STUDIA IURIDICA

105, 2024

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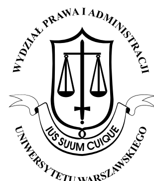
105, 2024



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The online version of the journal is its original version.

Studia Iuridica has been included in the list of journals scored by the Polish Ministry of Science and Higher Education for the purposes of parametric evaluation of scientific institutions.

Studia Iuridica has been granted financial suport from the Ministry of Education and Science within the “Development of Scientific Journals” programme (agreement no RCN/SP/0344/2021/1 dated 10 January 2023).

ISSN 0137-4346 (print)
ISSN 2544-3135 (online PDF)

Wydawnictwa Uniwersytetu Warszawskiego
02-678 Warszawa, ul. Smyczkowa 5/7
www.wuw.pl; e-mail: wuw@uw.edu.pl
WUW Sales Department: tel. (48 22) 55 31 333; e-mail:dz.handlowy@uw.edu.pl
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Typesetting
Barbara Obrębska

Printed by: POZKAL

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Studia Iuridica 105
ISSN 0137-4346; e-ISSN 2544-3135
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https://creativecommons.org/licenses/by/4.0/
https://doi.org/10.31338/2544-3135.si.2025-105.1

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WAR, SANCTIONS AND EXEMPTION FROM LIABILITY UNDER CONTRACTS FALLING WITHIN THE SCOPE OF THE CISG

Abstract

This article analyses the circumstances in which war or sanctions preventing the fulfilment of a contract covered by the CISG entitle the parties to exemption from liability for a contractual breach. It addresses how contractual provisions relate to Article 79 of the CISG. It also focuses on the interpretation of contractual provisions exempting parties from liability for breach of contracts covered by the CISG. It reveals the conditions under which war and sanctions may constitute the grounds for exemption from liability under Article 79 of the CISG in cases in which a buyer or seller has relied on performance by a third party. Finally, the paper addresses the issue of a notification of impediment by the party in breach.

KEYWORDS

CISG, force majeure, hardship, war, sanctions, notification of force majeure

SŁOWA KLUCZOWE

CISG, siła wyższa, trudności, wojna, sankcje, powiadomienie o sile wyższej

1. INTRODUCTION

Ukraine and Poland are parties to the UN Convention on Contracts for International Sales of Goods (the CISG).[1] Accordingly, the CISG can be applied to a contract for the international sale of goods if the seats of business of the contracting parties are located in Poland and Ukraine (Article 1 (1) (a) CISG), respectively, or if the law of Poland or Ukraine is applied to the contract (Article 1 (1) (b) CISG). The consequences of impossibility or hardship in the performance of such a contract due to war or sanctions may be governed by the CISG, in particular by Article 79, which will be applied to the extent that the parties have not excluded the application of the CISG, or derogated from, or modified its provisions, as provided by Article 6 of the CISG.

Application of the CISG may be expressly or impliedly excluded. An implied exclusion must be clearly traced to an intention of the parties to exclude the application of the CISG[2] (e.g., when the parties have chosen the substantive law of a non-contracting State to apply to the contract).[3] In contrast, the choice of the substantive law of a CISG contracting State indicates the willingness of the parties to have the CISG apply, as the CISG forms part of the law of the relevant State.[4] But a choice of the 'internal law' of a contracting State also indicates the parties' wish to exclude the application of the CISG.[5] That is, Article 79 of the CISG will apply in full if the contract does not contain provisions governing the exemption of a party from liability in breach of contract, or if the parties have not explicitly or implicitly excluded the application of the CISG, either in general or of Article 79 in particular.

A derogation from the provisions of the CISG occurs when the parties replace them with contractual provisions,[6] including by supplementing the provisions of the CISG with contractual provisions or by refusing to apply certain of its provisions.[7]

Many international sales contracts contain clauses that create an exemption from liability for their breach. Therefore, this paper initially discusses how contractual provisions of this kind relate to Article 79 of the CISG. Since the answer depends on how the relevant contractual provisions are interpreted, this paper

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[1] Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), <https://uncitral.un.org/> accessed 17 November 2024.

[2] SC Manner, M Schmitt, 'Article 6', in Christoph Brunner, Benjamin Gottlieb *(eds), Commentary on the UN Sales Law (CISG),* Alphen aan den Rijn 2019, 78.

[3] CISG-AC Opinion No 16, Exclusion of the CISG under Article 6, Lisa Spagnolo (Rapourter) 2014, <https://cisgac.com> accessed 17 November 2024.

[4] Manner, Schmitt (n 2) 79.

[5] Beate Gsell and others, 'CISG Art. 6, Rn. 12' in W Ball (Her.) *BeckOGK/Wagner*, 1 February 2023.

[6] Manner, Schmitt (n 2) 80.

[7] ibid, 81.

also focuses on the interpretation of contractual provisions purporting to create an exemption from liability for breach of contract when the contract is otherwise covered by CISG. The paper then discusses the conditions under which war and sanctions are grounds for application of Article 79 of the CISG. Finally, this article addresses the issue of notification of impediment by the party in breach.

2. INTERACTION BETWEEN CONTRACTUAL PROVISIONS DEALING WITH WAR AND SANCTIONS AND ARTICLE 79 OF THE CISG

Courts will rarely allow an exemption from liability based on Article 79 of the CISG.[8] Article 79 is, therefore, perceived as encouraging the parties to settle, in their contract, the consequences of the impossibility to perform their obligations and, thus, international sale contracts usually include force majeure or hardship clauses. Some may contain special war[9] or sanctions clauses.[10] They may, for example, list circumstances that will give rise to exemption from liability for the party in breach or that will initiate other mechanisms (e.g., renegotiation of the contract or its cancellation); or, they may define the circumstances that excuse a party's non-performance differently than Article 79 of the CISG does.

Therefore, it is important to determine how Article 79 of the CISG relates to such clauses. The UNCITRAL Digest of Case Law highlights two approaches to this issue. According to the first approach, the existence of a force majeure clause in a contract does not preclude the application of Article 79, i.e., the clause and Article 79 will apply simultaneously.[11] Under the second approach, the existence of a force majeure clause excludes the application of Article 79.[12]

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[8] Nevena Jevremovic, 'Article 79 CISG: Testing the Effectiveness of the CISG in International Trade Through the Lens of the COVID-19 Outbreak', in Poomintr Sooksripaisarnkit, Dharmita Prasad (eds), *Blurry Boundaries of Public and Private International Law: Towards Convergence or Divergent Still?* Singapore 2022, 140. Christoph Brunner, Christoph Hurni, 'Article 8', in Christoph Brunner, Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG),* Alphen aan den Rijn 2019, 95.

[9] War clauses are defined as a type of force majeure clause, but they more clearly define military risks, may set a lower threshold for causation, and may not require the party in breach to notify the other party of the outbreak of war. See Markus Burianski, Christian M Theissen, Eden Jardine, *War Clauses: Friend (not Foe) of Force Majeure*, 26 August 2019, White&Case, <https://whitecase.com> accessed 17 November 2024.

[10] For examples of sanctions clauses, see, e.g., *Consolidated ICC Guidance on the Use of Sanctions in Trade Finance- Related Instruments Subject to ICC Rules*, ICC, 2022, icc-document-use-of-sanctions-2022.pdf <https://iccwbo.org>accessed 17 November 2024.

[11] *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, New York, 2016, 379.

[12] ibid.

Contractual provisions stipulating the consequences of non-performance as a result of certain circumstances (e.g., war or sanctions) may completely or partially exclude the application of Article 79 of the CISG. A complete exclusion takes place when the relevant contractual provisions cover all the issues envisaged by Article 79. A partial exclusion occurs when the parties have included exemption clauses in their contract, but they do not cover all the issues Article 79 provides for. Therefore, it is necessary to interpret the relevant contractual provisions before determining the extent to which Article 79 of the CISG is applicable.

3. INTERPRETATION OF CONTRACTUAL PROVISIONS REFERRING TO WAR AND SANCTIONS

Contracts falling within the scope of the CISG are to be interpreted in accordance with Article 8 of the CISG, which sets out several rules of contract interpretation. Firstly, the contract must be interpreted in accordance with the intent of the party to whom the relevant statement is imputed or who is performing a certain action if the other party 'knew or could not have been unaware what that intent was' (Article 8 (1) CISG). However, this rule is rarely applied, because it can be difficult to prove the intent of a party, let alone that the other party knew or could not have been unaware of it.[13] Therefore, contracts are most often interpreted in accordance with the rule contained in Article 8(2) of the CISG,[14] i.e., 'according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances'. This provision is construed as indicating that the reasonable person is acting in good faith.[15]

Both the subjective standard of interpretation prescribed by Article 8(1) and the objective standard prescribed by Article 8(2) involve determinations by the means set forth in Article 8(3) of the CISG, which is interpreted as providing a non-exhaustive list of circumstances that may be taken into account in interpreting the contract.[16] These include practices and usages that the parties have authorized to be applied to their relations.[17] At the same time, the wording of Article 9(2)

[13] Donald J Smythe, 'Reasonable Standards for Contract Interpretation Under the CISG', Cardozo Journal of International and Comparative Law 2016, No 1, 14.

[14] ibid.

[15] Ewa Rott-Pietrzyk, *Interpretacja umów w prawie modelowym i wspólnym europejskim prawie sprzedaży (CESL)*, Warsaw 2013, 116.

[16] Christoph Brunner, Christoph Hurni, 'Article 8', in Christoph Brunner, Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG),* Alphen aan den Rijn 2019, 95; Ewa Rott-Pietrzyk (n 15) 122.

[17] See Art. 8 (3) of the CISG.

of the CISG gives rise to the conclusion that the parties to a contract may agree to apply usages both explicitly and implicitly.[18]

It is recognized that documents published by the ICC may be used to interpret a contract even if the parties have not agreed to do so.[19] Thus, it can be assumed that a force majeure clause that the parties have included in an international sale of goods contract may be interpreted by applying the ICC force majeure clause,[20] which covers '(i) war (whether declared or not), hostilities, invasion, act of foreign enemies, [and] extensive military mobilisation'.[21] Mention of war, both declared and undeclared, is very important, since the case law evidences different approaches to whether an undeclared war can be considered a war. For example, even before the full-scale invasion of the territory of Ukraine, Ukrainian courts had noted that armed invasion by Russian troops was a well-known fact.[22] 'War' and similar expressions (e.g., 'war-like operations', 'insurrection', 'rebellion', 'civil war') have been a subject of interpretation by the courts of other States. In such cases, although the courts did not directly state that the respective conflict was a well-known fact, they interpreted the term 'war' from the perspective of common sense.[23] In cases heard after the attack on Pearl Harbor, American courts used two approaches to the understanding of 'war' as a factor affecting the performance of contractual obligations. The first approach was that war exists if it is declared by the authorized bodies of a particular State.[24] The other was that war exists when, in fact, it is ongoing.[25]

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[18] See Art. 9 (2) of the CISG.

[19] Brunner, Hurni (n 16) 98.

[20] ICC Force Majeure Clause, 2020, icc-forcemajeure-hardship-clauses-march2020.pdf <https://iccwbo.org> accessed 17 November 2024.

[21] ibid.

[22] *Rishennia Pivnichnoho Apeliatsiinoho Hospodarskoho Sudu vid 25.03.2019*, Sprava 911/1897/18 [Judgment of the Northern Commercial Court of Appeal of 25 March 2019, Case 911/1897/18], <https: //reyestr.court.gov.ua> accessed 17 November 2024.

[23] See *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Company, Limited*, 2 K.B. 544, Court of Appeal, 1939, <lawofwar.org/kkk_ofkob_case.htm> accessed 17 November 2024.

[24] See, e.g., *Savage v Sun Life Assurance Co.*, United States District Court, W.D. Louisiana, MoNooe Division, 1944, <https://casetext.com/case/ savage-v-sun-life-assur-co> accessed 17 November 2024, *Pang v Sun Life Assurance Co.*, Supreme Court of Hawaii, 1945, <https://casetext.com/case/pang-v-sun-life-assurance-co> accessed 17 November 2024; *Rosenau v Idaho Mutual Benefit Association*, Supreme Court of Idaho, 1944, https://casetext.com/case/ rosenau-v-ida-mut-benefit-assn accessed 17 November 2024, *West v Palmetto State Life Insurance Co.6*, Supreme Court of South Carolina, 1943, <https://casetext.com/case/west-v-palmetto-state-l-co> accessed 17 November 2024.

[25] *New York Life Insurance Co. v Bennio*, Circuit Court of Appeals, Tenth Circuit, 1946, <https://casetext.com/case/ new-york-life-ins-co-v-bennion> accessed 17 November 2024; *Stankus v New York Life Ins. Co.*, Supreme Judicial Court of Massachusetts. Worcester, 1942, <https://casetext.com/case/ stankus-v-new-york-life-ins-co> accessed 17 November 2024.

When determining the moment when a war broke out for the purposes of a force majeure clause, it is necessary to determine what exactly may affect the contractual obligations and proceed from this point: has there been a formal declaration of war, or conduct of hostilities without such a declaration? Certainly much depends on how the force majeure clause is formulated. If the clause uses the term ‘war’, it should be understood that the moment of outbreak of war can be interpreted in different ways.

When included in contractual provisions, the term ‘sanctions’ can also be interpreted by considering usages widely known in international trade, in particular, as unified by the ICC, which understands sanctions to be ‘measures that restrict customary trade and financial relations with a country, entity or individual’.[26] Sanctions include ‘import and export bans, freezing of funds and assets and restrictions on admissions (travel bans)’.[27] Since sanctions may be imposed by international organizations (e.g., the UN) or by certain countries or blocs of countries (e.g., the EU), the concept of sanctions, where the force majeure clause refers to them, will be interpreted based on the legal provisions that imposed the relevant restrictions.

4. WAR AND SANCTIONS AS A GROUND FOR THE APPLICATION OF ARTICLE 79 OF THE CISG

4.1. WAR AND SANCTIONS AS AN ‘IMPEDIMENT’ FOR THE PARTIES TO A CONTRACT

If a contract falling within the scope of the CISG does not contain a force majeure, war, sanctions or hardship clause, it will be necessary to analyse whether the relevant situation meets the requirements of Article 79 of the CISG, which has been called ‘a not overly generous exception clause’[28] and which exempts contracting parties from liability for non-performance of the contract if the non-performance was caused by an impediment beyond the control of the breaching party. Traditionally, such impediments include ‘warfare …, terrorist attacks and sabotage, acts of state (orders, laws, decrees, etc.) ... explosions, fire, destruction of machinery, [and] a long general interruption or collapse of energy supply.’[29]

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[26] Sanctions: Basic Guide for SMEs, ICC, 2022, <https://iccwbo.org/ content/uploads/sites/3/2022/10/icc-guide-on-sanctions-for-smes-october-2022.pdf> accessed 17 November 2024.

[27] ibid.

[28] Michael G Bridge, ‘Force Majeure and International Supply Contracts’, Transnational Commercial Law Review 2020, No 1, 77.

[29] Christoph Brunner, ‘Article 79’, in Christoph Brunner, Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG),* Alphen aan den Rijn 2019, 570.

Acts of the State include sanctions, embargoes, as well as export and import bans.[30] The impediment must also have been unforeseeable to the party in breach at the time it entered into the contract, and it must have been unavoidable.[31] The standard of a reasonable person acting in similar circumstances is used to assess whether an event was foreseeable and avoidable.[32] An impediment is foreseeable if the debtor knew about it at the time he entered into the contract or could reasonably have been expected to know about it based on all the circumstances.[33] That is why a war that took place after the conclusion of a contract is considered to be an unforeseeable impediment, while a war that took place before the conclusion of a contract is a foreseeable impediment.[34] However, whether war as an impediment was foreseeable should be decided on a case-by-case basis, considering all the circumstances. Since a war can affect the whole country or be confined to regions, a war can also be considered a foreseeable impediment in some but not in other parts of the same country.

Predictably, it will be difficult to claim exemption from liability under Article 79 of the CISG due to sanctions imposed on the seller or buyer, precisely because the impediment giving rise to the exemption from liability must be 'unforeseeable'. And case law confirms this thesis. Thus, in *Greek Powder and Cartridge Company S. A. v The Ministry of Defence*, the arbitral tribunal refused to recognize the embargo that the UN imposed on Iraq due to its invasion of Kuwait, because the embargo was not unforeseeable: 'following the invasion of Kuwait by Iraq forces, it was repeatedly stated by the UN competent authorities that Iraq was at fault in the invasion of Kuwait and consequently was responsible for the imposition of the UN embargo, as well as for its maintenance through its defiance of the UN resolutions'.[35]

In addition, the impediment must be such that a party in breach 'could not reasonably be expected to ... have avoided or overcome it, or its consequences' (Article 79 (1) CISG). Examples of actions a party could take to avoid the consequences of an impediment include choosing a different route for the transporta-

[30] ibid, 572.

[31] Andre Janssen, Christian J Wahnschaffe, 'Der internationale Warenkauf in Zeiten der Pandemie', Europäische Zeitschrift für Wirtschaftsrecht 2020, 413.

[32] Brunner (n 29) 585.

[33] ibid; Ş Esra Kiraz, Esra Yıldız Üstün, 'COVID-19 and force majeure clauses: an examination of arbitral tribunal's awards', Uniform Law Review /Revue de droit uniforme 2020, No 25, 457.

[34] Christophe Guibert de Bruet, *Armed Conflict and Force Majeure*, Lalive. Lexology,<https://www.lexology.com/library> accessed 17 November 2024; Olaf Hofmann, *Der Ukraine-Krieg und seine Rechtsfolgen für Bauverträge*, THIS, No 9, <https://www.this-magazin.de/> accessed 17 November 2024.

[35] *Greek Powder and Cartridge Company S. A. v The Ministry of Defence*, ICC Case No 7094/CK/AER/ACS, 2003, <https://jusmundi.com> accessed 17 November 2024.

tion of goods; incurring additional (but not too burdensome) costs; and replacing generic items that are the subject of the sales contract with other items.[36]

It is important to note that the party in breach is burdened with an obligation to overcome the impediment or its consequences. Although this may seem obvious, the case law shows a need to emphasize this point further. For example, in *Hilaturas Miel, S.L. v Republic of Iraq* , the seller, Hilaturas Miel, S.L., was unable to make a shipment due to the outbreak of hostilities in Iraq and the following withdrawal from the transaction of Cotecna, a company that was supposed to inspect the goods for acceptance and payment. The seller argued that '[e]ven in the case of force majeure, Iraq had the obligation to cure any resulting breach at the earliest opportunity it had to do so'.[37] The court rejected this argument because it 'would turn the doctrine of impossibility on its head, since it was Hilaturas, and not Iraq, that was unable to perform its obligations under the Contract due to the advent of war and the withdrawal of the Cotecna inspector'.

Not only can war and sanctions make it impossible to perform contractual obligations, but they can also lead to economic hardship, i.e., to situations in which performance of a contract remains possible in principle, but has become too burdensome for the obligor (for example, due to a significant increase in the price of energy or of components required for the manufacture of goods to be furnished under an international sales contract). The question of whether this type of hardship falls within the scope of Article 79 of the CISG was debated during the drafting of the CISG,[38] and it is believed that the drafters intended to cover only cases of force majeure.[39]

Nevertheless, after the adoption of the CISG, it was argued that only in exceptional cases should economic hardship exempt an obligor from liability under Article 79.[40] Debate on this issue did not stop even after the adoption of CISG Advisory Council opinions 7 and 20, which clearly indicate that hardship is covered under the scope of Article 79 of the CISG.[41] Some authors insist that Article 79 should not cover hardship.[42] Others fully support opinions No 7 and No 20,

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[36] Brunner (n 29) 586.

[37] *Hilaturas Miel, S.L. v Republic of Iraq,* U.S. District Court, New York (Southern District), 2008, <https://www.unilex.info/cisg/case/1465> accessed 17 November 2024.

[38] John Honnold , *Documentary History of the Uniform Law for International Sales*, Deventer, 1989, 185, 252.

[39] Larry A Di Matteo, *Legal Tradition Bias in Interpreting the CISG: Hardship as Case at Point* in Francesca Benatti, Sergio Garcia Long, Filippo Viglione (eds) *The Transnational Sales Contract*, Milano 2022, 139.

[40] Peter Schlechtriem, Petra Butler, *The UN Convention on the International Sale of Goods*, Berlin, Heidelberg 2009, 204.

[41] CISG-AC Opinion No 7, Exemption of Liability for Damages Under Article 79 of the CISG, Alejandro M Garro (Rapourter) 2007, <http://www.cisgac.com/> accessed 21 January 2023. 'The CISG governs cases of hardship' CISG-AC Opinion No 20, Hardship under the CISG, E Muñoz (Rapourter) 2020, para 2, <http://www.cisgac.com/> accessed 17 November 2024.

[42] Larry A Di Matteo (n 39) 135–160.

noting that both force majeure and hardship may be grounds for exemption from liability.[43] The latter point of view deserves support because the text of the CISG does not contain a list of impediments, but only gives their characteristics. So, if the hardship meets the characteristics of an impediment as set out in Article 79 (1) of the CISG, a party may be exempted from liability under this article.

To be released from liability under Article 79 of the CISG, defendants must prove a causal link between non-performance and the impediment as characterized in Article 79.[44] Therefore, the impediment must restrict either the possibility of supply or the possibility of payment.[45] For example, a causal link exists if, as a result of warfare, the goods to be delivered under the contract were destroyed; if they were located in a territory to which there is no access; or, if sanctions prohibit the performance of contractual obligations.

4.2. WAR AND SANCTIONS AS AN IMPEDIMENT TO THIRD PARTIES

War or sanctions may cause non-performance by a third party engaged by the seller or buyer to perform all or part of the contract. In such cases, the question always arises whether Article 79(1) or Article 79(2) of the CISG should apply,[46] and the answer determines which party bears the burden of proving the circumstances enabling the exemption from liability under Article 79 (Article 79(1) clearly states that it falls to the party that failed to perform the obligation; Article 79(2) does not).[47] Exemption from liability on the basis of Article 79 is possible if the person involved in the performance of the contract is a third party within the meaning of Article 79(2) of the CISG, as well as if the failure by the third party can be classified as an 'impediment' to the party in breach according to Article 79 (1) of the CISG, and if a war or sanctions that prevented the third party from performing can also be classified as an 'impediment' with respect to the third party's ability to perform.

The main characteristics of third parties under Article 79(2) of the CISG are that they 'independently participate in the performance and … perform directly to the creditor'.[48] Such third parties may include, for example, carriers and sub-

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[43] Serio G Long, 'A Single Theory of Impediments Under the CISG: A Latin-American Perspective' in Francesca Benatti, Sergio G Long, Filippo Viglione (eds) *The Transnational Sales Contract*, Milano 2022, 267; Denis Philippe, 'Article 79 of the CISG, hardship, risk and renegotiation of the contract' in Helmut Grothe, Peter Mankowski (eds), *Europäisches und internationales Privatrecht: Festschrift für Christian von Bar zum 70. Geburtstag*, Munich 2022, 284.

[44] Brunner (n 29) 586.

[45] ibid, 572.

[46] (n 41) para 2.2. 'b'.

[47] ibid, para 15.

[48] Schlechtriem (n 40) 207.

contractors.[49] If the reason for the seller's failure is the failure of the seller's third-party supplier, the seller may be exempted from liability 'in certain extreme and exceptional cases',[50] which include, for example, situations in which the supplier is the only available source of supply, other sources are unavailable due to unforeseen and extraordinary events, or the defects in the available goods are not related to the typical risks of purchase assumed by the seller.[51]

5. NOTIFICATION OF AN IMPEDIMENT

Article 79(4) of the CISG obliges the party in breach to notify the other party of the impediment and its effect on the breaching party's ability to perform under the contract; it also provides that the other party must receive the notification. The rule in Article 79(4) is considered to be a derogation from the general rule established by Article 27 of the CISG.[52] If the aggrieved party does not receive the notification within a reasonable time after the impediment has or should have become known to the party in breach, the party in breach is liable for damages resulting from non-receipt of the notice, which may include, for example, those incurred by a buyer failing to meet obligations to its own customers.[53] At the same time, some commentators believe that the obligor will not have an obligation to compensate these damages if the aggrieved party knew about the impediment despite not being notified by the breaching party, as in this case there is no causal link between the obligor's failure to notify and harm to the aggrieved party.[54]

War and sanctions are impediments of which it will be difficult for the aggrieved party to prove he was unaware without notice from the party in breach. In this regard, it is worth mentioning that the existence of war may lead to a search for non-standard solutions to certify force majeure. For example, on 28 February 2022, the Chamber of Commerce and Industry of Ukraine (CCIU) posted on its website a scan of an open letter intended to substantiate force majeure circumstances (military aggression by the Russian Federation against Ukraine) 'from 24 February 2022 until their official ending'.[55]

[49] (n11) 378; Christoph Brunner (n 29) 569; Tugce Oral, 'Exemption from liability according to the art. 79 of the Convention on International Sale of Goods (CISG)', Juridical Tribune 2019, Vol 9, Iss 3, 652.

[50] CISG-AC Opinion No 7 (n 41) para 25.

[51] ibid.

[52] Schlechtriem, Butler (n 40) 208.

[53] Brunner (n 29) 587.

[54] Beate Gselland others, 'CISG Art. 79, Rn. 77' in W Ball (Her.) *BeckOGK/Wagner*, 1 October 2022.

[55] Letter of the Ukrainian Chamber of Commerce and Industry No 2024/02.0-7.1, <https://ucci.org.ua/> accessed 17 November 2024.

However, Ukrainian law provides no such method of certifying force majeure. Instead, such certificates are issued on an individual basis.[56] Moreover, force majeure is to be certified by the CCIU in some cases and by regional chambers in others.[57] There have been cases in which a certificate issued by a regional chamber was not credited as evidence of force majeure if the parties' contract provided that force majeure was to be confirmed by a CCIU-issued certificate.[58]

However, the day after Russia's full-scale invasion of Ukraine, the CCIU issued an order according to which regional chambers were given the right to certify force majeure circumstances even in cases when the issuance of such certificates falls within the competence of the CCIU. The regional chambers received these rights 'temporarily, for the period of martial law on the territory of Ukraine until its termination or cancellation'.[59] Taking into account the above case law, it may nonetheless be risky to rely on certification of force majeure by a regional chamber if the contract provided for certification by the CCIU.

Moreover, courts do not recognize the CCIU's open letter as proper proof of force majeure in contractual relations.[60] While the cases did not concern international sales contracts, they nonetheless allow us to predict Ukrainian courts' probable attitude toward use of this letter to substantiate an impediment in international sales cases in which the contract stipulates that a certificate of the CCIU may serve to substantiate the impediment. This approach by the courts cannot be supported, because it contradicts the principle of good faith for a party to deny

[56] Para 6.2. of Regulation on Certification by the Chamber of Commerce and Industry of Ukraine and by Regional Chambers of Commerce and Industry of force majeure circumstances (circumstances of unstoppable force), approved by the Decision of the Presidium of the Ukrainian Chamber of Commerce and Industry of 15 February 2014, No 40(3), <https://zakon.rada.gov.ua/rada/show/v0040571-14#Text> accessed 17 November 2024.

[57] See paras 4.1. and 4.2. of the Force Majeure Regulation.

[58] Postanova Verkhovnoho Sudu vid 26 travnia 2020 roku, Sprava No 918/289/19 [Supreme Court ruling of 26 May 2020, Case No 918/289/19], <https://reyestr.court.gov.ua≥accessed 17 November 2024.

[59] Order of the President of the Ukrainian Chamber of Commerce and Industry of 25 February 2022 No 3, <https:// ucci.org.ua/uploads/files/62989f8bb62c2687708951.pdf> accessed 17 November 2024. Martial law was imposed in Ukraine by presidential decree, initially for 30 days, and was then extended. Decree of the President of Ukraine 'On the Introduction of Martial Law in Ukraine' of 24 February 24, 2022 No 64 with amendments, <https://zakon.rada.gov.ua/laws/show/64/2022#Text> accessed 17 November 2024.

[60] Rishennia hospodarskoho sudu mista Kyieva vid 03 lystopada 2022 roku, Sprava No 910/4879/22 [Judgment of the Commercial Court of Kyiv as of 3 November 2022 Case No 910/4879/22], <https://reyestr.court.gov.ua> accessed 17 November 2024; Postanova skhidnoho apeliatsiinoho hospodarskoho sudu vid 02 lystopada 2022 roku Sprava No 917/353/22 [Resolution of the Eastern Commercial Court of Appeal as of 02 November 2022 Case No 917/353/22], <https://reyestr.court.gov.ua> accessed 17 November 2024; Rishennia hospodarskoho sudu Kirovohradskoi oblasti vid 29 chervnia 2022 roku, Sprava No 912/507/22 [Judgment of the Commercial Court of Kirovograd Region of June 29, 2022, Case No 912/507/22], <https://reyestr.court.gov.ua> accessed 17 November 2024.

knowledge of the war, a well-known fact, merely because they have not received notification of it from another party.

6. CONCLUSIONS

1. Force majeure, hardship, war, and sanctions clauses contained in contracts within the scope of the CISG may exclude the application of Article 79 of the CISG in whole or in part.

2. The use of the ICC force majeure clause to interpret a contract within the scope of the CISG (enabled by Articles 8 and 9 of the CISG) allows for a maximally broad interpretation of the term 'war', to include, among other things, an undeclared war.

3. A war that started after the conclusion of an international sale of goods contract is more likely to be recognized as 'unforeseeable' than the one that started before the conclusion of such a contract.

4. That it should be unforeseeable for sanctions to be imposed against the State that started the war or against persons supporting the outbreak of war after the war began seems doubtful, regardless of when the contract was concluded.

5. Economic hardship can be classified as an impediment under Article 79 of the CISG if it meets the characteristics stated therein.

6. If the war or sanctions prevented a person engaged by a seller or a buyer from fulfilling their duties, the seller or buyer may be released from liability under Article 79(2) of the CISG if: 1) the engaged person meets the criteria of a 'third party' within the meaning of Article 79 (2); 2) a third party's non-performance qualifies as an 'impediment' under Article 79(1) in regard to such a seller's or buyer's failure to perform under the contract; 3) war or sanctions may be qualified as an 'impediment' to the performance of obligations by such a third party under Article 79 (1).

7. War or sanctions are impediments that cannot be unknown to the buyer or the aggrieved party. Therefore, arguments to the effect that the buyer/obligee was unaware of the war or sanctions because it did not receive such a notification are unlikely to succeed.

8. It is advisable to send notification of impediment in accordance with Article 79 of the CISG (as long as the contract does not provide for another method of notification). However, if the impediment is war or sanctions, refusal to recognize the possibility of exemption from liability for breach of contract because the contract specified a notice procedure that the obligor did not observe is contrary to the principle of good faith.

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Studia Iuridica 105
ISSN 0137-4346; e-ISSN 2544-3135
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https://creativecommons.org/licenses/by/4.0/
https://doi.org/10.31338/2544-3135.si.2025-105.2

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RECENT CHANGES REGARDING THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS IN UKRAINE

Abstract

The article concerns recent changes regarding the law applicable to maintenance obligations in Ukraine. The author analyzes the impact of the ratification of the 2007 Hague Protocol on the amendment of the Ukrainian Law on Private International Law of 2005. The accession to the 2007 Hague Protocol by Ukraine opens a new chapter in the scope of law applicable to maintenance in Ukraine.

The law applicable to the maintenance obligation from parents in favour of children will no longer be determined by the connecting factor of citizenship but by the habitual residence. The habitual residence is the most appropriate connecting factor to determine the form and the amount of maintenance in a given situation. Determining the law applicable to the maintenance for children will be based on the correcting technique, designed to ensure that the creditor has the possibility of obtaining maintenance. In such a way the child's interest is protected against the applicable law which does not guarantee such child the maintenance.

Ukraine has joined the group of countries whose aim is to harmonize the governing laws applicable to the maintenance on a global scale because the 2007 Hague Protocol is the international agreement developed by the Hague Conference on Private International Law (HCCH).

KEYWORDS

Hague Protocol of 2007 on the law applicable to maintenance obligations, Ukrainian Private International Law, reforms of the domestic conflict of laws

SŁOWA KLUCZOWE

Protokół haski z 2007 r. o prawie właściwym dla zobowiązań alimentacyjnych, ukraińskie prawo prywatne międzynarodowe, reformy krajowego prawa kolizyjnego

1. INTRODUCTION

The common thing in relations between Poland and Ukraine is that the maintenance obligations with the so-called 'foreign element'[1] are governed by the national legislation and international agreements, in Poland they are additionally governed by the EU regulations. For the time being, Ukraine is an official candidate for accession to the European Union, therefore, the EU regulations are not directly applicable in its territory. However, the recent changes due to the ratification of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations[2] (hereinafter, the 2007 Hague Protocol) and an amendment of the Ukraine Act on private international law,[3] indicate the alignment of the Ukrainian legislations in the area to the EU regulations. Furthermore, Ukraine has joined the group of countries whose aim is to harmonise the governing laws applicable to the maintenance on the global scale because the Hague Protocol is the international agreement developed by the Hague Conference on Private International Law. The HCCH is the intergovernmental organisation the mandate of which is 'the progressive unification of the rules of private international law'.[4]

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[1] On the multiplicity and diversity of sources of law in the discussed scope, cf Andrzej Mączyński, 'Wielość źródeł prawa prywatnego międzynarodowego i spowodowane nią kolizje norm kolizyjnych (na przykładzie norm dotyczących zobowiązań alimentacyjnych)', in *Rozprawy z prawa prywatnego: księga pamiątkowa dedykowana Profesorowi Aleksandrowi Oleszce,* Anna Dańko-Roesler and others (eds), 650–671.

[2] OJ L 331, 16 December 2009, 17–18.

[3] ЗАКОН УКРАЇНИ Про внесення змін до Закону України «Про міжнародне приватне право» у зв'язку з ратифікацією Протоколу про право, що застосовується до зобов'язань про утримання, Документ 2802-IX, Про внесення змін до Закону ... | від 01.12.2022 No 2802-IX (<https://rada.gov.ua>), accessed 30 November 2024.

[4] HCCH | About HCCH, Art. 1 of the Statute of HCCH.

In Ukraine, the conflict-of-laws rules are governed by the Act of 23 June 2005 on Private International Law[5] (hereinafter: UA PIL). The UA PIL also contains regulations concerning the international civil procedure[6] and autonomously regulates the governing law applicable to maintenance in Section IX regarding family matters. This Section was significantly amended in December 2022 following the entry into force of the 2007 Hague Protocol in Ukraine.

The conflict-of-laws rules in the Ukraine are also regulated by international bilateral agreements, e.g., the Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal cases, signed in Kiev on 24 May 1993[7] and entered into force on 14 August 1994 in the international arena (hereinafter: the 1993 Polish-Ukraine agreement).[8] The 2007 Hague Protocol is a multilateral agreement, which in Ukraine entered into force on 1 December 2022.[9]

In Poland, the 2007 Hague Protocol has applied since 11 June 2011, when the 4/2009 Regulation[10] entered into force based on the Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.[11] The 4/2009 Regulation does not contain provisions on the governing law applicable to the maintenance and Article 15 hereof refers specifically to the 2007 Hague Protocol ('The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations in the Member States bound by that instrument.'[12]).[13]

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[5] Julia Czubak and others, Polish translation: Anatolyi Dowgert 'Ukraińska kodyfikacja prawa prywatnego międzynarodowego', Kwartalnik Prawa Prywatnego 2008/2, 571 (Закон України „Про міжнародне приватне право") No 2709-IV of 23 June 2005, Vidomosti Verkhovnoi Rady Ukrainy (VVR), 2005, No 32, 422.

[6] ibid, 364–365, translation from Ukrainian Julia Czubak and others.

[7] Journal of Laws of 1994, No 96, item 465.

[8] Its provisions may be applied by Polish courts and other authorities after its promulgation on 29 September 1994, cf Mateusz Pilich, in *Ukraińsko-polska umowa o pomocy prawnej i stosunkach prawnych w sprawach cywilnych i karnych. Komentarz do przepisów o sprawach cywilnych*, Mateusz Pilich (ed), Warsawa 2023 and quoted literature, note 9, 21, 253.

[9] ЗАКОН УКРАЇНИ Про ратифікацію Протоколу про право, що застосовується до зобов'язань про утримання, Документ 2339-IX, Про ратифікацію Протоколу пр... | від 01.07.2022 No 2339-IX <https://rada.gov.ua> accessed 30 November 2024.

[10] OJ L 7 of 10 January 2009, 1–79.

[11] 2009/941/WE, OJ L 331, 16 December 2009, 17–18. These issues have already been analysed in the Polish literature, see Anna Juryk, *Maintenance in the Private International Law*, Warsaw 2012, 152–157.

[12] 2009/941/WE, OJ L 331, 16 December 2009, 17–18.

[13] The relationship between various sources of maintenance law has already been discussed in Polish literature, see Anna Juryk*, Alimenty w prawie prywatnym międzynarodowym*, Warsaw 2012, 145–170; Andrzej Mączyński (n 1) 664; Mateusz Pilich, 'An analysis of the Articles 28 and 29, An analysis of the Article 97'*,* in Pilich (n 8) 121–124, 250–251.

2. RATIFICATION OF THE 2007 HAGUE PROTOCOL

Ukraine took steps toward implementing the 2007 Hague Protocol in 2016. However, the ratification did not take place until 6 years after the signing of the Protocol, based on the Act of 1 July 2022.[14] According to Article 9 (1) of the Act on International Agreements of Ukraine,[15] the ratification of international agreements is effected by the adoption of the ratification act and the text of such an international agreement[16] becomes an integral part of this act. The 2007 Hague Protocol is not the first Hague Convention establishing the provision on the law applicable to maintenance obligation. The 2007 Hague Protocol replaced the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations[17] in this area. Contrary to Poland, Ukraine has never adopted the provisions of the 1973 Hague Convention. In the absence of international agreements, the statutory regulation takes on greater significance.

The ratification process of the 2007 Hague Protocol by Ukraine was accomplished together with changes in the statutory regulation which entered into force as of 23 December 2022, soon after the 2007 Hague Protocol entered into force in Ukraine (1 December 2022).[18] As a result, the national statutory regulation duplicates the provisions of the 2007 Hague Protocol. However, the area of application of the statutory regulations is gradually decreasing because the different aspects of the international private law are more commonly regulated by international agreements and EU regulations, which contain the conflict-of-laws rules that have a broad application. We may ask for the reasons put forward by the Ukrainian legislator, however, in practice, the outcomes of such an amendment are more important.

In most of the cases, the main reason for changes in the legislation is the negative assessment of the current legal position. It is reasonable to ask whether the provisions of the UA PIL on the conflict-of-laws rules applicable to the maintenance obligations, which remained in force until 31 November 2022, for more

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[14] ЗАКОН УКРАЇНИ Про ратифікацію Протоколу про право, що застосовується до зобов'язань про утримання, Документ 2339-IX, Про ратифікацію Протоколу пр... | від 01.07.2022 No 2339-IX <https://rada.gov.ua> accessed 30 November 2024.

[15] ЗАКОН УКРАЇНИ Про міжнародні договори України, (Відомості Верховної Ради України (ВВР), 2004, No 50, ст.540), Про міжнародні договори України | від 29.06.2004 No 1906-IV <https://rada.gov.ua> accessed 30 November 2024.

[16] ЗАКОН УКРАЇНИ Про міжнародні договори України, (Відомості Верховної Ради України (ВВР), 2004, No 50, ст.540), Про міжнародні договори України | від 29.06.2004 No 1906-IV <https://rada.gov.ua> accessed 30 November 2024.

[17] Journal of Laws 2000.39.444.

[18] ЗАКОН УКРАЇНИ Про внесення змін до Закону України «Про міжнародне приватне право» у зв'язку з ратифікацією Протоколу про право, що застосовується до зобов'язань про утримання, Документ 2802-IX, Про внесення змін до Закону ... | від 01.12.2022 No 2802-IX <https://rada.gov.ua> accessed 7 August 2024.

than 17 years, did not follow the trends in the international regulations on the maintenance obligations. Indeed, the first decade of the 21st century brought major changes to the maintenance obligations defined in the international private law. The main reason justifying such changes was the fact that in 2007, the HCCH (Hague Conference on Private International Law) adopted the 2007 Hague Protocol, which has been in force since 2011 in the EU.

3. THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS IN UKRAINE BEFORE ENTRY INTO FORCE OF THE 2007 HAGUE PROTOCOL

Before the 2022 amendments to the UA PIL, the conflict-of-laws rules applicable to the maintenance obligations were regulated by Articles 66–68.[19] According to Article 66, the law applicable to relations between parents and children was either the law of the child's home country or the law more closely related to the legal relationship, provided that it was more favourable to the child. This was an example of an alternative, as confirmed by the phrase 'or'. Furthermore, the possibility to apply the law more closely related to maintenance depended on the fact that such a regulation is more favourable to the child.[20] The closer connection clause made the conflict-of-laws mechanism more flexible, and under such a clause a judge could, i.e., apply the general connecting factor of the child's country habitual residence, the common nationality of the parties to the maintenance obligation, etc.

In turn, Article 67 of the UA PIL regulated the law applicable to other maintenance obligations arising from family relationship, except for maintenance obligations arising from parent-child relationship.

Therefore, the literal interpretation of Article 67 of the UA PIL indicates a clear distinction between the conflict-of-laws regulation applicable to maintenance obligations arising from parent-child relationship and the conflict-of-law regulation on maintenance obligations arising from other family relationships.

[19] On Private International Law | on 23 June 2005 No 2709-IV (<https://rada.gov.ua>), accessed 5 August 2023; cf Anatoliy Dowgert, 'Ukrainian codification of the private international law', Private Law Quarterly 2008/2, 364-365, translation from Ukrainian Julia Czubak and others: Anatolyi Dowgert (n 5) 381; Mariia Zeniv, 'Dochodzenie alimentów na rzecz dziecka w sytuacjach międzynarodowych na tle prawa ukraińskiego', in Jacek Mazurkiewicz, Piotr Mysiak (eds), *Dobro pojemne jak krzywda. Prawna ochrona dziecka. Deklaracje a rzeczywistość*, Wrocław 2017, 257; Mariia Zeniv, 'Obowiązek alimentacyjny w prawie materialnym i prawie prywatnym międzynarodowym Ukrainy', Problemy Prawa Prywatnego Międzynarodowego, Vol 31, 126–127, <https://doi.org/10.31261/PPPM.2022.31.04> accessed 7 August 2024.

[20] Mariia Zeniv (n 19) 257.

Thus, the law applicable to parent-child and vice-versa maintenance obligations falls under the conflict-of-laws rules specified in Article 66 of the UA PIL, while the regulations applicable to other maintenance claims are regulated by the Article 67 of the UA PIL.

These other maintenance obligations were governed, in the first place, by the law of the country on which territory the person entitled to the maintenance had a residence (Article 67(1) of the UA PIL). In the event that the entitled person was not able to obtain these under the law of the country of his/her residence, according to Article 67(2) of the UA PIL, the *lex patriae* was the law applicable to the maintenance obligations between these parties. However, if the entitled person could not obtain maintenance neither under the law of the country of his/her residence nor under the *lex patriae*, then in such case, the applicable law was the law of the country of residence of the maintenance debtor (Article 67(3) of the UA PIL).

Therefore, even before its amendment, the UA PIL already utilized the corrective technique indicating the applicable law.[21] This type of technique is based on the assumption of seeking such substantive regulations as applicable law which ensure obtaining the maintenance by the entitled person. Taking as an example a situation where the court has determined the law of the country of residence of the maintenance creditor; however, despite such determination, the creditor will not obtain the maintenance; then the judge is not so much entitled as obliged to continue to search for the applicable law, so that the creditor obtains the maintenance. The judge will act based on the connecting factors forming this indication, in the order and sequence indicated by the legislature. The legislature in such cases also designates the maximum number of the connecting factors that can be used while determining the applicable law. The process of determination of the law applicable to the maintenance obligation is limited to maximum 3 connecting factors, in order to prevent excessive prolongation of the determination of the applicable law.

This technique shows a trend toward materialization of private international law, the goal of which is to provide sufficient protection of the creditor in obtaining the maintenance by setting a specific material legal objectives. This goal is gaining importance in the area of maintenance obligations in the parent-child relationships, where the child is the maintenance creditor. Meanwhile, the UA

[21] Andrzej Mączyński, 'Międzynarodowe prawo rodzicielskie w ustawodawstwach państw europejskich', Kwartalnik Prawa Prywatnego 1992/1–4, 135, 143; Andrzej Mączyński, 'Wskazanie kilku praw przez normę kolizyjną prawa prywatnego międzynarodowego', in *Rozprawy z polskiego i europejskiego prawa prywatnego. Księga pamiątkowa ofiarowana Profesorowi Józefowi Skąpskiemu*, Andrzej Mączyński, Maksymilian Pazdan, Adam Szpunar (eds), Kraków 1994, 238–239; Tomasz Pajor, *Nowe tendencje w części ogólnej prawa prywatnego międzynarodowego państw europejskich,* PPHZ, Vol 18, Katowice 1995, 64–65; Anna Juryk, *Maintenance in the private international law*, Warsaw 2012, 191–194, 197–198.

PIL, before its amendment in 2022, utilized the corrective designation technique for all maintenance obligations, except for the maintenance obligations arising from a parent-child relationship. The maintenance obligations arising between parents and a child were governed either by the law determined by the connecting factor of the child's citizenship or other law falling under the closer connection clause.

The corrective technique indicating the applicable law is characteristic of the Hague Conventions produced by the Hague Conference on Private International Law (HCCH).

In accordance with Article 68 of the UA PIL, the maintenance debtor could avoid the payment of maintenance for his/her relatives, if in the light of the country residence law, such maintenance obligation between him/her and the relatives did not exist.

The UA PIL did not recognize the habitual residence as the connecting factor, even though the habitual residence is considered as the most relevant factor to determine the law applicable to the maintenance obligations. The UA PIL consistently utilized the place of residence as such a connecting factor. In very broad terms, the connecting factor of habitual residence is based on the factual matters and permanence of stay, whereas the main component of the place of residence is an element of the will expressed as an intent to stay in a given place.

The UA PIL, before its amendment, was generally a combination of different arrangements utilized in the bilateral agreements, made by Ukraine with other States, i.e., Poland, and the provisions of the Hague Convention of 2 October 1973 on the law applicable to maintenance obligations.[22] It is worth mentioning in this place that Ukraine has never been bound by the provisions of the 1973 Hague Convention. Instead, Ukraine attempted to adjust the provisions of the UA PIL accordingly.

The qualification of the maintenance from parents on behalf of children as the conflict-of-laws rule concerning the parent-child legal relationship and the citizenship of the child as the connecting factor, indicates similarities to the Polish-Ukrainian Agreement of 1993. According to Article 28 of the 1993 Polish-Ukrainian Agreement, the legal relationships between parents and children, including maintenance claims involving children (including a child who reached the age of majority[23] – after AJ) are governed by the country laws of the child, in this particular case, either Polish or Ukrainian law. Nonetheless, the scope of the conflict-of-laws rule defined in Article 66 of the UA PIL was broader than the scope of a similar rule in Article 28 of the 1993 Polish-Ukrainian Agreement and also included the maintenance claims from children on behalf of parents and

[22] Journal of Laws of 2000 No 39, item 444.

[23] cf Mateusz Pilich, 'An analysis of the Article 28', in Pilich (n 8) 113–114.

introduced, as an alternative, the closer connection clause for maintenance claims between children and parents.

Pursuant to Article 29 of the 1993 Polish-Ukrainian Agreement, the law of the place of the residence of the maintenance creditor, other than the maintenance claims defined in Article 29 (after AJ), is applicable to other family law claims[24] (including, i.e., the maintenance claims from children for parents, between other relatives, relatives by affinity, spouses, ex-spouses, partners). The 1993 Polish-Ukrainian Agreement, contrary to UA PIL, does not utilize the corrective technique indicating the applicable law.

Furthermore, the corrective technique and *lex fori*, common nationality[25] as the connecting factor indicating the applicable law to maintenance obligations, utilized by the Ukrainian legislature in UA PIL are similar to the provisions of the 1973 Hague Convention. Moreover, Article 68 of the UA PIL was modelled based on the regulations of the 1973 Hague Convention.[26] The main difference lies in the exclusion of the corrective technique indicating the applicable law in the maintenance claims between children and parents. Such an exclusion denies the purposes why it was introduced in the first place, which is a facilitation concerning recovery of maintenance for children. Even though the provision of the UA PIL regarding the conflict-of-laws rules sought to keep up with the rapid changes in the then current trends, its provisions did not extend the corrective technique indicating the applicable law on the child maintenance claims. Additionally, it did not utilize the connecting factor of the habitual residence of the maintenance creditor.

4. THE AMENDMENT OF THE UA PIL AS A CONSEQUENCE OF THE IMPLEMENTATION OF THE 2007 HAGUE PROTOCOL

After the amendment of the UA PIL in 2022, the regulation of the law applicable to the maintenance in the UA PIL was expanded to 6 articles: Article 67, Article 67^1, Article 67^2, Article 67^3, Article 67^4, Article 68, while the location of these provisions within the Act did not change.[27]

The first important modification applies to the exclusion of the maintenance between parents and children from the scope of Article 66 which defines the

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[24] ibid, 123.

[25] See Articles 4 and 5 of the Convention of 1973 on the Law applicable to maintenance obligations.

[26] Articles 7 of the Convention of 1973 on the Law applicable to maintenance obligations.

[27] Про міжнародне приватне право | від 23.06.2005 No 2709-IV (<https://rada.gov.ua>), accessed 15 August 2024.

law applicable to the parent-children relationships. The second major change concerns modifications made in Article 67 of the UA PIL introducing the general rule on the law applicable to the maintenance obligations. In accordance with Article 67(1), the maintenance obligations arising from the family relationships fall under the law of the country's place of residence of the maintenance creditor, regardless of the sources of such maintenance. In other words, family relationships shape the grounds for such maintenance.

However, this general rule has several exceptions. The foremost exception is that the applicable law chosen by both parties prevails over this general rule. According to the provisions of Article 67(2) of the UA PIL, parties to the maintenance obligation may also designate the law applicable to the maintenance obligation on conditions defined in Article 67^{4}. It is, therefore, a limited designation because Article 67^{4} authorises the designation of one from a number of laws: 1) the law of the State of one of the parties at the time of designation, 2) the law of the States of the place of residence of one of the parties at the time of designation, 3) the law designated by the parties as applicable, or the law in fact applied, to their property regime; 4) the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation, 5) the law at the place where the court selected by the parties has its seat for the purposes of the given maintenance proceeding. The provisions specified in subsections 3 and 4 of Article 67^{4}(2) are dedicated to spouses, ex-spouses and partners. This, however, does not exclude the selection of other law defined in subsections 1, 3 and 5 of Article 67^{4}(2) of the UA PIL. The UA PIL also determines the form of the agreement on the designation. In accordance with Article 67^{4}, such an agreement has to be in writing and an agreement concluded in Ukraine requires notarisation.

Furthermore, the designation of law is not always possible. The provisions of Article 67^{4}(2) explicitly exclude the parties' designation of the law applicable to maintenance paid to minors, especially a person under the age of 18 years or an adult who, by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interest. In addition, Article 67^{4}(2) *in fine* specifies the timeframes of the law applicable to the given maintenance proceeding applied by the court selected by the parties in its seat. Such designation has to be done prior to the beginning of such a proceeding. Last but not least, the limitation on the selection of the applicable law is defined in Article 67^{4}(3) of the UA PIL, according to which the agreement on the designation of law is void if it leads to manifestly unfair or unreasonable consequences for any of the parties, unless at the time of the designation, the parties were fully informed and aware of the consequences of their designation.

It is also noteworthy that the choice of law is also addressed in Article 5 of the UA PIL, which establishes the institution of general private international law. This may have implications for the application of the applicable law under the maintenance provisions set forth in Articles 67–68 of the UA PIL. Indeed, in the

absence of any regulation pertaining to the choice of law in Article 67(4) of the UA PIL, recourse may be made to Article 5 of the UA PIL.

Another exception to the general rule governs the designation of the law applicable to the maintenance between spouses, ex-spouses and partners. Contrary to the Polish law, the substantive law of Ukraine[28] also regulates the maintenance obligation between partners. The partnership is understood as a relationship between a man and a woman who are not married, but have lived together as a family for longer time.[29] For this group of maintenance creditors and debtors, Article 67^{3} of the UA PIL stipulates that the law applicable is either the law of the State of last common place of residence of the spouses, ex-spouses or partners, or the law of the State which has a closer connection with the married couple (partnership), only if one of the parties to the maintenance proceeding objects utilizing the law designated by the general rule, which is the law applicable to the place of residence of the maintenance creditor (Article 67(1) of the UA PIL). Article 67^{3} makes the departure from the application of the general rule dependent only on the objection of the (ex-)spouse or partner. The objection of one party, not to mention both parties, is sufficient to apply the provisions of Article 67^{3} of the UA PIL. *A contrario*, an absence of such an objection results in the application of the general rule, according to which the place of residence designates the applicable law.

Article 67^{3} of the UA PIL lays down the alternative and equivalent application of the two different laws: the law of the last common place of residence of the (ex-) spouses/partners or other law which has a closer connection with the married couple (partnership). Designation of law having a closer connection with the married couple (or partnership in case of partners) rather than the law of the last common place of residence is an example of an application of the closer connection clause determining the law applicable to the maintenance obligation.

The amendment to the UA PIL employed the corrective technique determining the applicable law. Unlike under the previous legal regime, the amendment applies only to the maintenance included in Articles 67^{1} and 67^{2}. It is about the maintenance between the parents and children and maintenance from persons other than parents for the benefit of a minor. Whereby Article 67^{2} of the UA PIL precisely lists the maintenance creditors, which refers to the substantive regulation of the maintenance in Ukraine. Article 67^{2} specifies the maintenance from grandparents on behalf of their minor grandchildren, stepmothers/stepfathers for their stepchildren, from siblings for the benefit of minor siblings and from people who raised the child. The utilization of the conceptual grid of the substantive law

[28] Article 91 of the Ukrainian Family Code (UA Family Code), СІМЕЙНИЙ КОДЕКС УКРАЇНИ (Відомості Верховної Ради України (ВВР), 2002, No 21–22, 135), <https://zakon.rada.gov.ua/laws/show/2947-14#Text> accessed 15 August 2023.

[29] Article 91 of the UA Family Code explains that its provisions apply only to the relationship between a female and male („жінки та чоловіка"), similar position is presented in doctrine, cf Mariia Zeniv (n 19) 114–116 and the literature therein.

to define the scope of conflict-of law rules cannot be considered as a positive phenomenon because such rules serve to demarcate different legal systems.

Therefore, in the corrective technique indicating the applicable law, if the maintenance creditor cannot obtain the maintenance from the debtor based on the law applicable to the place of residence of the creditor, then the priority shall be given to the law applicable at the seat of the court (*lex fori* – Article 67[1]). If the creditor cannot obtain the maintenance based on the law applicable to the place of the site of the court, then according to the Article 67[1](3), the law of the common citizenship of the parties to the maintenance obligation shall apply. However, if the maintenance creditor seeks the maintenance before the court in which the maintenance debtor has his/her place of residence, *lex fori* is the connecting factor enshrining the corrective technique indicating the applicable law and the connector of the place of residence can be utilized only if the maintenance creditor will not be able to obtain the maintenance in accordance with the law applicable at the seat of the court (in the State of residence of the creditor entitled to maintenance according to Article 67[1](2)). In these rare situations when the creditor is not able to receive the maintenance based on the law applicable to the place of residence, the parties should refer to the law applicable to their common citizenship (Article 67[1](3)). However, if the parties do not have the common citizenship, the search for the applicable law ends on the second factor in the corrective technique indicating the applicable law. For some incomprehensible reason, the factor of the habitual residence is missing.

Article 68(1) of the UA PIL[30] is not sufficiently precise. According to subsection 1 thereof, the entitlement to waive the creditor's right to maintenance is determined by the place of residence. However, only the interpretation, *a contrario*, of the subsection 2 of this Article states that the subsection 1 refers to the maintenance creditor. Notwithstanding the connecting factor which is utilized to determine the applicable law, or the right of the maintenance creditor to waive his/her rights, must be solely based on the creditor's place of residence applicable law. In turn, in accordance with the Article 68(2), the maintenance creditor can avoid paying the maintenance on the ground that either there is no such obligation under the law of the place of residence of the debtor, or in the absence of the common nationality of both parties to the maintenance obligation, if they do have one. In the case of the common nationality of the creditor and debtor, such assessment is made cumulatively including two legal systems. The existence of such an obligation in one of the two legal systems precludes the debtor from invoking his/her rights specified in subsection 2 of Article 68. The entitlement of the creditor does not apply to rejection of the maintenance from parents on behalf of children and maintenance between (ex-)spouses (partners).

[30] Compare Article 6 of the 2007 Hague Protocol.

5. THE POTENTIAL IMPLICATIONS AND ASSESSMENT OF THE NEW REGULATION OF THE UA PIL

Even the provisional analysis of the UA PIL shows the significant similarities to the provisions of the 2007 Hague Protocol.[31] The title of the amendment to the UA PIL, as well the adoption date by the Verkhovna Rada of Ukraine (1 December 2022) indicate a link between this amendment and the 2007 Hague Protocol. The subject amendment was introduced under the Act of 1 December 2022 on the changes to the Ukrainian International Private Law in connection with the ratification of the Protocol on the Law Applicable to Maintenance Obligations. As mentioned above, such act was adopted by the Ukrainian parliament on the exactly same date as when the 2007 Hague Protocol entered into force in Ukraine.

The title of the Act amending the UA PIL, as well as its effective date causes associations of the implementation of the provisions of the 2007 Hague Protocol to the UA PIL. Such construct is not known in Polish practice. However, according to the Article 9 of the Constitution of Ukraine,[32] international agreements, ratified by the Verkhovna Rada of Ukraine, become an integral part of the national legislation, similarly as in Poland.[33]

The Ukrainian legislator presented a similar approach in Article 19 of the Act of 29 Juni 2004[34] on international agreements. According to Article 19(1) thereof, international agreements are the integral part of the national legislation of Ukraine and apply to the same extent. On the other hand, Article 19(2) clearly shows that in the case of conflicts between the provisions of international agreement and the provisions of national rules, the former shall prevail. Article 3 of the UA PIL presents similar approach, international agreements take precedence over the provisions of this Act. Similar assumptions underlay the Polish legislation.

In the explanatory memorandum[35] accompanying the draft of the Act from 2022 amending the UA PIL, the Ukrainian legislator confirmed that the main purpose of this project is the appropriate implementation of the provisions of the

[31] Compare Article 3–8 of the 2007 Hague Protocol.

[32] КОНСТИТУЦІЯ УКРАЇНИ (Відомості Верховної Ради України (ВВР), 1996, No 30, 141), Конституція України | від 28.06.1996 No 254к/96-ВР (<https://rada.gov.ua>) accessed 15 August 2024.

[33] Article 91(1) of the Constitution of the Republic of Poland, Journal of Laws of 1997, No 78, item 483.

[34] ЗАКОН УКРАЇНИ Про міжнародні договори України, (Відомості Верховної Ради України (ВВР), 2004, No 50, 540), Про міжнародні договори України | від 29.06.2004 No 1906-IV (<https://rada.gov.ua>) accessed 15 August 2024.

[35] ПОЯСНЮВАЛЬНА ЗАПИСКА до проєкту Закону України «Про внесення змін до Закону України «Про міжнародне приватне право» у зв'язку з ратифікацією Протоколу про право, що застосовується до зобов'язань про утримання», Картка законопроекту – Законотворчість (<https://rada.gov.ua>) accessed 15 August 2024.

2007 Hague Protocol to the Ukrainian national legislation. Such implementation is a condition *sine qua non* for the correct application of such provisions by the courts and the application of the rights of citizens in terms of the maintenance obligation. Elsewhere, the explanatory memorandum states that the purpose of the amendment is to adjust the national conflict-of-laws rules to the conflict-of-laws rules included in the 2007 Hague Protocol and, in my opinion, this is the main purpose of the amendment to the UA PIL.

The implementation referred to in the explanatory memorandum may suggest that the international agreement is not directly applicable. The explanatory memorandum also explains that one of the reasons behind the amendment of the UA PIL is to ensure that the 2007 Hague Protocol is applied properly. The memorandum invokes Article 9(7) of the Act on international agreements according to which if the ratification process of an international agreement requires the adoption of a new act or amendment of the existing act, then the drafts of such acts should be submitted to the Verkhovna Rada of Ukraine together with the ratification draft and the Verkhovna Rada of Ukraine should adopt them simultaneously. It was, therefore, considered appropriate to amend the UA PIL as a necessary measure to implement the 2007 Hague Protocol. It is difficult to agree with such approach because the provisions of the 2007 Hague Protocol are sufficiently precise and clear to allow direct implementation and there is no need to issue an additional act in order to implement the international agreement. The Polish constitution law also recognises two types of international agreements: agreements applicable directly and agreements requiring introducing amendments to the domestic laws (Article 91(1) of the Constitution of the Republic of Poland). The 2007 Hague Protocol belongs to the first group of the agreements applicable directly. An opinion of the Supreme Court of Ukraine[36] concerning the amendment project of 2022 confirms such approach. The Supreme Court of Ukraine took the view that including the detailed provisions in the UA PIL modelled on the provisions of the 2007 Hague Protocol is not required because the ratified Protocol will become an integral part of the Ukrainian national legislature and will apply directly. The Supreme Court recommended including a clear reference to the 2007 Hague Protocol in the UA PIL. [37]

It is also worth mentioning that Article 4(4) of the Act on international agreements of Ukraine[38] describes a situation in which the new international agreement

[36] Картка законопроекту - Законотворчість (<https://rada.gov.ua>) accessed 15 August 2024.

[37] <https://itd.rada.gov.ua/billInfo/Bills/CardByRn?regNum=6107&conv=9&_gl=1*xg-8wga*_ga*NDY4OTQ1MzAuMTY5MjA0MDUyNA..*_ga_G9VY19PRSD*MTY5MzMzOD-MzNy4yMy4xLjE2OTMzMzg0MDMuNjAuMC4w> accessed 15 August 2024.

[38] ЗАКОН УКРАЇНИ Про міжнародні договори України, (Відомості Верховної Ради України (ВВР), 2004, No 50, 540), Про міжнародні договори України | від 29.06.2004 No 1906-IV (<https://rada.gov.ua>) accessed 15 August 2024.

will have an impact on the present regulations of the Ukrainian domestic law. In such a situation, an offer to conclude the new international agreement should be accompanied by a draft presenting the potential changes to the existing acts or a need for new legislation. The preparatory documents to the amendment of the UA PIL did not refer to the provisions of the Article 4(4) of the Law on international agreements of Ukraine, instead the full analysis was made based on Article 9(7) of this Law.

The above mentioned regulations confirm/indicate that the Ukrainian legislation does not have a uniform position on the direct implementation of international agreements. The advantage of the solution proposed by Article 4(4) of the Law on the international agreements of Ukraine is to accommodate the needs of the practice which does not need to engage in the process determining which provisions of the international agreement are incompatible with the domestic regulation. Article 4(4) ensures that that the provisions of the domestic laws will be aligned with international agreements. A different view is presented by the international private law and reflected in Article 3 of the UA PIL, which states that international agreements prevail over the statutory regulation.

The amendment of the UA PIL after the 2007 Hague Protocol came into force is considered as a good opportunity to refine some of the provisions of international agreements, give them an interpretation or even to extend their scope. For instance, Article 67^3 of the UA PIL was added after the UA PIL was amended in 2022. This Article clearly refers to the maintenance obligation between partners, contrary to provisions of Articles, 1, 5 and 8(1) of the 2007 Hague Protocol. Article 1 of the 2007 Hague Protocol defines the scope of the act and explains, among others, that this provision determines the law applicable to the maintenance obligation arising from marriage. Only Articles 5 and 8(1)(d) provide further details according to which the provisions of this Protocol are also applicable to maintenance obligation between ex-spouses and the parties to a marriage which has been annulled. The literal interpretation of Article 1 in conjunction with Article 5 and 8 of the 2007 Hague Protocol indicates that the maintenance between partners is outside its scope. In my opinion, the 2007 Hague Protocol should be applied to maintenance between partners if the substantive law specified as the law applicable defines such an obligation between the partners. It could be also argued that since the doctrine allows for the application of the 2007 Hague Protocol to partnerships, which are not perceived as marriages, the provisions of such Protocol should also apply to the relationships existing as marriages, even though formally they are not recognized as ones. According to Article 91 of the Ukrainian Family Code, the maintenance obligation between partners applies only to a situation where one of the partners becomes incapacitated for work during cohabitation with his/her partner.[39]

[39] Zoryslava Romovska, 'The Family Code of Ukraine: the synthesis of own and foreign', in *From family law and official register issues*, Henryk Cioch, Piotr Kasprzyk (eds), Lublin 2007, 40.

Nevertheless, the amendment of the UA PIL from 2022 prejudged the application of the conflict-of-laws rules to the maintenance obligations between partners. The intent of such amendment is to ensure the proper application of the 2007 Hague Protocol by the Ukrainian authorities. In such a situation, these authorities will be more willing to apply to the maintenance obligations between partners, not only the statutory conflict-of-laws rules but also the conflict-of-laws rules specified in the 2007 Hague Protocol. This may also apply to Polish citizens living in Ukraine.

Another example presenting how the provisions of the 2007 Hague Protocol were clarified in the UA PIL is Article 67^4 (2) *in fine*. According to it, the designation of the law as applicable to the given proceeding can be made only prior to initiating the particular case, which is not provided by Article 7(2) of the 2007 Hague Protocol. A temporary limitation of the choice of applicable law seems therefore justified because the court requires legal certainty of which law will be applicable to resolve this case. Thus, Polish literature takes an assumption that the designation of law should be possible no later than on entering a defence on the merits. Especially, a disclosure of the fact that the agreement on the designation of law was entered into at the later stage of the proceeding has a significant implications on the proceeding itself.[40] The 2007 Hague Protocol states that the parties should enter into a written agreement at the same time designating the applicable law; on the other hand, Article 67^4(2) of the UA PIL is more strict in this area and inserts a condition for notarisation if such an agreement was concluded on the territory of Ukraine. Article 8(2) of the 2007 Hague Protocol specifies that such an agreement has to be in writing and signed by both parties or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference. There is no need for notarisation of such an agreement, a handwritten or electronic signature is sufficient. An inconsistency between the wording of the 2007 Hague Protocol and the wording of the UA PIL on the form of the agreement designated by the applicable law may distort the provisions of the Protocol in the future. The Ukrainian courts may presume that the provisions of the UA PIL are consistent with the provisions of the 2007 Hague Protocol and instead of referring to the text of the Protocol, they will rely on the provisions of the UA PIL.

The statutory regulation can differ from the convention regulation; however, in this case it is not consistent with the rationale for the UA PIL amendment. *De facto*, the differences should be avoided wherever possible. Consequently, even assuming that the purpose of the amendment was not to implement, but only harmonise the provisions of the UA PIL with the provisions of the 2007 Hague Protocol, the procedure applied by the Ukrainian legislator poses a risk that the implemented text will be distorted. In my opinion, the most concerns arise around

[40] Piotr Mostowik, 'Prawo właściwe dla rozwodu i separacji w świetle rozporządzenia unijnego nr 1259/2010', Kwartalnik Prawa Prywatnego 2011/2, 366–367.

the replacement of the habitual residence utilized by the 2007 Hague Protocol with the place of residence (UA PIL). These connecting factors have different meaning and substance, as well as firm interpretation in the EU law. The habitual residence is the most important connecting factor determining the law applicable to the maintenance obligation. It is, therefore, all the more surprising that such connecting factor was not included in the UA PIL amendment.

Furthermore, the scope of the applicable law is influenced by the regulations set forth in the general part of the UA PIL. This is particularly evident with regard to the institution of the *renvoi* principle. Article 12 of the 2007 Hague Protocol precludes the application of this principle with respect to the designation of the applicable law governing maintenance. Nevertheless, in accordance with Article 9(2) of the UA PIL,[41] with respect to personal and family-related legislation, a return reference to Ukrainian law is permitted. In comparison to the 2007 Hague Protocol, there is a notable discrepancy in the scope of application of the conflict-of-laws rules on maintenance under the UA PIL. Despite the Amendment Act of 1 December 2022 introducing the wording 'or an international agreement' into the wording of Article 9(1) *in fine* of the UA PIL, it is this author's opinion that this change is counterproductive. In accordance with paragraph 1 of Article 9, 'Any reference to the law of a foreign state should be construed as a reference to the norms of substantive law regulating the relevant legal relations excluding the application of its conflict-of-law rules, unless otherwise established by law or international agreement'. In contrast, the content of paragraph 2, which states, 'In cases on personal and family status of an individual, *renvoi* to the law of Ukraine is accepted', has remained unchanged. Given that the Ukrainian legislature excludes referral in principle, the introduced amendment at most allows for the admission of referral on the basis of an international agreement. In order to ascertain the desired effect of excluding the use of a *renvoi* reference for maintenance, it would be prudent to include the wording 'unless otherwise established by international agreement' in paragraph 2 of Article 9 of the UA PIL.

We cannot risk losing sight of the mandatory uniform interpretation of the provisions of the 2007 Hague Protocol (Article 20). In Poland, as well as in the EU, the 2007 Hague Protocol has been in force for more than 12 years and its uniform interpretation is guaranteed by the Court of Justice of the EU. Even though the Ukrainian authorities are not bound by the Court of Justice case law, nevertheless, each State acceding to the Protocol should observe the previous practice and follow the current interpretation. Otherwise, the uniform interpretation of the Protocol becomes a fiction. It is, therefore, justified that the Polish authorities

[41] <https://zakon.rada.gov.ua/laws/show/en/2709-15?lang=uk#Text> accessed 25 August 2024.

employ the well-established practice on applying the 2007 Hague Protocol with regard to the non-EU countries, which in the future will be bound by this Protocol.

The documentation legislation process indicates that the amendment of the UA PIL should contribute to the harmonisation process of the Ukrainian legislation with the legislation of the EU Member States.[42] Furthermore, the additional purpose of this amendment is to harmonise the provisions of the international private law, as well as to unify the application of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance[43] (the 2007 Convention). However, it is worth emphasizing the fact that entering the 2007 Convention into force would not entail changes to the UA PIL. The unification of the law applicable to the maintenance obligation is only a small fracture of the complex issue of the cross-border maintenance. For this reason, the consent to be bound by the 2007 Convention does not entail the obligation to be bound by the 2007 Hague Protocol.

In conclusion, the amendment of the UA PIL should not play any role in the Polish-Ukrainian relationships. According to the priority rule of the 2007 Hague Protocol, the demands presented in the justification to the amendment on the need to implement the 2007 Hague Protocol into the Ukrainian legislature as necessary to ensure the correct application of these provisions by the courts of Ukraine and obtaining the full rights of the maintenance obligations by the Ukrainian citizens are entirely unfounded.

6. SUMMARY

The accession to the 2007 Hague Protocol by Ukraine opens a new chapter in the Polish-Ukrainian relationships. Due to this accession, both States will be able to resign from the ways of determining the law applicable to the maintenance which, however, do not meet the current requirements sufficiently. It is worth emphasizing the fact that the law applicable to the maintenance obligation from parents on behalf of children will no longer be determined by the connecting factor of citizenship but by the habitual residence. The habitual residence is the most appropriate connecting factor to determine the form and the amount of maintenance in a given situation. Furthermore, the selection of the law applicable to the maintenance for children will be based on the correcting technique, targeted in

[42] ВИСНОВОК щодо проекту Закону про внесення змін до Закону України «Про міжнародне приватне право» у зв’язку з ратифікацією Протоколу про право, що застосовується до зобов’язань про утримання (реєстр. No 6107 від 27 вересня 2021 року) 1539972 (<https://rada.gov.ua>) accessed 25 August 2024.

[43] ibid.

particular at receiving the maintenance. In such a way, the child's interest is protected against the applicable law which does not guarantee such child the maintenance. Finally, the parties' choice to designate the applicable law is limited; however, such limitation does not apply to the maintenance on behalf of children and vulnerable adults. The designation of law may have a major contribution to the maintenance between (ex-)spouses.

The Supreme Court of Ukraine decided that the amendment of the UA PIL due to and in conjunction with the ratification of the 2007 Hague Protocol, together with the justification of the proper implementation and execution by the Ukrainian authorities was unnecessary. The justification of the amendment is denial of the role and position of the international agreements in the legal system of Ukraine.

Furthermore, the discrepancies between the provisions of the Hague Protocol and the UA PIL may result in the inadvertent distortion of the 2007 Hague Protocol's provisions if a judge erroneously applies the UA PIL in lieu of the 2007 Hague Protocol.

Notwithstanding the flawed rationale, the amendment of the UA PIL also presents some positive aspects. For instance, it could potentially result in the harmonisation of the legal framework governing alimony through the implementation of the UA PIL in relations with countries that are not parties to the Hague Protocol, provided that it does not give way to the provisions of other international agreements, e.g., bilateral ones.

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Studia Iuridica 105
ISSN 0137-4346; e-ISSN 2544-3135
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https://creativecommons.org/licenses/by/4.0/
https://doi.org/10.31338/2544-3135.si.2025-105.3

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REGULATING THE RIGHT TO DISCONNECT AT THE EU LEVEL: CONSIDERATIONS ON THE FUTURE LEGISLATION SCOPE

Abstract

The following study concerns the actions taken by the European social partners and the EU institutions in recent years, aiming to regulate the right to disconnect at the EU level. This issue has been on the agenda for several years, yet the European Commission put the legislative process on hold, allowing space for the social partners to negotiate. However, due to the lack of agreement the issue has to be settled by the EU institutions' court again. A complex analysis of the proposals already in place is necessary, as they will significantly impact the shape of future legislation and further European integration at the social level in times of digital revolution.

The aim of this article is to identify key elements of future legislation and critically analyse the already existing proposals. To put the considerations in context, the author describes the circumstances of the adoption of the resolution and explores the nature of the right to disconnect. Consequently, the author concludes that there are key issues that need to be included in future legislation, such as the definition of the right to disconnect (R2D), personal scope, or mutual obligations. However, some interpretative doubts arise within these fields.

KEYWORDS

right to disconnect (R2D), remote working, teleworking, working time, right to leisure

SŁOWA KLUCZOWE

prawo do odłączenia (R2D), praca zdalna, telepraca, czas pracy, prawo do wypoczynku

I. INTRODUCTION

The way of working and delivering results is subject to constant changes and keeps on taking newer forms. This is influenced by social changes, development of technology and information systems, as well as progressive globalisation. Undoubtedly, the COVID-19 pandemic has also had a significant impact, leading in many cases to the relocation of workplaces to workers' homes and changing the way they communicate with their employers.[1] Increased availability of workers outside of working hours is not merely the result of the pandemic but also of the development of digital tools and remote work intensifying this phenomenon. Working with ICT tools is widely used in various industries and professions, giving workers greater flexibility and allowing enterprises to adapt smoothly to economic and social changes. However, this way of performing work can blur the boundaries between workers' professional and private lives, leading to physical and mental health problems over time. The use of digital tools for professional purposes has created a culture of 'always-available' workers, working anytime, anywhere,[2] which does not necessarily result in increased productivity.[3]

[1] For details check, e.g, Eurofound, 'Living, working and COVID-19 in the European Union and 10 EU neighbouring countries' (Publications Office of the European Union 2022) <https://www.eurofound.europa.eu/publications/report/2022/living-working-and-covid-19-in-the-european-union-and-10-eu-neighbouring-countries> accessed 5 March 2024.

[2] Emanuele Dagnino, '"Working Anytime, Anywhere" and Working Time Provisions. Insights from the Italian Regulation of Smart Working and the R2D' (2020) 3 E-Journal of International and Comparative Labour Studies 1,2. See also Eurofound and the International Labour Office, 'Working Anytime, Anywhere: The Effects on the World of Work' (Publications Office of the European Union, and International Labour Office, 2017, updated 2019) <https://www.eurofound.europa.eu/publications/report/2017/working-anytime-anywhere-the-effects-on-the-world-of-work> accessed 5 March 2024.

[3] Pepita Hesselberth, 'Discourses on Disconnectivity and the R2D' (2018) 20 5 New Media & Society 1994, 1995; European Parliamentary Research Service (EPRS), 'The R2D' (European

While the appropriate use of digital tools has brought many economic and social benefits to both employers and workers, digital transformation should be based on respect for fundamental rights and values and positively impact working conditions. In recent years, the discussion on the consistent legal regulation of the right to disconnect has intensified. Actions have been taken by both the European social partners and the European Parliament. For these reasons, it has become necessary to examine the regulations already in force in selected Member States, as well as actions taken at the European level, and propose the most important issues that should be regulated concerning the right to disconnect, based, among other things, on the recommendations proposed by the European Parliament. Addressing them is particularly justified as the introduction and shape of future regulation at the EU level is still an open question.

II. THE TRIPLE-MODEL APPROACH TO THE R2D IN EU MEMBER STATES

The Right to Disconnect (R2D) has already been introduced in many countries, but its rapid expansion has occurred in recent years, largely due to the activities of EU organizations and institutions. There is a clear distinction between two primary models for its implementation: the first model involves legislation, and the second relies on corporate self-regulation. However, a third, referred to as the good-practice model, can also be identified.

The regulatory model has gained popularity, notably inspired by France, which became the first European state to incorporate the R2D into its national labour code in 2017. Procedures for fully exercising the employee's R2D, along with the establishment of mechanisms to regulate the use of digital tools while respecting rest, vacation periods, and personal and family life, are subject to mandatory annual negotiations between social partners at the workplace level for employers with 50 or more employees.[4] Other European States, including Spain, Italy, Belgium, Greece, and Slovakia, have also introduced the R2D into their legal frameworks, adopting their own regulatory methods. In several other countries, such as the Netherlands and Lithuania, future legislation is either under

Parliamentary Research Service 2020) 1–2 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642847/EPRS_BRI(2020)642847_EN.pdf> accessed 5 March 2024.

[4] Loïc Lerouge, Francisco Trujillo Pons, 'Contribution to the study on the "R2D" from work. Are France and Spain examples for other countries and EU law?'(2020) 13(3) European Labour Law Journal 450, 457, 459–460, <https://doi.org/10.1177/20319525221105102>; Luc Pansu, 'Evaluation of "R2D" Legislation and Its Impact on Employee's Productivity' (2018) 5(3) International Journal of Management and Applied Research 99, 100–101 <https://doi.org/10.18646/2056.53.18-008> accessed 5 March 2024.

discussion or already in progress.[5] In Member States where legislation exists, the main reason for regulating the R2D has been the lack of specific measures in collective agreements at the sectoral or company level to effectively address the challenges posed by ICT-based working.[6]

The R2D can be granted to all workers, in both the private and public sectors, as was done in the case of Spanish data protection legislation,[7] or only to certain categories of workers:

- those working in public or private enterprises with at least 50 employees (France); or
- civil servants, as initially occurred in Belgium,[8] however, following subsequent amendments under the ‘Labour Deal’, starting from April 2023, employers with at least 20 employees in the private sector are also required to guarantee disconnection; or
- employees using digital tools for professional purposes (Article L.312-9 of the Luxembourg Labour Code[9]);
- teleworkers, as regulated in the Greek[10] and Slovak labour codes,[11] or domestic workers, including occasional workers (Slovak labour code); or
- those working without precise restrictions on hours or place of work – referred to as *lavoro agile* in Italian legislation.[12]

Variations are also noticeable in how this right is implemented. It can be introduced through negotiations between social partners and collective agreements (France, Spain, Belgium, Greece, Luxembourg) or through individual agreements between the employer and worker (Italy). Generally, the existing laws do not provide for any concrete enforcement. Portuguese legislation is unique in that it imposes financial penalties on employers for contacting remote workers outside

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[5] LRT, ‘Changing work culture: Lithuanian MPs propose “R2D” legislation’ (2022) <https://www.lrt.lt/en/news-in-english/19/1784252/changing-work-culture-lithuanian-mps-propose-right-to-disconnect-legislation> accessed 5 March 2024; Legislative proposal on Dutch R2D available <https://vng.nl/wetsvoorstellen/wet-op-het-recht-op-onbereikbaarheid> accessed 5 March 2024.

[6] Eurofund, ‘R2D in the 27 EU Member States’ (2019) 19 |<https://www.eurofound.europa.eu/en/publications/eurofound-paper/2020/right-disconnect-27-eu-member-states> accessed 5 March 2024.

[7] Loïc Lerouge, Francisco Trujillo Pons, see (n 4) 460–461.

[8] European Trade Union Confederation (ETUC), ‘Belgian workers win R2D’ (2022) <https://www.etuc.org/en/belgian-workers-win-right-disconnect> accessed 5 March 2024.

[9] Luxembourg Labour Code (2023) <https://legilux.public.lu/eli/etat/leg/code/travail/20240227#art_l_312_9> accessed 5 March 2024.

[10] Iason Skouzos, ‘Law 4808/2021 (labour arrangements)’ (TaxLaw 2021) <https://www.taxlaw.gr/en/practice-areas/law-4808-2021-labour-arrangements/> accessed 5 March 2024.

[11] Marcel Dolobáč, ‘Legal protection of mental health of employees in Slovakia’ (2022) 30 Studia Iuridica Toruniensia 113, 121–123.

[12] UNI Global Union, ‘Legislating a R2D’ (2020) 4-5 <https://uniglobalunion.org/report/legislating-the-right-to-disconnect/> 5 March 2024; Evelina Dagnino (n 2) 5.

working hours (unless in an emergency). It only mentions a prohibited activity, but does not directly introduce the R2D as a separate employment right.[13]

The second model can be described as corporate self-regulation, meaning that the R2D is subject to voluntary consultation between social partners and is regulated at the level of specific workplaces, based on the assumption that existing legislation is sufficient. Germany has a rich history of self-regulation in this area, where the R2D has been granted in numerous private and public enterprises through collective agreements.[14] Similarly, in Nordic countries, collective bargaining is considered the best approach to ensuring that workers can disconnect.[15] It must be emphasized that the protection of work-life balance and collective bargaining is widespread across businesses in these countries, which facilitates solutions without the need for further legislation.

The third model, based on best practices, has so far been implemented only in Ireland, where a code of good practice was developed by the Workplace Relations Commission (WRC). This approach encourages employers to develop relevant policies that account for the needs of the business and its workforce. This does not necessarily need to be done through collective agreements. Additionally, the code highlights existing regulations, particularly regarding limits on working hours. However, there is no separate regulation for the R2D, and the code itself is legally non-binding. This means that the R2D is not enforceable in Ireland; however, courts and the WRC can rely on the provisions of the code when they are relevant to a specific case. Undoubtedly, one strength of the code is its definition of the R2D, which consists of three elements:

- the employee's right not to perform regular work outside normal working hours,
- the right not to face negative consequences for refusing to work outside of working hours,
- the obligation to respect the right of another person to disconnect.[16]

The above considerations lead to several conclusions. The provisions introduced by Member States vary, resulting in unequal levels of worker protection.

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[13] Mauro Pucheta, Ana C Ribeiro Costa, 'Going Beyond the R2D in a Flexible World: Light and Shadows in the Portuguese Reform'(2022) 51(4) Industrial Law Journal 967*,* 980–981 <https://doi.org/10.1093/indlaw/dwac030> accessed 5 March 2024.

[14] e.g., BMW, Volkswagen, Audi, Telekom, German Ministry of Labour – Mark Bell and others, 'A R2D: Irish and European Legal Perspectives' A Public Policy Report of the COVID-19 (School of Law Trinity College Dublin 2021) 27 <https://www.tcd.ie/law/2020.21/Final%20RTD%20report.pdf> accessed 5 March 2024; Paul Secunda, 'The Employee R2D' (2019) 9(1) Notre Dame Journal of International & Comparative Law 1 29–30.

[15] Eurofund (n 6) 18.

[16] Workplace Relations Commission, 'Code of Practice for Employers and Employees on the R2D' (2021) 2 <https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf> accessed 5 March 2024.

Generally, these provisions are rather brief and aim to introduce specific arrangements at the level of a particular sector or undertaking. There is also typically a lack of specific sanctions and enforcement mechanisms to provide workers with tangible protection. Notably, Member States have not clearly defined the R2D in their regulations. Considering all these issues, there may be a strong justification for introducing proper regulation at the EU level to guarantee equal protection for workers.

Moreover, regulatory trends are gaining popularity in Europe, as seen in Germany and Ireland, where the debate has resurfaced, with trade unions favouring a legislative solution regarding the R2D. This is primarily due to the insufficient protection offered under a self-regulatory model, which only applies to workers covered by such agreements (mainly in large companies), leaving many without protection.[17] Additionally, it may result in inconsistent standards, leading to unequal protection across different sectors and companies. It is also difficult to introduce a unified definition of the R2D under such a model.

III. THE ROLE OF THE EUROPEAN SOCIAL PARTNERS AND THE EUROPEAN INSTITUTIONS

Since the digital transition in the workplace presents many challenges for both workers and enterprises, labour markets, education, training, and social protection systems need to be adapted to this phenomenon. In 2020, the European social partners adopted the Framework Agreement on Digitalisation, covering areas such as digital skills, AI, surveillance, and connectivity. Regarding the R2D, they proposed providing employers and workers with information on compliance with working time regulations, teleworking, and remote working rules, including the use of digital tools and the risk of over-availability.[18] The proposed measures are soft and focus primarily on awareness-raising activities and prevention.

Also, the European Parliament considered the R2D as urgent for workers, and in January 2021, it presented a resolution with recommendations to the Commission on the right to disconnect (hereinafter referred to as ‘the Resolution’), accompanied by an annex containing the text of a legislative proposal – a Directive of the European Parliament and the Council on the right to disconnect (here-

[17] Eurofund (n 6) 21, 30–31.

[18] BusinessEurope, SMEunited, CEEP, ETUC, ‘European Social Partners Autonomous Framework Agreement on digitalisation’(2020) 10 <https://www.etuc.org/en/document/eu-social-partners-agreement-digitalisation> accessed 5 March 2024.

inafter referred to as 'the proposal' or 'the proposed directive').[19] According to the European Parliament, to prevent social dumping, it is necessary to define minimum requirements for the protection of all workers in the EU who use digital tools for professional purposes, as some Member States have already regulated this right at the national level.

Considering the initiatives described, a significant difference in the approach to regulating the R2D is evident. While in 2020, the social partners limited themselves to recommending a catalogue of measures for implementing the R2D, the proposal of the European Parliament includes detailed legal regulation of this right. The European Parliament emphasized, however, that the 2020 Framework Agreement on Digitalisation provided for the social partners to take implementation measures within three years, starting from 2020, and that a legislative proposal before the end of that implementation period would have undermined the role of social partners.[20]

Consequently, in June 2022, the European social partners signed a joint 2022–2024 Work Programme, including negotiations, inter alia, on legally binding measures to regulate telework and institute the R2D.[21] The social partners agreed to update the 2002 Autonomous Agreement on Telework (hereinafter referred to as the '2002 Agreement'), which would then be adopted as a legally binding agreement implemented through a European directive, introducing the R2D in line with previous recommendations from the European Parliament.[22] Unfortunately, negotiations lasting more than a year were unsuccessful, as two of the three employers' organisations refused to submit any text.[23]

On 30 April 2024, the European Commission initiated the first-phase formal consultation of social partners under Article 154(2) TFEU to gather their views on the possible direction of EU action to ensure fair telework and the R2D. Now, the issue has to be settled by the Commission's court and given the difficulties in reaching a common position among the European social partners, we can expect a directive from the Commission. The lack of consensus during negotiations is

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[19] European Parliament resolution of 21 January 2021 with recommendations to the Commission on the R2D (2019/2181(INL)) <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html> accessed 5 March 2024.

[20] The Resolution Pt 13; David Mangan, 'Agreement to Discuss: The Social Partners Address the Digitalisation of Work' (2021) 50(4) Industrial Law Journal 689, 699–700 <https://doi.org/10.1093/indlaw/dwab026> accessed 5 March 2024.

[21] The Work Programme has broader scope and also covers such priorities as green transition, youth employment, work-related privacy and surveillance, improving skills matching in Europe and capacity building – full text available here <https://www.businesseurope.eu/sites/buseur/files/media/reports_and_studies/2022-06-28_european_social_dialogue_programme_22-24_0.pdf> accessed 5 March 2024.

[22] The Work Programme Pt 5.

[23] ETUC, 'Telework: Legislative action needed by EU Commission' (2023) <https://www.etuc.org/en/pressrelease/telework-legislative-action-needed-eu-commission> accessed 5 March 2024.

disappointing, as the issue clearly falls within their competence, and proper implementation requires cooperation between social partners. It also demonstrates that the R2D is a challenging issue to regulate.

However, sectoral social partners – representatives in the European Social Dialogue Committee for Central Government Administrations, EUPAE, and TUNED (composed of the trade union organizations EPSU and CESI) – succeeded in signing the Sectoral Agreement on Digitalisation,[24] which addresses the R2D, in 2022. Subsequently, they requested the Commission to put it forward for adoption as a European directive.[25] It is important to note, though, that the Commission is free to decide whether to present a proposal for a decision to the Council or not.[26] Even if adopted as a legally binding directive, the sectoral agreement does not fully resolve the issue, as it only covers public workers and civil servants.

Regardless of how it is adopted, the future directive should only set minimum standards and conditions to ensure that workers can effectively exercise their R2D, and its implementation, together with practical arrangements, should be entrusted to the social partners in accordance with national law and practice, i.e., using collective agreements.[27] This is both understandable and desirable – the specific solutions will depend on the type of work performed, the structure of the company and employment, the digital tools used, the working time systems and schedules, etc. Existing legislation on this right, such as in France or Spain, establishes worker participation in determining solutions that allow them to disconnect. Unfortunately, in some Member States with low union density, entrusting social partners with the responsibility of setting working conditions through collective agreements may not yield the expected results, and in such cases, employers should also be able to introduce these arrangements, e.g., in work regulations, taking into account the workers' opinions to the fullest possible extent.

[24] Trade Unions' National and European Administration Delegation (TUNED) and European Public Administration Employers (EUPAE), 'European framework agreement of European social dialogue committee for central government administrations (SDC-CGA) on digitalisation' (2022) <https://www.epsu.org/sites/default/files/article/files/SDC%20CGA%20Agreement%20on%20digitalisation%20-%20EN%20-%20Signed.pdf> accessed 5 March 2024.

[25] EPSU, 'EU Social Partners signed new agreement on digitalisation for central government' (2022) <https://www.epsu.org/article/eu-social-partners-signed-new-agreement-digitalisation-central-government> accessed 5 March 2024.

[26] Case T-310/*18 European Federation of Public Service Unions (EPSU) and Jan Willem Goudriaan v European Commission* [2019], <http://publications.europa.eu/resource/cellar/ad2b44b0-f63e-11e9-8c1f-01aa75ed71a1ad2b44b0-f63e-11e9-8c1f-01aa75ed71a1> accessed 5 March 2024.

[27] The Resolution Pt 10, 13, 21.

IV. THE NATURE OF THE RIGHT TO DISCONNECT

Discussions on how to regulate the R2D should begin by exploring its origins and characteristics. There is a lack of academic studies on this topic and addressing this gap is essential to proposing specific legal solutions and resolving the debate over whether the R2D is necessary as a separate legal regulation.

The R2D is closely linked to fundamental workers' rights, such as a safe and healthy working environment, respect for private and family life, protection of personal data, and non-discrimination. The European Parliament even defined it as a fundamental right in Recital H of its Resolution. However, this right is secondary, as it derives from fundamental workers' rights. It should not be treated directly as fundamental, since such rights are already established and recognised in numerous documents. Nonetheless, given its close connection to fundamental rights, the R2D undoubtedly holds significant importance for workers.

The R2D is also closely tied to regulations on working hours and rest periods.[28] Like those regulations, it aims to preserve the health of the worker and is, therefore, an essential element of proper and safe work organisation. Given that working hours and rest periods are already regulated by the EU, some argue that these regulations are sufficient.[29] In my opinion, this reasoning stems from the mistaken assumption that the R2D is only about not working after hours. This issue is rooted in a legal dichotomy established by the Working Time Directive,[30] which separates working time from rest periods. The directive indirectly refers to the R2D by regulating maximum working time and minimum periods of daily and weekly rest, which must be observed to protect the health and safety of workers. In Article 5, the legislator uses the phrase 'uninterrupted rest period', making it clear that these rest periods must not be disrupted by, for example, electronic communications. The rest period cannot involve any activity for the employer that would limit the worker's freedom to manage their own time, even to the minimum extent.[31] Moreover, the Court of Justice of the European Union ruled that the timeframe during which a worker at home is obliged to respond to employer calls

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[28] Katarzyna Jaworska, 'The Right to Disconnect' (2022) 29 Studia z zakresu Prawa Pracy i Polityki Społecznej 51, 53 <10.4467/25444654SPP.22.005.15373> accessed 5 March 2024.

[29] Krzysztof Walczak, Maciej Chakowski, 'Rozwój nowoczesnych technologii w zatrudnieniu a konieczność wprowadzenia odrębnej instytucji prawnej, jaką jest prawo do bycia offline' (2024) 31(3) Studia z zakresu Prawa Pracy i Polityki Społecznej 211, 213–214 <https://doi.org/10.4467/25444654SPP.24.013.19929> accessed 5 March 2024.

[30] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time [2003] OJ L299/9.

[31] Małgorzata Kurzynoga, 'Propozycje Parlamentu Europejskiego unormowania prawa pracowników „do odłączenia" (the R2D)' (2022) 5 Praca i Zabezpieczenie Społeczne 3, 5–6 <doi:10.33226/0032-6186.2022.5.1> accessed 5 March 2024.

in a short period must be regarded as working time.[32] If a worker using digital tools communicates with the employer or performs work-related tasks outside of working hours due to the employer's specific needs, overtime regulations should apply. However, this approach fails to consider situations where a worker's rest is disrupted by calls or messages, even though no actual work is performed. In such cases, claiming overtime pay becomes problematic. Additionally, what happens if, due to constant notifications, a worker mistakenly assumes they need to work, completes the task, and later finds out it was not an overtime order? The employer might argue that the worker voluntarily interrupted their rest period. The R2D is also about protecting workers' physical and mental health by effectively ensuring their rest time.[33] In other words, it aims to safeguard workers from disruptions to their rest, which is currently not adequately covered by existing regulations, despite these disruptions significantly impacting the quality of rest. The ETUC goes a step further by asserting that the R2D already belongs to every worker, and the directive's purpose is simply to ensure its enforcement.

Moreover, labour law serves a protective function, and to maintain this function in a changing world it must adapt to current needs. Numerous studies have shown that current regulations are not sufficient, so action is required to ensure that workers can exercise their rights in this new reality and boundaries between professional and private life are reinforced.[34] The initiative to regulate the R2D aligns with recent actions by the European Union to improve working conditions, such as Directive 2022/2041 on adequate minimum wages,[35] the proposal for a directive on improving working conditions in platform work,[36] or the 2023 European Declaration on Digital Rights and Principles for Digital Decade.[37]

The concept of the R2D can have various dimensions. It can be limited to the worker's ability to refrain from working outside working hours or extended to a worker's duty, where non-compliance may bring negative consequences. It may also constitute an employer's duty to disconnect – in this scenario, employers are obliged to ensure that workers do not work during their rest periods, which means that the workers are disconnected even against their will. There is also the 'right to a chosen connection', where the worker can decide whether to connect outside

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[32] Case C-518/205 *Ville de Nivelles v Rudy Matzak* [2018], OJ C 414, 14 December 2015.

[33] European Law Institute, 'Guiding Principles on Implementing Workers' Right to Disconnect' (2023) 15<https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Guiding_Principles_Workers_Right_to_Disconnect.pdf> accessed 19 June 2024.

[34] Loïc Lerouge, Francisco Trujillo Pons (n 4) 452.

[35] Directive 2022/2041 on adequate minimum wages [2022] <http://data.europa.eu/eli/dir/2022/2041/oj> accessed 5 March 2024.

[36] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work [2021] COM/2021/762 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52021PC0762> accessed 5 March 2024.

[37] European Declaration on Digital Rights and Principles for the Digital Decade [2023] C 23/01 PUB/2023/89.

their usual work periods.[38] Since it is established that the R2D stems from the right to safe working conditions and is closely tied to the right to rest, workers cannot have complete discretion over whether to exercise this right. The Latin maxim *Volenti non fit iniuria* undergoes many limitations in labour law, especially when worker health is at stake. In a sense, a worker must also use this right to protect their health. I believe that imposing a strict disconnection obligation on the employer is excessive and would significantly limit flexible work arrangements. However, giving workers full discretion regarding disconnection will not yield the expected results and contradicts the nature of this right. What if workers choose not to disconnect because they believe it will lead to career advancement? In exercising the R2D, workers' conduct is essential, as they are responsible for ensuring their health and safety, as well as that of others at work. Therefore, they should manage their time properly and respect the right of others to rest. The R2D should be seen as a shared responsibility between employers and workers.[39]

In my opinion, employers should enable workers to exercise their rights, and their duties should primarily involve raising awareness, providing tailored methods and tools, and supervising, rather than directly disconnecting a worker. Although some 'hard' organizational measures, such as server blocking, may lead to forced disconnection, this should not be the employer's primary goal. If workers do not exercise their rights, the employer should identify the reasons and reorganise work or apply disciplinary measures – after all, ensuring adequate rest is essential and workers cannot waive this entitlement.

V. SCOPE OF THE FUTURE LEGISLATION ON THE R2D – KEY ISSUES

Since the social partners have failed to prepare relevant proposals for introducing the R2D, it is necessary to revisit the European Parliament's resolution to determine which provisions are crucial for future regulation and whether they require any amendments or elaboration.

1. DEFINITION AND PERSONAL SCOPE OF THE R2D

So far, national legal regulations do not provide a clear definition of the R2D. If uniform regulation is to be introduced at the EU level, it is crucial to include a definition in a future directive. The R2D is defined by the European Parliament

[38] Eurofund (n 6) 48.
[39] Małgorzata Kurzynoga (n 31) 10.

in Article 2(1) as the right not to engage in work-related activities or communications by means of digital tools, directly or indirectly, outside working hours. The resolution explains that this includes phone calls, emails, or other messages. In my view, the future directive should clarify that the R2D consists of two elements: the right not to respond to various work-related communications, and the right not to be disturbed by work-related matters during leisure time (in other words, the duty of others to respect a worker's R2D), with certain exceptions.[40] It should also clearly state that disconnection covers interactions with superiors, co-workers, and customers of the employer.

Some doubts may arise concerning the personal scope of the R2D. The social partners' proposal to include the R2D in the telework agreement might imply that it would apply exclusively to teleworkers.[41] Considering the expansion of ICT and digital tools in work processes, I believe that this right should be extended to the broadest possible group of workers, a view also supported by the European Parliament. According to the proposal, the R2D should apply to all sectors, both public and private, and all workers, regardless of their status or working arrangements, provided they use digital tools for work purposes.[42] This means it would cover not only remote or teleworkers but also those working on the employer's premises, whether they use digital tools constantly, regularly, or incidentally. Importantly, when determining worker status, the criteria established by CJEU case law should be considered.[43] Thus, the personal scope of the future directive should also cover the bogus self-employment. Finally, it should apply to all employing entities, regardless of the number of workers employed. Naturally, broad application does not mean all workers will be subject to the same modalities of application.[44]

The European Parliament's proposal refers to Directive 2003/88/EC, which provides for derogations from minimum rest periods in the case of managing executives or other persons with autonomous decision-making powers. Consequently, it is unclear whether they can exercise their R2D. To avoid any ambiguity, the future directive should explicitly state that there are no subject exemptions. I believe this is important given the high levels of mental and physical strain faced by managing executives, provided that practical solutions take into account

[40] Irmina Miernicka, 'Prawo do odłączenia się w świetle rezolucji Parlamentu Europejskiego z dnia 21 stycznia 2021 roku zawierającej zalecenia dla Komisji w sprawie prawa do bycia offline' (2022) 129 Przegląd Prawa i Administracji 123, 129 <https://doi.org/10.19195/0137-1134.129.8> accessed 5 March 2024.

[41] ETUC, 'ETUC response to the Commission's first-phase consultation of the European social partners on possible action in the area of telework and workers' right to disconnect' (2024) 2 <https://www.etuc.org/sites/default/files/document/file/2024-06/ETUC%20response%20to%20the%20Commission%20...%20Telework%20%20workers%27%20right%20to%20disconnect.pdf> accessed 12 August 2024.

[42] Proposal for a Directive on the R2D Article 1 para 1.

[43] Proposal for a Directive on the R2D Recital 15.

[44] ELI (n 33) 18

the interests of employers and the special regulations applicable to this group.[45] A similar view on this issue was also expressed by the ETUC.[46]

2. OBLIGATIONS OF EMPLOYERS AND WORKERS

The proposed directive primarily emphasises the employer's responsibility to enable workers to disconnect after working hours. However, it is important to recognize that the successful implementation of the R2D requires collaboration from all the parties involved.

Regarding employers' responsibilities, special emphasis is placed on two measures for implementing the R2D: establishing rules for reasonable use, including practical arrangements for switching off digital tools used for work purposes and monitoring the time spent on work-related duties by introducing a system for measuring working time. Thus, it is evident that the European Parliament's proposal requires employers to adopt tangible solutions in this regard, rather than merely engage in preventive and educational actions.

In my opinion, mandatory time tracking may reduce the flexibility that many modern work environments rely on, particularly for remote or project-based work, where strict time measurement can feel overly rigid. For these groups, implementing measures must allow for dispersed working hours and disconnection after a certain number of hours, rather than at a specific time during the day. It might be necessary to move beyond a strictly quantitative approach to working time and instead assess the workload. Additionally, setting up and managing mandatory monitoring systems could impose a significant administrative burden on employers, particularly smaller companies. Moreover, in some work models, such as creative industries, productivity is not easily measured by time alone, making mandatory tracking less effective.

There should be a graduation of employers' obligations, starting with preventive actions, such as informational and educational measures that raise awareness and provide practical arrangements for switching off digital tools. Simplifying the dialogue on the quality of working conditions, their impact on occupational health, and promoting educational approach are key to implementing the R2D,[47] as workers' rest periods are frequently violated unintentionally. This often results from poor communication in the workplace and the absence of rules regarding contact with, for example, remote or task-based workers. Additionally, some

[45] Irmina Miernicka, see No 38, 131; Małgorzata Kurzynoga, Krzysztof Kurosz, 'Prawo kadry zarządzającej i kierowniczej do bycia offline na przykładzie orzeczenia kolumbijskiego trybunału konstytucyjnego' (2024) 31 Studia z zakresu Prawa Pracy i Polityki Społecznej 167, 176–178 <doi:10.4467/25444654SPP.24.013.19926.>.

[46] ETUC, 'Position on the R2D' (2021) <https://www.etuc.org/en/document/etuc-position-right-disconnect> accessed 5 March 2024.

[47] Loïc Lerouge, Francisco Trujillo Pons, see No 4, 464.

workers themselves may be excessively available, hoping to be rewarded by the employer or believing they are expected to be always available. With these considerations in mind, educational and training activities should inform employees about:

- The importance of the R2D and the psychosocial risks of violating it,
- The digital tools used by the employer and the risks associated with them,
- Communication rules and respecting working time regulations,
- The employer's policies and measures to implement the R2D,
- Possible exceptions to providing the R2D.

Next, practical arrangements should be offered by the employer, considering the type of work performed, positions held, working time systems and schedules, digital tools used, communication channels, and other factors. There is a wide range of organizational solutions that can be implemented, from milder approaches like pop-up messages reminding employees about rest, best practices for bulk emails, autoresponders, or availability information in email or chat footers, to more stringent measures like connectivity shutdowns, server blocking, message blocking or delaying, or leaving digital tools at work.[48] If these methods fail to deliver the desired results, the employer should evaluate the reasons behind the shortcomings. Is this due to excessive workload? A normal, constant increase in work demand should not justify assigning overtime work. Is it because of the organisational culture, allowing out of hours contact? Or perhaps the worker is not managing their time effectively or handling additional responsibilities with the hope of some reward? The employer should then consider work reorganisation or corrective actions and introduce mandatory work time monitoring as a final measure. That is why a systematic assessment of the risks of over-connection and its causes must be regularly (e.g. once a year) conducted by all employers.[49]

The proposed directive lacks a clear emphasis on the responsibilities of workers, which are essential for effectively implementing the R2D. Workers should respect established boundaries for work hours and avoid engaging in work-related tasks or communications outside these hours unless otherwise agreed upon. They should comply with company policies and procedures regarding the R2D and make use of the resources and tools provided by their employer. Excessive ambition and the desire to excel cannot justify working excessive hours and forgoing rest. Moreover, workers should also respect their colleagues' R2D by refraining from sending non-urgent communications or expecting immediate responses outside agreed work hours. A significant role is assigned to management, who should demonstrate commitment to the disconnection policies by promoting expected behaviour, creating a culture that avoids out-of-hours contact and identifying necessary behavioural changes. They should also regularly exchange information

[48] Irmina Miernicka, see No 38, 132.
[49] ELI, see No 33, 19.

and participate in the process of evaluating arrangements for switching off digital tools already in place, to avoid infringements of working time regulations. Lastly, they are obliged to support a no-blame culture and guard against detriment to workers for not being contactable.[50]

Workers should also have a duty to reconnect, but this must be limited to extraordinary situations[51] – the proposal in Article 4, paragraph 1, *in fine*, describes these as 'force majeure or other emergencies'. However, these terms are vague and to prevent misuse, company regulations should specify as precisely as possible what constitutes an emergency at a particular workplace or for a specific category of workers, considering i.e. their level of responsibility. Neither the concepts of emergency or force majeure should be equated with mere business needs. It should be a case posing serious risk to people or potential serious damage to the business, its customers and/or its shareholders or legal event whose urgency requires the adoption of special measures or immediate responses.[52] Employers should establish with each worker which communication channel will be used for emergencies and specify the authorised contacts (e.g., only a supervisor or employer). They should also clarify the exact scenarios in which these contacts may reach the worker. This way, if a worker on leave receives a call from their supervisor, they will understand it is an emergency. There is no doubt that in the case of reconnection, a worker must be compensated. It is not clear from the proposal, however, whether overtime allowance is a sufficient form of compensation or if it should be an additional, special compensation for violating the R2D.[53]

3. PRIVACY AND DATA PROTECTION

The R2D is inseparably linked to the right to privacy. Spain has even included it in data protection legislation, highlighting its importance in ensuring privacy while using digital devices in the workplace. This is due to three main reasons. Firstly, the use of digital technologies and systems for measuring working time may lead to constant surveillance of workers. Secondly, this can result in the disproportionate and illegal collection of data on their location, habits, private life, or health. Thirdly, the power imbalance between a worker as a data subject and an employer as a data controller often means that a worker's consent to the processing of personal data is not freely given.[54]

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[50] Workplace Relations Commission (n 16) 8; 2020 Framework Agreement on Digitalisation, (n 18), 10.

[51] ELI (n 33) 21.

[52] ELI (n 33) 21–22.

[53] Irmina Miernicka (n 38) 133.

[54] The Resolution Pt 17; Paul Secunda (n 14) 9.

The proposed directive stipulates that employers shall process personal data only to record an individual worker's working time and by existing regulations, however, it lacks a clear instruction on protecting worker privacy. Specifically, this should include:

- An obligation to assess the impact of digital tools and measures implementing the R2D on personal data protection,
- An obligation to ensure the security of personal data processed in this context,
- An information obligation regarding the data processed by digital tools and the measures implementing the R2D,
- Training for workers on using available tools and measures to protect their personal data.

This is particularly important for those working remotely, using private equipment, private internet connections, or working under task-based systems, but should be applied equally to all workers using digital tools, regardless of their work organization.

4. PROTECTIVE MEASURES AND ENFORCEMENT

The legal regulation of the R2D would not be complete without protective measures for workers and mechanisms to address potential infringements. Such protective and enforcement measures are often absent in existing national legislation.

First, according to the proposal of the European Parliament, employers are required to perform health and safety assessments, including psychosocial risk assessments, concerning the R2D (Article 4, paragraph 1, Pt c). In February 2022, the World Health Organization and the International Labour Organization published a joint technical brief on healthy and safe teleworking, which emphasised that enterprises and governments should place clear limits on workplace surveillance and support workers' disconnection to reduce the negative physical and mental health implications.[55] Therefore, the obligation set out in the proposed directive can potentially lead to greater protection of workers' mental health, particularly regarding the risks associated with the use of digital tools.

Secondly, in cases where any derogation from the implementation of the R2D is permitted, employers must provide each affected worker with a written explanation substantiating the need for the derogation on every occasion it is invoked. The requirement for a written explanation may seem overly formal given the extraordinary circumstances. It might suffice to present the reasons for deroga-

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[55] World Health Organization and International Labour Organization, 'Healthy and safe telework: Technical brief' (Geneva 2021) 8, 12–13 <https://www.who.int/publications/i/item/9789240040977> accessed 5 March 2024.

tion in a format that ensures the worker is informed, such as through an email or other electronic message.[56]

Thirdly, the increase in workplace connectivity should not result in negative consequences in terms of recruitment or career advancement. Accordingly, under Article 5, Member States must ensure that discrimination, less favourable treatment, dismissal, or other adverse actions by employers due to the fact that workers have exercised or sought to exercise their R2D are prohibited. Given the challenges in proving that a worker was treated unfairly, the worker only needs to present facts that raise a presumption of such treatment. It would then fall to the employer to demonstrate that the adverse treatment was due to reasons unrelated to the worker exercising or attempting to exercise their R2D.

In case of the R2D violation, workers shall have access to swift, effective, and impartial dispute resolution mechanisms, as well as the right to redress (Article 6, paragraph 1). Member States are required to establish rules on effective, proportionate, and dissuasive penalties for infringements of national provisions. These proposed measures are essential – not only will workers be granted the R2D, but, perhaps more importantly in practice, they will be protected from negative consequences when exercising this right. Furthermore, employers will be prohibited from promoting continuous availability or rewarding employees who work outside of regular hours, as this could result in claims of unequal treatment. This is particularly important for workers who cannot be available outside regular working hours due to family, educational obligations, or health reasons.

VI. CLOSING REMARKS

The circumstances described in the article support the idea that future regulation of the R2D at the EU level is only a matter of time. Although legal acts relating to working time, rest periods, and health and safety are already in place, they do not guarantee sufficient protection for workers, and implementing some of these provisions may be challenging in jobs that rely on digital technologies. The European Parliament points out that the R2D is an inseparable part of the new working patterns in the digital era and should be considered an important social policy instrument at the EU level.[57] The digital transition should be guided by respect for human rights and the fundamental rights and values of the EU, with a positive impact on workers and working conditions.[58]

[56] Irmina Miernicka (n 38) 133.

[57] The Resolution Pt H.

[58] The Resolution Pt C.

Delegating further work to the European social partners was a good solution, as they should play a central role in defining the practical details of the R2D. It was also desirable to turn their actions into a directive, as previous autonomous framework agreements have shown that implementation can be particularly challenging in countries where social dialogue structures are weakly developed,[59] leading to a differential impact on working conditions. However, due to the absence of consensus, the matter has returned to the European Commission's agenda to guarantee real protection of workers' rights. Still, some issues related to future legal regulation require further consideration.

Determining the origins of the R2D, along with its main functions, helps counter arguments about its redundancy while also enabling a clearer definition of its character, implementation, and regulation. EU legislation in this regard can only be general to reconcile the benefits of digitalisation with the need for effective worker protection. Detailed arrangements ought to be tailored to specific workplaces.[60] Nevertheless, the future directive should be more comprehensive than the existing legislation of Member States to provide uniform protection for workers throughout the EU.

Thus, it seems that minimum legal regulation at the EU level should specify the broad definition and personal scope of the R2D, the measures necessary for its implementation, the procedure for carrying out these measures (involving the role of Member States, social partners, and employers), possible derogations, and protection mechanisms (primarily protection against discrimination). This would ensure that workers can fully exercise this right without fear of repercussions. The draft directive proposed by the European Parliament contains most of these elements, but some still require further discussion and clarification to be applied effectively, as I have outlined in earlier sections of the paper.

Special emphasis should be placed on clearly defining the R2D, extending it to all workers using digital tools for work purposes, dividing the responsibilities between the parties in the employment relationship, and ensuring adequate protection for already acquired rights, including the right to privacy. It is also important to note that workers themselves have responsibilities regarding disconnection and proper work organization – an aspect currently missing from the proposal. The successful implementation of the R2D requires a collective effort across the entire workplace.

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[59] European Commission, 'Study on the implementation of the autonomous framework agreement on violence and harassment at work' (2015) see, i.a., 67, 85, 98. <https://op.europa.eu/en/publication-detail/-/publication/09cef40c-0954-11e7-8a35-01aa75ed71a1/language-en> accessed 5 March 2024.

[60] Irmina Miernicka (n 38) 138.

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Studia Iuridica 105
ISSN 0137-4346; e-ISSN 2544-3135
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https://creativecommons.org/licenses/by/4.0/
https://doi.org/10.31338/2544-3135.si.2025-105.4

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THE CONCEPT OF IRREGULARITY IN THE IMPLEMENTATION OF PROJECTS CO-FINANCED BY EU FUNDS IN THE EUROPEAN UNION LAW: LESSONS FOR THE LEGISLATOR AND THE BODIES INVOLVED IN THE DISTRIBUTION OF EU FUNDS[1]

Abstract

The article aims to comprehensively discuss the concept of irregularity, which is a central category for EU funds. The analysis verifies whether and to what extent in the current normative environment the existing case law relevant for the interpretation of the elements of this concept remains valid and whether the provisions provided for in the new so-called Polish implementing act meet the requirements of the EU law in this regard. The conducted analysis proved, among others, that to this day, the judgment of the Constitutional Tribunal in case P 1/11 has not been reflected. Despite the fact that the Constitutional Tribunal ruled that it is inadmissible to derive the obligations of beneficiaries from the internal law, it is still a common practice that the violation of such acts is the basis for finding irregularities and issuing a decision on recovery. On this

[1] This article is the result of research funded by the University of Warsaw in connection with a project supported by the internal grant system under the 'Excellence Initiative – Research University' (Polish: „Inicjatywa doskonałości – Uczelnia Badawcza") programme PSP 501-D122-20-0004313.

basis, the author formulates appropriate conclusions for the legislator and the authorities involved in the distribution of EU funds.

SŁOWA KLUCZOWE

nieprawidłowość, fundusze unijne, polityka spójności, rozporządzenie 2988/95, rozporządzenie 1303/2013, rozporządzenie 2021/1060

KEYWORDS

irregularity, EU funds, cohesion policy, regulation 2988/95, regulation 1303/2013, regulation 2021/1060

I. INTRODUCTION

Violations committed by beneficiaries in the course of implementation of projects co-financed from the EU funds are, in a way, inherent in the nature of this type of investments. These breaches are not always intentional, bearing the hallmarks of the so-called subsidy fraud.[2] Often, they are the result of difficulties encountered by beneficiaries in navigating the complicated and complex legal environment governing the rules of spending European funds, which is characterized by far-reaching formalism and rigour. Consequently, the breaches that occur are of varying seriousness and have different legal consequences and effects for beneficiaries. Not every breach entails an automatic sanction in the form of a financial correction, termination of a grant agreement or criminal liability or liability for breach of public finance discipline. Not every infringement during project implementation will constitute an irregularity in the sense of the EU law, which is a central category for spending the European funds.

[2] Article 297 § 1 of the Criminal Code Act (Polish: Kodeks karny): 'Whoever, in order to obtain for himself or for someone else, from a bank or an organisational unit conducting similar business activity pursuant to the Act or from an authority or institution disposing of public funds – a credit, a cash loan, a suretyship, a guarantee, a letter of credit, a grant, a subsidy, a bank confirmation of an obligation arising from a suretyship or from a guarantee or a similar cash benefit for a specific economic purpose, payment instrument or a public procurement contract, submits a forged, counterfeited, false or untrue document or an untrustworthy written statement concerning circumstances of material importance for obtaining the said financial support, payment instrument or procurement contract, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years' (consolidated text: Journal of Laws of 2024, 17).

The new EU financial perspective 2021–2027 and the legislative package adopted for it, including the long-awaited in Poland Act of 28 April 2022 on the rules for the implementation of tasks financed from European funds in the financial perspective 2021–2027[3] [hereinafter: the Implementation Act] (Polish: Ustawa wdrożeniowa), provide the impetus to lean on the notion of irregularities. This category is of key importance for the implementation of EU funds, delineating the responsibilities of Member States, such as including the prevention and detection of irregularities to protect EU budgetary interests.

This article aims to provide a comprehensive discussion of the notion of irregularity in the current normative environment, taking into account the latest case law of the Court of Justice of the European Union, as well as Polish courts and the decision-making practice of national authorities involved in the distribution of European funds to date. The performed analysis serves to verify whether, and to what extent, the hitherto prevailing line of interpretation concerning the elements constituting the notion in question remains up-to-date, and whether the solutions provided for in the new Implementation Act correspond to the requirements posed in this respect by EU law. This, in turn, allows *in fine* to formulate appropriate conclusions for the legislator and the bodies involved in the distribution of EU funds. The author first presents the legal basis and the scope of application of the definition of irregularity (Part II), and then discusses the elements constituting this category (Part III) and the obligations and consequences related to their identification (Part IV). The final part contains conclusions resulting from the analysis, including postulates addressed to the Polish legislator (*de lege ferenda* conclusions) and to the bodies applying the law.

The reflections on this subject are focused on cohesion policy (also referred to as structural or regional policy), which should be understood as 'all activities of public authorities aimed at the optimal use of the resources of countries and regions, which ensure their sustainable economic and social growth and a high level of competitiveness'.[4] Given the fact that Poland has been one of the main beneficiaries of the Cohesion and Structural Funds,[5] this article will focus on the identification of irregularities that may occur in relation to investments carried out with the assistance of funds granted specifically under the Cohesion Policy.[6]

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[3] European funds in the financial perspective 2021–2027, Journal of Laws of 2022, 1079.

[4] Justyna Łacny, *Ochrona interesów finansowych Unii Europejskiej w dziedzinie polityki spójności*, Warsaw 2010, 91.

[5] European Commission website, <https://cohesion-data.ec.europa.eu/countries/PL>, Cohesion Open Data Platform (accessed 5 February 2023); see more Paweł Churski, Tomasz Herodowicz, Robert Perdał, 'Rola środków polityki spójności pozyskiwanych przez samorząd terytorialny w rozwoju społeczno-gospodarczym ośrodków regionalnych w Polsce', Samorząd Terytorialny 2016, No 7–8, 96.

[6] See more about effective EU policy Michael Baun, Marek Dan (eds), *Cohesion policy in the European Union*, Houndmills–Basingstoke–Hampshire–New York, New York 2014; Willem Molle, *European Cohesion Policy*, Londyn 2007.

II. LEGAL BASIS AND SCOPE OF APPLICATION OF THE DEFINITION OF IRREGULARITY

A cursory review of the EU legal acts governing the spending of European funds may lead the reader into some consternation. It appears that in the current state of the law there are two categories of irregularity next to each other. In the literature they are referred to as horizontal and sectoral.[7] The former is defined in Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests[8] [hereinafter Regulation 2988/95]. The aforementioned act regulates general rules on checks, measures and penalties concerning irregularities for the protection of the EU's financial interests.[9] The definition of irregularities contained therein is referred to as horizontal, as it sets out requirements applicable to all EU policies, including the Common Agricultural Policy [hereinafter CAP].[10]

The second category of irregularity is referred to as sectoral, as it was adopted on the basis of regulations that set out rules for the implementation of specific European funds. Such regulations include Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund, as well as laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund, and repealing Council Regulation (EC) No 1083/2006[11] [hereinafter Regulation 1303/2013]. These regulations also include Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021, laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Fair Transition Fund and the European Maritime, Fisheries and Aquaculture Fund together with the financial rules for these Funds and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Financial Support Facility for Border Management and Visa Pol-

[7] Justyna Łacny, 'Przedawnienie nieprawidłowości w wydatkowaniu funduszy Unii Europejskiej w świetle prawa Unii Europejskiej i orzecznictwa Trybunału Sprawiedliwości', Temidium 2022, No 2, 41 –51.

[8] Journal of Laws 23 December 1995, 312, 1.

[9] cf Article 1(1) of Regulation 2988/95.

[10] Justyna Łacny, 'Skutki nieprawidłowego wydatkowania funduszy UE w świetle prawa UE i orzecznictwa sądów UE', part I, Temidium 2017, No 3, 35; see more Justyna Łacny, *Korekty finansowe nakładane przez Komisję Europejską na państwa członkowskie za niezgodne z prawem wydatkowanie funduszy Unii Europejskiej*, Warsaw 2017, 49–61.

[11] Official Journal of the European Union L 347, 20 December 2013, 320.

icy[12] [hereinafter Regulation 2021/1060]. These two regulations (also commonly known as general regulations) share a feature, they formulate the key rules for the disbursement of EU funds ensuring the implementation of cohesion policy, with Regulation 1303/2013 being applied to programs and operations under the 2014–2020 programming period and Regulation 2021/1060 playing a key role from the perspective of cohesion policy implementation in 2021–2027. Therefore, the definitions used under both those general regulations could potentially be applicable, as beneficiaries continue to implement projects that received support under operational programs from the previous programming period. Specifically, the previous programming period, covering the years 2014–2020, is subject to the so-called *n+3* rule meaning that funds must be spent by the end of the third year after their commitment to the programme. Hence, in this case, beneficiaries were required to complete physical, material, and financial aspects of their projects by 31 December 2023. However, for 'unfinished' projects – those not fully completed or financially settled by the end of the programming period – there was an opportunity to submit a final application by 31 March 2024. This means that, as of now, there may still be ongoing projects from the 2014 – 2020 programming period, though the number is gradually decreasing as the final deadlines are approaching. An example illustrating the above-mentioned thesis are projects implemented under the European Regional Development Fund (ERDF), which encountered difficulties resulting from external factors, such as the COVID-19 pandemic, leading to the need to extend their implementation deadlines within permissible frameworks. Such cases demonstrate how both general regulations can still apply during the closure of the previous programming period.

Irregularity (in horizontal terms) is defined in Article 1(2) of Regulation 2988/95 as 'any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure'.[13] Therefore, such a definition requires[14] several conditions to be met cumulatively. Firstly, the occurrence of an act or omission (negligence) by an economic operator, understood under Article 7 as a natural person, a legal person and any other entity having legal capacity under national law who has committed the irregularity, participated in the irregularity or who is responsible for or has an obligation to

[12] Official Journal of the European Union L 231, 30 June 2021, 159.

[13] cf Article 1(2) of Regulation 2988/95.

[14] Justyna Łacny, 'Wydatkowanie funduszy Unii Europejskiej w wyniku nieprawidłowości. Elementy definicyjne pojęcia „nieprawidłowość" – wprowadzenie i wyrok Trybunału Sprawiedliwości z 26.05.2016 r. w połączonych sprawach Judeţul Neamţ i Judeţul Bacău przeciwko Ministerul Dezvoltării Regionale și Administrației Publice', European Judicial Review 2018, No 1, 49, together with the literature cited therein.

prevent the irregularity. Secondly, a breach of Union law. Thirdly, damage to the general budget of the EU or the risk of it being caused by the funding of unjustified expenditure from the general budget.[15]

The definition thus outlined is slightly different from the category of irregularity under the sectoral approach. Regulation 1303/2013 defines irregularity according to Article 2(36) as 'any breach of Union law, or of national law relating to its application, resulting from an act or omission by an economic operator involved in the implementation of the ESI Funds,[16] which has, or would have, the effect of prejudicing the budget of the Union by charging an unjustified item of expenditure to the budget of the Union'. Under the new General Regulation, minor editorial changes have been made to the wording of this definition. According to Article 2(31) of Regulation 2021/1060, an irregularity is now understood as 'any breach of applicable law, resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the budget of the Union by charging unjustified expenditure to that budget'. Thus, the EU legislator refers to an infringement of any rule applicable in a given case (without differentiating that it is a national or EU regulation). By contrast, invariably under both general regulations, an economic operator is understood as any natural or legal person or other entity taking part in the implementation of assistance from the Funds, with the exception of a Member State exercising its prerogatives as a public authority.[17]

A juxtaposition of the definitions of irregularity in horizontal and sectoral terms shows that they differ in scope, although the differences are not significant.[18] In the personal sphere, they define differently the economic operator whose acts or omissions may be the source of the irregularity. Under the general regulations, it is understood more narrowly by excluding from the scope of the definition the Member State in respect of the exercise of its powers as a public authority. In the material sphere, on the other hand, the General Regulations define the scope of the infringement more broadly by extending it to any legislation and not only to EU law regulations.

In this context, a question arises as to whether potential failures in the disbursement of European funds should be qualified as irregularities on the basis of the horizontal definition in Regulation 2988/95 or on the basis of the sectoral definition in the wording of the general regulations. It follows from the well-established case law of the Court of Justice of the European Union [hereinafter CJEU]

[15] cf the opinion of Advocate General Eleanor Sharpston of 17 November 2015 in Case C-406/14, *Wrocław – Miasto na prawach powiatu v Minister Infrastruktura i Rozwoju,* ECLI:EU:C:2015:761 (46).

[16] i.e., in accordance with recital 2 of the preamble to Regulation 1303/2013 of the following funds: European Regional Development Fund (ERDF), European Social Fund (ESF), Cohesion Fund, European Agricultural Fund for Rural Development (EAFRD) and European Maritime and Fisheries Fund (EMFF).

[17] cf Article 2(37) of Regulation 1303/2013 and Article 2(30) of Regulation 2021/1060.

[18] Justyna Łacny (n 7) 43.

that the point of reference should be the provisions of the general regulations serving as a basis for classifying the behaviour in question as irregular and for the conduct of proceedings to recover the misused funds.[19]

This does not change the fact that although the described definitions of irregularities differ, as J. Łacny aptly points out, they remain fundamentally convergent.[20] In addition, as the Court points out, these definitions should be subject to uniform interpretation, taking into account not only the wording but also the context and objectives of the regulation.[21] Thus, it should be assumed that the prerequisites of irregularity in the expenditure of European funds amount to the occurrence of three elements (an act or omission by the economic operator, a breach of law, and damage to or the risk of damage to the general budget of the EU),[22] between which there must be a causal link.

III. GROUNDS FOR IRREGULARITY

1. ACT OR OMISSION BY AN ECONOMIC OPERATOR

The first element constituting the notion of irregularity is the act or omission of an economic operator. In line with the observations made above, in the case of irregularities in the spending of cohesion policy funds, the source of the irregularity can only be an economic operator, which is understood to be any natural or legal person, or any other entity involved in the implementation of assistance from the Funds. In practice, the group so outlined will include primarily the beneficiaries of support but also institutions of the implementation system within a given measure (priority or programme), such as managing, intermedi-

[19] The judgment of the CJEU of 18 December 2014 in Case C 599/13 *Somvao*, ECLI:EU:C:2014:2462, paragraph 37 and the case law cited therein.

[20] Justyna Łacny (n 7) 44; similarly, Rafał Poździk, 'Art. 2' in *Ustawa o zasadach realizacji zadań finansowanych ze środków europejskich w perspektywie finansowej 2021–27.* Commentary, Rafał Poździk, Maciej Perkowski (eds), Warsaw 2023, 71.

[21] Judgment of the CJEU of 26 May 2016 in Joined Cases C-260/14 and C-261/14 *Judeţul Neamţ and Judeţul Bacău v Ministerul Dezvoltării Regionale și Administrației Publice*, ECLI:EU:C:2016:360, 34–38.

[22] However, the CJEU has not been entirely consistent and has sometimes subsumed these elements under two conditions, i.e., the act or omission of the economic operator constituting an infringement of the Union law and the damage or potential damage to the Union budget (see CJEU judgment of 2 March 2017 in Case C-584/15 *Glencore Céréales France*, ECLI: EU:C:2017:160, paragraph 38 and the case law cited therein). Notwithstanding the formal differences in classification, they do not affect the very interpretation of the concept of irregularity and the elements constituting that concept.

ate and implementing institutions.[23] At the same time, in line with the sectoral approach, this definition does not include the Member State exercising public authority powers – that is, in practice, the national authority acting in the imperial sphere. As a result, the activities of national authorities involved in the distribution of EU funds, to the extent that they are related to administrative authority (e.g., assessment of applications for funding, decision to award funding, clearance and control of projects) will not be able to be considered as irregularities.[24] *A contrario*, to the extent that these bodies remain party to relationships of a civil law nature (e.g., as beneficiaries carrying out the procurement of services or products under the project), they can be counted as economic operators whose behaviour is a source of irregularity.[25]

At the same time, the regulations commented on do not enumerate a catalogue of potential behaviour that can be considered as irregularities, which makes the range of potential misconduct extremely wide. The annual report of the European Court of Auditors on the implementation of the EU budget for 2021 shows that one of the main sources of irregularities in the cohesion policy spending can still be attributed to failures in the area of public procurement carried out in connection with the implemented projects, accounting for 14% of all the errors reported by the audit institutions.[26] Thus, in the area of project procurement, the sources of irregularities may in practice be a variety of actions (e.g., awarding a contract in the wrong mode, artificially dividing a project into several contracts, applying discriminatory selection criteria) but also omissions (e.g., failure to publish a contract notice, failure to extend the deadlines for submitting tenders in the event of significant changes in the contract documents, or failure to publish the selection or award criteria in the contract notice).[27]

[23] cf Rafał Poździk (n 20) 73.

[24] Grzegorz Karwatowicz, Jarosław Odachowski, 'Definicja legalna „nieprawidłowości" w kontekście funduszy strukturalnych i Funduszu Spójności', Kontrola Państwowa 2009, No 4, 122; see also CJEU judgment of 15 January 2009 in Case C 281/07 *Bayerische Hypotheken und Vereinsbank*, ECLI:EU:C:2009:6, paras 20-22; CJEU judgment of 21 December 2011 in Case C-465/10 *Chambre de commerce et d'industrie de l'Indre,* EU:C:2011:867, para 44). This does not mean, of course, that from the perspective of EU law such failures are acceptable – indeed, they may be subject to a financial correction imposed on a Member State by the European Commission on the basis of Article 104(1) of Regulation 2021/1060 – see in more detail Rafał Poździk (n 20) 74

[25] Rafał Poździk (n 20) 73–74.

[26] European Court of Auditors, Annual Report on the Implementation of the Budget for the Financial Year 2021 and the Activities Financed by the Eighth, Ninth, Tenth and Eleventh European Development Funds (EDFs) for the Financial Year 2021, Luxembourg 2022 , 171–172.

[27] For more on other possible actions and omissions, see Kamil Łoza, 'Article 26', in *Ustawa o zasadach realizacji zadań finansowanych ze środków europejskich w perspektywie finansowej 2021–27*, Rafał Poździk, Maciej Perkowski (eds), Warsaw 2023, 211 with the case law cited therein.

2. BREACH OF LAW

In order to speak of an irregularity, an act or omission of an operator must constitute a source of breach of law. On the grounds of Regulation 2021/1060, it is made clear that this refers in this context to any violation of applicable law – thus both EU law and national law, which, however, has already been confirmed in the jurisprudential practice of the CJEU.[28] Thus, although the wording of the provision dictates a broad interpretation of the premise of a violation of law as including in its scope both failures of the EU law and national law, it should be limited only to the violations of legally binding provisions. Such a view has so far been represented in the literature[29] and should remain valid. In practice, therefore, the point of reference for ascertaining violations by beneficiaries implementing projects in Poland may be two categories of regulations. First, binding acts of the EU law, i.e., primary law (primarily the founding treaties: the Treaty on European Union [hereinafter TEU][30] and the Treaty on the Functioning of the European Union [hereinafter TFEU][31]), and binding instruments adopted under secondary law (regulations, directives and decisions). Second, universally binding acts of law in Poland, namely the Constitution, laws, ratified international agreements, regulations and acts of local law.[32]

This means, therefore, that the premise of a violation of law will not be met if the subject of the violation included exclusively EU soft law acts, such as the recommendations and opinions listed in Article 288 TFEU but also non-binding non-institutional acts, which include, among others, communications, resolutions, explanations or guidelines,[33] such as guidelines issued by the European Commission in the area of public aid law.[34] On the other hand, in the case of sources of domestic law in Poland, a violation of an act of internal law, such as constitutional internally binding acts (resolution, order),[35] or extra-constitutional acts such as instructions, circulars, statutes, regulations or guidelines will not be considered an irregularity.[36]

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[28] See, e.g., Judgment of the CJEU of May 26, 2016 in Joined Cases C-260/14 and C-261/14 *Judeţul Neamţ and Judeţul Bacău v Ministerul Dezvoltării Regionale şi Administraţiei Publice*, ECLI:EU:C:2016:360, 36.

[29] Justyna Łacny (n 10) 34; Grzegorz Karwatowicz, Jarosław Odachowski (n 24) 119.

[30] Official Journal of the European Union C 202, 7/06/2016, 13 (consolidated version).

[31] Official Journal of the European Union C 202 , 7/06/2016, 47 (consolidated version).

[32] Article 87 of the Constitution of the Republic of Poland.

[33] See more broadly Gráinne de Búrca, Paul Craig, *EU Law: Text, Cases, and Materials*, Oxford 2015, 107.

[34] e.g, Guidelines on state aid for climate and environmental protection and energy-related goals from 2022, Journal of Laws Device C 80 of 18/02/2022, 1.

[35] Article 93 of the Constitution of the Republic of Poland.

[36] For more information on internal law acts, see Justyna Mielczarek-Mikołajów, *Akty prawa wewnętrznego organów administracji publicznej*, Wrocław 2021, 85–99.

The last sentence is of particular importance for beneficiaries implementing projects with the support of European funds. For the assessment of the eligibility of expenses (and, therefore, the possibility of their settlement in the form of an advance or refund), which are incurred in the course of project implementation, a key role is played by the guidelines adopted by the minister responsible for regional development,[37] defining common conditions and procedures for the eligibility of expenses.[38] In practice, it is not uncommon that the basis for issuing a decision ordering the reimbursement of funds by the authority[39] are the above-mentioned guidelines (e.g. in connection with the award of a contract in the project without a market research procedure [40]or in violation of the principle of competitiveness[41]).

However, the imposition of an obligation on the beneficiary to repay part or all of the grant in connection with the failure to comply with provisions that do not constitute universally binding law (such as guidelines for the eligibility of expenditures) should be considered inadmissible. This is determined, on the one hand, by Article 93(2) of the Constitution, according to which acts of internal law may not 'constitute the basis of decisions with respect to citizens, legal persons and other entities', and which is confirmed by the Constitutional Tribunal itself. In the context of the problem at hand, one of the most important judgments of the Constitutional Tribunal in cases involving European funds, i.e. P 1/11,[42] should be remembered. In the legal question posed, the WSA in Łódź raised reasonable doubts regarding, in particular, the constitutionality of Article 5(11) of the Act on the Principles of Development Policy (Polish: Ustawa o zasadach prowadzenia polityki rozwoju)[43] and its compliance with Article 87 of the Constitution, which defines a closed catalogue of acts of universally binding law. The cited Article 5(11) of the Act on the Principles of Development Policy[44] directed, in prac-

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[37] i.e., existing guidelines of the Minister of Finance, Funds and Regional Policy on the eligibility of expenditure under the European Regional Development Fund, the European Social Fund and the Cohesion Fund for 2014–2020 [Guidelines 2014–2020] and new guidelines of the Minister Funds and Regional Policy regarding the eligibility of expenditure for 2021–2027.

[38] For more information on the legal nature of guidelines for operational programs financed from European funds, see Jan Podkowik, 'Charakter prawny wytycznych dotyczących programów operacyjnych finansowanych ze środków UE', Zeszyty Naukowe Sądownictwa Administrakcji 2012, No 4, 69–86.

[39] Pursuant to Art. 207 section 1 of the Act of 27 August 2009 on public finances (Polish: Ustawa o finansach publicznych) (consolidated text: Journal of Laws 2002, 1634)

[40] See section 6.5.1 of the Guidelines 2014–2020; see also, e.g., the judgment of the Supreme Administrative Court of 30 July 2020, I GSK 854/20.

[41] See section 6.5.2 of the Guidelines 2014–2020.

[42] Judgment of the Constitutional Tribunal of 12 December 2011, P 1/11.

[43] Act on the principles of conducting development policy (Polish: Ustawa o zasadach prowadzenia polityki rozwoju) (Journal of Laws 2016, 383).

[44] Containing the definition of the implementation system understood as 'principles and procedures applicable to institutions participating in the implementation of development strategies

tice, the determination of the principles of the operational programme (including the selection criteria, the principles of evaluation and selection of applications, the means of appeal) within the internal competition procedure and, thus, the regulation of the rights and obligations of individuals (in the project selection procedure and, in particular, in the appeal procedure) outside the system of universally binding sources.

The Constitutional Tribunal shared the doubts of the Voivodship Administrative Court in Łódź regarding the unconstitutionality of the commented provision and ruled that it was unconstitutional. Although it noted that EU law does not determine in what type of legal acts the rights and obligations of entities applying for funds from regional operational programs are to be normalized. The Tribunal stressed, however, that the freedom of the Polish legislator remains limited due to the obligation to respect the general constitutional principles of the EU, such as the principle of equivalence (according to which national regulations governing the enforcement of claims under the EU law cannot be less favourable to individuals than those governing similar claims based on national law) and the principle of effectiveness (which assumes that national regulations cannot make it practically impossible or excessively difficult to exercise the rights conferred by the EU legal order).[45]

Consequently, in the opinion of the Constitutional Tribunal, it should be considered unacceptable that the rights and obligations of beneficiaries would be regulated by provisions of internal law, not subject to control by the Constitutional Tribunal, in particular, due to their compliance with the principles of decent legislation. The legal situation of the beneficiaries would be less favourable than that of the other addressees of administrative decisions issued solely on the basis of internal law, hindering the exercise by the entitled persons of their rights under the EU law.

Thus, it follows from the Constitutional Tribunal judgment that there is no basis for deriving the obligations of beneficiaries from domestic law. However, the judgment has not been implemented in its entirety, both in the sphere of law-making and application. First, at the level of universally applicable law – including neither the previous,[46] nor the current implementation law – adequate provisions that address all the rights and obligations of applicants and beneficiaries have not

and programs, including management, monitoring, evaluation, control and reporting, as well as the method of coordinating the activities of these institutions'.

[45] On the principle of equivalence and effectiveness as limits to the principle of procedural autonomy of the Member States, see Herwig Hofmann, 'General principles of EU law and EU administrative law' in *European Union Law,* Catherine Barnard, Steve Peers (eds), Oxford 2017.

[46] Act on the principles of implementing cohesion policy programs financed in the 2014–2020 financial perspective (Polish: Ustawa o zasadach realizacji programów w zakresie polityki spójności finansowanych w perspektywie finansowej 2014–2020) (consolidated text: Journal of Laws 2020, 818).

been introduced.[47] Also, as far as the decision-making practice of the relevant institutions is concerned, it is still possible to encounter an approach according to which a violation of the guidelines on eligibility of expenditures is the basis for a finding of irregularity and the issuance of a decision on reimbursement.[48]

At the same time, it is difficult to agree with the view that the obligation contained in the funding agreement to comply with the guidelines eliminates the problem associated with their status.[49] Although the grant agreement is a civil law contract, the competent authority, concluding and controlling the performance of the agreement, performs public tasks and exercises its sovereign powers, including the power to declare an adjustment or obligation to return the grant. Under private law, it is permissible to introduce into the contract provisions that do not have the force of common law. However, despite the civil law nature of the grant contract, the above freedom to regulate the rights of the parties to the contract does not apply to the grant contract as concluded between a public administration body and the beneficiary as an entity occupying a position external to the administration division. Therefore, it would be incorrect to assume that the parties to such a contract could establish that obligations (e.g., the obligation to repay funds) can be ruled on the basis of acts that do not constitute generally applicable law – such as guidelines.[50] Such a practice, moreover, would also be inconsistent with Article 52 of the Charter of Fundamental Rights of the European Union[51] [Charter or CFR], which allows restrictions on the rights and freedoms set forth in the Charter (e.g., the right to an effective remedy) to be imposed only by law.[52]

3. DAMAGE TO THE EU BUDGET

The violation discussed above will constitute an irregularity only to the extent that it may have negative budgetary consequences. Indeed, the last of the mandatory prerequisites for irregularity is the occurrence of actual (real) or potential damage to the EU budget. According to Regulation 2021/1060, an infringement will qualify as an irregularity only if it has caused or could cause damage to the

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[47] Krzysztof Borys and others, 'Art. 6', in *Ustawa o zasadach realizacji zadań finansowanych ze środków europejskich w perspektywie finansowej 2021–27.* Commentary, Rafał Poździk, Maciej Perkowski (eds), Warsaw 2023, 112–113.

[48] In the decision-making practice of the authorities, in the circumstances described, such decisions are most often issued on the basis of Art. 207 section 1 point 2) u.f.p. as an indication of the use of funds in violation of other procedures applicable to their use.

[49] Rafał Poździk (n 20) 92–93.

[50] Similarly, the judgment of the Provincial Administrative Court in Gliwice of 4 July 2016, IV SA/Gl 205/16.

[51] Official Journal of the European Union C 326, 26 October 2012, 391.

[52] Judgment of the Court of Justice of 17 September 2014 in case C-562/12 *Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007–2013 Seirekomitee,* ECLI:EU:C:2014:2229.

general budget of the Union through the financing of unjustified expenditure. The damage is, therefore, related to the expenditure of EU funds (e.g., the Cohesion Fund), from which the various operational programs are financed. At the same time, the view should be supported that although the General Regulation refers expressly to the occurrence of damage to the EU budget, this premise should be understood extensively as including in its scope also negative effects on the budget of the Member State in the case of projects co-financed with State funds.[53]

In the framework of the occurrence of the premise of damage, the actual occurrence of financial damage to the EU budget is not necessary and the potential damage is unrelated to the degree of materiality or inevitability.[54] However, it is disputed whether purely formal violations of the law, which, by their very nature, however, cannot have real financial consequences, can be considered irregularities.[55] One should be in favour of the position that deficiencies in the implementation of projects, which are of a purely technical nature (e.g., with regard to the manner of maintaining project documentation), but do not pose a risk to EU finances, cannot be considered an irregularity. Indeed, as it is aptly pointed out: 'institution of irregularities was not created for the mere fact of preventing violations of the law, but violations of the law resulting in damage to the EU budget'.[56] This, in turn, leads to the key observation that not every failure constitutes the occurrence of an irregularity within the meaning of EU law and, thus, that it may not automatically entail the imposition of a financial correction on the beneficiary.

The above relationship is also noticed by administrative courts, emphasizing that the imposition of financial corrections does not result from the mere fact of a violation of procedures by the beneficiary, but from the fact that such an action or omission causes or could cause damage to the EU budget by financing an unjustified expense.[57] Therefore, it is not sufficient for the authority to indicate that a breach of procedures has occurred, but it is necessary to demonstrate the effects or potential effects that this breach may have in the context of the EU general budget.

[53] Karwatowicz, Odachowski (n 24) 124–125.

[54] See Kamil Łoza (n 27) 210.

[55] This view is shared by Justyna Łacny (n 10) 35. Differently. Poździk (n 20) 74–75, Grzegorz Karwatowicz, Marta Lamch-Rejowska, 'Korekty finansowe jako sankcja za naruszenie przepisów Prawa zamówień publicznych'*,* Zamówienia Publiczne. Doradca 2010, No 1, 30.

[56] Karwatowicz, Odachowski (n 24) 123.

[57] Judgment of the Supreme Administrative Court of 25 September 2015. II GSK 1704/14; Judgment of the WSA in Białystok dated 27 January 2017, I SA/Bk 899/16.

IV. BURDEN OF PROOF AND CONSEQUENCES OF FINDING IRREGULARITIES

As can be seen from the considerations presented above, the mere violation of the law does not automatically determine the occurrence of irregularity, and the demand for reimbursement can justify only such a violation that meets the prerequisites of irregularity discussed above. According to established case law,[58] the occurrence of a total of three elements that make up the concept of 'irregularity', including a causal link between the violation and the damage, must be demonstrated by the authority with the burden of proof. In practice, this means that even if the beneficiary has in fact violated the applicable rules governing the disbursement of funds, the burden of proof is on the competent national authority to demonstrate the damage that such irregularity has caused or may cause to the budget of the European Union and the existing causal link between the failure and the damage.[59]

Determination of irregularities by the authority, in turn, is the premise for imposing a correction. The Supreme Administrative Court has repeatedly emphasized[60] that in determining the amount of the financial correction, the authority must take into account both the nature and gravity of the irregularity, as well as the financial losses incurred by the funds. These assumptions were previously expressed in Article 143(2) of Regulation 1303/2013, which directed Member States to apply proportional corrections. The fact that the new General Regulation does not provide an equivalent to the above provision, however, does not affect the validity of the previous principles under which the imposition of corrections takes place – as the gravity and nature of the irregularity and the financial impact on the EU budget continue to be criteria for determining the proportionality of the correction, as confirmed, among other things, in recital 70 of Regulation 2021/1060.[61]

As a result, the authority cannot limit itself to merely pointing out the legal provision that it believes has been violated, and the financial correction cannot be

[58] This is confirmed both by the jurisprudence practice of administrative courts (cf judgment of the Supreme Administrative Court of 12 October 2017, II GSK 186/16, judgment of the Supreme Administrative Court of 13 December 2016, II GSK 1265/15; judgment of the Supreme Administrative Court of 12 October 2017, II GSK 186/16; judgment of the WSA in Gliwice of 15 April 2019, III SA/Gl 1176/18 judgment of the WSA in Kielce of 29 August 2019, I SA/Ke 249/19) and common law (e.g., judgment of the SO in Toruń of 22 October 2018, I C 545/18.

[59] See also the decision of the Supreme Court of 2 July 2019 in the case of V CSK 60/19.

[60] e.g., Supreme Administrative Court judgment of 7 March 2019, I GSK 1201/18; Supreme Administrative Court judgment of 29 March 2019, I GSK 1147/18; Supreme Administrative Court judgment of 29 March 2019, I GSK 1159/18; Supreme Administrative Court judgment of 10 April 2019, I GSK 1051/18.

[61] See also Łoza (n 27) 219–220.

mechanically and unreflectively imposed on the beneficiary. On the contrary, it should be the result of a careful and independent analysis of the facts of the case by the authority. In turn, the result of such analysis should be a correction appropriate to the circumstances, reflecting both the characteristics and seriousness of the irregularity, taking into account the significance of the damage it caused, or could have caused, under the circumstances of the operation or programme in question. Consequently, in determining the irregularity and adjudicating the amount to be reimbursed, an indispensable element in justifying such a decision is to relate the amount to be reimbursed to the seriousness and severity of the deficiency. This element is considered constitutive of all decisions, and in any such decision the authority, while finding an irregularity, should at the same time make an argument indicating why it adopted the particular amount of financial correction.

The above considerations are worth concluding with the judgment of the Supreme Court of 7 October 2015, I CSK 878/14. In the case in question, the Minister of Economy requested that the defendant company be ordered to pay all of the grant awarded due to the company's alleged implementation of the project in violation of selected provisions of the grant agreement. The Supreme Court took the position that violation of part of the provisions of the grant agreement cannot deprive the entrepreneur of all support. The amount of reimbursement should be adequate and proportional to the severity of the violation. At the same time, it aptly noted that the implementation of aid programs should not lead to an irrational economy of an entrepreneur forced by the fear of losing the entire subsidy, even in the part in which the subsidy was properly used and the public purpose and investment objective were achieved, as was with the specific case. The Supreme Court stressed that: 'the demand for repayment of funds also in the part used correctly cannot be served by a strict view of the relevant EU regulations, if this not only does not correspond to the provisions of Polish law in the relationship between the State Treasury and the party to the contract as to the obligation to repay funds, but also violates the principles of rational economy and reasonable spending of aid funds, and furthermore harms the entrepreneur who is the recipient of the aid granted, used correctly in the essential amount'.[62]

V. SUMMARY

Despite the existence of a kind of dualism in the terminological grid of irregularities in EU law, the analysis carried out showed that the premises of this concept remain convergent. The content of Regulation 2021/1060, adopted as part of

[62] Also Łoza (n 27) 219–220.

the new EU financial perspective for 2021–2027, proves that the EU legislator has not decided to interfere further in the existing scope of the definition of irregularities than purely editorial changes. This means that for the purposes of interpreting irregularities, including the prerequisites that comprise them, the existing jurisprudence and decision-making practice developed both under Regulation 2988/95 and the previous General Regulation remains valid.

Confronting the above with the Polish regulations determining the conditions for implementation of projects with European funding, one must, therefore, conclude that the problems faced by beneficiaries so far also remain relevant. To this day, both in the sphere of lawmaking and law application, the judgment of the Constitutional Tribunal in the case P 1/11 has not been reflected. In light of it, it should be considered unconstitutional to decide on the rights and obligations of beneficiaries on the basis of acts that do not constitute universally binding law. Despite the fact that the Constitutional Tribunal ruled on the inadmissibility of deriving beneficiaries' obligations from the provisions of internal law, it is still common practice that a violation of the guidelines on eligibility of expenses is considered as a basis for determining irregularities and issuing a decision on reimbursement. At the same time, it is difficult to adhere to the position that the obligation to comply with the guidelines contained in the funding agreement eliminates the problem related to their status – although the agreement is of a civil law nature, but the body implementing public tasks and exercising its authority remains a party to it. For this reason, it is necessary to amend the current Implementation Act (especially Articles 5 and 6), so that any issues that may affect the emergence and scope of the obligations of applicants and beneficiaries are regulated exclusively on the basis of universally binding acts, such as the Implementation Act or a relevant regulation issued on the basis of the authorization contained in the Act.

Although the analysis carried out proved that the prerequisites that make up the concept of irregularity should be interpreted broadly, it is indisputable that not every failure leads to its occurrence. The causal link between the identified violation of the law and actual or potential damage to the EU budget must be demonstrated by the authority with the burden of proof. In cases of reimbursement, it is particularly important to correctly distribute the emphasis in the course of argumentation, whether the violation could have caused damage and to what extent. In this context, it should be acknowledged that shortcomings in project implementation, which by their (technical) nature cannot generate actual financial consequences, cannot be considered irregularities, as they do not pose a risk to EU finances.

In turn, the authority's demonstration that an irregularity has occurred in the circumstances of a given case should entail the imposition of a correction that reflects both the nature and gravity of the irregularity, taking into account the significance of the damage it has caused or could cause. It should be emphasized

that excessive rigor not only violates the general principles of proportionality, equity, but can also lead to a waste of public funds. Reimbursement should be made on a proportional basis only to the part and extent that the beneficiary has failed to meet its obligations for reasons on its side. This view summarizes the emerging line of jurisprudence of common courts and the Supreme Court, which pays particular attention to the proportionality of sanctions related to the return of funding in the event of certain deficiencies in the implementation of projects with EU funding.[63]

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[63] Krzysztof Brysiewicz, 'Dofinansowanie ze środków europejskich w orzecznictwie Sądu Najwyższego i sądów powszechnych', Monitor Prawniczy 2014, No 17, 895.

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Studia Iuridica 105
ISSN 0137-4346; e-ISSN 2544-3135
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https://creativecommons.org/licenses/by/4.0/
https://doi.org/10.31338/2544-3135.si.2025-105.5

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DATA PROTECTION FROM THE PERSPECTIVE OF THE CATHOLIC CHURCH IN POLAND – SELECTED PROBLEMS

Abstract

The standards for the protection of personal data processed within the framework of the statutory activities of ecclesiastical entities, such as parishes, dioceses, religious orders, higher seminaries or ecclesiastical associations, are closely related to the freedom of thought, conscience and religion. The constitutionally guaranteed autonomy of the Catholic Church (and other religious organisations) does not preclude them from being subject to a State supervisory authority, such as the President of the Office for Personal Data Protection. Pursuant to Article 91(1) of the GDPR, those churches or other religious organisations which, when the GDPR entered into force, already applied internal data protection rules, have the further possibility to apply autonomous regulations in this respect. The purpose of this study is to show the legal framework for the protection of personal data in the Catholic Church on the basis of particularistic canon law, as well as to present good practices in terms of mutual cooperation between the President of the Office for Personal Data Protection and the Church Data Protection Officer. The

main sources of analysis are the guidelines of the General Decree on the Protection of Individuals with regard to the Processing of Personal Data in the Catholic Church, issued on 13 March 2018 by the Polish Bishops' Conference based on canon 455 of the Code of Canon Law, as well as the annual reports on the activities of the Church Data Protection Officer.

KEYWORDS

GDPR, protection of personal data, the Catholic Church, Church Data Protection Officer, data administrator

SŁOWA KLUCZOWE

RODO, ochrona danych osobowych, Kościół katolicki, Kościelny Inspektor Ochrony Danych, administrator danych

INTRODUCTION

In the common law of the Catholic Church, the protection of personal data stems from the right to the protection of intimacy, regulated in the Code of Canon Law.[1] According to Canon 220: 'No one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy'.[2] The Catholic Church has been concerned with the protection of personal data for a long time, as can be seen, for example, in the penalty of *latae sententiae* excommunication incurred for violation of the secrecy of confession (Canon 1386 of the Code of Canon Law).

Since 25 May 2018, there has been a clear norm allowing churches and other religious associations to have and apply their own data protection regulations. This is because on this date, not only did the Data Protection Act of 10 May 2018[3] come into force, but also the provisions of GDPR[4], the General Data Protection Regulation, were directly applicable in the Polish legal order.

[1] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, 25 January 1983, AAS 75 (1983) part II, 1–317. Legal status as of 18 May 2022.

[2] Original translation approved by the Holy See.

[3] Journal of Laws of 2019, item 1781 consolidated text.

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4 May 2016, 1–88).

Until the GDPR regulations entered into force, the standard of personal data protection in the Polish legal order was influenced by the regulations resulting from the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data,[5] as well as the regulations provided for in the Act of 29 August 1997 on personal data protection.[6] On the ground of the Canon Law in Poland, apart from the provisions of the Code of Canon Law, the framework of personal data protection in the activity of the subjects of the Catholic Church was determined by the Instruction of 23 September 2009 elaborated by the Inspector General for Personal Data Protection and the Secretariat of the Polish Episcopal Conference.[7]

Churches or other religious associations, which at the time of the entry into force of the GDPR already had internal data protection rules in place, were given a further option under Article 91(1) of the GDPR to apply autonomous data protection regulations. However, these regulations had to be aligned with the GDPR.

An example of such detailed rules for the protection of personal data that are still in force today in the Catholic Church is the General Decree on the Protection of Individuals with regard to the Processing of Personal Data in the Catholic Church,[8] issued by the Polish Bishops' Conference on 13 March 2018 on the basis of canon 455 of the Code of Canon Law.

It is worth mentioning that by order of the Digital Affairs Minister of 30 January 2019,[9] pursuant to Article 7(4)(5) of the Act of 8 August 1996 on the Council of Ministers,[10] a Council for cooperation with churches and religious associations in matters of their data processing was established. It provides a forum for discussion on the processing of personal data by church entities. It aims to diagnose areas related to data processing by churches and other religious associations, which may require the support of the Digital Affairs Minister.

The purpose of this study is to show the legal framework for the protection of personal data in the Catholic Church in Poland, as well as to present good

[5] Directive 1995/46/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 U.L.1995.281.31 as amended.

[6] Journal of Laws of 2016, item 922.

[7] 'Instruction Protection of personal data in the activities of the Catholic Church in Poland', Akta Konferencji Episkopatu Polski 2 (2009), 53–59.

[8] Polish Bishops' Conference, General Decree on the protection of natural persons in relation to the processing of personal data in the Catholic Church, 13 March 2018, Akta Konferencji Episkopatu Polski 30 (2018), 31–45.

[9] Order No 3 of the Digital Affairs Minister of 30 January 2019 on the appointment of the Council for cooperation with churches and religious associations in matters of their data processing (Official Journal of the MC of 2019, item 3).

[10] Act of 8 August 1996 on the Council of Ministers (Journal of Laws 2022, item 1188 consolidated text).

practices in terms of mutual cooperation between the President of the Office for Personal Data Protection and the Church Data Protection Officer.

SCOPE OF THE TERM 'PERSONAL DATA'

The term 'personal data' is defined in Article 4(1) of the GDPR and means any information relating to an identified or identifiable natural person ('data subject'). This definition does not contain an enumerative list of what data is personal data. An identifiable natural person is one who can be identified, directly or indirectly, in particular, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. Thus, personal data within the meaning of the GDPR is not only a residential address or a telephone number but also a face on camera footage or a fingerprint. This definition is reproduced in Article 5(1) of the aforementioned General Decree of the Polish Bishops' Conference of 13 March 2018.[11] It should be borne in mind, however, that 'a name' on church grounds means not only a name according to civil status records but also a name received during baptism, confirmation or a name given while performing a religious profession (the so-called 'religious name').

The EU legislator distinguishes between special categories of personal data, known as sensitive data. It includes personal data revealing 'racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership' and genetic and biometric data used to uniquely identify a natural person, as well as data concerning a natural person's health, sexuality or sexual orientation (Article 9(1) GDPR). The criterion for distinguishing the above data is the fact that they directly concern the intimacy of a natural person. It should be borne in mind that the rules on the protection of personal data processed by ecclesiastical entities should be adapted to its doctrinal truths made visible in canon law as can be deduced from recital 4 of the GDPR,[12] which reads 'The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality'.

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[11] Piotr Kroczek, Piotr Skonieczny, *Ochrona danych osobowych w Kościele katolickim. Komentarz do Dekretu ogólnego Konferencji Episkopatu Polski w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych w Kościele katolickim z 2018 roku, Część III. Zagadnienia ogólne. Artykuły 1*–5, Kraków 2022.

[12] Piotr Stanisz, 'Naczelne zasady instytucjonalnych relacji państwo – Kościół', in Artur Mezglewski, Henryk Misztal, Piotr Stanisz, *Prawo wyznaniowe*, Warsaw 2011, 74–88.

CHURCH DATA PROTECTION OFFICER

On the basis of the General Decree of the Polish Bishops' Conference under review, the Church Data Protection Officer, i.e., an independent supervisory authority in matters of personal data protection in the Catholic Church in Poland, has been appointed (Article 35). The Church Data Protection Officer is an office within the meaning of Canon 145 § 1 of the Code of Canon Law ('An ecclesiastical office is any function constituted in a stable manner by divine or ecclesiastical ordinance to be exercised for a spiritual purpose').[13] According to Article 36 of the General Decree, the Church Data Protection Officer is elected for a four-year term by the Plenary Meeting of the Polish Bishops' Conference. Nothing prevents the same person from being elected for successive terms. If the Church Data Protection Officer were to seriously fail in their duties, they may be dismissed from their position. The general decree also provides for the possibility to resign in writing from the office. As the Polish Bishops' Conference indicates, the person performing the function of a Church Data Protection Officer should have adequate knowledge, experience and skills in the field of personal data protection.

The tasks of the Church Data Protection Officer, in accordance with Articles 37–38 of the General Decree, are:

– monitoring and ensuring compliance with data protection legislation within and in accordance with the activities of the Catholic Church and its structures;

– disseminating knowledge on the protection of personal data in the Church;

– advising data officers and data processors in the Church on data protection;

– providing information to the data subject on their rights in relation to the processing of personal data;

– deciding on the admissibility of the transfer of data to a public ecclesiastical legal entity established outside the territory of the Republic of Poland if there are reasonable doubts about the protection of the data;

– cooperating with the national supervisory authority, including sharing information and providing mutual assistance to ensure compliance with data protection legislation;

– monitoring changes in the Church's activities that affect the protection of personal data, in particular, the use of information and communication technologies;

– submitting to the Polish Bishops' Conference proposals for legal regulations or amendments to regulations concerning the protection of personal data;

– examining complaints concerning compliance with the regulations established in the Church with regard to the protection of personal data.

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[13] Remigiusz Sobański, 'Urzędy kościelne', in Józef Krukowski, Remigiusz Sobański, *Komentarz do Kodeksu Prawa Kanonicznego. Księga I. Normy ogólne*, Vol 1, Poznań 2003, 233–235.

Complaints to the Church Data Protection Officer are made by means of traditional correspondence and electronic communication. They mostly concern unjustified application of State laws regarding withdrawals from the Church, irregularities in making personal data public or the denial of the right to a copy of data.[14]

As stipulated in Article 39 of the General Decree, the Church Data Protection Officer prepares an annual report on his activities, which is forwarded to the Polish Bishops' Conference.

DATA PROTECTION LEGISLATION IN THE PRACTICE OF THE CATHOLIC CHURCH

The doctrine of law emphasises that both the Catholic Church and other religious associations do not need to have a single normative act of internal law to regulate the issue of personal data protection.[15] It is sufficient to have and apply their own regulations containing detailed rules for the protection of persons in relation to data processing.[16] The Catholic Church in Poland fulfilled the prerequisites of Article 91(1) of the GDPR and could, therefore, benefit from the possibility to exempt internal activities from the GDPR. The first condition was to apply specific rules for the protection of natural persons in relation to data processing when the GDPR came into force.[17] The second condition was to have the status of a church, religious association or community. According to Article 4 of the Concordat, the Republic of Poland recognises not only the legal personality of the Catholic Church but also the legal personality of all territorial and personal ecclesiastical institutions which have acquired such personality on the basis of the provisions of canon law.[18] The ecclesiastical authority shall notify the competent State authorities accordingly. The third and final condition under Article 91(1) GDPR is to bring its own data protection rules in line with the General Data Protection Regulation.

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[14] e.g., Report on the activities of the Church Data Protection Officer for the period from 6 June 2020 to 7 June 2021, Akta Konferencji Episkopatu Polski No 33 (2021), 266–269.

[15] Natalia Zawadzka, in *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, Edyta Bielak-Jomaa, Dominik Lubasz (eds), Warsaw 2018, 1112–1117.

[16] Paweł Fajgielski, *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz*, Warsaw 2018, 690–695.

[17] Radosław Mędrzycki, 'Wewnętrzna regulacja ochrony danych osobowych w Kościele katolickim w Polsce na tle art. 91 RODO', Prawo Kanoniczne 61 (2018) 4, 137–145, <https://doi.org/10.21697/pk.2018.61.4.07>.

[18] The Concordat between the Holy See and the Republic of Poland, signed in Warsaw on 28 July 1993 (Journal of Laws of 1998, No 51, item 318).

The internal regulation in relation to the Catholic Church in Poland is the aforementioned General Decree of the Polish Episcopal Conference on the Protection of Individuals with regard to the Processing of Personal Data in the Catholic Church, which contains many identical counterparts in the form of articles in the GDPR. However, it should be borne in mind that, depending on the areas of activity of the Catholic Church, not only the provisions of canon law, including those contained in the General Decree, will always apply. The first sphere of activity of the Catholic Church is the activity carried out in 'its own sphere' (Article 25(3) of the Constitution of the Republic of Poland), 'in its own domain' (Article 1 of the Concordat) or 'in its affairs' (Article 2 of the Act of 17 May 1989 on relations between the State and the Catholic Church in the Republic of Poland[19]). These activities are governed exclusively by canon law and concern, for example, the administration of the sacraments, the keeping of parish registers or the appointment of parish priests, i.e., internal matters of the Catholic Church in which the State and local authorities cannot interfere.[20] Another category is mixed matters, which can be the responsibility of both the State and the Church. These include educational activities, the management of cemeteries or the restoration of sacred monuments. The last area of church activities is practically subject to the regulation of State law and is related, among other things, to the conduct of business or donations. In both the second and third areas of ecclesiastical activities, Catholic Church entities are also obliged to comply with State (secular) law.

It should be noted that although the processing of personal data in the context of ecclesiastical activities, such as the keeping of metrological books, the maintenance of parish records or pastoral visits, is in principle performed on the basis of canon law,[21] different mechanisms reflected in State and EU regulations are clearly visible.

The purpose of Church and State data protection legislation is the same, namely the protection of human dignity.[22] Indeed, the concept of human dignity is not

[19] Act of 17 May 1989 on the relationship between the State and the Catholic Church in the Republic of Poland (Journal of Laws of 2023, item 1966 consolidated text).

[20] Piotr Majer, 'Ochrona prywatności w kanonicznym porządku prawnym', in *Ochrona danych osobowych i prawo do prywatności w Kościele*, Piotr Majer (ed), Kraków 2002, 83–124.

[21] Piotr Mazurkiewicz, 'Ochrona danych osobowych w Kościołach i związkach wyznaniowych w świetle rozporządzenia Parlamentu Europejskiego i Radu (UE) 2016/679 z dnia 27 kwietnia 2016 r. w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych)', in *Ochrona danych osobowych w Kościele*, Stanisław Dziekoński, Piotr Drobek (eds), Warsaw 2016, 19–34.

[22] The word 'dignity' (Latin *dignitas*) comes from the Latin *dignus*, which means: worthy of respect and honour, obliged to be respected with great importance. Mirosław Sadowski, *Godność człowieka i dobro wspólne w papieskim nauczaniu społecznym (1878–2005)*, Wrocław 2010, 26–31.

dealt with in theology or philosophy, but also in law, political science, medicine and many other scientific disciplines that address this concept to varying degrees.

Following the entry into force of the GDPR regulations, it is still not necessary for people preparing for particular sacraments to consent to their data being processed by the parish. The mere fact of asking for the administration of a sacrament or sacramental involves the provision of one's personal data and provides the basis for the careful collection, safeguarding and processing of personal data. In contrast, such consent will be necessary when that personal data is used for purposes other than those related to the provision of a religious service. It is not uncommon for Roman Catholic parishes to receive requests from State courts for the data of a person from the baptismal register or the register of the deceased in order to determine the heirs of a statutory succession. As indicated by Article 34(2) of the General Decree, such transfer of personal data is possible if it is necessary for the performance of the tasks laid down by law (point 1), or if it serves a public interest (point 4).

As practice shows, in many issues it is difficult to separate which matters fall under the assessment of the President of the Personal Data Protection Office and which fall under the competence of the Church Data Protection Officer. After all, it is not uncommon for a parish to employ staff or process personal data of beneficiaries of charitable activities who do not always belong to a particular parish.[23] Taking the example of social welfare homes run by religious orders, it is worth emphasising that the Church Data Protection Officer is a supervisory authority only with regard to the processing of personal data of residents of these homes concerning matters related to their membership in the Catholic Church. In the remaining scope, e.g., conclusion of cooperation agreements with external entities or granting authorization to employees of the social welfare home to process personal data, the supervisory authority is the President of the Personal Data Protection Office. It is, therefore, necessary to distinguish in which area only the Church Data Protection Officer is competent, and in which area the President of the Personal Data Protection Office is competent with regard to organisational units run by religious orders.

[23] Ewa Kulesza, 'Ochrona danych osobowych a wolność sumienia i wyznania w prawodawstwie polskim', in *Ochrona danych osobowych i prawo do prywatności w Kościele*, Piotr Majer (ed), Kraków 2002, 12–13; Piotr Skonieczny, 'Zakres podmiotowy Dekretu ogólnego KEP z 13 marca 2018 roku w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych w Kościele katolickim. Prawnoporównawczy punkt widzenia', Annales Canonici 14 (2018), No 1, 69–86.

COOPERATION OF THE CHURCH DATA PROTECTION OFFICER WITH THE PRESIDENT OF THE PERSONAL DATA PROTECTION OFFICE

As stated in Article 59(1) of the Data Protection Act 2018, the President of the Personal Data Protection Office cooperates in matters of personal data protection with the independent supervisory authorities appointed under Article 91 of the GDPR, i.e., among others, the Church Data Protection Officer; the Superintendent of Personal Data Protection established in the Seventh-day Adventist Church or the Evangelical Joint Commission for the Protection of Personal Data established by the Evangelical and Reformed Church. The main purpose of this cooperation is not only to exchange information, but also to provide mutual assistance with regard to compliance with data protection legislation.

As of 2019, only the Church Data Protection Officer has an agreement with the President of the Personal Data Protection Office on cooperation and mutual information sharing, as referred to in Article 59(2) of the Personal Data Protection Act. The relevant agreement was concluded on 10 May 2019. The agreement sets out the principles, scope and form of cooperation between the President of the Personal Data Protection Office and the Church Data Protection Officer, which concerns the implementation of the tasks of both authorities provided for by law, respecting their independence and competence. The purpose of the signed Agreement is the need to reconcile the protection of personal data with the exercise of the fundamental right to religious freedom, guaranteed by international, European and Polish law, also in its institutional dimension, as well as the possibility of ensuring effective cooperation between the Parties to the Agreement in the area of personal data protection. The Parties to the Agreement under consideration undertake to cooperate, in particular, to carry out educational and informational activities regarding the rights of individuals in the field of the right to private life and the right to personal data protection. Cooperation between the Parties to the Agreement shall take the form of periodic or ad hoc exchanges of information on the activities carried out by the Parties to the Agreement within their competence as defined by the provisions of the applicable law.

Within the framework of the aforementioned Agreement, among other things, a training course was organised on 7–9 October 2021 in Zakopane entitled ‘Personal data protection in Church entities: control, chancellery, responses’. The topics of the training included, for example, issues concerning the conduct of inspections with regard to compliance with data protection standards, there was also an opportunity to obtain answers to various legal and canonical issues concerning the practice of diocesan or religious curiae. Furthermore, on 31 January 2023, as part of the celebration of the 17th Personal Data Protection Day, an All-Poland Scientific Conference entitled ‘The Future of Personal Data Protection

in Light of Technological Developments' was organised in the town of Ełk. The programme of this event included a session entitled 'Churches and other religious associations in the service of data protection'.

In April 2023, on the initiative of the President of the Personal Data Protection Office, the Institute of Personal Data Protection Law was established to form a team of experts, practitioners and academics who have a strong influence on the emergence and formation of the data protection system in Poland. The Institute includes both the Church Data Protection Officer and academics scientifically involved in the issue of data protection in church institutions. The aim of the Institute's activities is, among others, to promote best practices and solutions in data processing and protection, through research, reports, education, consultancy and cooperation with other institutions, and participation in the processes of creating legal regulations in this field. It is also worth mentioning the International Scientific Conference organised under the theme 'Current Problems of Personal Data Protection in the Church and the State', held at the Pontifical University of John Paul II in Kraków on 11–12 May 2023. How important it is to raise awareness among employees of Church institutions about data protection law is evidenced, for example, by the training course organised on 11 May 2024 in Kraków – Łagiewniki for approximately one hundred data protection officers performing their function in churches and other religious associations. The training was organised by the Church Data Protection Officer in cooperation with the President of the Personal Data Protection Office. During the training, employees of the Control and Infringement Department of the Office for Personal Data Protection discussed the subject scope of the Office for Personal Data Protection's control, examples of violations of personal data protection regulations, as well as the legal consequences of improper data processing.

The number of complaints addressed to the President of the Personal Data Protection Office against a specific church entity for refusal to delete, publish, update or access personal data is small. There were 11 complaints in 2020, 13 complaints in 2021, five complaints in the following year 2022 and seven complaints in 2023. So far in 2024, the President of the Personal Data Protection Office has not received any complaints concerning churches or other religious associations applying specific rules on the protection of natural persons. It should be noted that the Church Data Protection Officer is not a State administrative body and, therefore, there are no grounds for the President of the Personal Data Protection Office to forward complaints regarding compliance with the canon law on personal data protection to the Church Data Protection Officer in accordance with its jurisdiction. In such cases, the President of the Personal Data Protection Office is obliged to issue a decision on refusal to initiate proceedings, due to the existence of the premise set out in Article 61a § 1 of the Code of Administrative Procedure.[24]

[24] Act of 14 June 1960 – Code of Administrative Procedure (Journal of Laws of 2024, item 572 consolidated text).

CONCLUSION

Resulting from Article 51 of the Polish Constitution,[25] the right to the protection of personal data is enjoyed by everyone, not only citizens. It is clear from the provisions of the GDPR that the regulations therein are intended to secure the right to the protection of personal data and to ensure the free flow of data. Certainly, the need to protect privacy stems directly from the growing sense of threat as a result of contemporary rapid technological change. On the other hand, the 2018 General Decree of the Polish Bishops' Conference indicates the following objectives for the creation of this ecclesiastical document: protection of human dignity, the right to a good name, the right to intimacy and the right to the protection of personal data.[26]

In the General Decree, the Polish Bishops' Conference has taken into account both the principles of protection of natural persons in relation to the processing of their personal data applied so far in the Catholic Church in Poland and the need to reconcile the protection of personal data with the exercise of the fundamental right to religious freedom, which is also guaranteed by positive law, including in its institutional dimension.

It is permissible to apply different data protection rules to ensure that the objectives of the GDPR are met. An example is the limitation of the right to request erasure[27] arising from Article 14(4) of the General Decree, where it is indicated that the right to request erasure does not apply if the data relate to sacraments administered or otherwise relate to the canonical status of a person.

The doctrine of law emphasises that the Church legislator did not canonise (did not recognise as its own law) the provisions of the GDPR, but merely copied their content.[28] Thus, the General Decree of the Polish Bishops' Conference and the EU regulation GDPR are independent normative acts. As emphasised in the literature on the subject, copying the provisions of GDPR, on the one hand, reduced the risk of the provisions of the General Decree of the Polish Bishops' Conference not

[25] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No 78, item 483, as amended).

[26] Piotr Kroczek, Piotr Skonieczny, *Ochrona danych osobowych w Kościele katolickim. Komentarz do Dekretu ogólnego Konferencji Episkopatu Polski w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych w Kościele katolickim z 2018 roku, t. I: Część I. Kwestie wstępne, Część II. Preambuła*, Kraków 2022; Bernard Łukańko, 'Stosunek kościelnej ochrony danych osobowych do RODO – uwagi na marginesie postanowienia Krajowego Sądu Pracy w Norymberdze z dnia 29 maja 2020, 8 Ta 36/20', Studia z Prawa Wyznaniowego 2020, Vol 23, 153–172.

[27] Joanna Buchalska, 'Prawo do bycia zapomnianym – w orzecznictwie polskim', in *Prawo prywatności jako reguła społeczeństwa informacyjnego*, Katarzyna Chałubińska-Jentkiewicz, Ksenia Kakareko, Jacek Sobczak (eds), Warsaw 2017, 147–168.

[28] Piotr Kroczek, *Przetwarzanie danych osobowych przez podmioty Kościoła katolickiego w Polsce: transfer między państwami*, Kraków 2020, 50–51.

being adapted to the EU Regulation, and on the other hand, caused a process of laicisation of its own internal law.

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Studia Iuridica 105
ISSN 0137-4346; e-ISSN 2544-3135
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https://doi.org/10.31338/2544-3135.si.2025-105.6

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COORDINATION AS A CONTEMPORARY CHALLENGE IN THE SCIENCE OF ADMINISTRATIVE LAW

Abstract

Contemporary coordination does not have a uniform normative definition, although the term is often used in legal regulations, especially administrative ones. On the one hand, it retains its lexical meaning and thus is legally undefined. On the other, it has different meanings for the purposes of detailed substantive law regulations. This alone translates into its abundance and diversity, which results in the fact that coordination does not have a uniform meaning in the legal language. The nature of coordination in public administration is to be sought in the construction of the legal form of action, with the proviso that it does not involve any of its classic forms. This encourages the search for other approaches. There have been proposals in the science of law to define coordination, e.g., as a method of administering or as a separate coordination relationship. In order to understand coordination, one should not try to put it in a rigid definition framework. On the contrary, one should perceive it as a multiform of administration. Identifying coordination as a legal institution is currently a major challenge for the science of administrative law.

KEYWORDS

coordination, public administration, administrative law

SŁOWA KLUCZOWE

koordynacja, administracja publiczna, prawo administracyjne

INTRODUCTION

Coordination as a legal institution has found application in public administration at various times in Poland. It is an inherent feature of organizing the activity of human communities and is continuously intensified along with the development and strengthening of social ties.[1] It is a dynamic process, the course of which takes into account current changes in the various areas of impact.[2] It was present in the socialist model of the State, it is also present in contemporary public administration. It occurs both in the public and in the private sectors. Moreover, it is an important (or even the most important) instrument for connecting these sectors. It is also widely used at the international level, including the organizational level of the European Union.

The term 'coordination' has many meanings. The etymology of the term emphasizes its complexity and heterogeneity, and even raises doubts about its origin. In dictionary terms, the term is derived from the Latin *coordinatio*, *coordinare*. It is usually translated using such synonyms as: 'agreeing', 'harmonizing' or 'orderly interaction'[3]. There are also interpretations of 'coordination' as a method that complements harmonization.[4] It is also described by such terms as: 'arrangement', 'ordering of various elements', 'activities to ensure their concerted interaction, mutual adjustment'[5] or 'harmonization'[6]. The term was borrowed by physiology and meant the proper interaction of the organs of the body. Hence, through the organic theory of a State, which treated a State as a peculiar organism, with the additional influence of the theory of division of labour, coordination

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[1] cf Andrzej Burda, 'Problemy koordynacji działania w ramach i pomiędzy centralnymi organami państwowymi', Annales Universitatis Mariae Curie-Skłodowska 1978, Sectio G, Vol XXV, No 1, 1.

[2] Teresa Bińczycka-Majewska, *Koordynacja systemów zabezpieczenia społecznego w Unii Europejskiej*, Kraków 1999, 34.

[3] cf, e.g., Mieczysław Szymczak, *Słownik języka polskiego. Tom pierwszy A-K*, Warsaw 1992, 1007; Władysław Kopaliński, *Słownik wyrazów obcych i zwrotów obcojęzycznych z almanachem*, Warsaw 2007.

[4] cf Piotr Wawrzyk, Konstanty A Wojtaszczyk (eds), *Przestrzeń wolności, bezpieczeństwa i sprawiedliwości w Unii Europejskiej. Słownik*, Warsaw 2011, 86.

[5] cf Bogusław Dunaj (ed), *Popularny słownik języka polskiego*, Warsaw 2000, term: 'coordination'.

[6] cf *Mały słownik języka polskiego*, Warsaw 1969, 301.

acquired the meaning it has today in all areas of life, namely, such a distribution of activities that, through their agreement, leads to the realization of the planned goal.

At the same time, its position in the system and legal classification remain unresolved in the literature. Bearing in mind the rule of law, its proper legal identification becomes crucial. The term 'coordination' is often used in the language of law to describe the functioning of public administration. The normative acts published in Dziennik Ustaw [Journal of Laws] and Monitor Polski [Official Gazette of the Republic of Poland] use this term as often as almost 6,000 times in various grammatical variants in relation to public sector entities. By contrast, this number is twice as high in the legal acts published in the Journals of the European Union, and nearly seven times higher in the acts of local law. Due to its frequency and presence in modern public administration, it is necessary to properly identify the essence and meaning of 'coordination'.

The approaches to coordination vary, depending on the branches of law. It is viewed slightly differently under private law and under public law. It is perceived differently under national, international and EU law. Under private law, coordination is closely related to the guarantee function of law and is vested in entities having subjective rights. Public law, as a rule, is concerned with the organization and functioning of entities performing public functions. Administrative law plays a particularly important role in this respect. R. Stankiewicz aptly states that it is necessary to distinguish the coordination relationship as a specific category of the administrative-legal relationship.[7] Identifying coordination as a legal institution is currently a major challenge for the science of administrative law.

COORDINATION AS A FORM OF PUBLIC ADMINISTRATION ACTIVITY

In the science of administrative law, there are a number of approaches to coordination.[8] It is difficult to determine its legal meaning and normative formula. It lacks an unequivocal linguistic interpretation or specified conceptual scope. Moreover, it is used interchangeably with legal terms describing other relationships between entities, such as: 'harmonization', 'cooperation', 'supervision', 'control' and 'management'. Coordination is also described as their component or resultant, or as an umbrella term encompassing all of them.[9] Although it often

[7] cf Rafał Stankiewicz, *Koordynacja w prawie administracyjnym*, Warsaw 2019, 17.

[8] For an interesting overview of coordination in Polish science of law cf Rafał Stankiewicz, ibid 12ff.

[9] cf, e.g., Przemysław Niemczuk, 'Aksjologia koordynacji w administracji publicznej', in Jan Zimmermann (ed), *Aksjologia prawa administracyjnego*, Warsaw 2017, 763ff.

remains closely related or similar to them, coordination exists independently of other forms of impact. It is embedded in the nature of coordination which, on the one hand, is convergent with the above-mentioned forms of impact, and on the other, is distinct from them. Its complexity translates into problems with determining its status in the legal system.

As a legal institution, coordination finds application in both subordinated and non-subordinated systems. In teleological terms, it is an activity whose aim is to ensure coherent and effective functioning of the whole through the proper functioning of its individual components. The form of coordination may vary. It may be part of authoritative measures, including those necessary to exercise supervision. At the same time, it may be a non-authoritative form of impact expressed as an opinion, recommendation or arrangement. It can also be a kind of service, e.g., provided in support of a given entity's activity. Viewed through the prism of dependency, coordination constitutes a form of interaction positioned between cooperation and management.

Coordination has found a particular application in shaping the relations within the European Union. Until recently, the normative basis for coordination in the EU law was Article 10 of the Treaty establishing the European Community.[10] Under the provisions of the Lisbon Treaty, the Member States coordinate their economic, employment and social policies within the European Union.[11] An analysis of the organizational and legal solutions which characterize the assumptions of the European Union leads to a conclusion that coordination is one of the basic methods of implementing the community values in almost all their manifestations. The Treaty of Rome, concluded on 27 March 1957, invokes harmonization and coordination in its numerous provisions, though without clearly defining these terms. Despite the impressive number of judicial decisions issued in the course of application of the Community legal acts, the European Court of Justice has never defined the term 'coordination'. It has only concluded that some of them play a coordinating role.[12] Coordination is one of the basic techniques for synchronizing activities within the European Union and the Member States.

The specificity of coordination in public administration is to be sought in the construction of the legal form of action, with the proviso that it is not any of its classic forms. This prompts one to look for other approaches. There have been proposals in the science of law to define coordination, e.g., as a method of

[10] The Treaty establishing the European Economic Community, Rome, 25 March 1957, in the wording of the Treaty of Nice (JL of 2004, No 90, item 864/2 as amended).

[11] cf Article 5 paras 1, 2, 3 of the Treaty on the Functioning of the European Union (OJ UE of 2008, C 115/47).

[12] cf Bińczycka-Majewska (n 2) 33.

administration.[13] In order to understand coordination one should not try to put it in a rigid definition framework. On the contrary, one should perceive it as a multiform of administration. Especially that, as M. Stahl notices, we can observe an evolution of the functions of coordination.[14]

The ambiguity of the term ‘coordination’ has been often emphasized in the literature.[15] It is usually used in two senses, i.e., praxeological and strictly legal.[16] The main criteria used to differentiate between those two are: the goal and the scope.[17] Based on the above, different types of coordination can be distinguished. One of the proposals is to differentiate between three types of coordination: branch, inter-branch and interministerial.[18] There are various classificatory criteria in the literature to describe the complexity of coordination in public administration. Based on the criterion of territory, there are: local coordination, national coordination, coordination within institutionalized international organizations (e.g., the European Union) and international coordination in the broad sense. Based on the organizational criterion, there is internal and external coordination. Coordination can also be divided into vertical and horizontal.[19] Although the proposed typologies do not exhaust the complexity of contemporary coordination, they bring us closer to understanding its nature.

SYMPTOMS OF COORDINATION IN THE ADMINISTRATIVE LAW

Coordination may manifest itself in a variety of ways in different systems through specific types. Due to the fact that it can be approached in a multidimen-

[13] cf, e.g., Michał A Waligórski, ‘Koordynacja – sposób administrowania czy prawna forma działania administracji?’, in Jan Boć, Andrzej Chajbowicz (eds), *Nowe problemy w teorii prawa administracyjnego*, Wrocław 2009, 477.

[14] cf Małgorzata Stahl, ‘Szczególne prawne formy działania administracji’, in Roman Hauser, Zygmunt Niewiadomski, Andrzej Wróbel (eds), *System prawa administracyjnego. Prawne formy działania administracji*, Vol 5, Warsaw 2013, 362.

[15] cf, e.g., Adam Chełmoński, ‘Instytucje administracyjnoprawne w zarządzaniu gospodarką narodową’, in Teresa Rabska (ed), *System prawa administracyjnego*, Vol IV, Wrocław-Warsaw-Kraków 1980, 476.

[16] cf Zygmunt Rudnicki, Tadeusz Skoczny, ‘Istota prawna koordynacji’, Państwo i Prawo 1971, No 11; Elżbieta Kronberger-Sokołowska, *Prawne formy koordynacji gospodarczej w zarządzaniu przedsiębiorstwami przemysłu kluczowego*, Warsaw 1976, 10ff; Andrzej Burda (n 1) 7.

[17] cf, e.g., Adam Chełmoński (n 15) 478; Michał A Waligórski (n13) 318.

[18] cf Adam Chełmoński (n 15) 479. It should be noted that those considerations took place in different socio-economic conditions.

[19] For more on these typologies cf., e.g., Zbigniew Leoński, *Nauka administracji*, Warsaw 2002, 129–130; Michał A Waligórski (n 13) 481–482.

sional way, distinguishing specific types of coordination requires systematization. For this purpose, it is necessary to adopt a specific interpretation serving as a prism through which it is possible to identify coordination within a given system, i.e., a classificatory criterion. The criteria for classifying coordination may vary. The most clear-cut of them seem to be the system criterion, the territorial structure, the relationship between entities, and the coordination instrument. With regard to the above criteria, the following systems can be distinguished: monistic, dualistic and pluralistic; horizontal and vertical; subordinated and non-subordinated; subjective and objective. Each of these systems occurs independently of one another, and often mixes with others. Taking into account all these criteria, one can identify different manifestations of coordination, which as a rule differ from one another.

a. TYPES OF COORDINATION IN THE POLITIC SYSTEM TERMS

The system criterion finds a particular application in the functioning of public administration. According to the Constitution of the Republic of Poland,[20] the territorial system is to ensure the decentralization of public authority[21] while maintaining the executive role of the Council of Ministers.[22] These principles find reflection in the duality of public administration, i.e., the functioning of centralized and decentralized local systems. The centralized system's tool is mainly the government administration, both central and local, which constitutes the executive apparatus of the Council of Ministers. The executive apparatus of the decentralized administration is the local self-government administration, composed of the bodies of local self-government units. The Constitution of the Republic of Poland also guarantees the freedom of association[23] and the freedom of economic activity.[24] The entities established and functioning in the voluntary exercise of these freedoms are defined as non-public. They are basically divided into two categories: social organizations and entrepreneurs. Coordination may take place between such entities in various configurations. It is not, however, external and internal coordination described in the literature. These typologies are similar to each other, but they have different assumptions. Coordination may be used for organizing the activity of entities having the same position in the system and the same status. Interactions will then take place, for example, within government administration or between entities of local self-government, i.e. within one sys-

[20] JL of 1997, No 78, item 483.
[21] cf Article 15 para 1, ibid.
[22] cf Article 10 para 2, ibid.
[23] cf Article 12 and 58, ibid.
[24] cf Article 20 and 22, ibid.

tem. The character of such coordination seems to be best described by the term monistic.

An example of monistic coordination in the functioning of government administration may be the role of voivodes in their relations with non-combined government administration,[25] or the application of this term in determining the competences of authorities in charge of particular government administration departments.[26] The term 'coordination' appears in many statutory acts providing for the functioning of government administration. It is often used in its lexical sense. There are also statutory acts which, to a greater or lesser extent, specify the scope of coordination as a form of action to be taken in order to perform the tasks stipulated in their provisions. However, each of them does it in a different manner. These acts include the ones that specify the assumptions of the Act on government administration departments,[27] as well as the acts that stipulate the competences of particular administrative structures.[28] Nevertheless, it is difficult to find in these regulations a uniform concept and content of coordination as

[25] cf Article 22 subpara 1 and 4, Article 58 and Article 51 subpara 1 of the Act of 23 January 2009 on the voivode and voivodeship government administration (JL of 2023, item 190).

[26] cf Article 7a para 2 subpara 5), Article 8 para 2 subpara 2) and 10a), Article 9 para 5, Article 9a para 1 subpara 12, Article 11 para 1 subpara 4), Article 11a para 1 subpara 7), Article 13 para 2 subpara 2), para 3 subpara 1) and 4), para 4 subpara 1) and 2), Article 20 para 3, Article 23a para 1 subpara 1), Article 26 para 2, Article 28a subpara 5), Article 29 para 1 subpara 2),Article 31 para 1 subpara 8), Article 32 para 1 subpara 3) and 6b), para 4, Article 33 para 1 subpara 5) and 8), Article 33d, Article 34 para 1, Article 38a. of the Act of 4 September 1997 government administration departments (JL of 2022, item 2512).

[27] cf e.g. Article 4 para 2 of the Act of 11 September 2001 on public health (JL of 2022, item 1608); Article 4 para 2 of the Act of 11 July 2014 r. on the principles of implementing cohesion policy programs financed under the 2014–2020 financial perspective (JL of 2020, item 818); Article 3a, Article 3b, Article 6b, Article 14g para 1 subpara 1), para 2 and 3, Article 14e para 1 and 2, Article 35, Article 35a para 2 of the Act of 6 December 2006 on the principles of implementing development policy (JL of 2024, item 324); Article 71, Article 292 of the Act of 27 August 2009 on public finance (JL of 2023, item 1270); Article 19 in conjunction with Article 18 of the Act of 4 March 2010 on infrastructure of spatial information (JL of 2021, item 214); Article 13 para 1 subpara 1), para 2, Article 14 of the Act of 16 September 2011 on development cooperation (JL of 2021, item 1425).

[28] cf e.g. Article 19 para 2 of the Act of 8 September 2006 on state medical rescue services (JL of 2024, item 625); Article 2 para 1 subpara 25) and 26) of the Act of 1 July 2005 on the donation, storage and transplantation of cells, tissues and organs (JL of 2023, item 1185); Article 54 of the Act of 15 April 2005 on supplementary supervision of credit institutions, insurance companies, reinsurance companies and investment companies being part of a financial conglomerate (JL of 2020, item 1413); Article 4 para 1 subpara 1) and 2), Article 5, Article 8 para 1 subpara 1) and 6a), Article 8a of the Act of 20 April 2004 on promotion of employment and job market institutions (JL of 2024, item 475); Article 8 para 2 of the Act of 15 July 2011 on control in government administration (JL of 2020, item 224); Article 21 para 3 of the Act of 25 June 2015 Consular Law (JL of 2023, item 1329); Article 24 of the Act of 30 April 2010 National Science Center (JL of 2023, item 153).

a form of administrative action. Hence, there is no normative pattern of action that could be considered to be characteristic of coordination.

A different picture of monistic coordination emerges from a dogmatic analysis of the functioning of local self-government. In the Act of 8 March 1991 on *gmina* [commune] self-government[29] and in the Act of 5 June 1998 on *powiat* [district] self-government,[30] this term does not appear at all and, therefore, does not define any activity of the administration of these self-government units. The Act of 5 June 1998 on voivodeship self-government[31] uses the term 'coordination' only once to define the tasks of a voivodeship government,[32] retaining at the same time its lexical meaning. It is also difficult to find this term in substantive provisions specifying the activity of local self-government bodies. Although the competences of individual self-government bodies display the features of coordination, any assertions in this respect will remain *a priori*. As a result, unlike in the case of government administration, it is currently difficult to grasp coordination in the provisions on the functioning of local self-government administration.

Coordination may also take place between entities from different sectors. In this respect, one should take into account its dualism and pluralism. The former remains closely related to the functioning of public administration. The structure of public administration is dualistic by nature – it includes government administration and self-government administration. The entities of these two administrations may combine their activities, e.g., through coordination, which thus takes a dualistic form. An example is the competence of the voivode in respect to local self-government bodies in the area of planning and imposing the obligation to provide services related to the general defense obligation of the Republic of Poland,[33] or the competence of the minister responsible for regional development in respect to the voivodeship self-government in the area of spatial development plans.[34] Another example may be the role of the Government Center for Security.[35] This government administration body is responsible for coordinating the information policy of public administration bodies (government and local self-government)

[29] JL of 2024, item 609.

[30] JL of 2024, item 107.

[31] JL of 2024, item 566.

[32] cf ibid Article 41 para 2 subpara 6.

[33] cf Article 30 para 2 subpara 3), Article 32 para 1 subpara 3), Article 34 para 1) of the Act of 11 March 2022 about defending the homeland (JL of 2024, item 248).

[34] cf Article 46a of the Act of 27 March 2003 on spatial planning and development (JL of 2023, item 977).

[35] cf Article 10 para 1 of the Act of 26 April 2007 on crisis management (JL of 2023, item 122).

during emergency situations.[36] It will also be a role of the voivode while coordinating tasks related to crisis management.[37]

If such relationships also involve entities from outside the public sector, then we can say about interactions between entities of different legal nature and position within the system. Considering the diversity of such entities and the multiplicity of such relationships, the word 'pluralistic' seems to best describe the nature of coordination in the above respect. An example of pluralistic coordination is the organization of fire protection. As in the previous example, here one can observe pluralism with regard to both coordinating and coordinated bodies. The former include both government and local self-government bodies; the latter, all units included in the national emergency and fire system, i.e., both public and non-public entities.[38] As regards the public sector, these include, on the one hand, the following government entities: organizational units of the National Fire Service and the Military Fire Protection; other services, inspections, guards and institutions. On the other hand, they include local self-government units: the commune professional fire service, the district professional fire service.[39] In the non-public sector, on the one hand, these include entities such as: a company fire service, a company rescue service, and entities that have voluntarily agreed to cooperate in rescue operations under a civil law agreement. On the other hand, these are also entities operating as associations: a voluntary fire brigade and an association of voluntary fire brigades.[40]

b. TYPES OF COORDINATION IN TERRITORIAL TERMS

The horizontal and the vertical systems reflect the State's territorial structure. Currently, there are three levels of territorial division and a central one. As a result, there are four basic organizational levels of public administration: commune, district, voivodeship, and central. These are supplemented by the units of auxiliary division and special purpose division.[41] The entities functioning at all the levels may interact with one another in the form of coordination.

The relationship between entities functioning at the same level is horizontal. It can involve both entities of the same legal status and position in the system, as well as entities of a different status. It is particularly visible in the organiza-

[36] cf Article 11 para 1 and para 2 subpara 5a) and 7) ibid.

[37] cf Article 22 para 4 of the Act on the voivode and voivodeship government administration; Article 25 para 6 of the Act on crisis management.

[38] cf Article 14 para 3 and 5 of the Act of 24 August 1991 on fire protection (JL of 2024, item 275).

[39] cf Article 2 para 4 and Article 15 para 1, 1a, 4, 4a ibid.

[40] cf Article 2 para 4 and Article 15 para 6 and 7 ibid.

[41] cf, e.g., Przemysław Niemczuk, *Administracja powiatowa w systemie terenowej administracji publicznej*, Rzeszów-Przemyśl 2014, 207ff.

tion of public administration. Horizontal coordination may be monistic, e.g., as in the case of the voivode's relationship with the voivodeship combined administration.[42] The horizontal system also includes coordination between entities of a different legal status and position, e.g., crisis management teams, especially the district ones. They have to be composed of the representatives of government administration, local self-government administration and social organizations.[43] The role they play in the crisis management process reflects the essence of coordination. Although the legislator does not use the term 'coordination' in respect to voivodeship, district and commune teams, this role can be inferred from the role of the Government Crisis Management Team. This team has been defined as the competent authority, e.g., in matters pertaining to the coordination of crisis management activities.[44] This view can be seen in how the local law stipulates the roles of individual crisis management teams.[45]

The relationship between entities located at different levels of State's structure is vertical. In the public sector, this type of coordination is characterized by a varying degree of coordination powers. The coordination of government administration activities resembles management, which is why it is similar to the coordination described in the literature as vertical.[46] An example can be the above mentioned competences of the bodies in charge of individual departments of government administration. In government administration, there is also coordination whose impact on the coordinated entities has a different character. An example is the coordination of district combined administration, which is the voivode's competence.[47] Coordination is also manifested in the aforementioned powers of the voivode in respect to government and local self-government bodies in the area of crisis management or in the area of planning and imposing the obligation to provide services related to the general defense obligation of the Republic of Poland. The above-mentioned coordination of voivodeship spatial development exercised by the minister responsible for regional development displays a different character. It is no different in the case of the aforementioned coordination of information policy during emergency situations, which is the competence of the Government Center for Security. Hence, vertical coordination affects entities in the monistic and dualistic, as well as pluralistic system. It also occurs between

[42] cf Article 51 para 1 of the Act on the voivode and voivodeship government administration.

[43] cf Article 17 para 6 of the Act on crisis management.

[44] cf Article 8 para 1 ibid.

[45] cf, e.g., Ordinance of the Mayor of Wyszków of 4 November 2013 No 262/2013 on the Regulations of Commune Crisis Management Team; Ordinance of District Head of Kolno of 2 September 2010, No 13/2010 on the Regulations of District Crisis Management Team; Ordinance of Lubelskie Voivode of 29 December 2010 No 493 on the Regulations of Voivodeship Crisis Management Team.

[46] For more on vertical coordination cf., e.g., Zbigniew Leoński (n 19) 129–130; Michał A Waligórski (n 13) 482.

[47] cf Article 51 para 1 of the Act on the voivode and voivodeship government administration.

a different number of levels within the vertical structure, i.e., between two and more levels of the territorial structure.

c. TYPES OF COORDINATION RESULTING FROM THE DEPENDENCIES BETWEEN ENTITIES

Another criterion for classifying coordination is the subordination of coordinated entities. The difference between the system of subordination and non-subordination results primarily from the relationships between entities. These relationships may stem from various conditions. In subordination systems, coordination may result from organizational or competence based relations. Organizational relations result from adopting a specific structure, the elements of which remain interrelated. In terms of competence, coordination is usually manifested in managerial or supervisory relationships. It is particularly important to distinguish between coordination activities undertaken as part of supervision and those undertaken as part of management.[48] One such example can be the competence of ministers in charge of government administration departments, or the competence of the voivode with respect to the combined government administration. Coordination in non-subordinated systems requires synchronization. For non-subordinated entities, coordination is often the only acceptable form of their relationship with the system. Understood in this way, coordination is used, for example, in the organization of crisis management, civil defense or fire protection, where the entities involved are independent of one another.

d. TYPES OF COORDINATION RESULTING FROM THE COORDINATION INSTRUMENT

Coordination can also be either subjective or objective, which depends on its source. If that source is a specific entity entrusted with the role of a coordinator, then what occurs is subjective coordination. If the coordination of activities performed by coordinated entities is only an effect of the implementation of norms that standardize and organize these activities without having to specify the competence of the coordinator, then what occurs is objective coordination.

In the case of the former, it is the subject, i.e., the coordinator, that is put in the center. Such an entity should display a coordinating potential. In other words, it should be able to combine organizational and functional characteristics.[49] In public administration, the rule of law requires that the coordinator has to be legally identified. Basically, there are two ways of identifying such an entity. The coor-

[48] cf, e.g., Michał A. Waligórski (n 13) 478.

[49] cf Jan Boć, in Jan Boć (ed), *Prawo administracyjne*, op. cit., 121–122.

dinator's role may be assigned to an existing public administration body.[50] A new entity may also be appointed to act as the coordinator.[51] Then, its coordinating competences, the subordinate entities to be coordinated, and the scope of coordination are stipulated. While these elements of coordination may be subject to modifications, the coordinator itself should remain relatively unchanged.

In a socialist State, it was considered possible to distinguish a coordinating entity and a coordinated entity in all types of coordination.[52] Because of contemporary socio-economic conditions, these views had to be revised. In addition to subjective coordination, another form has emerged that took on an objective character. In this approach, the coordinating entity is of secondary importance, or it does not exist at all. Objective coordination is a manifestation of the organizing role of legal norms, which coordinate the activities of various entities regardless of the nature and degree of dependence between them in order to achieve a common goal. The law may not always provide for the coordinator but only a coordinating function.[53] There are also systems in which the coordinating role is entrusted jointly to several entities. However, they do not constitute a separate coordinating entity, neither in organizational nor functional terms.[54] This role is exercised by coordination procedures, which are crucial in this process.[55] Therefore, coordination stands for legally defined mechanisms of conduct, the role of which is to coordinate the functioning of entities under their influence.[56] Coordinated entities are subjectively bound by such provisions, i.e., they have legally defined tasks and competences. They may be functionally independent of the activities carried out by other entities. They can also perform other tasks and use a different competence or material potential. The reason for combining such activities under one coordination process is the goal. An example of this form of coordination are some aspects of the functioning of the European Union. The question arises as to how the use of such coordination norms is to be supervised. However, this competence should not be associated with subjective coordination. The supervising entity's role is not to shape the specific activities of coordinated entities (as in the case of subjective coordination) but to ensure compliance with objective coordination norms.

[50] cf, e.g., Article 89 of the Act of 22 December 2015 on the Integrated Classification System (JL of 2020, item 226); Article 3a of the Act on the principles of implementing development policy.

[51] cf, e.g., Article 51 para 1 of the Act of 22 December 2015 on the principles of recognizing professional qualifications obtained in Member States of the European Union (JL of 2023, item 334); Article 59 para 1 of the Act of 18 August 2011 on marine safety (JL of 2024, item 1068).

[52] cf, e.g., Adam Chełmoński (n 15) 477.

[53] cf, e.g., Article 36a para 2 of the Act of 7 May 2010 on supporting the development of telecommunication services and networks, (JL of 2024, item 604);.

[54] cf, e.g., Article 66 para 3 of the Act of 29 November 2000 Nuclear Law (JL of 2021, No 623, item 276).

[55] cf, e.g., Article 66 para 4 ibid.

[56] cf, e.g., Article 88v and Article 88w ibid.

CONCLUSIONS

Contemporary coordination does not have a uniform normative definition, although the term is often used in legal regulations, especially administrative ones. However, the scope of coordination in these provisions varies. On the one hand, it retains its lexical meaning and thus is legally undefined. On the other, it has different meanings for the purposes of detailed substantive law regulations. This alone translates into its abundance and diversity, which results in the fact that coordination does not have a uniform meaning in the legal language. Despite numerous attempts, the science of law has not yet developed a universally accepted definition of coordination.[57]

The question arises as to whether it is necessary at all. In the existing normative picture of coordination, it is a multiform of action. It is an instrument of influence that does not resemble other forms of administrative activity. The frequency of its application testifies that it is needed not as a concrete but flexible form of impact, which can be adjusted to the needs resulting from relationships between entities where other forms provided for in the law do not apply. The specificity of coordination in public administration is to be sought in the construction of the legal form of action, with the proviso that it is not any of its classic forms. This prompts one to look for other approaches. Coordination's complexity stems from the lack of its legal classification. In order to understand coordination one should not try to put it in a rigid definition framework. On the contrary, one should perceive it as a multiform of administration.

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Studia Iuridica 105
ISSN 0137-4346; e-ISSN 2544-3135
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https://creativecommons.org/licenses/by/4.0/
https://doi.org/10.31338/2544-3135.si.2025-105.7

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CAPACITY OF A CHILD TO ACT IN PROCEEDINGS BEFORE THE INTERNATIONAL CRIMINAL COURT

Abstract

In order to properly approach the question of legal capacity of children to act in the proceedings before the ICC, three problems should be distinguished: the problem of legal capacity, the problem of representation, and the evidential rules. An analysis of the requirements of an application for participation in the proceedings as a victim and the requirement of informed consent in the case of a witness leads to the conclusion that capacity to act in the proceedings before the ICC is available to persons who are capable of giving consent. The legal validity of consent should be subject to the law of the nationality, the law of the country of domicile, or the country of habitual residence. The representation of a child before the ICC is not regulated. It should be assumed that in the first instance the parents are designated to represent the child, in the second – it is a guardian, and in the third – other adult, in respect of whom the ICC finds it satisfactory that they are acting in the best interests of the child. Rules of evidence pertaining to the circumstances on which the capacity to act and the right of representation of a child are founded encompass standards of proof, means of evidence, burden of proof and presumption in favour of a child's participation. The normative framework of children's participation in the proceedings before the ICC is characterised by the preponderance of *lacunae* over matter expressly regulated. It poses a risk of nullification of a child's right to be heard.

KEYWORDS

International Criminal Court, capacity to act in the proceedings before the International Criminal Court, representation of a child, child victim, child witness

SŁOWA KLUCZOWE

Międzynarodowy Trybunał Karny, zdolność procesowa w postępowaniu przed Międzynarodowym Trybunałem Karnym, reprezentacja dziecka, pokrzywdzony-dziecko, dziecko-świadek

The issue of children's participation in proceedings before the International Criminal Court ('ICC') has scarcely been elaborated until 2013.[1] Upon first verdicts of the ICC in cases concerning conscripting and enlisting of children,[2] the procedural-law status of a child in proceedings before the ICC has been given more attention by scholars.[3] In order to properly approach the question of legal capacity of a child to act in these proceedings, three problems should be distinguished: the problem of legal capacity, the problem of representation, and the evidential rules. Neither have these problems been analysed separately nor has the

[1] The scarcity of scholarly writing has been reported by: Helen Beckmann-Hamzei, *The Child in ICC Proceedings* (1st edn, Intersentia Ltd 2015) 22 and also Linda A Malone, 'Maturing Justice: Integrating the Convention on the Rights of the Child into the Judgments and Processes of the International Criminal Court' [2015] 43 Georgia Journal of International and Comparative Law 599, 610. From earlier literature: Rosemary Barberet, Cécile Van de Voorde, 'Children and International Criminal Justice', in Mangai Natarajan (ed), *International Crime And Justice* (Cambridge University Press 2011); Stuart Beresford, 'Child Witnesses and the International Criminal Justice System. Does the International Criminal Court Protect the Most Vulnerable?' [2005] 3 Journal of International Criminal Justice 721.

[2] *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06), judgment pursuant to Article 74 of the Statute of 14 March 2012 ICC; *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06), decision on sentence pursuant to Article 76 of the Statute of 10 July 2012 ICC; *The Prosecutor v Mathieu Ngudjolo Chui* (ICC-01/04-02/12), judgment pursuant to Article 74 of the Statute of 18 December 2012 ICC; *The Prosecutor v Germain Katanga* (ICC-01/04-01/07),), judgment pursuant to Article 74 of the Statute of 7 March 2014 ICC; *The Prosecutor v Germain Katanga* (ICC-01/04-01/07), decision on sentence pursuant to Article 76 of the Statute of 23 May 2014 ICC.

[3] Chronologically: Amann (n 3); Cynthia Chamberlain Bolaños, *Children and the International Criminal* Court (1st edn, Univeriteit Leiden 2014); Beckmann-Hamzei (n 1); Naila S Awan, 'Balancing a Child's Right to be Heard with Protective Measures Undertaken in "the Best Interests of the Child": Does the International Criminal Court Get it Right?' [2015] 35 Children's Legal Rights Journal 98; Malone (n 1); Patryk Gacka, 'Can Duress Exclude Criminal Responsibility of Former Child Soldiers? The Case of Dominic Ongwen Before The International Criminal Court', [2019] 82 Studia Iuridica 78.

question of proper representation been conclusively resolved.[4] Therefore, posing the following questions remains valid:

1. which legal norms govern the children's capacity to act in proceedings before the ICC,
2. who may act on behalf of children that do not have the capacity to act in proceedings before the ICC,
3. what are the rules of evidence for proving the facts on which the capacity to act and right to act on behalf of a child are founded.

These issues deserve discussion because they are fundamental to the realisation of children's rights, they are not precisely regulated, and have sometimes been confused with the status of adults who were children at the time of the act. An attempt to find answers to these questions is the aim of this article.

The notion of capacity to act denotes an ability of a person to perform valid acts in particular proceedings by themselves. It is defined by law. It is the general capacity to exercise any such rights, such as the right to file an application for participation in the proceedings or express consent for being called into the witness stand.[5] Capacity to act should be discerned from the capacity to be a party to judicial proceedings. Person possessing the capacity to be a party may be devoid of the capacity to perform valid procedural acts on their own. The capacity to be a party to particular proceedings and the capacity to act in these proceedings are regulated by norms of procedural law. Matters of substantive law are the capacity to be a party of legal rights and obligations and capacity to perform legally valid acts.[6]

The notions set out in the previous paragraph function under different names in different legal orders. What is relevant is that regardless of geographical context the question of whether an individual can act on their own in judicial proceedings remains valid. The name 'capacity to act' appears as culturally neutral. The equivocal name 'legal capacity' will be avoided in this article.

In light of the jurisprudence of international tribunals and official documents of the ICC, in the context other than the crime of conscripting and enlisting children into armed forces or groups or using them in hostilities,[7] a child is a per-

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[4] cf Beckmann-Hamzei (n 1) 205-208; Bolaños (n 3) 238.

[5] In the practice of the ICC informed consent of adults acting on behalf of a child witness has been deemed indispensable. Beckmann-Hamzei (n 1) 205.

[6] Maksymilian Pazdan, '§ 64. Zdolność sądowa i zdolność do czynności procesowych' in Marek Safjan (ed), *System prawa prywatnego*, Vol 1, Prawo cywilne – część ogólna (C.H. Beck, 2007) 924–927. These capacities are also referred to by an umbrella term 'capacity'. See Benedetta Ubertazzi, 'Capacity and Emancipation', Encyclopedia of Private International Law 1 (1st edn, 2017) 251.

[7] The definition of that crime sets the age limit of a victim at fifteen years. See Article 8 section 2 item b(xxvi) and item c(vii) of the Rome Statute of the International Criminal Court [1998] UN Treaty Series 2187/38544/3 ('RS') as amended by the Resolution RC/Res. 5 of the Review Conference of the Rome Statute, held in Kampala, Uganda, from 31 May to 11 June

son under the age of eighteen.[8] This age limit has been drawn from Article 1 of the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989 ('Convention on the Rights of the Child').[9] Nonetheless, the Office of the Prosecutor considers young persons whose ages are unknown to be 'children' for the sole purpose of its engagement with them, unless there is a reasonable basis to believe otherwise.[10] As the aim of this article pertains to the capacity of a child to act, it will only concern persons who are children at the time of the proceedings.

Before answering the questions set out at the beginning, it should be clarified in which procedural roles a child may appear before the ICC.

A child cannot act as an accused[11] in proceedings before the ICC, as the age of criminal responsibility before the ICC is eighteen. Pursuant to Article 26 of the RS, the jurisdiction of the Court *ratione personae* is limited to persons who have attained the age of eighteen years at the time of the commission of the crime within the jurisdiction of the Court. There are no exceptions to this rule. Scholars agree on this point.[12] More specific remarks are made in the context of child soldiers. It is underscored that child soldiers by their very 'normative nature' are victims, not

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2010 [2010] UN Treaty Series 2868/A-38544/197, and by the Resolution RC/Res. 6 of the Review Conference of the Rome Statute, held in Kampala, Uganda, from 31 May to 11 June 2010 [2010], the amendments were circulated by the Secretary-General under cover of depositary notification C.N.651.2010.TREATIES-8 of 29 November 2010.

[8] Situation in Uganda (ICC-02/04), decision on the victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, and a/0111/06 to a/0127/06 of 10 August 2007 ICC, paras 20 and 112; *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé* (ICC-02/11-01/15-379), decision on victims' participation status decision of 7 January 2016 ICC, para 60; The Office of the Prosecutor, Policy on Children (The Hague, 2023) <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-children-en-web.pdf> accessed 31 May 2024, 1, 15–16 and 50 footnote 97; The Office of the Prosecutor, Policy on Children (The Hague, 2016, <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF> accessed 31 May 2024, 2 and 11–12 and the jurisprudence cited therein. The 2023 Policy introduces also the term 'youth' which shall denote a person between eighteen and twenty-four years of age. In footnote 24, however, the age limits have been set at eighteen and twenty-five years of age, The Office of the Prosecutor (2023) (n 9) 16.

[9] Convention on the Rights of the Child [1989] UN Treaty Series 1577/27531/3. cf Malone (n 1) 615.

[10] The Office of the Prosecutor (2016) (n 9) 12. Such approach has not been enunciated in the 2023 Policy, cf The Office of the Prosecutor (2023) (n 9).

[11] The status of the accused before the ICC is regulated mainly by Articles 63–67 of the RS and by the rules 134bis-136 of the RPE. They pertain to the presence of the accused at trial, proceedings on an admission of guilt, presumption of innocence, rights of the accused, and taking evidence from the accused. Broadly on that topic see William Anthony Schabas, *An Introduction to the International Criminal Court* (6th edn, Cambridge University Press 2020) 304–321.

[12] Beckmann-Hamzei (n 1) 12, 140, and 147; Malone (n 1) 615; Barberet, Van de Voorde (n 1) 43–44; Schabas (n 11) 66; Karolina Wierczyńska, 'Przesłanki dopuszczalności wykonywania jurysdykcji przez Międzynarodowy Trybunał Karny'. Studium międzynarodowoprawne (1st edn, Wydawnictwo Naukowe Scholar 2016) 79.

perpetrators of international crimes.[13] Sometimes it is argued that the young age of a perpetrator may be taken into account when determining, whether there are sufficient grounds for prosecution,[14] the admissibility of the duress defence,[15] or when child victims claim reparations while having themselves committed international crimes as former child soldiers.[16] It is also noted that excluding minors from the jurisdiction of the ICC does not imply that minors cannot be prosecuted before domestic courts.[17] Considering that no minor has ever been charged with an international crime before any international criminal tribunal, and that the RS has set the age of responsibility for the first time in the drafting history of international criminal justice instruments, it does not seem viable that children will ever be prosecuted at an international level for international crimes.[18]

The victim is a quasi-party to the proceedings before the ICC.[19] A victim in proceedings before the ICC shall be a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the Court. Organizations or institutions that have sustained direct harm to certain types of property are also considered victims.[20] In the context of distinguishing direct and indirect victims by the ICC,[21] it can be noted that only natural persons may be indirect victims. In any event, the victim shall fulfil four criteria: their identity must be established, they must have personally suffered harm (their personal interests must be affected), a crime within the jurisdiction of the ICC has been committed, and there must exist a causal link between the crime and

[13] Gacka (n 3) 85-86; Amann (n 3) 427.

[14] Malone (n 1) 608 and 615.

[15] Gacka (n 3) 97.

[16] Beckmann-Hamzei (n 1) 12.

[17] Beckmann-Hamzei (n 1) 140.

[18] Beckmann-Hamzei (n 1) 139 –140.

[19] See Gilbert Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC' in Carsten Stahn, Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill Nijhoff 2009) 298; Sergey Vasiliev, 'Article 68(3) and Personal Interests of Victims in the Emerging Practice of the ICC' in Carsten Stahn, Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill Nijhoff 2009) 635.

[20] Rule 85 of the Rules of Procedure and Evidence [2002] Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr. 1) II.A ('RPE').

[21] In short terms, direct victims are those whose harm is the result of the commission of a crime within the jurisdiction of the Court. Secondly, indirect victims are those who suffer harm as a result of the harm suffered by direct victims. See *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06-1813), decision on 'indirect victims' of 8 April 2009 ICC, paras 44–52; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07-1491-Red-tENG), decision on the 345 Applications for Participation in the Proceedings Submitted by Victims of 23 September 2009 ICC, paras 51–56; Amann (n 3) 427.

the harm.[22] In the absence of age restrictions, a child may also act as a victim. This conclusion is reinforced in view of Article 12 of the Convention on the Rights of the Child, which enshrines the right of a child to be heard. The rights codified in the Convention on the Rights of the Child are deemed binding on the ICC and the right to be heard is deemed binding in the proceedings.[23] The ICC considers that, pursuant to Article 21 section 3 of the RS, read in conjunction with Article 12 of the Convention on the Rights of the Child, victims cannot be excluded from participating solely based on their age.[24]

Although there may be identified some child-specific crimes and crimes which by their nature affect mainly children within the jurisdiction of the ICC,[25] all international crimes may place the child in the position of a victim.[26]

A child in proceedings before the ICC may testify as a witness.[27] There is no minimum age of a witness in the proceedings before the ICC set by law. What seems to limit the participation of children as witnesses is their ability to testify.[28] It stems from a child's reliability, which in turn is deemed to stem from the degree of maturity of a child.[29]

The capacity to testify is analysed on a case-by-case basis. Before questioning a child, the investigators of the Office of the Prosecutor are required to have the child examined by a psychologist or other expert. The main purpose of the examination is to determine whether testifying would involve secondary victimisation.[30] In proceedings before the Chamber, psychological assessment shall

[22] *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06), decision on the Applications for Participation in the Proceedings a/0001/06, a/0002/06, and a/0003/06 of 18 July 2006 ICC, para 7; Banda and others (ICC-02/05-03/09), decision on Victims' Participation at the Hearing on the Confirmation of the Charges decision of 29 October 2010 ICC, para 2; *The Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), decision on 772 Applications by Victims to Participate in the Proceedings of 18 November 2010 ICC; *The Prosecutor v Laurent Gbagbo* (ICC-02/11-01/11), decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings of 4 June 2012 ICC, para 20; *The Prosecutor v Blé Goudé* (ICC-02/11-02/11), decision on Victims' Participation in the Pre-trial Proceedings and Related Issues of 11 June 2014 ICC, para 13; *The Prosecutor v Germain Katanga* (ICC-01/04-01/07 A3 A4 A5), judgment on the Appeals Against the Order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute' of 8 March 2018 ICC, paras 115–116. cf Bolaños (n 3) 164–166 and the judiciary cited therein; Beckmann-Hamzei (n 1) 84-85; Schabas (n 11) 361; Vasiliev (n 21) 649.

[23] Awan (n 3) 99. Similarly: Beckmann-Hamzei (n 1) 26; Bolaños (n 3) 228 and 230. cf Gacka (n 3) 79, footnote 7.

[24] *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé* (n 9), para 60.

[25] Malone (n 1) 607; Beckmann-Hamzei (n 1) 12; Barberet, Van de Voorde (n 1) 44.

[26] Bolaños (n 3) 108.

[27] Barberet, Van de Voorde (n 1) 44; Beckmann-Hamzei (n 1) 11.

[28] Malone (n 1) 617; Awan (n 3) 103; Beckmann-Hamzei (n 1) 136.

[29] Bolaños (n 3) 207 and 230.

[30] Regulation 36 section 3 of the Regulations of the Office of the Prosecutor [2009] ICC-BD/05-01-09 ('ROP').

be conducted prior to the court appearance in order to establish child's capacity to appear before the Chamber and current mental health and to identify special needs.[31]

In proceedings before the ICC, the roles of a victim and witness can be cumulated.[32] All protective measures provided for victims are applicable also to witnesses. The widespread pseudonymisation,[33] holding hearings *in camera* and the removal of personal data from publicised minutes of hearings impedes the investigation of the ICC's child interrogation practice. In addition to that, ICC does not publish statistical reports containing empirical data pertaining to children witnesses or victims.[34]

The capacity of a child to act in proceedings before the ICC has been approached from the perspective of rules 85 and 89 section 3 of the RPE[35] and Article 68 of the RS,[36] and from the perspective of human rights, namely the right of a child to be heard in judicial proceedings, enshrined in Article 12 of the Convention on the Rights of the Child.[37] Neither rules 85 and 89 section 3 of the RPE nor Article 68 of the RS stipulate that some category of subjects has or does not have the capacity to act on their own. As will be demonstrated below, it is possible to derive from the rule 89 section 3 of the RPE norms determining the capacity to act in proceedings before the ICC as a victim. The wording of the rule 89 section 3 of the RPE:

> [a]n application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled

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[31] Regulation 94bis section 3 of the Regulations of the Registry [2006] ICC-BD/03-03-13 as amended on 25 September 2006, on 4 December 2013, and on 1 August 2018.

[32] Bolaños (n 3) 11; Beckmann-Hamzei (n 1) 37. It has been argued that for the sake of a fair trial, participating victims should not be allowed to act as victim witnesses in the same case. This view has met with valid criticism. See Emily Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?' in D McGoldrick, P Rowe, E Donnelly (eds), *The Permanent International Criminal Court. Legal and Policy Issues*, (1st edn, Hart Publishing 2004) 327.

[33] Hofmański, Kuczyńska (n 35) 177. See also Michael E Kurth, 'Anonymous Witnesses before the International Criminal Court: Due Process in Dire Straits' in Carsten Stahn, Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill Nijhoff 2009) 615 and 626–629.

[34] These impediments have already been complained about by Beckmann-Hamzei (n 1) 33 and 217–218.

[35] Beckmann-Hamzei (n 1) 93–94 and 205.

[36] Awan (n 3) 108.

[37] Awan (n 3) 103; Malone (n 1) 604 and 617; Beckmann-Hamzei (n 1) 98-99 and 206; Bolaños (n 3) 169–170 and 238–239.

leaves the interpreter with two uncertainties: (1) whether in case of an application for participation of a child, there is an obligation that it has to be made by a person acting on behalf of the child, (2) what is the scope of the term 'child'.

With regard to the first uncertainty, it has to be noted that it appears clearly from the wording of rule 89 section 3 of the RPE that 'acting on behalf' is a substitute for 'acting with the consent' of a child victim. The rationale behind incorporating a person acting on behalf of a child into the procedure is that persons incapable of expressing consent must be represented by someone else. The representation of such victims by persons acting on their behalf is, therefore, mandatory.

As has been stated, within the legal framework of the ICC, a child is understood to be a person under eighteen years of age. Taken into account the remarks made in the preceding paragraph and the general presumption in favour of the child's ability to participate, derived from Article 12 of the Convention of the Rights of the Child, it has to be argued that rule 89 section 3 of the RPE refers the term 'child' only to such persons under eighteen years of age who are incapable of expressing consent. Therefore, rule 89 section 3 of the RPE states an obligation that in case of an application for participation of a child who is incapable of expressing consent, there is an obligation that it has to be made by a person acting on behalf of a child.

The scope of rule 89 section 3 of the RPE is not limited to the application for participation. Legal instruments governing the proceedings before the ICC do not provide for general norms governing the capacity to act. At the same time, filing the application is a prerequisite for participating in the proceedings (including reparation proceedings) as a victim. Since the most important procedural statement requires compliance with the conditions set in the Rule 89 section 3 of the RPE, the same standards are also required for any further statement affecting the procedural situation of a child victim. It can be easily derived from this requirement that the capacity to act in proceedings before ICC as a victim is, therefore, vested in children who are capable of expressing consent.

As regards witnesses, regulation 38 of the ROP[38] does not have normative significance as far-reaching as rule 89 section 3 of the RPE has. Its scope is limited to the questioning of a child performed by the Office of the Prosecutor. No analogous norm is applicable to questioning before the trial chambers. Neither can it be said that all the witnesses examined during the trial must inevitably come through the interview by the Office of the Prosecutor.

The consent to testify, similarly to the application for participation in the case of victims, is a prerequisite for participating in the proceedings as a witness. It can

[38] 'When a person is under the age of eighteen, the Office shall obtain consent from his or her parents, guardians or other relevant adult before questioning. In considering whether to question such a person, the Office shall take into account his or her best interests in accordance with article 68'.

be presumed that the standards applicable to the consent to testify also apply to all subsequent procedural statements of a witness. Within the practice of the ICC, the adult consent was deemed an indispensable substitute of a child's informed consent. Indeed, the requirement of the consent of an adult seems to stem from the underlaying requirement of the consent to be informed and it should be agreed that some children would be able to give an informed consent on their own.[39] The capacity to act in proceedings before ICC as a witness is, therefore, vested in children who are capable of expressing consent.

Having established that identical standards apply to victims and witnesses as regards their capacity to act in proceedings before the ICC, it remains to be seen what requirements the consent on which that capacity depends must meet. Legal instruments governing the operation of the ICC do not provide for norms applicable to assess the validity of such consent. This question is subject to a *lacuna*. For that reason, the application of Article 21 section 1 item c, enabling the ICC to apply general principles of law derived by the ICC from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, is permissible.[40] This competence is subject to a proviso that those derived principles are not inconsistent with the RS and with international law as well as internationally recognized norms and standards.

The question of the validity of consent is subject to the question of capacity to perform legally valid acts, which in turn falls within the scope of the personal statute.[41] Applicable personal statute is indicated by the conflicts of laws principles. These norms, insofar as they relate to personal statute, converge in the legal orders of the world. According to the position adopted by the majority of conflict of laws legislations worldwide, the nexus of nationality plays a decisive role in determining the personal statute of a natural person. Fewer legislations adopt a domicile nexus or the nexus of habitual residence in this respect. There are also mixed systems which, while employing the nationality nexus as primary, employ domicile or habitual residence subsidiarily.[42] A separate mention deserves to be

[39] Beckmann-Hamzei (n 1) 205–209.

[40] Bolaños (n 3) 52; general principles of law derived from national laws of legal systems of the world, confined to the field of conflict of laws are an incarnation of 'Rules of International Conflict of Laws', which was the term coined by Kurt Lipstein to denote rules of conflict of laws applicable before international tribunals. Kurt Lipstein, *Principles of the Conflict of Laws National and International* (1st edn, Martinus Nijhof Publishers 1981) 68.

[41] Maksymilian Pazdan, *Prawo prywatne międzynarodowe* (16th edn, Wolters Kluwer 2017) 132; Maksymilian Pazdan, '§ 18. Osoby fizyczne' in M Pazdan (ed), *System prawa prywatnego, Vol 20a, Prawo prywatne międzynarodowe* (C.H. Beck, 2014) 559; Anatol Dutta, 'Personal Status', *Encyclopedia of Private International Law 2* (1st edn, 2017) 1346–1347.

[42] Maksymilian Pazdan, *Prawo prywatne międzynarodowe* (16th edn, Wolters Kluwer 2017) 124; Maksymilian Pazdan, '§ 18. Osoby fizyczne' in M Pazdan (ed), *System prawa prywatnego, Vol 20a, Prawo prywatne międzynarodowe* (C.H. Beck, 2014) 557–558. See also Frederick

made of Article 12 section 1 of the Convention Relating to the Status of Refugees, adopted in Geneva on 28 July 1951,[43] which indicates the law of the country of domicile or, if a refugee has no domicile, the law of the country of residence as the one governing the personal status of a refugee. The evolution of personal nexuses in the civil-law legal culture proceeded from nationality, through domicile to the law of the place of habitual residence.[44]

The question of whether a child is capable of expressing consent shall, therefore, be assessed based on their national law. In the absence of nationality, it is necessary to resort to the law of the country in which a child is domiciled. Lacking domicile, a child is subject to the personal statute of the country of their residence. The applicable law may contain an overall rule governing the capacity to act in all circumstances or include some specific rules, applicable only to a narrow categories of acts.

The right to be heard, enshrined in Article 12 of the Convention on the Rights of the Child, implies an obligation to take the views of a child into account when undertaking any action that might affect the child.[45] It does not, however, imply an obligation to recognise the act performed by the child as legally valid. The wording of the General comment No 12 of the United Nations Committee on the Rights of the Child seems to support such an interpretation. The General comment emphasises in many places the need to provide conditions for the child to be able to express their views. However, at no point does it settle that the right to be heard may, in certain circumstances, be tantamount to the need to recognise the child's actions as legally effective procedural acts.[46] Addressing the right to be heard either directly, or through a representative, it treats the due representation of a child as a question distinct from the right to be heard.[47] Human rights in principle do not provide a comprehensive regulation of technical questions as the capacity to act. This matter belongs to the domain of procedural law and, in an international context, private international law (conflicts of laws). However, the right to be heard remains the yardstick that the norms of procedure before the ICC and principles of private international law, derived by the ICC from national laws of legal systems must, in any case, conform to (as stipulated in Article 21 section 1 item c of the RS).[48]

Alexander Mann, 'The Doctrine of Jurisdiction in International Law' [1964] 111 Recueil des Cours. Académie de Droit International 8, 56; Ubertazzi (n 6) 251.

[43] Convention Relating to the Status of Refugees [1951] UN Treaty Series 189/2545/137.

[44] For an in-depth analysis of this evolution see Mateusz Pilich, 'Łączniki personalne osób fizycznych w prawie prywatnym międzynarodowym (zagadnienia wybrane)' [2016] 19 Problemy Prawa Prywatnego Międzynarodowego 7, 11–24. See also Dutta (n 41) 1348–1349.

[45] United Nations Committee on the Rights of the Child, General comment No 12: The right of the child to be heard (CRC 2009), CRC/C/GC/12, 8 and 11.

[46] United Nations Committee on the Rights of the Child (n 45) 8, 10–13, and 16.

[47] United Nations Committee on the Rights of the Child (n 45) 12.

[48] See footnote 22.

Whenever a child lacks capacity to act, the question of their due representation arises. The ICC practice indicates parents, guardians or other relevant adult.[49] The provisions on the procedure before the ICC indicate ‘parents or the legal guardian’[50] or ‘parents, guardians or other relevant adult’.[51] The Victims and Witnesses Unit report on the confidentiality of medical records and consent to disclose medical records of 15 October 2009 indicates a ‘legal guardian’.[52] Principles for child protection and participation in transitional justice, prepared by UNICEF point out to a ‘parent or guardian’.[53] These indications have also been rephrased with the term ‘next of kin’.[54] These provisions do not state, however, any general rule.

A recourse to national laws of legal systems of the world does not produce any outcomes. Statutory representation does not constitute a single coherent institution in private international law, independent of the legal relations from which it arises. Also at the level of conflict of laws, there has been no development of nexuses indicating in an independent manner the law applicable to it. Indeed, the role of statute of statutory representation is fulfilled by the statutes relevant for the underlying legal relationships to which the right of representation is linked.[55]

It follows that no specific norms governing the statutory representation of a person who does not have the capacity to act can be derived from sources enumerated in Article 21 section 1 of the RS. The normative material on the basis of which persons entitled to such representation may be designated are legal norms of a greater degree of generality. The ICC practice indicating parents, guardians or other relevant adult deserves acceptation. Indications of these persons recur in the instruments governing the proceedings before the ICC. Representation by these persons seems to be the optimal solution when it comes to serving the best interests of a child. Treating the best interests of the child as a primary consideration is a duty of the ICC in all actions concerning children under Article 3 section 1 of the Convention on the Rights of the Child and Article 21 section 3 of the RS.[56]

[49] Beckmann-Hamzei (n 1) 39.

[50] Rule 17 section 3 of the RPE.

[51] Regulation 38 of the ROP.

[52] ICC-01/04-01/06-2166, para 6.

[53] UNICEF 2010b, 407–411.

[54] Beckmann-Hamzei (n 1) 43.

[55] Jadwiga Pazdan, ‘Art. 22’ in J Poczobut (ed), *Prawo prywatne międzynarodowe. Komentarz* (Wolter Kluwer 2017) 410–411; Łukasz Żarnowiec, ‘§ 26. Przedstawicielstwo ustawowe’ in M Pazdan (ed), *System prawa prywatnego, Vol 20a, Prawo prywatne międzynarodowe* (C.H. Beck, 2014) 820. In the case of parenthood, it would be the statute of parental responsibility. See Piotr Mostowik (ed), *Międzynarodowe prawo rodzinne* (Wolters Kluwer 2023) 254–258; Yuko Nishitani, ‘Kinship and Legitimation’, *Encyclopedia of Private International Law 2* (1st edn, 2017) 1070–1077.

[56] Awan (n 3) 103; Malone (n 1) 617; Bolaños (n 3) 229.

Whereas it can be presumed that persons who are closest to the child are in the best position to know and control their situation, the risk of a conflict of interest cannot be ruled out. Conflicts of interests may arise out of the relation between a child and their representative or between a child and other person represented by the same representative, as it may happen in the case of the Office of the Public Counsel for Victims.[57] Safeguarding best interests of the child necessitates that persons whose interests conflict with the interests of the child shall not represent them. As the need for their representation remains, they shall be represented by other persons, without conflicting interests (litigation friends). This issue has been highlighted in the literature.[58] Neither is it regulated by the legal instruments governing the operation of the ICC nor has it been referred to by the ICC practice.

It is also aptly noted that in a situation where parents or guardians might not be at the disposal of a child for any reasons, including death, disappearance or failure of a legal order to appoint a guardian, an informed consent shall be obtained from a child acting on their own.[59]

For these reasons, there is a need to determine the order of persons who may represent the child. Such an approach has been adopted by the ICC. In a case when a child victim lacked parents or guardians, Trial Chamber I allowed applications to be made on their behalf by another adult.[60] Indisputably, the parents come first. If parents cannot act on behalf of the child and the child has been assigned a legal guardian, the representation passes to the guardian. If neither parents nor the guardian can act on behalf of the child, the child may be represented by any relevant adult, referred to in the ICC practice. Bearing in mind the need to safeguard the best interests of the child and their right to be heard, the notion of a 'relevant adult' shall not be construed narrowly, but at the same time shall not extend to people who would not look after the interests of the child. Therefore, 'relevant adult' shall be understood as any adult, in respect of whom the ICC is satisfied that they are acting in the best interests of the child. In other words, the notion of 'relevant adult' denotes any adult except from these clearly 'irrelevant'.[61]

Having discussed the capacity to act and the right to act on behalf of a child, it remains to examine the rules of evidence for proving the facts on which they

[57] Beckmann-Hamzei (n 1) 122.

[58] Beckmann-Hamzei (n 1) 42-44.

[59] Beckmann-Hamzei (n 1) 42 and 102; Malone (n 1) 617.

[60] *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06-1861-AnxA1), annex A1 to the Order issuing public redacted annexes to the Decisions on the applications by victims to participate in the proceedings of 15 and 18 December 2008 ICC, paras 59–60. It was not stated in this decision that children may submit a victim's application form to participate in the ICC proceedings, regardless of any parental permission or control if parents were available. cf Bolaños (n 3) 167–168.

[61] Community members or child rights organisations could, for instance, come into consideration. Beckmann-Hamzei (n 1) 43–44.

are based. Two circumstances need to be proved: the age of a child and kinship, guardianship or being a relevant adult.

As the age is calculated based on the date of birth, it falls within the identity of a human. Thus, the standards developed by the ICC for proof of identity apply. The early judiciary on victims' participation required victims to prove their identity with an official identity document with a photograph. The standard of proof has been subject to relaxation. The ICC's case law allows other forms of identification (including non-official documents such as voting cards, student cards, birth certificates or ultimately, when no document is available, a statement signed by two witnesses).[62] As regards the standard of proof, a *prima facie* evidence is sufficient. The burden of proof rests on those who apply for participation.[63]

As proof of kinship, either official documents, such as a birth certificate or a letter from the local council, as well as non-official documents, such as a birth notification card or a baptism card have been required by the Pre-Trial Chambers.[64] Trial Chamber II ruled that a statement signed by two credible witnesses could be a proof of kinship or guardianship when an adult is acting on behalf of a child victim.[65] The standard of proof of kinship has been set by Trial Chamber I at the level of 'sufficient evidence'.[66] These norms should apply *mutatis mutandis* to the proof of guardianship or other circumstances which determine the 'relevance' of other adult.

It should be noted that whenever a person unsuccessfully purports to prove their kinship, there are no bases to preclude them from proving being a 'relevant person' instead if there is a prospect of succeeding in this.

[62] Bolaños (n 3) 166.

[63] Beckmann-Hamzei (n 1) 88.

[64] *The Prosecutor v Joseph Kony and Vincent Otti* (ICC 02/04-01/05-282), decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06,a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06,a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06,a/0121/06 and a/0123/06 to a/0127/06' of 14 March 2008 ICC, para 7; *The Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08-320), fourth decision on victims' participation of 12 December 2008 ICC, para 38. See also *The Prosecutor v Laurent Gbagbo* (ICC-02/11-01/11-86), second decision on issues related to the victims' application process of 05 April 2012 ICC, para 36 and *The Prosecutor v Laurent Gbagbo* (ICC-02/11-01/11-138), decision on victims' participation and victims' common legal representation at the confirmation of charges hearing and in the related proceedings of 4 June 2012 ICC, para 26.

[65] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07-1491-Red-tENG), grounds for the decision on the 345 applications for participation in the proceedings submitted by victims of 23 September 2009 ICC, para 98.

[66] *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06-601-tEN), decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 of 20 October 2006 ICC 12.

Finally, in case of doubts in establishing the circumstances on which a child's capacity to act or a person's right to represent the child depends, the child's capacity to act or of the person's right to act on behalf of the child should be presumed.[67]

In any case, the rules governing the capacity to act, the representation of a child, and the evidential standards shall not lead to the nullification of a child's right to be heard. Victims' participation shall be unquestioned also on account of the fact that it is an intrinsic part of the ICC's judicial system.[68]

Research presented in this article concludes that:

1. children's capacity to act in proceedings before the ICC is governed by norms derived from legal instruments governing the operation of the ICC, which indicate that the capacity to act is vested in children who are capable of expressing consent and by norms of law of the country of their nationality, in the lack of nationality – by the law of the country of domicile, and in the lack of domicile – by the law of the country of habitual residence, applicable to the capacity of expressing consent,
2. parents are the persons who may act on behalf of children that do not have the capacity to act in proceedings before the ICC; if parents cannot represent the child – it is a legal guardian; if the legal guardian cannot represent the child – it is the other adult, in respect of whom the ICC is satisfied that they are acting in the best interests of the child,
3. standard of proof of a child's age is *prima facie* evidence, standard of proof of kinship, guardianship or other circumstances which determine the status of 'other relevant adult' is 'sufficient evidence'; both circumstances shall be proven by a documentary evidence, lacking these, a statement signed by two witnesses should suffice; doubts should be resolved in favour of a child's participation.

It cannot go unnoticed that *lacunae* within the normative framework of the ICC in matters of a child's capacity to act and their representation are of a size greater than the matters explicitly regulated. It should be agreed that the drafters of the RS and the entire ICC system did not expect that, as far as the modalities of participation are concerned, there is a need to draw particular attention to child participation.[69] Uncertainty of law poses a risk of the nullification of a child's right to be heard. This risk must in any case be avoided.

Although it has been indicated how the ICC should proceed, it seems that more specific standards could be formulated in this respect. The most advisable way would be to reformulate the Rules of Procedure and Evidence by an amendment adopted by the Assembly of States Parties.

[67] Bolaños (n 3) 230.

[68] Bolaños (n 3) 239.

[69] Beckmann-Hamzei (n 1) 117; Bolaños (n 3) 238–239.

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NOTES

Studia Iuridica 105
ISSN 0137-4346; e-ISSN 2544-3135
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https://doi.org/10.31338/2544-3135.si.2025-105.8

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RECENTRALIZATION IN PROGRESS: UNDERMINING INFLUENCE OF THE TERRITORIAL SELF-GOVERNMENT BODIES ON NATIONAL POLICIES AND LEGISLATION

Abstract

This article focuses on specific dimension of the recentralization process observed in Poland since the 2015 parliamentary elections. From quantitative and qualitative perspective, it describes the trend of undermining the influence of the local and regional self-government bodies on the national legislative process. The practice of functioning of the Joint Commission of the Government and the Self-Government Bodies is analyzed in order to assess to what extent this original institutional mechanism was used after 2015 for effective involvement of the local and regional authorities in shaping the legislative framework concerning their functions and status. We conclude that the Commission's role has significantly deteriorated, as increasing number of laws have been prepared and adopted without even providing the Commission with opportunity to share its opinion on the relevant legislative proposals.

KEYWORDS

recentralization, local government, legislative process, local autonomy

SŁOWA KLUCZOWE

recentralizacja, samorząd terytorialny, proces legislacyjny, samodzielność lokalna

I. INTRODUCTION

Recentralization trend in the policies of central government in Poland has been clearly present since the 2015 parliamentary elections that resulted in formation of the right-wing populist majority led by the Law and Justice party (*Prawo i Sprawiedliwość*, PiS).[1] However, only recently the scope and depth of this shift has been comprehensively analyzed and captured through several indicators of local autonomy and capacities of the territorial self-government units at the local level. For the first time, the decentralization index prepared by a team of researchers under auspices of the Stefan Batory Foundation offers a more structured and complete comparison of evolution of the policy of the central government and legislature towards the local governments in the period 2014–2023.[2]

This article focuses on one of the elements of this assessment, namely the measurement of the political standing and impact of local government on the national policies and legislation. This issue was measured through composite indicator relating to the involvement of the Joint Commission of the Government and the Self-Government Bodies (*Komisja Wspólna Rządu i Samorządu Terytorialnego, KWRiST*). This body serves as a unique institutional formula for participation of the local and regional governments in the legislative process, already operating for three decades. In order to measure the political impact and strength of local and regional governments, we investigated the proportion of the legislative acts concerning self-government bodies (local and regional matters) that were adopted after or without consultation with the *KWRiST*. In this article, we provide more detailed insight into our investigations in this regard.

[1] See Dawid Sześciło, 'Is There a Room for Local and Regional Self-Government in the Illiberal Democracy? Struggle over Recentralization Attempts in Poland', Studia Iuridica, 2019, Vol 79.

[2] Marta Lackowska and others, *Indeks samorządności,* Warsaw 2023; Marta Lackowska and others, *Indeks samorządności. Druga edycja 2023*, Warsaw 2023; Marta Lackowska and others, *Indeks Samorządności 2024. Bilans dekady 2014–2023*, Warsaw 2024.

II. JOINT COMMISSION OF THE GOVERNMENT AND THE SELF-GOVERNMENT BODIES

The *KWRiST* was set up in 1993, though only in 2005 was the special law[3] on its functioning adopted. This cemented evolution of this body from an advisory committee of the Council of Ministers to a more standalone and formalized institution.[4] The organizational setup of the Commission is based on the principle of equal representation of the central government and representatives of the local and regional self-government units. While the government is represented by the members selected autonomously by the Prime Minister, the law establishes more detailed rules for filling up the seats reserved for the representation of the local and regional self-governments. In general, these rules aim at ensuring representation of various types of local and regional government units, i.e., smaller and more populated municipalities, districts and voivodeships.

The mandate of *KWRiST* was formulated quite extensively, including aligning position of the central government and local/regional government in terms of setting economic and social priorities in matters relating to municipal economy and functioning of municipal and district self-government, regional development and functioning of the voivodeship self-government. It also covers conducting reviews and assessments of the legal and financial conditions of the functioning of local and regional government, assessment of the functioning of local and regional government in relation to the EU integration processes, including the problems of absorption of the EU funds. However, the most important area of the *KWRiST's* operations involves providing opinions on the draft normative acts, programs and other documents relating to the self-government bodies and determining relations between the territorial self-government and other bodies of public administration.

In principle, the Commission operates according to the rule of consensus, striving to formulate unanimous opinion of both parties on the relevant draft normative act. In case of failure to achieve consensus, each party may adopt its own position on the respective matter. Considering this formula, the Commission generally does not conduct votes on the matters submitted to it.

The Joint Commission of the Government and the Self-Government Bodies is one of the most original in the European practice institutional mechanisms for involvement of the local and regional governments in the legislative process. Similar model also exists in Spain, in the form of National Commission for Local

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[3] The Law of 6 May 2005 on the Joint Commission of the Government and the Self-Government Bodies and the representatives of the Republic of Poland in the Committee of Regions of the European Union, Official Journal, No 90, item 759.

[4] See Hubert Izdebski, 'Pozycja ustrojowa Komisji Wspólnej Rządu i Samorządu Terytorialnego', Samorząd Terytorialny 2013, No 12; Igor Zachariasz, 'Geneza Komisji Wspólnej Rządu i Samorządu Terytorialnego', Samorząd Terytorialny, 2015, No 12.

Administration (NCLA). The NCLA is led by the minister of public administration and, alike *KWRiST*, consists of an equal number of representatives of local entities and the central government. Mandate of the NCLA primarily comprises considering the draft laws affecting local communities, but also making proposals and suggestions to the government regarding delegation of powers to the local administration, distribution of subsidies and other forms of transfers to the local entities, participation of the local entities in taxation revenues, as well as budgetary and financial matters. The Commission, to fulfill its functions, may require the Institute of Local Administration Studies to carry out studies and issue reports. Finally, the NCLA may also request the constitutionally legitimized bodies to challenge before the Constitutional Court the laws of the State or the Autonomous Communities that it deems detrimental to the constitutionally guaranteed local autonomy.[5]

More recently, the success story of the Polish *KWRiST* inspired creation of a similar body in Romania. The Interministerial Technical Committee for Decentralization was established in June 2022.[6] It includes the minister responsible for local government matters, State secretary in this ministry, representatives of the ministry of finance, other ministries, general secretariat of the government and heads of the associations of the local government units. The Committee is responsible, among others, for approving the draft of the general decentralization strategy developed by the coordinating ministry of the decentralization process, proposing solutions regarding the sectoral decentralization process or regarding the need to improve the way decentralized powers are exercised and endorsing the projects of sectoral decentralization strategies and the projects of sectoral strategies for improving the way of exercising decentralized powers. Separate government decision regulates the right of the associations of the local government units to provide opinions to the draft legislative acts.[7]

III. MEASURING THE PARTICIPATION OF THE LOCAL AND REGIONAL GOVERNMENTS IN THE LEGISLATIVE PROCESS

For the purposes of measuring the political strength of the territorial self-government bodies, we concentrated, in general, on the extent to which the Com-

[5] Article 117–119 of the Law 7/1985 of 2 April 1985 on the Bases of the Local Regime.

[6] Government Decision No 800 of 23 June 2022 for the organization, functioning and duties of the Interministerial Technical Committee for Decentralization and the working groups for the decentralization of competences.

[7] Government Decision No 635 of 11 May 2022 regarding the consultation procedure of the associative structures of the local public administration authorities when drafting normative acts.

mission was actually involved into legislative processes and to what extent the opinions of the self-governments expressed on this forum were taken into account by the government. Subsequently, we also analyzed the legislature considering the draft legislation. The composite indicator captures various dimensions of this problem through three components:

a) Share of the government-sponsored laws (adopted by the parliament) concerning the local and regional self-governments that were not submitted by the government to the *KWRiST* for opinion;
b) Share of the government-sponsored laws (adopted by the parliament) concerning the local and regional self-governments that were submitted by the government to the *KWRiST* for opinion and adopted despite the negative opinion of the representation of the local and regional self-governments;
c) Share of the laws concerning the local and regional self-governments adopted upon submission of the members of the parliament.

As a general rule, each of these components marks a negative trend of ignoring the voice of the local and regional self-governments or bypassing the main institutional channel for acquiring their opinions. The first case is a consequence of the fact that it is ultimately an autonomous decision of the government whether the draft normative act should be submitted to *KWRiST* or not. The representation of the local and regional self-governments in the Commission does not have power to oblige the government to table the legislative proposal for *KWRiST's* opinion.

Second case relates to situations where the proposals were filed to the Commission, but the parties failed to reach consensus and the representation of the local and regional self-governments decided to formulate negative opinion about the relevant draft. Considering that *KWRiST* is only an advisory body without any imperative powers, this opinion does not influence the course of the legislative process.

Final case illustrates the process of bypassing *KWRiST* through legislative proposals tabled directly by the parliamentarians of the ruling majority (often prepared by the relevant ministries) in order to accelerate the legislative process and skip the additional consultation and impact assessment requirements applicable to the government-sponsored drafts, including consultation in the formula of *KWRiST*. According to the parliamentary rules of procedure, proposals tabled by the members of parliament are not subject to any mandatory consultations with *KWRiST*.

Alike with other indicators constituting the decentralization index, this composite indicator was calculated for 2014 (last full year before the formation of the PiS-led parliamentary majority), 2021 (first edition of the decentralization index), 2022 (second edition of decentralization index) and 2023 (third edition of decentralization index). For each year, we analyzed all laws adopted by the parliament in search for the acts that could be categorized as meeting the criteria

elaborated in the 2005 Law on *KWRiST*, i.e., relating to the self-government bodies and determining relations between the territorial self-government and other bodies of public administration. For the purpose of this review, we followed the broad definition of these criteria, relying on the assumption that the government should proactively seek the inputs from the local and regional self-governments in the legislative process and enhance their influence on the legislative framework. It should be underlined that we included only proposals that were eventually adopted in the relevant year.

In quantitative terms, the number of adopted laws concerning the local and regional self-government bodies was similar across years covered by our analysis:

- 68 laws in 2014;
- 75 laws in 2021;
- 70 laws in 2022; and
- 57 laws in 2024.

However, in terms of the scope of involvement of the local and regional self-governments in the legislative process, we observed major differences. The table below presents the detailed results of the analysis for each of the components distinguished above as indicators of the participation of local and regional governments in the law making process.

Table. Analysis of involvement of the representation of the local and regional self-government bodies in the legislative process (2014, 2021, 2022)

	2014	2021	2022	2023
Total number of adopted laws concerning local and regional government	68	75	70	57
Number of the government-sponsored laws (adopted by the parliament) concerning the local and regional self-governments that were not submitted by the government to the *KWRiST* for opinion	6	23	19	9
Number of the government-sponsored laws (adopted by the parliament) concerning the local and regional self-governments that were submitted by the government to the *KWRiST* for opinion and adopted despite the negative opinion of the representation of the local and regional self-governments	1	6	3	10
Number of the laws concerning the local and regional self-governments adopted upon proposal of the members of the parliament	10	5	8	17

Source: Own analysis based on review of legislation adopted and protocols of the Joint Commission of the Government and the Self-Government Bodies.[8]

[8] Protocols of the meetings of the Joint Commission of the Government and the Self-Government Bodies were requested and obtained by the Stefan Batory Foundation, as the Commission fails to publish them on its official website.

The negative trend is clearly visible, also in terms of percentage of the laws adopted without adequate involvement of the *KWRiST* into the legislative process. In 2014, 25% of the laws were passed without *KWRiST's* opinion or despite the negative opinion of the local and regional self-governments' representation. In 2021 and 2022, the value of this indicator exceeded 40% and in 2023, it reached almost 70% of all the laws adopted. This increase could be attributed primarily to the more common practice of the government to ignore the Commission in proceeding government-sponsored draft laws. The two remaining subindicators are of rather marginal relevance for the full picture, except for 2023, when the significant number of laws were adopted upon proposal of the members of the parliament.

These results correspond well with and empirically confirm already formulated observations about atrophy of the mechanism of the local and regional governments involvement in the legislative process through the *KWRiST*.[9] Marginalizing the role of the Commission is a strong and accelerating trend. It manifests very clearly the overall approach of the central government and ruling majority towards the local and regional self-governments that leaves a steadily narrowing space even for presenting non-binding opinions on the government's proposals. The top-down approach to policy making seems to be further strengthening and legitimate questions about the very sense of continuing the *KWRiST* format could be raised.

Alarming trends are demonstrated not only by numbers and shares of legislative acts adopted without the Commission's involvement. More in-depth analysis of the individual legislative initiatives shows that this practice also relates to the acts of fundamental relevance for the functioning of the local and regional self-governments. For example, among the laws adopted in 2021 without the *KWRiST's* review, we can identify an initiative regulating salaries of the local and regional government officials or subsidies for home schooling managed by the local governments.

In 2022, the Commission was bypassed in the process of adoption of several laws of major relevance for the local and regional communities. For instance, the law extending the current term of the local and regional government bodies was adopted upon proposal of the members of parliament, hence without even formal ground for consultation with the *KWRiST*. The same scheme was applied to proceed the law changing the salaries of the teachers paid from the budgets of the local governments managing public schools. As part of government-sponsored proposals, the parliament adopted series of laws establishing mechanisms

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[9] See Justyna Przedańska, Michał Szwast, 'Komisja Wspólna Rządu i Samorządu Terytorialnego – w stronę upodmiotowienia samorządu terytorialnego', Ruch Prawniczy, Ekonomiczny i Socjologiczny, 2019, issue 4; Justyna Przedańska, 'Rola Komisji Wspólnej Rządu i Samorządu Terytorialnego w kształtowaniu zasad wsparcia finansowego dla jednostek samorządu terytorialnego w ramach Rządowego Funduszu Inwestycji Lokalnych', Acta Universitatis Wratislaviensis, 2021, No 4058.

for financial and non-financial aid to the Ukrainian refugees. These acts were adopted without requesting opinion of the *KWRiST* despite the fact that they imposed numerous new administrative, organizational and financial obligations on the local governments. In a similar manner, the government and parliament adopted extraordinary legislation obligating the municipalities to participate in the distribution of coal on preferential conditions to the individual consumers, in the context of war-related energy crisis. In 2023, even the amendments to the Law on *KWRiST* (modifying its composition) were adopted upon proposal of the members of parliament, hence without consultations with the local governments' representation in *KWRiST*.

IV. RESTORING THE MECHANISMS FOR INVOLVEMENT OF SELF-GOVERNMENT BODIES IN THE LEGISLATIVE PROCESS – LESSONS LEARNT

Considering the unique nature of *KWRiST* and its extensive track record of articulating the voice of local and regional communities in decision making at the central level, the experience of the current decay of this institutional mechanism should be transformed into concrete ideas and recommendations for revision of the legislative framework for the Commission. The main objective would be to eliminate the possibilities for bypassing the *KWRiST* in the legislative process through two major amendments. First of all, the representation of the local and regional self-governments should obtain the right to issue binding demand for submission of the government-sponsored legislative proposal for the Commission's opinion. The decision on redirecting the proposal to the *KWRiST* should not be left to the autonomous choice of the government. Secondly, the proposals lodged by the members of parliament should be subject to mandatory review of the Commission, alike all the proposals of the MPs, which are consulted with the government.

These two major improvements should be accompanied with more technical but still important revisions. The law on *KWRiST* should clarify at what stage of the legislative process the proposal should be submitted for the opinion of the Commission, i.e., before or after interministerial consultations, or at both phases. In the context of the legislative process, it might be also considered to explicitly allow the representation of the local and regional governments in the Commission to submit legislative proposals for the consideration of the government.

There is also a need to enhance the analytical capacities of the Commission by strengthening its apparatus. The Commission should absorb the National Institute of Local Government, which is subordinate to the Ministry of Interior and Administration, and which has never met expectations of providing extensive analytical

support feeding the public and policy debate on the local government. Strengthened *KWRiST* should be obliged to prepare several key documents regarding the state of local government every year, including: a report on the financial situation, on the problems of supervision of voivodes and regional audit chambers over local governments, on the problems of the jurisprudence of administrative courts in local government matters, or, for example, on citizen participation in local government (participatory budgeting, social consultations, civic legislative initiatives).[10]

Regardless of these ideas, the reactivation of the Commission and restoration of its role in the legislative process will require in the first place the policy shift in the approach of the central government towards local and regional authorities. Unless the government and ruling majority internalize the understanding of the value of providing the self-government bodies with the platform to present their views on the legislative proposals, even the most progressive arrangements in the law on *KWRiST* will have limited impact on the actual political strength of the local and regional governments.

A legislative proposal addressing some of the issues discussed above was recently prepared under the auspices of the Stefan Batory Foundation.[11] It envisages new, more transparent and representative mechanism for the selection of the self-governments' representation in *KWRiST*, the right of the self-governments' representation to demand submission of the legislative proposal to the Commision, as well as obligation to provide response to the comments and remarks submitted by the local governments. However, this proposal has not been yet formally lodged by any actors enjoying the right to the legislative initiative.

V. CONCLUSIONS

On its 30th anniversary, the Joint Commission of the Government and the Self-Government Bodies is facing the greatest crisis in its history. The problem of ignoring the voice of the local and regional governments in the legislative process reached systemic level with half of the laws concerning local and regional communities having been adopted without proper consultation with the Commission. This phenomenon is just a part of broader, comprehensive crisis of local and

[10] Dawid Sześciło, Komisja Wspólna Rządu i Samorządu: potrzeba nowej formuły, online: <https://www.batory.org.pl/blog_wpis/komisja-wspolna-rzadu-i-samorzadu-potrzeba-nowej-formuly/> accessed 20 January 2025.

[11] See Hubert Izdebski, 'Trzydzieści lat Komisji Wspólnej Rządu i Samorządu Terytorialnego. Propozycje zmian w ustawie o Komisji Wspólnej oraz o przedstawicielach Rzeczypospolitej Polskiej w Komitecie Regionów Unii Europejskiej', Samorząd Terytorialny 2023, issue 12.

regional autonomy since 2015. As the results of the decentralization index demonstrated, it is accompanied by curbing powers and scope of responsibilities of local and regional authorities, undermining financial capacities, as well as obtrusive administrative supervision over local and regional governments performed by the voivodes (regional governors appointed by the central government) and regional audit chambers.

In 2014, the Polish local government was perceived as one of the strongest in Europe, leading the decentralization process among post socialist countries of the Central and Eastern Europe.[12] The period after 2015 is marked with continuous deterioration of capacities and political standing of the local and regional communities. As demonstrated in this article, the recentralization trend is multi-faceted and also involves not only direct and explicit actions undermining the powers and capabilities of the self-government bodies. It may also be based on softer measures that nevertheless cumulatively have considerable impact on the overall degree of local autonomy.

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[12] Andreas Ladner, Nicolas Keuffer, Harald Baldersheim, 'Measuring local autonomy in 39 countries (1990–2014)', Regional & Federal Studies 2016, issue 26 (3).