances. This problem is slightly mitigated, if international and foreign case-law is ample and even a common standard of interpretation has been already established.

Yet, in relation to specific legal problem, the examples of international and foreign solutions might be scarce, as the issue is relatively new and it still needs to be examined. The very first opinions might neither be correct nor contain a profound analysis of the question in question. If there are more of them, they might be unknown to international community simply because of their non-existent translation into commonly used languages. This raises some serious doubts whether these few opinions known to international community should be followed by national courts.

The Polish Constitutional Tribunal pointed at some of the above-mentioned problems in its judgment in K 38/07: "*The need for references to foreign judicial decisions results from the fact of approximation of contemporary legal systems, however, it must be done with the reservation that it requires fulfilment of different conditions and awareness of different context. Extra-linguistic methods of interpretation are subsidiary to linguistic and logical interpretation of law. For the proper interpretation of domestic legislation with the use of international judicial dialogue, it is necessary to establish the adequacy of foreign patterns for the interpretation of the Polish law. There needs to exist an extreme caution in choosing a legal system to which a reference is made.*"[78]

Some of these problems might be partially softened, however, not totally eliminated. One of the solutions is a unification of citing, in the meaning of creation common international rules of citing of international and national judgments, as currently this problem is dependent totally on states, their courts and ways of publications used by legal scholars.[79] There exist attempts to create such common system, one of them is OSCOLA system (Nolan and Meredith, 2012), another is the Bluebook (Miles Prince, 2015). Germany has its own citation system in a form of an ISO norm.[80]

Another important way, especially for states like Central and Eastern European states, is to create collections of translations of high quality domestic judgments on significant issues into world languages. For example, the Constitutional Court of Slovenia

[77] Whereas the dialogue and its influence should be reciprocal (L'Heureux-Dubé, 1998, p. 27).
[78] Poland, Constitutional Tribunal, P 38/07 (3 July 2008).
[79] New York University School of Law. (2006). Guide to foreign and international legal citations.
[80] Deutsches Institut für Normung E. V. Information und Dokumentation - Richtlinien für Titelangaben und Zitierung von Informationsressourcen (ISO 690:2010).

prepared such collection.[81] More attention should be put to judicial comparativism during legal studies and lawyers' professional training as well, including not only judges but also prosecutors and attorneys. Moreover, it is also a task for legal doctrine to create more comparative analyses with proper citation of judgments, as the publications of legal scholars are commonly used by national judges as a source of information about foreign case-law.

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GUILTY OF NOT DOING THAT! / Marco Mazzocca

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Abstract: *Since ancient times, many legal constructions regarding blame or responsibility require subjects to be deemed accountable for their actions as well as for their omissions. The primary purpose of this work is to account for some legal and philosophical issues regarding the so-called negative events (i.e., events that have not occurred) through the development of two simple ideas. The first idea is to consider that, in most cases, a negative event is simply a normal positive event described negatively. The other idea is to distinguish the causal explanations of an event from the causal reports of an event. In this sense, it is shown how these two ideas not only clarify some fundamental philosophical issues, but they are also an excellent starting point for the interpretation and the application of some legal rules concerning omission.*

Key words: *event-based perspective of law; events; negative events; omission; causal omission; simple omission; omission in law*

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1. INTRODUCTION

The world we live in is extremely complicated. If someone is asked to write a catalogue of all that is in the world, that person will likely include not only the objects or persons who inhabit our planet but also anything that happens to these objects and people (see e.g. Broad, 1923, p. 242).[1] If then this individual is a lawyer, he or she will likely tell us more than just what happens in the world: He or she might tell us also what ought to happen in the world.

In the Law School, indeed, jurists learn to distinguish between what the case is and what the case ought to be. In this sense, suppose that a car is parked above the yellow lines. In that case, even if it is the case that the vehicle is parked on the yellow lines, that ought not to be the case according to the law. Similarly, for example, even if it is not the case that a tenant paid the rent, he or she ought to have paid for it according to the

[1] This "catalogue" is a simple list of what is around us and to which we usually refer when we speak or when we plan our actions. It is, in other words, a catalogue of everything that exists, has existed, and also of what, perhaps, may exist in the future. In this regard, the first author to use this metaphor was likely Charlie Broad.

law (and the contract she signed) (see e.g. Bix, 2000, pp. 1613–1624; Evans & Elqayam, 2018; Sinha, 1976, pp. 839–859).[2]

The two cases just mentioned – the parking on the yellow line and the non-payment of the rent – although similar, are different. While the first is an event that the law forbids, the second is an event that the law prescribes. But there is more: as the careful reader has already noticed, while in the first case the event seems like it happened, in the second the event did not occur. It should have happened, but it did not. And it is precisely on these particular not-occurred events that this brief essay focuses.

Indeed, the main objective of this work is to outline some of the most important philosophical issues related to the so-called negative events (i.e., events that did not happen) while showing their legal relevance. Specifically, after briefly outlining the concept of "event" and explaining why it is crucial even in the legal field, this paper focuses on two kinds of legally relevant omissions. Finally, in order to address some legally relevant issues related to the omissions, some philosophical strategies are suggested.

2. EVENT

Once one takes seriously the hypothesis that certain actions and events should be included in the catalogue of what there is in the world, the variety certainly would not be lacking: there are voluntary events (such as the stabbing of Caesar by Brutus) and involuntary events (such as the manoeuvre with which Jess hit a pedestrian), simple events (such as a shot) and complex events (such as the shareholders' meeting of a public limited company), positive events (such as the signing of a contract) and negative events (such as the non-payment of taxes). It is a list that could go on for a long time (cf. Varzi, 2001, pp. 39–40).

Of course, the variety of events just considered is not just about legal events. However, before going any further it is necessary to clarify what is meant by the word "event." In this regard, it should be noticed how some philosophers argue that events should be treated as concrete entities that occupy a specific space-time region. According to Quine (1960, p. 131), indeed: *"Physical objects [...] are not to be distinguished from events [...] Each comprises simply the content, however heterogeneous, of some portion of space-time, however disconnected or gerrymandered."*

Thus, according to this conception, the objects themselves would be nothing more than "long event[s]." (Broad, 1923, p. 393; cf. Varzi, 2001, p. 45).[3] Sometimes it certainly seems not so easy to locate the spatial-temporal boundaries of an event. However, we must not let ourselves be deceived: these are semantic problems, not metaphysical ones. If we cannot be precise about an event, this does not mean that the event itself is vague, but simply that we are talking vaguely (maybe because we have a vague idea of what happened). We are often unable to be precise, but that does not mean that the responsibility for this lies with the things we are talking about (Varzi, 2001, p. 47).

According to other philosophers, on the contrary, it is possible to characterize events in a pluralistic way rather than a monistic way – without using, at the same time, the semantics of possible worlds. In this regard, for example, the philosopher Jaegwon

[2] The bibliography on the distinction between *is* and *ought to* in legal philosophy is enormous. Since it is not possible to account for all this considerable bibliography which, starting from Hume's *Treatise of Human Nature* (1739), has been constantly enriched with new contributions, I only mention the works of Sinha, Bix, and Evans and Elqayam. These works could be considered as a valid starting point for the study of such a topic.

[3] It should be noted, however, that even if we support a philosophical position of this kind, we could still maintain a certain difference between events and object, being the first entities that *protract* over time, while the second are entities that *persist* over time.

Kim (1973, p. 222) suggested to characterize an event in the following way: *"We think of an event as a concrete object (or n-tuple of objects) exemplifying a property (or n-adic relation) at a time."*

In this sense, it might seem like a reductionist conception according to which events are related to other entities. However, at a closer look the properties mentioned in Kim's formulation would correspond to events understood as universal and, consequently, the individual events would be nothing more than recurrences of such universals. To explain this point, let us imagine a material object such as an apple. Suppose that after we perceive its shape, colour, weight, and all its other properties, we notice that its colour is precisely the same red as the bicycle parked outside the Empire State Building. The apple and the bicycle would then have a common property. Obviously, the red of the apple and the red of the bicycle are two distinct things: they are examples of the same property but in two different places and times and as such, they are particulars. Moreover, since they are properties that can be exemplified, in this case, by two different objects (an apple and a bicycle) (Varzi, 2001, p. 51) which, in turn, simultaneously exemplify other properties, we can conclude that they are abstract – and not concrete – particulars. They are what Donald Williams (1953) calls "tropes."

According to this last conception, thus, all events are tropes. Therefore, if exemplifications of different properties are different tropes, then exemplifications of different "event-proprieties" are different events. In this sense, for instance, "killing" is different from "killing violently" which, in turn, is different from "killing violently with premeditation".

These two different positions on events, the radical "unifiers" position (the monistic one) and the radical "multipliers" position (the pluralistic one), provide us with two different perspectives on what happens in the world. Both, however, tend to consider events as particular entities placed in a specific time and space. Both positions, in other words, are inclined to consider events as particular entities that can occur but not recur – in other words, an event may happen one time and one time only. But when it comes to examining events from a legal perspective, the legal philosophies seem to confuse matters.

In this sense, for instance, those who adopt a philosophy of natural law might be comfortable with Kim's position. They probably would say that legal events, after all, are nothing more than exemplifications of property-events plus one legal propriety: being against (or in accordance) with the natural law. Slightly different would be the response of the legal positivists. For the latter, legal rules would be nothing more than a long list of abstract event-properties which, if exemplified by an event, might trigger some legal consequences. In the first case, therefore, the task of the natural law theorists would be to understand if an event exemplifies all properties (including the legal one). In the second case, on the other hand, the task of the scholars of the legal positivism is to discover if some properties exemplified by an event appear in a legal norm – there are no legal properties.

The position of the theorists of legal realism (or of some of its derived theories) is also different. Of course, since both legal realism and legal positivism consider law as a human construct, they do not differ so much – in certain respects. However, unlike the positivists, realists think that the law does not provide determinate guidance to the solution of concrete legal cases. That is precisely the point for legal realists: "*statutes and the like may be law, but […] Because the law is indeterminate, judges actually decide cases on the basis of nonlegal considerations*." (Green, 2005, p. 1918) For this reason, in the opinion of legal realists, the task of lawyers should be to convince a judge (or a jury) that a specific event is (or is not) a specific legal event – using even non-legal arguments.

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In any case, whatever legal-philosophical position one adopts, when something that ought not to happen occurs, a good lawyer should at least be able to recognize the difference between what the case is and what the case ought to be according to the law. It seems more problematic, instead, to solve those cases in which something that, according to the law, ought to have occurred does not happen.

3. OMISSION

As everyone knows, in our ordinary world events happen or do not happen. It happened that the sun rose this morning at 5:01 a.m. in Košice, just as it happened that someone shot John F. Kennedy in Dallas on November 22, 1963, at 12:30 p.m. However, many events have not happened: some of them could have happened, but they have not happened – they are somewhat "unactualized possible" (Quine, 1948, p. 22) events. Some other events, on the other hand, could never have happened – they are "impossible events".

The problem, as Davidson (1985, p. 175) rightly explained, is that we "*often count among the things an agent does things he does not do*". In this moment, for example, I am not drinking coffee, I am not riding a bike, and I am definitely not dancing. Of course, if someone asked me what I am doing, I can simply answer that I am writing this short essay, but the answer may vary depending on the context. Suppose, for example, that my doctor, worried about my health, calls me and asks me what I am doing. I would likely say to him that I am not drinking coffee. This is because in that context my doctor would not be interested in what I am doing but in knowing if I am overdosing on caffeine.

In this sense, many philosophers argue that talking about events that do not happen is like talking about objects or people that do not exist. Of course, no one can forbid us to say that "the present king of France is bald," but that would be a bizarre statement since, as far as I know, there is no king in France today (see Quine, 1948; Varzi, 2001, pp. 22–23; cf. Russell, 1905, pp. 479–493; Berto, 2010; Meinong, 1904, pp. 1–50).[4] Therefore, although we often talk referring to things that do not exist, it is likely that we do not want to make any ontological commitment when we do that. Similarly, it is likely that when we talk about events that did not occur, we do not want to say that a non-event such as "the walk I did not take" really occurs. Nevertheless, often the language practices we use to indicate specific events in the legal discourse seem to refer precisely to negative (legal) events such as the following:

(1) Charlie's non-performance of the contract
(2) Gordon's non-payment of taxes
(3) Dr. House's failure to provide medical care caused the death of the patient
(4) Johnny's failure to turn off the gas caused an explosion (Varzi, 2007, pp. 155–167).[5]

These are just some of the examples of negative events that we should take seriously at least with regard to the legal field.

3.1 Simple Omission

In the legal field, when we talk about a negative event, we often refer to an ordinary, positive event under a negative description.

[4] The issue presented here in a maybe too simplistic way is actually well studied. For Bertram Russell, for example, this statement does not say anything about a specific individual who is currently the king of France and is bald. That statement, instead, says that a particular individual is currently the king of France and is bald.
[5] The event (4) proposed here is one of the events provided in Varzi.

Indeed, it is not difficult to imagine several possible descriptions for a single event. An event description often depends on the context one is speaking about and on what they want to describe. Nevertheless, this must not lead us to conclude that in the same spatiotemporal portion two or more different events have occurred. More simply, the same event may have different descriptions. Thus, why could we not describe an event also in negative terms?

Obviously, when we talk about events such as (1) or (2), we are not referring to negative actions; we are referring to what Charlie and Gordon actually did "*by mentioning a salient property that it lacked*" (Varzi, 2006, p. 136). A negative description, indeed, "*has a negative sense, not a negative referent*" (Varzi, 2006, p. 136). After all, in a legal context what is missing could be the only noteworthy information. Charlie, for example, may not have performed his contract because he went to a pub instead of showing up for work. Likewise, Gordon may have spent his money on an expensive car rather than paying taxes.

In cases like (1) and (2), no matter what people did; what matters is what they did not do. And it is important precisely because in those cases it seems legitimate to expect the occurrence of a particular event – which, instead, did not occur. If we assume that something happens just because a legal rule imposes it – thus, it ought to happen – then the non-occurrence of such an event will undoubtedly be legally relevant. The problem is precisely this expectation that something will happen just because a legal rule prescribes it to happen. The latter is such a pervasive problem that it cannot be adequately addressed here. In this paper it is sufficient to note how stating that an event should happen because it is prescribed by law does not mean that it will occur because of that law. Events happen or do not happen regardless of the law. Indeed, if one believes that a rule can physically prevent the occurrence of an event, he or she could have some trouble demonstrating the direct physical influence of a rule on the flow of events. Of course, a rule could influence people's behaviour and prevent them from acting against the law, but it is not the rule itself that makes it impossible;[6] it is the rule's observance. In this sense, then, it would make no sense to assume that just because a certain rule prohibiting a certain action exists, this action will not occur. The prohibited action could still occur: it would "only" be unlawful. The law, indeed, does not act in the domain of what is possible but in the domain of what is lawful (cf. Zanetti, 2017). In other words, events such as murders, robberies or theft will continue to happen even if prohibited by law.

It can sometimes happen that we want to make certain events happen so that we can consider them as legal events – and thus benefit from their legal effects. To put it more clearly, we often regard certain actions as having a particular legal significance because we wish to benefit from their legal consequences. Let us consider, once again, the first example. Both Charlie and his employer concluded the contract in all likelihood to enjoy its legal effects. It is because of that contract (and contract law applied to it) that it was legitimate to expect specific behaviour from Charlie (such as, for instance, showing up at work). Behaviour that, unfortunately, did not occur. Charlie did something different (such as, for example, going to the pub) from what, according to the employment agreement he signed, he was supposed to do (going to work). Nevertheless, it is useful to repeat that neither Charlie nor Gordon performed "negative actions". They simply performed other "positive actions" which, in both cases, lacked an expected property: respectively, fulfilling a contract and paying taxes.

[6] In this regard, it is important to distinguish between motivation and causation, even in the legal field. A person could be driven to cause a specific event by certain motives (including legal ones such as, for example, the willingness to follow a rule). However, the motivation does not cause an event; at most, it justifies it.

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These types of omissions – i.e., positive events under a negative description – are legally relevant precisely because of the positive event that occurred is not the positive event required by law. They are, in other words, what can be called simple omissions. In this case, it is possible to use the term "simple" to refer to such omissions precisely because, after all, their "complexity" seems to be linked to the way we speak. In that sense, then, although we often say that, for example, someone has not paid taxes or has not fulfilled a contract, we probably do not want to claim that actions they committed are non-actions. No one can perform a non-action, such as not paying taxes or not fulfilling contracts. What one can do instead is to take actions other than what should happen under the law. Once that is clarified, it should be easy to reason about such types of negative events.

3.2 Causal Omission

There is at least another type of omission that seems to be significant in a legal context. Indeed, while events like (1) and (2) appear to be legally significant because of the expected event did not occur, other events, such as (3) and (4) seem to be legally significant because they appear to have caused a legally relevant event. In other words, in these last cases one is not blamed for not having done something, but they are blamed for causing legally relevant events through his or her omission. For this reason, one might call this second type of omission causal omission.

Now, to think that the failure of an event may have caused another event seems to be challenging our "robust sense of reality" (see Bonino, 2014, p. 376; cf. Russell, 1919, pp. 169–170).[7] That is because we are generally used to think that a) omissions are negative actions, and b) causation depends only on positive action. Thus, it seems contradictory to state that c) omissions have a causal role (Tuzet, 2013).

It should also be stressed how the English language, using the word "failure" to refer to omission, tries to solve the problem upstream. It is a kind of linguistic fiction which, far from simplifying problems, seems to complicate them. When, in fact, we say that "someone fails to do something", we could mean two different things: that someone did not do something that they should do (i.e. a negative event), or that someone did not succeed in what he or she was trying to do (i.e. a failed positive event). However, even in the second case, although it may appear to be a failed positive event, it is a real negative event. Indeed, even if a person had tried to do something, it would still be an omission precisely because the attempt is failed (Varzi, 2006, pp. 146–149).[8] In this sense, if, for example, at the last inning of a baseball game the third batter of the losing team is called as being out, it is quite evident that he failed to hit the ball even though he tried. In other words, although he tried, the positive event "batter hitting the ball" did not occur. Further, it is also possible that the hitter does not even try to hit the ball. In both cases, however, the event "batter hitting the ball" would not have happened. Are we willing to say that the winning team won because the last batter of the losing team did not hit the ball?

[7] This is a reference to Russell's robust sense of reality, which, according to Bonino, can be defined as *"a philosophical attitude close to a sort of common sense empiricism."*

[8] In this regard, as Varzi rightly explains, "The notion of trying, however, is itself troublesome. For we can try to do something just as we can try not to do something. In the first case, the something we are trying to do is an action of some sort (turning off the gas, for instance). But what about the second case? Shall we say that when we try not to do something, our trying is directed towards a negative action of some sort? [...] I think this is another case where our intuitions and linguistic practices are seriously misleading. [...] For when we try to do something, we are striving for there to be some event of a certain kind. When we try not to do something, however, our endeavours admit of two different construals: one can push the analogy and say that we are again striving for there to be some event of a certain (negative) kind; but one can also say that we are striving for there to be no event of a certain (positive) kind."

We can assume that no one is willing to argue that the winning team won because of the points not made by the losing team. On the contrary, anyone could agree that the winning team won because of the points it earned.

Naturally, one could argue that this approach applies perfectly to baseball and not to the law. Yet, in legal discourse we often tend to blame those who are held liable for having caused something by their failure to act. However, exactly like the "batter's failure to hit the ball" did not cause the victory of the opposing team, "Dr. House's failure to provide medical care" did not cause the death of the patient and "Johnny's failure to turn off the gas" did not cause an explosion. In truth, the death of the patient was likely caused by his or her disease, and the explosion was caused by the one who switched on the gas.[9]

Therefore, assuming that no omissions have a causal role, all that remains is to understand how to assess causal omissions correctly. Indeed, since it was not Dr. House who caused the patient's disease in (3), and it was not Johnny who, turning on the light, caused the explosion in (4), one may wonder what would have happened if Dr. House had provided medical care and Johnny had turned off the gas.

The patient would probably not have died and there would certainly not have been an explosion. In other words, Dr. House and Johnny's failure to act did not cause anything: their failure did not stop the occurrence of something. We could then rephrase (3) and (4) as follows:

(3)' Dr. House's failure to provide medical care did not stop the death of the patient

(4)' Johnny's failure to turn off the gas did not stop an explosion

In other words, according to events (3)' and (4)', one is not blamed for causing something but for not preventing that something occurred.[10] This last consideration, however, could easily lead to bizarre conclusions. As an example, consider the case of the event (4)': *"not only does the causal history that led to the explosion include no event of Johnny's turning off the gas, it includes no event of my turning off the gas, either. Still, had I turned off the gas, there would have been no explosion,"* (Varzi, 2007, p. 164).

So, why should I not be blamed?

The answer is both spatial-temporal and legal in nature. This is because not everyone can stop an event from occurring. It is true that neither Johnny nor I – and nor you – turned off the gas. Nobody did it. However, unlike Johnny, I was not there at that time. I do not know who this Johnny is, I do not know where he lives, and I do not even know when the explosion happened, so why blame me?

To prevent the occurrence of an event, it is, therefore, necessary at least to be spatiotemporally close to it.[11] But it may not be enough. In some cases, in fact, to be

[9] It is also worth noting how it is not even useful to consider events like (3) and (4) only as negative descriptions of positive events as we previously did with simple omissions. Probably both Dr. House and Johnny did something else besides what they were supposed to do. However, those omissions are not legally relevant itself. They are legally relevant only because it seems to have caused something else. Thus, if the patient had recovered or the house had not exploded, no one would have had anything to complain about Dr. House and Johnny's failures.

[10] On closer inspection, indeed, some legal systems provide this kind of reading of what I call causal omissions. The Italian Criminal Code, for example, is explicit: In Article 40(2), it states that "where someone has the legal obligation to impede a crime, failing to prevent that crime is the same as committing such crime". In short, for the Italian penal code causal omissions are nothing more than a *fictio iuris*.

[11] A minimum of attention must be paid to what is meant by "being spatiotemporally close to an event". Imagine, for example, that there is a fire a few kilometres from where I am. If I see smoke out of the window or I smell burning in the air, then I am probably close enough to the event to perceive it directly. If, on the contrary, the fire is on another continent and I would hear about it only because someone told me over the phone, then I am not close enough to the event to be blamed for not stopping it. This was for two simple

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spatiotemporally close to the event is not sufficient to prevent the occurrence of that event.

Consider, for example, the event (3). Even if I had been there, in that hospital room at the exact moment the patient was being examined, what could I have done? Not being a physician, I would not have known how to prevent the patient's condition from deteriorating. In that case, therefore, only a person with the right skills and who was spatiotemporally close to the patient could have prevented the patient's death. Hence, to prevent an event it seems necessary at least a) to be close in space and time to the event and b) to be able to prevent it – in other words, to have the "qualities" to prevent it. But be careful: "necessary" does not mean "sufficient." Often, for example, the law requires an additional criterion: c) the existence of a legal duty to prevent such an event.

Now, since it is not a task of this work to explain what is meant by, and from what this legal duty derives – each philosophy of law, in truth, is potentially able to give a different response to these issues – in the last part of this section, two further brief considerations on causal omissions are presented.

In this regard, it should first be emphasized, once again, how what this work calls causal omissions are not causal at all. In this sense, they are not true causal reports since they do not express any cause of any event. But if causal omissions are not true causal reports, what are they?

Sure, omissions like (3) or (4) explicitly involve the word "caused" and this might lead us to think they are speaking of causes and effects. However, as Beebee rightly pointed out, to explain the cause of an event does not imply that the cause of the event should be identified precisely. Indeed, *"the way in which causal facts enter into an explanation can be more complicated than that. One can give information about an event's causal history in all sorts of other ways – by saying, for instance, that certain events or kinds of event do* not *figure in its causal history, or by saying that an event of such-and-such* kind *occurred, rather than that some* particular *event occurred. The moral here, then, is that something can be the explanans of a causal explanation without itself being a cause of the event cited in the explanandum"* (2004, p. 302).

Therefore, it is for this reason that causal omissions should not be considered as causal reports but rather as a causal explanation. The difference between them is, at this point, quite simple to understand: While causal reports make explicit the cause of an event, causal explanations explain why an event occurred. Of course, sometimes it is possible to produce a causal explanation of a certain event that explicitly mentions its causes. Other times, this is not possible and, as in (3) and (4), one can simply highlight how a particular event, which could have prevented specific effects, did not occur.

"In such cases, we have a causal explanation that cannot be matched by a genuine causal report. […] And although we can always switch from the 'cause' language to its 'because' counterpart, the converse does not hold. Every causal report translates directly into a causal explanation, but not vice versa," (Varzi, 2006, p. 144).

On closer inspection, it appears that this last distinction – between causal reports and causal explanations – might have enormous influence on jurists' reasoning. Indeed,

reasons: 1) whoever made me aware of the fire could prevent it from spreading (for example, by calling the fire brigade) 2) I was not close enough to the event to make sure that it happened. The question of time is a little different. Suppose a person confesses to me that he intends to commit a crime. If I stopped him or her at that moment, I would not precisely prevent a criminal action because expressing the intention to do something is not the same as doing it. Perhaps blocking him or her before he starts doing the action is tantamount to preventing him or her from committing it in the future, but this could lead to adverse consequences. Think, in fact, what would happen if we imprisoned people just for thinking of committing a criminal act. Thus, "temporal proximity to the event" means to be close to an event taking place or about to take place.

if one of the aims of the law is to prevent the occurrence of an event – of course, not "physically"– then it is interesting to note how it seems more useful to declare unlawful not stopping it, rather than to declare unlawful causing it. This is because a ban that "contemplates" only the causes of an event fails to impose anything on those who, despite not having contributed to causing it, were in the condition to stop it from occurring – while, on the contrary, to impose on someone to stop an event from occurring also implies prohibiting that person from causing it.

To be honest, everything that happens has not been stopped before it happened. In this sense, then, even simple omissions such as (1) or (2) might be considered problematic. After all, no one prevented Charlie from not fulfilling the contract, nor did someone prevent Gordon from not paying taxes. So, why has nobody – except Gordon and Charlie – been blamed for such events?

The answer probably lies in the choices made by the lawmaker. Choices that, whichever way one looks at them, appear to be not unproblematic.

4. CONCLUSION

Providing an overview of everything that happens in the world is certainly not an easy task. Doing it from a legally conscious perspective seems to be even more difficult. This is because such a perspective seems to have to take into account, alongside what happens, even what does not happen. For this reason, if we adopt a point of view that considers not only what the case is but also what the case ought to be, then our image of the world could become more complex.

Taking seriously what does not happen (i.e. the negative events) may seem an unnecessary effort by our legal systems. We could, indeed, build legal systems based only on positive events. In that case, however, we should also be prepared to deal with rather strange rules. This is because, for example, we would no longer punish the "non-performance of a contract" as in the case (1), but the "doing something instead of fulfilling the contract", updating, from time to time, the catalogue of possible positive events which cannot be performed instead of the fulfilment of the contract.

On the other hand, even the opposite solution does not sound tempting. Indeed, if it is true that one can refer to a positive event (such as the "killing of a person") through the description of a negative event (such as the "failure to preserve that person's life"), it is also true that such a solution could make legal reasoning much more complicated.

It is not the task of this work to outline such perspectives. What is most interesting here is to provide some food for thought about negative events. Speaking of omissions, we have seen how a sort of ontological confusion on the so-called negative events could lead to a consequent confusion concerning how to address them legally. The law, as this paper tried to illustrate, does not seem able to solve this kind of issue unless we clarify first what an omission is and how to deal with it from an ontological point of view.

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APPLY OR NOT TO APPLY? A COMPARATIVE VIEW ON TERRITORIAL APPLICATION OF CCPA AND GDPR /

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Abstract: *A new era of data protection laws arises after the adoption of the General Data Protection Regulation (GDPR) in the European Union. One of the newly adopted regulations of processing of personal data is Californian Consumer Privacy Act commonly referred to as CCPA. The article aims to fill the gap considering a deep analysis of the territorial scope of both acts and practical consequences of the application. The article starts with a brief overview of privacy regulation in the EU and USA. Introduction to GDPR and CCPA follows focusing on the territorial scope of respective legislation. Three scenarios of applicability are derived in the following part including practical examples.*

Key words: *data protection; privacy; GDPR; CCPA; territorial scope*

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1. INTRODUCTION

The area of data protection is one of the most discussed subjects in the current public debate. Traditional conservatism of law is slowly adapting to a new technological reality. Impact of technology on privacy may be enormous, therefore new legislation is needed to regulate and reflect the latest development (Andraško, 2017). New laws attempting to regulate the area of data have been adopted on both sides of the Atlantic Ocean and although the approach to legal protection of privacy is different, the fundamentals are similar.

The article examines two core legislative developments within the European Union and the United States of America considering the protection of privacy (or informational privacy) in regards to territorial scope. The emphasis is put on General Data Protection Regulation (GDPR) and California Consumer Protection Act (CCPA). The questions discussed in the article are of essential importance as cross-border commerce is one of the fundamental pillars of the world economy. The controllers in the EU and the USA shall carefully assess if data protection legislation is applicable especially in regards to territorial scope of laws. The in-depth research on the specific issue of the territorial applicability is generally absent (see Kessler, 2019 or Umhoefer, 2019). The second part

of the article is focused on the comparison of different backgrounds and approaches to the regulation of informational privacy in the EU and the USA. The third part deals with analysis of respective provisions of GDPR and CCPA related to territorial scope. The fourth part provides a brief overview of practical examples when laws are applicable or non-applicable to companies based on their residence.

2. FOUNDATIONS OF EU & US PRIVACY LAWS

It is of the essence to outline different background of EU and US privacy protection. First of all, each model of protection of privacy should be founded on several basic principles drafted by the Organisation for Economic Co-operation and Development (OECD). The principles are stated in OECD Guidelines[1] and include collection limitation principle, data quality principle, purpose specification principle, use limitation principle, security safeguards principle, openness principle, individual participation principle and accountability principle. Each party of the OECD (including most of the member states of the EU and USA) shall implement the principles into their privacy regulations.[2] It is therefore important to emphasize that many systems of protection of privacy are governed by same or similar principles although the approach itself may vary. These principles are implemented into different models of protection of privacy.

Kuner (2013) differentiates among four models of protection of privacy: complex, sectoral, self-regulating model and co-regulating model. Complex model represents a system with general regulation applicable to private and public sector with independent data protection authority responsible for ensuring compliance with data protection rules in the territory of the state. General regulation is often supplemented by specific sectoral regulation. An example of this approach is the European Union's GDPR and specific regulations (e.g. ePrivacy directive).[3] The second model of implementation is sectoral model. General regulation is absent, and each sector is regulated by specific tailor-made legislation. This is the case of the USA where many acts regulating privacy or data protection exist for different sectors (e.g. Health Insurance Portability and Accountability Act of 1996 for processing of personal information related to health). The self-regulating model is very similar to sectoral model, but regulation is not represented by specific acts rather by codes of conducts or sectoral codes drafted and adopted by market players from specific sectors. The co-regulating model is a combination of sectoral and self-regulating models. Specific legal framework adopted by legislator exists and the framework is complemented by sectoral rules developed by sectors. The latter is represented in Indonesia.

As highlighted above, the implementation of OECD principles is different in the EU and the US resulting in complex and sectoral model of regulation. However, some authors argue that the implementation of the OECD principles achieves the same results with different processes (see Bennett, 1988). It may be added that protection of privacy as such is approached differently in these countries from the human rights perspective. Within the European Union the right to data protection exists and is a fundamental part of the Charter of fundamental rights of EU (hereinafter known as "the Charter"). However European legislation differentiates between right to privacy and right to data protection and treats them like two separate rights. Article 7 of the Charter states that "*everyone has*

[1] Annex to the Recommendation of the Council of 23rd September 1980: Guidelines governing the protection of privacy and transborder flows of personal data.
[2] See e.g. Article 5 GDPR or Convention 108.
[3] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. OJ L 201, 31.7.2002, pp. 37–47.

the right to respect for his or her private and family life, home and communications." Proposal of the new ePrivacy Regulation[4] explicitly refers to the Article 7 in proposed Recital 1.[5] Article 8 of the Charter confers right to data protection according to which "*everyone has the right to the protection of personal data concerning him or her.*"[6] Furthermore the Charter states fundamentals of processing of personal data in section 2 of the pertinent article: "*Personal data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.*" Supervision over the data protection area shall be deemed by independent supervisory authorities.[7] The specification of Article 8 is represented by General Data Protection Regulation.[8]

Protection of (information) privacy in the United States of America is not derived from human rights legislation. The protection of privacy has evolved throughout the years in different sectors. Absence of general privacy regulation is often criticized by many authors (Bignami, 2007). It has to be also noted that federal legislation is often supported by specific state legislation.

From the historical point of view (see Solove, 2016) the most notable cornerstone was the publication of Warren and Brandeis´s article The Right to Privacy emphasizing the importance of having a remedy in privacy-related cases (Warren & Brandeis, 1890). In 1960 William Prosser created a typology of privacy torts based on the above-mentioned article (Prosser, 1960). Supreme Court of the United States continually developed protection of privacy based on the fourth amendment of the US Constitution reading: "*The right of the people to be secure in their persons, houses, papers, and effects, [a] against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*"[9] However, the provision protects only US citizens against unreasonable searches and seizure and does not constitute general privacy protection as in the Convention or the Charter (see Zanfir, 2012). US government in its developed legislation tackled contemporary issues of privacy protection.[10] Privacy laws are widely fragmented in common law, federal legislation, state law and state constitutions (Levin & Nicholson, 2005). Wide range of privacy rules are set forth as consumer protection and sector specific. These acts include The Fair and Accurate Credit Transactions Act 2003 or the CAN-SPAM Act 2003 (see more in Pernot-LePlay, 2020a). The protection of consumers is closely related to enforcement of rights of data subjects similar to the ones provided by GDPR. The latter is a reason for comparing consumer privacy protection in the selected state with legislation adopted in

[4] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications).

[5] *„Article 7 of the Charter of Fundamental Rights of the European Union ("the Charter") protects the fundamental right of everyone to the respect for his or her private and family life, home and communications. Respect for the privacy of one's communications is an essential dimension of this right. Confidentiality of electronic communications ensures that information exchanged between parties and the external elements of such communication, including when the information has been sent, from where, to whom, is not to be revealed to anyone other than to the parties involved in a communication. The principle of confidentiality should apply to current and future means of communication, including calls, internet access, instant messaging applications, e-mail, internet phone callsand personal messaging provided through social media."*

[6] Article 8 sec. 1 of the Charter.

[7] Article 8 sec. 3 of the Charter.

[8] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJ L 119, 4.5.2016, pp. 1–88.

[9] E.g. Katz v. United States, 389 U.S. 347 (1967).

[10] See e.g. Telephone Consumer Protection Act of 1991 or Driver´s Privacy Protection Act of 1994.

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the EU. The US legislator attempted to adopt comprehensive privacy legislation in the form of The Consumer Privacy Bill of Rights in 2012, however the bill never became a law. On the other hand, several states show convergence of EU data protection laws into their state legislation (Pernot-LePlay, 2020b). One of such laws is CCPA.

From the point of view of future development, it shall be emphasized that the USA plans to adopt general privacy regulation on the federal level. This aim is supported by the fact that the USA declared that the country may become a party to the Council of Europe's Convention 108.[11]

3. TERRITORIAL SCOPE

3.1. Territorial scope of the GDPR

GDPR is comprehensive data protection law applicable in the EU. Based on the material scope the regulation applies to the processing of personal data[12] wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.[13] The material scope of the GDPR is broad and is not limited only to some processing operations like sale, erasure or analysis of personal data.

Territorial scope of GDPR is set out in Article 3. The Article states three regimes of applicability of GDPR considering territorial aspects of processing of personal data. The first regime applies *"to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not."*[14] The second regime is applicable when controller or processor is established outside EU but processes personal data of data subjects located in the EU with regard to (i) the offering of goods and services regardless requirement of payment or (ii) monitoring of behaviour.[15] The third regime is applicable to entities outside of EU by virtue of public international law.[16] Territorial scope of GDPR has been explained in published Guidelines 3/2018 on the territorial scope of the GDPR[17] drafted by European Data Protection Board (EDPB) and provides valuable guidance to applicability of the Article 3 GDPR.

1. First regime – application of establishment criterion

Application of establishment criterion regime is composed of three criteria that have to be assessed: (a) if an establishment is in the EU, (b) if processing of personal data is carried out in the context of the activities of an establishment and (c) if it is applicable regardless of whether the processing takes place in the EU or not. Such threefold approach is also preferred by EDPB. All criteria shall be fulfilled cumulatively.

[11] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the second annual review of the functioning of the EU-U.S. Privacy Shield, https://ec.europa.eu/info/sites/info/files/report_on_the_second_annual_review_of_the_eu-us_privacy_shield_2018.pdf , p. 7 (accessed on 20.03.2020).

[12] Personal data being identified as *„any information relating to an identified or identifiable natural person ('data subject')."* Article 4 (1) GDPR.

[13] Article 2 (1) GDPR.

[14] Article 3 (1) GDPR.

[15] Article 3 (2) GDPR.

[16] Article 3 (3) GDPR.

[17] European Data Protection Board. *Guidelines 3/2018 on the territorial scope of the GDPR (Article 3).* Available at: https://edpb.europa.eu/our-work-tools/public-consultations/2018/guidelines-32018-territorial-scope-gdpr-article-3_en (accessed on 20.03.2020).

The first criterion to be taken into account is whether processing activities are conducted by "an establishment in the EU." GDPR does not define what an establishment is. However, recital 22 GDPR states that "*Any processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union should be carried out in accordance with this Regulation, regardless of whether the processing itself takes place within the Union. Establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect.*" The notion of establishment has been further clarified by the Court of Justice of European Union (hereinafter known as the "CJEU") in cases *Weltimmo*[18] and *Google Spain*.[19] In *Weltimmo* CJEU noted that establishment within the meaning of the law "*extends to any real and effective activity — even a minimal one — exercised through stable arrangements.*"[20] In terms of exercise through stable arrangements the CJEU added that "*both the degree of stability of the arrangements and the effective exercise of activities in that other Member State must be interpreted in the light of the specific nature of the economic activities and the provision of services concerned.*"[21] In terms of services provided via internet the threshold for stable arrangement may be quite low.[22]

An example of application of the first regime might be when US-based company has a branch in the European Union acting as "EU Headquarters."

Context of the activities of an establishment is the second criterion to be considered. EDPB emphasizes case-by-case analysis and approach.[23] The criterion shall be assessed via relationship between a data controller or processor outside the EU and revenue raised in the EU. An inextricable link is a prerequisite as per the decision of CJEU in the *Google Spain* case.[24] If the inextricable link between a company established outside EU and EU establishment is found, processing activities of the EU establishment shall fulfil the criterion in question. According to the older opinion of Article 29 Working Party (former EDPB) the revenue may also present evidence of an inextricable link.[25] "*The EDPB recommends that non-EU organisations undertake an assessment of their processing activities, first by determining whether personal data are being processed, and secondly by identifying potential links between the activity for which the data is being processed and the activities of any presence of the organisation in the Union.*"[26]

An example of this situation may be when a US-based company establishes a subsidiary in the territory of EU and the establishment conducts marketing activity in the EU. This is the case when inextricable link is clear as processing of personal data is directly connected to the US-based company and EU subsidiary. The same shall be held towards mutual profitability of activities of aforementioned entities.

[18] CJEU decision in *Weltimmo v NAIH* (C-230/14).
[19] CJEU decision *Google Spain SL, Google Inc. v AEPD, Mario Costeja González* (C-131/12).
[20] Weltimmo, para 31.
[21] Weltimmo, para 29.
[22] EDPB Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) Adopted on 16 November, p. 6.
[23] EDPB Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) Adopted on 16 November, p. 7.
[24] Google Spain, para 56 „*the activities of the operator of the search engine and those of its establishment situated in the Member State concerned are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed.*"
[25] Article 29 Data Protection Working Party Update of Opinion 8/2010 on applicable law in light of the CJEU judgement in Google Spain: „*In addition, the judgement suggests that other business models, and different forms of activity (including revenueraising) in an EU Member State may also trigger the applicability of EU law, although the assessment must be made on a case by case basis.*"
[26] EDPB Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) Adopted on 16 November, p. 8.

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The third criterion is that the regime under Article 3 (1) is applicable regardless of whether the processing takes place in the EU or not. The emphasis is therefore put on irrelevancy of place of processing activities after fulfilling the first two criteria. After the fulfilment of the two previous conditions the place of processing itself is not an essential feature of applicability GDPR in regards to territorial scope. The case may be illustrated by a US company that collects personal data of data subjects residing in the United States, Mexico and Panama but the processing of datasets is conducted within a branch located in Paris. Although the collection of personal data takes place outside of the EU, the processing of person data takes place in the EU and therefore GDPR is applicable. The same shall be held towards a Paris company that has a legally indistinct branch in the USA that processes personal data. In this case, while the processing activities are taking place in the USA, that processing is carried out in the context of the activities of the company in Paris and thus GDPR is applicable.

2. Second regime – targeting criterion (extra-territorial scope of GDPR)

GDPR is applicable also in cases where an establishment is not located in the territory of the EU. Article 3(2) of the GDPR provides that "*this Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.*" The common criterion for both alternative targeting criterions is that it relates to data subjects who are in the Union. The scope is thus not limited by citizenship or residence and the broad application is derived from human rights aspects as founding pillars of the European Union and EU society. The latter is explicitly confirmed by Recital 14 GDPR: "*the protection afforded by this Regulation should apply to natural persons, whatever their nationality or place of residence, in relation to the processing of their personal data*". An example may be a US company without an establishment in the EU that is a provider of a social network mobile app available and directed to consumers from the EU. Processing of personal data of data subjects using this app in Rome or Paris would fall under the territorial scope of GDPR. The situation would be different if the app would be intended only for the US market and not available for download in the European Union.

The first targeting criterion is the offering of goods and services. The offering of services also includes the offering of information society services, defined in point (b) of Article 1(1) of Directive (EU) 2015/1535 as "*any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*".[27] Whether the payment has been provided is not of the essence while evaluating the criterion.[28] For fulfilling the criterion the goods or services shall be intentionally offered to data subjects in the EU. The latter confirms Recital 23 GDPR stating that "*in order to determine whether such a controller or processor is offering goods or services to data subjects who are in the Union, it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union.*" However, it is not sufficient to trigger the criterion if website is accessible as such in the territory of EU. More indicating factors include language of the website, delivery to the EU, references of customers from EU or currency used within EU. Interpretation of notion of "directing activity" within the meaning

[27] EDPB Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) Adopted on 16 November, p. 14.
[28] See more in particular, CJEU, C-352/85, *Bond van Adverteerders and Others vs. The Netherlands State*, 26 April 1988, par. 16, and CJEU, C-109/92, Wirth [1993] Racc. I-6447, par. 15.

of Article 15(1)(c) of Regulation 44/2001 (Brussels I) may be of the essence when determining intention to sell goods and services. The guidance on the notion of directing activity is provided in the CJEU case *Pammer v Reederei Karl Schlüter GmbH & Co* and *Hotel Alpenhof v Heller* (joined cases C-585/08 and C-144/09).[29] Naturally, specific circumstance of each case have to be carefully evaluated and taken into account.

GDPR would be applicable in the situation when a US company without any branches or other establishments in the EU area has a website for selling books and magazines with possible delivery to the EU countries. The website also allows to make a payment in euros and contains references from customers from the EU that have bought books in the past. Those three aspects are strong indications that offering of goods is directed towards EU customers.

The second targeting criterion is monitoring of data subjects' behaviour. Recital 24 GDPR provides clarification of the latter: "*in order to determine whether a processing activity can be considered to monitor the behaviour of data subjects, it should be ascertained whether natural persons are tracked on the internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes.*" As EDPB notices, the scope of Article 3 (2) b) is broader than targeting as such. The article shall be triggered by various monitoring activities including processing personal data via wearables or smart devices.[30] Taking into account the guidance monitoring in line with Article 3 (2) b) may be encompassed within behavioural advertisement; geo-localization activities, in particular for marketing purposes; online tracking through the use of cookies or other tracking techniques such as fingerprinting; personalized diet and health analytics services online; CCTV; market surveys and other behavioural studies based on individual profiles or monitoring or regular reporting on an individual's health status.

An example of targeting criterion in this case would be a US company without establishment in the EU that analyses the data of customers in a shopping mall located in Berlin for the purpose of marketing analysis.

3. Third regime – public international law

Article 3 (3) GDPR constitutes specific legal regime of processing of personal data governed by virtue of public international law. The provision states that "*this Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law*". This regime applies to embassies, consulates and diplomatic missions in general. Respected definitions and statuses of aforementioned entities are governed by the

[29] One or more of the following factors shall be considered: The EU or at least one Member State is designated by name with reference to the good or service offered; The data controller or processor pays a search engine operator for an internet referencing service in order to facilitate access to its site by consumers in the Union; or the controller or processor has launched marketing and advertisement campaigns directed at an EU country audience; The international nature of the activity at issue, such as certain tourist activities; The mention of dedicated addresses or phone numbers to be reached from an EU country; The use of a top-level domain name other than that of the third country in which the controller or processor is established, for example ".de", or the use of neutral top-level domain names such as ".eu"; The description of travel instructions from one or more other EU Member States to the place where the service is provided; The mention of an international clientele composed of customers domiciled in various EU Member States, in particular by presentation of accounts written by such customers; The use of a language or a currency other than that generally used in the trader's country, especially a language or currency of one or more EU Member states; The data controller offers the delivery of goods in EU Member States.

[30] EDPB Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) Adopted on 16 November, p. 19.

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Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963.

3.2. Territorial scope of the CCPA

Discussion of territorial scope of the CCPA shall start with several notes regarding the applicability of the legislation itself. It shall be noted that this is not a federal law applicable to the United States of America as a whole but only to one state – California. Deriving from the name of the act itself, CCPA relates to consumers. The Consumer is defined as a natural person who is a California resident.[31] Based on the California Code of Regulations a California resident is understood to be every individual who is in the State for other than a temporary or transitory purpose and every individual who is domiciled in the State who is outside the State for a temporary or transitory purpose. All other individuals are non-residents in light of California Code of Regulations.[32] Obligations in CCPA do not apply to every organization residing in California. CCPA applies under five conditions. The first condition is that the organization conducts business for profit. Secondly, the organization collects consumer´s personal information. Third condition is that the organization determines the purposes and means of the processing of consumer´s personal information. The fourth condition is related to territorial applicability – the company must conduct business in California. The fifth condition is that the company shall meet one of the following conditions: (i) has annual gross revenues in excess of twenty-five million dollars ($25,000,000); and/or (ii) alone or in combination, annually buys, receives for the business' commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices; and/or (iii) derives 50 percent or more of its annual revenues from selling consumers' personal information.[33] Furthermore, the applicability of CCPA is not limited to the processing of personal information on the Internet (Goldman, 2018).

In regard to territorial applicability, CCPA applies to organizations doing business in California.[34] However, what exactly constitutes doing business in California is not defined in CCPA and may trigger application for companies not having establishment in the territory of the USA. The possibility of extra-territorial applicability of CCPA is also recognized by some authors (Pernot-LePlay, 2020b). Certain aid is provided by California Franchise Tax Board stating that: "*doing business in California if it actively engages in any transaction for the purpose of financial or pecuniary gain or profit in California or if any of the conditions (in law) are satisfied.*" These conditions are explicitly stated in section 23101 of the Revenue and Taxation Code of the California and are as follows: (i) the taxpayer is organized or commercially domiciled in California; (ii) sales, as defined in subdivision (e) or (f) of R&TC 25120, of the taxpayer in California, including sales by the taxpayer's agents and independent contractors, exceed the lesser of $500,000 or 25 percent of the taxpayer's total sales. For purposes of R&TC Section 23101, sales in California shall be determined using the rules for assigning sales under R&TC 25135,

[31] Section 1798.140. 7 (G) CCPA.
[32] Section 17014 of Title 18 of the California Code of Regulations.
[33] Section 1798.140.
[34] Section 1789.140 (c) (1): *„Business means…A sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that collects consumers' personal information, or on the behalf of which such information is collected and that alone, or jointly with others, determines the purposes and means of the processing of consumers' personal information***, that does business in the State of California***, and that satisfies one or more…"*

R&TC 25136(b) and the regulations thereunder, as modified by regulations under Section 25137; (iii) real and tangible personal property of the taxpayer in California exceed the lesser of $50,000 or 25 percent of the taxpayer's total real and tangible personal property; (iv) the amount paid in California by the taxpayer for compensation, as defined in subdivision (c) of R&TC 25120, exceeds the lesser of $50,000 or 25 percent of the total compensation paid by the taxpayer; or (v) for the conditions above, the sales, property, and payroll of the taxpayer include the taxpayer's pro rata or distributive share of pass-through entities. "Pass-through entities" means partnerships, LLCs treated as partnerships, or S corporations.[35]

Furthermore, CCPA states that the obligations imposed on businesses shall not restrict a business's ability to collect or sell a consumer's personal information if every aspect of that commercial conduct takes place wholly outside of California. For purposes of CCPA, commercial conduct takes place wholly outside of California if the business collected that information while the consumer was outside of California, no part of the sale of the consumer's personal information occurred in California, and no personal information collected while the consumer was in California is sold.[36]

4. COMPARISON AND SCENARIOS OF APPLICABILITY

Taking into account aforementioned findings, the comparison may be drafted and potential scenarios of applicability for companies doing business in the EU and California may be analysed.

In line with distinction of Article 3 GDPR the assessment shall reflect intra-territorial application and extra-territorial application. Taking into account provisions of GDPR and CCPA related to intra-territorial application, both acts are clear on that matter. GDPR applies to processing of personal data conducted within the context of activities of establishment in the European Union. As highlighted above, the interpretation of what the terms "establishment" and "context of activities" mean is very broad and also minimum activity may qualify to fulfil the criterion. CCPA states the criterion as "doing business in California." The term shall be interpreted in line with California Franchise Tax Board. Therefore, the criterion is closely connected to domicile (similarly to establishment) or revenue in the context of taxpaying in California.

Extra-territorial application of GDPR is stated in Article 3 (2) and applies processing of personal data related to offering of goods and services or monitoring of data subjects' behaviour located in the European Union. Two specific criteria are set out to establish extra-territorial applicability of GDPR. The terms are interpreted by recitals and guidelines mentioned above. It is not yet clear if CCPA has extra-territorial application at all as the act remains silent on the issue. However, the rational view is that CCPA should be applicable also to companies not domiciled in California fulfilling other criteria. Especially, out-of-California entity may be caught by CCPA when it meets one of the conditions stated in 23101 of the Revenue and Taxation Code of California.

[35] Section 23101 of the Revenue and Taxation Code of California.
[36] Section 1798.145 (a) (6) CCPA.

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	GDPR	CCPA
Intra-territorial application	- Establishment in the EU criterion (broadly interpreted)	- Doing business in California criterion (domicile or revenue)
Extra-territorial application	- Offering goods or services or monitoring behaviour of data subjects in the EU - International public law applicability	- Probably yes (see criteria in section 23101 of the Revenue and Taxation Code of California)

Figure 1: Comparison of territorial application of GDPR and CCPA. Source: Author

There are three basic scenarios of applicability of GDPR and CCPA considering the above comparison. First scenario is that GDPR and CCPA will be both applicable to the company. Second scenario is when only GDPR will be applicable to the company. Third scenario is when only CCPA will be applicable to the company.

First scenario: Application of both acts (GDPR & CCPA)

The first scenario with applicability of both GDPR and CCPA may be split based on the geolocation of the company.

If we have a company A based in Warsaw or in territory of another EU Member State and the company A process personal data, GDPR applies as per Article 3 (1). It is not essential whether data subjects are located in the EU or not.[37] CCPA would be applicable if the company A did business in California (please see considerations above).

If we have a company B located in California with direct application of CCPA, GDPR would be also applicable in two cases. The first case is when company B has an establishment in the EU that is processing personal data in the context of its activities. Second case is when company B does not have establishments in the EU but directs offering of goods or services or monitor behaviour of data subjects located in the EU.

Two subsequent notes have to be made towards the issue of applicability of both acts with regard to the personal applicability of GDPR. GDPR differentiates between controller and processor.[38] Without any further elaboration on the notions, controller is defined as "*the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or*

[37] EDPB Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) Adopted on 16 November, p. 9.

[38] Similarly CCPA differentiates between „businesses" and „service providers" in section 1798.140. **Business** *„means…A sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that collects consumers' personal information, or on the behalf of which such information is collected and that alone, or jointly with others, determines the purposes and means of the processing of consumers' personal information, that does business in the State of California, and that satisfies…"* **Service provider** means *„a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that processes information on behalf of a business and to which the business discloses a consumer's personal information for a business purpose pursuant to a written contract, provided that the contract prohibits the entity receiving the information from retaining, using, or disclosing the personal information for any purpose other than for the specific purpose of performing the services specified in the contract for the business, or as otherwise permitted by this title, including retaining, using, or disclosing the personal information for a commercial purpose other than providing the services specified in the contract with the business."*

Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law."[39] On the other hand, a processor means "*a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.*" The basic difference is that a controller determines purposes (and means) of processing of personal data and a processor shall have authorization to process personal data on behalf of the controller (see more in Berthoty et al., 2018, p. 163 et seq.).

In case that a company with the establishment in the EU (GDPR is applicable) appointed a processor in California, the processor would be bound by several obligations laid down directly by GDPR.[40] The processor not subject to the GDPR will therefore become indirectly subject to some obligations imposed by controllers while CCPA would be applicable as well after fulfilling thresholds set out by law would be applicable as well.

The reverse situation is less clear from the legal point of view. In case that a company established in California (subject to CCPA) is not covered by Article 3 (2) GDPR and appoints processor located in the EU, it would require more in-depth analysis of relationship between the companies. There is a probability that a processor in the EU (not subject to establishment criterion based on Article 3 (1) GDPR) would still be covered by processor obligations laid down by GDPR. However, this is without prejudice to applicability of GDPR to a controller established in California.[41]

In case of applicability of both data protection regimes, various obligations are triggered. On the one hand, compliance with basic principles of processing personal data and subsequent obligations is required in terms of GDPR. On the other hand, CCPA entails individual rights of consumers that go beyond the rights enshrined in GDPR e.g. right to opt out from the sale of personal data. Both acts include severe sanctions for the violation of respective data protection laws (for further comparison see Kessler, 2019).

Second scenario: Application of GDPR

As stated above, GDPR distinguishes between intra-territorial application and extra-territorial application. A company is bound by the provisions of Article 3 when it is established in the territory of the EU or directs sale of goods and services or monitors behaviour of data subjects in the EU. A situation when only GDPR applies would be a company established in Warsaw processing personal data of customers in the EU without being domiciled or paying taxes in California (see respective thresholds above). Another example would be a company domiciled in Seattle providing application to customers in the EU and directing its sale there. The same conclusion towards business in California shall be applicable as in the previous case.

Third scenario: Application of CCPA

The third scenario is for a company that is not caught by the applicability of Article 3 GDPR and only CCPA applies. This is for example the company that is doing business in California for profit and other conditions laid down by CCPA are applicable e.g. a start-up AC ltd. selling autonomous vehicles only in the territory of California and only to residents of California based on special trial regime established by Californian government. AC ltd collects and processes personal data about its customers and users of autonomous vehicles. However, the company shall limit its activities with regard to the EU. It must not have establishment in the EU processing personal data or direct its

[39] GDPR, Article 4 (7)
[40] See Article 28 GDPR.
[41] Please see discussion in EDPB Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) Adopted on 16 November, pp. 11-13.

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activities towards data subjects in the EU with regard to offering goods or services or monitoring of the behaviour. This would not be the case if a customer drives an autonomous vehicle in the territory of the EU.

5. CONCLUSION

Protection of information privacy is fairly different in the European Union and the United States of America especially in terms of legislative approach. EU adopts general legislation dealing with data protection issues for public and private sector respectively. USA prefers sectoral approach with a wide range of specific-aimed legislation on the federal level and state-level.

Comparing territorial scope of GDPR and CCPA it may be concluded that GDPR explicitly set forth for conditions of intra-territorial and extra-territorial activity. CCPA is not that clear in wording of the legislation although it is widely presumed that it may apply also on companies not established in California. The article analyses three possible scenarios of applicability of GDPR and CCPA. It shall be concluded that it is possible for both acts to be applicable for one company taking into account territorial scope of the legislation. If this is the case, several obligations arising from GDPR and CCPA respectively are triggered and "burden" the entity processing of personal data.

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DO THE NEW PEACE AGREEMENTS BETWEEN ISRAEL AND THE GULF STATES SET A "HONEY TRAP" FOR ISRAEL? / Nellie Munin

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Abstract: *This article examines whether the recent peace agreements, signed between Israel and the Gulf states: The United Arab Emirates and Bahrain in September 2020, form a 'honey trap', meant to use the economic benefits they offer as leverage to affect Israel's political position towards the Middle East conflict. Recalling that the EU exercises such an approach for many years, the article tries to assess its current and potential effectiveness to the parties involved.*

Key words: *Israel; EU; Gulf states; economic benefits; Israeli-Palestinian conflict; Public International Law*

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1. INTRODUCTION

Back in 2003 I wrote an article titled "the honey trap" (see Munin, 2003), suggesting that the EU uses its economic importance to Israel and the latter's keenness to deepen their economic bond, as leverage to try changing Israel's approach regarding its ongoing conflict with the Palestinian people.

This EU approach is not applied only to Israel. It is part of its broader "normative power" approach, or "carrot and stickism" (Manners, 2002) well established in literature, aiming at positioning the EU as a global political and economic player.

Theoretically, Israel should be particularly sensitive to this approach, due to its situs and market's unique characteristics. Pragmatically, however, this EU approach towards Israel seems to yield only limited results.

Since Israel's establishment, in 1948, the Arab states opted for a different approach to the Middle East conflict, refraining from any political or economic contact with Israel, at least formally, believing that this is an effective way to support the Palestinian side of the conflict. Throughout the years, this approach proved to be ineffective,[1] neither making Israel change its position regarding the conflict, nor

[1] UAE's minister of state, Anwar Gargash, openly admitted in a Zoom discussion with the American Jewish Committee (AJC) that the detachment approach led the Arab states nowhere (see Shery, 2020).

contributing to its ending. In the 1990's Egypt[2] and Jordan[3] changed their positions, concluding peace agreements with Israel. Although peace with both these states is still considered to be "cold", it facilitates certain necessary regional political and economic collaboration,[4] offering Egypt and Jordan some leverage for interference in the Israeli-Palestinian conflict. It also sends an indirect message to the Palestinian people that they are expected to follow the same path.

Egypt and Jordan - as well as Syria and Lebanon which did not sign peace agreements with Israel – share with it mutual borders. Attempting to help Palestinians, all participated in previous wars and lost territories which were captured by Israel. Their interest to conclude peace agreements with Israel thus involved (in the cases of Egypt and Jordan) or still involves (in the cases of Syria and Lebanon) a desire to regain these territories. Consequently, the terms of such peace agreements are subject to strong political domestic controversies in these countries, and even more so in Israel, which is expected to withdraw these territories in return for peace.

This consideration is irrelevant to the Gulf states situated thousands of kilometres away from the territories in conflict. They were never directly involved in hostilities emanating from the Israeli-Palestinian conflict. They refrained from official relations with Israel, not to protect their own interests, but rather to express identification with the Palestinians. Unofficially, limited economic and political relations between Israel and these states have been in existence for many years. Consequently, formal peace made with them does not face strong domestic political objections in any of the parties to these peace agreements.[5]

In recent years, the Gulf states' motivation to refrain from official connections with Israel was eroded in two major aspects:

- A growing *domestic* need to enhance economic collaboration with Israel – known as a global leader in high tech and advanced technologies - realizing the ongoing decline in economic importance of the Gulf states' major source of capital: oil (Rapier, 2020), broadly replaced with solar, wind and other environment-friendly sources of energy.
- The *growing frustration* from the stagnant Palestinian position and the abuse for hostile purposes of huge amounts of money (e.g., Pardos and Blanchard, 2004; FATF, 2020),[6] including sums contributed by the Gulf states and others to develop the Palestinian economy.

Both these aspects, enhanced by some US's incentives,[7] partly explain the recent shift of position which led to a conclusion of two new peace agreements, one between Israel and the United Arab Emirates (UAE) and the other between Israel and Bahrein, in

[2] See the full text of the agreement in Israel Ministry of Foreign Affairs (2013a).
[3] See the full text of the agreement in Israel Ministry of Foreign Affairs (2013b).
[4] In 2018 the total scope of Israeli imports from Egypt was 111 million $ and the total scope of Israeli exports to it was 72 million $ (Tel Aviv and Center Chambers of Commerce, 2019). In 2019, the total scope of Israeli imports from Jordan was 99.2 million $ and the total scope of Israeli exports to it was 8.8 million $. Israeli Central Bureau of Statistics, 2020).
[5] In Israel, it did not encounter any objection. In the Gulf states, some public protest was witnessed, but its scale was quite limited (Frisch, 2020).
[6] See also Official NGO Monitor website, available at: https://www.ngo-monitor.org.il/search/?q=+terror+financing (accessed on 22.11.2020).
[7] US's president Donald Trump promised in his first election campaign to bring peace to the Middle East. In January 2020 his administration initiated a peace plan for the region, titled Peace to Prosperity. See the full text in WhiteHouse.gov (2020). However, since this program did not seem to be accepted by the Palestinians, and Trump has an urgent need to "deliver" before the coming elections Trump, who was interested to enhance alternative peace agreements, suggested the Gulf states incentives such as the sale of F-35 jet airplanes to the United Arab Emirates (Globes, 2020).

September 15, 2020. According to US's President Trump, some five other Gulf states are expected to follow soon (Harkov 2020).

While this change of approach bears obvious political implications, it also opens the way for enhanced economic collaboration between Israel and the Gulf states, which was not possible previously. This collaboration might lead to a growing dependence of the Israeli economy[8] on these states, implying a political leverage over Israel, which did not exist hitherto.

This article examines whether, or to what extent, the new Gulf states' approach corresponds to EU's long-lasting "honey trap" approach towards Israel. Analysing the merits and limits of EU's approach during the years it is applied to Israel, the article tries to assess the potential leverage created by the new Gulf states' approach towards Israel, in both economic and political terms. The first section explains why Israel is potentially so sensitive to subjecting economic benefits to political dictation by its trade partners. The second section introduces EU's "normative power" and 'soft power' approaches, and their application to Israel. The third section analyses the new peace agreements between Israel, the UAE and Bahrein, assessing the potential economic leverage they suggest in comparison to that of the EU. The fourth section concludes.

2. ISRAEL'S VULNERABLE POSITION AS A GLOBAL TRADER

Israel is a relatively small country,[9] situated in a hostile neighbourhood. Although mostly surrounded by land, it effectively feels like an island: land transportation in and out of it is very limited, due to its conflict with most of its neighbouring countries. For the same reason, its major trade and political partners are geographically remote.

Due to Israel's small size and problematic situs, the Israeli economy heavily relies on international trade,[10] to exhaust its comparative advantages[11] and economies of scale[12] benefits. Moreover, Israel's geographical distance from many potential trade partners dictates its reliance on the EU – its geographically closest[13] trade partner outside the region – to save expensive shipment costs to remote destinations, and enable trade in perishable goods, such as fresh foods, flowers and livestock as well as in fragile goods, that could barely last long shipments.

Israel's major economic partners are the EU[14] and the US.[15]

The Israeli market is thus very vulnerable to lack or decline of external trade, emanating either from global drawbacks such as the current COVID-19 pandemic, or from potential political pressures assumed by its trade partners.

[8] Israeli politicians who commented on these agreements expressed hopes for intensive investments from these Gulf states in the Israeli market, to help it recover the current economic crisis caused by COVID-19. See, e.g. Odenheimer (2020).

[9] Israel's territory spreads over 21,640 Square KM (see Worldmeter, 2020). It is ranked 153 in terms of territory's size globally. Its population comprises some 9.2 million citizens (Israel Today, 2020).

[10] Imports and exports form almost 60% of Israel's GDP (Israeli Central Bureau of Statistics, 2020a).

[11] Comparative advantage is a notion attributed to the economist David Ricardo who, in the 19th century, suggested that each country should expertise in producing goods or services which it can produce in the lowest comparative cost, and buy other products and services from countries producing them in the cheapest comparative cost, to maximize its profits.

[12] Economies of scale is an economic principle suggesting that the cost per unit of output decreases as the scale of production (and sales) increases.

[13] The Cypriot border, serving as an EU gate, is only 300 km far from Israel.

[14] In 2019, Israeli exports to the EU exceeded 17.3 bn $ while its imports from the EU exceeded 27.6 bn $ (Israeli Central Bureau of Statistics, 2020b).

[15] In 2019, Israeli exports to the US exceeded 15.9 bn $ while its imports from the US exceeded 11.7 bn $ (Israeli Central Bureau of Statistics, 2020c).

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Until the 1990's, Israel tended towards a protectionist approach, to allow its infant industries to grow. In recent decades the decisiveness of international trade to the development of the Israeli mature economy is broadly realized.

Over the years, Israel took unilateral, regional and multilateral steps to facilitate international trade. In the multilateral sphere, it joined the GATT[16] in 1961 and the WTO[17] upon its establishment, in 1995.

Israel established a network of regional and bilateral trade agreements,[18] complementing the multilateral setting by allowing more specific, custom-made adjustments between their parties. Unilateral measures are taken from time to time, to fine-tune the balance between the Israeli market's domestic needs and its external trade.[19]

In previous decades Israeli decision makers believed that the WTO system would suffice to cover most Israel's trade concerns. Thus, insufficient efforts were invested in the bilateral and regional spheres. The deadlock the WTO experiences in recent years[20] illuminated the limits of Israel's relatively small bilateral and regional network of agreements. In recent years more efforts have been invested in broadening this network, but being time and effort consuming processes, negotiations advance slowly. Moreover, while trade in services is the source for more than 70% of Israel's GDP, it is yet uncovered by most of Israel's regional and bilateral trade agreements.[21]

The time and effort consuming processes of negotiating international trade agreements implies that Israeli decision makers have to prioritise their limited resources. That process is further slowed down by Israeli leaders' hesitation between reinforcing relations with the "old world" giants, i.e. the US and the EU which are Israel's major current trade – and political[22] – partners, and opting for new, promising domains by intensifying Israel's trade contacts with "new world" players, i.e. Far East emerging powers, such as China and India. This hesitation is also reflected in the public and business community discourse in Israel. However, Israel's list of the currently negotiated trade agreements seems to mark a growing realization of such variety's importance.

The recent COVID-19 pandemic offered an interesting setting to test another feature underlining (and limiting) Israel's global trade policy. Israeli decision makers

[16] GATT – the General Agreement on Tariffs and Trade. See full text in: https://www.wto.org/english/docs_e/legal_e/gatt47.pdf (accessed on 22.11.2020).

[17] WTO – the World Trade Organization, now encompassing 164 member states. See more details in: www.wto.org (accessed on 22.11.2020).

[18] Israel has regional trade agreements with the US, Canada, Mexico, MERCOSUR, Columbia, Panama, the EU, EFTA, the UK (to be effectuated after the Brexit), Turkey, Ukraine, Egypt and Jordan. Currently, Israel negotiates additional trade agreements with South Korea, India, Vietnam, China, the Euro-Asian Union and Guatemala (The Israeli Ministry of Economy, 2020).

[19] In 1991 Israel unilaterally liberalized trade in certain sectors, including lumber wood, shoes and textiles. Since then, unilateral liberalization was used to enhance competition and reduce prices, e.g. regarding certain cheeses in recent years, or to relieve seasonal lacks of certain products, e.g. eggs in spring 2020.

[20] WTO's stagnation in recent years emanates from several reasons, including disagreement between the US and other member states on nominations of Appellate Body members, and an ongoing disagreement between developed and developing member states on the desired WTO agenda. Consequently, the "Doha Round" that started in 2001 does not reach an end (see Pakpahan, N.D.).

[21] A chapter on trade in services is included in the free trade area agreement concluded with Panama in 2018 (Free Trade Agreement between the State of Israel and the Republic of Panama, 2018). One reason for that situation is, again, Israel's reliance on the multilateral sphere that disappointed: the TISA initiative, which was an attempt that failed to establish a complementary multilateral agreement on trade in services outside the GATS (see European Commission, 2017a). The other reason is a combination of the considerable efforts it requires from Israel and the reluctance of Israel's trade partners to push for it, due to the relatively small size of the Israeli market.

[22] Politically, Israel tends to rely more on the US than on the EU. The public opinion in Israel perceives EU's political position as biased in favour of the Palestinians. Thus, it perceives the US as a more honest broker.

believe that since it is surrounded by hostile neighbours it should maintain some - even uncompetitive - domestic industries, to ensure the supply of basic foods and products in cases of temporary international supplies cut offs. Unfortunately, one such regulated and protected industry: the domestic eggs industry, failed to deliver during the first COVID-19 wave in spring 2020 (see Munin, 2020).

Currently, Israel is thus a country situated in a hostile neighbourhood that could find itself isolated in terms of international trade in no time, due to political hostilities or international crises such as COVID-19. To exhaust its economic potential, it heavily relies on international trade. Due to years of strategic miscalculation, its current network of regional and bilateral trade agreements is quite limited. Consequently, the Israeli economy heavily relies on the EU and the US, its major trade partners. This reliance is further reinforced by Israel's political reliance on these two "old world's" superpowers.

These facts may explain Israel's vulnerability to political pressures from its trade partners.

3. THE EU AND THE "HONEY TRAP" IT SETS

The EU, the world's largest trade block, has been long using its economic power to affect the political agenda of its partners, by exercising what is broadly recognized by the literature as 'normative power' (see for example Duchêne, 1972; Galtung, 1073; Diez, 2013; Gordon and Pardo, 2015) – the 'export' of EU *legal norms* to other countries, e.g. by mutual international agreements, and other forms of "soft power" (e. g., Nye, 2009; Smith, 2006; Ociepka, 2013) – the power to *politically convince* the others to adopt behaviour, positions, norms or agendas shared by the EU.

In the Mediterranean region context, this policy has been reinforced since mid-1990's, with the conclusion of Association agreements between the EU and the Mediterranean countries. These agreements are rooted in the Barcelona Process,[23] launched at the euphoric time when the "Oslo Agreements"[24] between Israel and the PLO where concluded, and peace in the region seemed to be within reach. The Barcelona process envisioned an adjusted application of the EU model to the Mediterranean region, aiming to establish a network of international trade agreements among the Mediterranean countries, and a complementary network of agreements between them and the EU. While the potential parties where quite reluctant to establish the anticipated regional network of agreements,[25] most of them (including Israel) concluded Association agreements with the EU.

The EU aims to strengthen its position as a global political and economic player, competing with other global powers, such as the US and China (see European Commission, 2017b, pp. 8-10). It thus desires to portray an international image of a power that could potentially change the position of other players, as well as a guardian of public international law rules and basic rights of the relatively weak parties in international conflicts. The EU is interested in affecting the Middle East, due to its global political and

[23] Nowadays, the process has melted into the EU's Union for the Mediterranean (UFM) program. See more details in: The Barcelona Process or Euro-Mediterranean Partnership. Available at: https://www.barcelona.com/barcelona_news/the_barcelona_process_or_euro_mediterranean_partnership (accessed on 22.11.2020).

[24] The "Oslo Agreements", concluded between Israel and the PLO in 1993 and in 1995, provided for a gradual process of peace building in the region. The process was never completed due the political assassination of the Israeli Prime minister Yitzhak Rabin and the Palestinian hostilities that followed (see Israel Ministry of Foreign Affairs, 2013c).

[25] In some cases, due to regional conflicts. In other cases, due to low volumes of trade that did not justify the necessary efforts.

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economic importance and geographic proximity (see, e. g., Gomez, 2003; Wolf, 2009; Bicchi, 2010; Pierini, 2020). The Association agreements with the Mediterranean countries facilitate EU's exercise of "normative power" to that extent.

Reflecting EU's vision, all these Association agreements include political references. In the EU-Israel association agreement,[26] they are embodied in Article 2, subjecting the agreement to mutual respect of shared values, such as democracy and the rule of law, and in Article 3 providing for an ongoing political dialogue between the parties.[27]

Since their conclusion, these Association agreements have underlined EU's attempts to apply its political agenda to the Mediterranean countries including, inter alia, territorial disputes between Turkey and Cyprus over North Cyprus,[28] Morocco and Spain over Western Sahara,[29] and Israel and the Palestinian Authority over the 'occupied territories'.

In the latter case, after the conclusion of the Association agreements with Israel (1995) and with the PLO (1997)[30] the EU started to exclude the territories Israel captured during regional wars from the former Association Agreement's scope of application, contending that these territories are not part of "Israel".[31] The CJEU addressed this legal and political controversy in two[32] controversial[33] rulings, reinforcing this position. Since the CJEU holds the supreme power to interpret EU law, EU member states and institutions follow these rulings closely, applying this interpretation to EU legislation and administrative practices across the board.[34]

This EU approach certainly deprives the disputed territories off the economic benefits embodied in the EU-Israel Association agreement. Attempts to quantify its exact economic effect fail because the situation on the ground is dynamic, but the overall assessment is bearable for Israel. Concerns that other countries may be inspired by the EU to adopt a similar position towards the territories, or rather towards the entire Israeli economy (e.g., Kofman, 2014) did not turn into a broad-scale reality, in the meantime.

While the EU may have drawn some international attention and considerable academic and media attention for taking these steps, reinforcing its desirable international image, they did not change the Israeli position towards the territories.

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[26] Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, OJ L 147/3 21.06.2000. Available at: https://eeas.europa.eu/archives/delegations/israel/documents/eu_israel/asso_agree_en.pdf (accessed on 22.11.2020).

[27] Such references were not included in the previous free trade area agreement between Israel and the EU of 1975, which the Association agreement replaced.

[28] Case C-219/98 Regina v. Minister for Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. & Others, EU:C:2000:360 (re North Cyprus). Available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-219/98 (accessed on 22.11.2020).

[29] Case C-104/16 Council v. Front Polisario, judgment of 21 December 2016. Available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-104/16 (accessed on 22.11.2020).

[30] See full text in Treaties Office Database (2012).

[31] Simultaneously, they are unable to enjoy the benefits of the EU-PLO Association agreements, since these territories are effectively captured by Israel, exercising its sovereignty on them until the end of the conflict.

[32] C-386/08 Brita GmbH v. Hauptzollamt Hamburg-Hafen, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=72406&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4196248 (accessed on 22.11.2020); and Case C-363/18 Organization juive Europeenne, Vignoble Psagot LTD v. Ministre de l'Economie et des Finances, available at: http://curia.europa.eu/juris/liste.jsf?num=C-363/I (accessed on 22.11.2020).

[33] For details on the development of this controversy and the conflicting arguments by the parties, as well as criticism over EU's approach, see: Munin (2011); Munin (2015); Munin and Sitbon (2020).

[34] Brita judgment refers to import duties. Psagot judgment refers to consumer protection. Other fields are covered by EU regulation, e.g., European Commission (2011); European Commission (2013a); European Commission (2013b).

Another way by which the EU assumes pressure on Israel involves its refrainment from updating their Association agreement. The EU-Israel Association agreement was drafted more than 25 years ago. It definitely needs some updating. Thus, for example, it does not cover services, forming source for more than 70% of both parties GDP. Many provisions in it, allowing for potential collaboration in fields such as transportation, energy, education, immigration etc., that could have yielded economic advantages to both parties, are not realized, or fully exhausted, for political reasons. Although it is hard to assess the economic damage of this reality, it undoubtedly implies substantial economic losses, particularly to the Israeli economy, considerably depending on the EU as its major trade partner. Nevertheless, even this does not persuade Israel to change its approach towards the regional conflict.

In times of regional hostilities, e.g. military operations Israel conducted to put a stop to constant rocket shooting from Gaza Strip, some EU members suggested to rely on Article 2 of EU-Israel Association agreement, referring to mutual shared values, to suspend the entire agreement with Israel, for allegedly not respecting these values. A similar suggestion was recently invoked in the context of Israel's unilateral annexation plan (e.g., European Coordination of Committees and Associations for Palestine, 2015; European Parliament, 2014). Eventually, other member states undermined these initiatives, but this is another pending potential EU threat.[35]

The reason Israel does not change its position despite these strong pressures is that the territories' status is a core issue in Israeli politics, with some believing that it may affect Israel's very existence. Namely, it is too substantial to be given up for any economic benefits at stake.

Thus, the 'honey trap' the EU created has only a limited effect.

Yet another limit to EU's 'honey trap' lies in its own economic interests: when these are at stake, the EU would enhance connections with Israel, ignoring differences in their political positions. One good example is the ongoing collaboration between Israel and the EU regarding R&D ventures, now under the auspice of Horizon 2020.[36] Israel's ongoing active participation in this programme and in its preceding "Framework Programmes" was never threatened by the EU, because it serves well EU's interests.[37]

4. DO THE GULF STATES CREATE THEIR OWN "HONEY TRAP"?

4.1 The Negotiations: Assuming "Soft Power"?

According to negotiators, the peace agreements recently concluded between Israel, the UAE and Bahrein result from long years' efforts (Eichner, 2020). Moreover, the agreements bring into the open unofficial security and intelligence, economic and trade collaboration as well as a public inter-religious dialogue including Jews, Christians and Muslims that has already been taking place between Israel and these states.

In January 2020, the US published its peace initiative for the Mediterranean region. The plan supported the application of Israeli sovereignty to 30% of Judea and Samaria (part of the territories occupied in 1967). In return, Israel was required to agree

[35] Recently, this threat was invoked regarding the planned annexation of territories. According to the press, Sweden, Luxembourg and Ireland supported this initiative, while Hungary, Romania, Bulgaria and the Czech Republic where ready to Block it (Kahana and ILH Staff, 2020).

[36] See details and statistics about the Israeli participation in this program in Israel-Europe Research & Innovation Directorate (2020).

[37] On the contrary: in one of the outbursts of controversy between the EU and Israel, in 2013, Israeli Prime Minister Netanyahu threatened that due to EU's approach regarding the territories Israel would not join Horizon 2020. This threat was later removed after mutual negotiations (European Commission, 2013c).

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to the establishment of a Palestinian state with limited sovereign powers, supposing the Palestinians meet certain terms such as dealing with terror, giving up the right of return, stopping activities against Israel in international forums, recognizing Israel as a Jewish state that has a right to exist, etc. The programme did not subject the annexation of the territories by Israel to Palestinian agreement. Following explicit Palestinian rejection of this plan, the Israeli Prime Minister Netanyahu announced that Israel considers unilateral annexation of captured territories in the West Bank.[38] The deadline for this annexation was set for July 1st, 2020. This announcement triggered a broad public discourse in Israel, both in the media and in academic channels (e.g., Dekel and Shusterman, 2020; Commanders for Israel's Security in partnership with Israel Policy Forum, 2018). In June 2020 Netanyahu announced that to avoid broad global opposition, following thorough examination by domestic expert teams nominated to recommend further steps, the Israeli government considered to unilaterally annex only part of the originally planned territories. It was estimated that EU warnings contributed to this shift of position (Bersky and Kutz, 2020). Finally, Israel agreed to refrain from unilateral annexation altogether, at least for the time being, in return to the peace agreements with the UAE and Bahrein. This sequence of events, reported by the media, cannot indicate whether, or to what extent, the intention for unilateral annexation of all or part of the West Bank territories was serious, or rather a well-planned, coordinated device of misinformation, intended to draw the global and local attention from the last phase of the negotiations, or to create the impression of an American/Arab political achievement.

If Israel swaps a serious intention to unilaterally annex the territories with the peace agreements, the potential economic and political benefits such agreements offer may have served as "honey traps" for Israel, set either by the Gulf states,[39] the US or both. However, lack of sufficient information makes it hard to draw an evident conclusion. The political spin option cannot be completely ruled out, taking into account Israeli leaders' awareness of the possible far-reaching international and domestic political implications of such steps, on the one hand, and the contemporary shaky political statuses of President Trump and Prime Minister Netanyahu, on the other.

Gulf states leaders contend that in the negotiations process they succeeded to convince Israel to opt for normalization rather than annexation that would lead to severe regional, and maybe global, results. If this is true, these states exercised on Israel "soft power", obviously encouraged by the US - that was reinforced by the Israeli expectation for the political and economic benefits this move may yield, in its relations with the Gulf states and the US, as well as for a broader scale positive effects on its status in the region as well as on its global image.

4.2 The Agreements

4.2.1 *UAE-Israel Agreement*

The UAE is an emerging player in the Arab world. In recent years it plays a dominant role in regional politics. Its small army, considered to be the most skilled and

[38] Of the territories Israel has captured, some were withdrawn due to the peace agreements with Jordan and Egypt. The Gaza strip was unilaterally withdrawn while East Jerusalem and the Golan Heights were unilaterally annexed by Israeli laws. The territories Netanyahu addressed are situated in Judea and Samaria.

[39] Yousef El Otaiba, UAE's secretary of State and its Ambassador to the US described, in an interview he gave, a process by which the Gulf states convinced Israel to give up annexation and opt for normalization in the region, explaining to its leaders the destructive potential of this step, exercising trust-building gestures such as establishing "Abraham Family's House" in Abu Dabi, which would include a church, a musk and a synagogue; establishing a kosher catering in Dubai, and offering Israel more security and direct connections.

equipped army among the Arab states, is involved in fighting in Yamen, Libya and Afghanistan. The ratio between its small population (only one million nationals, nine million citizens) and its great oil reserves (about 100 million proved barrels) turns it into one of the richest countries in the world. Experts assess that UAE's motivation to conclude the agreement with Israel lies in its leader's desire to improve its international image, eroded by UAE's military involvement in Yamen, and strengthen its relations with the US, which offers the UAE certain guarantees and access to advanced weapons. Indirectly, this step supported US's president Trump in the last elections, an interest shared by UAE's leader Bin Zaid (Gozansky, 2020). This opinion may raise a doubt regarding UAE's "honey trap" motivation, suggesting that its major motivation to sign this agreement barely involves Israel (with which economic and political relations existed anyway). At the same time, however, affecting the Israeli position regarding the conflict may contribute to UAE's regional and global image restoration.

The Agreement's Text:

The Treaty of Peace, Diplomatic Relations and Full Normalization Between the United Arab Emirates and the State of Israel, concluded in September 15, 2020 (see full text in TOI STAFF, 2020), includes some elements that may indicate a "honey trap".

Similarly to EU-Israel Association agreement, it includes a political context, obtained by references to the Charter of the United Nations (Article 2), a mutual commitment to peace and stability in the entire Middle East, a commitment for regular mutual dialogue (Article 4), and a mutual commitment to cooperate with the US and others to launch a "strategic agenda for the Middle East" (Article 7).

Another resemblance to the EU-Israel Association agreement lies in a list of *potential* fields of economic collaboration, which should be developed into detailed agreements (Article 5). This list includes finance and investment; civil aviation; visas and consular services; innovation, trade and economic relations; healthcare – science, technology and peaceful uses of outer-space; tourism, culture and sport; energy – environment- education; maritime arrangements; telecommunications and post; agriculture and food security; water; legal cooperation.

The language of this framework agreement indicates that the parties expect to develop these specific economic collaboration agreements that would turn peace into a detailed reality, as soon as possible, providing: *"Any such agreements concluded before the entry into force of this Treaty shall enter into effect with the entry into force of this Treaty unless otherwise stipulated therein. Agreed principles for cooperation in specific spheres are annexed to this Treaty and form an integral part thereof."* [Emphasis added].

However, bearing in mind the fact that similar potential provisions, included in EU-Israel Association agreement 25 years ago are still not realized due to political disagreement about the Middle East conflict, and the 'cold' peace with Egypt and Jordan, one may foresee how such provisions may function as a "honey trap", either by immediate realization leading to greater economic dependence or by avoiding it, on political grounds. The Horizon 2020 example illustrates that the choice between these two alternatives might depend on the urgency of the Gulf states' need to enjoy connections with Israel and the fields in which such urgency exists.

Yediot Aharonot, 12 June 2020. Available at: https://www.ynet.co.il/articles/0,7340,L-5746959,00.html (accessed on 22.11.2020). Some assess that without a determinant declaration by UAE's leader, Sheikh Mohammed *bin Zayed*, supporting Jordan's position against the annexation, this normalization process would not have been launched at this timing (see Gozansky, 2020).

4.2.2 *Bahrein-Israel Agreement*

Bahrein is a tiny country, with a territory of only 780 Square KM. Nevertheless, in terms of richness it is graded 33 in the world. 85% of its incomes emanate from oil. Bahrein also enjoys very strong connections with the US, equipping its army with modern weapons. This is particularly important due to constant threats it suffers from neighbouring Iran (Gozansky, 2012). Bahrein lifted its boycott on Israel back in 2005 and since then held unofficial, visible political connections with Israel.

Bahrein seems to have joined the peace initiative in the last moment. Thus, at the time this article was written the parties signed only a declaration of peace,[40] rather than an agreement.

This declaration also reflects an equilibrium between, on the one hand, a mutual commitment to peace and security in the region, including an explicit commitment to continue *"the efforts to achieve a just, comprehensive, and enduring resolution of the Israeli-Palestinian conflict*." On the other hand – the "carrot": a mutual commitment to "*seek agreement in the coming weeks regarding investment, tourism, direct flights, security, telecommunications, technology, energy, healthcare, culture, the environment, and other areas of mutual benefit, as well as reaching agreement on the reciprocal reopening of embassies*."

Such future detailed agreements could shed more light on the balance of interests the parties would choose to adopt, and the leverage of political influence it might create. In this case, too, it remains to be seen how quickly detailed agreements would be signed, to conclude whether their very signature is used as a means of political pressure on Israel.

5. CONCLUSION

This article examined the presumption that the new peace agreements concluded between Israel and two Gulf states: UAE and Bahrein, form "honey traps" meant to give the latter a leverage to change Israel's approach towards its ongoing conflict with the Palestinians, in return to economic and political benefits. This presumption was inspired by UAE leaders' admissions that they changed their position towards Israel since the detachment approach did not yield the expected fruits.

However, a thorough analysis of the current available texts which were signed in Washington in September 15, 2020, and the surrounding circumstances does not seem to lead to a clear conclusion.

In terms of motivation, it is unclear whether the Gulf states at stake share EU's motivation. Their willingness to engage in these agreements could be totally different, as suggested. In addition, some open ends make it difficult to complete the assessment at this point in time:

Trade volume and essence: one open question refers to the potential economic effect of these new alliances on the Israeli economy. While the EU, exercising such a 'honey trap' on Israel, is its major trade partner, it is yet unclear to what extent the Israeli economy may find itself depending on Gulf states' investments or on trade with these countries. 'Honey traps' effectiveness rely on substantial trade/investments volumes or on unique, indispensable aspects of trade associated with a certain trade partner.

Lack of Details: the details of any future agreement between the parties are yet unknown. The current documents signed only form frameworks for the mutual working out of such future, detailed agreements.

[40] See full text of the declaration in Landau (2020).

The time frame is also decisive: if detailed agreements, covering all listed issues, are signed in a short while, the potential of delaying them for decades to assume pressure, as done by the EU, would be undermined. However, suspending the trade they would facilitate may serve as an alternative leverage.

Time will thus tell what the effect of these agreements would be. If other Gulf states would join this initiative, they might become part of a more decisive trade block, bearing a greater economic potential – and consequently a greater potential political power which could assume pressure on Israel to change its approach towards the conflict.

The fact that even EU's real effect on the Israeli position towards the conflict is quite limited, could indicate the limits of any intended "honey trap" the Gulf states may expect. Having said that, Israel should not, however, rule out the possibility that the EU, the US and Gulf states may in the future join hands to change Israel's political position towards the conflict, imposing on it joined economic pressure.

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SCHREMS II: WILL IT REALLY INCREASE THE LEVEL OF PRIVACY PROTECTION AGAINST MASS SURVEILLANCE? / Lusine Vardanyan, Václav Stehlík

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Abstract: *An important event that once again brought to the forefront issues related to mass surveillance was the judgment of the Court of Justice of the European Union (hereafter referred as CJEU) delivered on July 16, 2020 in the case of Data Protection Commissioner v. Facebook Ireland Ltd. and Maximilian Schrems (Schrems II). It can be considered as the first serious precedent in the field of surveillance, which is aimed at ensuring privacy in the field of national security. Therefore, it becomes an important issue to assess its impact on the legal framework of international transfers of personal data and on the level of privacy protection. The impact of the judgment on the level of privacy protection and mass surveillance is particularly important now that COVID-19 contact tracing programs are being widely used. In this research we try to trace the formation of the approach to mass surveillance in the case-law of CJEU before and after the Schrems II. We also try to point out some of the difficulties that the process of cross-border data transfer will face after the Schrems II. The main question of the study is whether the approach of the CJEU developed in the Schrems II will actually increase the privacy protection against mass surveillance. We conclude that the Schrems II is an important decision with serious consequences that go beyond the direct impact on data transfer between the EU and the US. It can have controversial influence of the level of privacy protection. Together with the positive trend of formation of more harmonized global data protection standards it can create many unresolved problems in the field of international data transfer and in economic dimension.*

Key words: *Court of Justice, privacy, mass surveillance, Schrems I, Schrems II., EU Law*

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1. INTRODUCTION

The issues of "mass surveillance" have again become relevant in connection with the COVID-19 and the choice of contact tracking apps to combat it, which also give an opportunity to collect and store personal data.

On March 23, 2020, the European Commission met with Telecom operators to discuss the issue of data collection and processing. This is a consequence of the fact

that on March 19, 2020, the European Data Protection Supervisor (further referred as EDPS) suspended a ban on the processing and exchange of personal information of European citizens. In his statement EDPS confirmed, with reference to the General Data Protection Regulation (hereinafter - GDPR), that this is now allowed for "*competent public health authorities and employers to process personal data in the context of an epidemic, in accordance with national law and within the conditions set therein*" (European Data Protection Board, 2020). Relying on this legal relief, the Internal Market Commissioner Thierry Breton contacted eight phone operators[1] and received the approval of all companies, thus, paving the way for an unprecedented project at the European level. The Commission will collect, combine and analyse personal data to ensure European coordination in the fight against Covid-19 and only the Commission will be responsible for any possible violation. As Breton said "*Digital technologies, mobile applications and mobility data have enormous potential to help understand how the virus spreads and to respond effectively*" (European Commission, 2020c). The Thierry Breton's Office wants to simulate the spread of the epidemic in the territory in real time and check the "*(...) link between containment measures and the spread of the virus*" (Untersinger, 2020) to assess the effectiveness of this containment. The European Data Protection Supervisor Wojciech Wiewiórowski in an open letter to Roberto Viola, the Director-General of DG CNECT, states that *"...the data protection rules currently in force in Europe are flexible enough to allow for various measures taken in the fight against pandemics*" (2020).

Another important event that updated the problems associated with mass surveillance was the decision of the Court of Justice of the European Union (hereafter referred as CJEU) on July 16, 2020 in the case of Data Protection Commissioner v. Facebook Ireland Ltd. and Maximilian Schrems.[2] At first glance, this ruling is considered to be continuation of the case Maximilian Schrems v. Data Protection Commissioner,[3] which invalidated the Safe Harbor (Decision 2000/520).[4] But despite the fact that in both cases the problem was to ensure the proper level of confidentiality when transferring personal data to EU countries, it is worth noting that the decision on Schrems II was made in a different political situation, in particular Brexit. Moreover, it was made against the background of the existence of extensive national surveillance laws and the legitimization of mass surveillance in the case law of the ECtHR. It seems that the CJEU itself takes into account the above factors when making a decision on the Schrems II.

Schrems II can be considered the first serious precedent in the field of surveillance, which is aimed at ensuring confidentiality in the field of national security. Therefore, it becomes an important issue to assess its impact on the legal framework of international transfers of personal data.

In this research, we will try to trace the formation of the approach to mass surveillance in the practice of CJEU before and after the Schrems II. We will also try to identify the factors that influenced the formation of the approach expressed in Schrems II, and show some of the difficulties that the process of cross-border data transfer will face after Schrems II. This will give us an opportunity to answer the question whether the

[1] Orange, Telecom Italia, Telefonica, Deutsche Telekom, Telia, Vodafone, Telenor and A1 Telekom Austria.
[2] Schrems II: CJEU, Judgment of the Court (Grand Chamber) of 16 July 2020, Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems, Case C-311/18, ECLI:EU:C:2020:559.
[3] Schrems I: CJEU, Judgment of the Court (Grand Chamber) of 06 October 2015, Maximillian Schrems v Data Protection Commissioner, Case C-362/14, ECLI:EU:C:2015:650.
[4] 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbor privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441) (Text with EEA relevance.), Official Journal L 215 , 25/08/2000, p. 0007 – 0047 (hereafter referred as Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC).

CJEU's approach developed in Schrems II really increases the level of the privacy protection against mass surveillance.

2. THE CASE LAW OF THE CJEU: BEFORE THE SCHREMS II

The development of the approach to mass surveillance in the EU begins with Decision 2000/520/EC, adopted on the basis of DPD.[5] Article 25 (1) of the DPD established the principle that the transfer of personal data to a third country is only possible if the relevant third country provides an adequate level of protection for such data, which may be established by a decision of the Commission. Article 57 of the DPD provided for the possibility of prohibiting the transfer of personal data to a third country when the latter did not provide this level of protection, although article 26 of the DPD knew many exceptions that allowed such transfer to a country that did not provide such protection. To achieve the objective of the DPD to facilitate the free movement of data flows the Commission approved the "Safe Harbor Principles", believing that they would provide "adequate" protection for EU citizens whose data was transferred to the US.[6] Annex I to Decision 2000/520 stated that the obligations imposed by these principles do not apply if justified by "*national security, public interest, and compliance with US law*" and "*legislative, administrative, or judicial decisions, create conflicting obligations, or grant explicit authorizations*", provided that organizations can then demonstrate that non-compliance with the principles is limited to "*measures necessary to safeguard the legitimate interests that the authorization is intended to serve.*"[7] It is clear that Safe Harbor member organizations had a duty to cooperate with intelligence agencies to identify potential violations of national security, and this obligation took priority over respect for the right to protect the personal data. This system was subsequently reviewed by the European Commission in 2002 and 2004. The European Commission issued an official criticism of this Decision.[8]

In October 2015 the CJEU in the case **Schrems I** declared invalid the "Safe Harbor" and concluded that the non-discriminatory nature of surveillance programs conducted by US intelligence services made it impossible to ensure that the personal data of EU citizens is properly protected when shared with US companies. The CJEU noted that "*interference with the right to privacy and the protection of personal data guaranteed by articles 7 and 8 of the EU Charter must … lay down clear and precise rules governing the scope and application of a measure and imposing minimum safeguards*"[9] and "*derogations and limitations in relation to the protection of personal data to apply only in so far as is strictly necessary*".[10] Also the right to effective judicial protection must be respected.[11]

[5] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; OJ L 281, 23.11.1995, pp. 31–50.
[6] Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC, pp. 7–47.
[7] Annex I Safe Harbor Privacy Principles issued by the US Department of Commerce on 21 July 2000/, available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000D0520:EN:HTML (accessed on 18.11.2020).
[8] V. Commission Européenne. *Communication au parlement européen et au conseil relative au fonctionnement de la sphère de sécurité du point de vue des citoyens de l'union et des entreprises établies sur son territoire*, COM(2013) 847 final, 27 novembre 2013.
[9] Schrems I: CJEU, Judgment of the Court (Grand Chamber) of 06 October 2015, Maximillian Schrems v Data Protection Commissioner, Case C-362/14, ECLI:EU:C:2015:650, p. 91.
[10] Ibid., p. 92.
[11] See ibid., p. 95.

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CJEU highlighted the extraterritorial effect of the right to protect personal data (see also Scott, 2014) strengthening the CJEU's control over the "*adequate*" level of personal data protection in third countries. While recognizing that the term "*adequate*" implies that such a country cannot be required to provide a level of protection strictly identical to that guaranteed in the EU legal order, the Court nevertheless found that it must be "*substantially equivalent to that guaranteed in the Union.*"[12] The Court also noted that the means used by third country should be read "*in accordance with fundamental rights*", which means that checks are carried out in accordance with the maximum requirements of the Directive.[13] Consequently, the foreign law in question must have an external control mechanism in the form of an independent body, which is a necessary element of any system aimed at ensuring compliance with the rules relating to the protection of personal data. This decision establishes a situation where the Court analyses the foreign law using external standards for it becoming the "new constitutional court" for the right to privacy in third country legislation, but in practice it does not have the authority to enforce its decisions.

The **case of Digital Rights Ireland** is also significant for the topic under consideration,[14] although many EU Member States either did not comply or partially complied with the decision (PRIVACY INTERNATIONAL, 2017, p. 12). In this case the CJEU considered the question of compliance with the EU Charter and Directive 2006/24/EC, which imposed an obligation on providers of electronic communications services to preserve data transmitted through them or generated by them. The CJEU declared this Directive invalid, considering its measures as a disproportionate invasion into the right to privacy and protection of personal data.[15] The main argument was that the goal of fighting organized crime and terrorism does not in itself justify general measures to preserve data; restrictions on the right to privacy and the right to protect personal data should be "strictly necessary".[16]

The CJEU criticized the general scope of the data interception obligation: this measure applied to "*all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime*"[17] or for the prevention of "*a threat to public security*".[18] The Court then pointed out that the Directive did not specify any objective material or procedural conditions limiting the access of national authorities to this data and established the need for a monitoring procedure by a court or an independent executive authority.[19] Finally, the period of prescribed data storage was not made dependent on an objective criterion that allowed it to be limited only to what was strictly necessary.[20]

[12] Schrems I: CJEU, Judgment of the Court (Grand Chamber) of 06 October 2015, Maximillian Schrems v Data Protection Commissioner, Case C-362/14, ECLI:EU:C:2015:650, p. 73.
[13] Ibid., p. 74.
[14] CJEU, Judgment of the Court (Grand Chamber) of 8 April 2014, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.
[15] Ibid., p. 69, 71.
[16] Ibid., p.51, 52.
[17] Ibid., p. 57.
[18] Ibid., p. 59.
[19] Ibid., p. 60–62.
[20] Ibid., p. 63–64.

The CJEU specified that there is not a ban on states using metadata interception as a preventive measure, but this interception should be targeted[21] and meet a number of requirements. The purpose of data interception should be limited to the fight against "serious crimes"; the principle of strict necessity should be observed when choosing the subject matter, means of communication, data types and time of application of this measure. In particular, national legislation should be based on objective evidence that can convince the public that there is at least an indirect link between intercepted data and the fight against serious crimes.[22]

The conclusions of this case were developed in the case of **Tele2 Sverige AB**,[23] which dealt with requests for the interpretation of article 15 (1) of Directive 2002/58/EC.[24] The principle of strict necessity, according to the Tele2 judgment, should also be observed at the stage of regulating the conditions for national authorities to obtain access to intercepted data: they should only pursue such a goal as the fight against serious crimes.[25] Among the requirements to be met by national legislation the CJEU also indicated prior control by courts or independent executive authorities; intercepted data must be stored within the EU and be permanently destroyed at the end of the storage period; citizens who have been subjected to surveillance must be notified of the operations that have been carried out and a remedy must be available to them.[26] Finally, Member States should ensure that the national legal regime meets the level of protection guaranteed by EU law.

Despite the progressiveness of this decision did not affect the purpose of protecting public safety. Except this, the text of Directive 2002/58/EC itself excludes from its scope of application "*activities concerning public security, defence, state security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law*".[27] The CJEU only recognized that Directive 2002/58/EC applied to both the interception and access stages of data, and interpreted its provisions in the light of the Digital Rights Ireland decision. However, this decision, in turn, was also limited to the purpose of fighting crime.

And if in case Tele2 Sverige AB the CJEU believed that only the fight against serious crimes can justify the retention of data, in the case of **Ministerio Fiscal**,[28] it found that limited access to this data can be provided even for the fight against non-serious

[21] CJEU, Judgment of the Court (Grand Chamber) of 21 December 2016, Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others, joined cases C-203/15 and C-698/15, ECLI:EU:C:2016:970, p. 108.

[22] CJEU, Judgment of the Court (Grand Chamber) of 8 April 2014, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238, p. 57.

[23] CJEU, Judgment of the Court (Grand Chamber) of 21 December 2016, Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others, joined cases C-203/15 and C-698/15, ECLI:EU:C:2016:970.

[24] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) OJ L 201, 31.7.2002, p. 37–47.

[25] CJEU, Judgment of the Court (Grand Chamber) of 21 December 2016, Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others, joined cases C-203/15 and C-698/15, ECLI:EU:C:2016:970, p. 103.

[26] See, for example, in the cases: ECtHR, Weber and Salavia against Germany, app. no. 54934/00, 29 June 2006, p. 95; and ECtHR, Zacharov v. Russia, app. no. 47143/06, 04 December 2015, p. 231.

[27] Article 3(2) of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[28] CJEU, Judgment of the Court (Grand Chamber) of 2 October 2018, proceedings brought by Ministerio Fiscal. Request for a preliminary ruling from the Audiencia Provincial de Tarragona, Case C-207/16, ECLI:EU:C:2018:788.

crimes. The CJEU clarified that the main threshold is that "*access must be proportionate to the seriousness of the interference with the fundamental rights in question that that access entails*"[29] and "*when the interference that such access entails is not serious, that access is capable of being justified by the objective of preventing, investigating, detecting and prosecuting 'criminal offences' generally*".[30]

So, for the CJEU, the indiscriminate nature of the collection and processing of personal data, even if it is intended to protect the society from serious crimes, violates the content of the fundamental right to respect for privacy and entails significant risks to rights and freedoms and requires that the exceptions to the protection of personal data and their restrictions were applied to the extent strictly necessary. The WP 29, which unites European personal data control authorities, published its first report on the "Privacy Shield", in which it "*recalls its long-standing position that massive and indiscriminate surveillance of individuals can never be considered as proportionate and strictly necessary in a democratic society, as is required under the protection offered by the applicable fundamental rights*".[31]

However, despite the fact that the Tele2 ruling deals only with measures taken to fight against crimes, the CJEU's general position on mass surveillance carried out for other purposes can also be drawn from the text of the judgment. Emphasizing that data interception should be restricted to persons suspected of planning or committing a serious crime or otherwise involved in it, the CJEU stated: "*[h]owever, in particular situations, where for example vital national security, defence or public security interests are threatened by terrorist activities, access to the data of other persons might also be granted where there is objective evidence from which it can be deduced that that data might, in a specific case, make an effective contribution to combating such activities*".[32]

The position of the CJEU based on these rulings strengthened the guarantees provided against the abuse of surveillance, and in the discourse of the need to ensure supervision over the excess of laws, since any system of mass surveillance is itself considered a violation of private life. Despite the noted shortcomings the significance of the CJEU's approach in terms of expanding access to courts for citizens, strengthening their procedural guarantees, and condemning the very possibility of mass surveillance should be highly assessed.

After the judgment in case Schrems I Safe Harbor was replaced by the Privacy Shield in accordance with the Decision 2016/1250.[33] But little has changed in terms of surveillance. This enabled Mr. Schrems to continue his campaign. In the new complaint Schrems argued that the US does not provide adequate protection because the US law requires Facebook Inc. to allow access to the transferred personal data of the NSA and the FBI. This means that data is used in a way that is incompatible with the right to privacy, and therefore data transfers via Facebook should be suspended. This became the subject of the Schrems II.

[29] Ibid., p. 55.
[30] Ibid., p. 57.
[31] Statement of the Article 29 Working Party on the Opinion on the EU-U.S. Privacy Shield, Brussels, 13 April 2016. Available at: https://ec.europa.eu/justice/article-29/press-material/press-release/art29_press_material/2016/press_release_shield_en.pdf (accessed on 18.11.2020).
[32] CJEU, Judgment of the Court (Grand Chamber) of 21 December 2016, Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others, joined cases C-203/15 and C-698/15, ECLI:EU:C:2016:970, p. 119.
[33] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176), C/2016/4176.

3. SCHREMS II: OLD SOLUTIONS AND NEW PROBLEMS

3.1 GDPR: further expansion of the external scope

The desire of expanding the scope of GDPR is not new for the case law of CJEU. In the case Google v CNIL,[34] there were some attempts to address the issue of the territorial scope of the right to be forgotten. The decision was made during the period when the GDPR came into force and the Court did not miss the opportunity to outline the scope of its practical application. At first glance, it can be concluded that the Court held that there is no obligation under Directive 95/46/EC to apply right to be forgotten globally.[35] However, the analysis of the decision allows us to see its other feature: the absence of a fundamental ban on the possibility of recognizing the universal application of the right to be forgotten and the GDPR. Having decided that Google "*must be regarded as carrying out a single act of personal data processing*", the Court subordinates the processing of data by Google on all its domains to the GDPR jurisdiction. The Court rules that GDPR applies to all Google, not just Google France.[36]

The CJEU also allows for further steps to be taken to ensure such universal application, for example by pointing to existence of a competence on the part of the EU law to lay down the obligation to carry out de-referencing globally.[37] In addition, the Court emphasizes that EU law does not prohibit the practice of global de-referencing. It tries to preserve the possibility of such application.[38] And this approach is due to the awareness that a categorical refusal of non-universal application of the right to be forgotten, as well as the GDPR, may make impossible to achieve the EU goal of ensuring a high level of personal data protection. The legalisation of the universal application of the right to be forgotten and the GDPR has set a vector for the case-law of the CJEU in the field of EU data protection, which is also further developed in the Schrems II case.

The Schrems II does not question US surveillance powers as such: personal data of EU data subjects "*transferred between two economic operators for commercial purposes might undergo, at the time of the transfer or thereafter, processing for the purposes of public security, defense and state security by the authorities of that third country*".[39] Rather, it highlights the lack of effective legal remedies for EU data subjects in the US. And this is how the Schrems II differs from the Schrems I. In the latter case the criticism of surveillance is more pronounced: "*legislation permitting the public authorities to have access on a generalized basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by article 7 of the Charter*".[40] Perhaps this is an indirect recognition of the position of the ECtHR, which stated that "*the decision to operate a bulk interception regime in order to identify hitherto unknown threats to national security is one which continues to fall within States' margin of appreciation*", adding that such regimes are "*valuable means to achieve the legitimate aims pursued, particularly given the current*

[34] CJEU, Judgment of the Court (Grand Chamber) of 24 September 2019, Google Inc v Commision nationale de l'informatique et des libertés (CNIL), C-507/17, ECLI:EU:C:2019:772.
[35] Ibid., p. 64.
[36] Ibid., p. 37
[37] Ibid., p. 58.
[38] Ibid., p.72.
[39] Schrems II: CJEU, Judgment of the Court (Grand Chamber) of 16 July 2020, Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems, Case C-311/18, ECLI:EU:C:2020:559, p. 86.
[40] Schrems I: CJEU, Judgment of the Court (Grand Chamber) of 06 October 2015, Maximillian Schrems v Data Protection Commissioner, Case C-362/14, ECLI:EU:C:2015:650, p. 94.

threat level from both global terrorism and serious crime".[41] However, this does not mean that the negative attitude towards mass surveillance is easing. On the contrary, the CJEU once again asserts its commitment to the "strict necessity" of conducting surveillance.

The CJEU further states that "*the Authorities of this third country cannot exclude this transfer from the scope of the GDPR in accordance with article 2 (2) of the GDPR*".[42] The justification for this approach is that article 4(2) of GDPR defines "processing" as "*any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means*" and mentions, by way of example, "*disclosure by transmission, dissemination or otherwise making available*", but does not distinguish between operations which take place within the European Union and those which are connected with a third country. Furthermore, the GDPR subjects transfers of personal data to third countries to specific rules in Chapter V thereof, entitled "Transfers of personal data to third countries or international organisations", and also confers specific powers on the supervisory authorities for purpose, which are set out in article 58(2)(j) GDPR.[43]

Simultaneously the CJEU argues that article 4 (2) of the TEU, which removes national security competence from the scope of EU law, applies only to the EU Member States.[44] Each EU Member State can balance national security needs with the right to data privacy at its own discretion, but this does not apply to third countries where EU data is transmitted.

In fact, the CJEU ones again turns the GDPR into a legal act of influence to countries outside the EU. European Commission assesses the GDPR "*as a catalyst for many countries around the world to consider introducing modern privacy rules*" (2020a, p. 12). The Court extends the rights and obligations stated by the GDPR to third states that receives personal data from the EU. This aspiration has quite noble goals: through the globalization of its privacy standards, to counter the dangers that arise from the increasing access of international data flows for national security agencies and to increase the level of privacy protection. This approach increases the discrepancy between the application of the GDPR within the EU and beyond, in effect deepening the already existing double standards of privacy protection. This contradicts the EU's clear desire to create global standards for the protection of the privacy.

3.2 The CJEU's repeated insistence on independent courts as the essential guarantors of privacy

In the case Schrems II the CJEU held that Section 702 of the Foreign Intelligence Surveillance Act (FISA) is not covered by requirements ensuring, subject to the principle of proportionality, a level of protection essentially equivalent to that guaranteed by the second sentence of Article 52(1) of the EU Charter[45] for reasons that this Section "*does not indicate any limitations on the power it confers to implement surveillance programs for the purposes of foreign intelligence or the existence of guarantees for non-US persons potentially targeted by those programs*".[46] In addition as a supervisory mechanism "*PPD-*

[41] ECtHR, Big Brother Watch and Others v. United Kingdom, app. no. 58170/13, 62322/14 and 24960/15, 13 September 2018, p. 386.
[42] Schrems II: CJEU, Judgment of the Court (Grand Chamber) of 16 July 2020, Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems, Case C-311/18, ECLI:EU:C:2020:559, p. 86.
[43] Ibid., p. 82.
[44] Ibid., p. 81.
[45] Schrems II: CJEU, Judgment of the Court (Grand Chamber) of 16 July 2020, Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems, Case C-311/18, ECLI:EU:C:2020:559, p. 178.
[46] Ibid., p. 180.

28 does not grant data subjects actionable rights before the courts against the US authorities".[47] The Court also rejects Executive Order 12333, which allows access to data transmitted in the US without this access being subject to judicial review.[48] In *Schrems II*, the absence of an independent court assessed as a big disadvantage for US privacy protection. Judicial redress has always been essential to the case law of CJEU in the field of data protection. And in the Privacy Shield, an Ombudsman within the State Department was supposed to serve as the institutional alternative to courts. But the Ombudsman has no guarantees of independence from the US Executive branch[49] or "*the power to adopt decisions that are binding on those intelligence services and does not mention any legal safeguards that would accompany that political commitment on which data subjects could rely*".[50] And the CJEU considers it as an important omission. It concludes that the Commission's decision on the adequate level of protection provided by the Agreement between the EU and the US is untenable.

Note that this is practically the criterion that was mentioned as an important guarantee in in the case Szabó and Vissy v. Hungary.[51] But this is also the criterion that was "abolished" as a result of the easing of the ECtHR's approach to mass surveillance in the case of Big Brothers Watch v. the United Kingdom. Here the ECtHR states that although in the United Kingdom permission to conduct mass surveillance was not issued by either a judge or an independent administrative authority, there are no problems because several indications show that there is no abuse of executive power.[52] Re-emphasizing the importance of the specified guarantee in the Schrems II is another step towards fragmentation of the judicial practice of the two European Courts. Can this be considered an increase in the level of privacy protection? Yes, if we take into account the same legitimization of mass surveillance in the practice of the ECtHR and the need to resist it. We will discuss it below.

3.3 Assessment of compliance of foreign laws by private companies

The CJEU repeated its position from the Schrems I and in determining the level of protection required by the GDPR. It ruled that the level of protection should be "practically equivalent" to the level of protection in the EU. However, the GDPR should be understood in the light of the EU Charter. The Court also stated that the assessment of the level of protection afforded in the context of such a transfer must, in particular, take into consideration both the contractual clauses agreed between the controller or processor established in the EU and the recipient of the transfer established in the third country concerned and, as regards any access by the public authorities of that third country to the personal data transferred, the relevant aspects of the legal system of that third country, in particular those set out, in a non-exhaustive manner, in Article 45(2) of GDPR.[53] The CJEU ruled that the use of SCC is required in a third country which "*guarantees the ensuring an adequate level of protection essentially equivalent to that ensured within the Union*".[54] The court interprets articles 46 (1) and (2) (c) in relation to article 45 (2) of the GDPR so that economic operators, when transferring personal data

[47] Ibid., p. 181.
[48] Ibid., p. 183.
[49] See ibid., p. 195.
[50] Ibid., p. 196.
[51] ECtHR, Szabó and Vissy v. Hungary, app. no. 37138/14, 12 January 2016, p. 77, 80, 81.
[52] ECtHR, Big Brother Watch and Others v. United Kingdom, app. no. 58170/13, 62322/14 and 24960/15, 13 September 2018, p. 381.
[53] Schrems II: CJEU, Judgment of the Court (Grand Chamber) of 16 July 2020, Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems, Case C-311/18, ECLI:EU:C:2020:559, p. 105.
[54] Ibid., p. 104.

on the basis of SCC, must take into account the relevant aspects of the legal system of this third country, including national security, in relation to any access by public authorities of this third country to the transferred personal data.[55] The burden of verifying that a data recipient in the destination country can meet the level of protection required by EU law is borne by economic operators that use SSC and are supervised by the competent data protection authority of an EU Member State.[56]

The content of such legal examination of foreign laws by private companies is unclear. Is it enough just to compare the requirements of foreign laws and GDPR requirements? Is it necessary to compare the GDPR with the practice of national security agencies of third countries? The latter seems difficult, if not impossible. Of course, this position is related to the desire to ensure the priority of fundamental rights over economic development. But this desire is almost impossible to implement in practice. However, companies in this case find themselves in the middle of two fires. On the one hand, when transferring data to a country that laws do not provide the level of protection required by EU law, they may face penalties, on the other hand, if they refuse such transfer, they may be subject to material sanctions within the framework of, for example, contractual relations.

Schrems II, which indicates the invalidity of the EU-US Privacy Agreement, may significantly reduce the flow of personal data from the EU to the US and have a negative impact on the development of international trade and information technology, given that the US is one of the leading powers in the digital economy. Enthusiasm for the GDPR as "*a key reference point at international level*" (European Commission, 2020a, p. 12) may be overshadowed by difficulty data flows after Schrems II. As mentioned in the European strategy for data: "*Today's European companies operate in a connected environment that goes beyond the EU's borders, so that international data flows are indispensable for their competitiveness*" (European Commission, 2020b, p. 23). Therefore, the consequences of the Schrems II can also be reflected in the decline in the competitiveness of European companies. Was this the purpose of the CJEU?

Also note that the Commission itself considers the promoting convergence of data protection standards "as a way to facilitate data flows and thus trade" (2020b, p. 23) and does not consider this promotion as an end in itself. The goal of prioritizing the protection of fundamental rights and creating more harmonized global data protection standards should not be achieved through complete disregard of economic factors; otherwise there may be a rebound effect on the same fundamental rights.

3.4 Schrems II: impetus for the development of constitutional law

One of the reasons for the CJEU's criticism of US legislation was a gap in US constitutional law for non-US persons. The Fourth amendment to the US Constitution provides different levels of legal protection to people in the US compared to those outside the US, including access to US courts. In some European countries, the level of privacy protection in national security surveillance may also depend on the nationality and residence of the data subject. This situation allows for a sharp decrease in the level of protection of privacy, since theoretically it allows surveillance by foreign intelligence agencies of all States whose citizen or resident data subject is not. The condemnation in Schrems II of a similar approach in US law may serve as a signal for many EU Member States to review their similar provisions and a new round in the development of constitutional law. Although according to article 4 (2) of the EU Treaty "*national security*

[55] Ibid., p. 105.
[56] Ibid., p. 135, 137, 142, 146.

remains the exclusive responsibility of each member state", according to the AG Manuel Campos Sánchez-Bordona "*this provision does not exclude that EU data protection rules may have direct consequences for national security*".[57]

Note that the Federal Constitutional Court of Germany is somewhat ahead of the CJEU in this regard. Federal Intelligence Service Act (BND Law BNDG) involves different types of surveillance depending on the nationality of citizens. It allows strategic intelligence by means of communication abroad. The Federal Intelligence Service (BND) does not have the right to such control over the communication of German citizens, as well as within its own borders: such surveillance is a violation of Article 10 of the German Basic Law, which protects the freedom of communications. The legal basis for such activities in relation to foreigners appeared in the security service in 2017 after the amendments to the above-mentioned law. The Federal Constitutional Court of Germany in its decision on 19 May 2020[58] explained that the protection provided by the German Constitution (Basic Law) in relation to German public authorities is not limited to the territory of Germany and protects foreigners in other countries, in this case, in the context of foreign telecommunications surveillance conducted by the BND.

The ruling of the Federal Constitutional Court of Germany is also notable for the fact that it may be a kind of response to some delay in the formation of adequate international standards governing the processing of personal data. National jurisdiction is trying to implement rules with global influence and spread their own privacy standards everywhere. In this aspect the Schrems II are the landmark decision, which mark the beginning of an important stage in creating standards for "extraterritorial" and universal privacy protection by the fact that it will strengthen the role of the GDPR in setting international data protection standards. It undoubtedly will also have an effect the surveillance activities of third countries' intelligence services. It is not yet possible to assess this effect, but we can definitely say that it will increase the level of privacy protection.

3.5 Problematic adequacy decisions after Schrems II

The EU seeks to maintain a high degree of privacy, while at the same time seeking to strengthen its role as a decisive actor in the digital economy. However, the current application of GDPR also introduces some obstacles to achieving these goals. The GDPR is used as a "lash" to force reform of third-country security services. However, this may not have the necessary effect, for example, in the case of those regimes that are not as democratic. Actually if the EU hopes that the approaches of the Schrems II can "force" the US to become more "adequate" due to the damage to its national security due to the economic bonuses from the use of EU personal data, this is in our opinion somewhat naive. After Snowden revelations, US tried to convince the EU that the surveillance of non-US persons was protected although there was no provision for it in US statutory law. The result of this attempt was the Presidential Policy Directive (The White House; Office of the Press Secretary, 2014). But Trump's policies are not so smooth. So perhaps those are

[57] Advocate General's Opinions in case C-623/17 Privacy International, joined cases C-511/18 La Quadrature du Net and Others and C-512/18 French Data Network and Others, and Case C-520/18 Ordre des barreauxfrancophones et germanophone and Others, Press release No 4/20, 15 January 2020. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200004en.pdf (accessed on 18.11.2020).

[58] Entscheidung des Bundesverfassungsgerichts - 1 BvR 2835/17 - (zu den §§ 6, 7, 13 bis 15, 19 Absatz 1, § 24 Absatz 1 Satz 1, Absatz 2 Satz 1, Absatz 3 des Gesetzes über den Bundesnachrichtendienst) (BVerfGE20200519 k.a.Abk.), 19.05.2020. AVAILABLE AT: https://www.buzer.de/gesetz/13986/index.htm (accessed on 18.11.2020).

right who after the Schrems II began to doubt that the US will allow to change the US law and to reduce the expense of surveillance.

There is another consequence that may possibly occur - it is challenging already existing adequacy decisions. As it is known, the European Commission also deals with a number of other countries.[59] None of these decisions is secured from judicial challenge after the Schrems II. The problem is that the Commission also makes an adequacy decision on taking into account the economic and commercial component of personal data transfers. This is a broader area for assessing adequacy than the one the CJEU considers and evaluates: ensuring a level of privacy protection consistent with the EU Charter.

As we have already noted, the CJEU in Schrems II subordinates economic interests to basic human rights, which means that if the adequacy assessment was carried out by the Commission based on the priority of the economic factor or taking into account the possible negative consequences of stopping transfers of personal data, then there is a potential possibility of challenge of any of the Commission's decisions on adequacy. Time will tell whether such a scenario will be implemented to review existing decisions.

3.6 GDPR: different consequences for different states

Schrems II does not smooth out the discrepancy between the external (international) and internal (in-European) consequences of applying the GDPR in the field of national security. The CJEU once again makes itself the arbiter of other countries' approaches to data access for national security purposes[60] and formulates requirements for national security agencies of third countries that it cannot impose on its own national security agencies.[61]

Disputes about the limitations of EU legislation in the field of national security become an object of attention of the Court in the rulings, issued on October 6, 2020.[62] The Court tries to answer the question of whether the EU law is applied in the context of the activities of security agencies of Member States. The CJEU found that EU privacy laws, such as the Directive on privacy and electronic communications[63] and the GDPR, cannot be overridden by national security agencies to allow for regular bulk data collection, and the protection mechanisms provided for data processing in the EU Charter are fully applicable in this area as well.

[59] For example: 2003/490/EC: Commission Decision of 30 June 2003 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data in Argentina (Text with EEA relevance); 2002/2/EC: Commission Decision of 20 December 2001 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided by the Canadian Personal Information Protection and Electronic Documents Act (notified under document number C(2001) 4539).

[60] Schrems II: CJEU, Judgment of the Court (Grand Chamber) of 16 July 2020, Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems, Case C-311/18, ECLI:EU:C:2020:559, p. 178.

[61] European Agency for Fundamental Rights 2015. "Surveillance by Intelligence Services: fundamental rights, safeguards and remedies in the EU"; Sidley Austin 2016. "Essentially Equivalent -A comparison of the legal orders for privacy and data protection in the European Union and the United States", January 2016; Opinion of Geoffrey Robertson QC, 14th January 2016.

[62] CJEU, Judgment of the Court (Grand Chamber) of 6 October 2020, The Investigatory Powers Tribunal (United Kingdom), in the proceedings Privacy International Case C-623/17, ECLI:EU:C:2020:790; CJEU, Judgment of the Court (Grand Chamber) of 6 October 2020, La Quadrature du Net and Others v Premier ministre and Others, joined cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791.

[63] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p. 37.

In case La Quadrature du Net the Court states, that all operations processing personal data carried out by providers of electronic communications services fall within the scope of Directive 2002/58, including processing operations resulting from obligations imposed on those providers by the public authorities.[64] In case Privacy International the Court states: *"…national legislation enabling a State authority to require providers of electronic communications services to forward traffic data and location data to the security and intelligence agencies for the purpose of safeguarding national security falls within the scope of [Directive 2002/58]"*.[65] Article 4 TEU actually exclude national security from the scope of application of the EU legislation. However, this is narrowly applicable to the activities of intelligence agencies for the protection of national security. Article 4 of the TEU does not cover the activities of service providers where requested or obliged, by national laws adopted in the implementation of Article 23 GDPR and/or Article 15 of Directive 2002/58, to restrict a number of individuals' rights for the purposes of protection of national security.

This is a step in gradually extending the requirements of EU law to the national security sphere of the EU Member States. The position of the CJEU reflected in the rulings of October 6, 2020, makes it possible to clarify the external boundaries of government access to "metadata", leaving them under a high level of protection in the EU, even if it is used for national security purposes. These decisions provide more detailed guidance on the standards that national security laws must meet. And together with Schrems II, they lay the groundwork for the upcoming decisions of the European Commission on the adequacy of a third country in relation to the transfer of personal data from the EU under the GDPR.

Note that in the case La Quadrature du Net and Others[66] the Court still allows general and indiscriminate storage of traffic and location data, in the event of a "*serious threat to national security*". The Court provides an opportunity for Member States to reform their laws by circumventing the position expressed in Tele 2. The ambiguity of concepts, describing the presence of threat to national security and identification of activities that pose a threat to national security by the Member State itself may lower the level of protection of the right to privacy. The equalization the external (international) and internal (in-European) consequences of applying the GDPR in this situation may also lower the level of protection in the field of international data flows, established by the Court in Schrems II. Anyway, it is clear that at the time of making a decision on the case Schrems II, the Court has shown a determination to continue fighting unjustifiably broad surveillance laws.

4. SOME FACTORS CONTRIBUTING TO THE FORMATION OF APPROACHES IN SCHREMS II

4.1 Brexit

Despite many provisions in Schrems II are repeating the provisions of Schrems I, Schrems II is not a complete continuation of Schrems I: it appears in a very different legal

[64] CJEU, Judgment of the Court (Grand Chamber) of 6 October 2020, La Quadrature du Net and Others v Premier ministre and Others, joined cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791, p. 94-97, 101.
[65] CJEU, Judgment of the Court (Grand Chamber) of 6 October 2020, The Investigatory Powers Tribunal (United Kingdom), in the proceedings Privacy International Case C-623/17, ECLI:EU:C:2020:790, p. 49.
[66] CJEU, Judgment of the Court (Grand Chamber) of 6 October 2020, La Quadrature du Net and Others v Premier ministre and Others, joined cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791, p. 141.

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and political discourse. Moreover, it seems that the Court itself also proceeded from these events. Among such facts: Brexit; the existence of extensive national surveillance laws; the legitimizing mass surveillance in case law of the ECtHR.

An indirect consequence of Schrems II may be a complication of the future EU and UK compliance decision. In the UK, as in the US, there is a mass surveillance system. As an EU Member State, the UK's national security surveillance practices did not fall within the scope of EU law, and the country was free to receive and transmit personal data within the digital single market. After Brexit, when the UK becomes a third country, data transfers will be regulated by Chapter V of the GDPR and the UK legal system, including national security, must provide a level of protection almost equivalent to that guaranteed in the EU. The Court's attitude to mass surveillance in Schrems II case indirectly endorses this approach to the UK. The CJEU makes it clear that after Brexit, all aspects of the UK's privacy regime, including national security, are subject to the adequacy requirement. Whether the existing supervision and an independent court will be sufficient for this is unknown.

Moreover, the CJEU stated that the third-country adequacy analysis is entirely based on the GDPR, whose requirements must be understood in the light of the EU Charter as interpreted by the Court itself[67] not the ECtHR. It may be reminded that the ECtHR sets more lenient criteria for surveillance, but even in this case, the ECtHR has repeatedly condemned UK laws for non-compliance with the ECHR standards.[68] The new UK law on intelligence services is now also being challenged in the ECtHR. If the ECtHR again finds that the new law does not comply with the ECHR standards, the European Commission cannot approve the adequacy of UK laws to EU legislation standards that are stricter than the ECHR standards. The threat of legal challenge in the CJEU is almost guaranteed. In light of this, getting an agreement on adequacy for the UK may be a difficult task for a long time to come.

4.2 Legitimation of mass surveillance in the case law of the ECtHR and opposition to it by the CJEU

After terrorist attacks since 2015, most European countries have adopted new, almost identical laws that allow mass surveillance on broad grounds. Thus, many laws allow extensive opportunities for mass surveillance of foreigners, where the victims of potential abuse are non-citizens with few legal protections for redress. The ECtHR has almost come to terms with this state, which cannot be said about the CJEU.

For the CJEU this issue can have two directions of decision: either the adoption of the position of the ECtHR as a determining weather vane through the use of potential of article 52(3) of the CFR, or deepening the existing fragmentation of case laws. As it is known, the CJEU is trying to minimize the effect of article 52(3) of the EU Charter.[69] The CJEU has shown that the autonomy of the EU's legal order is an absolute priority for it. It seems that the second direction will be preferable for the CJEU and Schrems II showed that the CJEU supported its already expressed position based on its previous case law. Today we have a fragmentation of the case law of the ECtHR and the CJEU. The Schrems II deepens it.

[67] Schrems II: CJEU, Judgment of the Court (Grand Chamber) of 16 July 2020, Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems, Case C-311/18, ECLI:EU:C:2020:559, p. 98-99.
[68] In the case Big Brothers the Court found that the methods of mass interception of communications practiced by the British Intelligence Agency violated article 8 and article 10 of the ECHR.
[69] CJEU, Judgment of the Court (Fourth Chamber) of 28 July 2016, JZ v Prokuratura Rejonowa Łódź – Śródmieście, Case C-294/16 PPU, ECLI:EU:C:2016:610.

How the ECtHR will respond to this, is not yet known, but the case Centrum för Rättvisa[70] and the case Big Brother Watch are challenged in the Grand Chamber now.

An assessment of the impact of the Schrems II on privacy protection is necessary in the scope of case law ECtHR, since all EU Member States are members of the Council of Europe and have signed the ECHR. The insufficiency in the dialogue of Courts hinders the formation of a coherent picture of protection in this area. In case of Digital Rights Ireland[71] the CJEU states the invalidity of the Directive 2006/24/EC. Referring to the case law of the ECtHR, the CJEU proceeded from the need for clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards.[72] In the Schrems II there are no references to the case law of the ECtHR, and this is not accidental.

First, it is a response to the case Centrum and the case Big Brother Watch, which marked a certain departure from the "strict necessity" standard, recognizing the broad discretion of national authorities and approving the mass surveillance policy as a "valuable tool" for protecting national security.

Second, the EU through Schrems II shows itself as a strong actor in the sphere of human rights in the world. It shows that in this aspect, it is not very "bound" by the judicial practice of the ECtHR and can take the initiative in creating standards for the protection of human rights.

5. CONCLUSIONS

The judgment of the Schrems II case is not a mere continuation of the CJEU's approach about the legal standards of international data transfer and "extraterritoriality" of GDPR, which has already been expressed in Schrems I. Schrems II is an important decision with serious consequences that go beyond the direct impact on data transfer between the EU and the US. It is aimed at protecting EU data subjects from exceeding the national security powers of third countries, but it can also create many unresolved problems in the field of international data transfer. The Schrems II shows that the EU has an impetus for the development of a unique case law of CJEU regardless of the modern approach developed in the ECtHR.

The EU takes the initiative to protect human rights to privacy from state surveillance setting the tone with GDPR. But to protect people from mass surveillance, much more needs to be done. It is primarily a formulation of more harmonized global data protection standards, finding a balance between privacy and security, privacy and the economic dimension of international data transfer and so on. The modern case law of the CJEU can have important implications for strengthening the protection of human rights in Europe and curbing potentially dangerous changes for both human rights and economic situation. Perhaps in the future, the CJEU will be forced to develop a more balanced approach to the relationship between national security, privacy and economics. This is what the Schrems II lacks to create reliable legal instruments for international data transfer and harmonized global data protection standards.

We can conclude that the Schrems II is an important decision with serious consequences and can have controversial influence in the level of privacy protection in global level.

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[70] ECtHR, Centrum v. Sweden, app. no. 35252/08, 19 June 2018.

[71] CJEU, Judgment of the Court (Grand Chamber) of 8 April 2014, Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General, and KärntnerLandesregierung, Michael Seitlinger, ChristofTschohl and Others, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

[72] Ibid., p. 54.

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SCANDINAVIAN LEGAL REALISM AND THE CHALLENGE OF RECOGNIZING EMERGENCY MEDICAL SERVICE AS A LEGAL NORM / Jenna Uusitalo

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Abstract: *Emergency medical service (EMS) forms a sub-category of the internationally recognized right to health. However, despite the codification of the right to health in various human rights conventions which have been implemented in national legislation, EMS still seems to be regarded as an economic expense or a political decision rather than a legal norm or a human right. This paper evaluates the causes for such a misunderstanding, primarily through Scandinavian Legal Realism which emphasizes the social contextualization of law. Supplementary scholarly views, as well as a history of human rights, are also applied to support the main arguments. Essentially, the paper claims that the challenge of recognizing EMS as a legal norm is associated with the relatively abstract and impersonalized nature of emergency care.*

Key words: *Emergency Medical Service; Human Rights; Legal Philosophy; Scandinavian Legal Realism*

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1. INTRODUCTION

In 2015, the Parliamentary Ombudsman of Finland published a decision according to which equal access to emergency medical care in Finland was compromised because of dead zones within the emergency medical service helicopters' (HEMS) geographical area of operation.[1] Despite the explicit constitutional references in the decision, the Ministry of Social Affairs and Health, as a responsible authority on the matter, was of the opinion that the issue was solely a political one and could not be resolved without due consideration of the budget (Mansikka, 2018; Ministry of Social Affairs and Health, 2018). Therefore, the new HEMS bases cannot be established until 2022 at the earliest, i.e., seven years after the Parliamentary Ombudsman's observations.

Contrary to the Ministry's perception, emergency medical service (EMS) is not merely a political or economic decision, but a legal norm which has a strong basis in international human rights law. While no international or regional human rights document refers to EMS specifically, it forms a *de jure* sub-category of the right to health, which

[1] The Decision of the Parliamentary Ombudsman of Finland (2015). *En Jämlik Tillgänglighet av Läkarhelikoptrar*. Dnro 1989/4/14.

itself has been recognized by international human rights law.[2] An additional human rights aspect is found in the definition of EMS which has traditionally provided urgent treatment to patients who suffer from injuries or sudden onset of illness.[3] In other words, the core function of EMS is to safeguard one of the most fundamental human right to life. By ratifying the international and regional human rights documents, Finland for instance, has accepted to be bound by the legal norms obligating it to protect life and to guarantee the highest standard of health care available within its resources. These norms have then been transferred in the Constitution and clarified in detail by substantive legislation such as in the Health Care Act (*Terveydenhuoltolaki*, 1326/2010) and the Decree on Emergency Medical Service (*Asetus Ensihoitopalvelusta*, 585/2017).

Considering that EMS has a relatively strong legal basis in Finnish law, it seems inevitable to ask why EMS faces challenges in becoming recognized as a legal norm enshrined in the international human rights law. This paper answers the aforementioned question primarily through the Scandinavian way of legal thinking, frequently referred to as Scandinavian Legal Realism or the Scandinavian School of Thought. This approach has been selected because the traditional distinction between natural and positivist legal theories seems rather insufficient to provide a comprehensive answer to the research question. Despite being a legal norm, EMS is nevertheless attached *inter alia* with economic, societal and political aspects (Uusitalo, 2018a, p. 405; Uusitalo, 2018b, p. 206). Therefore, Scandinavian Legal Realism, which perceives law as a social phenomenon that cannot be isolated from the social context, seems to offer the most compatible and practically oriented grounds for the present analysis (Jorgensen, 1984; Hart, 1959). However, as no single legal theory can comprehensively explain the functions of legal norms, ideas emerging from Scandinavian Realism are supplemented with additional scholarly views and the historical aspects of human rights that can *de facto* enhance the understanding of Scandinavian legal thinking.

Essentially, this paper argues that the main reason that EMS fails to be recognized as a legal (human right) norm is because of its impersonalized nature. To clarify this hypothesis, EMS is generally of no concern to an individual until emergency medical care is needed. It is only after a personal experience that a person starts to consider the importance of EMS and to evaluate the compatibility of existing legal frameworks with personal and societal values. Actions to change the prevailing societal understanding of EMS are initiated when the current legislative basis is no longer perceived to correspond with what individuals perceive as fair and just. The aim of the paper is to clarify the theoretical background and the challenges of legal (human rights) norms, primarily through concrete examples, in order to better understand how the law and human rights operate in society. The analysis is applied both at a national level and in the international arena.

This paper is structured as follows. After the introduction, section two explains the main perceptions and the position of Scandinavian Legal Realism with respect to other legal theories regarding the question of what law is. Section three examines how Scandinavian legal thinkers perceive human rights in general. Elected examples of human rights issues are presented and analysed. Section four applies the theoretical observations from the previous sections to analyse the primary research question: why

[2] See, for example, Article 25 of the Universal Declaration of Human Rights; Article 12 of the International Covenant on Economic, Social and Cultural Rights; Article 13 of the Revised European Social Charter.

[3] According to the Finnish law EMS is defined as "*urgent treatment of patients who have suffered an injury or a sudden onset of an illness primarily outside of health care treatment facilities*" (*Terveydenhuoltolaki* 1326/2010, art. 40(1))

does EMS faces challenges to be regarded as a legal norm? Finally, section five summarizes the findings and offers concluding remarks.

2. SCANDINAVIAN LEGAL REALISM ON THE DEFINITION OF LAW

The questions of what law is, how legal norms operate and why individuals follow laws are by no means straightforward. Historically, discussions have evolved around the question of the interactions between sovereign and subservient, evaluating *inter alia* whether people must unquestioningly obey laws in every circumstance, or whether the governing power is in fact vested on people (see Kant, 1793; Rousseau, 1762). Regarding the essential nature of law, legal positivists such as Hans Kelsen perceived law as an isolated phenomenon which should be distinguished from any form of moral sentiment or politics, and is followed simply by virtue of being a norm that imposes negative sanctions (Somek, 2007, pp. 411-414; Kammerhofer, 2009, pp. 227-228). Others, such as H.L.A. Hart, drew a distinction between rules imposing legal obligations and rules conferring legal power. He understood that not all legal provisions are coercive in nature, but still believed in the ultimate rule of the legal system (Hart, 1986; Lon Fuller, 1964, p. 385; Payandeh, 2011, p. 974). Arguments against what can be referred to as "*pure and isolated law*" were presented by natural law theorists such as John Rawls and Jürgen Habermas. They understood law to stem from moral values and a moral sense of justice that human beings have by nature (Weithman, 2009, pp. 117-118; Khan, 2012, pp. 153-154; Leeper, 1996, p. 139). This implies that a legal norm which does not reflect morality has *de facto* no legal value, and cannot even be a legal norm. The political theorist Carl Schmitt on the other hand, perceived law as nothing more than politics in which the monopoly has been granted to a lawmaker (Schmitt, 1929, pp. 19-25; Schmitt, 1932, p. 23; Berkmanas, 2010, p. 107). This represents a rather sceptical view with no positive validation in law. In this chaotic battle of contradictory views, the Scandinavian Legal Realism seems to offer a balancing settlement by combining differing perceptions of the law.

The Scandinavian Legal Realism, which is also frequently referred to as the Scandinavian School of Thought, was founded at the beginning of the 20th century and is traditionally associated with four scholars. Axel Hägerström (1868 – 1939), a Swedish philosopher and Alf Ross (1899 – 1979), a Danish lawyer, are generally regarded as the founders of the Scandinavian way of legal thinking. Working with them were Hägerström's students, Anders Vilhelm Lundstedt (1882 – 1955) and Karl Olivecrona (1897 – 1980) (Bjarup, 2005, pp. 1-2; Eliasz and Jakubiec, 2016, pp. 107-109). Whilst each of these philosophers has slightly different interpretations of the metaphysics of law, the essential elements for understanding the law are more or less in agreement.

What makes this Scandinavian line of legal thinking appealing is its practical orientation. For Scandinavian thinkers, law is a socially constructed fact, and therefore needs to be interpreted in the societal context (Jorgensen, 1984, p. 2; Baaz, 2009, pp. 10-11; Hart, 1959, p. 234).[4] Interestingly, despite the fact that Scandinavian realists aimed to challenge the distorted perception of law represented by both positivist and natural legal theories, they ultimately reflected the elements from both schools of thought and from other political and moral philosophers (Bjarup, 2005, pp. 1-2; Eliazs and Jakubiec, 2016, p. 107). However, such concessions towards other theories do not decrease the

[4] It should be noted that American legal realism shares the same understanding of law being dependent on social factors. However, representing legal theory in a common law jurisdiction, American realism is more focused on courts and socio-economic factors affecting to them, whereas Scandinavian legal realists reflect civil law jurisdiction (see Pihlajamäki, 2004, pp. 470-472).

importance of the Scandinavian Realism but rather they allow Scandinavians to offer a clearer perception of the law by combining various viewpoints and forming their own interpretations.

The main arguments and line of logic represented by Scandinavian Legal Realism can be summarized as follows:

1. It is not that a norm itself that has much value in reality. Instead, the importance is vested in the *idea of the norm* existing in people's minds (Schmidt, 1978, p. 10; Pattaro, 2009, pp. 540-542; Niemi, 2016, p. 34). It follows that a legal norm is only an abstract matter (*an idea*), having no practical meaning for an individual until it becomes a reality for them.
2. Individuals follow (the idea of) a legal norm because of their own moral sentiment of duty, fear of moral disapproval or sanctions, or because there is not sufficient motive to break the law (Schmidt, 1978, pp. 9-10; Jorgensen, 1984, pp. 2-5; Carty, 2003, pp. 822-824). Therefore the essential purpose of law is to direct a person's behaviour, and a mere feeling of being bound by law is sufficient to hinder illegal actions and make individuals comply with what is expected of them (Schmidt, 1978, pp. 13-20; Eng, 2011, p. 223; Holtermann, 2017, p. 30).
3. Those in power have a certain authority to influence a sense of right and wrong. A preference for security and a fear of the unknown can restrain individuals from the challenging legislation (Schmidt, 1978, pp. 16-18; Spaak, 2014). However, because norms do not have a reality of their own but are constructed in the minds of individuals to reflect the feelings of society, it follows that in order for a norm to have legal validity, it must correspond with what is perceived as fair and just by the public (Jorgensen, 1984, p. 5; Carty, 2003, p. 826; Pattero, 2009, pp. 540-542; Holtermann, 2017, p. 30). Therefore the power of a lawmaker is not absolute, but must *de facto* represent the societal values.

The foundation of Scandinavian Legal Realism is therefore human beings and human conduct in society. In a sense, such a philosophical approach is not inherently unique. It has, for instance, been admitted that even in the sphere of egoism, each individual citizen is nevertheless a member of society (Marx, 1844, pp. 128-131). Therefore, every individual decision and action should be reflected in a societal context, i.e., how actions affect others and how others perceive one's actions (Mill, 1849, p. 145; Sartre, 1945, pp. 30-31; Parekh, 2004, p. 47). However, what differentiates Scandinavian legal realists from these (political) philosophers, is that instead of engaging merely in a socio-political analysis, Scandinavians sought to explain the *functions of law* and legal norms by utilizing moral perceptions and socio-political evaluations.

Interestingly enough, Scandinavian Realism reflects, at least to some extent, legal positivism by acknowledging the existence of legal norms (or the *idea of a legal norm* that binds us). However, by claiming that individuals do not follow the norm simply because it exists, but because the public has accepted it, Scandinavians concede towards a natural theory of law as well as moral philosophers. In fact, such a notion can be seen to reflect an *inter alia* utilitarian approach according to which, law itself cannot be a synonym for justice due to the possible existence of unjust laws, even though the ultimate goal of law should be to promote happiness (Mill, 1861, p. 139; Hayden, 2001, p. 118). Consequently, Scandinavian Realism combines legal positivism that emphasize the existence of (some form of) norm, with moral (utilitarian) philosophers and natural law theorists appraising an individual's sense of righteousness and morality, i.e., personal feelings contributing to individual's decision on obeisance of the law.

Essentially, whether a norm is followed because it has been codified in the legislation or because we merely feel a moral sense to comply with it, is irrelevant for Scandinavian realists. Instead, what is important is the collective understanding among

individuals of what is regarded valuable enough to be followed. In contrast to natural law theorists, Scandinavian realists perceived law as more of an intangible phenomenon which has little importance to individuals in ordinary circumstances. In other words, what Scandinavians claim, is that individuals comply with the law more or less automatically, without any further moral appraisal, until they face injustice. What is regarded as injustice, on the other hand, derives from an individual's own values, attitudes, morals and prejudices (see Tamanaha, 2006, p. 1267). These factors, then, have a basis in historical and cultural heritage, which essentially explains why similar rules have different implementations depending on social context (Picker, 2011, p. 88; Eberle, 2011, p. 52). The similar logic of feeling bound, cultural context and the fear of moral disapproval, in fact applies equally at the national level among individuals and in the international arena to explain states' behaviour. Some states are more concerned about their international reputation and choose to comply with international norms simply to avoid "bad publicity" and because they perceive compliance to be the right thing to do. However, for some states, the feeling of being bound by common rules does not constitute sufficient grounds to adjust their conduct to correspond with international law. Thus, Scandinavian Legal Realism offers a practically oriented theory on law, according to which non-judicial determinants (and human factors) cannot be overlooked in the legal analysis of both national and international law.

3. SCANDINAVIAN LEGAL REALISM APPLIED TO HUMAN RIGHTS

Human rights form a branch of contemporary international law and are binding upon states either through ratification and implementation of international human rights treaties in accordance with the 1969 Vienna Convention on Law of Treaties, or because of customary international law. International human rights law, as we currently understand it, has its foundations in the 1948 Universal Declaration of Human Rights (UDHR) which was established in the aftermath of the terrible events of World War II. However, instead of being a mere codification of legal norms, human rights are *de facto* a formation of collective power representing our moral and political conceptions (see Lefort, 1986, pp. 261-263; Bagatur, 2014, p. 11; Keedus, 2011, p. 192). Human rights have a much longer history than conventional human rights law implies. Indeed, the rights that are currently guaranteed by the UDHR and other human rights treaties, in fact represent *inter alia* continuous historical failures to protect minorities as well as inhumane conditions and treatment of human beings.[5] Throughout history, human beings have taken actions to demand changes when they have found something that does not comply with their understanding of rightness. In other words, our awareness of *the right to have rights*, as Hannah Arendt presents it, as well as our membership of a political society, have enabled the development of (contemporary) human rights law (Arendt, 1958, p. 296; Oman, 2010, pp. 285-286). It is therefore fair to say that human rights law has evolved not only through our attempts to reconcile ourselves with historical guilt, but also through dissatisfaction and feelings of injustice.

It should be noted that, since there is no consensus on what law actually is, no agreement on the philosophical basis of human rights has been reached (Payandeh, 2011, p. 969; Cambell, 2011, p. 455; Bittner, 2015, pp. 73-74). Human beings are, of course, regarded as possessing rights simply by virtue of being human (Tasioulas, 2015, p. 50;

[5] In fact, the 13th century King of England limited his powers to infringe the rights of his sub servants by signing the Magna Carta. The anti-slavery movement, for instance, took place from the 17th century to the 19th century. Similarly, the French revolution (1789) and its American equivalent (1776) are classical examples of events in which the people were unsatisfied with how they were treated (see more in Neier, 2012, p. 2012; Moyn, 2008, pp. 22-25; Charvet and Kaczynska-Nay, 2008, pp. 72-74; Parekh, 2004, pp. 43-44).

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Pogge, 1995, pp. 187-191). However, at the same time the extent to which human rights have expanded, challenges human rights to be perceived purely as a source of natural law. Surely it is fair to claim that we should preserve the right to life by refraining from killing each other because of our moral perception, regardless of the existence or absence of a written criminal code. However, the assumption that individuals have a right to highly professional medical assistance and access to in vitro fertilization (IVF) treatment simply by virtue of our humanity, seems rather far-reaching, even though new technologies have enabled such rights (Tasioulas, 2015, p. 61). Thus, by simply applying the natural legal theory to human rights, the scope of our rights would be deemed much narrower than we have become accustomed to. The codification of rights allows us to expand our perceptions alongside the developments in our societies. However, even written legal provisions are meaningless without social contextualization.

Whilst Scandinavian legal realists have not discussed human rights *per se*, the concept of a "*legal right*" has been analysed, in particular by Olivecrona and Ross. Olivecrona, for example, regarded a right to be nothing more than an imaginary power, whereas for Ross, a right was merely "*a technical tool of presentation*" (see Spaak, 2014, p. 265; Bix, 2009, p. 112). However, despite their noble characterization of representing our historical guilt and dissatisfactions, human rights are essentially comparable to any other legislative norm, and can thus be analysed by applying the general notions of law presented by Scandinavian legal realists. The fact that human rights do not possess any magical characteristics over other legal rules can be explained by the idea that whilst international human rights today form an integral part of our legal systems, such norms have (generally) no legal validation at a national level without implementation (Meckled-Garcia, 2015, p. 304). The rules of international treaty law are not limited to international human rights *per se* but they apply *de jure* equally to all international agreements. Consequently, the nature of legal provision guaranteeing freedom of expression under Article 19 of the International Covenant on Civil and Political Rights (1966) does not inherently differ from the norm conferring ships the right to innocent passage through the territorial sea in accordance with Article 17 of the United Nations 1982 Convention on Law of the Sea.

However, it is important to note the difference between *international* human rights law and human rights *at national level*. The former is universal at the theoretical level as all international and regional human right treaties are *de facto* attributable to the UDHR, declaring equal and inalienable rights to all and reflecting the language of moral philosophy (Tesón, 1985, p. 382; Li, 1996, pp. 397-408; Buchanan, 2015, p. 244). However, *international* human rights without any social contextualization are simply too abstract and vague to have any practical legal validation and can be no more than a moral framework which helps to value states' conduct in the international arena (Renzo, 2015, pp. 570-576; Monshipouri, 2001, p. 372; Nelken, 1984, p. 170). Therefore, from the perspective of ordinary individuals, human rights gain their legal power through implementation, but at the same time they seem to lose their legal importance of being *human rights* as they are being transferred to mere legal norms. To clarify such a hypothesis, under normal circumstances people in Finland, for example, do not wake every morning thinking that they have the right to life and personal integrity – despite its constitutional protection which has been expanded further in the criminal code (39/1889) criminalizing *inter alia* homicides and bodily injuries. Instead, it is only after one's life has been endangered by a perpetrator, either directly or indirectly, that an individual becomes concerned with such a right.

What Scandinavian Legal Realism contributes to the explanation of human rights is the recognition of legal norms (or *ideas* of legal norms) being social factors which reflect an individual's perception of rightness. People do not respect the norms merely

because they are written laws, but because compliance is expected from them by other members of society, and because the public perceives no value in not obeying them. In a sense, human rights, even at the national level, appear to be more or less abstract or self-evident norms. These norms are of no concern to people until the *idea of a norm*, such as the right to life, actualizes in reality, e.g. surviving a car accident. Furthermore, due to social contextualization, or cultural diversity, human rights have different effects in different societies (Raz, 2015, p. 229). That is why gender-neutral marriages, for instance, are accepted in every Nordic country, while same-sex relationships are still illegal in Uganda and even carry the death penalty in Sudan (Amnesty International, 2018a). Similarly, wearing the burqa in Muslim countries reflects a religious and cultural context whereas prohibiting them in Denmark represents a different social environment (Margolis, 2018; The Independent, 2018). Such examples not only illustrate how cultural diversity affects the implementation of human rights, but also elucidate the Scandinavian legal realists' perceptions on the de facto way that the law functions.

As Scandinavians explain it, law is by no means an absolute and unchallengeable representation of sovereign will. Rather it is the existence of norms (in people's minds; i.e. an idea of a norm) that confers authorities the *de facto* power (Pattero, 2009, p. 542; Spaak, 2014, pp. 267-268). Actions are thus initiated when the idea of how law should be does not correspond with what law is. For example, a successful campaign promoting gender-neutral marriage in Finland was launched in 2013. An act permitting same-sex couples to register their partnerships, but not to enter into marriage, was perceived by the public as discriminatory and unjust (Tahdon2013, 2013a; Hallituksen esitys, 2015). In addition to the general public, a large number of organizations, companies and celebrities stated their support for the campaign (Tahdon2013, 2013b). The enhanced Marriage Act came into force in March 2017. The campaign proves the Scandinavian theory of the importance of values in social context since not everyone who supported the campaign was personally directly affected by the unjust law (i.e. a discriminatory Marriage Act). Instead, it was a sense that the legislation in force contradicted one's inner value judgment and understanding of equality that enabled both natural and legal persons to act.

The Scandinavian legal realists' perceptions on how the law functions and why (human rights) legislation is changed can be seen in the philosophy of Hannah Arendt (1906-1975) and Jacques Ranciére (b. 1940). Similarly to Scandinavian realists who valued the socially constructed idea of a norm, Arendt and Ranciére also focused on social contextualization and the power of a group in their explanation of human rights. For them, human rights do not belong to everyone simply by virtue of humanity, but because rights are demanded and fought for by those who lack those rights (Arendt, 1958, pp. 279, 301-302; Ranciére, 2010, pp. 67-68; Van der Hemel, 2008, p. 18). In other words, what Arendt and Ranciére essentially claim is that we *have an idea of a norm* (i.e. an idea of the right to have rights), something that we perceive to have a right to because that right corresponds with our feelings of justice and fairness, e.g. gender-neutral marriage. When our idea of rightness does not correspond with the rights that we have (our *de jure* rights), we engage in actions to cause what Ranciére referred as dissensus in order to achieve the change that reflects our understanding of the rights we believe we are entitled to. Legislators respond to our demands because they represent a formation of our social power and ability to cause political struggle, and/or because lawmakers share similar perceptions (Lefort, 1986, pp. 261-263; Bagatur, 2014, p. 11; Oman, 2010, p. 287; McLoughlin, 2016, pp. 315-316).

In this regard, banning burqas in Denmark cannot be regarded wrong *per se* as this Scandinavian country does not have an intensive religious or cultural attachment with Islam. What matters more is the notion that Scandinavia has always been regarded

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among the safest regions in the world,[6] and therefore security has been more or less self-evident for the Scandinavians. However, terrorist attacks such as the 2017 Stockholm car attack or the stabbing in Turku (Finland) four months later[7] have demonstrated the fact that security is not an intangible and absolute value which cannot be interfered with. However, it is precisely because this long-existing societal feeling of security was in danger of being lost that Danish people felt compelled to act. Since Islam is not a widely represented religion in Scandinavia, the public security was valued over the freedom of religion (and expression). Notably, Denmark did not restrict or prohibit freedom of religion, but merely modified it to fit and reflect better Danish societal values of security.[8] Similarly, at the international level, the Denmark's idea of security exceeds moral approval to which it was subjected to by international human right organizations (Margolis, 2018; Amnesty International, 2018b). Essentially, such a situation authenticates the perception according to which human rights gain their validation at the national level.

4. SCANDINAVIAN LEGAL REALISM EXPLAINS WHY EMS FACES CHALLENGES

One of the main reasons for EMS facing challenges in being recognized as a legal human rights norm, is linked to the overall problem of international law being subject to power politics and state interests. While the UDHR is repeatedly referred to as a basis for modern human rights, in practice the document lacks judicial effect. The legally binding international human rights law created a distorted perception of socio-economic rights primarily associated with communism (Tomuschat, 2003, p. 1). This led to an artificial, unnecessary and impractical categorization of human rights (see Gould, 2015, p. 189; Clayes, 2015, pp. 233-234). This misperception, according to which social and economic rights should be separated from civil and political ones (since no interconnection is understood to exist between them), has unfortunately been repeated time after time at the national level.

It is true that not all human rights are equal in their meaning. For example, unlike the traditional perception of the right to life including the prohibition to kill,[9] the right to EMS does not *per se* demand any actions from right holders. Human beings refrain from killing each other either because of the legal norm that has already been codified in the national law and/or because it is (morally) expected that we should not kill each other. Similarly, the right to marry a same-sex partner or the preservation of one's security, are concerns that have more or less a direct and concrete effect on individuals. EMS, on the other hand, is a right which imposes duties on the state, but roughly speaking does not provoke or confer any behavioural norms to individuals. Therefore, the explanation that Scandinavian legal realists would give to the question of why EMS fails to be recognized

[6] The most recent Global Peace Index report placed Denmark the 5th safest country in the world, Iceland holding the first place and other Scandinavian countries (i.e., Finland, Sweden and Norway) accommodating the positions of 14, 15 and 17 (see Institute for Economics & Peace, 2020).

[7] In the 2017 Stockholm car attack, the perpetrator hijacked a van and drove into the public killing five and injuring tens of bystanders. In Turku, a perpetrator stabbed two victims to death and injured several others. In both cases the perpetrators had expressed their support to ISIS (Islamic State in Iraq and Syria), and were initially found guilty of terrorist crimes. See more in Stockholms Tingsrätt (District Court of Stockholm), Dnro B 4708-17, 7 July 2018; Varsinais-Suomen käräjäoikeus (District Court of Southwest Finland), Dnro 18/125884, 15 June 2018.

[8] It should also be noted that according to the international human rights law, the freedom of religion and freedom of expression are not absolute rights but can *de jure* be subject to limitations *inter alia* on the grounds of public safety or national security. See, for example, Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art. 9(2) & 10(2); International Covenant on Civil and Political Rights (1966), art. 18(3) & 19(3).

[9] See, for example, the cases of ECtHR Osman vs United Kingdom, app. no. 23452/94, 28 October 1998, and ECtHR, Mahmut Kaya v. Turkey, app. no. 22535/93, 28 March 2000.

as a legal (human rights) norm is that, as important as EMS is in safeguarding the right to life, under normal circumstances individuals are not cornered with EMS because they lack any personal attachment to it. In other words, when individuals have not been associated with EMS in practice, the abstract right (an idea of having a right) to EMS has not materialized or become personalized for them.[10] It is only after an individual faces the need for, or becomes aware of emergency medical care, that the abstract idea of the right to EMS actualizes in reality and invokes an evaluation of whether the existing legal framework corresponds with the individual's perception of how the law should be.

In this regard, it is irrelevant that socio-economic rights have a different nature from civil and political ones, because the Scandinavian logic applies to all human rights and legal norms in the same way. Instead, it is the perception of individuals that diverts rights from each other. For example, the right to education, despite being a socio-economic right, touches upon every family with children, whereas an individual may never exercise the right to peaceful assembly even though it is one of the core first-category human rights. The failure to perceive EMS as a human right, or even a legal norm, occurs precisely because it is too abstract in appearance for individuals to be concerned with. This Scandinavian notion applies to politicians and legislators as well. For instance, Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), lays down the core minimum requirements that the state must undertake in order to guarantee the right to health under Article 12 of the Covenant. However, Article 12 has been drafted in a rather abstract way calling for the right of everyone to enjoy the highest attainable standards of health and obliging the state to take progressive steps to ensure availability of all medical services and medical attention in the event of sickness, but the article is nevertheless silent regarding an explicit right to EMS. Indeed, the right to health and health care as enshrined in Article 12 of ICESCR, has been described as incoherent and unspecific (Wolff, 2015, pp. 491-492; Brownlee, 2015, p. 502). Because of a generalized wording of the said article, and an absence of a specific reference to EMS, it is understandable that the legislators and politicians may fail to acknowledge the essential importance of EMS as being a human right (or even a legal norm) since the right to EMS is only an abstract idea to them, with no practical meaning in reality.

The above-mentioned claim is well-illustrated in the judgment issued by the Administrative Court of North Finland in which two applicants unsuccessfully challenged the legality of the Hospital District's decision to remove two ambulances from sparsely populated areas.[11] The applicants filed the claim because they lived in the affected areas and were therefore affected by the decision despite the absence of an actual incident. Applying Scandinavian Legal Realism to explain these actions, the rearrangement of the location of ambulances made the applicants realize that their sense of security (i.e. the idea of EMS being able to respond without undue delays) was compromised. Actions were eventually initiated because the Hospital District's new plan did not reflect the applicants' feelings of justice and fairness. From the legal point of view, the failure of the claim, on the other hand, resulted from the applicants' failure to argue the case from a constitutional (human rights) perspective which would have enabled a stronger emphasis on a properly functioning EMS system (i.e. the right to EMS) and the right to life.[12] Another significant factor contributing to the unsatisfactory result for the applicants was the fact that neither the Hospital District nor the general population recognized the importance of

[10] In fact, health care in general is perceived as a need-based right which is exercised only when there is a medical problem (Nickel, 2015, p. 159).

[11] See Oulun hallinto-oikeus (2014). Päätös dnro 14/00053/1; and Administarive Court of Oulu (2014). Decision dnro 14/00053/1.

[12] The case was sought to challenge the administrative laws, including the Health Care Act and Local Governmental Act, and made no references to human rights.

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the issue because the removal of ambulances from these areas had no direct effect on them. Reasoning, placing a wide emphasis on economic determinants and cost-effectiveness was in accordance with the Administrative Court's jurisdiction, and the judgment *per se* contained no legal deficiencies. However, the case might have reached a different judgment if it had been litigated from a different perspective in a different court, or if the applicants had generalized the issue and invoked a wider population to acknowledge injustice of the Hospital District's decision.

By establishing some legal provisions concerning EMS at the national level, Finland has *de jure* satisfied its obligations under international treaty law, even though the extent of the implementation can be debated. From the Scandinavian perspective, legislators have exercised their power not only to comply with international law, but also to influence the sense of right and wrong. Because of the generally impersonalized nature of EMS (i.e. the fact that not everyone needs to invoke their right to EMS), the majority of individuals are satisfied with the existing legal framework (the idea of EMS) without facing the need to further evaluate that idea. However, as Scandinavians and scholars like Jacques Ranciére and Alain Badiou believe, law is not a representation of an absolute sovereign power, but rather a creation of on-going negotiations which result *inter alia* from people's feelings (Blechman, Chari and Hasan, 2012, pp. 163-164; Pettersson, 2011, p. 265; Banaker, 2010, p. 24). It follows that EMS becomes a defendable human right when it receives a personalized interest, when someone's idea of EMS does not match with the reality. A change therefore occurs as a result of our actions (Gündogdu, 2014, p. 370). Since the law is inherently a social phenomenon, a sole individual has relatively little chance to affect a change, the chosen actions depend on the position and perception of others as well. Therefore, in order to ensure the availability of ambulances in sparsely populated areas, or to abolish dead zones in the EMS helicopters' operational areas, one must transfer the abstract idea of EMS to the societal reality through personalization by appealing to peoples' emotions (Rorty, 1993, pp. 254-255; Hunt, 2007, p. 26; Faralli, 2014, p. 59). When the legal norm of EMS is no longer a mere abstract idea but has a personal attachment, either through one's own experience of injustice or as a result of becoming aware of existing unfairness, individuals no longer fear sanctions or moral disapproval from others while engaging in actions (of negotiations, disturbances, demonstrations etc.) to change the prevailing system. This is because their actions reflect the wider societal values.

The equivalent logic of an impersonalized idea of EMS applies to the state as well. The state is not concerned with EMS if no self-interest is at stake (Uusitalo, 2018c, pp. 101-102). As long as the state has implemented at least some health care provisions and has some form of EMS in place, the international community, the UN Committee on Economic, Social and Cultural rights for example, should have no reason to interfere with the state's internal affairs in that regard or express any moral disapproval. When individuals perceive EMS more as an abstract idea rather than an actual norm, no dissatisfaction from the public would be expected either. It follows that Finland, for example, could postpone the establishment of new HEMS bases because their absence is not regarded to have any (wide) capability of disturbing those in power. However, just as a legislator has the power to direct our behaviour, the Scandinavian Legal Realists would identify with the claim that it should be in public interest to promote fairness, and prevent any dissatisfaction that might escalate (Finnis, 2011, pp. 33-34). In relation to the Scandinavian logic, it is important to note that it is not the injustice itself that is capable of causing disturbances, but rather the feeling (an idea) of injustice. It follows that EMS and the right to it is a matter of collective will - a form of a traditional social contract enabling those in power to maintain power because the public perceives no reason to dethrone them (Bagatur, 2014, p. 11; Rousseau, 1762). Furthermore, in the globalized and

highly interconnected world where states are expected to hold certain moral standards in relation to human rights, the feeling of injustice can emerge externally (Monshipouri and Welch, 2001, p. 372; Kistner, 2014, p. 122). This can cause dissensus in the international arena if other states or human rights organizations express their moral disapproval of Finland's failures regarding EMS. Finland may then comply with these external influences if it regards them to have valid grounds, or it may disregard them due to differences in opinion on the idea of EMS.

Since the government wishes to stay in power and it is in the state's interest to avoid any external influence, implementation of EMS legislation (and of any laws) should essentially reflect the moral standards and evaluations of what is perceived as fair and just. In this regard, the determining factor is not whether the right to EMS is actually and explicitly codified in the international human rights treaties, but how its implementation and actualization from an abstract idea into reality is understood to correspond with the values of a specific society.

5. CONCLUDING REMARKS

Scandinavian Legal Realism was founded at the beginning of the 20th century to challenge the distorted battle on the metaphysics of law between natural law theorists and legal positivists. Whereas (roughly speaking) natural theorists emphasize our moral consciousness as a directing factor to explain the essence of law, and legal positivists believe only in the written norms, for Scandinavian thinkers the validity of the legal norm does not rely on the norm itself, but on the idea of a norm. Essentially, Scandinavian Legal Realism perceives law as an abstract phenomenon which gains its value through actualization. This occurs either when the matter touches upon us directly, or when the existing legal norm is perceived not to correspond with our idea of what the public regards to be just and fair. What primarily distinguishes Scandinavian Legal Realism from natural or positivist legal theorists, is the incorporation and greater emphasis of human feelings to explain the legal metaphysics.

The Scandinavian way of legal thinking is in fact quite successful in explaining the problems of contemporary human rights law. Since human rights are now codified in international conventions and implemented in national legislation, it is irrelevant to engage in the discussion about the essential metaphysics of the rights. Instead, what Scandinavian perception offers to current human rights law is the notion that the law and its implementation is always affected by societal determinants. Because of these societal variations, the same human rights have different meanings at national levels. This explains why gender-neutral marriage, for instance, is legalized in one state and criminalized in another. Furthermore, as the Scandinavian thinkers would explain it, as long as human rights are implemented to correspond with the general perceptions of rightness, justice and fairness in the given society, these legal norms are regarded more or less as abstract (or self-evident) ideas which, under normal circumstances, do not impose concerns on human beings. However, individuals start to evaluate the validity of a legal norm when it is, for some reason, transferred into reality. This line of logic is also applicable to rationalize why emergency medical service (EMS) faces challenges to be recognized as a legal norm.

Despite being a sub-category of the internationally recognized human right to health and thereby enjoying some form of implementation at the national level, EMS still seems to be perceived as an economic expense or a political question rather than a legal norm. Applying the Scandinavian Legal Realism, this misperception is caused by the impersonalized nature of EMS – an abstract idea of the right to EMS that has not been actualized. In other words, even though EMS is essentially designed to safeguard the

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fundamental human right to life by ensuring urgent treatment in life-threatening situations, individuals are not concerned about the placement of ambulances or EMS helicopters until they actually face the need of emergency care. It follows that EMS becomes a defendable legal norm only when it receives a personalized interest from someone and that person can convince others of the existing injustice.

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PRIVATE ANTITRUST ENFORCEMENT IN DIGITAL MARKET / Dominik Wolski

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Abstract: *The increasing popularity of private antitrust enforcement in the EU is reflected by number of antitrust damages claims in the member states, following the transposition of the Damages Directive. Meanwhile, rapid growth of digitization in every aspect of social and economic life, particularly in business like commerce and services, has taken place. Recently, the above phenomenon was intensified by COVID-19. This paper aims at discussing private antitrust enforcement and antitrust damages claims in the context of digital transformation of the market. To this extent, there are several main characteristics of the market (e.g. multi-sided platforms, the role of third-party sellers, etc.), that have to be taken into consideration in the above discussion.*

Key words: *Private antitrust enforcement; digital market; on-line platforms; networks; third-party sellers; market characteristics; antitrust damages claims*

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1. INTRODUCTORY REMARKS

For the last few years private antitrust[1] enforcement has becoming increasingly popular in the European Union (EU). Nevertheless, its birthplace is the United States (US), where private enforcement has been dominating the whole enforcement of antitrust law for the last approximately hundred years.[2] The underlying idea of private enforcement is to compensate parties injured by infringement of competition law (both businesses and consumers) as well as discourage actual or potential perpetrators from infringing competition law rules in the future (so called deterrence effect).[3] In the EU, the increasing popularity of private antitrust enforcement reflects number of antitrust damages claims

[1] The term "antitrust" is of an American origin being a contradiction of "trust" (see Jones, 1999, pp. 7-8), whereas 'competition' has more in common with the European Union (EU) legal settings. Since this paper discusses private enforcement mainly referring to American and the EU legal environments, both terms are used interchangeably with no difference in meaning.
[2] See more about the US model of private antitrust enforcement Jones (1999, pp. 3-22) and Floyd and Sullivan (1996).
[3] It is worth noting that discussion of the primary goals of private enforcement seems to be never ending. As interesting examples of the debate see Lande, (2004; 2006); Dunne (2014) and Lande and Davis (2010).

in the member states[4] that follows the transposition of the Damages Directive[5] to the legal systems of the latter. The antitrust claims can be issued based both on the EU and national competition laws. Thus after years of hesitation towards private enforcement of competition law (contrary to the above mentioned US legal tradition), it eventually found its place on the EU agenda.

In order to successfully pursue antitrust damages claim, it is necessary to ascertain, that any infringement of antitrust law occurred (e.g. collusion, abuse of dominance, foreclosure, etc.). This in turn, to be an effective legal ground of both public and private intervention, must occur in the market, namely as it is called in competition law 'relevant market'. The latter constitutes a part of the whole market and it is denoted for the needs of a particular case upon certain criteria laid down in competition law.[6]

Meanwhile, rapid growth of digitization in every aspect of social and economic life, particularly in business like commerce and services, has taken place. This resulted in digital transformation of the market, sometimes even called "digital revolution" (see Bundeskartellamt, 2019, p. 1), which profoundly changed the way businesses run their economic activity (see also Bundeskartellamt, 2016, p. 1). Both digitization and business becoming increasingly global create new opportunities, however, at the same, time big digital companies can have ability to drive competition out (see Vestager, 2019). In the wake of the above transformation, an infringement of competition law is no longer the same infringement as it was in the traditional market, as the market is not the same as it was a couple of decades ago, at least seen from its technical structure. This change is also reflected in antitrust proceedings and decisions of the EU and national competition authorities, relating to digital market in various aspects of business operations (banking, e-commerce, travel bookings, etc.).[7] The examples mentioned in the footnote, taken mostly from the EU market but having usually global reach are not the targets, but they are used in order to portray the chief competition issues in digital market. This is also to

[4] This conclusion is based on data accessible in legal literature, case-law, court records, press releases, etc. collected by the author. It is however worth emphasizing that no comprehensive report is publicly accessible in any of the member states, at least to the best of author's knowledge.

[5] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, p. 1–19).

[6] See in the EU Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372 /03). Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29 (accessed on 04.12.2020).

[7] See e.g. the European Commission (EC) decision of 4 May 2017 on Amazon's commitments in relation to E-book MFNs and related matters (case no. AT.40153); another Amazon case relating to possible anti-competitive conduct initiated by the EC on 17 July 2019, case no. AT.40462, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291 (accessed on 04.12.2020); Mastercard and Visa inter-regional interchange fee cases (cases no. AT.39398 and no. AT.40049), eventually ending in commitments accepted by the EC on 29 April 2019, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40049 (accessed on 04.12.2020); Polish Allegro case (marketplace company) initiated by the Polish Office of Competition and Consumer Protection on 10 December 2019 (*Procedure against Allegro. A new platform for whistle-blowers*, 10 December 2019, available at: https://www.uokik.gov.pl/news.php?news_id=16014 (accessed on 04.12.2020); and another Allegro case initiated on 3 September 2020 by the same authority (see official website of the Polish competition authority, available at: https://www.uokik.gov.pl/ (accessed on 04.12.2020); Booking commitments accepted on 21 April 2015 by the French Competition Authority (FCA), the Italian Competition Authority (ICA) and the Swedish Competition Authority (SCA) that have coordinated their investigations [*The French, Italian and Swedish Competition Authorities Accept the Commitments Offered by Booking.com*, available at: https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-italian-and-swedish-competition-authorities-accept-commitments-offered-bookingcom (accessed on 04.12.2020)]; Lithuanian *Eturas* case (online booking platform): CJEU the preliminary ruling of 21 January 2016, Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba, C-74/14, ECLI:EU:C:2016:42.

illustrate how complex relationships among businesses operating in the same market can be.

Digital platforms are in the scope of the interest of many stakeholders. For example, the double role of the platforms (owning a marketplace and selling out on it simultaneously) was the subject of the intervention of one of the US Senators, Elizabeth Warren, advocating for a law preventing large companies doing so (Magana, 2019). In the EU, the German Competition Authority (Bundeskartellamt) conducted extensive, in-depth analysis of digital market and its characteristics in order to know, if competition law methodology applicable to traditional market should change or not (Bundeskartellamt, 2016).

Digital transformation of the market was sharply intensified by COVID-19, which resulted in a massive shift of many consumers from traditional, brick and mortar market of commerce and services, to e-commerce and e-services. Many consumers who have switched online, simultaneously have changed their purchasing habits. For the latter reason many of them are not expected to return to the traditional market in the future.

Having said that, this paper aims at discussing private antitrust enforcement in the context of complexity of a digital market. Does antitrust damages claims environment has significantly changed or it has not as a result of the above mentioned "digital revolution"? Are the main elements of antitrust damages claim, such as determining an infringement, identifying a perpetrator, quantifying harm or causal link between the infringement and damage different in digital market? These are among other things questions that this paper tries to address against the background of changes that have taken place in the market and recent case-law, in particular cases pertaining to big digital companies. On top of that, there is a meaningful question of whether and to what extent, the application of private antitrust law should change due to the above mentioned digitization of the market.

2. ANTITRUST PRIVATE ENFORCEMENT IN THE "NEW ERA"

As already mentioned, private antitrust enforcement in the US has come a long way having more than a hundred-year legacy. This also means that the market at that time, when subsequently Sherman Act (1890) and Clayton Act (1914) were adopted (see Jones, 1999, pp. 6-13), was substantially different from nowadays. Overall, the legal settings, the economic and market environment significantly differ as well, comparing to the legal and economic environment at the end of the twentieth century, not to say the beginning of the twenty-first. However, interestingly enough, the idea of technological giants and their skirmishes with regulators and competition authorities is not a new one, at least in the US. There is a noticeable similarity between current digital platforms that can under certain circumstances dominate the market and Vail's idea of communication's empire, who valued more monopoly than competition (Wu, 2011, p. 8).

Even though, the history of private enforcement in the EU is shorter, reaching back the beginning of 2000s, the first case which is recognized as a pivotal point in this history, namely landmark decision in *Courage Crehan* case, was set in the traditional market (the exclusive purchase obligation - beer tie).[8] This means in turn, that private enforcement also in the EU, usually following public one, must be adopted to the new market reality.

Meanwhile not only the market has changed as a result of "digital revolution" bolstered by spread of COVID-19, but the application of the law to the new environment

[8] See CJEU, judgment of 20 September 2001, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others, C-453/99, ECLI:EU:C:2001:465.

had to be adjusted at least in some areas (e.g. data protection, privacy, IP and copyrights in the Internet, etc.). Did antitrust private enforcement change as well following the above mentioned changes of legal and business environment?

The above question needs to be addressed considering two separate preliminary assumptions that are discussed in the following parts of this paper. Firstly, from the legal perspective, the main principles of private antitrust enforcement remain unchanged. The party that suffered damage as a result of competition law infringement, irrespectively of whether in traditional or digital market, is entitled to sue the infringer under civil procedure and to seek remedy. The latter, usually monetary compensation, includes actual damages, lost profits, interests and other reasonable costs of litigation (e.g. legal service).

Considering recent, one of the most known private enforcement cases from digital market (Visa/Master Card 'multilateral interchange fees' case in the United Kingdom (UK)[9] or Amazon 'price parity' and 'fair pricing' case[10]), we can fairly realize, that the above mentioned elements did not change in digital market. In respect to quantum of damages, what we can learn from the above cases, it is how the court dealt with so called passing on defense and in this respect the "broad axe issue". It should be also noticed, that after the implementation of the Damages Directive, the overall rules do not significantly differ in the US and the EU member states, subject to some particularities of given legal settings (e.g. treble damages in the US or costs of litigation rules, see Floyd and Sullivan, 1996, p. 1047 et seq.; Jones, 1999, pp. 80-84).

As already mentioned, in spite of the above revolutionary change of the market, the overall principles of private antitrust enforcement have been remaining unchanged, not only since their implementation in the legal systems of the EU member states, but subject to some particularities, ever since the outset of private enforcement in the US. However, what could or should change is the application of the above principles to the new market environment (big digital platforms, big data, new market definition, etc.).

3. DIGITAL MARKET CHARACTERISTICS

Having considered the year 2001 (the Court's ruling in *Courage Crehan* case) as the beginning of an increasing role of private enforcement in the EU, thus not so much distant past, the market to which private enforcement rules apply substantially changed. As a consequence of the change, several features of the current digital market have to be borne in mind when applying such rules. First of all, a great part of the market of commerce and services that before the market transformation had been operating in a traditional, brick and mortar mode (independent shops and retailers, shopping centres, merchants, travel agents, cash transactions, etc.) moved to on-line platforms of various kinds. This shift pertains to goods and services, including home equipment, furniture, food including essentials, books, e-books, holidays, travel bookings, insurances, and many others. The list is obviously not exhausted. Recently, this on-line shift was bolstered and intensified by COVID-19. In fact, a great part of social, professional and commercial life moved on to "digital reality".

[9] See *UK Supreme Court gives important judgement in the Visa/Marstercard 'interchange fee' litigation*, Sherman & Sterling, 23 June 2020, available at: https://www.shearman.com/perspectives/2020/06/uk-supreme-court-gives-important-judgment-in-the-visa-mastercard-interchange-fee-litigation (accessed on 04.12.2020) and the judgement of the Supreme Court of 17 June 2020: United Kingdom, Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others; Sainsbury's Supermarkets Ltd and others v Mastercard Incorporated and others [2020] UKSC 24, available at: https://www.supremecourt.uk/cases/docs/uksc-2018-0154-judgment.pdf (accessed on 04.12.2020).

[10] See the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424).

Seemingly, the above process could only up competition game creating new opportunities ("*New companies, with millions or even billions of users, have emerged from nowhere …*", Vestager, 2019). This is because as a result of less actual and technological barriers (e.g. lower entry costs), it gives easier, quicker and cheaper access to the market of all players, namely producers, suppliers, retailers and customers. Theoretically, on the supply side, almost everyone is able to place his offer on-line, as on the demand side everyone having access to the internet, can buy or use services on-line. Whether traditional or digital market, there is nothing better for competition than quick, open, cheap and equal access to it for all participants.

From the above perspective (an open, easily accessible market), nothing better could have ever happened for the economy, but digitization. As a consequence, had this ideal world existed, neither public intervention of competition authorities nor antitrust damages claims of private claimants would have been needed. Nonetheless, at least since1626, the year when 'New Atlantis' by Francua Bacon was published we know, that ideal world exists only in books and thinkers' minds. So it is in case of the digital transformation of the market. The openness of the digital market, that gives many opportunities and is sometimes expressed also in so-called net neutrality, is in some aspects not so obvious. The natural temptation to build an empire and close the market was in place as early as the first communication monopoly, namely the Bell system, was established in the US (Wu, 2011, pp. 50-51).

What is clear from merely a few interventions of competition authorities as well as private antitrust claims recalled in this paper, both in the US and the EU, in an open digital market, a few "digital giants" arose. As the worldwide scale examples can serve Amazon, Booking, Visa, MasterCard or Google. Only to give a picture of such scale, Amazon.com, Inc. is the world's largest online retailer and its sales account for almost half of all retail e-commerce in the United States.[11] In the E-book market, Amazon acting upstream as a publisher and downstream as an E-book retailer controls a big part of the market as well.[12] In 2017 Mastercard and Visa, based on purchase transactions, accounted together for above 75% of the market share globally (Szmigiera, 2019). Also big, but nationwide, operating locally, are *Eturas* (Lithuania) or *Allegro* (Poland), other examples of online platforms (travel bookings and both marketplace and retailer respectively). Allegro is the most popular online shopping platform in Poland (in 2019 79% of customers came to buy new items online on this platform).[13]

The above numbers reflect the market reality, which in some cases brings about the dominant position of companies insofar as they are able to control the market they operate. For the sake of the access to the great number of customers, from the third-party sellers' perspective, to be able to sell online through the platform is like Hotel California ("*lovely place to expand an online retail business*").[14] However, on the other side, in many cases the dominant position (or almost dominant) of big digital companies causes a situation, in which open, cheap and easy-accessible market for all participants can exist only in theory. From the practical point of view, the position of big digital platforms can under certain circumstances result in a big market power, on both supply

[11] See the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 1.
[12] See the European Commission (EC) decision of 4 May 2017 on Amazon's commitments in relation to E-book MFNs and related matters (case no. AT.40153), p. 7.
[13] *Procedure against Allegro. A new platform for whistle-blowers*, 10 December 2019, available at: https://www.uokik.gov.pl/news.php?news_id=16014 (accessed on 04.12.2020).
[14] The Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 17.

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and demand side. On the demand side, the most important from the customers' perspective is to find an offer at good quality and price.

Therefore, having in mind massive information flow and a number of offers attracting customers' attention every day and hour, the consumer is overwhelmed. For obvious reasons, a real challenge of every retailer is not to place the offer but to do it in the most efficient way. Here the possibility given by digital platforms becomes a key factor. For the consumer living in a fast moving world and having limited time at disposal but at the same time persistently looking for the best offer possible (goods or services), it is easier to visit one of the well-known digital platforms, instead of searching smaller, independent retailers or marketplaces. On the supply side, occupying a big part of the market and having a great number of loyal customers, it is easier for a big digital platform to reach out consumer and attract him the offer, than for the above smaller businesses. As said, they have a great competitive advantage of holding a big market share and giving a number of smaller businesses opportunity to offer their goods and services, and eventually reach out customers.

Another characteristic of the digital market of great importance for private antitrust enforcement is complexity. As arises out of the above-mentioned cases of big digital platforms, most of them pursue many functions, at least two. They provide smaller businesses (retailers and service providers) with an opportunity to put up their offers on the platform, operating as a marketplace. At the same time, big digital operators offer their own goods and services on the same platform. This brings about the double role of digital platforms being the same time marketplace's owners and retailers. They are called "two-sided platforms" providing services to two different groups (third-party sellers and their customers).[15] Here is the complexity. It means that the platforms compete for their own offer with the offer of third-party sellers present on the same platform. As a result, a potential limitation of freedom in offering goods and services set up between the platform and retailer (e.g. in respect to prices, discounts, innovations, alternative distribution channels, etc.) can lead to restraints of competition. This effect is bolstered by the fact that most of the big digital platforms have the dominant position in the market or at least have attempted to monopolize it.[16]

How complex the digital market dominated by big digital platforms and networks is (matching platforms, advertising platforms, etc.) we can also see in the study conducted by the German Competition Authority (Bundeskartellamt, 2016). No less important from the perspective of the above complexity is using algorithms by many undertakings running their businesses online, in particular those big ones. It is also another subject under the scrutiny of competition authorities (see Bundeskartellamt, 2019).

Bearing in mind the complexity of the digital market, what is of great importance in the context of competition law infringement and potential private antitrust claims, it is the notion of 'relevant market.' In order to prove competition law infringement and to successfully pursue private damages claim following such finding, it is necessary to

[15] See the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 1; the European Commission (EC) decision of 4 May 2017 on Amazon's commitments in relation to E-book MFNs and related matters (case no. AT.40153), p. 7, and *Procedure against Allegro. A new platform for whistle-blowers*, 10 December 2019, available at: https://www.uokik.gov.pl/news.php?news_id=16014 (accessed on 04.12.2020), p. 1.

[16] See *The French, Italian and Swedish Competition Authorities Accept the Commitments Offered by Booking.com*, available at: https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-italian-and-swedish-competition-authorities-accept-commitments-offered-bookingcom (accessed on 04.12.2020); the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), pp. 32-33; see the European Commission (EC) decision of 4 May 2017 on Amazon's commitments in relation to E-book MFNs and related matters (case no. AT.40153), p. 17.

ascertain that competition law infringement had occurred in the 'relevant market'. In the traditional market, this notion in the EU law was denoted by two elements, namely geographical scope and product substitutability.[17] Thus "*defining" markets is to study the complex interplay between product characteristics, customer and supplier behaviour, firms' substitution decisions and regulation*" (Vestager, 2019). The complexity of digital market causes a situation where neither of the above criteria would allow easily to denote 'relevant market', when needed in order to find competition law infringement. Considering online business reality, in particular fact that online platform is accessible even from the farthest corner of our globe, the geographical criteria are not sufficient enough, even considering shipping barriers, customs and other costs related with online shopping. As a consequence, the question of the geographical scope of the market translates in the question where the market's boundaries lie. For example, in telecom cases the market covers at least the EU single market or even the whole world (Vestager, 2019). Therefore, it is very often difficult to denote 'relevant market' based on the geographical dimension. Not better with substitutability criterion. Having considered products and services offers' complex characteristics as well as the whole range of different areas where big digital platforms operate (e-books and many accompanying functionalities accessible on the platform, ecosystem of services designed to work together, etc.) as well as customers' choices and habits, it is very difficult to find fully substitutive product. Moreover, in many cases it can be difficult for the customer to switch from one ecosystem to another (Vestager, 2019). These factors often result in a situation, in which even for businesses is difficult to find who is a competitor of whom, not to say about competition authority (Vestager, 2019).

In the wake of digital market transformation and due to its complexity and shortcomings of the current definition of the relevant market,[18] the EC following the 2019 speech of M. Vestager, in 2020 decided to launch public consultations aiming at the evaluation of the definition of the relevant market for the purposes of competition law.[19] On the other hand, the Bundeskartellamt concluded, that "*the current antitrust tools are in principle also suitable for the assessment of digital platforms and networks*" (2016, Results and Recommendations, p. 4).

4. WHO DOES HARM, WHO IS HARMED?

As mentioned in the beginning, there are two main functions of private antitrust enforcement, compensation and deterrence, sometimes supplemented by public sector savings due to less number of interventions of state authorities. As in each part of the tort liability regime, social costs have to be taken into consideration as well (see e.g. Givati and Kaplan, 2020). Nevertheless, it goes without saying, that from the practical perspective of parties to antitrust litigation, the compensatory function is of the biggest significance and the others hardly matter. As a result, bearing in mind the above characteristics and complexity of the digital market, it is vital to realize which party did cause damage (and should pay compensation) and which party suffered it (and should be awarded of damages). There is however not an easy answer to this question, at least from a certain perspective.

[17] See *Commission Notice on the definition of relevant market for the purposes of Community competition law* (OJ C 372, 9.12.1997, pp. 5–13).
[18] *Commission Notice on the definition of relevant market for the purposes of Community competition law* (OJ C 372, 9.12.1997).
[19] Competition: Commission consults stakeholders on the Market Definition Notice, 26 June 2020. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1187 (accessed on 04.12.2020).

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To start with the claimant perspective, bearing in mind merely few cases recalled in this paper, the consumer usually can claim that he suffered damage. This is, however, only viable provided that other conditions of liability for damage caused by competition law infringement are fulfilled. For example, the consumer can claim that his damage equals price overpaid as a result of the infringement. Had an anti-competitive practice or prohibited agreement not occurred, the overprice (including overcharge[20]), would have not been paid by a consumer. As stated in one of the complaints, due to pricing policy one of the platforms, the sellers were forced to maintain supracompetitive prices paid by customers.[21] Anti-competitive practice can also result in a lack of choice or limited choice (which in the end raises prices as well), less innovative products or services, etc.[22] As we can see in one of the studies, in the digital market, innovation potential and data sources matter a big deal as well (Bundeskartellamt, pp. 16-19).

Therefore, despite some particularities of the digital market, the consumer's perspective towards damage he can suffer in the digital market, as a result of competition law infringement, does not substantially differ from that one in the traditional market. Additionally, the consumer himself can neither infringe competition law nor cause harm or contribute to it. The latter situation in relation to the claimant other than the consumer can differ in some cases outlined below.

In respect to businesses other than the big digital platforms, they can also suffer damage resulting from infringement of competition. Said can pertain to retailers who do not want to use or are not allowed to use a given platform due to their lack of consent for conditions set forth by the platform. Obviously, this can be a case only if the above conditions are not consistent with competition law. The damage can consist of losses (more likely lost profits) caused by no entry in the market, higher entry costs, lack of opportunity to launch innovative product attracting consumers, etc.

The harm-related matters are more complicated in relation to other parties, usually businesses, operating in the digital market. This issue mostly concerns businesses that under certain circumstances can also suffer damage, namely third-party sellers or service providers (e.g. book or e-book sellers, hotels, travel agents, tourist apartments' owners, etc.) cooperating with one of the big digital platforms and placing their offers on it. The above smaller businesses, not necessarily small, but having significantly smaller market power, cooperate with the platform under the contract. Thus they have a legal relationship with the platform. They also to the great extent constitute the platform's business being an inherent part of it. On the other hand, considering the market share of big online platforms, the latter is big enough to be desired by the third-party sellers and service providers. This in turn allows online platforms to impose specific provisions in contracts. These provisions can put the platform in a better position comparing to other, smaller independent platforms and own channels of third-party sellers.

Based upon case-law recalled in this paper, typical anti-competitive clauses used by big online platforms are "price parity" (also "best price" clauses)[23] or platform most

[20] According to Article 2 clause 20 of the Damages Directive 'overcharge' means the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law.

[21] See the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 5.

[22] See e.g. the European Commission (EC) decision of 4 May 2017 on Amazon's commitments in relation to E-book MFNs and related matters (case no. AT.40153), p. 22.

[23] See *The French, Italian and Swedish Competition Authorities Accept the Commitments Offered by Booking.com*, available at: https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-italian-and-

favoured nation or "PMFN"[24] and "fair pricing" policy.[25] Conduct of online platform based upon contractual clause can also consist of data collection (competitively sensitive information, e.g. about marketplace sellers, their products and transactions on the marketplace) and its analysis in order to restrain competition.[26] As the above-mentioned study points out, data source becomes an important factor in the digital market (Bundeskartellamt, 2016, pp. 16-17). There are other non-price-related, though competitively sensitive clauses (e.g. "Notification Provisions").[27]

As a result of the above, there are two basic types of competition law infringements that can cause damage. The first, bearing in mind the market power of the biggest online platforms can be an abuse of a dominant position. It can occur by imposing on the smaller businesses (e.g. third-party sellers) conditions that both limit their ability to sell products and services at a lower price than on the platform (price-related provisions) and set forth actual constrains in switching to other, independent platforms or sale through the third-party's own channels. A typical example is the above-mentioned contractual clause constraining retailers from offering their products at better (i.e. lower) price on other than a big online platform. The other one set up barriers for retailers (e.g. e-book sellers) prone to use more innovative solutions or functionalities, throughout obligatory noticing of the big online platform about the solution, that the retailer is about to use on a competing platform or third-party seller's own distribution channel. Innovation potential is also another factor well pointed by Bundeskartellamt as relevant when assessing the digital market from a competition law perspective (Bundeskartellamt, 2016, pp. 16-17).

Notwithstanding, the above clauses as integrated into the contract between the online platform and third-party seller, can under certain conditions be construed from an antitrust perspective as a collusion (e.g. price fixing), concerted practices or any other type of agreement that restrains competition. In this case, a retailer (booksellers, hotel, travel agency, etc.) is deemed as the party to the anti-competitive agreement in question.

Having said that, two types of relationships of a potential wrongdoer and injured party have to be analysed at length. Firstly, in case of the usually less complicated scheme, the stronger party abuses its dominant position over the other parties (e.g. retailers or service providers). Secondly, in a more complex situation arising under the above-mentioned contractual anti-competitive clause, a third-party seller and an online platform can be the parties to the contract including an anti-competitive clause. As we can see from the examples mentioned in this paper, in both typical cases (abuse of dominance and contractual constraints) damage suffered by an injured party, if proved under the conditions of civil proceedings, is considered the same way. It usually can result from the lack of ability of sale at a higher price on the independent platform or third-party's own channel (e.g. lost profits) as well as from the lack (or constrained) ability of

swedish-competition-authorities-accept-commitments-offered-bookingcom (accessed on 04.12.2020); and the European Commission (EC) decision of 4 May 2017 on Amazon's commitments in relation to E-book MFNs and related matters (case no. AT.40153), p. 9.

[24] It reads „*the purchase price and every other term of sale … is at least as favorable to Amazon Site users as the most favorable terms via Your Sales Channels*", see the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 3.

[25] See the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 3; and the European Commission (EC) decision of 4 May 2017 on Amazon's commitments in relation to E-book MFNs and related matters (case no. AT.40153), p. 9.

[26] European Commission (2019). *Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon*, 17 July 2019. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291 (accessed on 04.12.2020).

[27] The European Commission (EC) decision of 4 May 2017 on Amazon's commitments in relation to E-book MFNs and related matters (case no. AT.40153), pp. 11-12.

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implementation more innovative solutions or functionalities due to obligatory noticing of the big platform. The occurrence of damage on the part of the retailer or service provider in the above cases is possible. However, in the second case (contractual clause restraining competition) two types of issues have to be discussed at length in order to ascertain if in a particular case, a perpetrator is liable for damage on the part of an injured party. The first issue pertains to the liability, namely is the party to an anti-competitive agreement liable for damage caused to the party to the same agreement? The second issue is relating to the quantification of harm suffered by a retailer or service provider.

The first of the above-mentioned issues was the subject of the landmark decision in *Courage Crehan* case. In its ruling, the Court ascertained eligibility of the party to the agreement infringing competition (prohibited agreement) to seek compensation from another party to the same agreement. As stated in the Court's judgement, the latter party infringed competition by forcing another party to integrate an anti-competitive clause in the agreement.[28] However, it is important that the litigant should not profit from his own unlawful conduct. The bargaining power of the party enabling to impose an anti-competitive condition on a weaker party has to be taken into account as well. The same rules apply to contractual relationships between the online platform and the retailer.

In relation to the second issue, namely quantification of harm suffered by an injured party in the aforementioned relationships, the answer seems to be even more complicated. This is because the quantum of harm in antitrust damages cases is based upon the economic and market analysis. It is usually a result of many factors, namely losses and profits of the injured party. Consequently, the question is not only to what extent the injured party suffered due to the anti-competitive practice but also whether the injured party has benefited from the infringement. Additionally, quantification of harm must answer to the question if the injured party passed the loss on to its customers.[29] In cases discussed in this paper it will be the question if a given retailer (e.g. book or e-book third-party seller) or service provider, as a consequence of the limitations arising under the contract with the online platform, benefited to any extent. For example, if case analysis allows to make the assumption, that if the seller had used an alternative platform to sell its products at a higher price or if it had applied in its operations more innovative solution or functionalities, it would have benefited more than it did when using one of the big online platforms. In relation to above-mentioned 'pass on defence', there is another question whether the claimant passed its actual or potential loss on to its clients or suppliers downstream or upstream. The result of this profound and complex analysis can show the actual damage and lost profits of the party seeking compensation from the perpetrator. Eventually, the compensation should be reduced by a part of the damage covered by benefits of an injured party or damage that was passed on to its clients or suppliers.

Bearing in mind the above, it seems that the simplest possible (not simple) calculation of damage suffered by the injured party applies to B2C transactions. It is the case of one of the recent class actions in the US concerning losses suffered by

[28] See CJEU, judgment of 20 September 2001, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others, C-453/99, ECLI:EU:C:2001:465.

[29] See e.g. *UK Supreme Court gives important judgement in the Visa/Marstercard 'interchange fee' litigation*, Sherman & Sterling, 23 June 2020, available at: https://www.shearman.com/perspectives/2020/06/uk-supreme-court-gives-important-judgment-in-the-visa-mastercard-interchange-fee-litigation (accessed on 04.12.2020) and the judgement of the Supreme Court of 17 June 2020: United Kingdom, Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others; Sainsbury's Supermarkets Ltd and others v Mastercard Incorporated and others [2020] UKSC 24, available at: https://www.supremecourt.uk/cases/docs/uksc-2018-0154-judgment.pdf (accessed on 04.12.2020).

consumers, resulting from abusive practices of a big online platform.[30] However, even though this calculation is seemingly not complicated being based upon so-called overcharge (i.e. supra-competitive prices paid by consumers), as well as less choice and less innovative solutions available for consumers, it is still at least in part based on estimated losses.[31] The exact calculation is hardly possible.

In the second case of a party to the contract suffering damage as a result of abusive practice of a bigger party, calculation of damage, considering all the above-mentioned factors, is even more challenging and complex. Both examples, however, well demonstrate the complexity of quantification of harm in antitrust damages claims that becomes even more complex when applying private enforcement rules to cases related to the digital market. The "double role" of mostly dominant platforms – the same time competing with third-party sellers and providing them with an opportunity of placing their offers on the platform – additionally increases the complexity of the application.

5. OTHER RELATED ISSUES

Apart from the calculation of damage, there are some other issues that have been discussed in the legal literature and case-law ever since the outset of private antitrust enforcement. Even though conclusions from the discussion and legal interpretation can vary in particular legal systems (e.g. the US and Europe), some of the elements have a lot in common. There are for example issues such as the concept of competition law infringement and identifying the infringer, causal link between the infringement and damage suffered by the injured party or standing of an indirect purchaser downstream and upstream in the supply chain.[32]

As regards to the infringement of competition law and identifying the infringer, if an antitrust damages claim follows decision of the competition authority ('follow-on' claim), then all what the claimant should know before filing a claim is included in the above decision. Therefore, in follow-on cases the main burden when finding the infringer and ascertaining the violation of competition law rests on the competition authority. This process does not significantly differ in cases related to the digital market, though, the competition authority is challenged by the complexity of the latter outlined above.

In case of 'stand-alone' actions (not preceded by a decision of the competition authority), this challenge rests on the plaintiff, which is more burdensome in some type of relationships related to the digital market (e.g. the platform-retailer contractual relationships discussed above). Additionally, in case of a contract (prohibited agreement), based on well-established case-law following *Courage Crehan* case, when identifying an infringing party, the decisive factor is which party, considering its bargaining power in given circumstances, was able to force another party to agree on the anti-competitive clause in the agreement. The application of this rule to the digital market would not change.[33]

[30] The Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 5 and p. 12.
[31] See the Class Action Complaint of 19 March 2020, United States District Court Western District of Washington at Seattle (Case No. 2:20-cv-00424), p. 13.
[32] Some of the issues are discussed in the EU context in Wolski (2016, pp. 69-96; 2017, pp. 69-84).
[33] See also the Court's judgement in *Eturas* case in relation to tacit consent for anti-competitive conduct of the travel booking online platform: CJEU the preliminary ruling of 21 January 2016, Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba, C-74/14, ECLI:EU:C:2016:42.

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Provided that the claimant, whether a business, a consumer or a group of consumers in case of the class action, is able to prove damage he suffered, the second issue is to link the damage and the infringement based upon private law principles of the particular legal system. This applies in each case the same way, whether follow-on or stand-alone. This is because competition authority decision does quantify damage, but merely ascertains the occurrence of competition law infringement. Therefore even considering presumption of damage resulted from a cartel infringement set forth in the Damages Directive,[34] although rebuttable, quantification of harm is not presumed. What this means is that the claimant in order to be successful in filing a claim must always prove the size of damage he suffered. This can be particularly complex and difficult bearing in mind the above-mentioned downstream and upstream relationships between the big digital online platform and retailers or service providers respectively.

6. CONCLUSIONS AND RECOMMENDATIONS

In conclusion, although many similarities with the traditional market, the so-called digital revolution brought about important changes, that have to be taken into account when discussing and applying private antitrust enforcement rules (e.g. consumers' easy access to the market, almost no geographical limits, the dominance of a digital online platform, etc.). The above-described complexity of the digital market, in particular in downstream and upstream online platform-retailers-suppliers scheme as well as main difficulties of private antitrust enforcement (e.g. quantification of harm, causal link, indirect purchaser standing, etc.), are in antitrust damages claims related to the digital market even harder. Certainly, the application of private enforcement rules to the digital market requires a profound understanding of the market, its functions and relationships between its participants. For the above reasons, the environment of antitrust damages claims significantly changed due to the digital transformation of the market. Whether to file a claim is easier or not, vastly depends on the understanding of the market structure and its characteristics. This is important not only on the part of a claimant but first and foremost for the court when adjudicating the case. As the example of the UK judgement mentioned in this paper makes it clear, the court is able to cope with such cases, in particular when specializing in competition law. On the other hand, having in mind the main elements of antitrust damages claims (e.g. damage, quantification of harm, causal link, etc.), they do not significantly differ when applying to cases related to the digital market.

Having said that, as recommendations, there are two elements worth emphasizing. Firstly, in relation to the infringement of competition law and antitrust damages claims following the infringement, definition of the relevant market (a market where the infringement occurs), is of great significance. The market changed and the definition of the market in competition law should be rethought and changed as well. In this respect, consultations initiated by the EC can bring about necessary adjustment of relevant market definition to the new market environment. For this reason, the Bundeskartellamt's conclusion with respect to current competition law tools and digital platforms seems to be at least premature.

From the perspective of practical application, assuming that eventually in competition law-based cases the court adjudicates the plaintiff and defendant's arguments, an understanding of the digital market is crucial. Therefore, not only the courts should have ability to cope with the complexity of the digital market, but the role of the experts' opinions are of great importance. Even though the court, in particular when

[34] This presumption is set forth in Article 17 clause 2 of the Damages Directive.

not specializing in competition cases,[35] is highly skilled, considering the aforementioned complexity and fact that competition law is inextricably intertwined with the economy, an expert opinion is inevitable in order to just and effectively decide in antitrust damages cases. There is also a need for the impartiality of the above experts since they play crucial role in private antitrust cases.

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DISCUSSION PAPERS AND COMMENTARIES

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THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: NEW ACTOR IN EU CRIMINAL LAW / Dominika Becková

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The article presents output of the research project APVV-18-0421 „The European Public Prosecutor´s Office in Connections of the Constitutional Order of the Slovak Republic as Strengthening of the European Integration through Law"

Abstract: *The European Public Prosecutor's Office was established under enhanced cooperation in 2017, as a new body in the institutional system of the European Union. The establishment of the European Public Prosecutor's Office changes the EU criminal law in a significant way, as it is the first body of the European Union, which will undertake its own investigations of criminal offences affecting the financial interests of the EU, carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States.*

Key words: *European Public Prosecutor's Office; EPPO; EPPO Regulation; Competence; EU criminal law; Crimes affecting the EU's financial interests; PIF Directive; Lisbon Treaty; Article 86 TFEU; European Union law*

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1. INTRODUCTORY REMARKS

The issue of criminal law protection of the budget and the financial interests of the European Union has been the topic of many discussions for nearly 30 years.[1] One of the most significant changes in the Union criminal law came during the year 2017, when Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of

[1] The idea of the establishment the European Public Prosecutor was firstly launched in the *Corpus iuris* project in 1990s, but it remained controversial for a large number of Member States. This attempt was followed by the Green-Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor (COM (2001) 715), which was adopted on 11 December 2001, later the topic appeared also at the Convention for an EU Constitution. The Treaty of Lisbon has brought many changes to EU Criminal Law, mainly the legal basis for the future European Public Prosecutor's Office (scope of competences), but it does not directly set up EPPO. The last attempt on the field of the establishment of the EPPO was a Council Regulation on the Establishment of the European Public Prosecutor's Office. COM (2013) 534 final.

the European Public Prosecutor's Office („*the EPPO Regulation*")[2] has been passed. The European Public Prosecutor's Office became a new body of the Union with an extremely hard task – to fight crimes against the EU budget and protect the Union's financial interest through the provisions of criminal law. Until now, criminal policy has been applied exclusively on the national level by Member States' bodies without their practice being controlled, replaced or applied in parallel by any body of the European Union. The establishment of the European Public Prosecutor's Office signifies the turning point in the protection of the financial interests of the European Union, as this new Union's body has the power to investigate and prosecute criminal offences affecting the financial interests of the EU.

The establishment of the European Public Prosecutor's Office together with the establishment of minimum rules concerning the definition of criminal offences affecting the Union's financial interests, strengthen the protection of the EU budget in line with the acquis of the Union in the field of criminal policy. According to this fact, the EPPO is a new body in the legal environment of the EU, it has to define precisely its competences set out in Article 86 of the Treaty on the Functioning of the European Union and in the EPPO Regulation, as well as their exercise in practice. The material competence of the EPPO is laid down in Art. 22 EPPO Regulation, according to which the EPPO is competent in the offences affecting the financial interests of the Union that are provided in the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interest by means of criminal law („*the PIF Directive*"), as implemented in national law. The legal framework for the investigations and prosecutions on behalf of the EPPO is the EPPO Regulation, as a partly harmonised criminal procedural law, and national laws of Member States will apply only in cases when a matter is not regulated by the EPPO Regulation.

This article's general aim is to clarify the task and the competence of the European Public Prosecutor's Office in the European Union law. To reach this aim, it is necessary to focus on the provisions of the Treaty on the Functioning of the European Union (provisions about judicial cooperation in criminal matters), as they are the cornerstone of nowadays EU criminal law. The second part of this article deals with the question of the material competence of the EPPO and its limitation. This part also takes a closer look at the exercise of the competence of the EPPO.

2. THE TREATY FRAME

The constitutional changes in the concept of the EU criminal law could be found in the Treaty of Lisbon, which is also known as the reform treaty. The Lisbon Treaty abolished the pillar structure and completed the absorption of the third pillar – cooperation in the fields of justice and home affairs into the first pillar (nowadays the only one existing). The entry into force of the Treaty of Lisbon opened the possibility to improve the integration in judicial cooperation in criminal matters in the EU. The provisions of Art. 82 – 86 TFEU provide for the harmonisation of criminal law, changes in the existing European criminal law institutional system, changes in the powers of European criminal law bodies, as well as they provide the possibility to establish new bodies to the institutional system, specifically the EPPO. The opportunity to establish a new body to combat crimes affecting the financial interests of the Union presents the most significant change in existing EU criminal law and poses a challenge for the EU itself and its Member States. Article 86 TFEU provides the legal basis for the establishment of

[2] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

the European Public Prosecutor's Office. Article 86 TFEU does not directly set up the European Public Prosecutor's Office but left its establishment to the existing EU institutions and the Member States.[3] Although Art. 86 TFEU does not directly establish the EPPO, it provides for three types of special procedures for the EPPO subsequent establishment. Firstly, the Council may establish the European Public Prosecutor's Office from Eurojust by regulation adopted under a special legislative procedure. Secondly, in the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council and in a case of a consensus in the European Council, the draft has to be adopted by the Council. The last option, the one used for the establishment of the EPPO in 2017, in case of disagreement in the European Council, at least nine Member States can establish enhanced cooperation based on the draft regulation.

Article 86 TFEU is just setting up the basic mandate of the EPPO which is responsible for investigating, prosecuting, and bringing to judgment the perpetrators of, and accomplices in offences against the Union's financial interests.[4] The mandate of the EPPO can be extended by a decision of the European Council to combat serious crimes having a cross-border dimension and affecting more than one Member State.[5] Judicial cooperation in criminal matters in the EU is based on the principle of mutual recognition of judgments and judicial decisions. The provisions on the minimal harmonised rules of criminal law refer to criminal areas listed in Art. 82 and 83 TFEU.[6] The problem is that the above-mentioned list of criminal areas does not explicitly include the crime of fraud against the Union's financial interests, the crime the EPPO has the competence to investigate and prosecute as the only body of the EU. The provisions about combatting fraud or other illegal activities affecting the financial interests of the EU can be found in Art. 325 TFEU which establishes the guidelines for building the legal architecture that will protect the EU's financial interests (Marín, 2020). Based on this provision, the EU and the Member States have to take measures to counter fraud or any other illegal activities affecting the EU's financial interests, whereas the measures taken in the Member States have to be the same as they take to counter fraud affecting their own financial interests. There is no doubt, that Member States have a key role in the process of fighting fraud by taking effective measures to protect the EU budget. By comparison with Art. 82 – 83 TFEU (harmonisation of laws in criminal matters) and Art. 325 TFEU (measures to combat fraud) it can be seen that the legislator aimed to separate a special group of crimes, where the Union can approximate the criminal laws of the Member States and the crimes of fraud affecting the Union's budget, as the crime of fraud affecting the financial interests of the EU is serious. Article 325 TFEU contains a legal basis to take measures in order to assure an effective deterrent and protection and can be qualified as a special provision to the general provision of Art. 83 TFEU (Vervaele, 2018).

The legislator decided to give an option to the EU institutions and the Member States to establish a special criminal law enforcement body of the Union – the European Public Prosecutor's Office - with competence to fight directly against crimes affecting the

[3] Article 86 par. 1 TFEU.
[4] Article 86 par. 2 TFEU.
[5] Article 86 par. 4 TFEU.
[6] The approximation of the laws and regulations of the Member States concerns the areas of mutual admissibility of evidence between the Member States, the rights of individuals in criminal procedure, the rights of victims of crime or other specific aspects of criminal procedure which the Council has identified by a decision (Art. 82 par. 2 TFEU). The area of crimes, where the minimum rules concerning the definition of criminal offences and sanctions can be adopted, are due to Art. 83 TFEU terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime, and organised crime.

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Union's financial interests through the criminal law. The Art. 86 TFEU is not defining the institutional structure of the EPPO, the appointment of its members, its competence, or its rule of procedure. The institutional design of the EPPO determines its status and powers, its relations with national authorities and existing EU institutions and bodies and makes the transfer of sovereignty visible for the Member States (Ligeti and Weyembergh, 2015). The problem in this context is that The Treaty on the Functioning of the European Union is limited just to stating that the general rules applicable to the EPPO, the conditions governing the performance of its functions and the rules of procedure applicable to its activities shall be the object of the regulation on the establishment of the EPPO. The missing institutional context of the EPPO in primary law of the EU caused problems and long discussions with the aim to find the proper way. The result came in 2017 when the EPPO was established by the Council Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. Based on Art. 3 of the EPPO Regulation the EPPO is a new body of the EU with a legal personality. The EPPO, as presented and set-up in the EPPO Regulation will not only be a new actor in the Union's judicial landscape, but it also brings an entirely new and different approach in fighting crimes in the European Union (Csonka, Juszczak and Sason, 2017).

3. THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND ITS COMPETENCE

The establishment of the European Public Prosecutor's Office is the result of the obligation of the Union and the Member States to protect the Union's financial interests against criminal offences which cause significant financial damage. The experiences with combatting crimes affecting the financial interest of the Union, in which the Member States had exclusive competence to fight against them showed, that the aim should be better achieved at the Union level. Because of this fact – to achieve better results and more effective investigation and prosecution – the main task of the EPPO is to investigate, prosecute and bring to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union.[7] Due to the fact, that the EPPO has direct power of investigation and prosecution, it will dramatically increase the number of prosecutions of crimes affecting the Union's financial interests, increase the deterrent effect for potential criminals and solve the problems of different applicable legal systems (Maesa, 2017).

3.1. Material competence of the EPPO

The material competence of the EPPO, set in Art 22 EPPO Regulation, covers criminal offences affecting the financial interests of the EU as provided for in the PIF Directive,[8] and as implemented by national law.[9] The PIF Directive establishes minimum rules concerning the definition of criminal offences and sanctions with regard to combatting fraud and other illegal activities affecting the Union's financial interests.[10] Harmonized offences include procurement and non-procurement fraud, customs revenue fraud, VAT revenue fraud, active and passive corruption, or money laundering.

[7] Article 4 EPPO Regulation.
[8] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interest by means of criminal law.
[9] Article 22 par. 1 EPPO Regulation.
[10] The PIF Directive contains definitions of criminal offences with regard to fraud affecting the Union's financial interests in two main categories – fraud affecting the Union's financial interests (Article 3) and other criminal offences affecting the Union's financial interests (Article 4).

The Union's legislator provides the definitions of criminal offences affecting the financial interests of the EU in the PIF Directive, but the Union does not have the competence to set legally binding definitions of criminal offences. The scope of the PIF Directive is to serve as a reference frame with harmonized financial criminal offences (Kuhl, 2017). The concrete definitions of criminal offences which fall within the material competence of the EPPO, are required to be set by the Member States in their national laws (criminal law), by which the PIF Directive will be transposed into national law. The transposition of the PIF Directive and its rules will not be homogenous, and the result will be that the original mandate of the EPPO will not be homogenous either (Marín, 2020).

In addition to investigations and prosecution of criminal offences defined in PIF Directive the EPPO also has the competence to investigate and prosecute the offences regarding participation in a criminal organisation,[11] if the focus of the criminal activity of a criminal organisation is to commit any of the offences defined in the PIF Directive.[12] Moreover, the competence of the EPPO is also given for any other offence that is inextricably linked to criminal offences affecting the financial interests of the EU as defined in the PIF Directive.[13] In this case, the EPPO can exercise its competence only when two conditions are simultaneously fulfilled: (1) there exists an inextricably link[14] between a criminal offence defined in the PIF Directive and other criminal offence, and (2) the maximum sanction provided by national law for an offence defined in the PIF Directive is higher than the maximum sanction for an inextricably linked offence.[15]

The EPPO regulation also contains negative definition of the competence of the EPPO. The EPPO does not have the competence to investigate and prosecute criminal offences relating to national direct taxes including offences inextricably linked to them.[16]

In connection with the competence of the EPPO, it is necessary to keep in mind the possibility of an option to extend the competence of the EPPO. The possibility of extending the competence of the EPPO is connected with serious crimes having a cross-border dimension.[17] The decision to extend the powers of the EPPO has to be adopted by the unanimous decision of the European Council. The first attempt to extend the competence of the EPPO came soon after the establishment of the EPPO, on 12 September 2018, when the European Commission presented an initiative to extend the competence of the EPPO to cross-border terrorist crimes as part of the comprehensive and strengthened European response to terrorist threats.[18]

The material competence of the EPPO in every single case is according to Art. 23 EPPO Regulation determined by its territorial and personal competence. The EPPO is competent for the criminal offences referred to in Art. 22 where these offences (a) were committed in whole or in part within the territory of one or several Member States,[19] (b)

[11] Criminal organisation for the purpose of the EPPO Regulation is criminal organisation as defined in Framework Decision 2008/841/JHA.
[12] Article 22 par. 2 EPPO Regulation.
[13] Article 22 par. 3 EPPO Regulation.
[14] The term inextricably link should be considered in light of the relevant case-law of the Court of the Justice of the European Union, for which the relevant criterion is the identity of the material facts, so it should be understood in the sense of existence of a set of concrete circumstances which are inextricably linked together in time and space (Recital 54 EPPO Regulation).
[15] Article 25 par. 3 let. a EPPO Regulation.
[16] Article 22 par. 4 EPPO Regulation.
[17] Article 86 par. 4 TFEU.
[18] Communication from the Commission to the European Parliament and the European Council. A Europe that protects: an initiative to extend the competence of the European Public Prosecutor's Office to cross-border terrorist crimes. COM/2018/641 final.
[19] For the purposes of the EPPO Regulation Member State is a Member State participating in enhanced cooperation.

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were committed by a national of a Member State, provided that the Member State has jurisdiction over such offences when committed outside its territory, or (c) were committed outside the territories of Member States by a person who was subject to the Staff Regulations or the Conditions of Employment, at the time of the offence, provided that the Member State has jurisdiction for such offences when committed outside its territory. The EPPO will have the competence to investigate and prosecute criminal offences in cases, in which the European (territorial or personal) link to the committed offence exists. On the other hand, the territorial and personal competence of the EPPO has to be read and applied in connection with the idea, that the EPPO should exercise its competence as broadly as possible so its investigations and prosecutions may extend to offences committed outside the territory of the Member State.[20]

3.2. Shared competence

The European Public Prosecutor's Office is an indivisible body of the Union operating as a single Office. The EPPO can perform effectively its task – to investigate, prosecute and bring to judgment the perpetrators of criminal offences affecting the financial interest of the Union - only when the EPPO and the competent national authorities will support and inform each other.[21] Sound communication and cooperation between the EPPO and the national authorities are fundamental to ensure real protection of the Union's financial interests and effective enforcement system (Csonka, Juszczak and Sason, 2017). For the EPPO, to become an effective player in the area of EU criminal law, it is necessary to have up to date information about the criminal offences affecting the financial interests of the EU. Due to these reasons, the institutions, bodies, offices and agencies of the EU and the relevant authorities of the Member States have the obligation to report to the EPPO any criminal conduct in respect of which the EPPO could exercise its competence.[22] The mutual exchange of information of importance, as well as the principle of loyalty, are both instruments necessary for the effective investigation and prosecution of crimes at the Union's level.

Based on the reported criminal conduct the EPPO has to decide whether there are grounds to initiate its investigation, to exercise its right of evocation, or whether there are no grounds to initiate its investigation. If the EPPO decides to exercise its competence, the national authorities will not exercise their own competence in respect of the same criminal conduct.[23] [24] The system provided by Art. 86 TFEU and the EPPO Regulation is a system of shared competences between the EPPO and national authorities in the fight against crimes affecting the financial interests of the EU, based on the mere right of evocation of the EPPO (Rafaraci, 2019). Right of evocation of the EPPO,[25] is the result of negotiations and it replaced the concept of exclusive competence of the EPPO. In cases, where the EPPO decides to exercise its right of evocation, the competent national authorities of the Member States have to stop their investigation and transfer the case to the EPPO.

Even when the criminal offence falls within the material competence of the EPPO, the EPPO cannot exercise its competence unless the criminal offence involves damage

[20] Recital 64 EPPO Regulation.
[21] The relation between the EPPO and the Member States, especially their national authorities involved in the criminal matters, is governed by the principle of sincere cooperation.
[22] Article 24 par. 1 EPPO Regulation.
[23] Article 25 par. 1 EPPO Regulation.
[24] Article 25 par. 2 EPPO Regulation.
[25] Article 27 EPPO Regulation.

to the Union's financial interests higher than EUR 10.000.[26] The EPPO also refrains from exercising its competence over criminal offences affecting Union's financial interests in two other cases.[27] Firstly, if the criminal offence defined in the PIF Directive is inextricably linked to another offence, decisive criteria are sanctions and damage caused. If the maximum sanction provided for by national law for a criminal offence defined in the PIF Directive is equal to or less severe than a maximum sanction for an inextricably linked offence, the EPPO shall not exercise its competence. The exception to this rule is the situation when an inextricably linked offence has been instrumental to commit the criminal offence defined in the PIF Directive. The second case, when the EPPO refrains from exercising its material competence, is the case when the damage caused or likely to be caused to the Union's financial interest does not exceed the damage caused or likely to be caused to another victim. As highlighted above, it is clear that in some situations the competence of the EPPO and the competence of the Member State (its national prosecution authorities) can come into conflict, as both of them have the competence to investigate the cases under some conditions or circumstances, whereas not all of them are clear yet. In such a case, the specified national authority is the one with the right to decide who has the power to investigate and prosecute the case. To any conflict of competence between the EPPO and the competent national authorities, the Court of Justice of the EU has jurisdiction to give preliminary rulings concerning the interpretation of Article 25.[28]

When the EPPO decides to initiate an investigation or exercise its right of evocation, the competent national authorities of the Member State have to be informed as soon as possible. The investigation of the EPPO is then initiated and handled by the European Delegated Prosecutor.[29] The European Delegated Prosecutor is responsible for investigations and prosecutions of the criminal offences against the Union's financial interest and for bringing cases to judgment, as he performs his tasks under the direction and supervision of the central Office of the EPPO. During the investigations, the European Delegated Prosecutor acts on behalf of the EPPO and has the same powers as a national prosecutor in respect to investigations, prosecutions and bringing cases to judgment.[30] The European Delegated Prosecutor is acting on behalf of the EPPO, investigating and prosecuting the criminal offences which fall within the material competence of the EPPO, but the European rules governing investigation and prosecution of these criminal offences do not exist. Because of missing European rules, the European Delegated Prosecutor undertakes all necessary procedures and measures under the national law. The problem of these situations is that national criminal laws of the Member States are different (e.g. competences of the prosecutors, their positions, different transposition of the PIF Directive). These differences may at the end lead to a different exercise of the EPPO's competence at the national level.

4. CONCLUSIONS

The EPPO regulation represents a move towards the EU Criminal law and paves the way for a new era of criminal justice cooperation in the EU (Ligeti and Weyembergh, 2015). By the establishment of the European Public Prosecutor's Office under the

[26] In situations like this, the EPPO can exercise its competence only if the case has repercussions at Union level which required the investigation by the EPPO or if the case involves EU officials or other servants.
[27] Article 25 par. 3 EPPO Regulation.
[28] Article 42 par. 2 EPPO Regulation.
[29] The European Delegated Prosecutor is a prosecutor at the national level of participating Member States, who is simultaneously a member of the EPPO.
[30] Article 13 EPPO Regulation.

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enhanced cooperation, the Member States proved their real interest to build an effective legal system to protect the financial interest of the European Union and its budget (Iancu and Jigau, 2019). The establishment of the single European Public Prosecutor's Office represents a conceptual change which means a shift from a system based exclusively on mutual recognition of investigation measures adopted by national authorities to a completely new European mechanism of investigation and prosecution of criminal offences by the independent European Public Prosecutor's Office with power to take decisions, which are directly enforced in the Member States (Met-Domestici, 2017).

The adoption of the EPPO Regulation represents an effort to establish harmonized rules in the area of fighting against the financial interests of the European Union. The EPPO Regulation determines its competence, its institutional structure and exercise of its competence. The EPPO regulation itself determines its competence in general terms, but its text does not contain definitions of the criminal offences affecting the financial interests of the EU. The legislator of the EPPO Regulation decided to make reference to the PIF Directive and the national implementing provisions in the question of definitions of the criminal offences. The EPPO proposal does not only lack common definitions of the criminal offences affecting the financial interests of the Union, but it also refrains from defining the concrete powers of the EPPO in the investigation and the prosecution (Lohse, 2015). In this context, the EPPO Regulation sets up a mixed model consisting of minimum European criminal rules but the exercise of powers of the EPPO in the Member States will be based on national criminal laws. Despite the fact, that the competence of the EPPO is regulated by the provisions of the European Union law, the EPPO will exercise its competence mostly under the provisions of national criminal laws.

Nowadays it is not possible to make a clear conclusion on the true added value of the EPPO, as the EPPO is still in its setting-up phase. The competence of the EPPO opens a space for this new body of the Union to protect the financial interests and the budget of the Union effectively, in cooperation with the competent national authorities. The material competence of the EPPO and its exercise, as well as problems connected to shared competence, will raise when the EPPO will assume the investigative and prosecutorial tasks.

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THE MODEL OF SUPERVISION OVER ADMINISTRATIVE COURTS IN POLAND / Jan Olszanowski

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Abstract: *One of the most significant current discussions in Polish legal doctrine is how actions of executive powers, especially supervisory measures can affect judicial independence. It is related to basic constitutional and administrative law issues, including the separation of powers, the independence and the impartiality of the judiciary, the independence of the courts, the supervision and control, the efficiency and effectiveness of judicial protection. The analysis focuses on the dependence between the model of administrative supervision adopted in administrative justice and the efficiency of the courts, as well as their perception by the public. The study will examine supervisory measures aimed at ensuring the efficient functioning of the courts. The effectiveness of judicial review of administrative justice is essential for the protection of individuals' rights and the functioning of the state authorities in both the social and the economic sphere. From an extrajudicial point of view its significance is reflected in the influence on the judiciary, which will not only be effective in its procedural activity, but also in the level of trust and social prestige. It holds that the three arms of the state – the executive, the judiciary and the legislature – should, to a greater or lesser extent, be kept separate. That way, they are able to hold one another to account. This theory about the separation of state power went on to have a formative effect on the development of modern-day democracies. And it's this vision of the tripartite separation of state power that is essential to the EU's argument against the Polish reforms of the judiciary. The problem of supervision over administrative courts is also connected with external and internal independence of the judiciary. External independence refers to freedom from undue outside pressure, while internal independence protects individual judges from undue pressure from within the system. "Undue internal pressure" sometimes comes from court presidents and may take different forms: even where individual judges are not formally subordinate to court presidents or other authorities and may be result of attribution of workload, allocation of resources and benefits, disciplinary powers, powers of transfer and secondment, distribution of cases, etc. The aim of this paper is to examine the problem of supervision over administrative courts in legal system of Poland. The article focuses on the dependence between the model of administrative supervision and the efficiency of the courts.*

Key words: *supervision over courts; independence of judiciary; administrative justice.*

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1. INTRODUCTION

The administration of the courts, their management, and the technical aspects of their functioning, as well as the supervision of these activities, are often exercised by specific bodies which do not have to fall under the structure of judicial power (Mikuli, 2014, p. 521). In the case of administrative courts, the model of supervision is different. It is exercised by the President of the Supreme Administrative Court. Supervision may be understood as all the actions pertaining to the organisational and financial functioning of the courts (administrative supervision), or to the appellate procedures of a higher court concerning the judgment of a lower court (judicial supervision).[1] The aim of this paper is to examine the problem of the proper shape of the supervision over administrative courts in the Polish legal system from the theoretical point of view.

The analysis focuses on the dependence of the model of administrative supervision adopted in administrative justice on the efficiency of the courts, as well as their perception by the public. It is also essential to discuss whether this supervision is not abused by the public authorities who exercise it in order to achieve other ends than to make the activity of the courts more effective. First, it is necessary to present how the administrative courts proceed and how they are constructed. Attention also has to be paid to how the Polish doctrine defines supervision over courts. The most important problem is the separation of administrative tasks from the administration of justice. The tension that arises in this context involves, within the framework of administrative supervision, the simultaneous consideration of judicial independence and the efficiency of the court's activity, the separation of the judiciary from other authorities, and the need for its co-operation with the legislative and executive powers. It has to be pointed out that there is a distinction between administrative supervision and other forms of supervision, especially judicial supervision (exercised by the courts of higher instance as part of the established procedure) (see Łazarska, 2015, p. 327).[2] Finally, it is also necessary to compare the differences between the supervision of common courts and of the administrative courts, and to review this supervision.

This may sound obvious, but the courts must be accessible, and should dispense justice freely, fairly, impartially and expeditiously.[3] The procedures of lawsuits and the structure of the courts are a means of providing justice. The State, as a whole, should supervise proper functioning of judiciary and should not leave scope for practices or processes which may ultimately hinder or prevent the dispensation of justice. The administrative activities of courts consist in providing adequate technical, organizational and financial conditions for the courts to operate and perform their tasks, and also in ensuring the correct course of the court's internal functioning, which is directly connected with the tasks that it performs (dispensation of justice). These activities should be aimed at providing resources for the internal organisation of the courts' bodies. This should be the task of bodies and organizational units of the court.

Poland, which in October 2015 elected its first single-party government since 1989, following the election victory of PiS ("Prawo i Sprawiedliwość" which translates as the "Law and Justice" party), has received internal criticism (from the lawyers' organizations) and international criticism following its introduction of new legislation, which many believe will curtail the independence of the judiciary (Biernat, 2018; Bojarski & Wejman, 2017, p. 118; Koncewicz, 2017; Starski, 2016; Żurek & Mazur, 2017). The amendments to the structure of courts in Poland have even resulted the submission of a

[1] Art. 3 of the Polish Act on the System of Administrative Courts, Journal of Laws (2002).
[2] Poland, Constitutional Tribunal, K 45/07, OTK-A 2009/1/3 (15 January 2009).
[3] Art. 6.1 of the Convention on the Protection of Human Rights and Fundamental Freedoms; art. 47 Charter on the Fundamental Rights of the European Union.

proposal for a European Council decision on the determination of there being a clear risk of a serious breach by the Republic of Poland of the rule of law.[4] From 2015 until now, there have been many modifications to the statutes regarding the structure of the Supreme Court and the common courts.[5] They are also connected with the supervision exercised over the courts (Malicki, 2019, p. 270). The reforms affect the administrative judiciary to a lesser extent. However, the essence of the problem, consisting in the scope and manner of exercising supervision over the courts and judges, is the same: it relates to the effectiveness of judicial review. The proper functioning of supervision over the activity of the courts is crucial for the effectiveness of the entire legal system. Moreover, the effectiveness of judicial review and the shape of the supervision over the courts' activities are essential for the protection of individual rights and the functioning of the state authorities in both the social and the economic sphere. From an extrajudicial point of view, its significance is reflected in the influence on the judiciary, which will not only be effective in its procedural activity, but also on the level of trust and social prestige. Judicial power should aim to achieve an efficient and fair legal system (van Dijk, 2014, p. 16). When the system of supervision of the courts is complete and consistent, it will be possible to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only, and without any improper influence.

2. THE SYSTEM OF THE JUDICIARY IN POLAND

Poland is a constitutional republic formed on democratic grounds based on the principle of the separation of powers (Piotrowski, 2018, pp. 216–220).[6] The system of government is founded on the balance between the legislative, executive and judicial powers. The legislative power is vested in the Parliament, consisting of the lower house (Sejm) and the upper house (Senate). The executive power is vested in the President of Poland and the Council of Ministers, while the judicial power is vested in the courts and tribunals. The constitutional checks and balances constitute a mechanism which establishes mutual control between the authorities on equal level (Tremmel, 2014, p. 6). The principle of separation of powers clearly states that the legislative, executive, and judicial powers are separated, that there should be a balance between them, and that they should cooperate with each another (Sobczak, 2015, p. 82). This theory on the separation of state power came to have a formative effect on the development of modern-day democracies. Therefore, this vision of the tripartite separation of state power is essential to the EU's argument against the Polish reforms of the justice system.

The significance of this principle is not only of an organizational nature. The principle of separation of powers seeks, e.g. to protect human rights by preventing abuse of power by any authority. An element inherent to the principle of separation of powers, and to the foundation of democratic rule of law, is the principle of judicial impartiality (Uitz, 2009, p. 126). The implementation of this principle has always been pursued in democratic systems, while its abandonment has been characteristic of totalitarian and authoritarian ones.[7] It requires a guarantee of independence of judiciary from the political

[4] COM(2017) 835, 2017/0360 (APP), Reasoned proposal in accordance with the article 7 (1) of the Treaty on European Union regarding the rule of Law in Poland: Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (Belgium, 2017).

[5] The most important is the Polish Act on the Supreme Court, Journal of Laws (2017) and Polish Act amending the Act on the National Council of the Judiciary and some other acts, Journal of Laws (2017).

[6] According to art. 2 of the Konstytucja Rzeczypospolitej Polskiej [Constitution], Apr. 2, 1997 (Poland) (hereinafter 'the Polish Constitution'): *"The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice."*

[7] Poland, Constitutional Tribunal, K 11/93, OTK No. 2/1993 (9 November 1993).

influence of the legislative and executive authorities. The interdependences between state bodies results from the non-existence of an absolute organizational separation between functions, but that does not contradict the fact that each sovereign body is actually the main holder of its given function (Correia, 1993a, p. 89). Moreover, another crucial rule established by the Polish Constitution is the principle of democratic state ruled by law,[8] which stipulates the requirements for legal drafting – carried out by the law-giver – which are also referred to as the principles of appropriate (correct, proper) legislation, as well as the principles of the proper exercise of power by executive and judiciary.[9]

The sources of Polish law are divided into two categories, i.e. universally binding law and internal law. According to the current Polish Constitution of 2 April 1997, the sources of universally binding Polish law are: the Constitution itself — as the supreme law of the land, statutes, and ratified international agreements and regulations. In addition to these sources, it is necessary to mention that the acts issued by respective bodies - in the course of their operation constitute universally binding law in the territory of the relevant body that issued such acts (local law). Moreover, Poland is a Member State of the European Union, and therefore the national courts and tribunals are obliged to ensure the full application of the EU law and judicial protection of the rights of individuals under the same. The Constitution of the Republic of Poland stipulates the dual nature of the judicial authority, in that it is composed of courts and tribunals. The courts encompass the Supreme Court, common courts, administrative courts (including the Supreme Administrative Court) and military courts. As regards tribunals, the Constitution lists the Constitutional Tribunal and the Tribunal of State.

The issue of the competences of administrative courts and the essence of administrative justice exercised by these courts is covered in the Article 184 of the Polish Constitution. This provision states that administrative courts exercise, to the extent specified by statute, control over the performance of the public administration. Such control shall also extend to judgments on the conformity to statute, of resolutions issued by the local government bodies, and normative acts of territorial organs of government administration (more on the problem of control exercised by Polish administrative courts see Kmieciak, 2013).

The acts regulating the detailed competences of administrative courts which are referred to in the Constitution are, above all, the Act on the System of Administrative Courts[10] as amended and the Act on the Proceedings before Administrative Courts[11] as amended. According to the Article 3 and the following provisions of the Act on the Proceedings before Administrative Courts, these courts shall adjudicate on individual complaints brought against mainly administrative decisions or orders subject to complaint, termination of proceedings, or determining the substance of the case, as well as orders issued in executive proceedings and proceedings to secure claims, written interpretations of tax levied in individual cases. The administrative courts should also adjudicate on disputes regarding local enactments issued by local self-governments or by regional authorities of the state administration, as well as complaints concerning administration's failure to act.

In 1 January 2004, Poland introduced a two-tier system of administrative judiciary (Skoczylas & Swora, 2007). According to Article 13, § 1 of the Act on the

[8] According to the art. 2 of the Polish Constitution: *"The organs of public authority shall function on the basis of, and within the limits of the law."*

[9] Poland, Constitutional Tribunal, P 15/05, OTK No. 11/A/2006 (12 December 2006) and Poland, Constitutional Tribunal, P 16/03, OTK No. 4/A/2004 (27 April 2004).

[10] Poland, Act on the System of Administrative Courts, Journal of Laws (2002).

[11] Poland, Act on the Proceedings before Administrative Courts, Journal of Laws (2002).

Proceedings before Administrative Courts, the voivodship courts hear – in principle – all administrative matters, except for matters reserved for the jurisdiction of the Supreme Administrative Court. Cases within the jurisdiction of administrative courts are considered in the first instance by the voivodship administrative courts. The Supreme Administrative Court supervises the work of the voivodship administrative courts. The voivodship administrative courts are divided into divisions whose number depends on the voivodship.

The basic task of the Supreme Administrative Court and the administrative courts is to control the legality of the activities of the public administration (Turłukowski, 2016, p. 126). This includes adjudicating on compliance of resolutions adopted by local self-government bodies and of normative instruments passed by the regional bodies of government administration with law. The subject of this compliance control is the adherence to the law by public administration bodies, in other words, the protection of substantive law, and the result of this control – if the administrative court determines that a breach of substantive law has occurred – is the application of the legal reliefs e. g. revocation of a decision. Most often, however, the protection of substantive law involves the protection of normative rights of citizens which derive from the norms of substantive law, and which have been breached as a result of an unlawful action of public administrative bodies. The administrative court is a court of cassation which investigates whether an act or deed of an administrative body complies with the provisions of law. If the court decides that the act or deed does not comply with the law, it rescinds it or declares it void. When delivering a judgement, the court performs a legal assessment of the act and provides guidelines regarding application of law in a given individual case, or declares previous decision subject to appeal, ineffective. This brings the administrative court's role to a close, and the case is referred to the administrative bodies which are to take further action. This is the result of the principle of separation of powers. In the Polish legal system, there is the rule that a court judgement should not deprive the administration of its discretionary powers (Kmieciak, 2012, pp. 3–5; see also Correia, 1993b, p. 89; Jansen, 2005, p. 54) If the administrative court controls the legality of administrative decisions, generally, this cannot result in depriving the administration of the essence of the material function that it wields. The case then will go back to the administrative authority.

3. LEGAL GUARANTEES OF THE INDEPENDENCE OF THE JUDICIARY AND IMPARTIALITY OF THE ADMINISTRATIVE COURTS IN THE CONTEXT OF THE SUPERVISORY CONTROL OVER JUDICIARY

One of the most significant discussions currently taking place in the Polish legal doctrine is how supervision can affect judicial independence (Mikuli, 2014, p. 522). This is related to basic issues in constitutional and administrative law, including: separation of powers, independence and the impartiality of the judiciary, independence of the courts, supervision and control, and efficiency of judicial protection.

The principle of judicial independence entails the independence of each individual judge at exercise of his adjudicating functions. In their decision making, judges should be independent, impartial and able to act without any and all restrictions, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organization should not undermine individual independence of judges. However, it might be possible that the supervisory authority has influence on the judges, especially within its capacity to introduce incentive measures or disciplinary measures (the capacity to initiate disciplinary proceedings). Sometimes, it pointed out, that the independence of individual judges and the independence of the

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judiciary are separate matters, and there is need to distinguish judicial autonomy from the independence of individual judges (Kosař, 2017, p. 120). However, it is also clear that the fundamental right to an effective remedy enshrined therein means, inter alia, that everyone is entitled to a fair hearing by an independent and impartial tribunal. This is the most important task for the judiciary and legislative powers.

The Polish Constitutional Tribunal clearly stated that all cases shall be considered before the competent, impartial, and independent courts specified in the Constitution. The independence and impartiality of courts and judges are closely related to each other. The independence of the courts refers, above all, to the organizational and operational separateness of the judiciary from the other organs of public authority, in order to guarantee full autonomy thereof in terms of consideration of cases and adjudication. In turn, the independence of judges means that judges shall act solely on the basis of the law, in accordance with their conscience and personal convictions. Several elements are connected with the notion of independence: impartiality with regard to participants in proceedings, the independence of judges from non-judicial bodies, the independence of judges from authorities and other judicial bodies, independence from political influence nature, as well as the internal independence of a judge.[12] In fact, the principle of separation of powers should ensure judges a degree of protection against interference with their exercise of judicial power, including interference by fellow judges and other authorities.

The basic regulation concerning independence and impartiality of courts is set out in the Article 45 paragraph 1 of the Constitution of the Republic of Poland. This regulation establishes the individual's right to a fair and public hearing. The right to have a case examined by an independent and impartial court is expressed in the Article 6 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and in the Article 14 paragraph 1 of the International Pact on Civil and Political Rights. With the term 'independence of judges', emphasis is placed on judges not being dependent on factors outside of legal requirements when it comes to their judicial activity. The independence of judges, including the independence of the judges of the Tribunal, comprises numerous elements, namely:

1) impartiality towards the participants in proceedings;

2) independence from non-judicial authorities (institutions);

3) judge's autonomy in his/her relations with other branches of government and other judicial bodies;

4) independence from political factors;

5) the intrinsic independence of judges.

The independence of judges is not only their right but also a constitutional obligation, whereas the protection of judge's independence is a constitutional obligation of the legislator and the organs of judicial administration.[13]

Traditionally, also the Venice Commission distinguished between the external and internal independence of the judiciary. External independence refers to freedom from undue outside pressure, while internal independence protects individual judges from undue pressure from within the system. "Undue internal pressure" sometimes comes from court presidents and may take different forms: even where individual judges are not formally subordinate to court presidents, other powers (attribution of workload, allocation of resources and benefits, disciplinary powers, powers of transfer and secondment, distribution of cases, etc.) may be easily abused. The borderline between internal and external independence may become blurred when the appointment of court presidents is

[12] Poland, Constitutional Tribunal, SK 7/06, OTK-A No. 9/2007/9 (24 October 2007).
[13] Poland, Constitutional Tribunal, K 3/98, OTK ZU No. 4/1998 (24 June 1998).

politicized. It is thus important to examine what powers court presidents have vis-à-vis ordinary judges, and how those presidents are appointed, dismissed, etc., i.e. whether they themselves enjoy sufficient independence from the executive and the legislature.[14]

4. ADMINISTRATIVE SUPERVISION OVER ADMINISTRATIVE COURTS

The administrative activities of courts are contained consist in providing adequate technical-and-organizational conditions as well as financial conditions for the courts to operate and perform their tasks, and also in ensuring the correct course of the court's internal functioning, which is directly connected with the tasks it performs. These activities should be aimed at providing financial resources for the operation of an internal court office, and to ensure its proper course, it is connected with proper shape of organizational units of the court.

In turn, supervision itself is one of the central institutions of administrative law. The manner of its exercise, the types of measures and supervisory activities are among the basic issues in the study of systemic and procedural law. Supervision does not represent an institution typical for the judiciary. The problem is how to transpose the norms of administrative law into the field of supervision over judiciary (Banaszak, 2014, p. 6). There are views judicial independence must be absolute, with no interference from any external source. These rely on the importance of judicial independence and the (apparently) existing contradiction between judicial independence and any review of judge's actions and claim that no external reviewing mechanism should be maintained to handle this matter. According to this understanding, even matters of judicial administration must be handled by and within the judicial system itself (Shetreet, 1984, p. 979).

The supervisory measures applied to the courts are not as intense as in the case of administrative authorities, which are based on hierarchical structure and vertical subordination. Given the sensitive nature of the issue, the concept of supervision must be used carefully and appropriately in relation to the administrative practice of the courts and, possibly, it could be replaced with a different legal structure, including, for example, the management scheme.

In the European jurisprudence, supervision is primarily associated with administration – including the management of budget allocations, external administrative practices, and proper formal procedures, whereas adjudication (legal judgments and precedents, material accuracy) remains largely outside the scope of supervision. Thus, here supervisory control constitutes, in principle, a kind of retrospective control, as it does in central administration (Lienhard, 2009b, p. 3). The model of administrative supervision over the judiciary is functionally linked with the principles of legal certainty legal security, the protection of citizens' trust in the State and its laws, and appropriate legislation.[15] The model of administrative supervision of the courts and judges is one of the factors affecting the qualification of the state and its assessment in terms of the implementation of democratic standards and the rule of law. The legal regulation of such supervision corresponds with the level of trust which the courts enjoy in the society. The courts, which are bodies of personal and material resources, must have their own administration. In any case, administrative supervision

[14] Report of the Venice Commission on the independence of the judicial system, Part I: the independence of judges, CDL-AD(2010)004, Study No. 494 / 2008, p. 12 (2010).
[15] Poland, Constitutional Tribunal, Kp 3/09, OTK ZU No. 9/A/2009 (28 October 2009); Poland, Constitutional Tribunal, K 23/09, OTK ZU No. 2/A/2011 (3 March 2011) and Poland, Constitutional Tribunal, P 49/13, OTK ZU No. 7/A/2014 (29 July 2014).

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should not enter the judicial area. It is thus justified to pose a question whether the judicial sphere can be separated from the administrative activities of the courts and, in the broader context, from the sphere of executive and legislative powers. Moreover, in the Article 178 of the Polish Constitution of 1997, it is clearly stated that judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

In the literature, supervisory control has three different definitions. The narrow definition restricts supervisory control to aspects of the formal adherence to proper administrative procedures, including budget management. The medium position goes a step further and includes the examination of trends in adjudication, as well as, the appraisal of legislative success and effectiveness (with a view to amending the law), and also inquiries in the case of gross infringements of the law or violations of procedures (e. g. delays). A broad definition of the concept would, in addition, involve enhanced rights to information (in particular the obligation to provide information about court judgments and rulings, and would not in principle exclude the material study of court judgments) (Lienhard, 2009b, p. 2). The Polish Constitutional Tribunal explains the meaning of supervision as management and organizational activity connected with the jurisdictional acts of a court. The court's administrative activity involves the activities which are necessary to ensure the proper and continuous functioning of the court. It is clearly stated that court administration should make it possible for courts and judges to actually fulfil their tasks (Lienhard & Kettiger, 2017, p. 9).

The judicial administrative activities *sensu stricto* also comprise a certain degree matters concerning the personal issues of both judges and the court clerks, and the regulatory activities executed during the course of a trial, or otherwise directly connected with adjudication. The supervision over the courts may also be understood as administrative activity and administrative supervision consisting of assessing the due course of office work, checking and applying orders and instructions by the court's administration bodies, monitoring the performance of judges´ and other court staff duties, as well as analysing the jurisprudence of the court (see Mikuli, 2014, p. 532).[16] The problem of supervision over the courts is also connected with the external and internal independence of judiciary, especially in the sphere of judicial power only the court enjoys the discretion to act (Gudowski, 1994, p. 32; Lienhard, 2009a).

In the legal doctrine, there is a great deal of difference between administrative and judicial supervision. Administrative supervision covers issues connected with the financial and administrative activity of courts, as well as any other issues concerning efficient consideration of cases and proper execution of judgements. This means that the supervisory power regarding administrative matters should not interfere with judicial independence the wording of judgements and decisions, whose correctness may be examined only according to the procedure stipulated by law (Kiener, 2001, p. 301). It should be noted that courts often have to adjudicate on conflicts between individual rights and the State, and this relationship is imperilled when the State takes control over judicial functions. An incorrect model of supervision over the courts enables the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby poses a grave threat to judicial independence as a key element of the rule of law.

The Supreme Court shall exercise judicial supervision over common and military courts regarding judgments (Article 183, paragraph 1 of the Polish Constitution) (Gudowski, 2015, pp. 15–19). The administrative supervision of common courts in

[16] Poland, Constitutional Tribunal, K 45/07, OTK-A 2009/1/3 (15 January 2009).

accordance with the Article 9 of the Act on the System of Common Courts[17] as amended is exercised by the Minister of Justice, judges seconded to the Ministry, as well as the presidents of the courts and thus the executive branch. The Minister of Justice's supervision of the courts' administrative activity has a long tradition in Poland. It also existed before World War II under the Constitutions of 1921 and 1935 (Mikuli, 2017, p. 13). The current legislation increases the powers of the Minister of Justice related to the internal organization of the courts, to the appointment and dismissal of the presidents and deputy presidents of the courts, and extends the competences of the Minister of Justice in the areas of promotion and discipline. The competence of the Minister of Justice regarding the administrative supervision over the courts is justified by referring to the general position of the Ministry of Justice in the legal system (Mikuli, 2014, p. 525). It is emphasized that not all the activities of the courts involve the dispensation of justice, because there are many activities which are related to the organizational or administrative aspects of the courts' activities. The problem, first of all, lies in the ambiguous wording of the statutory regulations, which makes it difficult to clearly distinguish administrative tasks in a strict sense from duties connected with the dispensation of justice. However, many scholars and judges in Poland claim that the administrative activity of the common courts should rather be controlled by judicial bodies especially by the First President of the Supreme Court (Celej, 2007; Żackiewicz-Zborska, 2008; Zawiślak, Sawko, & Bujak, 2009, pp. 833 – 837).

Another model of supervisory control was set up in the branch of administrative courts. The Supreme Administrative Court exercises supervision (both judicial and administrative) over voivodship administrative courts. This is of great importance because the administrative courts cannot be in any way dependent on the government administration. These courts control the legality of administrative authorities' activities. Additionally, the administrative courts are not supervised by the Supreme Court. It is necessary to raise the question of legitimacy of maintaining two distinctly different models of court supervision (over common courts and administrative courts), and of compliance with the Constitution and international law.

5. THE SUPERVISORY COMPETENCES OF THE PRESIDENT OF THE SUPREME ADMINISTRATIVE COURT

The supervision of the administrative courts is exercised by the President of the Supreme Administrative Court, as provided for in the Article 12 of the Act on the System of Administrative Courts.[18] However, the President of the Supreme Administrative Court may assign specific activities of court administration to the judges and may authorize them to manage particular affairs on his behalf. It is clearly stated in the Act on the System of administrative courts that the judges of the administrative courts and court assessors, within the exercise of their office, shall be independent and subjected only to the Constitution and statutes. This means that administrative supervisory activities cannot encroach on an area in which judges and court assessors are independent (Oleszko, 1988, p. 29).

Firstly, administrative supervision may rely on the financial resources of the administrative courts. The consequence of the autonomous regulation of the supervision of administrative courts is that the President of the Supreme Administrative Court equips the authorities with the power to draw up the revenue project and expenditure budget of the Supreme Administrative Court, which includes the revenue and expenditures of

[17] Poland, Act on the System of Common Courts, Journal of Laws (2001).
[18] Poland, Act on the System of Administrative Courts, Journal of Laws (2002).

voivodship administrative courts. Activities associated with the supervision of the administrative courts may also be connected with access to activities of the courts. For example, the President of the Supreme Administrative Court, the president of a voivodship administrative court and other persons appointed to direct and supervise administrative activity have the right of access to activities of an appropriate voivodship court or they may attend a trial held in camera and may demand explanation and elimination of irregularities (Kuczyński & Masternak-Kubiak, 2009, p. 199). The President of the Supreme Administrative Court and the president of a voivodship administrative court may annul **administrative rulings** which are not in conformity with the law. It is necessary to emphasize that exercising this kind of competence cannot encroach into the judgements' merits.

Within the scope of measures of supervision over the administrative activities of voivodship administrative courts, the President of the Supreme Administrative Court may order an inspection or general inspection in the court (Kuczyński & Masternak-Kubiak, 2009, pp. 202–203). In the event that irregularities have been found in respect of the effectiveness of the court proceedings, the President of the Supreme Administrative Court and the president of a voivodship administrative court may point out such irregularities and may demand that their consequences be eliminated. Moreover, the President of the Supreme Administrative Court shall establish the principles of clerical work in all administrative courts.

The President of the Supreme Administrative Court also has many competences connected with the structure of the administrative courts and their management. For example, a voivodship administrative court is divided into divisions created and dissolved by the President of the Supreme Administrative Court. Moreover, s/he defines the number of judges, vice-presidents of the court and court assessors at the voivodship administrative court and appoints a president and a vice-president in a voivodship administrative court after seeking the opinion of the general assembly of that court. The President of the Supreme Administrative Court is the Chairperson of the General Assembly and of the Board of the Supreme Administrative Court. These bodies are very important in the process of assessing the candidates for Supreme Administrative Court judges.

A measure connected with judicial supervision is the possibility of the President of the Supreme Administrative Court to apply to the Supreme Administrative Court for adoption of a resolution explaining legal regulations whose application has caused a divergence of jurisprudence between administrative courts (Skoczylas, 2004, p. 225).

As can be seen from the catalogue of statutory competences, the power of the President of the Supreme Administrative Court, in terms of judiciary and administrative supervision, are wide. The manner in which the directive of separation between the administrative and judicial supervision is implemented largely depends on the personal qualities of the people holding supervisory posts, because the judicial and administrative functions of the President of Supreme Administrative Court cannot be unambiguously separated. In my opinion, there is no doubt that this body, free of political pressure, may exercise these powers in a manner consistent with the Constitution. The competences of the President of Supreme Administrative Court do not interfere with court proceedings. The purpose of these powers is only to ensure the right course of a lawsuit or the proper organization of a given court. The shape of the administrative supervision is also in line with the principle of separation of powers.

6. CONCLUSION

There is widespread conviction that the reforms of the judiciary in Poland should be implemented to improve the quality of the due process of law and the efficiency of justice as a whole. It is also obvious that court administration and proper supervision over judiciary have direct influence on the quality of court performance and on the quality of justice being the essential outcome thereof. The quality work in courts is measured by performance of courts, public services, and the quality of justice (Simonis, 2019). However, the transformation of the system of administration of justice should pay more attention to building of ethical consensus and responsibility, rather than to institutional and staff changes (Bobek, 2010, p. 251). Supervision of the judiciary is not limited exclusively to administration, but also, in a narrow sense, concerned with judgments and rulings. Supervisory authority may have some influence on the judges. For example, the influence may consist in the participation of the supervisory body in the process of judges´ promotion, or potential capacity to initiate disciplinary proceedings. It is obvious that it is impossible to create a supervisory body which would be completely independent of any other bodies. This is necessitated by the need to establish the selection procedure of members of such a body, and to create a supervisory body over the existent supervisory authorities. In other words, someone has to choose the members of a supervisory body. Notwithstanding the foregoing, the supervisory body should be independent from the executive branch of the State, which always seeks to influence the judiciary. This is particularly important in the case of administrative judiciary, which is established to control the activities of the state administration bodies.

In relation to supervisory control over the courts, further restrictions arise as a result of judicial independence. It must be assumed that the basic principle is that supervision is primarily concerned with administration, including the management of budget allocations, whereas adjudication is largely outside the scope of supervision. Supervision thus constitutes, in principle, a kind of retrospective control, as it does in central administration. It has to be emphasized that Poland is a parliamentary republic where the separation of powers is one of the most important principles regulating the system (Banaszak, 2017, p. 570). Even before the current parliamentary term, the administrative supervision of the Minister of Justice was criticized both in the legal doctrine and by the association of judges. This is why the system of the supervision adopted by the President of the Supreme Administrative Courts (who is always a judge) has to be assessed more positively than supervision adopted by the Minister of Justice over the common courts ('Warszawski Oddział "Iustitii" w sprawie dobrych praktyk nadzorczych.', 2013).

Judicial review in individual cases should be conducted by an independent authority which is separate from the legislature and the executive. Separation of powers implies that each of the branches of government should be vested with substantive powers that correspond with its nature. What is more, each of the three branches of government ought to have a certain minimum of exclusive competence that would determine the nature of a given branch.[19] Attention should be given to the independence of individual judges irrespective of the model of court administration in which they operate, as such strategy is more resistant to abuse of the constitution (Kosař, 2017, p. 98). The independence of the courts and judges from politicians is at the heart of the normative importance of independent courts within the rule of law (Popova, 2012, pp. 139–145). The internal pressure of supervisory bodies can be as dangerous as the pressure from the bodies of the executive or even legislative branches. The exercise of

[19] Poland, Constitutional Tribunal, K 34/15 (3 December 2015).

supervisory power often escapes additional control and may be abused. The most important issue of administrative supervision is that the less political factors influence the judiciary, the better it is able to protect the rights of an individual through independent courts and independent judges. The scope of competence in the field of administrative supervision over the administrative courts falls within the definition proposed above. Moreover, the exercise of supervision over this branch of the courts by a judicial factor (not related to the executive) does not raise any doubts regarding the system (related to the separation of state powers).

This is the reason why the scientific assessment of administrative supervision over the administrative courts (conducted by the President of the Supreme Administrative Court) can be assessed positively, as opposed to the model of administrative supervision over common courts. Administrative courts are more independent in this respect, and apart from the practice and current political turmoil, from the theoretical point of view, it can be concluded that there is a separation of the judicial and executive powers from the executive. *De lege ferenda*, various possibilities arise in this connection. Supervision over the common courts may be exercised by the Supreme Court. Then this court would be equipped with competences in the field of administrative and judicial supervision over the common courts.

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INSOLVENT GROUPS OF COMPANIES IN THE EUROPEAN UNION – OBJECTIVES OF ESTABLISHING GROUP COORDINATION PROCEEDINGS / Noémi Suri

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Abstract: *Before 26 June 2017, there was no single universal regulation governing the treatment of insolvency cases concerning groups of companies or certain members of a group in the European Union. The Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings defines the effective execution of insolvency proceedings at the different group members involved as the general objective of the legal source. The aim of my paper is to review the detailed rules of group coordination proceedings, during which I focus on the request for opening group coordination proceedings, on the possibility of defining which court has jurisdiction, on the review of the opt-out and opt-in rights related to group coordination proceedings and on the presentation of the powers assigned to the coordinator.*

Key words: *Insolvency proceedings of members of a group of companies; the legal status of the group of companies; the coordinator; the right of opt-out and opt-in; multilateral coordination mechanisms; commercial law; EU law; Hungary*

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1. INTRODUCTION

Before 26 June 2017, there was no single universal regulation governing the treatment of insolvency cases concerning groups of companies or certain members of a group in the European Union. The scope of the Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency proceedings (hereinafter referred to as the "Insolvency Proceedings Regulation")[1] affected natural or legal person taxpayers (traders or private individuals) for whom it was deemed necessary to launch partial or complete divestment of insolvency proceedings involving the assignment of a liquidator.[2]

Based on the authorisation granted by the Article 46 of Insolvency Proceedings Regulation, a consultation mechanism was initiated on 30 March 2012 to execute the necessary amendments of insolvency rules. The so-called *Vienna-Heidelberg Report* (hereinafter referred to as the "Vienna-Heidelberg Report") (Hess, Oberhammer, & Pfeiffer,

[1] Official Journal of the European Communities. L 160/1. 30.6.2000.
[2] See Article 1 (1) Insolvency Proceedings Regulation.

2014), prepared by *Hess*, *Oberhammer* and *Pfeiffer* constituting the basis of this consultation, held it effective during the development of specific rules for groups to develop a system of rules which is based on respect towards the diversity of jurisdictions in the EU Member States and does not lead to a unification of civil substantive law (so-called „substantive consolidation") (Hess et al., 2014, p. 227; Oberhammer, Koller, Auernig, & Planitzer, 2017, p. 186).

Paragraph 51 of the Preamble to the recast regulation on insolvency published[3] in the EU Official Journal on 5 June 2015 defines the effective execution of insolvency proceedings at the different group members involved as the general objective of the legal source. The legal source aims to warrant this objective by establishing a system of rules based on cooperation and communication between the courts and the insolvency practitioners while implementing provisions ensuring coordinated insolvency proceeding(s) launched against all the business entities of group(s) of companies (Jaufer, 2017, p. 255). "The reform is based on a "procedural coordination" approach which respects each group member's separate legal identity" (Oberhammer et al., 2017, p. 185). When coordinating the proceedings of different fields, ensuring independence remains a general requirement.

2. THE LEGAL STATUS OF THE GROUP OF COMPANIES IN THE NEW REGULATION

The recast regulation determines the definition of group of companies under *definitions*: *"group of companies means a parent undertaking and all its subsidiary undertakings"*.[4] It must be considered a "parent undertaking" "[…] an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. An undertaking which prepares consolidated financial statements in accordance with the Directive 2013/34/EU of the European Parliament and of the Council (1) shall be deemed to be a parent undertaking."[5]

The parent undertaking needs to prepare consolidated financial statements if a.) has a majority of the shareholders' or members' voting rights in another undertaking (a subsidiary undertaking); b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking (a subsidiary undertaking) and is at the same time a shareholder in or member of that undertaking; c.) has the right to exercise a dominant influence over an undertaking (a subsidiary undertaking) of which it is a shareholder or member, pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association, where the law governing that subsidiary undertaking permits its being subject to such contracts or provisions.; d.) is a shareholder in or member of an undertaking, and controls alone, pursuant to an agreement with other shareholders in or members of that undertaking, a majority of shareholders' or members' voting rights in that undertaking.[6]

[3] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency proceedings. Official Journal of the European Communities. L 141/19. 5.6. 2015. (hereinafter referred to as the „EU Insolvency Regulation").
[4] See Article 2 (13) EU Insolvency Regulation.
[5] See Article 2 (14) EU Insolvency Regulation .
[6] Article 21(1) of the Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the Annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

The scope of the regulation covers only debtor groups of companies and members of groups whose centre of interest resides in the European Union.[7] The EU Insolvency Regulation does not define which groups of companies or members of groups are to be considered debtors, the same way as it does not set forth whether the legal status of "debtor" means the same as "an insolvent group of companies or an insolvent member of a group". In certain Member States "over-indebtedness in itself is not a condition for launching insolvency proceedings" (Veress, 2019, p. 15), therefore in my opinion, the definition of debtor groups of companies (or a group member) may only be applied to groups of companies (group members) against whom insolvency proceedings as defined in Annex A of this regulation have been initiated.

3. THE NATURE OF THE REGULATION

Rules on insolvent groups of companies in the EU Insolvency Regulation may be classified into two groups: 1. the focus of the so-called general part is the institutional system of cooperation mechanisms, 2. the special part contains the detailed rules of group coordination proceedings. According to *Mangano's* approach the general part consists of three blocks: a) duties of cooperation and communication; b) IPs' extra powers; c) protocols (2016, p. 286).

The provisions of the Articles 56-60 of the Regulation enforce decentralised coordination (Jaufer, 2017, p. 260) in the event of insolvency proceedings concerning two or more members of the same group. The cooperation mechanism can be divided into three levels: firstly, cooperation and communication between insolvency practitioners, secondly, cooperation and communication between courts, and thirdly, cooperation and communication between insolvency practitioners and the courts. In line with *Bornemann's* approach, this decentralised coordination is successful in avoiding shortcomings stemming from the inherent relationship of subordination between the main proceeding and the territorial proceedings (Bornemann, 2016, p. 176; Jaufer, 2017, p. 260). The rules in the Articles 56-58 set forth an obligation for cooperation between insolvency practitioners and the courts. It is important to note, that the cooperation between the courts and the insolvency practitioners shall not be aimed at realising goals which defy creditor interests, a resolution must be achieved in full consideration of the interests of the group (and interests within the group) (Jaufer, 2017, p. 261).

The Article 56 of the Regulation lays dawn the duty to cooperate for an insolvency practitioner (Wessels, 2017, p. 673). During coordination between insolvency practitioners three levels of cooperation obligations is specified by the regulation: a) duty to inform each other; b) coordination of administration and supervision over members of the group; c) development of a harmonised plan to restructure the business operation of the group and preparation and execution of the negotiations necessary thereto.[8] The new EU Insolvency Regulation authorised insolvency practitioners to transfer further rights to one practitioner selected from them to facilitate the measures prescribed by points b) and c) above, and to agree on the distribution of tasks, if the law of the Member State allows them to do so. The new EU Insolvency Regulation outlines the cooperation duties between insolvency practitioners only in terms of the content and not the form (verbal, written, formal conditions of agreement) (Jaufer, 2017, p. 261).

[7] Pursuant to Art. 3(1) of the EU Insolvency Regulation: „The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

[8] See Article 56(2) of the EU Insolvency Regulation.

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During the cooperation and communication between the courts, achieving the goal of increased efficiency in administration through the harmonisation of certain territorial proceedings is paramount. Cooperational duties shall be fulfilled by all courts irrespective of whether the given court has already opened insolvency proceedings against two or more members of the group, or a request for opening such proceedings concerning another member of the group has been submitted at the given court. The new EU Insolvency Regulation also authorises courts to designate an independent person or body acting under their instructions to achieve such coordination.[9] The question arises whether this person can only be an insolvency practitioner as defined by the provisions of the regulation or other persons possessing adequate professional expertise can be authorised at the discretion of the courts. During communication between the courts, the principle of immediacy is mandatory,[10] which, in my view, calls upon the application of the rules of the Regulation on serving judicial and extrajudicial documents in civil or commercial matters.[11] The content of the cooperation between courts is defined in detail by the legal source: coordination during the appointment of insolvency practitioners; exchange of information; coordination of the administration and supervision of the group members' assets and affairs; coordination of hearings, and the approval of protocols.

The base for the cooperation obligation between insolvency practitioners and the courts is created in all cases by a proceeding already opened or requested to be opened by a submission against a second member belonging to the same group of companies. Beside the principle of efficiency, the issues of the compatibility of the legal systems of the involved Member States as well as the conflicts of interests, incompatibility stemming from conflicts of interests also arise during cooperation between the insolvency practitioners and the courts.

The Article 60 of the new legal source grants the following special powers to insolvency practitioners in proceedings concerning members of a group of companies (so called IPs' extra powers) (Mangano, 2016, p. 287): 1.) in order to facilitate the administration and the efficiency of proceedings, the insolvency practitioner may be heard in any of the proceedings opened against any other member of the same group.[12] According to *Jaufer* this right to be heard also entails ensuring the right to make recommendations (2017, p. 262). 2.) The right of intervention: requesting a stay of enforcement actions, including any measures related to the realisation of assets, 3.) preparation of a restructuring plan to re-establish the group member's solvency and carry out the necessary measures to the adequate enforcement of the restructuring plan, 4.) requesting the opening of group coordination proceedings. The court shall adopt a resolution on the stay of enforcement actions, during which it has to hear the insolvency practitioner. The suspension of the partial or full realisation of the assets may last no longer than three months, during which the court may order the insolvency practitioner to take every adequate step prescribed by the law of the Member State – such as

[9] See Article 57(1) of the EU Insolvency Regulation.
[10] See Article 57(2) of the EU Insolvency Regulation.
[11] Regulation (EC) No 1393/2007 of the European and of the Council of 13 November 2007 on the Service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000. Official Journal of the European Communities. L 324/79. 10.12.2007.
[12] According to Wessels this "provision does not establish any special procedure, the procedural details are governed by the respective lex fori concurus" (2017, p. 681).

insurance measures – and deemed necessary to enforce the rights of the creditors involved in the proceedings.[13]

4. INSOLVENCY PROCEEDINGS OF MEMBERS OF A GROUP OF COMPANIES

The special part of the provisions related to insolvent groups of companies comprises the rules of group coordination proceedings. The condition for opening the proceedings, added as a new element to the revamped insolvency regulation, is the declared state of insolvency of a group member (Jaufer, 2017, p. 261). The rules set forth in the regulation regarding group coordination proceedings aim at the establishment of so-called multilateral coordination mechanisms (Jaufer, 2017, p. 264), which presuppose the coordination of at least two main proceedings opened in different Member States (Jaufer, 2017, p. 264). During the proceedings, besides enforcing the principle of efficiency, one rule in the Preamble paragraphs must also be highlighted, namely the one requesting respect for the separate legal personality of the individual group members (Oberhammer et al., 2017, p. 185).[14] Group coordination proceedings are divided into two phases by the new EU Insolvency Regulation. The first phase focuses on coordination, which means determination of the conditions for opening the proceedings, the relevant regulation on jurisdiction, the insolvency practitioners' right to lodge objections, the resolution ordering the group coordination proceedings and the institution of the group coordination plan. The second phase concentrates on the activities of the coordinator. In addition to the powers of the coordinator, this phase also outlines the basic coordination obligations between the coordinator and the insolvency practitioners.

The aim of my paper is to review the detailed rules of group coordination proceedings, during which I focus on the request for opening group coordination proceedings, on the possibility of defining which court has jurisdiction, on the review of the opt-out and opt-in rights related to group coordination proceedings and on the presentation of the powers assigned to the coordinator.

4.1 Details of the procedure

4.1.1 Initiation of proceedings

It can be safely stated along with the new EU Insolvency Regulation, that group coordination proceedings are mechanisms of cooperation the ordering of which falls under the jurisdiction of a court in a non-contentious proceeding opened upon request. The proceeding is in all cases initiated at the request of the insolvency practitioner appointed for an insolvency proceeding opened with regard to a member of a group of companies.[15]

The regulation "does not contain any rules specifically devoted to the international jurisdiction of companies belonging to a group" (Mangano, 2016, p. 282). According to my opinion the regulation prescribes one general and one special rule among the jurisdiction rules related to the opening of group coordination proceedings. The Article 61 defines as general head of jurisdiction the insolvency practitioner's

[13] Pursuant to Article 60(2) of the EU Insolvency Regulation: „The court may extend the duration of the stay by such further period or periods as it considers appropriate and which are compatible with the rules applicable to the proceedings, provided that the conditions referred to in points (b)(ii) to (iv) of paragraph 1 continue to be fulfilled and that the total duration of the stay (the initial period together with any such extensions) does not exceed 6 months."

[14] See also Para. 51 of the Preamble of the EU Insolvency Regulation.

[15] See Article 61(1) of the EU Insolvency Regulation.

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submission of a request to open a group coordination proceeding at any courts having jurisdiction over the insolvency proceedings initiated against a member of the group concerned. In the event of parallel proceedings opened in line with this jurisdiction rule, the prevention rule prescribes that the court at which the request was filed first will have jurisdiction to decide on the opening of the group coordination proceeding.[16] *Wessels* evaluated this rule as such the priority rule means "that only the time element is decisive, not the fact that the request itself it contains is sufficient grounds or is inadmissible" (2017, p. 688).

Besides general jurisdiction, the Article 66 determines the institution of the choice of court as an exclusive head of jurisdiction: the insolvency practitioners appointed to carry out insolvency proceedings against the group members may initiate the proceeding in front of the most adequate forum based on a request written by or confirmed in writing by two-thirds of the insolvency practitioners.[17] In this respect the question may arise: what aspects do or may the insolvency practitioners consider when determining which Member State court is "the most adequate" to decide on the opening of the group coordination proceeding?. I believe, in this regard the following factors may be equally decisive: the main centre of interest of the debtor group of companies, the number of subsidiaries of the debtor group of companies seated in the given Member State(s), the location of the group's assets (rights and concessions), the regular place of residency of the main creditors of the group. In terms of the choice of jurisdiction, the request to open group coordination proceedings shall be submitted at the court having exclusive jurisdiction over the proceedings. The court having jurisdiction based on the general jurisdiction rule has to decline jurisdiction in favour of the court of choice pursuant to Section 3 of the Article 66. From this rule one can draw the conclusion that courts having jurisdiction based on the general head of jurisdiction may not review the choice - of whether the most adequate forum was indeed determined - in effect, since if the request complies with the rules of the Articles 61 and 66, they must decline jurisdiction.

Concerning the request for opening group coordination proceedings, the regulation sets the direction of submitting the request, on the one hand, and defines its mandatory attachments on the other. With regard to submitting the request, Section 2 of the Article 61 specifies the applicable law as the law of the Member State under which the insolvency practitioner was appointed. Consequently, it bears no significance in which Member State the request was filed (Jaufer, 2017, p. 264), and the determination of the applicable law by the regulation may lead to the application of a foreign law both for the court having jurisdiction and for the requesting person (i.e. the insolvency practitioner). Regarding the content of the request the regulation only specifies minimum rules (Bornemann, 2016, p. 216): a) recommendation on the person of the group coordinator (which includes documentation certifying the suitability and qualifications of the coordinator as well as a written statement from the coordinator assuming the task); b) the outline of the recommended group coordination proceeding; c) the list of appointed insolvency practitioners for the group members concerned and the competent courts and other authorities having jurisdiction over the insolvency proceedings concerning the group members; and d) cost estimates of the group coordination broken down by the individual members of the group.[18]

[16] See Article 62 of the EU Insolvency Regulation.
[17] When interpreting this part of the regulation, it can be stated that if carrying out the proceedings in front of the most adequate forum is a requirement, by insolvency practitioners we refer to the insolvency practitioners appointed for both the main proceedings and the territorial proceedings.
[18] See Article 61(3) of the EU Insolvency Regulation.

4.1.2 Establishing group coordination proceedings

After receiving the request, the court having jurisdiction over opening the group coordination proceeding must examine the following in effect: a.) whether the group coordination proceeding is indeed an efficient treatment of the insolvency proceeding(s) concerning the individual members of the group, b.) whether one of the creditors of the group members involved in the proceedings is to become negatively affected in financial terms because of the involvement of the given group member in the proceeding, and c.) whether the nominated coordinator complies with the requirements set forth in the regulation.[19] If the request is in accordance with the conditions defined in Section (1) of the Article 63 of the EU Insolvency Regulation, the court must notify the insolvency practitioners appointed for the group members about the request to an open group coordination proceeding and the nominated coordinator.

Section (4) of the Article 63 of the new EU Insolvency Regulation declares, that (Member State) insolvency practitioners must be provided with the opportunity to present their opinion on the group coordination proceeding. Firstly, insolvency practitioners may raise objections against opting the main and/or territorial insolvency proceedings in the group coordination proceeding (right of opt-out and opt-in), secondly, they may object to the insolvency practitioner nominated for coordinator.[20] Lodging an objection may be carried out within 30 days of receiving the court notification on the form prescribed in the Article 88 of the Regulation. The court attaches different legal consequences for the different objections: while exercising the right of opting out excludes participation in the group coordination proceeding, objection against the person of the coordinator does not necessarily result in exclusion from the coordination mechanism, and is not an objection against the group coordination proceeding itself (Jaufer, 2017, p. 265). If the insolvency practitioner raises an objection against the inclusion of a given insolvency proceeding in the group coordination proceeding, the insolvency proceeding is not included in the group coordination proceeding, the scope of the group coordination proceeding (including the costs thereof) shall not be extended to the given insolvency proceeding. In my opinion, the regulation leaves the door open for the Member State law with regard to the decision on the right to opt out or opt in when it stipulates as some kind of framework rule that the insolvency practitioner must obtain all approvals of the inclusion or exclusion in the coordination prescribed by the Member State law.

If the insolvency practitioner lodges an objection against the person of the coordinator, and at the same time does not object against including the given insolvency proceeding in the group coordination proceeding, then, pursuant to the Article 67, the court may request the insolvency practitioner to submit a new request for the initiation of group coordination proceeding. An objection against the person of the coordinator – a "constructive objection" as referred to by Bonnemann (2016, p. 219) – does not exclude the opening of a group coordination proceeding for the group of companies concerned, but, based on the Article 67, the insolvency practitioner lodging the objection must practically initiate a new proceeding in harmony with Section 3 of the Article 61 of the new EU Insolvency Regulation.

Upon reviewing the regulation on objections, it can be safely stated that, whereas an objection to the person of any coordinator by an insolvency practitioner blocks the opening of a group coordination proceeding, objection against involving a certain

[19] According to the Article 71: "*1. The coordinator shall be a person eligible under the law of a Member State to act as an insolvency practitioner. 2. The coordinator shall not be one of the insolvency practitioners appointed to act in respect of any of the group members, and shall have no conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group members.*"
[20] See Article 64(1) EU Insolvency Regulation.

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insolvency proceeding in the group coordination proceeding has no suspending[21] or delaying effect[22] on the coordination process itself. One piece of criticism may be raised against the regulation saying that Section (2) of the Article 64 defines a due date for submitting objections, but it fails to govern, thus does not set time limits on the initiation of the new proceeding.[23]

4.1.3 Ordering the opening of a proceeding

If the deadline for filing objections elapses, and the request complies with the requirements outlined in Section (3) of the Article 61 of the new EU Insolvency Regulation, the court may pass a decision to open a group coordination proceeding. Section (1) of the Article 68 of the new EU Insolvency Regulation provides an itemised list of the content of the court decision opening the group coordination proceeding,[24] but it does not specify a normative deadline for reaching such a decision. The decision on an opening group coordination proceeding shall be sent to the coordinator and the insolvency practitioner participating in the coordination with opting in rights. The regulation does not govern the issue of legal remedy/remedies against the decision, so based on Reinhart's position (2016, p. 9) I believe that Member State regulations are governed with regard to legal remedies.

4.2 Conducting of the insolvency proceedings of members of a group of companies and the activities of the coordinator

In fact, group coordination proceedings are cooperational mechanisms based on continuous exchange of information between the coordinator and the insolvency practitioners of the Member States, and they are aimed at reorganising the insolvent group of companies, thus restoring the group's solvency, economic performance and financial stability. In my view, the new regulation on insolvency proceedings does not create unified insolvency proceedings applicable throughout the European Union and superior to the Member State proceedings by establishing the institution of group coordination proceedings,[25] but through inclusion in insolvency proceedings it facilitates solutions for the legal position of insolvent groups or groups on the verge of insolvency by mean of a framework of harmonised coordination mechanisms between the group of companies and the specific group members without infringing on the interests of the specific group members and the creditors.

The coordinators' activities constitute the centre of the group coordination proceedings and the coordination mechanisms. The Article 71 of the regulation defines the conditions prescribed for the coordination proceedings, whereas the Article 72 provides an itemised list of the coordinator's responsibilities and powers. In my opinion, the powers of the coordinator may be divided into three groups: 1. coordination of

[21] In my opinion, an objection against the coordinator excludes the opening of the coordination altogether if no request to initiate a new group coordination proceeding is submitted.
[22] Until a request for a new group coordination proceeding is filed.
[23] Pursuant to the Article 67 of the EU Insolvency Regulation the court may appoint the insolvency practitioner filing the request by way of exercising its right of discretion.
[24] The court with jurisdiction over ordering group coordination proceedings nominates the coordinator in its decision, decides on the course and cost estimates of the proceedings, as well as on the distribution of costs among the members concerned. See Article 68(1) of the EU Insolvency Regulation
[25] Paragraph (22) of the Preamble to the new EU Insolvency Regulation determines that, owing to the different material legislation of the Member States, no unified EU-wide insolvency proceedings with a universal scope can be established, which, in my view, can be reiterated after careful consideration of the system of rule pertaining to group coordination proceedings too.

Member State insolvency proceedings: identifying and outlining in broad terms the recommendations for a harmonised conduct of insolvency proceeding(s) through cooperation with insolvency practitioners,[26] 2. restructuring the solvency of the group of companies to which the development of a group coordination plan in the central,[27] and 3. participation in Member State insolvency proceedings in which the coordinator is entitled to take part, speak in any proceedings concerning the group or any of its members and request the suspension of such proceedings.[28]

Beyond the tasks defined in Article 72 of the EU Insolvency Regulation, coordinators have a central role in the subsequent inclusion of insolvency proceedings in group coordination proceedings. The regulation provides grounds for insolvent groups of companies to join in the cooperation mechanism following the ordering of the group coordination proceeding. The legal source defines two types of cases for subsequent inclusion: i) if the insolvency practitioner lodges an objection against the inclusion of the given insolvency proceeding in the group coordination proceeding in the initiating phase of a group coordination proceeding (i.e. in the case of opt-out), ii) if an insolvency proceeding concerning the group of companies was opened after the ordering of the group coordinating proceeding. The coordinator makes a decision on subsequent inclusion following consultations with the affected insolvency practitioners. One condition for subsequent inclusion is the unilateral support of all the insolvency practitioners.[29]

The activities of the coordinator are defined by the court, which they shall carry out during a defined term under judicial supervision and for a set fee. Having completed their tasks, the coordinators shall prepare a final statement of costs (Wessels, 2017, p. 730),[30] which shall be submitted to the court ordering the group coordination proceedings and sent to all the insolvency practitioners. If the coordinator becomes undeserving of carrying out the tasks (owing to conduct causing damage to creditors; non-performance of the tasks assigned in the court decision), the court may withdraw the nomination ex officio or at the request of an insolvency practitioner.

5. SUMMARY

From December 2012, a change of concept can be traced to the European Commission's insolvency proceedings, consultation and legislative initiatives in this field at the EU level: The Commission's interest has shifted from winding-up proceedings to preventive restructuring proceedings. Following a review of the EU legislation on groups of companies and individual group members, I believe that the new Insolvency Regulation, in line with the objectives set out in the Preamble to the source and the group coordination procedure (in particular the institution of the group coordination plan), can be considered as new evidence, which in a broad sense can be classified as a reorganization procedure, in a narrower sense it can be assessed as a cooperation mechanism that facilitates and supports reorganization proceedings.

Consequently, the group coordination proceedings are cooperational mechanisms based on continuous exchange of information between the coordinator and

[26] See Article 72(1,2b) of the EU Insolvency Regulation.
[27] The group coordination plan is a package of measures prepared by the coordinator with the aim of restoring the financial stability of the group members, to resolve the group members' insolvency, and settle and facilitate lawsuits or out-of-court settlements and foster agreements between the insolvency practitioners of the group members.
[28] See Article 72(2a,2e) of the EU Insolvency Regulation.
[29] See Article 69(2b) EU Insolvency Regulation.
[30] The regulation does not prescribe a specific form of the statement.

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the insolvency practitioners of the Member States, and they are aimed at reorganising the insolvent group of companies, thus restoring the group's solvency, economic performance and financial stability. In my view, the new regulation on insolvency proceedings does not create unified insolvency proceedings applicable throughout the European Union and superior to the Member State proceedings by establishing the institution of group coordination proceedings, but through inclusion in insolvency proceedings it facilitates solutions for the legal position of insolvent groups or groups on the verge of insolvency by mean of a framework of harmonised coordination mechanisms between the group of companies and the specific group members without infringing on the interests of the specific group members and the creditors.

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REPORTS

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INTERNATIONAL AND NATIONAL LEGAL ASPECTS OF DIRECT CITIZEN PARTICIPATION IN LOCAL SELF-GOVERNMENT (BRATISLAVA, 3 DECEMBER 2020) / Ľudovít Máčaj

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On the 3rd December 2020, Comenius University in Bratislava, Faculty of Law organized an international scientific conference entitled **"International and national legal aspects of direct citizen participation in local self-government"**. It was organized online via the MS Teams application. The conference represented the outcome of the research team concerning the project VEGA No. 1/0757/20 titled "Means of direct democracy in the conditions of smart cities and municipalities", awarded by the Scientific Grant Agency of the Ministry of Education, Science, Research and Sport of the Slovak Republic and the Slovak Academy of Sciences.

The aim of the conference was to identify shortcomings of the legal regulation of the means of direct democracy at the level of local self-government and the possibilities of their implementation electronically in Slovakia, as well as the advantages of foreign legal regulation. Its ambition was to join the voices drawing attention to the need for wider digitization of public administration with a special focus on the implementation of direct forms of local democracy in Slovakia.

The conference was held under the auspices of doc. JUDr. Lívia Trellová, PhD. from Comenius University in Bratislava, Faculty of Law. She opened the conference with a speech and also welcomed all guests. At the same time, she presented the tasks and goals of the project, not only about this calendar year but also other next years of the project duration.

A total of 20 participants registered for the conference, while 11 separate scientific submissions were presented during the meeting. The conference was attended by representatives of the academic community from Comenius University in Bratislava, Faculty of Law, and also guests from Slovakia and the Czech Republic, as well as representatives of legal practice and the third sector (their workplace is mentioned below).

The introductory lecture was given by doc. JUDr. Marek Domin, PhD., who outlined the constitutional basis of direct democracy at the municipal level and tried to answer whether the current legal regulation of local referendum in Slovakia contains a sufficient guarantee of the implementation of the constitutional principles. Then the word was given to prof. JUDr. Mária Srebalová, PhD., who presented a submission about good governance in local self-government communication, which was prepared with the doc. PhDr. JUDr. Tomáš Peráček, PhD. from Department of Information System of Faculty of Management, Comenius University in Bratislava. In their contribution, they pointed out the possibilities on the basis of which the means of direct democracy could be put into practice, using several means of practical research to obtain information. In the third presentation, Ing. Paul Pirovits, as a representative of the third sector (civic associations "Priama demokracia" and "Robme to správne") focused on the project of civil councils. He pointed to this project, in which the direct participation of citizens in the administration of public affairs is applied in a special way. He also addressed a call for the implementation of this project. The fourth contribution was presented by Mgr. Mária Bezáková. She pointed out the importance of the principle of direct democracy as one of the pillars of a democratic and rule of law and its importance in legislation.

The second session of the conference focused on aspects of issues of spatial planning, administrative law as well as application practice. It was opened by Mgr. Ľudovít Máčaj, PhD., pointing out issues of the possibilities of direct participation of the population of the municipality in spatial planning, with the perspective of landscape planning as an institute of nature and landscape protection. JUDr. Štefan Haulík focused on certain issues of present tools of direct democracy on the level of municipalities. Even if these tools are guaranteed and protected by the highest level of the legal order, for instance by the Constitution of the Slovak Republic, they are not sufficiently used in legal practice. JUDr. Matúš Radosa analyzed the electronic performance of direct participation of the population in local self-government in the light of the current legal regulation of the European Union. The session continued with the submissions of two Czech guests. JUDr. Ing. Josef Staša, CSc. from Charles University in Prague presented several considerations on the participation of citizens in spatial planning at the municipal level while presenting some interesting reflections on the future possibilities of legislation in this area. JUDr. Monika Horáková, Ph.D. from Palacký University in Olomouc presented her ideas about local referendum on territorial changes of the municipality.

The final session was opened by Mgr. Lukáš Tomaš from Pavol Jozef Šafárik University in Košice, with the analysis of the decision-making practice of the Supreme Administrative Court of the Czech Republic in matters of construction of local referendum issues and possibilities of its evaluation in the conditions of Slovakia. Subsequently, Mgr. Ján Mazúr, PhD. presented his submission on the alternative tools for involving the population in local self-governance. He described the Slovak application Link for Mayor (OPS), as well as examples of similar deliberative applications that allow citizens to formulate their political preferences, making them instruments of direct democracy at the local level. Finally, doc. JUDr. Lívia Trellová, PhD. concluded the conference with her contribution and a summary of problematic issues in the field of direct democracy at the local level, which will be further explored and developed in the direction of proposing new legal solutions within the project.

The conference brought an exchange of views between legal theory, legal practice, and the third sector. We believe that it provided a certain basis for the further solution of the mentioned project, which can be very important at present when more and more activities are being moved to the online space. At the same time, it provides more opportunities for the use of the means of direct democracy, the application of which is suitable at the level of local self-government.

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IMPROVEMENT OF EFFECTIVENESS OF LEGAL REGULATION OF PUBLIC PROCUREMENT AND ITS APPLICATION WITHIN EU LAW CONTEXT (BRATISLAVA, 25 NOVEMBER AND 3 DECEMBER 2020) / Adam Máčaj, Daniel Zigo

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Comenius University in Bratislava held two scientific conferences in November and December 2020, dealing with contemporary topics in public procurement and its regulation on national and European level. Due to the ongoing restrictions related to the SARS-CoV-2 pandemic, both events were held online, nevertheless they attracted a plethora of participants of both academic and professional backgrounds. Both conferences were held as part of a research project APVV-17-0641 "Improvement of effectiveness of legal regulation of public procurement and its application within EU law context", but focused on a broad range of issues with cross-cutting implications,

including independence and accountability of decision-making authorities, effectiveness of sanctions, and alternatives thereto.

The first conference, "Independence, Accountability, and Protection of Public Interest in Market Regulation and Public Procurement", took place on Wednesday, 25 November 2020 at 1:00 p.m. The keynote speech was delivered by JUDr. Miroslav Hlivák, PhD., LLM, president of the Office for Public Procurement of Slovakia, followed by doc. JUDr. Ing. Ondrej Blažo, PhD., director of the Institute of European Law at Faculty of Law of the Comenius University in Bratislava. The main highlights of the conference opening were especially the reiterated need for maintaining independence of market regulatory authorities on a variety of grounds, such as the requirements stemming from EU law, the independence as indispensable feature to ensure functioning of responsible authorities, and the broader implications of independence of public bodies. On the other hand, implications pertaining to accountability and democratic control of the very same institutions were also considered to be essential in contemporary discourse.

Afterwards, JUDr. Zuzana Šabová, PhD. and Assoc. Prof. Ing. Daniela Zemanovičová, CSc. brought useful insight into the development and newest proposed changes in the Anti-monopoly Office of Slovakia, which are likely to impact also the political independence and impartiality from external pressures. Describing the historical changes to nominations and appointments into the leading positions of the Anti-monopoly Office, the speakers found that variety of factors are liable to undermine objective and subjective independence of regulatory bodies, including but not limited to political appointees being granted leading positions in the institutions, or confidentiality of candidates proposed for the position.

JUDr. Mária T. Patakyová, PhD. from Institute of European Law at Faculty of Law of the Comenius University in Bratislava devoted her presentation to assessment of ongoing transposition of Directive (EU) 2019/1 in Slovakia that similarly impacts especially institutional position of Anti-monopoly Office. The main features of the proposed changes deal with explicit formulation of independence and impartiality in the statutory provisions, or more precise delimitation of bodies entitled to submit proposals for appointment of president of the Anti-monopoly Office to the government. On the other hand, the appointment by the government remains deficient in transparency, and proposed changes in cooldown period of leading representatives of the Anti-monopoly Office are similarly unsatisfactory, especially as they seem to lack enforcement mechanism.

Ing. Boris Gregor, vice-president of the Anti-monopoly Office, noted in the discussion that within the office, an independent proposal of legislative amendments needed to deal with position, independence, and tasks of the Anti-monopoly Office, providing for a comprehensive transposition of Directive (EU) 2019/1 from the view of professionals working directly in the institution. Their own efforts were, however, halted by difficulties in accessibility and transparency of similar regulations in other EU Member States, hampering comparative analysis or an assessment of best practices. Similarly, president of the Office for Public Procurement concurred that he considers independence of control and regulatory authorities as one of essential features in a rule of law, and praised attempts of the European Commission to strengthen this independence. He pointed out that on the basis of this impetus, Office for Public Procurement was drafting its own proposed amendments to legislation for over a year, in an attempt to balance interests of contracting authorities, as well as tenderers, and broader consideration of public interest. In their proposal, this balance is maintained through an ambitious strengthening of institutional independence, by formulating strict requirements for

candidates for presidency, or institutional balance in appointments to the Council of the Office for Public Procurement, as an appellate body.

Assoc. Prof. JUDr. Katarína Kalesná, CSc. from Institute of European Law at Faculty of Law of the Comenius University in Bratislava dealt with professionalization of public procurement in her speech. She considered especially its modernization and centralization through education in a variety of topics pertinent to public procurement, such as fundamental principles of public procurement, intellectual property, or case-law related thereto. She also pointed out the close relationship between competition law and public procurement, suggesting that absence of the former in education of responsible stakeholders may prove to be detrimental to the latter.

Prof. JUDr. PhDr. Miroslav Slašťan, PhD. from Department of International Law and International Relations at Faculty of Law of the Comenius University in Bratislava focused on the issue of EU legislative instruments in the area of public procurement and their legal effects. He pointed out the problem that frequently, monitoring, decisions, and revision are undertaken by the same institutions within the Member States.

JUDr. Juraj Tkáč from Comenius University in Bratislava, Faculty of Law assessed similarly revision procedures in public procurement. He pointed out that in spite of the announced changes, no draft of actual statutory text to be the basis of the amendments has been presented thus far. This hinders public discussion about the proposals, as well as limits the experts from academia and practice to analyse the appropriateness or necessity, and benefits of the proposed changes. He cautioned that the proposed changes, including those dealing with tenders below threshold values, may eventually come into conflict with EU law, as it nevertheless covers such tenders cross-border, and limited discussion of the impact the changes may have is therefore not desirable.

The second online conference, "Administrative Sanctions and Alternative Approaches to Solutions of Public Procurement Rule Infringements", took place on 3 December 2020 and, following up on various issues from the previous conference, elaborated especially on ways of adopting preventive, support, and sanction mechanisms in public procurement, and how to mitigate the amount and scale of infringements in public procurement.

The conference was once again opened both by JUDr. Miroslav Hlivák, PhD., LLM, president of the Office for Public Procurement of Slovakia, and oc. JUDr. Ing. Ondrej Blažo, PhD., director of the Institute of European Law at Faculty of Law of the Comenius University in Bratislava. President Hlivák once again appreciably noted the topic of the conference focused on questions that are subject to review in the proposed legislative changes. He reiterated the necessity to change the public perception of the Office for Public Procurement's activities to emphasize other approaches of their activities than sanctions. Director Blažo focused on quantification of fines imposed for infringements of public procurement rules in his speech. The aim of his research was to establish the amount of fines imposed by the Office for Public Procurement to various types of contracting authorities in Slovakia, and disaggregate the amount and height of fines on the basis of underlying infringement. The results established that most common infringement in public procurement is omission to act in accordance with procedure under the Public Procurement Act, and similarly this infringement is most severely punished, by fines comparatively higher to other infringements. The second most common infringement was violation of basic principles of public procurement, and most often, the responsible contracting authorities were either central government bodies, or regional self-administering entities. The research then focused on inquiring whether contracting authorities considered the sanctions and took steps to prevent similar infringements in the future, e.g. by claiming damages from persons responsible, or

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adopting compliance measure *pro futuro*. Overall, out of 241 cases, only 146 contracting authorities adopted similar measures, posing therefore the question whether these, in conjunction with alternative sanctions, should not be considered more viable in relation to height of the fines by themselves.

The ensuing discussion dealt with a broad range of related issues, including the possibility to mitigate the fine imposed by 50%, which has been proven to bring preventive effects on contracting authorities, and proposals on part of the Office for Public Procurement consider expansion of situations where such mitigation of fines could be considered. The issue that arose in the course of comments by participants was also whether strict stipulation of lowest and highest applicable fine is the appropriate limitation, and whether proportion of the actual value of the tender should not be considered. In the view of the Office for Public Procurement, the current legislation is easier in application, although as doc. JUDr. Matej Horvat, PhD. pointed out, courts in Czechia already require these fines to avoid being destructive for the companies concerned. He also questioned what alternative approaches to pecuniary sanctions could be considered if public procurement itself concerns predominantly funding and public finances.

JUDr. Hynek Brom from Charles University in Prague dealt with purpose of the fines and alternative concepts of sanctioning infringements in public procurement, e. g. through changes especially in procedural rules, where more initiative would be required from the parties, as compared to current burden of investigation being placed upon Office for Public Procurement. This way, the sanction in form of the fine would be supplemented also by official finding as to the entitlements of respective parties and lawfulness of their claims.

Assoc. Prof. JUDr. Peter Lukáčka, PhD. from Department of Commercial Law and Economic Law at Faculty of Law of the Comenius University in Bratislava, with JUDr. Peter Kubolek from Office for Public Procurement, delivered their speech, dealing with prospective future introduction of prior assessment of contractual terms in public procurement, with the purpose of broadening the scope of monitoring from Office for Public Procurement prior to conclusion of a contract, to include assessment of compatibility of contractual terms not only with rules of public procurement, but also other mandatory norms, infringement of which can restrict competition, irresponsibly allocate public funding, or even annulment of tender. Alternative to sanctioning such infringement in form of prior assessment would therefore bring effective way to monitor infringements before they occur.

The final presentation was held by Mgr. Daniel Zigo from Department of Commercial Law and Economic Law at Faculty of Law of the Comenius University in Bratislava, and dealt with civil liability of public officers for damages caused when managing public funds. Assessing the historical attempts to enshrine such liability in Slovakia, and current legislative proposals, the author found that even in absence of any legislative amendments, which are likely to be controversial and intensively debated, the law offers a variety of measures to invoke civil liability of public officials even nowadays. The real issue is very rare commencement of the applicable proceedings. On the other hand, the ongoing proposals provide for conferring competence on specific state bodies to enforce the civil liability against public officials, and enshrine obligation of public officials to act with due diligence explicitly in the legislative text. Nevertheless, it remains questionable whether these novelties in fact increase the likelihood of public officials being called to account for their failures in securing appropriate utilization of public finances.

The conferences brought new life into ongoing debates concerning public procurement and efficient administration of public finances, issues that are of ever-increasing importance across the EU. Further development in this area is therefore certainly expected, providing yet other incentives for extensive academic research, and cooperation of academia with professionals and state authorities in the future.

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