



STUDIA IURIDICA

107, 2025



STUDIA
IURIDICA

STUDIA IURIDICA

107, 2025



Scientific Board

Grażyna Bałtruszajtys (Chairperson, University of Warsaw), Tomasz Giaro (University of Warsaw), Jan Błęzyński (University of Warsaw), Marc Bors (University of Fribourg), Zdzisław Galicki (University of Warsaw), Hubert Izdebski (Polish Academy of Sciences), Jacek Lang (University of Warsaw), Michael Martinek (Saarland University), Adam Niewiadomski (University of Warsaw), Maria Rogacka-Rzewnicka (University of Warsaw), Alessandro Somma (Sapienza University of Rome), Michael Stürner (University of Konstanz), Marek Wąsowicz (University of Warsaw), Beata Janiszewska (Secretary, University of Warsaw)

Editor-in-Chief

Sławomir Żółtek

Executive Editors

Paweł Banaś, Oktawian Kuc

Editor

Julia Sochacka

Commissioning Editor

Dorota Dziedzic

Editing

Małgorzata Sulęta-Sildatke

Publication under the Creative Commons Attribution 4.0 (CC-BY) license (full text available at <https://creativecommons.org/licenses/by/4.0/>)

© Copyright by Authors 2025

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 support 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

Online bookshop: www.wuw.pl/ksiegarnia

Typesetting

Beata Stełęgowska

Printed by: POZKAL

STUDIA IURIDICA N0 107 (2025)

<i>Anna Gerecka-Żołyńska</i> – Punishment In Cases of Offences against Cultural Heritage. Model Remarks against the Background of UNESCO and the Council of Europe Conventions	7
<i>Wojciech Jasiński, Jacek Kosonoga, Sławomir Żółtek</i> – Obligation of State and Local Government Institutions to Provide Assistance to Authorities Conducting Criminal Proceedings (Article 15 § 2 of the Code of Criminal Procedure)	23
<i>Jędrzej Kupczyński</i> – The Comparison of Polish and German Models for the Utilisation of Police Body-Worn Cameras.	42
<i>Monika Strus-Wołos</i> – Is Denying Legally Incompetent (Incapacitated) Persons the Right to Vote Compatible with Principles of Democracy in the European Union – an Analysis Based on the Example of European Parliament Elections.	69
<i>Marcin Szwed</i> – The Meaning and Function of Judicial Independence under the European Convention on Human Rights.	90
<i>Anna Zbiegień-Turzańska</i> – Continuing Convergence of Corporate Governance Models? Towards Efficiency of Polish Regulations on Supervisory Boards in Companies and Cooperatives	114
<i>Monika Szwarz</i> – The Provision of Services in the EU Internal Market via Collaborative Economy Platforms and Protection of Consumers: Actors, Obligations and Enforcement	132
<i>Ewa Milczarek</i> – Security of Crossborder Data Transfer – the EU-USA Perspective	156
<i>Edyta Figura-Góralczyk</i> – Escape Clause in International Family, Property and Succession Law.	179

Anna Gerecka-Żołyńska

Adam Mickiewicz University in Poznań, Poland

e-mail: gerecka@amu.edu.pl

ORCID: 0000-0001-5897-4447

**PUNISHMENT IN CASES OF OFFENCES
AGAINST CULTURAL HERITAGE.
MODEL REMARKS AGAINST THE BACKGROUND
OF UNESCO AND THE COUNCIL OF EUROPE
CONVENTIONS**

Abstract

Among the issues raised internationally that relate to the protection of cultural heritage, increasing attention is being paid to the individual responsibility of perpetrators of crimes against cultural property. The aim to harmonise the level of criminal law protection of cultural property in national legal systems is seen as one of the most important factors that could reduce crime in this area. Legislative initiatives undertaken by countries in order to strengthen the criminal law protection of cultural property focus primarily on two groups of problems: the development of a catalogue of offences against cultural property and the determination of the type and amount of sanctions with which these offences should be threatened.

In the search for an optimal pattern of penalisation, the article identifies the norms of international law influencing the scope of penalisation of behaviours violating the principles of protection of cultural property in the national legal orders and analyses the legislative achievements so far obtained within the framework of international cooperation at the universal and regional (European) level. The considerations were concentrated around three key issues, which were considered to be: the notion of just punishment, the analysis of the scope of criminal law protection of cultural property set

out in the documents of UNESCO and the Council of Europe, and the type and amount of sanctions that should be applied to behaviour directed against cultural property under legal protection. The last part of the article consists of the final conclusions formulated after an autonomous assessment of the regulations adopted in the two systems of international cooperation on the criminal law protection of cultural heritage indicated above.

KEYWORDS

international protection of cultural heritage, individual criminal responsibility, UNESCO, Council of Europe, European Union, cultural property, criminal sanctions, administrative sanctions, imprisonment, confiscation of property

SŁOWA KLUCZOWE

międzynarodowa ochrona dziedzictwa kulturowego, indywidualna odpowiedzialność karna, UNESCO, Rada Europy, Unia Europejska, dobra kultury, sankcje karne, sankcje administracyjne, pozbawienie wolności, konfiskata mienia

1. HIGHLIGHTING THE PROBLEM

In the field of international law, the question of undertaking formalised cooperation for the protection of cultural property became particularly important in the second half of the 20th century with the establishment of international organisations that included the protection of cultural heritage among their basic statutory objectives.¹ In this context, from a global perspective, it is worth mentioning the establishment of UNESCO in 1946, and from a regional (e.g., European) perspective, the establishment of the Council of Europe in 1949.²

¹ Bart Zwegers, *Cultural Heritage in Transition A Multi-Level Perspective on World Heritage in Germany and the United Kingdom, 1970–202*, Springer 2022, 3 <<https://doi.org/10.1007/978-3-030-93772-0>>; see more Alberto Martorell, *The role of cultural heritage in the global society* in Bogusław Szmygin (ed), *Heritage in transformation: cultural heritage protection in XXI century – problems, challenges, predictions*, Lublin 2016, 151–152.

² Attempts to regulate the few issues of protection of cultural property related to humanitarian law were made as early as the beginning of the 20th century. The peace conferences organised at that time in The Hague resulted in the adoption of several conventions regulating the conduct of armed conflicts. Of particular importance, from the point of view of the protection of cultural property, were those adopted in 1907: Convention IV on the Laws and Customs of War and Convention IX on Bombardment by Naval Armed Forces in Time of War. Another example of the beginnings of international cooperation for the protection of cultural property is the Treaty

De lege lata, attention is drawn to the disproportion between the adopted rules of cooperation based on civil law instruments and those based on criminal law elements. The former have a comprehensive character, and among them, the remedies in the form of return or restitution of cultural property occupy a key position, while criminal law protection is regulated in a marginal and fragmentary way.³ The low level of recommendations for criminal law protection is the result of the use of the concept of minimum intervention in international treaties for the protection of cultural property.⁴ This concept leaves States Parties free to choose the acts challenged and the sanctions threatened, which may be criminal or administrative. The freedom of choice of sanctions indicates that it is of primary importance to achieve the stated objective of ensuring effective protection of cultural heritage. Determining the means by which this objective is achieved holds lesser importance. The advantage of using the concept of minimum intervention is the flexibility to implement the solutions adopted in the international agreement into the national order.

The arguments in favour of strengthening criminal law protection include, on the one hand, the increase in the level of threat and variety of attacks on cultural property and, on the other hand, the increase in the real possibility of apprehending the perpetrator of a criminal offence using measures provided for in the criminal procedure. Against this background, the inclusion of the perpetrators of this type of crime committed in the context of an armed conflict under the jurisdiction of the International Criminal Court⁵ is also of particular importance.

A mode of responsibility based on the norms of criminal law is linked to the need for national criminal law systems to develop a catalogue of offences against cultural objects, which may include specific behaviour not yet criminalised. The constituent elements of the offences in these cases are co-determined, inter alia,

for the Protection of Artistic and Scientific Institutions and Historical Monuments, adopted on 15 April 1935 by the majority of American states (Brazil, Chile, Dominican Republic, Guatemala, Colombia, Cuba, Mexico, El Salvador, USA, Venezuela), referred to as the Roerich Treaty after its creator. For a more extensive discussion, see Roger O' Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge 2006, 22–27; Anna Przyborowska-Klimczak, *Rozwój ochrony dziedzictwa kulturalnego w prawie międzynarodowym na przełomie XX i XXI wieku*, Lublin 2011, 43–71.

³ See also Wojciech Kowalski, *Restytucja dzieł sztuki w prawie międzynarodowym*, Katowice 1989, 22–24; Kamil Zeidler, *Restitution of cultural property, Hard Case. Theory of Argumentation. Philosophy of Law*, Gdańsk-Warszawa 2016, 26–29.

⁴ Stefano Manacorda, 'Criminal Law Protection of Cultural Heritage: An International Perspective' in Stefano Manacorda, Duncan Chappell (eds), *Crime in the Art and Antiquities World Illegal Trafficking in Cultural Property*, Springer 2011, 18.

⁵ Rome Statute of the International Criminal Court done at Rome on 17 July 1998 <<https://www.icc-cpi.int>>.

by the rules of legal protection of cultural property adopted in the national legal order, insofar as they prescribe the manner of dealing with these exceptional objects. As a result, violations of these rules lead to criminal liability.

This solution is peculiar in the sense that if the questioned behaviour concerned objects other than cultural assets, it could remain unpunished. Under the Polish Act on the protection and care of monuments,⁶ for example, we may point to the act of destroying a monument, which is classified as a criminal offence (Article 108(1–2)). Criminal liability in this case is incurred by anyone who destroys a monument, even if the destruction is carried out by the owner of the monument. Criminal liability in the case of destruction of things that are not monuments is enforced on the basis of Article 288 (1) of the Polish Criminal Code⁷ and applies only to behaviour involving destruction of another person's property. An important element in shaping effective criminal law protection is also the selection of appropriate penalties and criminal measures to be imposed for offences against cultural property, taking into account the relevant rules of individual and general prevention. The purpose is not only to prevent impunity for acts that threaten cultural heritage, but it is also fundamental that they are in accordance with the standards of due process and the norms guaranteed by international human rights law.

2. RESEARCH METHODOLOGY

The article analyses the key treaties for the protection of cultural heritage developed by UNESCO and the Council of Europe in order to indicate the norms of international law influencing the level of penalisation of behaviour violating the principles of protection of cultural property in the national legal orders.⁸ The considerations carried out focus on three issues: the notion of just punishment, the analysis of the scope of criminal law protection of cultural property set out in the documents of UNESCO and the Council of Europe, and the type and amount of sanctions that should be applied to behaviour directed against legally protected cultural property.

The final conclusions are drawn after an autonomous assessment of the regulations adopted in the two systems of international cooperation on the criminal law

⁶ Act of 23 July 2003 on the protection and care of historical monuments (Consolidated text, Official Journal 2022, 840).

⁷ Act of 6 June 1997 Criminal Code (Consolidated text, Official Journal 2023, 17).

⁸ Scott Veitch, *Moral Conflict and Legal Reasoning*, Oxford, Portland Oregon 2002, 205–206.

protection of cultural heritage indicated above. The considerations are carried out primarily using the dogmatic legal method.

3. THE CONCEPT OF JUST PUNISHMENT IN CRIMINAL LAW DOCTRINE

Punitive repression, which corresponds to the moral principle that wrong deeds should be punished, has for centuries acted as a regulator of human relations.⁹ In social terms, a punishment that arouses universal approval, resulting from the need for revenge, which is one of the elements of the social sense of justice, is considered just.¹⁰

In the science of criminal law, the discussion on just punishment has been held for years, both on the grounds of its adjudication in the *civil law* system, as well as in the *common law* system.¹¹ It is nowadays unanimously accepted that punishment should take into account both retributive and preventive objectives. The essence of punishment should not be reduced to a mere problem of retribution.¹² In the process of imposing a particular punishment, its severity is of paramount importance, which depends on the gravity of the act, the degree of guilt and the consideration of the various circumstances of the offence, classified as mitigating or aggravating. In this context, it is worth recalling the Italian Constitutional Court's ruling No 313 of 4 July 1990, from which it follows that punishment has an obligatory repressive character and is deeply linked to the need for social defence and the general prevention of crime. The retributive and repressive functions of punishment should set the minimum conditions without which punishment would lose its meaning. However, the Court has stipulated that, while reintegration, deterrence and social defence are values with a constitutional basis, the impairment of civil rights on their basis can only occur for a corrective purpose, explicitly defined in the Italian Constitution in the context of punishment.¹³

⁹ Kazimierz Buchała, Andrzej Zoll, *Polskie prawo karne*, Warszawa 1995, 13.

¹⁰ Bogusław Janiszewski, 1999, 'Sprawiedliwość kary. Rozważania w świetle prawnych podstaw jej wymiaru' in Andrzej J Szwarc (ed), *Rozważania o prawie karnym. Księga jubileuszowa z okazji 70. urodzin Profesora Aleksandra Ratajczaka*, Poznań 1999, 152–153; Paweł Petasz, *Sens, istota i cele kary kryminalnej*, Gdańskie Studia Prawnicze, 2005, Vol XIV, 1129.

¹¹ The discussion covers not only the notion of fair punishment but also the principles of due process, without which it is objectively impossible to achieve fair punishment. Kevin J Heller, Markus D Dubber, 'Introduction' in Kevin J Heller, Markus D Dubber (eds) *The handbook of comparative criminal law*, Stanford University Press 2011, 2–3.

¹² Jarosław Warylewski, *Kara. Podstawy filozoficzne i historyczne*, Gdańsk 2007, 22.

¹³ M. C. Carta, *Detention conditions and treatment of prisoners in the case-law of the Court of Justice of the European Union and of the European Court of Human Rights* in Anna Gerecka-

This view is also reflected in the democratic legal systems of other countries that respect human rights, in particular the standards for deprivation of liberty set out in the International Covenant on Civil and Political Rights (Articles 9 and 10)¹⁴ and, at the European level, in the Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 3, 5, 7).¹⁵ It is emphasised in the doctrine that the concept of just punishment is linked to the principle of proportionality by assuming that it is measured in accordance with the (negative) value of the act.¹⁶ From a practical point of view, for the concept of just punishment, not only the type and seriousness of the offence for which it is imposed is of significance, but also the comparison of the given punishment with penalties currently imposed for similar offences.¹⁷

Among the comments on the concept of ‘just punishment’, one cannot overlook the concept of ‘restorative justice’, which has been gaining increasing recognition in recent decades, despite the partly critical assessment of the doctrine.¹⁸ Restorative justice reduces the importance of the criminal response, giving priority to providing compensation to the victims of the crime for their losses.¹⁹ In the case of crimes against cultural goods due to their unique and irreplaceable scientific, cultural, historical, and archaeological value, the obligation to compensate for the damage caused by the crime, even if it constitutes a significant financial burden for the perpetrator, leaves a deficiency from the point of view of satisfying the victim. As a result, the victim will expect justice not only by compensating the harm caused by the crime, but also by imposing a severe punishment on the perpetrator.²⁰ In this context, under the norms of international criminal law, the jurisdiction of the International Criminal Court is of particular interest. In the structure of the proceedings before this Court, the compensation procedure, in

-Żołyńska (ed), *International legal sources of implementation of the humanitarian principle in the of imprisonment*, Poznań 2021, 61–62.

¹⁴ International Covenant on Civil and Political Rights adopted on 19 December 1966 in New York <<https://www.ohchr.org>>.

¹⁵ Council of Europe Convention of the Protection of Human Rights and Fundamental Freedoms, Roma 4 November 1950, Council of Europe Treaty Series – No 005 <<https://www.coe.int/en/web/conventions>>.

¹⁶ Marian Cieślak, *Polskie prawo karne*, Warszawa 1999, 129.

¹⁷ Janiszewski (n 10) 153.

¹⁸ Wojciech Zalewski, *O pojmowaniu sprawiedliwości w prawie karnym*, Gdańskie Studia Prawnicze, 2005, Vol XIV, 1114–1115.

¹⁹ Ilaria Bottiglierio, *Redress for victims of crimes under international law*, Springer Dordrecht 2004, 2–3.

²⁰ Vladimír Pelc, *Criminal Penalties Affecting Property* in Jiří Jelinek, Jozef Záhora (eds), *Sanctions under criminal law*, Wolter Kluwers Budapest 2019, 97.

which the issue of reparation for the losses suffered by the victims of war crimes is decided, constitutes one of the stages of the execution proceedings.²¹

Given, in turn, that the Rome Statute recognises as a war crime the deliberate targeting of buildings dedicated to religious, educational, artistic, scientific or charitable purposes, historical monuments, hospitals and places where the sick and wounded are gathered, provided that they are not military objectives (Article 8(2)(b)(IX) and Article 2 (e)(iv)), compensation may be awarded to a specific group of victims whose loss results from the destruction of a cultural asset. This solution has already been practically used in the *Ahmadi Al Mahdi* enforcement proceedings.²²

Combining the issues of just and severe punishment against the background of the possibility of punishment in cases of crimes against cultural property, attention must also be paid to the problem of organised crime. For years, there have been suggestions in the science of international criminal law to specify the correlation between the protection of cultural property and the regulation of organised crime. This issue was particularly emphasised after the adoption of the United Nations Convention against Transnational Organised Crime in Palermo.²³

Those in favour of extending the catalogue of offences relating to participation in an organised criminal group, as defined in the 2000 Convention, to include the offence of trafficking in works of art and archaeological artefacts, justified their position above all by the need for a global toughening of penalties for the perpetrators of this type of offence. At the time, they called for an interpretative extension of the provisions of the Palermo Convention in national legal orders by including offences against cultural property. In particular, with reference to the definition of serious crime in Article 2(b) of the 2000 Convention, it was suggested to States Parties that, for offences of trafficking in works of art and archaeological artefacts committed in conjunction with participation in an organised group, the threshold for a minimum term of imprisonment should be set at four years.²⁴

²¹ More: Anna Gerecka-Żołyńska, 'Procesowe oczekiwania ofiar w postępowaniu przed Międzynarodowym Trybunałem Karnym na tle zasady rzetelnego postępowania sądowego' in *Hominum causa omne ius constitutum sit. Księga jubileuszowa Profesora Piotra Hofmańskiego*, Paweł Czarnecki and others (eds), Wolters Kluwer 2024, 539–546.

²² International Criminal Court judgment of 27 August 2016, No ICC-01/12-01/15 <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_07244.PDF>.

²³ The United Nations Convention of 15 November 2000 against Transnational Organized Crime, adopted by General Assembly resolution 55/25 (UNTOC, Palermo Convention) <<https://www.unodc.org/unodc/en>>.

²⁴ Manacorda (n 4) 22.

The issue of strengthening the protection of cultural heritage against the threats posed by trafficking, with reference to the solutions adopted in the Palermo Convention, was also signalled at international forums during this period, inter alia, in the ‘Protection against trafficking in cultural property’ resolutions promulgated by the Economic and Social Council in 2004²⁵ and 2008,²⁶ as well as in several subsequent Security Council resolutions.²⁷

Within the framework of cooperation between European states, the question of distinguishing offences against cultural goods committed as part of the activities of an organised group as a specific category of offence was resolved with the adoption of the Council of Europe Convention on Offences Relating to Cultural Property.²⁸ At that time, it was decided that offences relating to cultural property committed by organised criminal groups or with the intention of financing terrorist operations would generally be classified as terrorist offences. At the same time, the existing international and national counter-terrorism instruments were considered sufficient, also with regard to the prosecution of this type of crime.²⁹

In a similar way, this problem has been addressed in European Union law, as confirmed, for example, by the Regulation on the entry and import of cultural objects into the European Union from non-member countries adopted in 2019.³⁰ In justifying the adoption of the aforementioned legal instrument, it was linked to the objectives pursued by the Directive on combating terrorism, adopted in 2017.³¹

²⁵ (ECOSOC) Resolution 2004/34, adopted during the 47th plenary meeting on 21 July 2004, ‘Protection against trafficking in cultural property’, <<https://ecosoc.un.org/default/files/documents/2023/resolution-2004-34pdf>>.

²⁶ (ECOSOC) Resolution 2008/23, adopted during the 42th plenary meeting on 24 July 2008, ‘Protection against trafficking in cultural property’, <<https://ecosoc.un.org/ecosoc/docs/2008/resolution%202008-23.pdf>>.

²⁷ Resolution 2199 of 12 February 2015 of the UN Security Council, particularly paragraphs 15, 16 and 17; Resolution 2253 of 17 December 2015 of the UN Security Council, in particular paragraphs 14 and 15; Resolution 2322 of 12 December 2016 of the UN Security Council, in particular paragraph 12; Resolution 2347 of 24 March 2017 of the UN Security Council <<https://documents.un.org/doc/unoc>>.

²⁸ Council of Europe Convention on Offences Relating to Cultural Property adopted on 19 May 2017 in Nicosia, Council of Europe Treaty Series – No 221.

²⁹ Explanatory Report to the Council of Europe Convention on Offences Relating to Cultural Property <<https://rm.coe.int/1680a55237>>.

³⁰ Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the entry and import of cultural goods (Official Journal. EU.L.2019.151.1).

³¹ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (Official Journal.EU. L 88, 31 March 2017).

4. THE SCOPE OF CRIMINAL LAW PROTECTION OF CULTURAL PROPERTY IN THE UNESCO AND COUNCIL OF EUROPE DOCUMENTS

Adopted by the Council of Europe in 2017, the Nicosia Convention is an act of international law comprehensively setting out the substantive and formal conditions for the criminal law protection of cultural property. In general terms, the document also formulates model comments on the sanctions that should be imposed on behaviour that violates the principles of this protection. The Convention takes into account the significant solutions developed so far in the field of the protection of cultural property in the international forum, both at the global and regional (European) cooperation level.

Prior to the adoption of the Nicosia Convention, the issue of the criminal law protection of cultural objects was signalled primarily by the UNESCO Conventions of 1954 on the Protection of Cultural Property in the Time of Armed Conflict³² and 1970 on Measures to Prohibit and Prevent the Illicit Import, Export and Transfer of Ownership of Cultural Property.³³ In terms of global commitments in this context, mention should also be made of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.³⁴ With regard to initiatives developed by the Council of Europe, it is worth recalling the Convention on Crimes against Cultural Property drawn up in 1985, although its practical significance is negligible as it has not been ratified by any State.³⁵

³² Council of Europe Convention for the Protection of Cultural Property in the Event of Armed Conflict, together with its implementing Regulations and Protocol for the Protection of Cultural Property in the Event of Armed Conflict, signed at Hague on 14 May 1954; Second Protocol, drawn up at Hague on 26 March 1999, to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention – Legal Affairs – <<https://www.unesco.org/en/legal-affairs/convention-protection-cultural-property-event-armed-conflict-regulations-execution-convention>>).

³³ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; adopted by the General Conference at its 16th session, Paris, 14 November 1970 (UNESCO Digital Library – <<https://unesdoc.unesco.org/ark:/48223/pf0000133378>>).

³⁴ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995 (1995 Convention - UNIDROIT – <<https://www.unidroit.org/instruments/cultural-property/1995-convention/>>).

³⁵ Council of Europe Convention on Crimes against Cultural Property (known as the ‘Delphi Convention’) was opened for signature to Council of Europe Member States on 23 June 1985. It has not entered into force because only six states have signed it and none have ratified it, Council of Europe Treaty Series – No 119.

Among the above-mentioned acts of international law, the Second Protocol appended in 1999 to the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict³⁶ is of particular importance from the point of view of the criminal law protection of cultural property. This document, in Article 15(a–e), identified five cases classified as grave breaches of this Protocol, among which three: (a) making a cultural property subject to enhanced protection the object of attack, (b) using a cultural property subject to enhanced protection or its immediate surroundings in support of military action, and (c) extensive destruction or appropriation of a protected cultural property, were considered to be acts that threaten the security of cultural property to such a degree that their perpetrator should be held criminally responsible.

Against the conduct defined in Article 15(a–c) of the Second Protocol, there was thus no provision for non-criminal sanctions, which constituted an innovative solution. Hitherto, respecting the concept of ‘sovereignty’ and applying the concept of conventional minimalism, the decision on the choice of the type of legal responsibility of the offender was left to the State, equally assessing the level of protection built on criminal and administrative sanctions. Thus, State Parties to the Second Protocol were obliged to incorporate into their national systems the relevant crimes, the prosecution of which should take into account the principles of international law. Among the instruments of international cooperation in this context, the need for legal assistance, the introduction of universal jurisdiction, the preservation of extradition regulations and the recognition of the principle of *aut dedere aut iudicare* in cases where extradition is not possible³⁷ were pointed out in particular.

The horizontal approach to the criminal law protection of cultural heritage facilitates the strengthening of the response of the judiciary of individual states in prosecuting crimes against cultural property, expands the possibilities of international cooperation and eliminates gaps in the existing protection system resulting from the diversity of national regulations. Against this background, attention is first drawn to the need to harmonise the statute of limitations for criminal prosecution and the rules of prosecution as well as to equalise the level of legal liability in the case of unlawful actions aimed at marketing illegally obtained cultural property. The implementation of this demand would deprive the perpetrators of illegal activities of the possibility to evade the resulting consequences, by choosing as the place of the crime countries with a lenient catalogue of penalties and

³⁶ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999 <<https://www.ihl-databases.icrc.org/assets/590-IHL-95-EN.pdf>>.

³⁷ Manacorda (n 4) 29; O’ Keefe (n 2), 2006, 274.

low effectiveness of law enforcement agencies (*forum shopping*). This idea was included in the 2017 Council of Europe Convention, extending it to other types of criminal acts.

The Nicosia Convention lists the acts endangering cultural property which should be criminalised in the national legal order.³⁸ The issue of sanctions regulated by Article 14 of the Convention generally coincides with the content of Article 9 of the Council of the European Union Regulation laying down the rules for the export of cultural objects from the territory of a Member State.³⁹ Both the Convention and the Regulation give the sanctions three basic functions: prevention, effectiveness and proportionality. On the other hand, Article 14 of the Nicosia Convention innovatively suggests that offences against cultural property should be punishable by a custodial sentence high enough to warrant extradition. The European Convention on Extradition⁴⁰ identifies offences punishable by a maximum term of imprisonment of at least one year or more as grounds for extradition (Article 2(1)).

5. MONETARY PENALTIES UNDER THE NICOSIA CONVENTION AS DETERRENT ELEMENTS

Article 14 of the Nicosia Convention lists monetary penalties in addition to the penalty of imprisonment. At the same time, it stipulates that imprisonment should not be imposed for excavating on land or under water to find and remove cultural objects without having the authorisation required by the law of the State in which the excavation took place (Articles 14(1) and 4(1a)) and for the importation of movable cultural objects, which is prohibited under the law of the State concerned, if the cultural objects were obtained from excavations carried out without the authorisation required by the law of that State (Articles 14(1) and 5(1b)).

Imprisonment should also not be imposed for exporting protected cultural property in violation of the law of a State if the perpetrator knew that it had been stolen, extracted or exported in violation of the law of another State (Articles

³⁸ Theft and other forms of unlawful appropriation (Article 3), Unlawful excavation and removal (Article 4), Illegal importation (Article 5), Illegal exportation (Article 6), Acquisition (Article 7), Placing on the market (Article 8), Falsification of documents (Article 9), Destruction and damage (Article 10).

³⁹ Regulation 116/2009 of 18 December 2008 on the export of cultural goods (Official Journal. EU.L.2009.39.1).

⁴⁰ Council of Europe Convention on Extradition Paris, 13 December 1957, Council of Europe Treaty Series – No 024.

14(1) and 5(1c)). The proposed solution should be assessed positively, even though it partially breaks the criminal law model for the protection of cultural heritage, shaped by the 2017 Convention. The recommendation to adopt a monetary penalty as a reaction to the above-mentioned unlawful behaviour makes it possible to establish the responsibility of the perpetrator not only through criminal liability, but also through administrative liability. Responsibility based on the elements of administrative law in the discussed scope may be the preferred option due to the fact that issues related to the search for monuments and their export abroad are regulated by administrative law. In this context, such issues of the national cultural heritage protection system as the way of cataloguing monuments, the definition of conditions for excavations and the rules for issuing export certificates can be pointed out, among others. On the other hand, it must be stated that the suggestion to subject the illegal search for cultural property and its illegal export from the territory of the State to a punishment other than imprisonment does not exclude the possibility of criminalising such behaviour. In such a case, the criminal sanction may, as recommended by the Convention, be of an economic nature (fine) or otherwise partially restrict the freedom and rights of the perpetrator (e.g., restriction of liberty, prohibition to exercise a profession, prohibition to engage in a certain type of activity). Although it follows from Article 14(2) of the Nicosia Convention that, in the case of offences against cultural property, sanctions prohibiting or restricting professional activities should be imposed on legal persons, in systems where it is not possible to attribute criminal liability to legal persons, the measures listed in Article 14(2) of the Nicosia Convention should be applied to natural persons responsible for offences against cultural property if the commission of the offences was in connection with their professional activities.

Given that the profit motive is one of the leading motives for offences against cultural property, national legal systems should include among the consequences of such offences measures allowing for the seizure and confiscation of any instrument used in the commission of the offence and the seizure and confiscation of proceeds or property derived from the commission of the offence. Such a solution is introduced in Article 14(3) of the Nicosia Convention.

In contrast, the Nicosia Convention report⁴¹ states that the way in which measures relating to the seizure and confiscation of the proceeds of crime are defined corresponds to the concepts adopted in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime,⁴² and the Council of

⁴¹ Explanatory Report to the Council of Europe Convention on Offences Relating to Cultural Property <<https://rm.coe.int/1680a55237>>.

⁴² Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, adopted in Strasbourg on 8 November 1990, Council of Europe Treaty Series – No 141.

Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism,⁴³ which identify confiscation of the proceeds of crime as one of the most effective instruments to combat crime. In this view, confiscation is not only intended to prevent the unjust enrichment of the perpetrator, but also has a deterrent function due to the coercive nature of taking the proceeds and property obtained through the commission of a crime.

The criminal law nature of asset confiscation is, therefore, important to ensure that this measure can be realistically enforced, and not only within the national system. Asset confiscation is one of the measures included in cooperation agreements in criminal matters between States, which allows it to be enforced even when the property is located outside the territory of the State in which the criminal proceedings take place. Confirmation of cooperation in criminal matters between EU Member States in this dimension, for example, is provided by Regulation (EU) 1018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing and confiscation orders.⁴⁴ When implementing the criminal measure of confiscation of property obtained through the commission of a criminal offence, questions of assessing the good faith of the purchaser of an illegally obtained object are irrelevant.⁴⁵ The resulting conflict between the unauthorised transferor, the legitimate victim and the bona fide purchaser in terms of reparation shall be resolved on the basis of civil law and, if necessary, on the basis of the rules contained in the aforementioned international treaties, when the scope of the transaction goes beyond the borders of a single State.

6. CONCLUSIONS

The type, level and effectiveness of punishment are important factors with which crime against cultural goods can be reduced. However, the introduction of strict rules of criminal responsibility into national legal systems will not decrease the level of crime if it is not backed up by effective law enforcement and judicial action. The deterrent function of punishment can be fully realised if the potential offender is convinced not only of the severity of the punishment, but also of the

⁴³ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, adopted in Warsaw on 16 May 2005, Council of Europe Treaty Series – No 198.

⁴⁴ Regulation (EU) 1018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing and confiscation orders (Official Journal UE. L. 2018.303.1).

⁴⁵ Agnieszka Plata, *Spór o zbiory Muzeum Brytyjskiego*, Gdańsk 2024, 112–116.

impossibility of avoiding it. The first step towards the attribution of criminal responsibility in a fair criminal trial is, therefore, the apprehension of the offender. In countries where law enforcement agencies have a high level of operational efficiency, this usually happens quickly. Among other things, international cooperation is important to achieve this goal, not only in the case of cross-border crimes, but also when the perpetrator of a crime seeks refuge in another country to avoid criminal responsibility.

Against this background, it must be stated that the Nicosia Convention is a tool of international law that facilitates States Parties to delimit the scope of the penal protection of cultural heritage in their national legal systems and sets out rules for cooperation in the prosecution of such offences. The document has also been prepared for the benefit of States not belonging to the Council of Europe, which promotes the global unification of the model of criminal law protection of cultural property. It is, therefore, rightly pointed out that the ratification of the Convention by as many countries as possible will reduce the phenomenon of *forum shopping* primarily by levelling the level of criminal sanctions.

It is worth emphasising that the assumption adopted in the Convention that the offences listed therein are to be punishable by imprisonment, with the minimum lower limits of imprisonment unequivocally defined, is an innovative solution, as none of the previously adopted acts of international law on the protection of cultural property contained such regulations. Defining the lower limit of imprisonment at a level that allows the extradition of the perpetrator is an important element in strengthening the criminal law protection of cultural heritage at the level of international cooperation. Such is also the case with the recommendation that perpetrators be ordered to confiscate property and proceeds of crimes against cultural property.

The particular value of cultural heritage means that professionals responsible for its preservation should, in the event of a breach of their duties, be deprived of the possibility of continuing to exercise their profession or trade. The imposition of this type of sanction closes off an avenue of income and forces a change in previous professional activity, which in a broad assessment, can be perceived as equally distressing as the imposition of a custodial sentence.

On the other hand, the Nicosia Convention, in order to preserve the coherence of national legal systems for the protection of cultural heritage, does not deprive States Parties of the possibility of enhancing the role of administrative sanctions in this system, which, unlike criminal sanctions, are more flexible and of a more generalised nature. From the point of view of international cooperation, however,

their feasibility is relatively limited by the lack of comprehensive cooperation instruments beyond the few regulations adopted by the Member States of the European Union.

REFERENCES

Bottiglierio I, *Redress for victims of crimes under international law*, Springer Dordrecht 2004

Buchała K, Zoll A, *Polskie prawo karne*, Warszawa 1995

Carta MC, *Detention conditions and treatment of prisoners in the case-law of the Court of Justice of the European Union and of the European Court of Human Rights* in Gerecka-Żołyńska A (ed), *International legal sources of implementation of the humanitarian principle in the case of imprisonment*, Poznań 2021

Cieślak M, *Polskie prawo karne*, Warszawa 1999

Explanatory Report to the Council of Europe Convention on Offences Relating to Cultural Property

Gerecka-Żołyńska A, *Procesowe oczekiwania ofiar w postępowaniu przed Międzynarodowym Trybunałem Karnym na tle zasady rzetelnego postępowania sądowego in Hominum causa omne ius constitutum sit. Księga jubileuszowa Profesora Piotra Hofmańskiego*, Czarnecki P and others (eds), Wolters Kluwer, Warszawa 2024

Heller KJ, Dubber MD (eds) *The handbook of comparative criminal law*, Stanford University Press 2011

Janiszewski B, *Sprawiedliwość kary. Rozważania w świetle prawnych podstaw jej wymiaru* in Szwarc AJ (ed), *Rozważania o prawie karnym. Księga jubileuszowa z okazji 70. urodzin Profesora Aleksandra Ratajczaka*, Poznań 1999

Kowalski W, *Restytucja dzieł sztuki w prawie międzynarodowym*, Katowice 1989

Manacorda S, *Criminal Law Protection of Cultural Heritage: An International Perspective* in Manacorda S, Chappell D (eds), *Crime in the Art and Antiquities World Illegal Trafficking in Cultural Property*, Springer 2011

Martorell A, *The role of cultural heritage in the global society* in Szmygin B (ed), *Heritage in transformation: cultural heritage protection in the XXI century – problems, challenges, predictions*, Lublin 2016

O' Keefe R, *The Protection of Cultural Property in Armed Conflict*, Cambridge 2006

Pelc V, *Criminal Penalties Affecting Property* in Jelinek J, Záhora J (eds), *Sanctions under criminal law*, Wolter Kluwers Budapest 2019

Petasz P, *Sens, istota i cele kary kryminalnej*, Gdańskie Studia Prawnicze, 2005, Vol XIV

Plata A, *Spór o zbiory Muzeum Brytyjskiego*, Gdańsk 2024

Przyborowska-Klimczak A, *Rozwój ochrony dziedzictwa kulturalnego w prawie międzynarodowym na przełomie XX i XXI wieku*, Lublin 2011

Veitch S, *Moral Conflict and Legal Reasoning*, Oxford, Portland Oregon 2002

Warylewski J, *Kara. Podstawy filozoficzne i historyczne*, Gdańsk 2007

Zalewski W, *O pojmowaniu sprawiedliwości w prawie karnym*, Gdańskie Studia Prawnicze, 2005, Vol XIV

Zeidler K, *Restitution of cultural property. Hard Case. Theory of Argumentation. Philosophy of Law*, Gdańsk-Warszawa 2016

Zwegers B, *Cultural Heritage in Transition: A Multi-Level Perspective on World Heritage in Germany and the United Kingdom, 1970-202*, Springer 2022

Wojciech Jasiński

University of Wrocław, Poland

e-mail: wojciech.jasinski@uwr.edu.pl

ORCID: 0000-0002-7427-1474

Jacek Kosonoga

Lazarski University, Poland

e-mail: jacek.kosonoga@lazarski.pl

ORCID: 0000-0001-7348-944X

Sławomir Żółtek

University of Warsaw, Poland

e-mail: s.zoltek@wpia.uw.edu.pl

ORCID: 0000-0002-3918-1588

**OBLIGATION OF STATE AND LOCAL GOVERNMENT
INSTITUTIONS TO PROVIDE ASSISTANCE
TO AUTHORITIES CONDUCTING CRIMINAL
PROCEEDINGS (ARTICLE 15 § 2 OF THE CODE
OF CRIMINAL PROCEDURE)**

Abstract

Article 15 § 2 of the Code of Criminal Procedure (CCP) obliges state and local government institutions to provide assistance to authorities conducting criminal proceedings. Providing the assistance referred to in Article 15 § 2 CCP primarily includes the provision of services that enable the performance of procedural actions necessary in criminal proceedings. The assistance may also include the provision of information requested by the authority conducting criminal proceedings. However, choosing this form of assistance can only serve to pre-select information or verify potential sources. Article 15

§ 2 CCP cannot replace the specific procedures for securing evidence provided for in the procedural law because this would lead to the disregard of norms that protect the rights and liberties of participants in criminal proceedings. The process of obtaining evidence and introducing it into the proceedings must, therefore, take place within the framework of the procedures set forth in the CCP. Only then will the constitutionally ensured rights of the participants in criminal proceedings be respected.

KEYWORDS

prosecuting authorities, assistance, state authorities, local government institutions

SŁOWA KLUCZOWE

organy ścigania, pomoc, instytucje państwowe i samorządowe

1. INTRODUCTION

According to Article 15 § 2 of the Law of 6 June 1997, the Code of Criminal Procedure,¹ all state and local government institutions are obliged, within the scope of their activity, to provide assistance to authorities conducting criminal proceedings within the time limit set by these authorities. The aforementioned provision is an expression of the principle of cooperation of state bodies in combating crime, which in turn is related to the principle of mandatory prosecution.²

The prototype of Article 15 § 2 CCP can be found in the original wording of Article 8 of the Regulation of the President of the Republic of Poland of 19 March 1928 – Code of Criminal Procedure.³ This provision stipulated that state civil and military authorities as well as local governments were obliged to assist courts and prosecutors (§ 1). In particular, the Police carried out the instructions of the court and the public prosecutor with regard to the prosecution of crimes (§ 2). The court or the public prosecutor could directly request armed assistance from the military authority (§ 3). By the Act of 20 July 1950 on the amendment of the

¹ Hereinafter: CCP.

² In particular, see Piotr Kardas, *‘Odpowiedzialność za nadużycie władzy publicznej w przypadku niezawiadomienia o popełnieniu przestępstwa’* *Prokuratura i Prawo* 2007, No 7–8, 5–41; Stanisław Cora, *‘Zasada legalizmu ścigania a zawiadomienie o przestępstwie’*, *Państwo i Prawo* 2010, issue 10, 5–19; Czesław Kłak, *‘Niepełna opinia biegłego w polskim procesie karnym’*, *Prawo i więź* 2020, issue 2, 70–84.

³ Journal of Laws of 1928, No 33, item 313; hereinafter: CCP of 1928.

rules of criminal procedure,⁴ the above provision was moved to Article 7 CCP of 1928, where its § 1 received the following wording: State, civil and military authorities as well as state and cooperative enterprises and social organisations are obliged to provide assistance to the court and the prosecutor's office. The catalogue of entities obliged to assist the courts was, therefore, extended to state and cooperative enterprises and social organisations. The deletion of local government bodies from the list of entities obliged to provide assistance to the court and prosecutor's office should be explained by the political structure of the Polish People's Republic.⁵

In the original wording of the Act of 19 April 1969 Code of Criminal Procedure,⁶ it was decided to modify the above-mentioned provisions by indicating in the content of Article 7 that the Police (officially named at that time Citizens' Militia), in the scope of criminal proceedings, executes the orders of the court and the prosecutor, and conducts preliminary proceedings under the supervision of the prosecutor (§ 1). However, pursuant to Article 7 § 2 CCP of 1969, all state and social institutions were obliged, within the scope of their activity, to assist authorities conducting criminal proceedings. Comparing the quoted content with the previous regulation, one can see not only a change in the order of the provisions of § 1 and § 2, but also, more importantly, the imposition of the obligation to provide assistance to all authorities conducting criminal proceedings – not only the court and the prosecutor's office. The material scope of the aforementioned assistance was also clarified by indicating that the obligation to assist authorities conducting criminal proceedings is limited by the scope of action of state and social institutions. The discussed provision, in its unchanged wording, was in force until the Act of 6 June 1997 CCP entered into force.

In the original version of the currently applicable CCP, the provision of Article 15 § 2 had the following wording: All state, local government and social institutions are obliged, within the scope of their activity, to provide assistance to authorities conducting criminal proceedings. This regulation was modified by the Act of 9 May 2007, amending the Act – Code of Criminal Procedure and certain other acts.⁷ The change included: 1) removing social institutions from the list of entities obliged to provide assistance to authorities conducting criminal proceedings under § 2 and adding § 3, which regulated the issue of the obligation to provide assistance in relation to entities other than state and local government institutions,

⁴ Journal of Laws of 1950, No 38, item 348.

⁵ By the Act of 20 March 1950 on territorial bodies of a uniform state authority (Journal of Laws of 1950, No 14, item 130, as amended) associations of territorial local government were abolished and replaced by national councils, which were after all territorial bodies of a uniform state authority.

⁶ Journal of Laws of 1969, No 13, item 96 as amended; hereinafter: CCP of 1969.

⁷ Journal of Laws No 99, item 664; hereinafter: Act of 9 May 2007.

2) enabling authorities conducting criminal proceedings to set a deadline for the provision of assistance by state and local government institutions.

As far as the content of Article 15 § 2 CCP in its original wording constituted an ‘adaptation’ of Article 7 § 2 CCP of 1969 to the political realities that occurred after the entry into force of the Constitution of the Republic of Poland of 2 April 1997, which manifested in restoring local government bodies to the list of recipients of the request for assistance, the normative change introduced by the amendment of 9 May 2007 requires additional clarification.

As indicated in the explanatory memorandum to the government’s draft bill of the aforementioned act, the purpose of the amendment was to ‘equip procedural authorities with instruments to discipline participants in criminal proceedings’.⁸ On the one hand, attention was drawn to the limited subjective scope of the addressees of the request for assistance. On the other hand, the shortcomings of the amended regulation were raised, including excessively narrow scope of the provision – the request could only concern assistance within the scope of activity of a given entity. Practical difficulties were also mentioned, i.a., including those relating to requests to provide access to premises necessary to conduct a procedural action in a situation where the scope of activity of a given institution did not include control over specific real estate properties.⁹ Finally, it was noted that there is no regulation allowing for establishing a binding deadline to provide assistance to investigating authorities. The draft proponent did not justify the need to introduce a regulation allowing for establishing such a deadline.

2. OBLIGATION TO PROVIDE ASSISTANCE TO ENTITIES OTHER THAN AUTHORITY CONDUCTING CRIMINAL PROCEEDINGS

The starting point for an in-depth analysis of the principle of cooperation between state authorities in combating crime should be the consideration of similar legal regulations contained in other normative acts. It should be noted that sometimes the lawmaker directly determines the permissibility of application of Article 15 § 2 CCP within a given procedure.¹⁰ The above provision will also find application

⁸ Explanatory memorandum of the government draft bill amending the CCP and certain other acts, 5th term, Sejm press release No 483, 1.

⁹ The above reasons, according to the draft proponent, supported, among others, the introduction of Article 15 § 3 CCP, a detailed analysis of which goes beyond the scope of this study.

¹⁰ See Article 8 of the Act of 24 August 2001 Petty Offences Procedure Code, Journal of Laws of 2024, item 977 as amended.

in those proceedings in which the lawmaker refers to the application of a provision of CCP in general and at the same time does not exclude the possibility of applying Article 15 § 2 CCP.¹¹

There are also numerous instances in the legal system where powers similar, but not identical, to those under the CCP are granted to officers of certain law enforcement agencies. An example of such a regulation is Article 15 paragraph 1 point 6 of the Act of 6 April 1990 on the Police,¹² according to which officers have the right to request necessary assistance from state institutions, governmental and local government bodies as well as entrepreneurs conducting public utility activities. At the same time, the aforementioned institutions and entrepreneurs are obliged, within the scope of their activity, to provide this assistance, within the scope of the applicable legislation. The above-mentioned power, under Article 14 paragraph 1 of the Police Act, may be exercised by Police officers applying secret surveillance, investigative as well as administrative measures. It is worth highlighting that the ‘assistance’ referred to in the discussed provision must be ‘indispensable’. Thus, the subsidiary nature of the right to demand assistance is apparent. In other words, the possibility of requesting assistance is triggered when the specific objective of the action performed cannot be achieved by other means which would not require the involvement of institutions or entrepreneurs. The content of Article 15 of the Police Act, with minor modifications, is reproduced in the provisions of acts shaping the powers of other agencies, such as: with regard to the Internal Security Agency and the Foreign Intelligence Agency – Article 23 paragraph 1 point 7 and Article 24 paragraph 1 point 1 of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency,¹³ with regard to the State Fishing Guard – Article 23 paragraph 7 of the Act of 18 April 1985 on inland fisheries,¹⁴ with regard to the State Hunting Guards – Article 39 paragraph 2 point 12 of the Act of 13 October 1995 Hunting Law¹⁵ or in relation to the Forest Guard – Article 47 paragraph 2 point 10 of the Act of 28 September 1991 on forests.¹⁶ The above list is not exhaustive, but serves to illustrate the claim that, in certain procedural settings, the regulation of Article 15 § 2 CCP may overlap in content with the provisions of other acts.¹⁷ An example of a regulation providing

¹¹ See Article 113 of the Act of 10 September 1999 Fiscal Penal Code; Journal of Laws of 2025, item 633.

¹² Journal of Laws of 2025, item 636; hereinafter: Police Act.

¹³ Journal of Laws of 2024, item 812 as amended.

¹⁴ Journal of Laws of 2022, item 883.

¹⁵ Journal of Laws of 2025, item 539.

¹⁶ Journal of Laws of 2025, item 567.

¹⁷ See Andrzej Jezusek, ‘Niektóre aspekty powszechnego obowiązku udzielenia pomocy organom prowadzącym postępowanie karne’, *Palestra* 2016, No 6, 41.

for a slightly different way of defining the discussed obligation is Article 14 § 1 of the Act of 21 January 1999 on the Sejm inquiry committee¹⁸ which does not use the general formula of the obligation to provide assistance, but clearly indicates its forms, stipulating that the organs of public authorities and the organs of other legal persons and organisational entities without legal personality shall, at the request of the committee, provide written explanations or present documents at their disposal or the files of any case conducted by them.

The regulations presented above confirm that there are quite a number of cases in which legal norms grant public institutions the power to request assistance from certain entities, the ratio of which is based on the need to facilitate and often accelerate the actions and proceedings conducted by these institutions. Although these are often institutions that can perform procedural actions, the lawmaker considered it appropriate to separately regulate the issue of assistance within the framework of ongoing criminal proceedings. The above undoubtedly confirms the vital importance that the lawmaker attaches to the creation of conditions for the timely and efficient conduct of criminal proceedings.

3. THE SUBJECTIVE SCOPE AND NATURE OF THE OBLIGATION TO PROVIDE ASSISTANCE

From the subjective perspective, the obligation to provide assistance to authorities conducting criminal proceedings has been defined relatively broadly. Article 15 § 2 CCP contains a categorical obligation of state and local government institutions to provide assistance. In the case of other entities (Article 15 § 3 CCP), the provision of assistance is conditional on the finding that, without such assistance, the performance of the procedural action is impossible or significantly hindered. The justification for such a dichotomy can be found in the relationship between the obliged entity and the authority conducting criminal proceedings. The obligation of entities within the structure of a state, whose duty is, among other things, to prosecute and detect perpetrators of crimes, should be perceived differently from that of entities outside of this structure, which may include both organisational units of the private sector and natural persons. For guarantee reasons, even the indirect implementation of state obligations by private entities, especially in areas such as combating crime, should always be an exception limited to a minimum.

¹⁸ Journal of Laws of 2016, item 1024.

The obligation referred to in Article 15 § 2 CCP is not dependent on additional conditions, provided that these activities are undertaken within the scope of the entity's designated responsibilities. The situation is, therefore, different from the case of the relative obligation to provide assistance, as its imposition is permissible only when, without such assistance, carrying out a procedural action is impossible or significantly more difficult (Article 15 § 3 CCP). The authority conducting criminal proceedings is responsible for the assessment of this premise. This applies to cases when the assistance of a non-procedural entity is necessary to perform a given procedural action.

In Article 15 § 2 CCP, the lawmaker used very broad generic categories, assuming that the obligation to provide assistance rests with state and local government institutions. It applies *verba legis* to all state and local government institutions, regardless of their organizational form, structure or location. The wording of the provision, therefore, reflects the desire to encompass the subjective scope of the legal regulation in question as broadly as possible. However, this obligation to provide assistance does not apply to social organisations. If the lawmaker wants to grant specific rights or impose specific obligations on social organisations, it does so directly in the content of the legal act, often indicating them alongside state and local government institutions (see, e.g., Article 19 § 1 CCP and Article 21 § 1 CCP). However, social institutions fall within the scope of Article 15 § 3 CCP.

An institution (Latin *institutio*) is an organizationally separate unit of a public character, operating in a given field, dealing with a specific range of matters, and being an independent, legal and permanent structure.¹⁹ A state institution is an organisational structure financed from public funds, established by the state to perform public tasks and provide services to the public. Its task is to meet the needs of individuals or groups and to ensure the efficient functioning of the community as a whole, and the persons comprising it are authorised to perform the defined activities publicly and impersonally. These are offices or other state structures that perform public tasks.²⁰ Local government bodies are institutions of local government, which are formed by communities of residents living in specific units of the territorial division of the state, as well as professional and economic local government. *Lege non destituende* – this is not just about local government. If the lawmaker wanted to limit the meaning of local government only to a specific type, he would probably do it explicitly, as, e.g., in the content

¹⁹ Halina Zgólkowa (ed), *Praktyczny słownik współczesnej polszczyzny*, Vol 14, Poznań 1998, 288, see also Piotr Hofmański, Elżbieta Sadzik, Kazimierz Zgrzyzek (eds), *Kodeks postępowania karnego. Komentarz*, Vol 1, Warsaw 2011, 377.

²⁰ Ryszard A Stefański, *Prawo karne materialne. Część szczególna*, Warsaw 2008, 349.

of Article 156 a CCP – in relation to local government *sensu stricto* or in Article 21 point 2 CCP – in relation to professional self-government.

State and local government institutions include, for example, state offices, local government units (municipal, district, voivodeship), inspections (e.g. Trade Inspection, Sanitary Inspection, National Labour Inspectorate or National Inspectorate for Environmental Protection), guards (e.g. State Fire Service, City Guard, Municipal Guard, forest guards, national park guards), institutions: supervisory (e.g. The Supreme Audit Office and its delegations or regional audit chambers), health services (e.g. hospitals, clinics), social insurance (ZUS, KRUS), public utilities (e.g. public transport facilities) or cultural and educational facilities (e.g. museums, theatres, cultural centres, schools and universities), unless they are private entities.²¹

4. MATERIAL SCOPE OF THE OBLIGATION INCUMBENT ON STATE AND LOCAL GOVERNMENT INSTITUTIONS

Article 15 § 2 CCP uses a very general expression regarding the nature of the obligation incumbent on state and local government institutions. It indicates that they are obliged to provide assistance to authorities conducting criminal proceedings. This applies not only to the court or the prosecutor's office, but also to the Police and other bodies authorized to carry out procedural actions. However, this obligation is limited by the scope of activity of a given institution. Assistance should be provided within the time limit set by the authority conducting criminal proceedings. CCP does not prescribe the form of the request for assistance. It may, therefore, be a written or oral summons. It is important that its content is communicated in a clear and understandable way. For these reasons, a written summons should be preferred as it offers greater certainty in this respect. In cases of urgency, however, an oral summons is sufficient. Moving on to the analysis of the key wording used in the provision of Article 15 § 2 CCP, namely 'providing assistance to authorities conducting criminal proceedings', it should be noted that – as already indicated – similar regulations were already provided for in CCP of 1928 and 1969. In the post-war doctrine, based on CCP of 1928, it was assumed that the obligation to provide assistance covers 'a request submitted in the course of criminal proceedings to provide any information and present documents in order to establish the actual factual circumstances within the framework

²¹ Tomasz Grzegorzczak in Tomasz Grzegorzczak (ed), *Kodeks wykroczeń. Komentarz*, Warsaw 2013, 202.

of existing suspicions that a crime has been committed'.²² An identical view was expressed on the basis of the provisions of Article 7 § 2 CCP of 1969.²³ Moreover, in case law based on the 1969 codification, this obligation was understood as including the issuance of documents that were to constitute evidence in ongoing proceedings.²⁴

Under the CCP of 1997, the way in which the phrase 'providing assistance to authorities conducting criminal proceedings' is understood, with a few exceptions, has not been the subject of extensive doctrinal reflection. It is worth noting that even the vast majority of scholars commenting on the provisions of CCP do not directly address this issue.²⁵ The above issue was analysed in more detail by Dorota Kaczorkiewicz, who points out that the lawmaker does not specify how the assistance referred to in Article 15 § 2 CCP should be understood. However, since the authority conducting criminal proceedings requests such assistance in the context of ongoing proceedings, this refers to activities that enable the performance of a specific procedural action. The author, therefore, claims that assistance under Article 15 § 2 CCP may consist in lending a means of communication as part of a pursuit, making premises available for the purpose of, for example, an on-site inspection or carrying out a planned secret surveillance measure, enabling the interrogation of a person staying, for example, in a closed hospital facility, enabling special remote interrogation (Article 172 CCP), using equipment that would require installation in premises that do not belong to authorities conducting criminal proceedings, providing necessary devices required for secret surveillance measures or carrying out an experiment by the authority conducting criminal proceedings.²⁶ However, with regard to obtaining information, Dorota Kaczorkiewicz indicates that it is possible to provide assistance in the process of

²² Stefan Kalinowski, Mieczysław Siewierski, *Kodeks postępowania karnego. Komentarz*, Warsaw 1960, 39.

²³ Mieczysław Siewierski in M Mazur (ed), *Kodeks postępowania karnego. Komentarz*, Warsaw 1971, 38.

²⁴ Judgment of the Supreme Court of 30 September 1982, I KR 228/82, OSNPG 1983, No 4, item 47. The Supreme Court stated in the above judgment that 'since the hospital management did not even send documents regarding all the stays of the accused in the psychiatric hospital and did not even provide a specific answer to the Court's repeated requests, the matter should have been referred to the authorities to which the hospital is subordinated, and even to the Ministry of Health, as provided for by Article 7 § 2 CCP. It is impossible to dispense with evidence that the court hearing the case deemed necessary for its proper resolution solely on the grounds that a state institution does not want to disclose documents in its possession that were not covered by state secrecy'.

²⁵ See commentaries edited by Piotr Hofmański, Jerzy Skorupka, Dariusz Świecki, Jarosław Zagrodnik, Katarzyna Dudka and Andrzej Sakowicz.

²⁶ Dorota Kaczorkiewicz, 'Udzielenie pomocy organom postępowania karnego', *Przegląd Prawno-Ekonomiczny* 2009, No 9, 9.

obtaining certain information if the authority is unable to access it on its own. However, the acquisition of information itself must be based on a separate legal basis that allows the authority conducting criminal proceedings to obtain it.²⁷ It is also emphasised in the legal doctrine, among other things, that ‘assistance may consist in performing specific actions, providing access to a specific item or premises. *Lege non distinguente* – within the framework of assistance, it is also possible to provide certain information’.²⁸ Moreover it is argued that Article 15 § 2 CCP allows authorities conducting criminal proceedings to ‘demand, for example, access to premises owned by a natural person in order to inspect the crime scene or conduct an experiment, or to request information relevant to criminal proceedings, e.g. from a hospital director about the fact and date of hospitalisation of a given person’.²⁹

Within the framework of doctrinal views, it is also worth paying attention to those that indirectly refer to the nature of activities that may come into play in the event of fulfilling the obligation to provide assistance. Andrzej Sakowicz assumes that ‘the purpose of assistance is not to replace a procedural action with an action performed through the assistance provided, but only to obtain assistance in order to carry it out’.³⁰ It is also very important to point out that Article 15 § 2 CCP ‘cannot (...) in any way replace actions for which the lawmaker has provided an appropriate form, procedure or provides its participants with specific procedural guarantees. Therefore, it will be inadmissible, for example, to request privileged information, replace expert opinions with the “assistance” of a given entity, or request information from a person who has the right to refuse to testify. Obviously, the provision in question cannot constitute a basis for demanding unlawful conduct’.³¹ Sławomir Steinborn also argues that ‘the action taken in the “assistance” procedure provided for in Article 15 § 2, if it reveals significant circumstances that may constitute the basis for factual findings, should be an impulse for the

²⁷ Dorota Kaczorkiewicz, ‘Udzielenie pomocy organom postępowania karnego’, *Przegląd Prawno-Ekonomiczny* 2009, No 9, 8–9.

²⁸ Jacek Kosonoga in Ryszard A Stefański, Stanisław Zabłocki (ed), *Kodeks postępowania karnego. Vol I. Komentarz do art. 1-166*, Warsaw 2017, 227.

²⁹ Wincenty Grzeszczyk, *Komentarz do art. 15, thesis 4 in Kodeks postępowania karnego. Komentarz*, Lex/el 2014.

³⁰ Andrzej Sakowicz in Andrzej Sakowicz (ed), *Kodeks postępowania karnego. Komentarz*, Warsaw 2025, 104.

³¹ Jacek Kosonoga in Ryszard A Stefański, Stanisław Zabłocki (ed), *Kodeks postępowania karnego. Volume 1. Komentarz do art. 1-166*, Warsaw 2017, 227. This view was accepted by Piotr Gensikowski, *Komentarz do art. 15, thesis II.1* in Dariusz Drajewicz (ed), *Kodeks postępowania karnego. Vol I. Komentarz. Article 1–424*, Legalis.

authority conducting criminal proceedings to take action to secure it and transform it into evidentiary material in the form required by law'.³²

Analysis of the obligation to provide assistance under Article 15 § 2 CCP also requires an insight into how the obligation set out in Article 15 § 3 CCP, which is identical in nature, is understood. The latter provision, despite differences in relation to the obligation imposed on entities mentioned in § 2, uses the same wording 'providing assistance'. The analysis of doctrinal views indicates that they are consistent with those formulated on the basis of Article 15 § 2 CCP. First of all, it should be noted that 'the body may only demand from the requested entity conduct that does not violate other provisions of law, and only such conduct may constitute the subject of the obligation'.³³ As far as the forms of such assistance are concerned, for example Andrzej Sakowicz states that the regulation of Article 15 § 3 CCP 'is intended – in accordance with the will of the lawmaker – to allow the authority conducting criminal proceedings, among other things, to effectively request information relevant to criminal proceedings, e.g. from the hospital director about the fact and date of hospitalisation of a given person'.³⁴ Michał Kurowski points out that 'it should be considered possible, for example, to ask a corporation providing transport services whether it performed a specific service on a given day, however, this will be of informative nature and it will then be necessary to apply an appropriate procedure for obtaining evidence, e.g., hearing a witness'.³⁵ In the case law, it is stated that pursuant to Article 15 § 3 CCP, during disciplinary proceedings, it is possible to request information from the educational institution about the dates on which a judge conducted teaching classes there.³⁶

Understanding of the obligation to provide assistance was discussed in-depth by Andrzej Jezusek, who referred to the content of sub-statutory legal acts developing the regulation of the discussed obligation in respect to law enforcement agencies (e.g., Article 15 § 1 point 6 of the Police Act). This author rightly indicates as a point of reference § 29 paragraph 2 of the no longer applicable regulation of the Minister of National Defence of 14 December 2001 regarding the detailed manner

³² Sławomir Steinborn, *Komentarz do art. 15, thesis 9* in Jan Grajewski, Piotr Rogoziński, Sławomir Steinborn (ed), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX/el. 2016.

³³ Andrzej Jezusek, 'Niektóre aspekty powszechnego obowiązku udzielenia pomocy organom prowadzącym postępowanie karne', *Palestra* 2016, No 6, 44.

³⁴ Andrzej Sakowicz in Andrzej Sakowicz (ed), *Kodeks postępowania karnego. Komentarz*, Warsaw 2025, 104.

³⁵ Michał Kurowski, 'Komentarz do art. 15', Vol 4 in Dariusz Świecki (ed), *Kodeks postępowania karnego. Vol 1. Komentarz aktualizowany*, LEX/el. 2025.

³⁶ Judgment of the Supreme Court of 26 September 2016, SNO 31/16, LEX No 2135819.

of exercising certain powers by soldiers of the Military Police,³⁷ which lists as forms of providing assistance, for example: providing premises or its parts for a specified period, lending means of transport or communication or other items, or enabling the operation of technical devices.³⁸ These examples illustrate well the essence of the assistance in question. Andrzej Jezusek also adds that another form of assistance may be ‘providing relevant information or providing specific data’.³⁹ Of course, it should be borne in mind that the context of the above statement is the general performance of the statutory duties of the Military Police, and not only the performance of actions within the scope of criminal proceedings. However, this does not affect the validity of the above view. Similarly to Article 15 § 2 CCP in relation to Article 15 § 3 CCP, it is also emphasized that information provided as part of assistance by state and local government institutions does not serve as a substitute for activities aimed at collecting and securing evidence. Sławomir Steinborn states that ‘the institution of “providing assistance” cannot be used to waive the need for an expert opinion when, in order to establish the facts, it is necessary to examine important circumstances, the confirmation or exclusion of which requires special knowledge’ (Article 193 CCP). It is obvious that the institution of ‘providing assistance’ should not be identified with seeking the opinion of a scientific or specialist institution (Article 193 § 2 CCP).⁴⁰ Andrzej Jezusek draws the same conclusion with regard to the acquisition of property, arguing that in this case not the general norm of Article 15 § 3 CCP but the provisions on search and seizure should be applied.⁴¹

In the context of considerations on the obligation under Article 15 § 3 CCP, attention should also be paid to the observation made by Andrzej Jezusek, who points out that this provision allows for interference with the rights and freedoms of the entity to which a state body turns for help. Therefore, this is not a regulation that provides a legal basis for interference with the rights of third parties. Such interference requires a separate legal basis (e.g., for a transfer of data relating to

³⁷ Journal of Laws of 2001, No 157, item 1851.

³⁸ Andrzej Jezusek, ‘Niektóre aspekty powszechnego obowiązku udzielenia pomocy organom prowadzącym postępowanie karne’, *Palestra* 2016, No 6, 44.

³⁹ Andrzej Jezusek, ‘Niektóre aspekty powszechnego obowiązku udzielenia pomocy organom prowadzącym postępowanie karne’, *Palestra* 2016, No 6, 44.

⁴⁰ Stanisław Steinborn, ‘Komentarz do art. 15’, Vol 11 in Jan Grajewski, Piotr Rogoziński, Sławomir Steinborn (ed), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX/el. 2016. Similarly, in relation to substituting witness testimony with the content of written information provided pursuant to Article 15 § 3 CCP – Michał Kurowski, ‘Komentarz do art. 15’, thesis 4 in Dariusz Świecki, *Kodeks postępowania karnego. Vol I. Komentarz aktualizowany*, LEX/el. 2025.

⁴¹ Andrzej Jezusek, ‘Niektóre aspekty powszechnego obowiązku udzielenia pomocy organom prowadzącym postępowanie karne’, *Palestra* 2016, No 6, 48.

a given person).⁴² It is worth adding that in the latter case, relevant regulations may be limited not only to separately regulated premises justifying the performance of a given action. The procedure for obtaining specific information may also be an issue regulated by the lawmaker, taking into account legal remedies, such as the possibility of challenging the performance of a given action.

The analysis of the doctrinal and jurisprudential views presented above leads to three main conclusions.

Firstly, it should be assumed that the provision of assistance referred to in Article 15 § 2 CCP primarily includes the provision of services that enable the performance of procedural actions necessary in criminal proceedings. This may concern, as already indicated above, the provision of specific material resources necessary to perform procedural actions.

Secondly, the assistance provided may also include the provision of information requested by the authority conducting criminal proceedings. Nowadays, this may involve the use of various technologies (especially IT technologies). It should be noted, however, that the provision of information as a form of assistance may only serve the purpose of preliminary selection of information or verification of potential sources. The legal doctrine rightly emphasises that Article 15 § 2 CCP cannot replace the forms of securing evidence provided for in the CCP. Therefore, if it is necessary to question a witness or obtain an expert opinion, relevant information must be collected as part of these procedural actions. Similarly, if it is necessary to obtain documents, the appropriate procedure is specified in the provisions of Chapter 25 CCP. The provision of assistance is intended to enable the conduct of procedural actions, including evidentiary proceedings, and not to replace them. Therefore, such an action must be performed on a legal basis other than Article 15 § 2 CCP.

Thirdly, it should be emphasised that the recourse to specific information collection regimes rather than a general norm obliging public institutions to provide assistance is motivated not only by systemic correctness, but above all by the necessity to protect the rights of individuals. The provisions concerning interrogations, obtaining an expert opinion, seizing property and conducting searches contain various procedural guarantees that are intended to protect the rights of the participants in the proceedings. It cannot be argued that in the case of state and local government institutions this issue is irrelevant. In most cases, these institutions provide information not about themselves, but about third parties. In

⁴² Andrzej Jezusek, 'Niektóre aspekty powszechnego obowiązku udzielenia pomocy organom prowadzącym postępowanie karne', *Palestra* 2016, No 6, 46.

this respect, it is necessary to comply with procedural requirements that protect against abuse of power also in relations between public institutions. The doctrine emphasizes correctly, as it has already been mentioned, that the provision of Article 15 § 2 CCP does not provide grounds for interference with the rights of third parties. Such interference requires a separate and much more precise legal basis, specifying the conditions and procedure for permissible interference. Moreover, it should not be forgotten that some public authorities, although they cooperate with other institutions within the state structure, must enjoy autonomy or independence (e.g., local government units, courts, the National Bank of Poland, Supreme Audit Office). This clearly contradicts the simplifying assumption that the flow of information between public authority institutions can consist in the unlimited transfer of information requested by another institution based solely on a general regulation creating an obligation to provide assistance.

The provision of Article 15 § 2 CCP, in addition to introducing the obligation for state and local government institutions to provide assistance to authorities conducting criminal proceedings, indicates that this should be done within the time limit set by the body conducting the criminal proceedings and within the scope of activity of the given institution. With regard to the first of the above issues, it should be noted that the assistance is limited solely to the scope of the criminal proceedings conducted.⁴³ Although the lawmaker does not formulate this reservation directly in relation to the scope of the obligation, but in the wording concerning the body requesting assistance, there can be no doubt that it concerns assistance not in any scope, but only within the scope of the given criminal proceedings. Therefore, assistance that would serve to perform activities of a different nature, e.g., secret surveillance measures, is excluded from the mandatory scope of assistance.⁴⁴ The stage of the proceedings at which the authority requests assistance is irrelevant. This may occur both during preliminary proceedings and at trial.⁴⁵ Moreover, the obligation to provide assistance also comes into effect when the authority performs the so-called preliminary verification⁴⁶ (Article 307 CCP).⁴⁷ Although these activities do not fall within the scope of criminal proceed-

⁴³ Andrzej Sakowicz in Andrzej Sakowicz (ed), *Kodeks postępowania karnego. Komentarz*, Warsaw 2025, 104.

⁴⁴ Jerzy Skorupka in Jerzy Skorupka (ed), *Kodeks postępowania karnego. Komentarz*, Warsaw 2023, 68 and the literature cited therein.

⁴⁵ Michał Kurowski, 'Komentarz do art. 15', Vol 3 in Dariusz Świecki, *Kodeks postępowania karnego. Vol I. Updated commentary*, LEX/el. 2025.

⁴⁶ For more on the concept of preliminary verification see Wojciech Jasiński, Karolina Kremens, *Criminal law in Poland*, WoltersKluwer 2019, 216.

⁴⁷ Sławomir Steinborn, 'Komentarz do art. 15', Vol 8 in Jan Grajewski, Piotr Rogoziński, Sławomir Steinborn (ed), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX/el. 2016.

ings, it is reasonable to assume that in the case in question, Article 15 § 2 CCP should be understood functionally and exclude preliminary verification within the scope of application of this regulation. There are clearly pragmatic reasons for this approach. Preliminary verification is aimed at clarifying whether there are grounds to initiate proceedings and, therefore, it pursues the same verification purpose as in the case of actions undertaken during the criminal proceedings aimed at verifying whether a prohibited act has been committed and whether it is possible to hold a specific person criminally liable for it.

The obligation to provide assistance as provided for in Article 15 § 2 CCP is limited by the scope of activity of a given state and local government institution. This scope should be understood as all tasks (obligations and powers) performed by a given institution. It is sometimes claimed in the legal literature that state and local government institutions should also, if possible, provide assistance beyond this scope.⁴⁸ However, this position seems to be too far-reaching. This is because the express provision of Article 15 § 2 CCP limits the legal obligation imposed on a given institution only to the framework of its activity. This issue is particularly important in the case of local government institutions. Local government has constitutionally guaranteed independence, the negative aspect of which is ‘freedom from arbitrary interference by other public authorities’.⁴⁹ This means that ‘all forms of interference in the sphere of activity of local government units must be consistent with the Constitution, defined by statute and justified by the need to ensure the protection of constitutional values’.⁵⁰ Therefore, it should be assumed that if the aid was outside the scope of the institution concerned, it would not be obliged to provide it. However, this does not change the fact that, within the framework of cooperation between state and local government institutions, such assistance should be provided if it is possible and will not lead to the disruption of the proper functioning of the entity in question.

Referring to the issue of the deadline set by the authority conducting criminal proceedings, one should agree with the view expressed in the doctrine that it must be realistic, possible to meet and cannot paralyze the activity of a given institution or its organizational units.⁵¹ The deadline for fulfilling the obligation should

⁴⁸ Piotr Hofmański, Elżbieta Sadzik, Kazimierz Zgryzek in Piotr Hofmański (ed) *Kodeks postępowania karnego. Vol 1. Komentarz do art. 1–296*, Warsaw 2011, 163.

⁴⁹ Judgment of the Constitutional Tribunal of 29 October 2009, K 32/08, OTK-A 2009, No 9, item 139.

⁵⁰ Judgment of the Constitutional Tribunal of 29 October 2009, K 32/08, OTK-A 2009, No 9, item 139.

⁵¹ Sławomir Steinborn, ‘Komentarz do art. 15’, Vol 9 in Jan Grajewski, Piotr Rogoziński, Sławomir Steinborn (ed), *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX/el. 2016.

be set in specific units of time. Therefore, the use of phrases such as ‘immediately’ or ‘as soon as possible’ should be avoided. Their evaluative nature makes it impossible to verify whether the deadline has been exceeded. Moreover, the deadline should be realistic, i.e., set in such a way that it creates a real possibility of meeting it. In turn, lack of a specified deadline should be interpreted as the necessity to fulfill the obligation within a reasonable, customary timeframe left to the relevant entity’s own assessment. It should also be noted that the CCP does not specify in what circumstances an authority conducting criminal proceedings may request assistance. It is sometimes claimed that this may happen when performing a procedural action is impossible or significantly difficult.⁵² However, taking into account the content of Article 15 § 3 CCP, which expressly articulates such a condition in relation to institutions other than state and local government institutions, this interpretation does not seem correct. It should, therefore, be assumed that in any situation in which it is difficult to independently perform a certain action, it is possible to resort to the provisions of Article 15 § 2 CCP. Obviously, the latter provision does not constitute a prerogative to burden other public institutions with obligations that can be successfully performed by authorities conducting criminal proceedings themselves. On the other hand, however, there are no grounds to assume that only difficulties of a certain degree (as defined in Article 15 § 3 CCP) justify seeking assistance from a state or local government institution.

5. CONSEQUENCES OF FAILURE TO PROVIDE ASSISTANCE TO AUTHORITIES CONDUCTING CRIMINAL PROCEEDINGS

The provision of Article 15 § 2 CCP does not determine the procedural consequences of failing to provide assistance to the authority conducting criminal proceedings. This does not mean, however, that it constitutes *lex imperfecta*. The basis for imposing a disciplinary penalty in this case is Article 287 § 1 CCP, according to which a fine of up to PLN 3,000 may be imposed, among others, on a representative or manager of an institution, legal person or organisational unit without legal personality obliged to provide assistance to the body conducting criminal proceedings, who unjustifiably fails to provide it within the specified time limit. In the case of a collegial body, the responsibilities of a specific entity related to the provision of assistance will be determined by the organizational structure and division of competences adopted in a given unit. This may result from an act or an internal legal document, e.g., a statute or rules and regulations.

⁵² For example, Andrzej Sakowicz in Andrzej Sakowicz (ed), *Kodeks postępowania karnego. Komentarz*, Warsaw 2025, 104.

For obvious reasons, liability is individualized in the sense that the sanction is imposed on a specific person who is responsible for providing assistance, even if he or she does not act individually. This could include, for example, a department director, a company director, or a company president. Their responsibility is to supervise the correct and timely execution of assigned activities. It is rightly pointed out in the case law that it is impermissible to impose a disciplinary penalty on an institution as such (e.g., a bank). The sanction under Article 287 § 1 CCP may only be imposed on a representative or manager of an institution, legal person or organizational unit and, therefore, not on an institution, legal person or organizational unit.⁵³

The decision to impose a disciplinary penalty is subject to appeal (Article 290 § 2 CCP). In an appeal, both the scope of the request and the fulfillment of the conditions for its filing may be questioned. The allegation of imposing an unrealistic deadline for fulfilling the obligation may also be raised. It is also conceivable that the performance of the duty to provide assistance conflicts with the scope of the powers and obligations of the entity concerned. Hence, as is rightly assumed in case law, resorting to a financial penalty is justified only when there are no doubts as to whether the entity called upon to execute the order is actually unjustifiably avoiding the performance of its obligation. There are, therefore, no grounds for imposing a disciplinary penalty when there are real reasons to refuse to comply with the order. In such a situation, imposing a penalty means resolving the legal problem using the wrong tool, i.e., a repressive measure, instead of using the right method, i.e., through appropriate legal argumentation.⁵⁴

6. CONCLUSION

The obligation of state authorities and local government institutions to provide assistance to authorities conducting criminal proceedings regulated in Article 15 § 2 CCP, as has already been indicated, has not been the subject of broader doctrinal reflection so far. More attention was undoubtedly drawn to the provision of Article 15 § 3 CCP, which applies to non-public entities.⁵⁵ This state of affairs seems to result mainly from the fact that the issue of providing assistance between public institutions seems to be quite obvious and does not generate any significant

⁵³ Resolution of the Court of Appeal in Kraków of 23 July 2012, II AKz 311/12, KZS 2012, No 7–8, item 58.

⁵⁴ Resolution of the Court of Appeal in Kraków of 23 July 2012, II AKz 311/12, KZS 2012, No 7–8, item 58.

⁵⁵ Cf especially the above-quoted study on this issue by Andrzej Jezusek.

theoretical or practical problems. However, the analysis conducted in this study indicates that such a view is an oversimplification. This remark concerns, in particular, the scope of the obligation referred to in Article 15 § 2 CCP. While there is no doubt that providing assistance in the form of specific services (e.g., making available a means of transport or premises) enables the performance of procedural actions, it is much more complicated to determine the scope of permissible information acquisition. In the era of the information society, the growing volume of data collected by public authorities and the ease of their processing and transfer, authorities conducting criminal proceedings are faced with the temptation to use the general norm of Article 15 § 2 CCP in order to quickly access information. It should be emphasized, however, that in a situation where this information is supposed to have evidentiary value, and especially if it concerns third parties, it is necessary to obtain it in accordance with the proper procedure specified in the provisions of CCP (e.g., regulations contained in Chapter 25 CCP). Only the provisions specifying such a procedure define a precise procedural framework for obtaining information, the depositories of which are the institutions indicated in Article 15 § 2 CCP, and also offer appropriate legal protection against abuse. The latter is important not only because the unlimited use of Article 15 § 2 CCP could lead to circumventing restrictions on obtaining certain information for the purposes of criminal proceedings and, consequently, lead to the violation of individual rights. This is also about an important institutional dimension, which must protect state and local government institutions called upon to provide assistance against the arbitrary actions of other state institutions. Respect for their autonomy and independence, especially in relation to information processing, is very important for the proper functioning of the state apparatus.

REFERENCES

- Cora S, 'Zasada legalizmu ścigania a zawiadomienie o przestępstwie', Państwo i Prawo 2010, issue 10
- Gensikowski P, 'Komentarz do art. 15' in Dariusz Drajewicz (ed), *Kodeks postępowania karnego. Vol I, Komentarz*, Article 1–424, Legalis
- Grzegorzczuk T in Grzegorzczuk T (ed), *Kodeks wykroczeń. Komentarz*, Warsaw 2013
- Hofmański P, Sadzik E, Zgryzek K in Hofmański P (ed), *Kodeks postępowania karnego. Komentarz*, Vol I, Warsaw 2011
- Jasiński W, Kremens K, *Criminal law in Poland*, WoltersKluwer 2019
- Jezusek A, *Niektóre aspekty powszechnego obowiązku udzielenia pomocy organom prowadzącym postępowanie karne*, Palestra 2016, No 6

Kaczorkiewicz D, 'Udzielenie pomocy organom postępowania karnego', *Przegląd Prawno-Ekonomiczny* 2009, No 9

Kalinowski S, Siewierski M, *Kodeks postępowania karnego. Komentarz*, Warsaw 1960

Kardas P, *Odpowiedzialność za nadużycie władzy publicznej w przypadku niezawiadomienia o popełnieniu przestępstwa*, *Prokuratura i Prawo* 2007, No 7–8

Kłak C, *Niepełna opinia biegłego w polskim procesie karnym*, *Prawo i Wiąż* 2020, No 2

Kosonoga J in Stefański R, Zabłocki S (eds), *Kodeks postępowania karnego. Komentarz*, Warsaw 2017

Kurowski M, *Komentarz do art. 15*, Vol 4 in Świecki D (ed), *Kodeks postępowania karnego. Vol I*

Sakowicz A in Sakowicz A (ed), *Kodeks postępowania karnego. Komentarz*, Warsaw 2025

Siewierski M in Mazur M (ed), *Kodeks postępowania karnego. Komentarz*, Warsaw 1971

Skorupka J in Skorupka J (ed), *Kodeks postępowania karnego. Komentarz*, Warsaw 2023

Steinborn S, *Komentarz do art. 15* in Grajewski J, Rogoziński P, Steinborn S (ed) *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX/el. 2016

Stefański RA, *Prawo karne materialne. Część szczególna*, Warsaw 2008

Zgółkowa H (ed), *Praktyczny słownik współczesnej polszczyzny*, Vol 14, Poznań 1998

Jędrzej Kupczyński

University of Warsaw, Poland

e-mail: j.kupczynski@uw.edu.pl

ORCID: 0000-0002-9963-5852

THE COMPARISON OF POLISH AND GERMAN MODELS FOR THE UTILISATION OF POLICE BODY-WORN CAMERAS

Abstract

This paper presents a comparison of the Polish and German models for the utilisation of police body-worn cameras (Polish: *kamery nasobne*). Three groups of variables were compared: (1) usage policy; (2) situational and social context, and (3) technology. Regarding situational and social context, the circumstances under which body-worn cameras were implemented into police service differed in Poland and Germany. In Poland, the public discourse focused on the use of this technology to reduce the (ab)use of coercive measures by police officers. In Germany, on the other hand, the focus was mainly on the fact that the technology could protect police officers from assaults. Regarding the policy of use and technology, the article compares the models of body-worn camera use in Poland and Germany in the following aspects: the rank and type of legal act (or other document) regulating the use of these devices; the places and areas where events can be recorded; the extent to which events can be recorded by these devices; the retention period of produced recordings; the obligation for an officer to inform a person about the fact of recording an intervention; the integration of these devices and other technologies. German legislation on body-worn cameras is much more detailed than the Polish one in almost every aspect. The Polish legal framework for the use of this technology is, in turn, partly incomplete. The article does not postulate a complete reception of the foreign model into the Polish legal system. However, certain legal solutions could serve as a benchmark or inspiration for the Polish legislator. These could include, e.g., solutions to increase awareness of the

fact that police officers use body-worn cameras; to increase the rights of a person who has been recorded with such a camera; to supplement the provisions on the retention period of recordings; to encompass the possibility and potential scope of integrating body-worn cameras with other technologies, such as, for example, automated pattern recognition based on artificial intelligence algorithms. The latter issue remains outside the area of legal regulation in Poland, whereas in Germany, there are some detailed legal solutions in this respect.

KEYWORDS

cameras, body-worn cameras, police, surveillance, new technologies, artificial intelligence

SŁOWA KLUCZOWE

kamery, kamery nasobne, policja, nadzór, nowoczesne technologie, sztuczna inteligencja

I. INTRODUCTION

Body-worn cameras (BWC; Polish: *kamery nasobne*)¹ are small devices, designed to record video and, most often, audio, placed on a law enforcement officer's uniform and intended to document the course of duty in an overt way. They have now become a standard piece of police equipment in many countries. They appeared in the Polish Police in 2018,² when a pilot study was carried out, which involved equipping officers with the first batch of cameras.³ In Germany, mean-

¹ In the article I will use the phrase 'body-worn cameras' and the abbreviation BWC interchangeably. It is worth noting that in British-English language publications the abbreviation 'BWV', derived from 'Body-Worn Video', is more common than 'BWC' overtly.

² Although the first test cases of their use in the Police took place back in 2016 (Infosecurity24, 'Policja testuje kamery nasobne na ŚDM' InfoSecurity24 (Warsaw, 25 July 2016) <<https://infosecurity24.pl/policja-testuje-kamery-nasobne-na-sdm>> accessed 28 September 2024) and in 2015 (Rafał Wasiak, 'Kryminalistyczno-prawna problematyka wprowadzenia do użytku nasobnych kamer video w Policji' (unpublished PhD thesis, University of Warsaw 2019), 119).

³ The pilot study consisted of equipping three police garrisons (in Warsaw, Lower Silesia and Podlasie) with a small batch of a total of 190 body cameras for a period of 6 months (Andrzej Chyliński, Anna Krawczyńska, 'System Rejestracji Audio-Wideo' (2018) 157 *Gazeta Policyjna* <<https://gazeta.policja.pl/997/archiwum-1/2018/numer-157-032018/157760,System-Rejestracji-Audio-Wideo.html>> accessed 27 September 2024) and did not result in a report or other form of written evaluation that would be publicly available.

while, they had already been used as police equipment for about five years.⁴ In legal language, they are referred to as ‘recording devices worn close to the body’ (German: *körpernah getragenen Aufnahmegeräten*), and in everyday language, the English phrase ‘bodycam’ is used.

Judging from the statements made by representatives of various groups of interest in Poland, most of the stakeholders were in favor of introducing and subsequently increasing the number of body-worn cameras in the Police. It was assumed that the new technology would increase the level of transparency of the Police actions, including the ability to secure reliable evidence;⁵ increase professionalism and reduce the use of coercive measures by law enforcement officers;⁶ finally, increase the cooperativeness of citizens and protect police officers against groundless complaints.⁷ Police executives declared that the presence of body-worn cameras brought good results,⁸ although it should be noted that no research or evaluation was presented to confirm this. Sceptical voices were in the minority.⁹

⁴ A pilot project in Frankfurt am Main, Hesse, took place in 2013 (Marcel Müller, ‘Bodycam: Eine Erfolgsgeschichte Nimmt Ihren Lauf’ (2016) 65 *Deutsche Polizei. Zeitschrift Der Gewerkschaft Der Polizei* 14). Subsequently, BWCs were deployed in other federal states, such as Bavaria, Baden-Württemberg, Bremen, Hamburg, Rhineland-Palatinate, and Saxony in 2017–2019 (Selina Klämmt, ‘Der Einsatz von Bodycams durch die Polizei und die Vereinbarkeit mit den deutschen Grundrechten’ (unpublished thesis, Fachhochschule Meißen 2021) 5–6). The enumeration is illustrative and not exhaustive.

⁵ For example: Najwyższa Izba Kontroli, ‘Przygotowanie wybranych podmiotów do realizacji zadań na rzecz zapewnienia porządku publicznego z wykorzystaniem środków przymusu bezpośredniego’ (Information on audit results, 14 July 2022, No KPB.430.002.2022, ref no 14/2022/P/21/040/KPB, Warsaw 2022) 58 <<https://www.nik.gov.pl/plik/id,26195.vp,28975.pdf>> accessed 27 September 2024.

⁶ See Adam Klepczyński and others, ‘Złe traktowanie osób podejrzanych i zatrzymanych przez funkcjonariuszy Policji. Raport z badania ankietowego prowadzonego wśród adwokatów’ (Hel-sinki Foundation for Human Rights 2018); also Wasiak (n 2) 188, 191–192.

⁷ For example: statement by Jarosław Zieliński (Secretary of State at the Ministry of Internal Affairs and Administration) to the Parliamentary Committee on Administration and Internal Affairs (24 January 2018) 35 <<https://orka.sejm.gov.pl/zapisy8.nsf/0/0F1A8B1F3E0935E3C-125822C00525115/%624File/0276608.pdf>> accessed 27 September 2024.

⁸ For example: a statement by the spokesman for Police Chief Insp. Mariusz Ciarki, quoted in: Patrycja Rojek-Socha, ‘Kamery w policji sprawdzają się – będzie ich więcej’ (*Prawo.pl*, 15 July 2019) <<https://www.prawo.pl/prawnicy-sady/kiedy-policjanci-moga-nagrywac-interwencje.445099.html>> accessed 28 September 2024; also: statement by Dariusz Augustyniak (Deputy Chief of Police) to the Parliamentary Committee on Administration and Internal Affairs (26 October 2022) 11 <<https://orka.sejm.gov.pl/zapisy9.nsf/0/663FD39E55DD40EDC12588EE003704A5/%-24File/0051809.pdf>> accessed 28 September 2024: ‘(...) I cannot imagine that Polish police officers are not equipped with body cameras. This is an equipment that every modern police force has. We can already see the great effects of the use of cameras by Polish police officers’.

⁹ The voice of police officers themselves who are users of body cameras, at least during the period of Wasiak’s research, should be qualified as such. From the surveys he conducted, it appears that

At the same time, a meta-analysis was published in Germany, which concluded that none of the eleven evaluation studies previously conducted in the German-speaking states brought convincing evidence that the BWCs were fulfilling their purpose.¹⁰

II. AIM OF RESEARCH AND EXPLANATION OF REASONS AND LIMITATIONS

The consideration of the German experience could provide an interesting and relevant point of reference for the administration of body-worn cameras in Poland, whereas such comparisons have not yet been made.¹¹ Both of those countries have significant similarities in terms of legislation, with the leading role of law written in legal acts rather than *common law*. Both Germany and Poland harmonize their legislation with the EU legal system, including legal acts directly and indirectly related to police body-worn cameras.¹² Thus, some analogies and comparisons between Poland and Germany in terms of the legal environment in which BWCs operate are relevant (having in mind, of course, that due to Germany's federal nature, a plurality of individual states' legal systems are present alongside the federal one). Moreover, the presentation of the German experience and legal framework seems particularly valuable for broadening the debate on body-worn cameras, as to date most of the information on these devices comes from sources

police officers generally denied that the presence of BWCs improved their professionalism or reduced the number of interventions with physical force; they presented mixed conclusions as to whether the implementation of BWCs reduced aggression and increased cooperative tendencies on behalf of citizens; and, finally, a minority of surveyed police officers supported the introduction of BWCs for all police officers on patrol duty in their units; Wasiak (n 2) 133–170.

¹⁰ Davis Adewuyi, 'Effekte von Bodycams zur Prävention von Gewalt gegen Polizeikräfte: Systematische Übersichtsarbeit zu den Methoden und Ergebnissen von Studien zur Evaluation des Präventionsansatzes' (National Centre for Crime Prevention 2021). It is worth pointing out that the main goal of introducing bodycams in Germany was to reduce aggression against police officers (this thread will be developed later in the article), and the report evaluated the degree to which this very goal was achieved. The meta-analysis included 11 studies, 10 of which were conducted in the German states and one in Switzerland.

¹¹ A search of scientific and media publications reveals no such cases.

¹² Such as Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA[2016] OJ L119/89 (in Poland recognised in the abbreviation 'DODO').

and studies produced in the United States and other *common law* countries.¹³ Whereas the dissimilarity of the legal system and the organizational culture of law enforcement agencies makes such comparisons at least partly inadequate.

However, when drawing comparisons with Germany, it is worth pointing out that the organization of police services in that country is significantly different than in Poland. At the federal level, there are: the Federal Police (*Bundespolizei*) and the Federal Criminal Bureau (*Bundeskriminalamt*). The latter is generally carrying out investigative, intelligence-oriented, information security and international cooperation tasks,¹⁴ so its officers generally do not use body-worn cameras.¹⁵ At the level of individual states (*Länder*), on the other hand, there are local police services – *Landespolizei*, but in most cases the administrative tasks connected with maintaining order in public spaces have been separated and transferred to other agencies, called public order authorities – *Ordnungsbehörden* (also as: *Sicherheitsbehörden* or *Polizeibehörden*).¹⁶

The main users of body-worn cameras in Germany are the police forces: the federal (*Bundespolizei*) and in the individual states (*Landespolizei*). Both perform patrol duties in an analogous way to Polish police officers. The patrol duty will be the main focus of this article.

Therefore, this work aims to show the different legal frameworks for utilising BWCs as well as the advantages and disadvantages of each solution, in order to provide a benchmark for developing the optimal model for the Polish Police. I have chosen the German model for this in-depth analysis due to the high relevance, resulting from the affinity of the legislative paradigm, functioning in the same EU legal regime, as well as cultural and geographical proximity.¹⁷

¹³ Sander Flight, 'Taking off the blinders: A general framework to understand how bodycams work' in Bryce Clayton Newell (ed), *Police on Camera: Surveillance, Privacy, and Accountability* (Routledge 2021) 26.

¹⁴ Information based on the official website of the Federal Criminal Bureau: Bundeskriminalamt, 'Unsere Aufgaben' <https://www.bka.de/DE/UnsereAufgaben/unsereaufgaben_node.html> accessed 28 September 2024.

¹⁵ Although it is worth mentioning that they have the authority to record video and audio in public and non-public places without the knowledge of those being recorded (Section 34 of: 2017 Federal Criminal Bureau Act (Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten) [BGBl I 1354] (FRG)).

¹⁶ Martin Stuttmann, *Polizei- und Ordnungsrecht* (Alpmann Schmidt 2023) 2.

¹⁷ Given that BWCs should feature high recording quality and long battery lifetime even in adverse weather conditions or cold temperatures, seemingly trivial factors such as geographic proximity and similar climates can nevertheless be relevant.

The body of research conducted so far indicates that BWC footage might play a significant role in criminal, misdemeanor and disciplinary proceedings, providing a relevant, comprehensive set of information for the court (or other procedural body), while at the same time, this type of evidence appears extremely rare, at least in Polish judicial practice.¹⁸ For that reason, designing an optimal model for utilising these devices seems even more important.

III. METHODOLOGY AND TOOLS FOR COMPARING THE POLISH AND GERMAN MODELS OF USING BWCs IN THE POLICE FORCE

In this work, I adopt a functional comparative approach,¹⁹ following these steps: 1) problem statement; 2) objective presentation and 3) functional comparison. In addition, I utilise a tool designed by Sander Flight specifically for BWCs. According to Flight, the model of using body-worn cameras is shaped by three groups of variables: 1) usage policy; 2) situational and social context; and 3) technology. The first group includes the legal framework, methodologies, rules and recommendations under which officers equipped with cameras operate. The second group includes variables related to what tasks are set for the BWCs, how the relationship between the police and the public is shaped, and in what places and situations the use of these devices is expected. The third group relates to the technological characteristics of the devices and systems used in a particular police force.²⁰ Utilising this schema seems helpful to present a full, comprehensive picture of the use and administration of body-worn cameras. Hence, I based a comparison of the Polish and German models of using these devices on this tool.

Knowing the context surrounding the deployment of the cameras helps to understand legal and technological solutions that were eventually chosen, also fulfilling the first step in the functional comparative approach adopted herein. Therefore, the second group of variables will be described first.

¹⁸ Jędrzej Kupczyński, 'Research based evaluation of body-worn camera (BWC) footage as evidence in criminal proceedings. Preliminary findings' (EUROCRIM 2024 – 24th Annual Conference of the European Society of Criminology, Bucharest, 13 September 2024).

¹⁹ As described: Ralf Michaels, 'The Functional Method of Comparative Law', in Mathias Reimann, and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford Academic 2012) 352–359.

²⁰ Sander Flight (n 13) 29–30.

Next, I will present a number of issues that fall into the first and third group of variables in Flight's schema, thus elaborating how different jurisdictions address challenges and problems pertaining to BWCs (second step in functional comparative approach). These issues are as follows:

1. Rank and type of legal act (or other document) setting the rules for the use of body-worn cameras by police forces – what regulations apply to these devices?
2. Places and areas in which it is possible to record events – is the competence to use a body-worn camera limited to certain spaces, such as public places?
3. Scope of events to be recorded by body-worn cameras – what is specifically recorded and does the officer have the authority to decide whether to record a particular interaction with the camera or not?
4. Retention period of recordings from body-worn cameras and buffer mode – how long are the recordings archived and is there a difference in the retention period depending on the status of specific recordings, e.g., as having evidentiary value?
5. Overt utilisation of BWCs and police officers' duty to inform the person that the intervention is being recorded – is the BWC's operator obliged to inform about the recording and under what conditions?
6. Integration of body-worn cameras and other technologies – are BWCs combined with automated facial recognition, risk prediction or other modern technologies, and if so, under what conditions?

Eventually, I will provide the evaluation and comparison of models adopted in the two jurisdictions.

IV. CIRCUMSTANCES SURROUNDING THE INTRODUCTION OF BODY-WORN CAMERAS TO POLICE FORCES

Before comparing the model of using body-worn cameras in the two countries, it is worth looking at the context in which they found their way into police forces. In Poland, the debate on equipping the Police with BWCs was fueled by cases that provoked great public emotion, in which police officers abused (or were suspected of abusing) their powers. One of these was the case of Igor Stachowiak, who, after his apprehension, died while in police custody at a station in Wrocław. An important piece of evidence in clarifying the circumstances of this case was the camera footage from a stun gun that was used to shock the detainee in the

unmonitored bathroom of the police station.²¹ This happened in 2016, when the BWCs were not used by the Police. Five years later, the devices were present on police officers' uniforms when the death of Dmytro Nikiforenko in a sobering chamber in Wrocław occurred. In that case, police officers were convicted, among other things, of abusing their powers and manslaughter.²² However, this was not based on evidence from body-worn cameras, because despite the fact that the police officers were equipped with them, they failed to use them to record the intervention.²³ These and some other cases that were included in the dispute on body-worn cameras for the Police have one thing in common. That is the act of abusing (or suspected abusing) of power by officers. It can be hypothesized that in the Polish public debate, the implementation of body-worn cameras has been discussed significantly in the context of counteracting the (ab)use of coercive measures by police officers.

In a sense, the opposite situation took place in Germany. The introduction of body-worn cameras for police officers was also preceded by a case that was widely discussed in the media and aroused public interest. However, the case was of a completely different nature than in Poland. Namely, it concerned the act of obstructing the intervention and an assault (initially verbal and later also physical) on police officers on patrol duty in Frankfurt am Main. Subsequently, the perpetrator of this assault accused, in the press, the officers of mistreating him. This happened in 2011 and resulted two years later in the implementation of a pilot program of body-worn cameras in Frankfurt am Main.²⁴ Thus, while

²¹ The case resulted in a final conviction of four police officers for abusing their powers and maltreating a person deprived of liberty. All information about the case from: Helsinki Foundation for Human Rights, 'Sąd Najwyższy utrzymał w mocy wyrok skazujący byłych policjantów za znęcanie się nad Igorem Stachowiakiem' (Helsinki Foundation for Human Rights, 28 August 2023) <<https://hfhr.pl/aktualnosci/sad-najwyzszy-utrzymal-wyrok-ws-stachowiaka>> accessed 30 September 2024; and from statement by Sebastian Chmielewski (Director of the Department at the National Prosecutor's Office) to the Parliamentary Committee on Administration and Internal Affairs (24 January 2018) <<https://orka.sejm.gov.pl/zapisy8.nsf/0/0F1A8B1F3E0935E3C-125822C00525115/%24File/0276608.pdf>> accessed 30 September 2024.

²² Information about the case for: Helsinki Foundation for Human Rights, 'Zapadł wyrok w sprawie śmierci Dmytra Nikiforenki we wrocławskiej izbie wytrzeźwień' (Helsinki Foundation for Human Rights, 6 June 2024) <<https://hfhr.pl/aktualnosci/zapadl-wyrok-w-sprawie-smierci-dmytra-nikiforenki>> accessed 30 September 2024. At the time of writing this article (2024–2025), the conviction was not final.

²³ Information as stated by Jarosław Szymczyk (Chief of Police), to the Parliamentary Committee on Administration and Internal Affairs (21 July 2022) <<https://orka.sejm.gov.pl/zapisy9.nsf/0/412704D5F1CCD335C125888E002E20D3/%24File/0289809.pdf>> accessed 30 September 2024. The failure to use the available body-worn cameras formed the basis for disciplinary charges against the officers in this case.

²⁴ Müller (n 4) 14; also: Ulrike Kruse and others, 'The de-escalating potential of body-worn cameras: Results from six German police departments' (2023) 88 *Journal of Criminal Justice* 1.

the German discourse on the body-worn cameras in police forces also focused on the potential to reduce aggression, it referred to the aggression directed at officers. The presence of the BWCs was expected to contribute to their safety.²⁵ This was related to the upward trend observed in practice, as well as highlighted in statistics, in the number of violent crimes against police officers.²⁶ Thus, the situational context in which body cameras were implemented in the Polish and German police forces differed, which may have affected the legal framework that was designed for the technology, as well as the experience of its utilisation.

V. RANK AND TYPE OF LEGAL ACT (OR OTHER DOCUMENT) SETTING THE RULES FOR USE OF BODY-WORN CAMERAS BY POLICE FORCES

In Poland, the basic issues related to the use of body-worn cameras are regulated in legal acts of statutory and sub-statutory rank, while specific issues are regulated in internal laws and documents of a non-normative nature, partly leaving it to practice. The competence to record events was granted by statutory laws²⁷ with provisions referring to ‘technical means’ in general and not specifically to body-worn cameras. Taking into account the constitutional principle of the rule of law,²⁸ it seems that the use of body-worn cameras by public entities not granted with similar statutory powers would not be possible. The chosen model of regulation is in line with the Polish and European (continental) legislative tradition. Yet some reservations may be raised by the fact that the legal framework on BWCs is partially incomplete. Certain (important) issues, such as the obligation of a police officer to record every intervention, have been ‘regulated’ (on the central level) only in a non-normative document.²⁹

²⁵ Müller (n 4) 14.

²⁶ Over the 2011–2019 period, the number of violent crimes against police officers in Germany increased from 30,628 to 38,635, and the number of victims from 52,240 to 80,084. Cited: Davis Adewuyi (n 10) 7.

²⁷ In the case of the Police – Police Act of 6 April 1990 [2025] JoL [Journal of Laws] 636, hereinafter: the Polish Police Act, primarily Article 15 section 1 items 5a–5b. In the case of the Border Guard – Border Guard Act of 12 October 1990 [2024] JoT [Journal of Laws] 915, primarily Article 11 section 1, items 7–7b. In the case of municipal and communal guards – Communal Guards Act of 29 August 1997 [2021] JoT [Journal of Laws] 1763, primarily Article 11 section 2.

²⁸ Article 7 of 1997 Constitution of Republic of Poland: ‘The public authorities act on the basis and within the limits of the law’.

²⁹ I am referring to the: Chief of Police, ‘Instrukcja użytkowania Systemu Rejestracji Audio-Wideo (RAW), w tym kamer nasobnych pozostających na wyposażeniu policjantów służby prewencyjnej’ (unpublished internal document of the Police, Warsaw 2019), English: *Instruction on the use*

The way these issues are regulated in Germany is similar in some respects. The competence of police forces to record video and audio has been granted in legal acts of statutory rank. These powers are separately regulated in the Federal Police Act (*Bundespolizei*)³⁰ and in the laws on police services from the individual states (*Länder*).³¹ It should be noted that some German statutory-level regulations are more detailed than in the Polish case. They also cover detailed and technical issues such as the time frame of the so-called buffer (loop recording) commonly used in body-worn cameras to document events immediately preceding the moment the recording is initialized,³² or the purposes, circumstances and procedures under which it is permissible to make recordings in certain categories of places and spaces (this will be discussed later in the article). Some of these regulations, as in the case of the federal police or the police of the state of Schleswig-Holstein, were introduced specifically for the purpose of equipping officers with body cameras and apply directly to these devices, while others – as in the Polish case – regulate the general competence of a given service to perform video and audio recordings.³³

VI. PLACES AND AREAS IN WHICH IT IS POSSIBLE TO RECORD EVENTS

In Poland, police officers were initially allowed to use body cameras only in public spaces.³⁴ This competence was not limited by any criteria³⁵ or by formu-

of the Audio-Video Recording System (RAW), including body-worn cameras remaining on the equipment of police officers of the preventive service (hereinafter: Instruction RAW). For more on this topic, see Jędrzej Kupczyński, ‘Użytkowanie kamer nasobnych przez policję i inne służby w świetle bieżących polskich regulacji prawnych’ (2023) 3 Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury 67.

³⁰ 1994 Federal Police Act (*Bundespolizeigesetz*) (FRG); especially: § 27a.

³¹ For example, for Saxony: 2019 Saxon Police Authorities Act (*Sächsisches Polizeibehördengesetz*) (FRG); especially: § 30. For example, for Schleswig-Holstein: 1992 General Administrative Law for Schleswig-Holstein (*Allgemeines Verwaltungsgesetz für das Land Schleswig-Holstein*) (FRG); especially: § 184a.

³² A body-worn camera in buffer mode continuously records everything, while also continuously overwriting this recording with the next footage after a predefined period, usually 30–60 seconds. If the recording mode is triggered, the buffer is automatically added at the beginning of the recording. If the recording mode is not triggered, no part of the buffer is retained.

³³ E.g. § 14 section (6) of the law from the state of Hesse: 2005 Hessian Public Security and Order Act (*Hessisches Gesetz über die öffentliche Sicherheit und Ordnung*) (FRG).

³⁴ Article 15 section 1 item 5a of the Polish Police Act.

³⁵ Apart from the general provision that performing statutory powers by policemen should be in accordance with human dignity, respect and protection of human rights (Article 14 section 3 of the Polish Police Act).

lating a specific purpose that had to be fulfilled for the recording to be made. Starting from February 2019, police officers were granted the power to record video and audio also in places other than public spaces but only during an ‘intervention’.³⁶ At the same time, the ‘intervention’ has been defined quite broadly, as the involvement of a police officer in the course of an event that may violate legal norms and performance of measures aimed at determining the nature, type and circumstances of the event and undertakings aimed at restoring the violated legal order.³⁷ As a matter of fact, any manifestation of the performance of statutory powers by a policeman must be recognized as falling within the definition of an ‘intervention’. So, in the current state of the law, the Police have a very broad competence to use body-worn cameras in both public and private spaces.

In Germany, the power to record events with BWCs in various types of spaces appears to be more limited than in Poland, although the details depend on specific regulations at the federal or state level.

In Rhineland-Palatinate, officers are not allowed to use cameras in dwellings and private spaces, but only in publicly accessible places³⁸ (although there are voices and even legislative proposals indicating the intention to grant them such a competence).³⁹ Similarly, recording is limited to publicly accessible places for officers in, for example, Hesse,⁴⁰ Saxony⁴¹ or Lower Saxony⁴² as well as within the federal police.⁴³ In Thuringia, on the other hand, a casuistic solution has been introduced to prohibit recording in residential places, premises belonging to such places and on fenced private property. At the same time, recording in workplaces, offices, and commercial spaces⁴⁴ was allowed, albeit with significant restrictions.

The issue of whether to allow police officers to record sound and video in private spaces, primarily those intended for habitation, has caused and, as it seems, still

³⁶ Article 15 section 1 item 5b of the Polish Police Act, which became effective 6 February 2019.

³⁷ Article 15 section 7c of the Polish Police Act.

³⁸ § Section 31 (1) of the Rhineland-Palatinate law: 1993 Police and Public Order Authorities Act (Polizei- und Ordnungsbehördengesetz) (FRG).

³⁹ See the February 2024 statement by Michale Ebling, Minister of the Interior of Rhineland-Palatinate, quoted in Stephen Weber, ‘Polizei soll Bodycams auch in Wohnungen nutzen dürfen’ (mittelhessen.de, 6 February 2024). <<https://www.mittelhessen.de/politik/politik-rheinland-pfalz/polizei-soll-bodycams-auch-in-wohnungen-nutzen-duerfen-3288314>> accessed 10 August 2024.

⁴⁰ § 14 section (6) of 2005 Hessian Public Security and Order Act (Hessisches Gesetz über die öffentliche Sicherheit und Ordnung) (FRG).

⁴¹ § 30 section (1) of 2019 Saxon Police Authorities Act (Sächsisches Polizeibehördengesetz) (FRG).

⁴² § 32 section (4) of the law from the state of Lower Saxony: 2005 Lower Saxony Police and Public Order Authorities Act (Niedersächsisches Polizei- und Ordnungsbehördengesetz) (FRG).

⁴³ § 27a (1) of 1994 Federal Police Act (Bundespolizeigesetz) (FRG).

⁴⁴ § 33a section (5) of the law from the state of Thuringia: 1992 Thuringian Police Tasks Act (Thüringer Gesetz über die Aufgaben und Befugnisse der Polizei) (FRG).

causes debate in Germany. Constitutional arguments,⁴⁵ related to the inviolability of the dwelling (regulated in Article 13 of the Constitution of the Federal Republic of Germany),⁴⁶ are used against such a solution. The use of body-worn cameras in private spaces, primarily to ensure the safety of the officers themselves, is advocated, on the other hand, by the German Police Union.⁴⁷ The argument for this solution, as well as for the implementation of body cameras in general, is the need to ensure the safety of officers.⁴⁸ As a result, solutions have been put in place in some states to allow the use of body-worn cameras in private spaces, albeit with certain reservations.

In Bavaria, this is only possible to avert an imminent threat to a person's life, health or freedom; this regulation applies to residential places. In addition, in such places, police officers are not allowed to use cameras in continuous mode, i.e., loop recording.⁴⁹ The possibility of recording events with BWCs is, therefore, much narrower than in publicly accessible spaces, where these devices (including loop recording) can be used when the general clause is met – to ensure the safety of a police officer or a third party.⁵⁰

An unconventional and rather strict approach to the use of body-worn cameras in private spaces is introduced in Baden-Württemberg. It pertains specifically to residential places (not office, retail or business premises). The recording of video and audio by BWCs in residential dwellings is permitted only for the purpose of averting an imminent threat to a person's life or health.⁵¹ Moreover, no recording of situations described as 'core sphere of private life' is allowed under any conditions.⁵² If a recording is started that subsequently covers such a situation, further

⁴⁵ Frank Schmidt, *Polizeiliche Videoüberwachung durch den Einsatz von Bodycams* (Nomos 2018) 429, cited after Arno Glauch, 'Frank Schmidt: Polizeiliche Videoüberwachung durch den Einsatz von Bodycams' (2019) 4 *Kriminalpolitische Zeitschrift* 247.

⁴⁶ 1949 Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) (FRG).

⁴⁷ German: Gewerkschaft der Polizei <<https://www.gdp.de>> accessed 14 August 2024. For example, the standpoint in favor of using body cameras in private residences is expressed in Sven Neumann, 'Einsatz der Bodycam in Wohnungen. Der lange Weg – ein Kommentar' (2024) 7 DP – Deutsche Polizei Schleswig-Holstein 1 <<https://www.gdp.de/Schleswig-Holstein/DP/2024/DP-7-2024.pdf>> accessed 14 August 2024.

⁴⁸ Müller (n 4) 16

⁴⁹ § Section 33 (4) sentences 3 and 6 of a law from the state of Bavaria: 1990 Bavarian Police Tasks Act (Gesetz über die Aufgaben und Befugnisse der Bayerischen Polizei) (FRG).

⁵⁰ § 33 section (4) sentence 1 of 1990 Bavarian Police Tasks Act (Gesetz über die Aufgaben und Befugnisse der Bayerischen Polizei) (FRG).

⁵¹ § 44 section (5) sentence 2 of the law of the state of Baden-Württemberg: 2020 Police Act (Polizeigesetz) (FRG).

⁵² In German: *Kernbereich privater Lebensgestaltung*. This is regulated under § 44 section (7) of 2020 Police Act (Polizeigesetz) (FRG).

recording must be stopped immediately. The concept of the ‘core sphere of private life’ refers to a sphere of intimacy that state authorities may not interfere with under any circumstances, and derives from the case law of the German Federal Constitutional Court.⁵³

VII. SCOPE OF EVENTS TO BE RECORDED BY BODY-WORN CAMERAS: OBLIGATIONS AND EXCLUSIONS

It is worth considering whether a given model for the use of BWCs includes such situations, events or interactions between the police and the public that must be recorded with cameras or, on the contrary, that must not be recorded. The answer to this question might be drawn partly from the description of the spaces in which the devices are used. However, this information needs to be summarized and supplemented.

In Poland, an officer equipped with a body-worn camera is obliged to record every intervention and, therefore, every situation in which he or she performs his or her statutory duties. However, this is ‘regulated’ at the central level only in a non-normative document.⁵⁴ In some police garrisons, this obligation was additionally included in internal legal acts issued by the chiefs of local Police units.⁵⁵ Thus, this is not subject to the discretionary decision of a police officer whether or not to record a particular intervention. Nor have any rules been formulated regarding the prohibition of recording specific events or situations. Therefore, the scope of events subject to recording is very wide. On the other hand, however, BWCs do not record the entire shift of a police officer.⁵⁶

The catalogue of events subject to recording with body-worn cameras in Germany is much narrower, and its exact shape depends on the legislation of the respective state, as well as whether the recording is carried out in a public, private or residential place, what situation it would cover, and finally on the decision of the police officer himself/herself.

⁵³ This concept has been present in jurisprudence for several decades, starting with: *Elfes* (1957) 6, 32 (Bundesverfassungsgericht).

⁵⁴ See footnote 28. As to the definition of an ‘intervention’ – see the section ‘Places and areas in which it is possible to record events’.

⁵⁵ Further information: Kupczyński (n 28) 71.

⁵⁶ Apart from the fact that during the whole shift the device is in the buffer mode – the recording is continuously made and erased after 30 seconds.

The solution of recording the entire police officers' shift was adopted neither at the federal level nor in any of the states. Also, generally, no obligation to record every singular intervention was imposed. As a standard, it is up to an officer's discretion whether – given the conditions that allow the use of a body-worn camera – he or she will utilise this device or not. In Thuringia, for example, the initiation of recording depends on an officer's free decision made in a specific situation.⁵⁷ This solution differs strongly from the Polish model.

Sometimes, however, a specific type of intervention or situation is defined in which an officer is required to use a BWC. For example, in Berlin (the state), a police officer equipped with a body-worn camera must use it if he/she uses coercive measures against a person or if requested to do so by the person against whom the intervention is being made.⁵⁸ In Thuringia, on the other hand, an officer is obliged to make a recording upon instructing that coercive measures may be used or if he/she uses them, as well as when he/she is in the vicinity of another police officer using coercive measures, and finally if it is requested directly by the person against whom the intervention is being undertaken. What is more, the police agency is required to configure or select cameras to trigger automatic recording whenever an officer's firearm is being brought out from its holster.⁵⁹

Such legal solutions, especially in the aspect of making police officers' duties dependent on the will of the person concerned (citizen), seem uncommon from the Polish perspective.

On the other hand, some events and situations that absolutely must not be recorded with body-worn cameras have also been defined. As already indicated, in Baden-Württemberg the use of BWCs is prohibited if a situation falls within the 'core sphere of private life'.⁶⁰ A similar prohibition, also relating to the 'core sphere of private life', is adopted in the legislation of Lower Saxony⁶¹ and Thuringia.⁶²

⁵⁷ Kruse and others (n 23) 2.

⁵⁸ § Section 24c (2) of the Law of the Land of Berlin: 2006 General Law on the Protection of Public Security and Order in Berlin (Allgemeines Gesetz zum Schutz der öffentlichen Sicherheit und Ordnung in Berlin) (FRG).

⁵⁹ § 33a section (2) of: 1992 Thuringian Police Tasks Act (Thüringer Gesetz über die Aufgaben und Befugnisse der Polizei) (FRG).

⁶⁰ See footnote 51.

⁶¹ § 33 section (2) of: 2005 Lower Saxony Police and Public Order Authorities Act (Niedersächsisches Polizei- und Ordnungsbehördengesetz) (FRG).

⁶² § 33a section (6) of 1992 Thuringian Police Tasks Act (Thüringer Gesetz über die Aufgaben und Befugnisse der Polizei) (FRG).

VIII. RETENTION PERIOD OF RECORDINGS FROM BODY-WORN CAMERAS AND BUFFER MODE

There is no doubt that the recording of an image or voice with the use of body-worn cameras constitutes the processing of personal data. The entity responsible for processing such data – the Police – is obliged to act in accordance with the principle of proportionality.⁶³ So, the scope of data processing should be at the minimum level, ensuring the achievement of the purpose of this processing. This is affected by, among other things, the period for which the data is being kept by the Police.

In Poland, the retention period for Police body-worn camera recordings is a minimum of 30 days and a maximum of 60 days.⁶⁴ This period may be extended if the BWC records contain evidence that is relevant to criminal, misdemeanor or disciplinary proceedings (already underway or to be initiated).⁶⁵ Statutory law does not specify how long this period is extended. In practice, the period is set for 1 year.⁶⁶ Devices utilised by Polish police officers have a loop recording function – the buffer is set at 30 seconds.⁶⁷ After this period, the recorded material is automatically overwritten, unless the recording mode is activated. No statutory law provision makes any mention of the issue of loop recording. Likewise, there is no mention of it in the Instruction RAW document.

In Germany, the retention period for recordings varies from state to state and depends on the purpose for which the recording was made or may fulfill. In the Federal Police, it is 30 days. However, it may be extended under specific conditions, specifically, when it is necessary for the investigation of a crime or serious administrative misconduct,⁶⁸ for the abrogation of danger in an individual case; for verifying the legality of police actions, particularly at the request of the person concerned. In these cases, the retention period for recordings is extended to

⁶³ Article 13 section 1 of: Act on the protection of personal data processed in connection with preventing and combating crime of 14 December 2018 [2023] JoT [Journal of Laws] 1206; hereinafter: Polish Law Enforcement Data Protection Act.

⁶⁴ Article 15b of the Polish Police Act. The recordings are stored in a digital form, on a server, within the police Audio-Video Recording System (according to points VIII and X of the document: Instruction RAW).

⁶⁵ Article 15b of the Polish Police Act.

⁶⁶ Further on this issue, see Kupeczynski (n 28) 73.

⁶⁷ Chyliński, Krawczyńska (n 3).

⁶⁸ In German: *Ordnungswidrigkeit* – violation of order. In the legal sense, the concept is similar to the Polish misdemeanor.

6 months as a standard. It can be even longer, but only for the need to prosecute crimes and administrative misconduct or verify the legality of police actions.⁶⁹

A similar, though not identical, model for regulating the length of recordings' retention is also adopted in the laws of the individual states. In the case of the federal police, it is noteworthy that the initiative is partially placed in the hands of the interested party – the citizen – in terms of shaping the length of the processing of personal data, which is an uncommon solution from the Polish perspective.

In Bavaria, the retention period for recordings is two months and can only be extended if the recording in question is necessary for a case of serious administrative misconduct or a criminal offense; also for assessing the legality of police officers' actions, if such an assessment can be anticipated.⁷⁰ In Lower Saxony, this period is six weeks, and may be extended in cases where it is necessary for a criminal case or crucial to prevent a lack of evidence.⁷¹ Such a redaction of the legal provision indicates, as it seems, only the auxiliary significance of BWC recording as evidence. This kind of evidence is used exceptionally, in the absence of other available means of evidence.

Going back to the issue of the retention period of recordings – the strict legal solution adopted in Baden-Württemberg is quite unconventional. As a rule, the BWCs are used there only in 60-second loop recording mode. So the typical storage period for recordings is just 60 seconds.⁷² In exceptional situations, it is possible to store recordings from the body-worn cameras for a longer period.⁷³ But in case of recordings made in residential spaces, this requires an additional court approval.⁷⁴ Therefore, in the standard situation, there is no retention of recordings at all, but their ongoing deletion. On the other hand, when the described conditions are fulfilled, the recordings from the body-worn cameras are treated as any other form of video surveillance – they are stored for 4 months with the possibility of extension in certain cases related to, among others, the prosecution of crimes and

⁶⁹ § 27a section (4) of 1994 Federal Police Act (Bundespolizeigesetz) (FRG).

⁷⁰ § 33 section (8) of: 1990 Bavarian Police Tasks Act (Gesetz über die Aufgaben und Befugnisse der Bayerischen Polizei) (FRG).

⁷¹ § 32 section (4) sentence 7 of 2005 Lower Saxony Police and Public Order Authorities Act (Niedersächsisches Polizei- und Ordnungsbehördengesetz) (FRG).

⁷² § 44 section (8) and (10) of 2020 Police Act (Polizeigesetz) (FRG).

⁷³ Specifically: '(...) if the circumstances justify the belief that this is necessary for the protection of police officers or other persons from danger to life or health'. - Own translation from § 44 section (8) sentence 1 of 2020 Police Act (Polizeigesetz) (FRG). In the case of places intended for residential use, additionally, the threat to life or health must be 'imminent' § 44 section (8) sentence 2 of 2020 Police Act (Polizeigesetz) (FRG).

⁷⁴ § 44 section (6) of 2020 Police Act (Polizeigesetz) (FRG).

administrative offences.⁷⁵ Thus, the legal solution adopted in the state seems to suggest the primary task of BWCs is to simply improve security during interactions between police officers and the public, rather than to produce evidence for future prosecution.

The opposite legal solution is present in Rhineland-Palatinate, where the use of BWCs in loop recording mode is prohibited completely.⁷⁶ Permanent recordings are erased after 30 days, unless further retention is necessary for criminal or serious misdemeanor proceedings; for the aversion of danger in individual cases or for checking the legality of police actions, especially at the request of the person concerned (citizen).⁷⁷

IX. OVERT UTILISATION OF BWCS AND POLICE OFFICERS' DUTY TO INFORM THE PERSON THAT THE INTERVENTION IS BEING RECORDED

Body-worn cameras are used to record events overtly. To fulfill the task of de-escalating aggressive behavior against police officers, the individuals need to be aware that their behavior is being recorded in the first place. Studies conducted to date (outside Poland) suggest that citizens are relatively often not aware at all that officers were equipped with BWCs and were recording the intervention.⁷⁸ Hence, the issue of properly informing the public that the police officers are using these devices seems important.

In Poland, a policeman is obliged 'to as much extent as possible' to 'give notice' to the member of the public about recording the video and audio, but only if he or she intervenes in places other than public places, i.e. in private space.⁷⁹ Statutory provisions do not regulate possible forms of communication other than 'giving notice' that could increase awareness of the use of BWCs among the citizens.

⁷⁵ § 44 section (10) in conjunction with section (11) of 2020 Police Act (Polizeigesetz) (FRG).

⁷⁶ § 31 section (3) of 1993 Police and Public Order Authorities Act (Polizei- und Ordnungsbehördengesetz) (FRG).

⁷⁷ § 31 section (4) of 1993 Police and Public Order Authorities Act (Polizei- und Ordnungsbehördengesetz) (FRG).

⁷⁸ See Cynthia Lum and others, "Body-worn cameras" effects on police officers and citizen behavior: A systematic review' (2020) 16 Campbell Systematic Reviews e1112 (and literature cited therein).

⁷⁹ Article 15c of the Polish Police Act. It is worth noting that the Instruction RAW document extends this obligation to all types of spaces and interventions (point V. subsection 5.5.). The internal regulations of individual police units may also chalk up this obligation in a broader way than that implied by the Polish Police Act.

In Germany, the same issue has been regulated somewhat differently. In principle (although differences may arise within the laws of individual states), there is a requirement that the utilisation of body-worn cameras must be done in public; that the participants of the intervention must know that they are being recorded.

In Lower Saxony, for example, the use of BWCs from the perspective of citizens should be ‘recognisable’.⁸⁰ Federal legislation mandates that an officer must indicate in an ‘appropriate form’ the fact that a body-worn camera is being used, but may omit this in an emergency situation.⁸¹ In Baden-Württemberg, on the other hand, the obligation to inform about recording with BWCs exists unless it is ‘obvious’.⁸²

Generally speaking, the German legislation focuses on the goal (to use BWCs in an overt way so that the citizens are aware of it. It makes fewer references to the form in which this goal should be achieved (e.g., by ‘giving notice’).

The casuistic legal model from Thuringia bears certain distinctions. As a rule, the ‘appropriate measures’ are required to ensure that body-worn cameras are utilised openly. In addition, an obligation was imposed on officers to inform the persons concerned about the activation of the recording in advance. Only in emergency situations, police officers may omit this obligation. Moreover, the police agency is obliged to configure or select cameras so that the devices emit an optical and acoustic signal upon starting the recording. Finally, officers are mandated – if the situation permits – to instruct the persons concerned about their right to access and review the recording.⁸³

X. INTEGRATION OF BODY-WORN CAMERAS AND OTHER TECHNOLOGIES

Sometimes introducing new technologies to the police service triggers a tendency to extend the use of already deployed tools beyond their originally intended purposes.⁸⁴ This is no different in the case of body-worn cameras, which can

⁸⁰ In German: ‘*ist kenntlich zu machen*’. § 32 section (4) sentence 3 of 2005 Lower Saxony Police and Public Order Authorities Act (Niedersächsisches Polizei- und Ordnungsbehördengesetz) (FRG).

⁸¹ § 27a section (2) of 1994 Federal Police Act (Bundespolizeigesetz) (FRG).

⁸² § 44 section (10) of 2020 Police Act (Polizeigesetz) (FRG).

⁸³ § 33a section (4) of: 1992 Thuringian Police Tasks Act (Thüringer Gesetz über die Aufgaben und Befugnisse der Polizei) (FRG).

⁸⁴ This phenomenon is known in the literature as ‘function creep’. See: Bert-Jaap Koops, ‘The concept of function creep’ (2021) 13 Law, Innovation and Technology 29.

potentially be combined with a range of other technologies,⁸⁵ such as those related to automatic facial recognition, risk prediction, etc. It is worth considering the current and potential future state of BWC integration with other technologies in Poland and Germany in the context of current legislation. A common point of reference is European Union legislation, including, in addition to the aforementioned ‘DODO’ directive, the so-called AI Act,⁸⁶ which prohibits, among others, the use of remote biometric identification systems (for instance, automatic facial recognition) in real time, in public spaces, for law enforcement purposes.⁸⁷

Statutory law in Poland does not regulate the possible integration of body-worn cameras (or other police video surveillance systems) with automated facial recognition technology, biometric identification, risk prediction, etc. Nevertheless, the possible implementation of such technologies would have to fall within the scope of statutory tasks of the Police and comply with the principles of processing personal data in connection with preventing and combating crime,⁸⁸ and finally with the Constitution of the Republic of Poland.

Also in Germany, detailed statutory regulation of this issue is uncommon.⁸⁹ However, some states have introduced legislation explicitly addressing the integration of video surveillance and other new technologies in policing.

The Bavarian police law grants a relatively broad possibility of integrating police recordings with certain automated image processing systems. This also applies to recordings made with body-worn cameras. However, it is only permissible to use systems of automated recognition and interpretation of patterns relating to objects (and not persons).⁹⁰ This could include, for example, automated recognition of dangerous objects such as firearms.

⁸⁵ For more on this topic, see William Webster, Diana Miranda and Charles Leleux, ‘Evidence Review into Public Experience and Confidence of Body Worn Video in a Policing Context’ (Scottish Institute for Policing Research 2022) <<https://dspace.stir.ac.uk/bitstream/1893/34460/1/UoS%20BWV%20Final%20June%202022.pdf>> accessed 18 December 2024.

⁸⁶ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 on establishing harmonized rules for artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144, and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L.

⁸⁷ Article 5(1)(h) of the Artificial Intelligence Act. However, numerous exceptions are provided to this prohibition.

⁸⁸ Chapter 3 of Polish Law Enforcement Data Protection Act.

⁸⁹ Apart from automated reading of vehicle licence plates. This specific technology has been regulated in most states. However, this is not done with the use of body cameras and, therefore, lies outside the scope of this article.

⁹⁰ § 33 section (5) in conjunction with section 4 of 1990 Bavarian Police Tasks Act (Gesetz über die Aufgaben und Befugnisse der Bayerischen Polizei) (FRG).

In Baden-Württemberg, it is possible to use real-time automated image processing algorithms, but only for identifying behavioral patterns that indicate the commission of a crime. This is only permitted in places that are at high risk of crime, as well as during gatherings and public events when the conducted risk analysis indicates a threat of a terrorist attack.⁹¹ This applies mainly to stationary forms of video surveillance, and given the type of technology permitted, it would be impractical to correlate it with body-worn cameras. Currently, the technology is used to monitor, by stationary video surveillance systems, part of the inner city of Mannheim.⁹²

Thuringia, on the other hand, has explicitly banned the combination of body-worn cameras (as well as recorders in police vehicles) with automated facial recognition software.⁹³

XI. SUMMARY: WHERE ARE SIMILARITIES AND DIFFERENCES, AND WHAT CONCLUSIONS DO THEY BRING?

The general features of the legal system in Poland and Germany are to some extent alike (apart from the federal nature of the state in Germany). Hence, there are certain similarities in terms of how and from what type of legal acts the BWC utilisation model emerges. This is mainly statutory law. It should be noted, however, that German legislation is far more precise (sometimes even casuistic) in the sense that it regulates a number of detailed issues on BWCs, which are not addressed by any provisions in the Polish legal system. One cannot reasonably postulate excessive casuistry in legislation. Still, it must be seen as a drawback that the Polish regulations lack certain basic issues, like the loop recording (buffer mode), the retention period of recordings of evidentiary significance, and the obligation to record every intervention (while ‘regulating’ these issues in a non-normative Instruction RAW document).

⁹¹ § 44 section (4) of 2020 Police Act (Polizeigesetz) (FRG).

⁹² Landesbeauftragter für den Datenschutz und die Informationsfreiheit Baden-Württemberg, ‘Datenverarbeitungen der Sicherheitsbehörden’ (8 January 2024) <<https://www.baden-wuerttemberg.datenschutz.de/datenverarbeitungen-der-sicherheitsbehoerden/>> accessed 14 December 2024.

⁹³ § 33a section (9) of 1992 Thuringian Police Tasks Act (Thüringer Gesetz über die Aufgaben und Befugnisse der Polizei) (FRG).

The deployment of BWCs to police forces took place in Poland and Germany in a different social context. The main purpose of these devices was also defined differently. In Germany, they were to increase officers' safety, and in Poland, they were meant as a tool to decrease the (ab)use of coercive measures by the Police.⁹⁴ That is why significant differences in the BWCs utilisation model in these countries occur. For the same reason, the possible introduction of foreign solutions into the Polish legal system would have to be limited, taking into account the different social context.

In Poland, police officers are granted the competence to use the BWCs in any place (both public and private) and for any intervention. What is more, an obligation was imposed on them to record every intervention, albeit resulting (at the central level) only from a non-normative Instruction RAW document. There is no exclusion from recording any situation. Recordings are kept for a period of 30–60 days, or longer if they may be of evidentiary value. In the latter case, the statutory law does not specify what this period would be. Similarly, the issue of loop recording is left outside any regulation. In order to raise awareness of the Police's use of BWCs, officers were mandated, as far as possible, to give notice to citizens on recording. According to the Polish Police Act, this obligation is limited to spaces other than public places.

In Germany, it is quite different – the competence to use BWCs by police forces is limited in some states only to public spaces. In the instances in which a registration in private places is allowed, it usually comes with a number of restrictions and limitations. German police officers generally make discretionary decisions whether or not to register an intervention. Yet, there are certain situations in which they are obliged to turn the cameras on (such as the use of coercive measures in Thuringia) or forbidden to use them (when a 'core sphere of private life' would be recorded). It was precisely defined how long the recordings should be kept (usually 1–2 months) and for how long this period can be extended (usually 4–6 months) and under what conditions. Loop recording (buffer mode) was also regulated, specifying the conditions under which it can and cannot occur, and even the length of the buffer (usually 30–60 seconds). The obligation to inform about the use of BWCs has sometimes been regulated even more generally than in Poland, defining the purpose (overt recording) rather than the means to achieve it ('give notice'). However, officers' duties in this regard have sometimes been casuistically defined.

⁹⁴ It is worth noting that a similar narrative about body-worn cameras is present in the United States, see, for example: U.S. Department of Justice, 'Justice Department Awards over \$23 million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States' (21 September 2015) <<https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law>> accessed 20 January 2025.

The fact that Polish officers can, or rather must, use BWCs everywhere and at every intervention seems to correlate with the assumption that these devices are primarily intended to limit the (ab)use of coercive measures by the police officers. Modifying this model towards the German one, for instance, leaving the decision whether or not to record an intervention to the police officers' discretion, would not contribute to achieving this postulate. Besides, the German model is not free of flaws. It sometimes seems to impose obligations on police officers that are difficult to implement. In Baden-Württemberg, for example, an officer intervening in a private apartment is obliged to make a rather far-reaching legal analysis of the factual circumstances: whether in a given situation the recording would fulfill a statutory purpose, such as the aversion of an imminent threat to life, and at the same time whether it would not accidentally violate a 'core sphere of private life'. Whereas, especially in emergency situations, there might be no time for an officer to analyze such legal considerations prior to the decision on activating a body-worn camera.

However, certain solutions adopted in Germany deserve attention as beneficial for implementation in Poland. The technology of automatically triggering a recording when a service firearm is brought out of its holster, present in Thuringia, seems to address the natural risk of a police officer not being able to focus his or her attention on starting the recording in a dynamic life-and-death situation.

Moreover, strengthening the rights of the person who was recorded with a body-worn camera is worth considering. The German model stipulates that such a person can influence the retention period of the recordings – at his or her request, the period can be extended when it is necessary to assess the legality of police actions. It also seems to be beneficial to allow, as in Thuringia, persons concerned to access and review the recordings on which they have been captured.

Finally, the issue of 'giving notice' to citizens about registration seems to require some improvement in Poland. There are no grounds for limiting this obligation to private places, as in the Polish Police Act provisions. In turn, without legislative intervention, it would be reasonable to implement solutions aimed at increasing the visibility of the cameras themselves, awareness of the fact that they are being used, or clarity of the activation of the recording mode (by emitting a clear signal).⁹⁵ This could contribute, without burdening the police officers with additional

⁹⁵ The BWCs used by the Polish Police emit a single voice message 'I am recording' when the recording mode is activated, and a light signal (red LED) when the mode is activated. It should be noted, however, that the voice message is quite quiet and can be drowned out even by city noise. What is more, it is usually emitted before the participants of the intervention are near the camera (which is natural – a police officer activates the camera immediately before interacting with citizens, for example, upon approaching them). The red LED is not clearly visible. It is easy to

duties, to broaden citizens' awareness of the fact that they are being recorded. And after all, such awareness is necessary if the BWCs are to bring a de-escalating effect. Perhaps a certain point of reference would be the Frankfurt police's existing practice, whereby officers wear visible, reflective vests with the words 'Videorecording'.



Fig. 1: Opportunities to increase the visibility of body-worn cameras. Left: Polish police officer; right: a police officer in Frankfurt am Main wearing a reflective vest. Sources respectively: Szymon Zięba, 'Kamera osobista dla policjanta. Każda interwencja będzie nagrana' (Trojmiasto.pl, 30 September 2019) <<https://www.trojmiasto.pl/wiadomosci/Kamera-osobista-dla-policjanta-Kazda-interwencja-bedzie-nagrana-n138358.html>> accessed 18 December 2024; and Müller (n 4) 17.

Thus, while it would be unreasonable to postulate a broad, copy-like adoption of the entirety of German regulations into the Polish model, certain specific solutions could be applied for the benefit of achieving the goals set for the BWCs. All the more so because, as has been pointed out, the Polish model is not free of gaps that would require urgent supplementation.

XII. ACKNOWLEDGEMENT

The publication is the result of a research project *Kamery nasobne w pracy organów ścigania i wymiaru sprawiedliwości* [Body-worn cameras in policing and criminal justice], No 2021/41/B/HS5/02988, funded by the National Science Center.

overlook it given the element of stress, anxiety and emotion that can accompany the people against whom the intervention is being undertaken.

REFERENCES

Adewuyi D, 'Effekte von Bodycams zur Prävention von Gewalt gegen Polizeikräfte: Systematische Übersichtsarbeit zu den Methoden und Ergebnissen von Studien zur Evaluation des Präventionsansätze' (National Centre for Crime Prevention 2021)

Bundeskriminalamt, 'Unsere Aufgaben' <https://www.bka.de/DE/UnsereAufgaben/un-sereaufgaben_node.html> accessed 28 September 2024

Chief of Police, 'Instrukcja użytkowania Systemu Rejestracji Audio-Wideo (RAW), w tym kamer nasobnych pozostających na wyposażeniu policjantów służby prewencyjnej' (unpublished internal document of the Police, Warsaw 2019)

Chyliński A, Krawczyńska A, 'System Rejestracji Audio-Wideo' (2018) 157 *Gazeta Policyjna* <https://gazeta.policja.pl/997/archiwum-1/2018/numer-157-032018/157760_System-Rejestracji-Audio-Wideo.html> accessed 27 September 2024

Sander Flight S, 'Taking off the blinders: A general framework to understand how bodycams work' in Bryce Clayton Newell (ed), *Police on Camera: Surveillance, Privacy, and Accountability* (Routledge 2021)

Glauch A, 'Frank Schmidt: Polizeiliche Videoüberwachung durch den Einsatz von Bodycams' (2019) 4 *Kriminalpolitische Zeitschrift* 247

Helsinki Foundation for Human Rights, 'Sąd Najwyższy utrzymał w mocy wyrok skazujący byłych policjantów za znęcanie się nad Igorem Stachowiakiem' (Helsinki Foundation for Human Rights, 28 August 2023) <<https://hfhr.pl/aktualnosci/sad-najwyzszy-utrzymal-wyrok-ws-stachowiaka>> accessed 30 September 2024

Helsinki Foundation for Human Rights, 'Zapadł wyrok w sprawie śmierci Dmytra Nikiforenki we wrocławskiej izbie wytrzeźwień' (Helsinki Foundation for Human Rights, 6 June 2024) <<https://hfhr.pl/aktualnosci/zapadl-wyrok-w-sprawie-smierci-dmytra-nikiforenki>> accessed 30 September 2024

Infosecurity24, 'Policja testuje kamery nasobne na ŚDM' *InfoSecurity24* (Warsaw, 25 July 2016) <<https://infosecurity24.pl/policja-testuje-kamery-nasobne-na-sdm>> accessed 28 September 2024

Klämmt S, 'Der Einsatz von Bodycams durch die Polizei und die Vereinbarkeit mit den deutschen Grundrechten' (unpublished thesis, Fachhochschule Meißen 2021)

Klepczyński A and others, 'Złe traktowanie osób podejrzanych i zatrzymanych przez funkcjonariuszy Policji. Raport z badania ankietowego prowadzonego wśród adwokatów' (Helsinki Foundation for Human Rights 2018)

Koops B-J, 'The concept of function creep' (2021) 13 *Law, Innovation and Technology* 29

Kruse U and others, 'The de-escalating potential of body-worn cameras: Results from six German police departments' (2023) 88 *Journal of Criminal Justice* 1

Kupczyński J, 'Użytkowanie kamer nasobnych przez policję i inne służby w świetle bieżących polskich regulacji prawnych' (2023) 3 *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 67

Landesbeauftragter für den Datenschutz und die Informationsfreiheit Baden-Württemberg, 'Datenverarbeitungen der Sicherheitsbehörden' (8 January 2024) <<https://www.baden-wuerttemberg.datenschutz.de/datenverarbeitungen-der-sicherheitsbehoerden/>> accessed 14 December 2024

Lum C and others, 'Body-worn cameras' effects on police officers and citizen behavior: A systematic review' (2020) 16 Campbell Systematic Reviews e1112

Najwyższa Izba Kontroli, 'Przygotowanie wybranych podmiotów do realizacji zadań na rzecz zapewnienia porządku publicznego z wykorzystaniem środków przymusu bezpośredniego' (Information on audit results, 14 July 2022, No KPB.430.002.2022, ref no 14/2022/P/21/040/KPB, Warsaw 2022) 58 <<https://www.nik.gov.pl/plik/id,26195.vp,28975.pdf>> accessed 27 September 2024

Michaels R, 'The Functional Method of Comparative Law', in Mathias Reimann, and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford Academic 2012)

Müller M, 'Bodycam: Eine Erfolgsgeschichte Nimmt Ihren Lauf' (2016) 65 Deutsche Polizei. Zeitschrift Der Gewerkschaft Der Polizei 14

Neumann S, 'Einsatz der Bodycam in Wohnungen. Der lange Weg – ein Kommentar' (2024) 7 DP - Deutsche Polizei Schleswig-Holstein 1 <<https://www.gdp.de/Schleswig-Holstein/DP/2024/DP-7-2024.pdf>> accessed 14 August 2024

Parliamentary Committee on Administration and Internal Affairs, Record of Meeting (24 January 2018), <<https://orka.sejm.gov.pl/zapisy8.nsf/0/0F1A8B1F3E0935E3C-125822C00525115/%24File/0276608.pdf>> accessed 27 September 2024

Parliamentary Committee on Administration and Internal Affairs, Record of Meeting (21 July 2022) <<https://orka.sejm.gov.pl/zapisy9.nsf/0/412704D5F1CCD-335C125888E002E20D3/%24File/0289809.pdf>> accessed 30 September 2024

Parliamentary Committee on Administration and Internal Affairs, Record of Meeting (26 October 2022) <<https://orka.sejm.gov.pl/zapisy9.nsf/0/663FD39E55DD40ED-C12588EE003704A5/%24File/0051809.pdf>> accessed 28 September 2024

Rojek-Socha P, 'Kamery w policji sprawdzają się – będzie ich więcej' (Prawo.pl, 15 July 2019) <<https://www.prawo.pl/prawnicy-sady/kiedy-policjanci-moga-nagrywac-interwencje,445099.html>> accessed 28 September 2024

Stuttman M, Polizei- und Ordnungsrecht (Alpmann Schmidt 2023) 2

U.S. Department of Justice, 'Justice Department Awards over \$23 million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States' (21 September 2015) <<https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law>> accessed 20 January 2025

Wasiak R, 'Kryminalistyczno – prawna problematyka wprowadzenia do użytku nabsobnych kamer video w Policji' (unpublished PhD thesis, University of Warsaw 2019)

Weber S, 'Polizei soll Bodycams auch in Wohnungen nutzen dürfen' (mittelhessen.de, 6 February 2024) <<https://www.mittelhessen.de/politik/politik-rheinland-pfalz/>>

[polizei-soll-bodycams-auch-in-wohnungen-nutzen-duerfen-3288314](#)> accessed 10 August 2024

Webster W, Miranda D and Leleux Ch, 'Evidence Review into Public Experience and Confidence of Body Worn Video in a Policing Context' (Scottish Institute for Policing Research 2022) <<https://dspace.stir.ac.uk/bitstream/1893/34460/1/UoS%20BWV%20Final%20June%202022.pdf>> accessed 18 December 2024

Zięba Sz, 'Kamera osobista dla policjanta. Każda interwencja będzie nagrana' (Trojmiasto.pl, 30 September 2019) <<https://www.trojmiasto.pl/wiadomosci/Kamera-osobista-dla-policjanta-Kazda-interwencja-bedzie-nagrana-n138358.html>> accessed 18 December 2024

Polish statutory laws

Act on the protection of personal data processed in connection with preventing and combating crime of 14 December 2018 [2023] JoT [Journal of Laws] 1206

Police Act of 6 April 1990 [2025] JoL [Journal of Laws] 636

Communal Guards Act of 29 August 1997 [2021] JoT [Journal of Laws] 1763

Border Guard Act of 12 October 1990 [2024] JoT [Journal of Laws] 915

German statutory laws

2006 General Law on the protection of public security and order in Berlin (Allgemeines Gesetz zum Schutz der öffentlichen Sicherheit und Ordnung in Berlin) (FRG)

1992 General Administrative Law for Schleswig-Holstein (Allgemeines Verwaltungsgesetz für das Land Schleswig-Holstein) (FRG)

1994 Federal Police Act (Bundespolizeigesetz) (FRG)

2017 Federal Criminal Bureau Act (Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten) [BGBl I 1354] (FRG)

1990 Bavarian Police Tasks Act (Gesetz über die Aufgaben und Befugnisse der Bayerischen Polizei) (FRG)

1949 Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) (FRG)

2005 Hessian Public Security and Order Act (Hessisches Gesetz über die öffentliche Sicherheit und Ordnung) (FRG)

2005 Lower Saxony Police and Public Order Authorities Act (Niedersächsisches Polizei- und Ordnungsbehördengesetz) (FRG)

1993 Police and Public Order Authorities Act (Polizei- und Ordnungsbehördengesetz) (FRG)

2020 Police Act (Polizeigesetz) (FRG)

2019 Saxon Police Authorities Act (Sächsisches Polizeibehördengesetz) (FRG)

1992 Thuringian Police Tasks Act (Thüringer Gesetz über die Aufgaben und Befugnisse der Polizei) (FRG)

Legal acts of the European Union

Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA[2016] OJ L119/89

Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 on establishing harmonized rules for artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144, and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L

Court rulings

Elfes (1957) 6, 32 (Bundesverfassungsgericht)

Conferation speeches

Jędrzej Kupczyński, ‘Research based evaluation of body-worn camera (BWC) footage as evidence in criminal proceedings. Preliminary findings’ (EUROCRIM 2024 – 24th Annual Conference of the European Society of Criminology, Bucharest, 13 September 2024)

Monika Strus-Wołos

e-mail: monika.strus-wolos@adwokatura.pl

ORCID: 0000-0002-9175-7839

**IS DENYING LEGALLY INCOMPETENT
(INCAPACITATED) PERSONS THE RIGHT TO VOTE
COMPATIBLE WITH PRINCIPLES OF DEMOCRACY
IN THE EUROPEAN UNION – AN ANALYSIS BASED
ON THE EXAMPLE OF EUROPEAN PARLIAMENT
ELECTIONS**

Abstract

Epidemiological data concerning persons affected by dementia disorders, including Alzheimer’s disease (AD), are alarming. The population affected by dementia disorders may increase by up to three times by the year 2050. Adverse demographic changes remain the underlying reason, the swift ageing of the majority of European societies (all health and economic consequences included) having given rise to the *silver tsunami* phrase coined in scientific literature.

Legal solutions regarding the legal competence of individuals with mental disorders, dementia included, differ across individual European Union Member States, with the disparities arising due to varying legal traditions. While some countries still employ the institution of full or partial incapacitation, others have chosen to replace the latter with more flexible solutions.

The right to vote is a fundamental right in democratic states. As it is, the 27 EU Member States pursue one or more of the following three electoral right-related solutions: (1) exclusion from participating in elections, (2) conditional participation in elections,

(3) full voting rights. Since states applying the first solution comprise over two-thirds of the European Union's population, several hundred thousand constituents are excluded from the voting process. Denying such large groups the right to vote in elections to the European Parliament may gravely impact election results.

The issue of regulations regarding voting rights extended to persons without full legal competence has not been harmonised on the EU level. Electoral law regulations have been designated a Member States' competence, with the proviso that states must respect general EU law principles, including the prohibition of discrimination.

KEYWORDS

incapacitation, the right to vote, fundamental rights, EU joint electoral ordinance

SŁOWA KLUCZOWE

ubezwłasnowolnienie, prawo wyborcze, prawa podstawowe, wspólna ordynacja wyborcza w UE

1. INTRODUCTION

Depending on the type and severity of the illness, individuals affected with various mental disorders may have issues with discerning the consequences of their actions, including actions with legal consequences (legal actions). However, it would be difficult to clearly list the types of mental disorders that could potentially affect the proper functioning of individuals who suffer from specific diseases. Regardless, it is noteworthy that the world is on the verge of an epidemiological calamity caused by dementia disorders, including Alzheimer's disease (AD).

According to the WHO International Statistical Classification of Diseases and Related Health Problems, 10th Revision (ICD-10), dementia is a syndrome caused by a disease of the brain, usually of a chronic or progressive nature, involving a disturbance of multiple higher cortical functions, including memory, thinking, orientation, comprehension, calculation, learning capacity, language, and judgement. Clinical components aside, definitions specified in the Diagnostic and Statistical Manual of Mental Disorders, 4th edition (DSM IV) of the American Psychiatric Association, and 2012 recommendations of the Polish Alzheimer's Association Expert Team emphasise disruptions to previous occupational and

social activities, and impairment of daily activities¹ – the actual direct reasons for patients and/or their families seeking support from legal institutions. WHO has already drafted ICD 11, which European Union Member States are to adopt by the end of 2026. DSM V has also been prepared.

Epidemiological data concerning persons affected by dementia disorders, including Alzheimer's disease (AD), are alarming. Scholars claim dementia disorders may be affecting just under 47 million individuals worldwide, 33 million of whom suffer from AD (AD usually accounts for around two-thirds of the diagnosed dementias). Yet according to forecasts, the population affected with dementia disorders may reach 132 million globally by the year 2050, with as many as 92 million suffering from AD;² in Poland, the number may reach 1.2 million – over twice the number recorded currently.

Alzheimer's disease and similar conditions are a measurable economic burden for the economy. According to alarming reports, the cost of care and treatment for Alzheimer's patients in the United States could exceed one trillion US dollars by 2050,³ the cost accounting for 2/5 of the entire Medicare budget: a federal health insurance programme for people aged 65 or older, and younger people with disabilities.

Furthermore, developed countries have recorded a surge in the population of senior citizens in the 80-plus age group, the upsurge is greater than in other age groups.⁴ The phenomenon has even given rise to a new phrase in English-language reference writings: *silver tsunami*. It is, therefore, obvious that issues experienced by non-self-sufficient individuals – dependent mentally rather than physically – will be on the rise.

Rapid growth in the population of persons suffering from dementia is more than a medical or economic challenge. From the legal standpoint, ensuring that the rights of such individuals are protected to the extent possible – in ways safeguarding their participation in public life – remains the highest priority.

¹ Maria Barcikowska, 'Wprowadzenie do zespołów otępiennych', *Po dyplomie Neurologia* <<https://podyplomie.pl/wiedza/neurologia/079.wprowadzenie-do-zespolow-otepiennych>> accessed 20 June 2025.

² *ibid.*, 3.

³ 'Ta choroba rujnuje budżet Ameryki' *WP Finanse* (5 April 2016) <<https://finanse.wp.pl/ta-choroba-rujnuje-budzet-ameryki-6114859969849473a>> accessed 20 June 2025.

⁴ Piotr Błędowski, 'Potrzeby opiekuńcze' in Piotr Błędowski and others (eds), *POLSENIOR 2. Badanie poszczególnych obszarów stanu zdrowia osób starszych, w tym jakości życia związanej ze zdrowiem* (Gdańsk 2021), 921.

2. PURPOSE AND METHODOLOGY OF THE PAPER

The paper attempts to answer the questions of whether denying persons deprived of legal capacity the right to vote is consistent with the foundations of democracy, and also whether a common electoral law regulating elections to the European Parliament is needed in the European Union.

To answer those questions, the paper analyses respective acts of international law, certain EU members' regulations, and case law.

Dogmatic and comparative law research methods were used. The first method analyses the content and meaning of legal norms that may be relevant to the subject of the article, which will allow for the right to vote to be placed in the hierarchy of fundamental civil rights. On the other hand, a comparison of constitutional and statutory solutions in some EU countries with different legal traditions is helpful in determining whether it is possible to create a uniform European electoral system.

3. INCAPACITATION

Numerous states around the world employ incapacitation as a legal instrument protecting individuals with severe mental disorders, whose self-sufficient functioning is either impossible or hampered. Polish legal literature does occasionally suggest that the incapacitation institution has been most firmly rooted in Soviet law-influenced states.⁵ It seems the belief is not entirely correct: while obviously differing in detail, incapacitation has been and still is employed practically throughout Europe, the USA,⁶ and in numerous other states, including Sharia law countries.⁷

Yet, it is also true that a growing number of states have been reaching for increasingly flexible instruments to establish the legal status of persons incapable of managing their own actions in part or in whole. Lithuania, for example, reformed

⁵ Jacek Gudowski, 'Ubezwłasnowolnienie – relikw normatywny czy przejaw prawnego obskurantyzmu?' (2022) 11–12 *Przegląd Sądowy*, 22.

⁶ Consider the notorious case of the artist Britney Spears having been incapacitated by her father.

⁷ Anicée Van Engeland, 'Legal Incapacity and the Concept of Hajr Under Iranian Law: An Analysis of Civil Code in Relation to Mental Health', *Islamic Law Blog* (22 December 2017) <<https://islamiclaw.blog/2017/12/22>> accessed 3 January 2025; Monika Dimitrowa, 'Kobieta arabska w krajach Maghrebu w świetle ograniczeń nakładanych na nią przez społeczeństwo' (2010) 3071 *Acta Universitatis Vratislaviensis*, 101.

its incapacitation-related legislation in 2015; while the institution as such has remained, in each individual case, a court of law is obliged to determine areas for purposes of which the given person has been incapacitated and afore-ruled incapacitation is subject to annual judicial reviews.

Nonetheless, much remains to be done in the area. According to the Polish Ministry of Justice statistics, over the past twenty years, courts have been annually ruling to the effect of incapacitation in 50–70% of all the cases examined, over 90% of judgements providing for total incapacitation.⁸ Intensive work on the reform has only recently started and it is not certain that it can be implemented in 2025.

It is commendable that legislators, the judiciary and the general public have visibly changed their attitude, because incapacitation (and/or similar instruments) is currently perceived as an implement designed to provide mentally impaired individuals with proper aid while preserving their right to participate in public life to the extent possible. Changes have been brought, which are the effect of tremendous educational efforts of governments and pro publico bono organisations, as well as a transformation of the legal environment that is now forcing authorities to take specific action. Therefore, since incapacitation is designed to provide persons suffering from mental disorders with assistance in managing personal and financial matters, denying such individuals the right to vote a priori seems to be an unfair and undeserved sanction.

4. LEGAL PROTECTION OF PERSONS WITH DISABILITIES IN THE EUROPEAN UNION

The United Nations Convention on the Protection of Rights of Persons with Disabilities⁹ drafted in New York on 13 December 2006, is the most important piece of legislation protecting senior citizens affected by, inter alia, mental disorders against discrimination, and safeguarding their dignity, independence, as well as the right to health and social care. The Convention is of fundamental importance to the worldwide evolution of legislation pivotal to the needs of persons with disabilities. Pursuant to the provisions of Article 12 of the Convention, States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others and ensure that all measures that relate to the exercise of

⁸ Statistical Bulletin of the Judiciary, ‘Ubezwołasnowolnienia w latach 2004–2023’, Ministry of Justice <<https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>> accessed 20 January 2025.

⁹ Convention on the Rights of Persons with Disabilities (2006) Treaty Series, 2515, 3.

legal capacity provide for appropriate and effective safeguards to prevent abuse. The above exercises the principle of equality before the law. Parties to the Convention include individual States as well as the European Union. The Convention on the International Protection of Adults of 13 January 2000 is another piece of legislation of significance to the subject at hand. The purpose of this Convention – negotiated towards the end of the previous century – was to meet the needs of 21st-century mobile populations while responding to demographic changes in Europe and other countries globally.¹⁰

The European Parliament passed two resolutions regarding the aforesaid Convention. European Parliament Resolution 2008/2123 (INI) of 18 December 2008 included recommendations to the Commission on cross-border implications of the legal protection of adults. It encouraged European Union Member States that have not yet done so to ratify the Hague Convention. It also requested the Commission to submit to Parliament a legislative proposal on strengthening cooperation between Member States. The aim was to improve the recognition and enforcement of decisions on the protection of adults, incapacity mandates, and lasting powers of attorney. European Parliament Resolution 2015/2085 (INL) of 1 June 2017 also made recommendations to the Commission regarding the protection of vulnerable adults. It reiterated the call to EU Member States that have not yet done so to sign and/or ratify the Hague Convention. Additionally, it urged Member States to promote self-determination for adults by expanding national legislation to include mandates in anticipation of incapacity.

The rights of the elderly, their independence and dignity are also protected under Articles 25, 26 and 35 of the Charter of Fundamental Rights of the European Union,¹¹ the aforesaid provisions apply, inter alia, to patients suffering from mental disability.

While it is not a piece of legislation recognised as a universally binding source of European Union law – yet referred to by the European Court of Human Rights (ECtHR) in its case law, which in turn significantly influences the level of rights protection extended to persons with disabilities in Europe – another document may prove important: Recommendation R (99)4 of 23 February 1999 of the Committee of Ministers of the Council of Europe on Principles Concerning the Legal Protection of Incapable Adults. The Recommendation advises, inter alia, that domestic legislation be sufficiently flexible to enable a suitable legal response

¹⁰ European Parliament, Directorate-General for Internal Policies, *Memo* (November 2012) <<https://www.europarl.europa.eu/document/activities/cont/201301/20130110ATT58889/20130110ATT58889PL.pdf>> accessed 2 January 2025.

¹¹ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

in each individual case. It was exactly this Recommendation that the ECtHR referenced in the judgement in the case of *Shtukaturv v Russia*,¹² as Russian law only distinguished between full legal competence or total lack thereof when incapacitating a mentally ill person, without consideration for intermediate or borderline health conditions.

On 22 July 2009, the (European) Commission submitted (to the European Parliament and the Council) a supplementary document to the earlier Communication on a European initiative on Alzheimer's disease and other types of dementia.¹³ The document explains that the Commission's Alzheimer's disease-related initiative arises from the importance Member States attach to European-level measures in the field, as duly confirmed by conclusions of the Council¹⁴ adopted during the French Presidency, on 16 December 2008. The Commission further emphasised that Europe does not share a vision on ethical issues regarding adult persons with special needs, which exposes such persons to the risk of discrimination.

Multiple factors can contribute to discrimination: age, exclusion, negligence of the valuable knowledge and experience of the elderly, stigmatisation of dementia, and the hugely complex matter of rights of caregivers to the ill (resolved differently in the domestic law of individual Member States).

5. THE RIGHT TO VOTE AS A FUNDAMENTAL RIGHT

Democracy is a value shared by all European Union Member States. The Preamble to the European Convention on Human Rights points to the association between the profound belief in fundamental freedoms, which are the foundation of justice and peace in the world, and are best maintained by an effective political democracy. The Preamble to the Charter of Fundamental Rights of the European Union similarly reads: 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law'.

¹² *Shtukaturv v Russia*, App No 44009/05 (ECtHR, 27 March 2008).

¹³ European Commission, *Communication on a European Initiative on Alzheimer's Disease and Other Dementias*, COM(2009) 380 final <<https://eur-lex.europa.eu/legal-content/EN/TX-T/?uri=CELEX%3A52009DC0380>> accessed 5 January 2025.

¹⁴ Council of the European Union, *Council Conclusions on Public Health Strategies to Combat Neurodegenerative Diseases* (16 December 2008). <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/lsa/104778.pdf> accessed 5 January 2025.

Free, pluralist and universal election of representatives to the legislature or president of the state is one of the pillars of democracy. European Union citizens' voting rights have been safeguarded in Articles 39 and 40 of the Charter of Fundamental Rights of the European Union, their provisions mentioning European Parliament elections as well as local elections in individual EU Member States. Furthermore, pursuant to Article 39(2), 'Members of the European Parliament shall be elected by direct universal suffrage (...)'.¹⁵

Article 29 of the United Nations Convention on the Rights of Persons with Disabilities requires ensuring that persons with disabilities have the opportunity to effectively and fully participate in political and public life, on an equal basis with others, directly or through freely chosen representatives, including the right and possibility to exercise active and passive suffrage.

In reports monitoring the process of adapting Member State legislation to this Convention, the European Union Agency for Fundamental Rights recommends that incapacitated persons be granted voting rights to the extent possible. The Agency emphasises that this is the first of the four key components of such individuals' rights to participate in public life (apart from proper adaptation of polling stations and electoral procedures, raising awareness of political rights of persons with disabilities, and backing opportunities for active participation in political life).¹⁵

Equal and universal access to subjective voting rights is a given in democratic countries, a principle protected by a presumption of the existence of these rights. World history lists assorted past examples of introducing electoral censuses, depriving certain groups of citizens of electoral rights: persons with no writing or reading skills and/or individuals not holding assets above a certain value were banned from participating in elections. Furthermore, elections were not always equal: votes cast in elections by persons forming part of a specific category could matter more, for example, than votes cast by others. It did happen that some individuals were granted more votes than others.¹⁶

The actual scope of 'electoral universality' is disputable. Scientists are not in agreement whether the attribute refers to active voting rights only, or to aspects of active and passive electoral rights. Some have been known to point out that the term itself is broader, including the right to nominate candidates. Today, it is most commonly accepted that universal suffrage includes active and passive electoral

¹⁵ European Union Agency for Fundamental Rights, *Who Will (Not) Get to Vote in the 2019 European Parliament Elections?* (Vienna 2019) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-right-vote-ep-elections-legal-capacity_en.pdf> accessed 1 July 2025.

¹⁶ Maciej Koszowski 'Dwadzieścia osiem wykładów ze wstępu do prawoznawstwa' (Warsaw 2019) 343.

rights alike.¹⁷ This, however, does not mean the complete absence of limitations – in particular, that active voting rights are automatically tantamount to the right of the voter running for office themselves. Numerous legislatures have introduced a higher minimum age requirement for potential candidates.

Contemporarily, any state authority decisions – legislative decisions included – to the effect of restricting or denying civic voting rights are subject to control, currently exercised by the ECtHR. Yet, given the fact that electoral law forms part of the Treaty of the European Union law, reviews by the Court of Justice of the European Union (CJEU) cannot be excluded.

Case law of the ECtHR contains declarations to the effect of electoral rights being universal rights, one of the most significant fundamental rights in any democratic society; given the above, electoral rights should not be considered a privilege of any kind. Consequently, a presumption in favour of granting voting rights to all citizens as broadly as possible ought to apply.¹⁸

In the ECtHR's watershed judgement in the case of *Mathieu-Mohin and Clerfayt v Belgium*¹⁹ referred to as 'formative' in legal literature, the Court leaned towards the notion of electoral universality as a civic right (in contrast to an older doctrine, presenting a narrow interpretation of elections in terms of the state's obligation to hold them). The Court found that the institutional aspect aside, the right to free elections carries a subjective aspect as well,²⁰ whereas Article 3 of Protocol 1 to the European Convention on Human Rights gives rise to an individual's rights regarding both the active and passive aspects of voting rights. The Court accentuated that although Article 3 of Protocol No 1 does not enumerate premises for permitted interference with civil rights as specified pursuant to Articles 8–11 of the Convention itself, limitations to electoral rights must meet specific requirements. A restriction shall be introduced on grounds specified in domestic legislation, not affect the essence of the law or deprive it of effectiveness, serve the purpose of protecting a legitimate goal, and be proportionate.²¹ In the 21st century, the right to vote is thus an underlying principle.²²

¹⁷ Tomasz Kowalczyk, 'Charakter i znaczenie zasady powszechności prawa wyborczego – przegląd stanowisk we współczesnej doktrynie polskiej' (2016) *Studia Iuridica Toruniensis* (XVIII) 95, 95–118

¹⁸ *Hirst v United Kingdom* (No 2), App no 74025/01 (ECtHR, 6 October 2005), ECHR 2005-IX.

¹⁹ *Mathieu-Mohin and Clerfayt v Belgium*, App no 9267/81 (ECtHR, 2 February 1987).

²⁰ Ireneusz C. Kamiński, 'Prawo do wolnych wyborów w europejskiej konwencji praw człowieka' [2015] XIII(95) *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 11, 11–13.

²¹ *Mathieu-Mohin and Clerfayt v Belgium*, para 52.

²² *ibid*, para 59.

As duly noted in legal science:

the subjective aspect of the right to free elections, i.e., one concerning an individual with active and passive electoral rights alike, is an area wherein Strasbourg case law has proven incomparably more rigorous than institutional options of the state. This is where most of the judgements referencing violations of Article 3 of Protocol No. 1 have been located.²³

The legal discourse surrounding the voting rights of persons with intellectual disabilities continues globally.²⁴ Israeli scholars have developed the CAT-V tool to assess voting competence among such individuals. This instrument is both simple to administer and demonstrates high reliability. It evaluates four decision-making capacities: understanding, appreciation, reasoning, and choice, in accordance with the so-called ‘Doe standard’, established through U.S. case law. According to this standard, an individual possesses the capacity to vote if they understand the nature and consequences of voting and are able to make a choice. The Israeli researchers advocate for the global use of this test as a screening measure—one that both prevents the stigmatization of the entire population of individuals with severe intellectual disabilities through blanket disenfranchisement and deters third-party manipulation.²⁵ It appears that this recommendation could be implemented at least within care institutions for persons with such disabilities, where closed electoral districts are established (in Poland, for instance). Such a practice could reduce the risk of the formal voting rights of residents, who may lack an understanding of the voting act, being exploited by facility staff or visitors.

Moreover, considering that the granting of voting rights may yield positive therapeutic and pro-social effects – as noted by scholars in the field of psychiatry²⁶ – the principle of *in dubio pro elector* (when in doubt, in favor of the voter) should be created and applied.

²³ Kamiński (n 20) 22.

²⁴ See e.g. Jesse A Okwerekwu and others, ‘Voting by People with Mental Illness’, (2018) 46(4) *The Journal of the American Academy of Psychiatry and the Law*, 513–520; Antoine Bosquet and others, ‘The vote of acute medical inpatients: a prospective study’, (2009) 12(5) *The Journal of Aging and Health*, 699–712.

²⁵ Israel Doron and others, ‘Psychiatric Patients: Compromise of the Integrity of Elections, or Empowerment and Integration into the Community?’ (2014) 51(3) *The Israel Journal of Psychiatry and Related Sciences* 169, 172–174.

²⁶ Michael Nash, ‘Voting as a means of social inclusion for people with a mental illness’ (2002) 9(6) *The Journal of Psychiatric and Mental Health Nursing*, 701–702.

6. LEGALLY INCOMPETENT PERSONS' CAPACITY TO PARTICIPATE IN ELECTIONS TO THE EUROPEAN PARLIAMENT

The electoral rights of incapacitated persons (or persons regarding whom similar legal instruments had been applied) can be discussed in the context of the right to vote in elections to the European Parliament, as in this case, certain countries may display differences in comparison with domestic legislation.

Today, the EU comprises three legal orders concerning options to participate in Parliamentary elections. Some states (and pre-Brexit Great Britain) have guaranteed the right to participate in elections to the European Parliament to incapacitated individuals. It is notable that Croatia reformed its electoral law as early as December 2012, to grant incapacitated Croatian citizens the right to participate in national elections as well as the 2013 European Parliamentary elections. Other states – Hungary, Slovenia, the Czech Republic and Slovakia – allow electoral participation to such persons, pending judicial decision. The largest group of Member States, Poland included, has excluded incapacitated persons from parliamentary elections – pursuant to domestic electoral law or the Constitution (Poland being an example of the latter).²⁷

It should nevertheless be noted that the number of states belonging to the first group is steadily increasing, both through legislative amendments and judicial developments.

In the vast majority of EU Member States, the right to participate in elections to the European Parliament is not subject to separate regulation under national law. Exceptions include Malta, Slovakia, Lithuania, and Latvia. Article 12(a) of the Maltese Act provides that *'no person shall be qualified to be registered in the European Union Electoral Register if he is interdicted or incapacitated for any mental infirmity by a court in a Member State or is otherwise determined in a Member State to be of unsound mind'*.²⁸ In contrast, the legal acts of the remaining three states have been amended to remove such restrictions on electoral rights.

²⁷ European Union Agency for Fundamental Rights, 'Can Persons Deprived of Legal Capacity Vote?' <<https://fra.europa.eu/en/content/can-persons-deprived-legal-capacity-vote>> accessed 20 January 2025.

²⁸ European Parliament Elections Act, Chapter 467 of the laws of Malta, 1 January 2004, <<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8933>> accessed 1 July 2025.

It may further be observed that in some countries (such as Ireland and Finland), the right to vote in national parliamentary elections is subject to stricter conditions than in other types of elections, including those to the European Parliament.²⁹

It is striking that the extension of voting rights to persons deprived of legal capacity, or with such capacity limited, is proceeding unevenly – even among countries with similar legal traditions and cultural backgrounds. For instance, in Italy, legislation governing elections and electoral registers that excluded persons with mental or intellectual disabilities from voting was repealed as early as 1978.³⁰ Spain, by contrast, undertook a similar reform only forty years later,³¹ although it did not require a change to the Constitution, because this act referred to ordinary law for the definition of active suffrage.

The Czech Republic and Slovakia represent examples of reform spurred by case law. In the Czech Republic, in response to numerous complaints and inquiries, the Ministry of the Interior requested the Supreme Court to issue a position harmonizing the divergent decisions of lower courts. While some courts, in ruling on the restriction of legal capacity, held that such restriction also encompassed the right to vote, others made no such reference. The Supreme Court clarified that, in proceedings concerning the restriction of legal capacity, a court may also rule specifically on whether the voting right is affected. In this context, the disenfranchisement of a person may only result from an explicit judicial decision.³² Similarly, in Slovakia, the annulment of a statutory provision that restricted voting rights solely to persons with full legal capacity was brought about by a decision of the Constitutional Court.

In both countries, constitutional provisions concerning the deprivation of electoral rights refer to ordinary legislation. Conversely, implementing reforms is more difficult in states where such matters are regulated at the constitutional level. For instance, in the Netherlands, constitutional reform was required to remove a prohibition that had existed under Article 54 of the Constitution, which barred persons under guardianship due to mental or intellectual disabilities from voting. Although the Council of State had issued an opinion in favour of such a reform in

²⁹ European Union Agency for Fundamental Rights (n 15).

³⁰ Legge 13 maggio 1978, n. 180, Italy <<https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1978-05-16&atto.codiceRedazionale=078U0180>> accessed 2 July 2025.

³¹ Ley Orgánica 2/2018 de 5 de diciembre 2018, Spain <<https://www.boe.es/buscar/act.php?id=BOE-A-2018-16673>> accessed 2 July 2025.

³² Czech Supreme Court, Position of 15 February 2017, Cpjn 23/2016, No. 3/2017 <https://rozhodnuti.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/1C9E8AD9ABF63AD0C12580C9001F-C91E?openDocument> accessed 2 July 2025.

2008, it took five years to effect the constitutional amendment. In Luxembourg, Article 53(3) of the Constitution continues to exclude persons under full guardianship from participating in elections,³³ despite prior plans for reform by 2015.

In Germany, following the judgment of the Federal Constitutional Court in 2019,³⁴ certain federal states amended their legislation to remove restrictions on the voting rights of persons under full guardianship. However, these changes apply only to national and local elections and have no bearing on elections to the European Parliament.³⁵ Since states representing the group prohibiting persons without full legal competence to participate in elections still comprise over half of the European Union's population, several hundred thousand constituents are excluded from the voting process. Poland has excluded a group of around 100,000 voters; in Germany and France, the numbers reach over 81,000 and 65,000, respectively.³⁶ According to a group of MEPs who submitted question E-002211/2023 to the President of the European Parliament, 400,000 people were excluded in the 2019 elections to the European Parliament. Denying such large groups the right to vote may gravely impact election results.

Regarding incapacitated persons' capacity to participate in elections to the European Parliament, an ECtHR judgement of fundamental significance ought to be considered: the judgement of 20 May 2010 in the case of *Alajos Kiss v Hungary*.³⁷ Therein, the Court concluded that an indiscriminate removal of voting rights, without an individualised judicial evaluation of the person's judgement, is a violation of Article 3 of Protocol No 1 to the European Convention on Human Rights. Such line of adjudication, ordering courts to examine the cognitive capacity of individuals in terms of their ability to make free and informed electoral decisions, has been continued in successive judgements, in one of which the Court went as far as to point out that mental disability resulting in a partial incapacitation (guardianship) ruling cannot constitute the sole justification for the removal of voting rights.³⁸ Incidentally, it should be noted that at the time of the ECtHR ruling, Spanish law had been amended by abolishing the ban on voting by incapacitated persons, as mentioned earlier.

³³ Constitution of the Grand Duchy of Luxembourg < https://www.constituteproject.org/constitution/Luxembourg_2009?lang=en >.

³⁴ Order of the Federal Constitutional Court - Second Senate of 29 January 2019, 2 BvC 62/14, <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/01/cs20190129_2bvc006214en.html> accessed 2 July 2025.

³⁵ See (n 15).

³⁶ *ibid.*

³⁷ *Alajos Kiss v Hungary* [2010] ECHR 153, 41 EHRR 35 (ECtHR).

³⁸ *Caamaño Valle v Spain*, App no 43564/17 (ECtHR, 11 May 2021), paras 59–60.

Notably, this line is a consequence of previous ECtHR case law. In the aforementioned case of *Hirst v United Kingdom*,³⁹ for example, the Court also found that the potential indiscriminatory removal of voting rights without accounting for differences between individual cases does not meet the requirement of the legal measure's proportionality. The Court further emphasised that the principle of universality of electoral rights established in Article 3 of Protocol 1 to the Convention precludes the exclusion of entire social groups from participating in elections.

The United Nations Convention on the Protection of Rights of Persons with Disabilities sets out an even higher standard for protecting the voting rights of persons with intellectual disabilities. In one of their Communications, the United Nations Committee on the Rights of Persons with Disabilities declared that an exclusion of the right to vote based on a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualised assessment, constitutes discrimination based on disability within the meaning of Article 2 of the Convention.⁴⁰

This is a very far-reaching view. According to the author, it goes beyond the linguistic interpretation of Article 29 (a) of the Convention. It states that ensuring suffrage should be achieved 'inter alia by: (i) ensuring appropriate, accessible and understandable electoral procedures, facilities and voting materials; (ii) protecting the rights of persons with disabilities to vote by secret ballot in elections and public referenda without intimidation, and to stand for election, to hold office effectively and to perform all public functions at all levels of government, facilitating, where appropriate, the use of assistive and new technologies; (iii) guaranteeing the free expression of will by persons with disabilities as voters and, to this end, where necessary, allowing persons with disabilities, at their request, to be assisted when voting by a person of their choice'. Therefore, the Convention does not grant absolute electoral rights, but lists examples of tools to facilitate participation in elections by persons with disabilities, emphasizing in particular the simplification and comprehensibility of the procedure.

It should be noted, however, that the ECtHR in Strasbourg continues to hold that, although in a democratic system there must be a presumption in favour of the inclusion of all citizens in the electoral process, Article 3 of Protocol No 1 to the European Convention on Human Rights does not guarantee persons with intellectual disabilities an absolute right to exercise the right to vote, especially if a given

³⁹ See (n 18).

⁴⁰ UN Committee on the Rights with Disabilities, Communication No 4/2011, CRPD/C/10/D/4/2011 (20 September 2013).

country takes steps to gradually extend voting rights to people with intellectual disabilities.⁴¹ There is, therefore, a certain discrepancy with the restrictive position of the United Nations Committee on the Rights of Persons with Disabilities.

Nonetheless, it does seem that national solutions denying the right to vote may be acceptable if based on individual expert evaluations of the given person's cognitive capacity, and conforming to the international standard set by the case law of the ECtHR.⁴² The participation of a person completely ignorant of the electoral act contents and/or consequences in any elections does not affect the scope of his or her rights. It can well be declared that such circumstances are nothing but an exercise in electoral rights formality, whereas the protection of rights should primarily carry true and tangible meaning.

The potential for differences in national- and European Parliament-related election enfranchisement arises from the fact that while pursuant to a specific judgement of the CJEU,⁴³ Member States shall make provisions in national legislation for those entitled to vote in elections to the European Parliament, such competencies shall be exercised in respect of EU law. Consequently, Member States shall be bound by rights, freedoms and principles specified in the Charter of Fundamental Rights of the European Union (ChFR).⁴⁴ The reconstruction of the right to vote in European Union elections shall thus not only account for the content of Article 39 of the ChFR, but of Article 21(1) as well, the latter prohibiting discrimination for reasons of disability. As mentioned above, EU law includes the United Nations Convention on the Protection of Rights of Persons with Disabilities, especially Article 29(a), directly referencing the 'right to vote and be elected'.

Recognition of the European Union law in terms of assessing the right to vote in elections to the European Parliament has been blatantly illustrated by the ruling of a Polish court of law. The District Court in Nowy Sącz ordered that the constituent register be expanded to include a partially incapacitated person, whose active and passive electoral rights had been removed pursuant to the Electoral Code. Referencing EU law, the Court found that curtailing the electoral rights of such a person automatically without an individualised evaluation of that person's mental health would be defective. The Court referenced, inter alia, ECtHR case

⁴¹ *Caamaño Valle v Spain*, para 59.

⁴² Cf. e.g. joined cases of *Strøbye and Roselind v Denmark*, App Nos 25802/18 and 27338/18 (ECtHR, 2 February 2012).

⁴³ Case C-650/13 *Thierry Delvigne v Commune de Lesparre-Médoc and Préfet de la Gironde* [2015] EU:C:2015:648.

⁴⁴ *ibid.*, paras 31–33.

law and Article 14 of the Treaty on European Union, which establishes the principle of universality of elections to the European Parliament.⁴⁵

7. SHOULD A JOINT ELECTORAL ORDINANCE BE ESTABLISHED FOR THE EUROPEAN UNION?

The 1992 Treaty of Maastricht on European Union⁴⁶ provided that elections shall be held on the basis of a uniform procedure, and that the European Parliament would be charged with drafting said procedure, the draft requiring unanimous approval by the Council. Since the Council had failed to reach a consensus regarding any of the drafts submitted, the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts⁴⁷ introduced the so-called joint action option. It is noteworthy that while the Treaty of Amsterdam had been designed to expand European Union competencies, a step back was taken in comparison with the Treaty of Maastricht in terms of electoral law uniformity. It may thus be concluded that Member States agreed to leave this area outside the realm of shared and unified regulation.

The European Parliament had made attempts to introduce uniform electoral principles applicable across 27 Member States by establishing joint minimum rules already in the 20th century. The 2022 Legislative Resolution is yet another attempt of this kind.⁴⁸ The Resolution will have to be approved by the Council unanimously (Article 223 of the Treaty on the Functioning of the European Union), following which it will be resubmitted to the Parliament for approval before being adopted by all Member States in line with their respective constitutional requirements. Negotiations with the Council will begin only once all Member States have expressed their positions. Some states have already filed their objections to project components requiring that the electoral system applying to EU-level elections be harmonised.⁴⁹

⁴⁵ Decision of the District Court in Nowy Sącz, I Ns 376/19 (19 April 2019).

⁴⁶ Treaty on the European Union [1992] OJ C191/1.

⁴⁷ Treaty of Amsterdam [1997] OJ C340/1.

⁴⁸ European Parliament, *Legislative Resolution on the Proposal for a Council Regulation on the Election of the Members of the European Parliament by Direct Universal Suffrage* [2022] OJ C465/171.

⁴⁹ Harmonising rules concerning electoral participation of non-nationals, for example, would prove problematic, since European Union Member States follow no less than four systems of establishing residence for voting rights purposes. Furthermore, voluntary or obligatory participation in the electoral process would require some countries to break with tradition, as related regulations vary.

In the draft Council Regulation submitted by the European Parliament as an Annex to the 2022 Legislative Resolution, provisions of Articles 4 and 5 are to regulate the active and passive voting rights aspects. Article 4(1) of the draft Annex reads: ‘Every Union citizen from 16 years of age, including persons with disabilities, regardless of their legal capacity, shall have the right to vote in elections to the European Parliament without prejudice to existing constitutional orders establishing a minimum voting age of 18 or 17 years of age’. Pursuant to Article 5(1), ‘Every Union citizen from 18 years of age shall have the right to stand as a candidate for the elections to the European Parliament in either a national constituency or in the Union-wide constituency, or in both’.

It is observable that the draft provides for full electoral participation of every citizen – regardless of disability or legal competence – in the active voting process only. Full universality has been omitted in the draft regulation concerning the right to stand as a candidate for elections. Therefore, any preceding universality notions notwithstanding, even European Union legislators are in no doubt that the universality of the passive voting rights aspect can be subject to limitations.

The justification for introducing 16 years of age as the voting rights minimum has triggered a number of doubts. Section AF(23) of the draft Resolution proposes age uniformity for reasons of 16 years of age being the recognised minimum required in certain countries: Austria, Germany, Malta and Belgium. It is noteworthy that in multiple Member States, candidates running for office must be older than 18 years of age (21 years of age – Bulgaria, Cyprus, Czech Republic, Estonia, Ireland, Lithuania, Latvia, Poland and Slovakia; 23 years of age – Romania; 25 years of age – Italy and Greece). On the other hand, section G of the Preamble reads, ‘increased turnout is a positive signal and shows that citizens, and in particular the youngest generations of the Union, are taking an increasing interest in the development of the European integration’. This would, therefore, be a measure serving the purpose of increasing the number of constituents voting in favour of greater Union integration. However, the argument that such a solution would warrant greater democratisation seems somewhat unconvincing, since – with regard to the right to propose candidates – Article 10(1) of the draft ostensibly does not⁵⁰ provide for the right to nominate candidates by collecting a specific volume of constituent signatures in support of the given candidate, the measure common across numerous Member States. In terms of that particular electoral process component, the most universal and democratic form has been replaced by a preference for a politicised procedure of candidate selection. On a side note, it might well be concluded that specifying a uniform minimum age for all voters in

⁵⁰ The draft regulation provides that candidatures may be submitted by ‘all political parties, associations of voters, electoral alliances and European electoral entities’.

the draft Resolution does not contribute to establishing electoral law rules, as the age threshold matter does not fit into the principal category.

Rather than amending the electoral structure, the Union ought to convince its citizens to support greater integration through effective policies and economic success. An electoral act is one with momentous consequences, requiring maturity and responsibility alike.

The ECtHR has emphasised in its case law that states parties to the European Convention on Human Rights enjoy extensive competencies in establishing their own electoral systems. The Court has pointed out that numerous states have a history of long-standing traditions in the field, preceding the day of the Convention coming into force. Therefore, for a state to be recognised as not being in breach of Convention-warranted rights, it is sufficient to establish that the way its legislative body is elected observes the principles of democracy, reasonable periodicity (such body following term-of-office limitations), secrecy, and – finally – freedom of electoral opinion expression. Notably, for this very reason, complainants have been rarely successful in challenging domestic electoral laws pursuant to applications filed with the ECtHR.⁵¹

Legal reference literature emphasises that the Court has been referencing its restricted control-related role on a variety of occasions, any review measures obligatorily tying in with acceptance of the considerable diversity of historical developments, cultural traditions and political thought, resulting in individual visions of democracy.⁵² The Court had highlighted it even in judgements affirming breaches of the right to participate in elections, while emphasising that electoral law provisions deemed unacceptable in one state may prove justified in another, since any analysis of legal provisions ought to account for the political evolution of the given state.⁵³

Such exact historical and political differences make any non-controversial uniformity exercise extremely difficult, the minimum voting age being one justified case in point. If imposed top-down with no respect for pluralism or tradition, such a Resolution could only serve to harm the Union's cohesion and internal strength, becoming an argument for Eurosceptical political powers.

It, therefore, seems that there is no need for European Union-level regulations in the area of electoral law concerning elections to the European Parliament, provided that domestic courts of law and state authorities continue following the

⁵¹ Kamiński (n 20) 13.

⁵² *ibid.*

⁵³ *Hirst v United Kingdom* (No 2), para 61 and *Mathieu-Mohin and Clerfayt v Belgium*, para 54.

provisions and principles of European Union law and ECtHR case law, whenever organising elections and/or compiling electoral registers.

8. CONCLUSIONS

Due to the profound differences in the traditions of the individual EU Member States, societies could find it difficult to accept a common electoral law. As a result, it could unnecessarily undermine the unity of the Union. As far as the right to vote by incapacitated persons is concerned, individual court decisions are the most sensible solution. On the one hand, this guarantees the protection of this right which is fundamental to democracy; on the other hand, it will prevent third parties from abusing the formal right of persons with profound mental or intellectual disabilities. It seems that the United Nations Committee on the Rights of Persons with Disabilities' opinion to grant electoral rights without any restrictions is too far-reaching. It does not take into account the public interest in conducting fair elections free from abuses. The position of the Court in Strasbourg is more accurate, provided that the principle of proportionality is observed.

REFERENCES

Scholarly literature references

- Barcikowska M, 'Wprowadzenie do zespołów otępiennych', *Podyplomie Neurologia* <<https://podyplomie.pl/wiedza/neurologia/079,wprowadzenie-do-zespolow-ote-piennych>> accessed 20 June 2025
- Błądowski P, 'Potrzeby opiekuńcze' in Błądowski P and others (eds), *POLSENIOR 2. Badanie poszczególnych obszarów stanu zdrowia osób starszych* (Gdańsk 2021)
- Bosquet A and others, 'The Vote of Acute Medical Inpatients: A Prospective Study' (2009) 12(5) *Journal of Aging and Health*
- Dimitrowa M, 'Kobieta arabska w krajach Maghrebu w świetle ograniczeń nakładanych na nią przez społeczeństwo' (2010) 3071 *Acta Universitatis Vratislaviensis*
- Doron A and others, 'Psychiatric Patients: Compromise of the Integrity of Elections, or Empowerment and Integration into the Community?' (2014) 51(3) *Israel Journal of Psychiatry and Related Sciences*
- Gudowski J, 'Ubezważnowolnienie – relikw normatywny czy przejaw prawnego obskurantyzmu?' (2022) 11–12 *Przegląd Sądowy*
- Kamiński I C, 'Prawo do wolnych wyborów w europejskiej konwencji praw człowieka' [2015] XIII(95) *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*

Koszowski M, *Dwadzieścia osiem wykładów ze wstępu do prawoznawstwa* (Warsaw 2019)

Kowalczyk T, 'Charakter i znaczenie zasady powszechności prawa wyborczego – przegląd stanowisk we współczesnej doktrynie polskiej' (2016) XVIII(95) *Studia Iuridica Toruniensia*

Nash M, 'Voting as a Means of Social Inclusion for People with a Mental Illness' (2002) 9 *Journal of Psychiatric and Mental Health Nursing* 701

Okwerekwu J A and others, 'Voting by People with Mental Illness' (2018) 46(4) *Journal of the American Academy of Psychiatry and the Law* 513

Van Engeland A, 'Legal Incapacity and the Concept of Hajr Under Iranian Law: An Analysis of Civil Code in Relation to Mental Health', *Islamic Law Blog* (22 December 2017) <<https://islamiclaw.blog/2017/12/22/>> accessed 3 January 2025

Official Reports and Institutional Documents

Council of the European Union, *Council Conclusions on Public Health Strategies to Combat Neurodegenerative Diseases* (Brussels, 16 December 2008)

European Commission, *Communication on a European Initiative on Alzheimer's Disease and Other Dementias*, COM(2009) 380 final

European Parliament, Directorate-General for Internal Policies, *Memo* (November 2012)

European Parliament, *Legislative Resolution on the Proposal for a Council Regulation on the Election of the Members of the European Parliament by Direct Universal Suffrage* [2022] OJ C465/171

European Union Agency for Fundamental Rights, *Can Persons Deprived of Legal Capacity Vote?* <<https://fra.europa.eu/en/content/can-persons-deprived-legal-capacity-vote>> accessed 20 January 2025

European Union Agency for Fundamental Rights, *Who Will (Not) Get to Vote in the 2019 European Parliament Elections?* (Vienna 2019)

Statistical Bulletin of the Judiciary – Ministry of Justice, *Ubezważnowolnienia w latach 2004–2023* <<https://isws.ms.gov.pl/>> accessed 20 January 2025

Legal Acts and Treaties

Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

Constitution of the Czech Republic

Constitution of the Kingdom of the Netherlands

Constitution of the Slovak Republic

Constitution of the Grand Duchy of Luxembourg

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (Rome, 4 November 1950) ETS No 5

Convention on the Rights of Persons with Disabilities (2006) UNTS 2515, 3
 European Parliament Elections Act, Chapter 467 (Laws of Malta, 1 January 2004)
 Legge 13 maggio 1978, n. 180 (Italy)
 Ley Orgánica 2/2018, de 5 de diciembre (Spain)
 Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1952) ETS No 9
 Treaty of Amsterdam [1997] OJ C340/1
 Treaty on European Union [1992] OJ C191/1

Case Law – European and National

Alajos Kiss v Hungary, App No 38832/06 (ECtHR, 20 May 2010)
Caamaño Valle v Spain, App No 43564/17 (ECtHR, 11 May 2021)
Delvigne v Commune de Lesparre-Médoc and Préfet de la Gironde, Case C-650/13 [2015] EU:C:2015:648
Hirst v United Kingdom (No 2), App No 74025/01 (ECtHR, 6 October 2005)
Mathieu-Mohin and Clerfayt v Belgium, App No 9267/81 (ECtHR, 2 February 1987)
Shtukaturov v Russia, App No 44009/05 (ECtHR, 27 March 2008)
Strøbye and Roselind v Denmark, App Nos 25802/18 and 27338/18 (ECtHR, 2 February 2012)
 Constitutional Court of Germany, *Order of the Federal Constitutional Court*, 2 BvC 62/14, 29 January 2019
 Czech Supreme Court, *Position*, Cpjn 23/2016, No 3/2017 (15 February 2017)
 District Court in Nowy Sącz, Decision I Ns 376/19 (19 April 2019)
 UN Committee on the Rights of Persons with Disabilities, *Communication No 4/2011*, CRPD/C/10/D/4/2011 (20 September 2013)

Press and Web Publications

‘Ta choroba rujnuje budzet Ameryki’, *WP Finanse* (5 April 2016), <<https://finansse.wp.pl/ta-choroba-rujnuje-budzet-ameryki-6114859969849473a>> accessed 20 June 2025

Marcin Szwed

University of Warsaw, Poland
e-mail: m.szwed@uw.edu.pl
ORCID:0000-0002-7692-7043

THE MEANING AND FUNCTION OF JUDICIAL INDEPENDENCE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

1. INTRODUCTION

Judicial independence is one of the cornerstones of modern constitutionalism. Without an independent judiciary, effective oversight of government action would be impossible, and the protection of fundamental rights and freedoms would likely remain illusory. Importantly, in contemporary Europe, judicial independence can no longer be viewed as solely a matter of domestic law. On the contrary, it is one of the pillars of the transnational European legal order, which is constituted by the standards developed by the Council of Europe and European Union law. These two systems influence each other, as evidenced by numerous references in the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) to one another. These references also concern the interpretation of the notion of judicial independence.¹

¹ See e.g. *A.K. v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy* [2019] CJEU Joined Cases C-585/18, C-624/18 and C-625/18 at 126-133; *BN, DM, EN v Getin Noble Bank S.A.* [2022] CJEU Case C-132/20 at 116-128; *Wałęsa v Poland* [2023] ECtHR 50849/21 at 171; *Xhoxhaj v Albania* [2021] ECtHR 15227/19 at 298 and 313. On the dialogue between the two European Courts (with regards to the requirement of legality of establishment of courts) see e.g. Cecilia

This article aims to examine the significance of judicial independence under one of the founding documents of the European legal order, that is the European Convention on Human Rights (ECHR, Convention). The analysis focuses on how the ECtHR interprets the concept of ‘judicial independence’, and the role this safeguard plays within the Convention’s broader normative structure. The central thesis advanced here is that the significance of judicial independence cannot be reduced solely to Article 6 of the ECHR. In fact, it serves a dual function. On the one hand, it forms part of the individual’s right to a court. On the other hand, it serves as a value influencing the interpretation of all provisions of the Convention.

The article is divided into two main sections. The first part explores the substance of judicial independence as developed in the ECtHR’s case law. The second addresses the functions of this principle within the framework of the Convention. This section first briefly considers judicial independence as part of a subjective right under Article 6 ECHR, and then examines its broader impact on the interpretation of other Convention rights. The article concludes with a summary of the key findings.

2. THE MEANING OF JUDICIAL INDEPENDENCE UNDER THE ECHR

2.1. THE ESSENCE OF JUDICIAL INDEPENDENCE

In the text of the ECHR, the notion of an ‘independent tribunal’ appears exclusively in Article 6. This provision expresses the right of individuals to an independent tribunal, but it does not define what this independence entails. Such a definition was, however, provided in the recent case law of the ECtHR.

In the Grand Chamber judgment in *Guðmundur Andri Ástráðsson v Iceland*, the Court indicated that ‘judicial independence’ means ‘the necessary personal and institutional independence that is required for impartial decision-making, and it is thus a prerequisite for impartiality’.² According to the Court, it encompasses:

- (i) a state of mind, which denotes a judge’s imperviousness to external pressure as a matter of moral integrity and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that en-

Rizcallah and Victor Davio, ‘The Requirement That Tribunals Be Established by Law: A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust’ (2021) 17 *European Constitutional Law Review* 581.

² *Guðmundur Andri Ástráðsson v Iceland* [2020] ECtHR [GC] 26374/18 at 234.

sure their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties.³

However, this definition does not resolve all uncertainties surrounding the concept of ‘judicial independence’. In particular, the question arises whether this independence pertains exclusively to judges as individuals, or whether it also encompasses courts as institutions. Secondly, doubts also concern the relevance, under the Convention, of understanding independence as a ‘state of mind’ of judges, given the obvious difficulties associated with assessing such a subjective condition. Finally, a crucial issue is the question of whom a judge must be independent from.

2.2. INSTITUTIONAL AND INDIVIDUAL INDEPENDENCE

Judicial independence is often considered to have two dimensions: institutional and individual.⁴ The former pertains to the judiciary as one of the three branches of government and to the courts as institutions entrusted with the administration of justice. The latter relates to individual judges who adjudicate within these courts.

These two dimensions of judicial independence are safeguarded through various measures. The protection of individual independence is ensured primarily by the adequate guarantees of the status of judges, such as irremovability or non-transferability. Institutional independence, on the other hand, may encompass such issues as judicial self-governance, principles of court administration, and the financial autonomy of courts.⁵

In the Court’s case law, breaches of the right to an independent tribunal most frequently result from serious shortcomings in individual independence. The institutional dimension of judicial independence poses a far more challenging issue to address within the framework of individual applications. Issues concerning the relationship between the judiciary and other branches of government are usually more abstract and relate to the principle of separation of powers. And

³ *ibid.*

⁴ See e.g. Shimon Shetreet, ‘The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges’ (2009) 10 *Chicago Journal of International Law* 275, 284–286.

⁵ Shetreet (n 4).

while the Court acknowledges the growing importance it attaches in its jurisprudence to the principle of separation of powers, it also stresses that ‘neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers’ interaction’.⁶

Having said that, one can find judgments in which violations of the ECHR were related to the realm of institutional independence. For example, the Court has found it problematic to grant an executive body broad powers to challenge the legality of final court judgments, as such a tool ‘may in practice become a tool of political supervision over court judgments by the executive’.⁷ Moreover, individual and institutional independence are closely intertwined,⁸ and some cases reviewed by the ECtHR are significant for both dimensions of judicial independence. For example, cases concerning the dismissal of court presidents⁹ relate, in the first place, to the individual independence of judges holding these positions. However, case law protecting them from arbitrary removal also limits the executive’s influence on court administration, thereby strengthening institutional independence.¹⁰

2.3. SUBJECTIVE AND OBJECTIVE JUDICIAL INDEPENDENCE

In the aforementioned definition presented in the judgment in *Ástráðsson v Iceland*, the Court identified two components of judicial independence. First, judicial independence involves a proper ‘state of mind’, which pertains to a judge’s resistance to pressure and ability to adjudicate independently. Second, it also includes a legal-institutional component, which concerns the existence of mechanisms protecting judges from undue influence. The former can be termed subjective independence, while the latter refers to objective independence.

⁶ *Kleyn and Others v the Netherlands* [2003] ECtHR [GC] 66394/10, 23115/13, 46621/12, 2679/12, 7215/12, 62560/11, 44311/11, 29826/11, 12868/11, 5691/11 at 193.

⁷ *Wałęsa v Poland* [2023] ECtHR 50849/21 at 231.

⁸ As the Committee of Ministers of the Council of Europe held: ‘The independence of individual judges is safeguarded by the independence of the judiciary as a whole’ – see Committee of Ministers, Recommendation CM/Rec(2010)12 – Judges: independence, efficiency, responsibilities, 17 November 2010, point 4.

⁹ See e.g. *Baka v Hungary* [2016] ECtHR [GC] 20261/12; *Broda and Bojara v Poland* [2021] ECtHR 26691/18, 27367/18.

¹⁰ Cf. Mathieu Leloup, ‘The Concept of Structural Human Rights in the European Convention on Human Rights’ (2020) 20 Human Rights Law Review 480, 490–492.

The objective aspect of judicial independence is obvious and does not require extensive explanations. The subjective aspect of judicial independence is more problematic. It is undoubtedly true that ensuring the actual independence of courts requires not only establishing an appropriate legal framework but also that judges themselves possess the psychological resilience to withstand such pressures.¹¹ The problem, however, is that it is practically impossible for the ECtHR to evaluate, without controversy, whether a specific judge exhibits psychological independence. For this reason, subjective independence has not played a significant role in the Court's case law to date.

However, given that in *Ástráðsson* the Court explicitly included the subjective aspect in the definition of judicial independence, this concept could be further developed in the Court's jurisprudence in the future. It could lead, for example, the ECtHR to scrutinise judicial appointment procedures more closely as appropriate appointment procedures are undoubtedly necessary to select judges who demonstrate adequate moral integrity and resilience to various pressures. Moreover, the concept of substantive independence may also have some significance in cases concerning the disciplinary responsibility of judges. On the one hand, it would strengthen the authorities' obligation to refrain from taking measures against judges that could negatively impact their ability to adjudicate independently. But on the other hand, it may justify measures applied against judges who do not exhibit sufficient subjective independence.

2.4. INTERNAL AND EXTERNAL INDEPENDENCE

As already mentioned, the ECtHR's interpretation of judicial independence entails protecting judges from various forms of pressure. Depending on the source of such pressure, two aspects of judicial independence can be distinguished: external and internal.¹² What is essential is that both of them were explicitly recognised in the case law of the ECtHR.¹³

¹¹ Martin Sunnqvist, 'Impartiality and Independence of Judges: The Development in European Case Law' (2022) 5 *Nordic Journal of European Law* 67, 71, 93; David Kosař and Samuel Spáč, 'Judicial Independence' in Jeff King and Richard Bellamy (eds), *The Cambridge Handbook of Constitutional Theory* (Cambridge University Press 2025) 870, 882.

¹² See e.g. Committee of Ministers, CM/Rec(2010)12, points 11–25.

¹³ See e.g. Biljana Braithwaite, Catharina Harby and Goran Miletic (eds), *Independence and Impartiality of the Judiciary. An Overview of Relevant Jurisprudence of the European Court of Human Rights* (AIRE Centre 2021) 34–36; Joost Sillen, 'The Concept of "Internal Judicial Independence" in the Case Law of the European Court of Human Rights' (2019) 15 *European Constitutional Law Review* 104.

The external aspect of judicial independence is more evident and directly linked to the principle of the separation of powers, which assumes the separation of the judiciary from the legislative and executive branches. In practice, it is particularly crucial to protect judges from pressures exerted by the executive branch. However, judicial independence also encompasses protection against actions by the legislature.¹⁴ The ECtHR also notes that the concept of independence includes independence from the parties to the proceedings. It could, therefore, be violated if, for example, members of a court were subordinate to one of the parties.¹⁵

Judicial independence, however, cannot be confined solely to protecting judges from external pressures and influences. In its judgment in *Parlov-Tkalčić v Croatia*, the Court stated that

judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court.¹⁶

However, thus far, the ECtHR has issued relatively few judgments addressing the limitations of internal judicial independence, and it has only found these to constitute violations of the Convention in isolated cases.¹⁷

2.5. DE JURE AND DE FACTO JUDICIAL INDEPENDENCE

For the judiciary to be truly independent, it is essential not only to have legal guarantees protecting courts and judges from unlawful pressures (*de jure* independence) but also to ensure that these guarantees are respected in practice (*de facto* independence).¹⁸

Legal mechanisms protecting judges against external and internal pressures may ensure that independence is protected *de jure*. However, for years, legal scholar-

¹⁴ See e.g. *Ovcharenko and Kolos v Ukraine* [2023] ECtHR 27276/15, 33692/15.

¹⁵ See e.g. *Sramek v Austria* [1984] ECtHR 57752/21 at 42.

¹⁶ *Parlov-Tkalcic v Croatia* [2009] ECtHR 24810/06 at 86.

¹⁷ Sillen (n 13) 106–110.

¹⁸ See e.g. Tetiana A Tsuvina and Alina Yu Serhieieva, 'Judicial Independence De Jure and De Facto: Lessons for Ukraine from the Case Law of the ECtHR' [2023] *International Comparative Jurisprudence* 50.

ship has debated and studied the extent to which *de jure* independence translates into *de facto* independence.¹⁹ Undoubtedly, the latter is also influenced by various non-legal factors, such as political culture or the level of corruption among judges.

The ECtHR recognises the need to ensure judicial independence in both law and practice.²⁰ When assessing whether a judicial body meets the requirements of Article 6(1) of the ECHR, the Court considers the existence of legal regulations protecting the independence of its members. However, it also emphasises that ‘the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective’.²¹ For this reason, ‘in determining whether or not there has been a violation of Convention rights, it is often necessary to look beyond the appearances and the language used and concentrate on the realities of the situation’.²² In the context of judicial independence, this means that ‘the constitutional safeguards of the independence and impartiality of the judiciary do not suffice. They must be effectively incorporated into everyday administrative attitudes and practices’.²³

Respecting *de facto* independence requires state authorities to refrain from interfering in ongoing judicial proceedings or exerting pressure on judges. The ECtHR also stresses that authorities must respect court judgments in practice, even if they disagree with them.²⁴ Failures in this regard may result in a violation of the Convention, regardless of whether a state has adequate *de jure* guarantees of independence. At the same time, a high level of compliance with *de facto* independence may sometimes mitigate the lack of adequate legal mechanisms. For instance, in cases concerning the irremovability of judges, the Court notes that the absence of formal guarantees in law ‘does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present’.²⁵

¹⁹ See e.g. James Melton and Tom Ginsburg, ‘Does De Jure Judicial Independence Really Matter?: A Reevaluation of Explanations for Judicial Independence’ (2014) 2 *Journal of Law and Courts* 187.

²⁰ See also Robert Spano, ‘The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary’ (2021) 27 *European Law Journal* 211, 218–220.

²¹ *Beer and Regan v Germany* [1999] ECtHR [GC] 28934/95 at 57.

²² *Stafford v the United Kingdom* [2002] ECtHR [GC] 46295/99 at 64.

²³ *Agrokompleks v Ukraine* [2011] ECtHR 23465/03 at 136.

²⁴ *ibid.*

²⁵ *Campbell and Fell v the United Kingdom* [1984] ECtHR 7819/77, 7878/77 at 80.

3. TWO FUNCTIONS OF JUDICIAL INDEPENDENCE

3.1. INTRODUCTION

Judicial independence and the principle of the Rule of Law, of which judicial independence is one of the core elements, play various roles under the Convention. According to Robert Spano, the principle of the Rule of Law can operate as an optimisation principle, a rule with fixed content, or in a hybrid dimension that combines these two aspects at the same time.²⁶ Spano argued that this last dimension involves, in particular, judicial independence, which is a source of both fixed rules (e.g. requirement of judges to be appointed lawfully), as well as optimisation directives (necessity to ensure fair trial).²⁷

In my view, judicial independence serves primarily two functions under the ECHR. First, the right to an independent tribunal is a subjective right explicitly protected by Article 6(1) of the ECHR. Second, judicial independence also serves as a value that influences the interpretation of all provisions of the ECHR. In this dimension, its significance extends beyond the scope of Article 6.

3.2. JUDICIAL INDEPENDENCE AS AN ELEMENT OF THE INDIVIDUAL'S RIGHT TO A COURT

The right to an independent court must be interpreted within the broader framework of Article 6 of the ECHR. The scope of this provision is limited to cases concerning civil rights and obligations, and criminal charges. Both terms have an autonomous character and are interpreted quite broadly by the Court; however, certain categories of cases, such as electoral disputes²⁸ and those related to migration,²⁹ fall outside the scope of Article 6. Moreover, even if Article 6 is applicable, it does not necessarily mean that the given case has to be considered from start to finish in the proceedings, satisfying all the requirements stemming from this provision. The Court has indicated that a violation of this provision can be avoided, 'if any structural or procedural shortcomings identified in the proceedings before an administrative authority are remedied in the course of the subsequent control by a judicial body that has full jurisdiction'.³⁰

²⁶ Spano (n 20) 215.

²⁷ *ibid* at 217, 221.

²⁸ See e.g. *Karimov v Azerbaijan* [2014] ECtHR 12535/06 at 54–55.

²⁹ See e.g. *Mamatkulov and Askarov v Turkey* [2005] ECtHR [GC] 46827/99; 46951/99 at 82.

³⁰ *Ramos Nunes De Carvalho E Sá v Portugal* [2016] ECtHR [GC] 55391/13, 57728/13, 74041/13 at 132.

According to the ECtHR's case law, the right to a court comprises several elements. First, it guarantees access to a court, meaning the ability to bring a case before a court for adjudication.³¹ Second, it entails the right to a court that is independent, impartial, and established by law. Third, individuals have the right to proceedings that meet the requirements of fairness, public hearing, and being carried out without undue delay. Finally, the right to a tribunal also includes the right to the enforcement of a final judgment.³² Additional guarantees are provided in the context of criminal proceedings.

The right to an independent tribunal is thus one of several guarantees derived from Article 6(1) of the ECHR. However, similarly to other components of the right to a court, it has an autonomous character in the sense that a violation of judicial independence will result in a breach of Article 6, even if other requirements under the provision are not infringed. Nevertheless, the links between various components of the right to a court under Article 6 ECHR are strong. The relation between three values which concern the proper constitution of courts is particularly interesting in this regard. These are, besides the independence, impartiality and establishment by law.

The essence of judicial impartiality lies in the absence of 'prejudice or bias' towards the parties or the subject matter of the proceedings.³³ According to the well-established case law of the ECtHR, judicial impartiality can be analysed from two perspectives.³⁴ The subjective impartiality test examines whether, in a specific case, the judge 'held any personal prejudice or bias'.³⁵ In contrast, the objective impartiality test evaluates 'whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality'.³⁶ In certain cases, factors indicating both subjective and objective bias may coexist, as the Court emphasises that 'there is no watertight division between subjective and objective impartiality'.³⁷

There are significant connections between independence and impartiality of a court. The ECtHR accurately holds that judicial independence is a prerequisite for impartiality.³⁸ If a judge is not independent, a party may have reasonable doubts about the factors influencing the judgment, particularly concerns that extra-legal

³¹ *Golder v the United Kingdom* [1975] ECtHR 4451/70 at 26–36.

³² *Immobiliare Saffi v Italy* [1999] ECtHR [GC] 22774/93 at 66.

³³ See e.g. *Kyprianou v Cyprus* [2005] ECtHR [GC] 73797/01 at 118.

³⁴ See e.g. *ibid.*

³⁵ *Micallef v Malta* [2009] ECtHR [GC] 17056/06 at 93.

³⁶ *Morice v France* [2015] ECtHR [GC] 29369/10 at 73.

³⁷ *Micallef v Malta* (n 35) at 95.

³⁸ *Guðmundur Andri Ástráðsson v Iceland* (n 2) at 234.

circumstances, such as external pressure or career considerations, could play a role. Given this close relationship between the two values, the Court acknowledges that ‘the concepts of independence and objective impartiality are closely linked and, depending on the circumstances, may require joint examination’.³⁹

The requirement that a case be heard by a tribunal established by law pertains to the legality of the court’s functioning. According to the ECtHR, the primary purpose of this guarantee ‘is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament’.⁴⁰ However, the right to a tribunal established by law can be violated not only through breaches of legislative acts passed by Parliament, but also through violations of ‘other provisions of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular’.⁴¹

The requirement of being ‘established by law’ is closely connected with the other two institutional guarantees set out in Article 6(1) of the ECHR, as all three serve to protect the rule of law and the separation of powers.⁴² The links between the right to an independent tribunal and the right to a tribunal established by law can be observed, for instance, in how the judicial appointment process affects both guarantees. The difference lies in the focus: from the perspective of the right to a tribunal established by law, the critical question is whether sufficiently serious violations of domestic law occurred in the appointment process. In contrast, assessing a tribunal’s independence involves examining whether the process itself included mechanisms to protect against undue political influence and ensured the selection of judges based on merit-based criteria.

Nevertheless, as already mentioned, each of these requirements has an autonomous character and, as a result, a violation of judicial independence may arise even if there are no grounds to question the impartiality or legality of the establishment of a court. In light of the Court’s case law, the right to an independent tribunal can be violated by reasons that can be grouped into two categories.⁴³

First, such a violation may arise if, due to the improper legal regulation of the tribunal’s position and structure, a court is objectively perceived as not independent. In this context, the Court pays particular attention to factors such as: ‘the manner of

³⁹ *Denisov v Ukraine* [2018] ECtHR [GC] 76639/11.

⁴⁰ *Guðmundur Andri Ástráðsson v Iceland* (n 2).

⁴¹ *ibid* at 212.

⁴² *ibid* at 231–234.

⁴³ Cf. Przemysław Tacik, ‘Habitual deference? Strasbourg standards of judicial independence and challenges of the present’ (2019) 17 *Review of International, European and Comparative Law* 47, 58.

appointment of the body's members, the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence'.⁴⁴ The ECtHR considers all these factors collectively, meaning that deficiencies in one area do not necessarily preclude the tribunal's independence, as the other factors must also be taken into account.⁴⁵ The crucial question is whether, taking into account all relevant circumstances, the tribunal presents 'appearances of independence'. As Rafael Bustos Gilbert highlighted, 'This criterion operates as a fulcrum on which the three previous criteria are weighed simultaneously according to the circumstances of the case. In particular, a test of independence is applied based on the appearances conveyed to the parties or the public'.⁴⁶

The ECtHR's case law concerning the right to an independent tribunal is highly fact-specific,⁴⁷ and it is challenging to derive clear, precise standards regarding judicial organisation.⁴⁸ Such an approach by the Court may be justified, to some extent, by the principle of subsidiarity, under which the Court should refrain from establishing overly far-reaching standards that, without sufficient justification, would undermine the constitutional traditions of the Member States.⁴⁹

Therefore, despite some evolution in recent case law, the Court still grants states relatively broad discretion when it comes to, for example, designing the method of appointing judges. It holds that 'appointment of judges by the executive or the legislature is permissible under the Convention, provided that appointees are free from influence or pressure when carrying out their adjudicatory role'.⁵⁰ This suggests that the method of appointment itself holds secondary importance compared to the factors ensuring judicial independence after the appointment. Among these, the guarantee of irremovability appears to be the most prominent.⁵¹ According to the ECtHR's jurisprudence, the irremovability of judges constitutes a fundamental standard that 'must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6 para 1'.⁵² In contrast,

⁴⁴ *Ramos Nunes De Carvalho E Sá v Portugal* (n 30) at 144.

⁴⁵ Braithwaite, Harby and Miletić (n 13) 18.

⁴⁶ Rafael Bustos Gisbert, 'Judicial Independence in European Constitutional Law' (2022) 18 *European Constitutional Law Review* 591, 605.

⁴⁷ *ibid* 606.

⁴⁸ Tacik (n 43) 53–58.

⁴⁹ Marcin Szwed, 'Europejski Trybunał Praw Człowieka jako europejski sąd konstytucyjny' (2024) 2 *Przegląd Konstytucyjny* 51, 60–61.

⁵⁰ *Maktouf and Damjanović v Bosnia and Herzegovina* [2013] ECtHR [GC] 2312/08, 34179/08 at 49.

⁵¹ See e.g. Marcin Szwed, 'Problematyka nieusuwalności sędziów w orzecznictwie Europejskiego Trybunału Praw Człowieka' (2021) 3 *Przegląd Konstytucyjny* 143.

⁵² *Morris v the United Kingdom* [2002] ECtHR 38784/97 at 68.

the ECtHR's case law rarely addresses deficiencies in other guarantees of judicial independence, such as non-transferability, immunity, or adequate remuneration.

A violation of Article 6(1) of the ECHR may also occur if the independence of the court and its judges is safeguarded through appropriate legal mechanisms, but in practice, undue pressures on judges or other inappropriate interference in the proceedings occur in the course of a specific case. Such pressure may violate the independence of a tribunal both when it originates from bodies external to the judiciary and when it emanates from within. These may take the form of, for example, direct instructions given by a court's president to judges as to how to adjudicate in a given case, and such instructions are then followed.⁵³ Another form of pressure on courts may arise from public statements by politicians regarding ongoing proceedings.⁵⁴ When assessing whether specific statements have undermined the independence or impartiality of a court, the ECtHR considers primarily their content and form⁵⁵. Impermissible interferences in the proceedings may also take other forms, such as the reassignment of cases to different courts or judges,⁵⁶ or the adoption of laws with retroactive effect aimed at influencing specific judicial proceedings.⁵⁷

3.3. JUDICIAL INDEPENDENCE AS AN INTERPRETATIVE VALUE

The significance of judicial independence cannot, however, be reduced solely to Article 6 of the ECHR. It also constitutes an interpretative value – one that influences the interpretation of all the provisions of the Convention.

The Preamble to the Convention refers to certain values or principles that can be considered as underlying its foundations. Among such values are human rights, fundamental freedoms, democracy, justice, peace, subsidiarity, and the rule of law. Importantly, similar values (individual freedom, political liberty, rule of law, democracy) are also mentioned in the Statute of the Council of Europe. Certainly, these values, in themselves, do not create specific rights or obligations.⁵⁸

⁵³ See e.g. *Khrykin v Russia* [2011] ECtHR 33186/08.

⁵⁴ *Čivinskaitė v Lithuania* [2020] ECtHR 21218/12 at 117.

⁵⁵ *ibid* at 134; *Kinsky v the Czech Republic* [2012] ECtHR 42856/06 at 91–99.

⁵⁶ See e.g. *Bochan v Ukraine* [2007] ECtHR 7577/02 at 71–85; *Moiseyev v Russia* [2008] ECtHR 62936/00 at 182–185; *Bahaettin Uzan v Turkey* [2020] ECtHR 30836/07 at 59–68.

⁵⁷ *Maggio and Others v Italy* [2011] ECtHR 46286/09, 52851/08, 53727/08, 54486/08, 56001/08 at 43–50.

⁵⁸ Jan Klabbers, 'Treaties and Their Preambles' in Michael J Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 182; David Kosař and Katarína Šipulová, 'The Strasbourg Court Meets Abusive

Nevertheless, they still fulfil a very important normative function. The Court has repeatedly emphasised in its case law that the Convention must be interpreted in light of its Preamble.⁵⁹ Such an approach is consistent with the rules of interpretation of international treaties provided in the Vienna Convention on the Law of Treaties.⁶⁰ According to its Article 31(1), ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Article 31(2) clarifies that the preamble of the treaty is one of the elements constituting the important interpretative context of its provisions. Moreover, as noted in the scholarship, preambles can also assist in determining the object and purpose of the treaty.⁶¹

As already mentioned, among such fundamental values that influence the interpretation of the Convention is the rule of law. The interpretative importance of the rule of law has long been noted by legal scholars. According to Steven Greer, the principle of legality and the rule of law is one of the primary constitutional principles of the interpretation of the Convention,⁶² while Robert Spano considered it to be one of ‘several underlying doctrinal strands or principles’ permeating case law of the Court⁶³ or even ‘lodestar guiding the development’ of its case law.⁶⁴ The Court itself, too, has recognised that the rule of law is an inherent part of all its provisions, ‘and the whole Convention draws its inspiration from that principle’.⁶⁵ Therefore, as R. Spano aptly observed, the rule of law ‘provides for a methodological point of departure in the examination of any arguable Convention complaint whilst at the same time creating a frame of reference when the Court interprets and applies the rights and freedoms provided for by the Convention’.⁶⁶

Constitutionalism: *Baka v. Hungary and the Rule of Law*’ (2018) 10 *Hague Journal on the Rule of Law* 83, 101.

⁵⁹ See e.g. *Sadowski v Poland* [2025] ECtHR 56297/21 at 85; *M.L. v Poland* [2023] ECtHR 40119/21 at 167.

⁶⁰ See e.g. Eszter Polgári, ‘The Role of the Vienna Rules in the Interpretation of the ECHR: A Normative Basis or a Source of Inspiration?’ (2021) 14 *Erasmus Law Review* 82; Geir Ulfstein, ‘Interpretation of the ECHR in Light of the Vienna Convention on the Law of Treaties’ (2020) 24 *The International Journal of Human Rights* 917.

⁶¹ Klabbers (n 58) 182–188; Max H Hulme, ‘Preambles in Treaty Interpretation’ (2016) 164 *University of Pennsylvania Law Review* 1281, 1300–1305.

⁶² Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 195–202.

⁶³ Robert Spano, ‘The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law’ (2018) 18 *Human Rights Law Review* 473, 489.

⁶⁴ Spano (n 20) 211–212.

⁶⁵ *M.L. v Poland* (n 59) at 167.

⁶⁶ Spano (n 20) 215.

Given that judicial independence is undoubtedly a fundamental component of the rule of law, it must also be considered as ‘interpretative value’ under the ECHR. The significance of judicial independence in this dimension is best seen in the increasingly dynamic ECtHR case law concerning the protection of judges’ rights.⁶⁷ For instance, the Court developed a case law which extended the application of Article 6 of the Convention to almost every dispute concerning the professional relationship of a judge.⁶⁸ As the Court explains, ‘It would be a fallacy to assume that judges can uphold the rule of law and give effect to the Convention if domestic law deprived them of the guarantees of the Articles of the Convention on matters directly touching upon their individual independence and impartiality.’⁶⁹ Moreover, interference with the independence of individual judges often correlates with violations of their rights, particularly those enshrined in Articles 8 and 10 of the Convention. In theory, in such cases, the ECtHR rules not on whether there has been a breach of judicial independence but instead on whether the specific substantive rights of a judge have been respected. In practice, however, the Court often takes into account the special role of judges and the importance of judicial independence as a foundation upon which the entire Convention rests.⁷⁰ It has held, for example, that restricting judges’ freedom of expression to discourage them from speaking out in defence of the rule of law and judicial independence serves no legitimate purpose.⁷¹ Furthermore, the Court’s case law indicates that a state’s efforts to destroy judicial independence constitute an unacceptable purpose under the ECHR, potentially justifying a finding of a violation of Article 18 of the Convention.⁷² The protection of individual independence of judges could be further strengthened if the Court were to adopt an interpretation of Article 6 § 1 of the ECHR that derives from this provision a subjective right of judges to have their independence respected and protected by public authorities.⁷³

⁶⁷ See e.g. Hildur Hjörvar, ‘Judges as Rightsholders’ in Jon Fridrik Kjølbro, Síofra O’Leary and Marialena Tsirli (eds), *Liber Amicorum Robert Spano* (Eleven Anthemis 2022).

⁶⁸ See e.g. Mathieu Leloup, ‘Not Just a Simple Civil Servant: The Right of Access to a Court of Judges in the Recent Case Law of the ECtHR’ (2022) 4 *European Convention on Human Rights Law Review* 23.

⁶⁹ *Bilgen v Turkey* [2021] ECtHR 1571/07; *Grzęda v Poland* [2022] ECtHR [GC] 43572/18.

⁷⁰ *Alparslan Altan v Turkey* [2019] ECtHR 12778/17 at 102.

⁷¹ *Tuleya v Poland* [2023] ECtHR 21181/19, 51751/20 at 542–542.

⁷² *Miroslava Todorova v Bulgaria* [2021] ECtHR 40072/13 at 203–214; *Juszczyszyn v Poland* [2022] ECtHR 35599/20 at 317–33. See e.g. Aikaterini Tsampi, ‘Article 18 ECHR as a New Pillar of Judicial Independence and Separation of Powers’ (2023) 7 *Europe des Droits & Libertés/Europe of Rights & Liberties* 369.

⁷³ Linos-Alexander Sicilianos, ‘The Subjective Right of Judges to Independence: Some Reflections on the Interpretation of Article 6, para 1 of the ECHR’ in Paulo Pinto De Albuquerque and Krzysztof Wojtyczek (eds), *Judicial Power in a Globalized World* (Springer International Publish-

The principle of judicial independence may also influence the interpretation of the Convention in cases unrelated to the rights of judges. This concerns, in particular, the interpretation of guarantees related to deprivation of liberty set out in Article 5 of the Convention. Paragraph 1 of this provision enumerates the permissible grounds for deprivation of liberty, one of which is ‘the lawful detention of a person after conviction by a competent court’ (Article 5(1)(a)). According to the ECtHR’s case law, a tribunal that is not independent or not properly constituted under the law cannot be considered ‘competent’ within the meaning of this provision, and consequently, it cannot decide on deprivation of liberty under this procedure.⁷⁴ Moreover, according to Article 5(4) of the Convention, persons deprived of liberty based on the decision of a non-judicial body must have access to judicial review of the legality of their detention. According to the ECtHR’s case law, a court considering such a case does not have to be a classical tribunal integrated with the rest of the judiciary, but it must be an impartial and independent body – meeting the same standards as those required by Article 6(1) of the ECHR.⁷⁵

Judicial independence, in its dimension as an interpretative value, may also influence the interpretation of limitation clauses contained in various provisions of the Convention. In this context, the requirement that any interference be ‘in accordance with the law’, also implies ‘that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence’.⁷⁶ The Court’s reference to an ‘independent body’ or ‘judicial or other independent scrutiny’ indicates that access to a court is not always mandatory. Nonetheless, if domestic law provides for the jurisdiction of courts, violations of judicial independence may result in a breach of the requirement of legality. Likewise, the requirement of legality can also be violated in cases where the source of interference with an individual’s freedom or rights is a judgment issued by a court that is unlawfully established and, consequently, also not independent. The Court presented such an interpretation in two recent cases against Poland. In *M.L. v Poland*, the source of unlawful restriction of the applicant’s rights was the judgment of the Constitutional Tribunal in the panel involving an irregularly appointed individual.⁷⁷ In *Wałęsa v Poland*, the interference with the applicant’s

ing 2019); Mathieu Leloup, ‘Who Safeguards the Guardians? A Subjective Right of Judges to Their Independence under Article 6(1) ECHR’ (2021) 17 European Constitutional Law Review 394.

⁷⁴ See e.g. *Ilaşcu and Others v Moldova and Russia* [2004] ECtHR [GC] 48787/99; *Yefimenko v Russia* [2013] ECtHR 152/04 at 101–111.

⁷⁵ See e.g. *J.B. and Others v Malta* [2024] ECtHR 1766/23 at 143.

⁷⁶ *H.F. and Others v France* [2022] ECtHR [GC] 24384/19, 44234/20 at 275.

⁷⁷ *M.L. v Poland* (n 59) at 160–176.

right was not carried out in accordance with the law because its source was the judgment of the Chamber of the Extraordinary Review and Public Affairs of the Supreme Court, which is composed solely of unlawfully appointed judges and, as such, has been questioned both by the ECtHR and the CJEU.⁷⁸

In some cases, the issue of judicial independence may be significant from the perspective of Article 13 of the ECHR, which guarantees a right to an effective remedy. This article does not require that the remedy always involves access to court,⁷⁹ and only in exceptional cases has the ECtHR explicitly indicated that, due to the gravity of the matter, access to a court was necessary to comply with Article 13 of the ECHR.⁸⁰ In many other cases, however, the Court has stated that the body adjudicating the remedy, even if not judicial, must be independent.⁸¹ Thus, in this context as well, providing an individual with a remedy adjudicated by a court that does not meet the independence standard would fail to fulfil the requirements of Article 13 of the ECHR.

An interesting problem in this context is the extent to which judicial independence may influence the interpretation of Article 34 of the ECHR. In particular, a question may arise as to whether the requirement to exhaust domestic remedies also includes those that would be examined by courts that, due to systemic deficiencies, fail to meet the standard of independence. According to the case law of the Court, parties are required to exhaust only those remedies that are effective in the specific circumstances of the case.⁸² It can be reasonably argued that, in assessing the effectiveness of remedies, consideration should also be given to issues related to the state of the rule of law in the country.⁸³ If it is evident that, on the one hand, due to the nature of the case, and on the other hand, due to the lack of independence of the body responsible for examining the matter, filing a remedy has no real prospect of success, requiring the party to do so nonetheless appears excessively formalistic.⁸⁴ However, the Court has not, to date, explicitly adopted such an interpretation.⁸⁵ This reluctance may stem from concern over the

⁷⁸ *Wałęsa v Poland* (n 7) at 290–291.

⁷⁹ *Hirsi Jamaa and Others v Italy* [2012] ECtHR [GC] 27765/09 at 197.

⁸⁰ *Ramirez Sanchez v France* [2006] ECtHR [GC] 59450/00 at 165–166.

⁸¹ *Khan v the United Kingdom* [2000] ECtHR 35394/97; *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania* [2014] ECtHR [GC] 47848/08 at 149–153.

⁸² *Vučković and Others v Serbia* [2014] ECtHR 17153/11 at 69–77.

⁸³ Alain Zysset and Başak Çalı, ‘Exhausting Domestic Remedies or Exhausting the Rule of Law? Revisiting the Normative Basis of Procedural Subsidiarity in the European Human Rights System’ (2023) 14 *Transnational Legal Theory* 157, 170–171.

⁸⁴ Zysset and Çalı (n 83); Mathieu Leloup, ‘The Question of Non-Independent Apex Courts as Effective Remedies to Be Exhausted’ (2024) 5 *European Convention on Human Rights Law Review* 320.

⁸⁵ Leloup (n 84) 327–330.

potential consequences of such an interpretation. In a situation where systemic problems with judicial independence exist in a given state, the Court may be overwhelmed with applications in cases that domestic courts have not first examined.

4. CONCLUSION

The essence of judicial independence is related to the state in which courts, and individual judges adjudicating within them, may be objectively perceived as acting in accordance with their legal knowledge and their own conscience, free from any pressures.⁸⁶ Judicial independence, understood in this way, is one of the pillars of the human rights system established by the Convention. It serves essentially two functions. First, it is a key element of the right to a court protected under Article 6 of the Convention. Second, as a core element of the rule of law, mentioned in the Preamble to the Convention as one of its founding values, it also constitutes a value that affects the interpretation of all the provisions of the ECHR. Therefore, systemic violations of judicial independence may lead to serious consequences under the Convention. These may involve not only a breach of Article 6, but also of other provisions.

The Court's case law, as analysed in this paper, must be generally assessed positively. It has developed certain standards related to the independence of the judiciary, impartiality, and the legality of its functioning. Moreover, it also extended the protection guaranteed by the Convention to the individual judges whose rights may be violated through various interferences with their independence. What is also important is that the recent case law of the Court, particularly in cases against Poland, shows that the Court has noted and reacted to serious, systemic violations of judicial independence carried out by illiberal, populist authorities.⁸⁷

This does not mean, of course, that the Court's approach to the protection of judicial independence is absolutely perfect and cannot be subject to justified criticism. For example, the Court was criticised in the past for being too deferential to domestic authorities and the national arrangements regarding the organisation of the judiciary.⁸⁸ This criticism is, to some extent, valid, as the Court's case law

⁸⁶ See also Paulo Pinto De Albuquerque and Alexandre Au-Yong Oliveira, 'The Twilight of the Gods: Independence of the Judiciary and the Rule of Law in Europe' in Filipe Marques and Paulo Pinto De Albuquerque (eds), *Rule of Law in Europe* (Springer Nature Switzerland 2024) 24.

⁸⁷ See e.g. Magda Krzyżanowska-Mierzewska, 'Proceduralna reakcja Europejskiego Trybunału Praw Człowieka na kryzys praworządności w Polsce' (2023) 2 *Europejski Przegląd Sądowy* 16.

⁸⁸ Tacik (n 43).

indeed does not impose stringent standards on the Contracting States regarding, for example, the procedure for judicial appointments. The Court's reaction to wide-scale violations of judicial independence in Turkey was likewise considered by some to be insufficiently effective.⁸⁹ Moreover, the Court's case law remains insufficiently clear or coherent in certain areas. This concern, for example, the interpretation of the *Ástráðsson* test (problem visible in particular in the context of wide debates in Poland over the status of judges irregularly appointed to courts other than the Supreme Court),⁹⁰ the applicability of Article 6 of the Convention to interferences with judicial status carried out *ex lege*,⁹¹ or the minimum threshold required for the applicability of Article 8 to cases concerning measures affecting professional lives of judges.⁹²

There is, therefore, still scope for the development of the Court's case law to strengthen the protection of judicial independence under the Convention. The Court has already communicated several cases in which it will consider whether Article 6 guarantees judges a subjective right to have their independence respected and protected by the State.⁹³ Moreover, some passages in the *Ástráðsson* judgment and subsequent cases,⁹⁴ emphasising the importance of basing the process of judicial appointments on merit, suggest that in the future, the Court could develop clearer standards in this area, exceeding the mere requirement of legality.⁹⁵ As indicated above, the ECtHR could also pay more attention to the independence of courts when assessing the effectiveness of domestic remedies for the purpose of determining the admissibility of the application. It is also possible that the future

⁸⁹ Dilek Kurban, 'Authoritarian Resistance and Judicial Complicity: Turkey and the European Court of Human Rights' (2024) 35 *European Journal of International Law* 355.

⁹⁰ See e.g. Wojciech Piątek, 'Restoring the Rule of Law in Poland: Towards the Most Appropriate Way to Put an End to the Systemic Violation of Judicial Independence: ECtHR 23 November 2023, No 50849/21, *Wałęsa v Poland*' (2025) 21 *European Constitutional Law Review* 139, 156–160; Marcin Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR' (2023) 15 *Hague Journal on the Rule of Law* 353.

⁹¹ See e.g. Mathieu Leloup and David Kosar, 'Sometimes Even Easy Rule of Law Cases Make Bad Law: ECtHR (GC) 15 March 2022, No 43572/18, *Grzęda v Poland*' (2022) 18 *European Constitutional Law Review* 753, 775–778; Mathieu Leloup, 'A right for judges to challenge legislation? Strasbourg's untenable ambiguity', *Strasbourg Observers*, 16 April 2024, <https://strasbourgob-servers.com/2024/04/16/a-right-for-judges-to-challenge-legislation-strasbourgs-untenable-ambiguity/>. See also: concurring opinion of judge Pauliine Koskelo in *Kartal v Türkiye* [2024] ECtHR 54699/14.

⁹² See e.g. joint partly dissenting, partly concurring opinion of judges Krzysztof Wojtyczek and Péter Paczolay in *Juszczyszyn v Poland* (n 72).

⁹³ See e.g. *Biliński v Poland*, 13278/20; *Leszczyńska-Furtak and Others v Poland*, 39471/22; *Syn-akiewicz and Others v Poland*, 46453/21.

⁹⁴ *Guðmundur Andri Ástráðsson v Iceland* (n 2) at 220–222; *J.B. and Others v Malta* [2024] ECtHR 1766/23 at 151–153; *Catană v the Republic of Moldova* [2023] 43237/13 at 80–85.

⁹⁵ *Rizcallah and Davio* (n 1) 601.

evolution of the Court's case law in the area discussed here could be influenced by the case law of the CJEU. In this regard, it is worth noting, for example, the rule of non-regression in the field of judicial independence, which appeared in some rulings of the Luxembourg court,⁹⁶ but still has not been officially recognised by the ECtHR.⁹⁷

It is worth noting, however, that the gradual increase of the standard of protection of judicial independence in the Court's case law is not without controversy. The evolution of the Court's jurisprudence faced criticism even from some judges of the ECtHR. For instance, the application of Article 6 to disputes concerning the status of judges, as criticised by Judge Krzysztof Wojtyczek, who argues that the extension of this provision to public-law disputes between State organs may, in the long term, undermine the efficiency of human rights protection in Europe.⁹⁸ Similarly, the extensive interpretation of the right to private life in the context of judges was negatively assessed by judge Egidijus Kūris, who argued that in the Court's case law, Article 8 was becoming increasingly interpreted as ∞ (sign of infinity).⁹⁹

Therefore, even though I believe that the protection of judicial independence in the Court's case law could be strengthened, there are certainly some limits for the development of the jurisprudence in this direction. Although the ECtHR is sometimes perceived as the 'European Constitutional Court'¹⁰⁰ and the Court itself has recognised the constitutional character of the Convention,¹⁰¹ the latter is certainly not a sort of pan-European constitution, but a human rights treaty. Therefore, the Court's primary task is to monitor the protection of individual rights, rather than seeking the harmonisation of rules concerning the organisation of the judiciary in Europe. Moreover, the Court cannot adopt arbitrary, unforeseeable interpretations that are completely detached from the text of the Convention to impose new obligations on states in the sphere of judicial organisation. Likewise, it cannot ignore the principle of subsidiarity, which since the entry into force of Protocol 15, has a basis in the Preamble to the Convention.

⁹⁶ *Repubblica v Il-Prim Ministru* [2021] CJEU Case C-896/19 at 64.

⁹⁷ See also Bustos (n 46) 611–612.

⁹⁸ Dissenting opinion of judge Krzysztof Wojtyczek in *Baka v Hungary* (n 9).

⁹⁹ Dissenting opinion of judge Egidijus Kūris in *Erményi v Hungary* [2016] ECtHR 22254/14.

¹⁰⁰ See e.g. Szwed (n 49); Geir Ulfstein, 'Transnational Constitutional Aspects of the European Court of Human Rights' (2021) 10 *Global Constitutionalism* 151; Wojciech Sadurski, 'Quasi-Constitutional Court of Human Rights for Europe? Comments on Geir Ulfstein' (2021) 10 *Global Constitutionalism* 175; Robert Harmsen, 'The European Court of Human Rights as a "Constitutional Court": Definitional Debates and the Dynamics of Reform' in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights* (Oxford University Press 2007).

¹⁰¹ *Loizidou v Turkey* [1995] ECtHR [GC] 15318/89 at 75.

REFERENCES

Braithwaite B, Harby C, Miletić G (eds), *Independence and Impartiality of the Judiciary. An Overview of Relevant Jurisprudence of the European Court of Human Rights* (AIRE Centre 2021)

Bustos GR, 'Judicial Independence in European Constitutional Law' (2022) 18 *European Constitutional Law Review* 591

Greer S, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006)

Harmsen R, 'The European Court of Human Rights as a "Constitutional Court": Definitional Debates and the Dynamics of Reform' in Morison J, McEvoy K, Anthony G(eds), *Judges, Transition, and Human Rights* (Oxford University Press 2007)

Hjörvar H, 'Judges as Rightsholders' in Kjølbrot JF, O'Leary S and Tsiarli M (eds), *Liber Amicorum Robert Spano* (Eleven Anthemis 2022)

Hulme MH, 'Preambles in Treaty Interpretation' (2016) 164 *University of Pennsylvania Law Review* 1281

Klabbers J, 'Treaties and Their Preambles' in Bowman Michael J, Kritsiotis Dino(eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018)

Kosař D, Šipulová K, 'The Strasbourg Court Meets Abusive Constitutionalism: *Baka v Hungary* and the Rule of Law' (2018) 10 *Hague Journal on the Rule of Law* 83

Kosař D, Spáč S, 'Judicial Independence' in King Jeff and Bellamy Richard (eds), *The Cambridge Handbook of Constitutional Theory* (Cambridge University Press 2025)

Krzyżanowska-Mierzevska M, 'Proceduralna reakcja Europejskiego Trybunału Praw Człowieka na kryzys praworządności w Polsce' (2023), No 2, *Europejski Przegląd Sądowy* 16

Kurban D, 'Authoritarian Resistance and Judicial Complicity: Turkey and the European Court of Human Rights' (2024) 35 *European Journal of International Law* 355

Leloup M 'A right for judges to challenge legislation? Strasbourg's untenable ambiguity', *Strasbourg Observers*, 16 April 2024, <<https://strasbourgobservers.com/2024/04/16/a-right-for-judges-to-challenge-legislation-strasbourgs-untenable-ambiguity/>>. See also concurring opinion of judge Pauliine Koskelo in *Kartal v Türkiye* [2024] ECtHR 54699/14

--, 'Not Just a Simple Civil Servant: The Right of Access to a Court of Judges in the Recent Case Law of the ECtHR' (2022) 4 *European Convention on Human Rights Law Review* 23

--, 'The Concept of Structural Human Rights in the European Convention on Human Rights' (2020) 20 *Human Rights Law Review* 480

--, 'The Question of Non-Independent Apex Courts as Effective Remedies to Be Exhausted' (2024) 5 *European Convention on Human Rights Law Review* 320

- , 'Who Safeguards the Guardians? A Subjective Right of Judges to Their Independence under Article 6(1) ECHR' (2021) 17 *European Constitutional Law Review* 394
- , Kosař D, 'Sometimes Even Easy Rule of Law Cases Make Bad Law: ECtHR (GC) 15 March 2022, No 43572/18, Grzęda v Poland' (2022) 18 *European Constitutional Law Review* 753
- Melton J, Ginsburg T, 'Does De Jure Judicial Independence Really Matter?: A Reevaluation of Explanations for Judicial Independence' (2014) 2 *Journal of Law and Courts* 187
- Piątek W, 'Restoring the Rule of Law in Poland: Towards the Most Appropriate Way to Put an End to the Systemic Violation of Judicial Independence: ECtHR 23 November 2023, No 50849/21, Wałęsa v Poland' (2025) 21 *European Constitutional Law Review* 139
- Pinto De Albuquerque P, Au-Yong Oliveira Alexandre, 'The Twilight of the Gods: Independence of the Judiciary and the Rule of Law in Europe' in Marques Filipe, Pinto De Albuquerque Paulo (eds), *Rule of Law in Europe* (Springer Nature Switzerland 2024) 24
- Polgári E, 'The Role of the Vienna Rules in the Interpretation of the ECHR: A Normative Basis or a Source of Inspiration?' (2021) 14 *Erasmus Law Review* 82
- Rizcallah C, Davio V, 'The Requirement That Tribunals Be Established by Law: A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust' (2021) 17 *European Constitutional Law Review* 581
- Sadurski W, 'Quasi-Constitutional Court of Human Rights for Europe? Comments on Geir Ulfstein' (2021) 10 *Global Constitutionalism* 175
- Shetreet S, 'The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges' (2009) 10 *Chicago Journal of International Law* 275
- Sicilianos L-A, 'The Subjective Right of Judges to Independence: Some Reflexions on the Interpretation of Article 6, Para. 1 of the ECHR' in Pinto De Albuquerque P, Wojtyczek K(eds), *Judicial Power in a Globalized World* (Springer International Publishing 2019)
- Sillen J, 'The Concept of "Internal Judicial Independence" in the Case Law of the European Court of Human Rights' (2019) 15 *European Constitutional Law Review* 104
- Spano R, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 *Human Rights Law Review* 473
- , 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary' (2021) 27 *European Law Journal* 211
- Sunnqvist M, 'Impartiality and Independence of Judges: The Development in European Case Law' (2022) 5 *Nordic Journal of European Law* 67
- Szwed M, 'Europejski Trybunał Praw Człowieka jako europejski sąd konstytucyjny' (2024) 2 *Przegląd Konstytucyjny* 51, 60–61

--, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR' (2023) 15 Hague Journal on the Rule of Law 353

--, 'Problematyka nieusuwalności sędziów w orzecznictwie Europejskiego Trybunału Praw Człowieka' (2021) 3 Przegląd Konstytucyjny 143

Tacik P, 'Habitual deference? Strasbourg standards of judicial independence and challenges of the present' (2019) 17 Review of International, European and Comparative Law 47

Tsampi A, 'Article 18 ECHR as a New Pillar of Judicial Independence and Separation of Powers' (2023) 7 Europe des Droits & Libertés/Europe of Rights & Liberties 369

Tsvina TA, Serhieieva A Yu, 'Judicial Independence De Jure and De Facto: Lessons for Ukraine from the Case Law of the ECtHR' [2023] International Comparative Jurisprudence 50

Ulfstein G, 'Interpretation of the ECHR in Light of the Vienna Convention on the Law of Treaties' (2020) 24 The International Journal of Human Rights 917

--, 'Transnational Constitutional Aspects of the European Court of Human Rights' (2021) 10 Global Constitutionalism 151

Zysset A, Çalı B, 'Exhausting Domestic Remedies or Exhausting the Rule of Law? Revisiting the Normative Basis of Procedural Subsidiarity in the European Human Rights System' (2023) 14 Transnational Legal Theory 157

CASE LAW

CJEU

A.K. v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy [2019] CJEU Joined Cases C-585/18, C-624/18 and C-625/18

BN, DM, EN v Getin Noble Bank S.A. [2022] CJEU Case C-132/20

Repubblika v Il-Prim Ministru [2021] CJEU Case C-896/19

ECtHR

Agrokompleks v Ukraine [2011] ECtHR 23465/03

Alparslan Altan v Turkey [2019] ECtHR 12778/17

Bahaettin Uzan v Turkey [2020] ECtHR 30836/07

Baka v Hungary [2016] ECtHR [GC] 20261/12

Beer and Regan v Germany [1999] ECtHR [GC] 28934/95

Bilgen v Turkey [2021] ECtHR 1571/07

Bochan v Ukraine [2007] ECtHR 7577/02

Broda and Bojara v Poland [2021] ECtHR 26691/18, 27367/18

Campbell and Fell v the United Kingdom [1984] ECtHR 7819/77, 7878/77

Catană v the Republic of Moldova [2023] 43237/13

- Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania* [2014] ECtHR [GC] 47848/08
- Čivinskaitė v Lithuania* [2020] ECtHR 21218/12
- Denisov v Ukraine* [2018] ECtHR [GC] 76639/11
- Erményi v Hungary* [2016] ECtHR 22254/14
- Golder v the United Kingdom* [1975] ECtHR 4451/70
- Grzęda v Poland* [2022] ECtHR [GC] 43572/18
- H.F. and Others v France* [2022] ECtHR [GC] 24384/19, 44234/20
- Hirsi Jamaa and Others v Italy* [2012] ECtHR [GC] 27765/09
- Ilașcu and Others v Moldova and Russia* [2004] ECtHR [GC] 48787/99
- Immobiliare Saffi v Italy* [1999] ECtHR [GC] 22774/93
- J.B. and Others v Malta* [2024] ECtHR 1766/23
- Juszczyszyn v Poland* [2022] ECtHR 35599/20
- Karimov v Azerbaijan* [2014] ECtHR 12535/06
- Khan v the United Kingdom* [2000] ECtHR 35394/97
- Khrykin v Russia* [2011] ECtHR 33186/08
- Kinský v the Czech Republic* [2012] ECtHR 42856/06
- Kleyn and Others v the Netherlands* [2003] ECtHR [GC] 66394/10, 23115/13, 46621/12, 2679/12, 7215/12, 62560/11, 44311/11, 29826/11, 12868/11, 5691/11
- Kyprianou v Cyprus* [2005] ECtHR [GC] 73797/01
- Leszczyńska-Furtak and Others v Poland*, 39471/22
- Loizidou v Turkey* [1995] ECtHR [GC] 15318/89
- M.L. v Poland* [2023] ECtHR 40119/21
- Maggio and Others v Italy* [2011] ECtHR 46286/09, 52851/08, 53727/08, 54486/08, 56001/08
- Maktouf and Damjanović v Bosnia and Herzegovina* [2013] ECtHR [GC] 2312/08, 34179/08
- Mamatkulov and Askarov v Turkey* [2005] ECtHR [GC] 46827/99; 46951/99
- Micallef v Malta* [2009] ECtHR [GC] 17056/06
- Miroslava Todorova v Bulgaria* [2021] ECtHR 40072/13
- Moiseyev v Russia* [2008] ECtHR 62936/00
- Morice v France* [2015] ECtHR [GC] 29369/10
- Morris v the United Kingdom* [2002] ECtHR 38784/97
- Ovcharenko and Kolos v Ukraine* [2023] ECtHR 27276/15, 33692/15
- Parlov-Tkalcic v Croatia* [2009] ECtHR 24810/06

Ramirez Sanchez v France [2006] ECtHR [GC] 59450/00

Ramos Nunes De Carvalho E Sá v Portugal [2016] ECtHR [GC] 55391/13, 57728/13, 74041/13

Sadowski v Poland [2025] ECtHR 56297/21

Sramek v Austria [1984] ECtHR 57752/21

Stafford v the United Kingdom [2002] ECtHR [GC] 46295/99

Tuleya v Poland [2023] ECtHR 21181/19, 51751/20

Vučković and Others v Serbia [2014] ECtHR 17153/11

Wałęsa v Poland [2023] ECtHR 50849/21

Xhoxhaj v Albania [2021] ECtHR 15227/19

Yefimenko v Russia [2013] ECtHR 152/04

This research was funded in whole by the National Science Centre, Poland, grant ‘European Court of Human Rights towards violations of judicial independence in illiberal democracies’, principal investigator: Marcin Szwed, grant number: 2023/51/D/HS5/01117. For the purpose of Open Access, the author has applied a CC-BY public copyright licence to any Author Accepted Manuscript (AAM) version arising from this submission.

Anna Magdalena Zbiegień-Turzańska

University of Warsaw, Poland

e-mail: a.zbiegien@wpia.uw.edu.pl

ORCID:0000-0003-1885-0698

CONTINUING CONVERGENCE OF CORPORATE GOVERNANCE MODELS? TOWARDS EFFICIENCY OF POLISH REGULATIONS ON SUPERVISORY BOARDS IN COMPANIES AND COOPERATIVES

Abstract

The presented paper concerns the problem of efficiency in institutional supervision exercised under both company and cooperative law by the supervisory board. The paper also includes an international perspective involving convergence processes between different board systems. The convergence syndrome consists of developing common standards of corporate governance aimed at efficiency, irrespective of board structures. In 2022, the Polish legislator introduced extensive amendments to the regulatory framework, remodelling the legal position of the supervisory board. Despite the fact that the said amendments have been introduced only under company law, there are important arguments for conducting a comparative legal analysis involving both companies and cooperatives. It is unclear how the remodelled regulatory framework fits into the said convergence phenomenon and, eventually, whether the introduced solutions will allow for improvement in the field of corporate governance.

KEYWORDS

company, cooperative, supervisory board, convergence, corporate governance, due care, business judgement rule

SŁOWA KLUCZOWE

spółka kapitałowa, spółdzielnia, rada nadzorcza, konwergencja, ład korporacyjny, należyta staranność, *business judgement rule*

1. INTRODUCTION

The struggle for efficient internal management control is at the centre of the corporate governance debate. **Corporate governance** – which in essence is about management and control¹ – provides a system of tools and structures that enable mitigation of conflicts that are involved in managing a corporate entity. This paper addresses the problem of efficiency in institutional supervision exercised in the dual-board scheme by the supervisory board. In the introductory part, the author presents basic corporate governance models and main characteristics of Polish companies and cooperative law with reference to board structures, as well as similarities between the mentioned (corporate) entities (1.). Furthermore, the paper examines the convergence phenomenon (2.) and investigates legislative changes introduced under company law in Poland in 2022 in the field of supervision (3.). The presentation of this background will allow for a more detailed examination of the problem in question, namely the problem of efficiency in supervision (4.). In this part of the paper, the author's intention is to examine the significance and potential efficiency of specific legislative changes introduced under Polish company law in 2022 which affect the functioning of the supervisory board, i.e. the remodelled regulatory framework governing the duty of care and liability of board members, as well as the business judgement rule. The author also intends to assess the relevance and potential impact of this framework for cooperative law, especially with reference to the interpretation of board members' duties and liability. The overall objective of the paper is to assess whether the introduced amendments fit into the convergence phenomenon and, eventually, whether they will enhance corporate governance.

a) CORPORATE GOVERNANCE MODELS AND BOARD STRUCTURES UNDER POLISH COMPANY AND COOPERATIVE LAW

Board structures and, as a consequence, corporate governance models vary. Boards can operate as one- or two-tier organs. A one-tier or a single board

¹ *Cadbury Report (Report of the Committee on the financial aspects of corporate governance)*, December 1992, section 2.5.

entrusts both management and control to the board of directors, who are vested with universal powers. In turn, a two-tier or a dual board scheme separates these functions into two distinct bodies: the management board and the supervisory board. Under Polish law, boards in companies and cooperatives operate mainly under a **dualistic model of governance**. In such a setting, the supervisory board is identified as a key actor of internal corporate governance.² To be more specific, Polish joint-stock companies (**JSC**) and almost all **cooperatives** (with minor exceptions) must have a supervisory board.³ In turn, in limited liability companies (**LLC**) the supervisory board becomes mandatory if the share capital exceeds 500.000 PLN and there are more than 25 shareholders.⁴ A simplified joint-stock company (**SJSC**), introduced in Poland in 2021, has a flexible model of governance, which allows for the introduction of a dual-board system, with a management board and, optionally, a supervisory board or a one-tier board system.⁵ If the simplified joint-stock company has a monistic model of governance, both the management of the company's affairs and supervision remain within the scope of the duties of the board of directors.⁶ A monistic model of governance can be adopted, in both company and cooperative law, also on a multinational level (*Societas Europea, Societas Cooperativa Europea*).⁷

b) SIMILARITIES BETWEEN COMPANIES AND COOPERATIVES

In 2022, the Polish legislator remodelled the legal position of the supervisory board, especially in joint-stock companies, due to extensive amendments of the Code of Commercial Companies⁸ (CCC). These amendments have been intro-

² Krzysztof Oplustil, *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej* [*Corporate governance instruments in joint-stock companies*], Warszawa 2010, 380.

³ See: Art. 381 of the CCC, as well as Art. 35 § 1 item 2 and Art. 46a of the Cooperative Law.

⁴ See: Art. 213 § 2 of the CCC. More on institutional supervision in limited liability companies: Piotr Piniór, *Nadzór wspólników w spółce z o.o. [Supervision in limited liability companies]*, Warszawa 2012, 405.

⁵ See: Art. 300(52) § 1 and 2 of the CCC. More on the model of governance applicable to simplified joint-stock companies: Adam Opalski, *Prosta spółka akcyjna – nowy typ spółki handlowej (część II)* [*Simple joint-stock company – a new type of company (part 2)*], PPH 2019/12, 6, Krzysztof Oplustil, *Zarządzanie i nadzór w systemie monistycznym w prostej spółce akcyjnej* [*Management and supervision in a monistic system in a simplified joint-stock company*], PPH 2023/9, 46.

⁶ See: Art. 300(73) § 1 of the CCC. The articles of association (or a resolution of the board) may, however, delegate business management to executive directors. In such a case, other directors (called the non-executive directors) exercise supervisory functions (Art. 300(76) § 1 of the CCC).

⁷ Act of 4 March 2005 on the European Economic Interest Grouping (EEIG) and European Company (SE), Journal of Laws 2022, item 259; Act of 22 July 2006 on the European Cooperative Society (SCE), Journal of Laws 2018, item 2043.

⁸ Act of 15 September 2000 – Code of Commercial Companies, Journal of Laws 2024, item 18.

duced only under company law; however, a comparative legal analysis involving both companies and cooperatives seems justified due to a **significant structural similarity** between the mentioned legal entities. Both companies and cooperatives should be classified as legal persons of corporate type. Moreover, many institutions of both company and cooperative law have been shaped in a similar way; the respective provisions of Cooperative Law⁹ governing the legal position of the supervisory board resemble in many aspects the ones provided for in the CCC. There are also common areas of research resulting from both the regulatory framework (i.e., relating to internal audit) and soft law.

c) RESEARCH QUESTIONS

The problem of efficiency in institutional supervision requires an international perspective involving convergence processes between the two distinguished board systems. The **convergence syndrome** consists of developing common standards of corporate governance irrespective of board structures and transplanting some elements (rules, mechanisms) primarily inherent to one board system towards another in order to improve corporate governance and internal control mechanisms; a certain convergence – within the same objective – is also visible between legal systems based on similar assumptions when it comes to board models. It is unclear how the amendments to the regulatory framework introduced in Poland in 2022 fit into the said convergence phenomenon and, eventually, whether these amendments will allow for improvement in the field of corporate governance. Among others, it is uncertain how the currently remodelled regulatory framework has influenced the **liability** of the supervisory board members (towards the company) and the **standard of due care** applicable to them. As under Cooperative Law, there is no explicit regulation on the duty of care attributable to supervisory board members, an important question concerns the standard of due care applicable to the said members. The addressed problem plays a crucial role in the field of liability for damage caused to the cooperative within wrongful (negligent) supervision. Another important research question refers to the interpretation and potential functioning of the so-called **business judgement rule** in relation to supervisory board members. It is unclear how to apply this rule in the case of the said members, given the fact that they usually perform tasks other than making business decisions.¹⁰

⁹ Act of 16 September 1982 – Cooperative Law, Journal of Laws 2024, item 593.

¹⁰ Andreas Cahn, David C Donald, *Comparative Company Law. Text and Cases on the Laws Governing corporations in Germany, the UK and the USA*, Cambridge University Press 2018, 449.

As a final introductory remark, it should be noted that the proper functioning of both companies and cooperatives has significant consequences not only for the parties involved (and their members), but also more broadly for a multiple group of **stakeholders**, including employees, customers, local and even global communities. Recurring financial crises show the importance of institutional supervision exercised in the dual board system by the supervisory board.

2. THE CONVERGENCE PHENOMENON

a) TOWARDS FLEXIBILITY IN BOARD STRUCTURES

It is claimed that **neither of the board systems is inherently better**,¹¹ there seems to be no fundamental advantage of one organizational model over another, especially when it comes to efficiency in supervision. Each of the systems (models) has its own advantages and disadvantages. Due to this observation, some jurisdictions allow for a **flexible model of governance**; the parties involved are thus empowered to choose an adequate board structure. The trend towards greater structural flexibility on the board level is visible in Europe, especially in France and Italy.¹² Also in Poland, apart from the simplified joint-stock company, it is postulated to introduce – as one of the possible scenarios for joint-stock companies and cooperatives – a monistic model of governance, both in company¹³ and cooperative law.¹⁴

b) THE ROLE (OBJECTIVE) OF CONVERGENCE AND ITS EXEMPLIFICATION

The said observation – claiming that neither of the board systems is better – also provokes the **convergence syndrome**, which has the objective to promote

¹¹ Klaus J Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, ECGI, January 2011, Law Working Paper No 170/2011, 74.

¹² Klaus J Hopt, Patrick C Leyens, *The Structure of the Board of Directors: Boards and Governance Strategies in the US, the UK and Germany*, ECGI, January 2023, Working Paper No 567/2021, 4; Hopt, Leyens, *Board Models in Europe. Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France and Italy*, ECGI, Law Working Paper No 18/2004, 21.

¹³ Adam Opalski, *Rada nadzorcza w spółce akcyjnej [The supervisory board in joint-stock companies]*, Warszawa 2006, 512.

¹⁴ Grzegorz Kozieł, *One-tier model in the cooperative operating under general rules of Polish Law as one of the options of governance of this cooperative, proposed for the law as it should be*, *Studia Prawnicze KUL* 2022/4, 98.

efficiency in corporate governance. In dual-board systems, this process consists of strengthening the strategic role of the supervisory board and improving the information flow (as these are presented as key advantages of the monistic model of governance). Due to these changes, the supervisory board is expected to be not only a supervisor and controller, but also an advisor to the management board, exercising a strategic function. In turn, in larger entities run under a monistic model of governance, the introduction of non-executive and independent directors, as well as the separation of the positions of the CEO (chief executive officer) and board chairman, can be identified as elements of the convergence phenomenon.¹⁵ Executive directors are usually employed as managers. As opposed to that, non-executive directors are not involved in running the day-to-day business.¹⁶ They play particularly important roles in matters such as risk management, financial reporting and internal financial controls. They also have significant responsibilities on the nomination, audit and remuneration committees.¹⁷ Under the UK Corporate Governance Code (principle G), the board (of premium listed companies) should include an ‘appropriate combination’ of executive and non-executive directors. Within the convergence phenomenon, there are also some common trends regarding standards of independence, expertise and diversity, board committees (esp. audit committees). Similar problems also arise with respect to mitigating conflicts of interest, self-dealing or related-party transactions. It has been held that there is a trend in Europe towards specialised rules for listed companies and growing **convergence of internal control mechanisms** independent of board structures.¹⁸

3. REMODELLED REGULATORY FRAMEWORK (POLAND, 2022)

a) INFORMATION FLOW, ADVISORS AND BOARD APPROVAL

In 2022, the Polish legislator introduced important **amendments to the regulatory framework**.¹⁹ As pointed out in the justification of the amending act,

¹⁵ Hopt, Leyens, *Board Models in Europe. Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France and Italy*, ECGI, Law Working Paper No 18/2004, 19.

¹⁶ Derek French, *Mayson, French & Ryan on Company Law*, Oxford University Press 2023, 345, Brenda Hannigan, *Company Law*, Oxford University Press 2018, 255.

¹⁷ Hannigan, *Company Law*, Oxford University Press 2018, 255.

¹⁸ Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, ECGI, January 2011, Law Working Paper No 170/2011, 19, Cahn, Donald (n10) 94.

¹⁹ Act of 9 February 2022 amending the Code of Commercial Companies and some other acts, Journal of Laws 2022, item 807. The amendment entered into force on 13 October 2022.

these amendments are intended to improve the efficiency of supervision in companies.²⁰ The new regulatory framework consists of several elements, whereby the most extensive changes affect joint-stock companies. First of all, in the field of **information flow**, the legislator introduced an obligation, on the side of the management board of joint-stock companies, to inform the supervisory board, without additional request, about certain key aspects of the company's operations (Art. 380¹ of the CCC). The newly introduced regulation is very detailed and complex. Another important element of the remodelled regulatory framework is the extension of the reporting obligations on the side of the supervisory board itself (Art. 382 § 3¹ of the CCC). Moreover, the institution of **the supervisory board advisor** is presented as a way to 'empower' the board in the process of obtaining information; novelty derives not from the possibility to appoint an advisor (because this institution was already known prior to amendments), but from the representation model. Currently, the supervisory board is authorized to represent the company when concluding a contract with a supervisory board advisor. The new regulatory framework also aims to strengthen the powers of the supervisory board in the field of **board approval**. Under the current provisions of the law (Art. 384¹ § 1 of the CCC), a so-called related-party transaction (if it exceeds a certain amount in relation to the company's total assets) requires the supervisory board's approval in private (non-listed) companies; a regulation governing related-party transactions in listed companies already existed before the said amendment. New regulations also concern the appointment of board committees and certain other elements of internal functioning (Art. 390¹ of the CCC). Some of the introduced solutions also apply to limited liability companies and simplified joint-stock companies.²¹

b) DUTY OF CARE, DUTY OF LOYALTY AND THE BUSINESS JUDGEMENT RULE

Another important element of the remodelled regulatory framework is the codification of the **duty of care**, **duty of loyalty** and the **business judgement rule** (i.e., Art. 387¹ and Art. 483 § 3 of the CCC); an amendment affecting board members in joint-stock companies and limited liability companies, as an analogous regulation already existed in the regulatory framework of simplified joint-stock companies. Currently, a supervisory board member of each company should act,

²⁰ Justification of the amendment proposal, <<https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1515>>.

²¹ Piotr Pinior, *New provisions on supervisory board under Polish Commercial Companies Code*, *Právny obzor* 105/2022 (special issue), 44.

when exercising his/her duties, with due care resulting from the professional nature of his/her activity and remain loyal to the company. Furthermore, a board member (including a supervisory board member) does not breach the duty of care if, being loyal to the company, he/she acts within the limits of justified economic risk based on the information, analyses, and opinions which should be taken into account in the given circumstances when making a diligent assessment.

4. TOWARDS EFFICIENCY IN SUPERVISION: BETWEEN CONVERGENCE AND DIVERGENCE

a) PLURALITY OF REGULATIONS IN THE FIELD OF SUPERVISION

When addressing the question whether the introduced solutions will allow for improvement in the field of corporate governance, to begin with, it should be noted that there is a visible plurality of regulations concerning supervision applicable to certain business actors among companies and cooperatives (i.e. listed companies, supervised institutions, public interest entities), resulting both from the relevant provisions of the law and soft law regulations.²² These regulations provide for numerous legal instruments and rules in the field of corporate governance, relating to (among others): audit committees, statutory auditors, related-party transactions, standards of independence and expertise, which constitute the very essence of supervision and internal control. What is also important, the above-mentioned regulations are adapted to the specific nature and size of a given corporate entity. This allows for the conclusion that for listed companies, the amendments of the regulatory framework adopted in Poland (in 2022) do not introduce revolutionary changes in the field of supervision; the situation seems substantially different when it comes to private (non-listed) companies.²³

²² This includes, among others: the Act of 29 September 1994 on accounting (Journal of Laws 2023, item 120), applicable to both companies and cooperatives, the Act of 11 May 2017 on statutory auditors, audit firms, and public oversight (Journal of Laws 2024, item 1035), applicable to public interest entities, the Act of 29 July 2005 on public offering, conditions governing the introduction of financial instruments to organized trading and listed companies (Journal of Laws 2024, item 620), applicable to listed companies, as well as soft law regulations, such as: *Best Practice for GPW listed companies 2021* <https://www.gpw.pl/pub/GPW/files/PDF/dobre_praktyki/en/DPSN2021_EN.pdf>, GPW – Warsaw Stock Exchange) and *Principles of corporate governance for supervised institutions* <https://www.knf.gov.pl/knf/en/komponenty/img/principles_of_corporate_governance_39736.pdf>.

²³ Michał Romanowski, Piotr Haiduk, *Ocena przepisów poświęconych funkcjonowaniu Rad Nadzorczych w związku z projektem ustawy – o zmianie ustawy – Kodeks spółek handlowych oraz*

b) RELATED-PARTY TRANSACTIONS

Moreover, the amended regulatory framework (Poland, 2022) – which can be seen as a paradox – is to some extent **divergent**; the existing trend towards growing convergence of internal control mechanisms independent of board structure is observed and identified in relation to listed companies and not to companies of all types. For example, the regulation on **related-party transactions** – applicable to private companies (Art. 384¹ of the CCC) – differs from the regulation adopted in § 111b of the *Aktiengesetz* (applicable to listed companies; *börsennotierte Gesellschaften*). Also under UK law, despite a different method applied in order to safeguard the fairness of related-party transactions (shareholder approval), the mechanism relates to listed companies (with a premium listing), in accordance with FCA²⁴ Listing Rules.²⁵ This raises the question whether the remodelled regulatory framework – which applies to all companies of a given type – will enhance and strengthen corporate governance or rather have a contrary effect. It can be argued that a regulation that is ‘divergent’ in nature – imposing extensive and strict obligations on private (non-listed) companies – is too burdensome for these entities and, as a consequence, will not enhance efficiency in institutional supervision. It can be argued that a model regulation in the field of institutional supervision – applicable to all companies regardless of their character and type – is not needed and that the ‘one size fits all’ approach adopted by the legislator is incorrect.

c) DUTY OF CARE AND LIABILITY OF BOARD MEMBERS

In turn, the codification of the duty of care, of the duty of loyalty and of the business judgement rule can be viewed as an important element of the **convergence phenomenon**. With regard to the **duty of care** and duty of loyalty, the relevant provisions of the law in this field are identical (e.g., in joint-stock companies: Art. 377¹ and Art. 387¹ of the CCC), regardless of management board or supervisory board member status. This fits into an international trend; under UK law all directors owe specific duties to the company; duty to promote the success of the company (art. 172 CA²⁶ 2006), duty to exercise reasonable care, skill and diligence (sec 174 CA 2006); it is even held that the distinction between executive

niektórych innych ustaw [Assessment of the provisions on the functioning of Supervisory Boards with regard to the draft Act amending the Commercial Companies Code and certain other acts], 26.

²⁴ FCA – Financial Conduct Authority.

²⁵ Hopt, Leyens, *The Structure of the Board of Directors: Boards and Governance Strategies in the US, the UK and Germany*, ECGI, January 2023, Working Paper No 567/2021, 24.

²⁶ Companies Act 2006 (CA 2006).

and non-executive directors has no significance in company law.²⁷ Under German law, the situation is somewhat different; the regulation on the duty of care (*Sorgfaltspflicht*) and on some elements of the duty of loyalty (*Treupflicht*) provided for in § 93 of the *Aktiengesetz*²⁸ and § 34 of the *Genossenschaftsgesetz*²⁹ is designed for management board members; however, the said regulations apply, by analogy, also to supervisory board members of joint-stock companies or cooperatives (§ 116 of the *Aktiengesetz* and § 41 of the *Genossenschaftsgesetz*). Regardless of the differences observed, the Polish codification of the duty of care and of the duty of loyalty can be viewed not only as an element of the convergence phenomenon, but also as an important instrument towards efficiency in supervision. Under the remodelled regulatory framework, there are significantly more arguments to support the position that the (mere) breach of the duty of care and of the duty of loyalty is to be viewed as illegal;³⁰ as a consequence, a board member may be held liable for damage caused to the company which results (solely) from the breach of the said duties.³¹ This allows for the conclusion that the remodelled regulatory framework leads to the improvement in the field of corporate governance; it gives a chance to broaden liability of board members (Art. 483 § 1 of the CCC), including supervisory board members, and to abolish the unfortunate concept supported by a part of the Polish jurisprudence, which – for a long time – held that board members are not liable for damage caused to the company which results from the (mere) breach of the duty of care; the said breach was, according to this standpoint, relevant only for the estimation of the fault of a board member.³² Under the currently remodelled regulatory framework, the obligation to act with due care seems to have a dual function; firstly, the abuse of the statutory duty of care (objective standard) constitutes a prerequisite of a board member's liability for damage caused to the company, as such abuse is to be viewed as illegal. In addition to that, the breach of the duty of care is also relevant for the estimation

²⁷ French, *Mayson, French & Ryan on Company Law*, Oxford University Press 2023, 345.

²⁸ The German Stock Corporation Act (AktG) of 6 September 1965.

²⁹ The German Cooperative Law (*Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften*, GenG) of 1 May 1889.

³⁰ Piniór, *Duty of loyalty and due care of the board member under Polish law*, *Review of European and Comparative Law* 2022/4, 20.

³¹ That opinion was presented also before the amendment of the regulatory framework which led to the codification of the duty of care and the duty of loyalty. See Adam Opalski, Krzysztof Oplustil, *Niedochowanie należytej staranności jako przesłanka odpowiedzialności cywilnoprawnej zarządców spółek kapitałowych [Breach of the duty of care as a ground for civil liability of company's directors]*, PPH 2013/3, 17.

³² See the Polish Supreme Court's judgements: of 9 February 2005 (V CSK 128/05, TPP [Transformacje Prawa Prywatnego] 2006/2/133), of 24 September 2008 (II CSK 118/08, OSNC 2009/9/131). A significant change in this jurisprudence was introduced within the Supreme Court's judgement of 24 July 2014 (II CSK 627/13, OSNC-ZD 2015/4/61).

of the fault; as a consequence of that, a board member may be freed from the said liability by proving that in the given circumstances, the required standard of due care was upheld and that he/she exercised all the diligence necessary in the given situation.³³

Despite this general remark, it should be noted that there are significant differences in the exact wording of the relevant provisions of the CCC governing liability of board members in companies of the given type (LLCs, JSCs and SJSCs). In JSCs, LLCs and cooperatives, the relevant provisions of the CCC and Cooperative Law refer to the breach of the law or to the breach of the provisions of the statutes (the articles of association) (see: Article 293 § 1, 483 § 1 of the CCC, and Article 58 of the Cooperative Law). In turn, the regulatory framework governing SJSCs refers to the failure to perform or improper performance of a board member's duties, including failure to exercise due care resulting from the professional nature of his/her activity or failure to maintain loyalty (Article 300(125) § 1 of the CCC). These differences can be interpreted as the legislator's intention to establish **different prerequisites of the said liability**, depending on the type of entity in question.³⁴ *Prima facie* the said liability would appear stricter in simplified joint-stock companies (as opposed to joint-stock companies, limited liability companies and cooperatives). Such a conclusion must be seen as a paradox, given the fact that the SJSC has been designed for start-ups and innovative entrepreneurship. From a comparative perspective, the regulatory framework governing liability of board members in simplified joint-stock companies very much resembles directors' liability for the breach of duty under German and UK law and can be viewed as a part of the convergence phenomenon. As mentioned earlier, under the current provisions of the CCC, there are important arguments to support the position that board members are liable for the damage caused to the company resulting from the breach of their duties (including the duty of care) also in LLCs and JSCs, as such conduct can be interpreted as illegal within the meaning of Article 293 § 1 and Article 483 § 1 of the CCC (also Article 58 of the Cooperative Law). A differentiation of the legal status (situation) of board members in SJSCs, as opposed to LLCs and JSCs, is not justified; however, for avoidance of

³³ Some scholars claim, however, that in such a setting, a board member can no longer be exempt from liability towards the company; the introduction of an 'absolute' (unlimited) liability is argued. This is due to the fact that by proving a violation of the duty of care (by the claimant), a board member (acting as the defendant) is deprived of the possibility to prove the contrary. See Jacek Jastrzębski, *W sprawie odpowiedzialności członków organów spółek kapitałowych [On the liability of corporate directors and officers]*, PPH 2013/7, 20.

³⁴ Paweł Słup, *Odpowiedzialność cywilna członków organów wobec prostej spółki akcyjnej [Civil Liability of Members of Governing Bodies Towards a Simple Joint Stock Company (Part 2)]*, PPH 2023/3, 22.

confusion, the respective provisions of the law should be unified, in accordance with the standard applicable to SJSCs (Article 300(125) § 1 of the CCC) which establishes a broad concept of board members' liability.

d) IMPLICATIONS FOR COOPERATIVE LAW

As far as cooperative law is concerned, it is uncertain how to interpret the current regulatory framework with regard to board members' duty of care, as no explicit regulation referring to this concept is provided for in the Cooperative Law. Given the lack of regulation, it is also crucial to examine how to supplement the existing regulatory framework for the future; the most relevant question concerns the standard of due care applicable to board members. *De lege lata*, despite a uniform regulation on board members' liability for damage caused to the cooperative (Article 58 of Cooperative Law), the applicable standard of due care should be differentiated, depending on the actual status of a given board member. In case of supervisory board members – who, by force of the law, must be chosen from among the cooperative's members³⁵ – the standard of due care will be usually established in accordance with the general rule resulting from Article 355 § 1 of the Civil Code; the applicable standard is thus of ordinary (average) nature and appears to be less strict than the professional one established for companies' board members. If, however, a cooperative's board member (especially a management board member) exercises his/her function as a professional, the applicable standard of due care should be estimated in accordance with the professional rule introduced in Article 355 § 2 of the Civil Code; such board member is obliged to act with due care resulting from the professional nature of his/her activity, despite no explicit rule on that higher standard in Cooperative Law.³⁶ *De lege ferenda*, in order to enhance efficiency of supervision and corporate governance in cooperatives, a uniform and strict regulation should be introduced, analogous to that provided for supervisory board members of companies in Article 387¹ of the

³⁵ See Art. 45 § 2 of the Cooperative Law.

³⁶ A different position on this topic was presented by the Supreme Court in the judgement of 27 September 2023, II PSKP 3/23, OSNP 2024/3/28, where it was held that the standard of due care applicable to management board members of a cooperative should be established in accordance with the general rule resulting from Art. 355 § 1 of the Civil Code, and not with reference to the professional standard established in Art. 355 § 2 of the Civil Code. According to the Supreme Court, this is due to the fact that under Cooperative Law, there is no specific regulation on the standard of due care applicable to board members, analogous to that provided for in Art. 293 of the CCC. The presented standpoint can be disputed, especially when it comes to board members professionally exercising their function. There seems to be little justification for the general approach adopted by the Supreme Court.

CCC. The respective provisions of Cooperative Law should state explicitly that a board member (including a supervisory board member), when exercising his/her duties, must act with due care resulting from the professional nature of his/her activity and remain loyal to the cooperative. Such regulation would also apply to board members who are chosen from among cooperatives' members, imposing a strict standard of conduct (i.e., in the field of supervision). Moreover, under the Cooperative Law, the legislator should also provide for a regulation according to which a violation of the statutory duties (i.e., the duty of care and the duty of loyalty) may result in liability of a cooperative's board member.³⁷

e) TOWARDS A STRICTER STANDARD OF DUE CARE

As a separate remark, it should be noted that the remodelled regulatory framework governing the powers and duties of the supervisory board may increase the standard of due care applicable to supervisory board members under company law, especially in joint-stock companies. This is due to the fact that the supervisory board has currently gained new legal instruments which allow it to overcome the so-called information asymmetry, as provided for in Article 380¹ of the CCC, which imposes on the management board the obligation to inform the supervisory board about certain key aspects of the company's operations. Given the fact that the standard of due care applicable to the company's board members is of a professional nature, a prudent and skilful supervisory board member is expected to examine and investigate the relevant information, which he/she has currently broad access to. Moreover, the attribution of the power to represent the company in the contract to be concluded with a supervisory board advisor is designed as an instrument of the board's 'empowerment' in the process of obtaining the relevant

³⁷ However, it can be argued that also under the currently existing regulatory framework (Art. 58 of Cooperative Law), a board member (including a supervisory board member) should be held liable for damage caused to the cooperative which has resulted from the breach of statutory duties. An analogue position was supported under company law (before the amendment of the regulatory framework) by the Supreme Court in the judgement of 24 July 2014 (II CSK 627/13, OSNC-ZD 2015/4/61). When elaborating that judgement and applying its argumentation towards cooperatives, it must be noted that, on the one hand, a board member (including a supervisory board member) may be held liable only for damage caused by acts or omissions in breach of the law or the provisions of the statutes. However, when estimating compliance with the law, also statutory obligations towards the cooperative must be taken into account. The supervisory board is obliged to exercise supervision and control over all areas of the cooperative's activity (Art. 44 of Cooperative Law). When exercising that function, a supervisory board member shall act prudently and in the cooperative's best interest; actions contrary to that interest violate the general rule specified in Art. 44 of Cooperative Law and constitute sufficient grounds for a board member's liability in accordance with Art. 58 of the Cooperative Law.

knowledge and information, which, as a consequence, may increase the applicable standard of due care. Currently, under the remodelled regulatory framework, the supervisory board can seek additional (external) knowledge relevant for the supervision process, irrespective of the management board's approval of the contract (to be concluded with the supervisory board's advisor).

f) THE BUSINESS JUDGEMENT RULE

Finally, as far as the **business judgement rule** is concerned, as pointed out earlier, the application of the said rule towards supervisory board members may differ depending on the type of power executed by the supervisory board.³⁸ When it comes to representing the company in contracts with management board members, as well as board approval, the application of the business judgement rule is similar, as in the case of management board members. Under German law, the business judgement rule is limited to 'business decisions' (*unternehmerische Entscheidungen*), which narrows the applicable scope of the said rule towards supervisory board members.³⁹ Since under Polish law, the business judgement rule is not limited to business decisions, there seems to be more room for the application of the said rule also when executing (mere) supervisory functions. The business judgement rule allows to release supervisory board members from liability for damage caused to the company within the supervision process, if that process – although estimated *ex post* as wrong and harmful to the company – was conducted with diligence, which involves, among others, collecting the relevant information, analyses and opinions which should be taken into account in the given circumstances when making a diligent assessment of the company's activities. The said rule – applicable to supervisory board members – allows to create a certain balance; the standard of liability seems currently strengthened, but at the same time, a supervisory board member may be exempt from the said liability, if within the supervision process he/she acted prudently. As mentioned earlier, the obligation to act with due care currently has a dual function; a potential breach of the said duty is also relevant for the estimation of the fault. In the given circumstances, when proving that no fault is attributable to a supervisory board member, he/she may question having substantial access to the relevant information on the company's activities, or even argue disinformation on the side of the management

³⁸ Cahn, Donald (n 10) 449.

³⁹ Judgement of the German Federal Court of Justice (Bundesgerichtshof, BGH), 21 April 1997, II ZR 175/95, known as *ARAG v Garmenbeck*. See also L. Strohn, *Pflichtenmaßstab und Verschulden bei der Haftung von Organen einer Kapitalgesellschaft*, Corporate Compliance Zeitschrift, 2013/5, 177.

board. Despite the codification of the management board's obligation to inform the supervisory board on different aspects of the company's activity, it may turn out, in the given case, that the supervisory board is regularly 'flooded' with thousands of documents containing irrelevant information or that some documents (the relevant ones) are kept hidden. In such a case, the proper execution of the supervisory function becomes substantially difficult or even impossible, also for a prudent, skilful and diligent supervisory board member. Moreover, in the given circumstances, when proving that no fault is attributable to a supervisory board member, he/she may show opinions and analyses collected within the supervision process, which would be relevant for the estimation of the correctness of the said process. As pointed out earlier, the supervisory board is currently empowered to represent the company when concluding a contract with a supervisory board advisor, which *prima facie* makes it easier for that board to gain additional knowledge (collect the relevant information, analyses and opinions). However, it might not be the case, due to limitations of the said power provided for in the statutes and/or actual (mis)conduct of the management board. In the given case – where the proper execution of the supervisory function required additional (external) knowledge relevant for the supervision process – a supervisory board member may argue that he/she was unable to make a diligent assessment of the company's activities due to the fact that the power to represent the company in the contract to be concluded with a supervisory board's advisor was excluded by the statutes and the management board refused to sign such a contract. In the given circumstances, this may lead to the conclusion that no fault is attributable to a supervisory board member.

As far as cooperative law is concerned, there is an important gap in this field. Similarly, as is the case in company law, the business judgement rule should also be codified under cooperative law. The respective provisions of Cooperative Law should state explicitly that a cooperative's board member (including a supervisory board member) does not breach the duty of care if, being loyal to the cooperative, he/she acts within the limits of justified economic risk based on the information, analyses, and opinions which should be taken into account in the given circumstances when making a diligent assessment.

5. CONCLUSIONS

To sum up, the following conclusions should be formulated:

1. A model regulation in the field of institutional supervision – applicable to all companies and cooperatives, regardless of their character and type

- is not needed. The growing convergence of internal control mechanisms independent of board structures, aimed at increasing efficiency in corporate governance, and observed within other jurisdictions, has a very narrow scope of application and is not of a general nature.
- 2. The codification of the duty of care and of the duty of loyalty can be viewed as an important element of the convergence phenomenon and as an instrument towards efficiency in supervision. Such codification affects and broadens the scope of liability of board members.
- 3. The remodelled regulatory framework governing powers and duties of the supervisory board in company law may increase the standard of due care applicable to supervisory board members.
- 4. The standard of due care applicable to supervisory board members and the business judgement rule should be codified under cooperative law.

REFERENCES

- Andersen PK, Andersson JB, *European Model Companies Act*, Nordic and European Company Law. LSN Research Paper Series 2017
- Beuthien V, Schöpflin M, Wolff R, *Genossenschaftsgesetz*, München 2018
- Błaszczak P, *Koncepcja „biznesowej oceny sytuacji” na tle prawa polskiego (uwagi de lege lata i de lege ferenda)* [*The business judgement rule under Polish law (de lege lata and de lege ferenda comments)*], Państwo i Prawo 2012/3
- Cadbury A, *Report of the Committee on the Financial Aspects of Corporate Governance*, December 1992
- Cahn A, Donald DC, *Comparative Company Law. Text and Cases on the Laws Governing corporations in Germany, the UK and the USA*, Cambridge University Press 2018
- Davies PL, Hopt KJ, *Board in Europe – Accountability and Convergence*, ECGI, Working Paper No 205/2013
- Davies PL, Worthington S, Hare Ch, *Gower Principles of Modern Company Law*, Thomson Reuters 2021
- French D, *Mayson, French & Ryan on Company Law*, Oxford University Press 2023
- Gordon JN, *Convergence and Persistence in Corporate Law and Governance*, European Corporate Governance Institute, Working Paper No 370/2017
- Hannigan B, *Company Law*, Oxford University Press 2018
- Hopt KJ, *Comparative Corporate Governance: The State of the Art and International Regulation*, ECGI, January 2011, Law Working Paper No 170/2011
- Hopt KJ, Leyens PC, *Board Models in Europe. Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France and Italy*, ECGI, Law Working Paper No 18/2004

Hopt KJ, Leyens PC, *The Structure of the Board of Directors: Boards and Governance Strategies in the US, the UK and Germany*, ECGI, January 2023, Working Paper No 567/2021

Jastrzębski J, *W sprawie odpowiedzialności członków organów spółek kapitałowych [On the liability of corporate directors and officers]*, PPH 2013/7

Jungmann C, *The Effectiveness of Corporate Governance in One-Tier and Two-Tier Board Systems – Evidence from the UK and Germany*, *European Company and Financial Law Review*, 2006, Vol 3, issue 4

Kozieł G, *One-tier model in the cooperative operating under general rules of Polish Law as one of the options of governance of this cooperative, proposed for the law as it should be*, *Studia Prawnicze KUL* 2022/4

Kucharski B, *Business judgement rule – kwestia bezprawności czy winy [Business judgement rule – question of unlawfulness or fault]*, PPH 2023/10

Opalski A, *Rada nadzorcza w spółce akcyjnej [The supervisory board in joint-stock companies]*, Warszawa 2006

-- *Prosta spółka akcyjna – nowy typ spółki handlowej (część II) [Simple joint-stock company – a new type of company (part 2)]*, PPH 2019/12

--, Oplustil K, *Niedochowanie należytej staranności jako przesłanka odpowiedzialności cywilnoprawnej zarządców spółek kapitałowych [Breach of the duty of care as a ground for civil liability of company's directors]*, PPH 2013/3

Oplustil K, *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej [Corporate governance instruments in joint-stock companies]*, Warszawa 2010

--, *Zarządzanie i nadzór w systemie monistycznym w prostej spółce akcyjnej [Management and supervision in a monistic system in a simplified joint-stock company]*, PPH 2023/9

Pietrzykowski K (ed), *System Prawa Prywatnego. Tom 21. Prawo spółdzielcze [Private Law System. Part 21. Cooperative Law]*, Warszawa 2020

Piniór P, *New provisions on supervisory board under Polish Commercial Companies Code*, *Právny obzor* 105/2022 (special issue)

--, *Duty of loyalty and due care of the board member under Polish law*, *Review of European and Comparative Law* 2022/4

Romanowski M, *Natura spółki jako determinanta jej ustroju i funkcji jej władz – kilka refleksji [The nature of the company as a determinant of its structure and the functions of its authorities - some reflections]*, in K Bilewska (ed), *Efektywność zarządzania i nadzoru w spółce handlowej. W poszukiwaniu optymalnego modelu ustroju spółki [Effectiveness of management and supervision in a commercial company. In search of an optimal company structure]*, Warszawa 2018

--, Haiduk P, *Ocena przepisów poświęconych funkcjonowaniu Rad Nadzorczych w związku z projektem ustawy – o zmianie ustawy – Kodeks spółek handlowych oraz niektórych innych ustaw [Assessment of the provisions on the functioning of Supervisory Boards*

with regard to the draft Act amending the Commercial Companies Code and certain other acts]

Schmidt K, *Gesellschaftsrecht*, Köln 2022

Strohn L, *Pflichtenmaßstab und Verschulden bei der Haftung von Organen einer Kapitalgesellschaft*, *Corporate Compliance Zeitschrift*, 2013/5

Słup P, *Odpowiedzialność cywilna członków organów wobec prostej spółki akcyjnej* [*Civil Liability of Members of Governing Bodies Towards a Simple Joint Stock Company (Part 2)*], PPH 2023/3

Monika Szwarc

Institute of Law Studies, Polish Academy of Sciences

e-mail: monika.szwarc@inp.pan.pl

ORCID:0000-0001-7885-8021

**THE PROVISION OF SERVICES
IN THE EU INTERNAL MARKET
VIA COLLABORATIVE ECONOMY PLATFORMS
AND PROTECTION OF CONSUMERS:
ACTORS, OBLIGATIONS AND ENFORCEMENT**

Abstract

The objective of this article is to present the EU rules regarding the protection of consumers' rights in the context of the provision of services in the EU internal market with the intermediation of collaborative economy platforms. The first approach to collaborative economy platforms entering the EU internal market focused on specific challenges posed by the triangular configuration of economic relationships of actors involved in the provision of services via such platforms (European Commission communication of 2016). This sector-specific approach of reflection shifted soon afterwards to a more general and overarching approach to all online platforms and even more general – to providers of information society services. After almost fifteen years of the presence of collaborative economy platforms in the EU internal market, it seems important to present the synthesis of this evolution of the EU approach and the resulting EU regulatory scheme. As a starting point, the article takes the challenges identified by academia and the EU institutions concerning the protection of consumers' rights in contracts concluded with the intermediary of collaborative economy platforms, including: the legal classification of the actors involved in collaborative economy platforms as 'consumers' and 'traders', terms which are crucial for the application of the EU rules on consumer protection; the

obligations of such platforms and the providers of underlying services in their relations with consumers; the division of liability between the collaborative economy platform and the provider of the underlying service in their relations with the consumer; and, last but not least, the role of collaborative economy platforms in enforcing the obligations of underlying service providers. These issues are presented with due account of the evolution of EU law since collaborative economy platforms appeared in the EU internal market. The article starts with a short presentation of collaborative economy platforms in the EU internal market and the challenges this posed for the application of EU law at the time. Then, the article investigates the EU law as it stands at present regarding the actors in the collaborative economy model from the traditional perspective in EU consumer law, distinguishing between a ‘consumer’ and a ‘trader’, and the obligations of collaborative economy platforms and providers of the underlying services in their relations with consumers. The final part scrutinises the relations between collaborative economy platforms and providers of the underlying services in terms of enforcement.

KEYWORDS

collaborative economy platforms, consumer protection, providers of information society services, providers of intermediary services, Digital Services Act

SŁOWA KLUCZOWE

platformy gospodarki współdzielenia, ochrona konsumentów, dostawcy usług społeczeństwa informacyjnego, dostawcy usług pośrednictwa, ustawa o usługach cyfrowych

1. INTRODUCTION

EU consumer law is based on the traditional assumption that a consumer is a party to a contract who is weaker than a supplier of goods or provider of services (normally acting within the framework of their professional activities), and that such imbalance results in structural information asymmetries between market participants, which in turn becomes an obstacle to the efficient allocation of economic resources.¹ As a result, EU consumer policy is founded on the distinction between the two parties to a contract: a ‘consumer’, who is acting outside their business activity, and a ‘trader’, who is a professional actor in the economic

¹ Rolf H Weber, ‘From Disclosure to Transparency in Consumer Law’, in Klaus Mathis, Avishalom Tor (eds), *Consumer Law and Economics*, Cham: Springer International Publishing 2021, 74.

interaction (contract). Even in the first EU laws aiming to protect consumers (as weaker parties in contracts with traders), the focus was on the traders' information obligations to rebalance the information asymmetry and allow consumers to make informed choices.

It proved very difficult to fit into this legal classification the phenomenon of collaborative economy platforms, which appeared on the EU internal market in 2011. At that time, the Uber enterprise (incorporated in the USA in 2008) launched its operations in Paris. This new business model featured a smartphone application/website (made available by Uber to its users) serving as an intermediary tool between short-term/occasional drivers offering transportation and persons looking for local, occasional transport services. The second most visible example of this business model has been Airbnb (established in the USA in 2009 and registered in Ireland), which offers intermediary services between people offering short-term rental of accommodation and people searching for such type of accommodation. In both examples, providers of the underlying services (transport or accommodation) were not necessarily professionals running their own businesses, because this business model is based on a specific configuration of economic partners, where the exchange of services is facilitated by an online platform that creates an open marketplace for temporary services provided by business entities as well as private individuals. There are three categories of actors involved: providers of the underlying services, who share assets, resources, time and/or skills (these can be service providers acting in their professional capacity or private individuals offering services on an occasional basis); recipients of the underlying services; and intermediaries that connect – via an online platform – providers with users and facilitate transactions between them.² The most disruptive feature of this business model is that the underlying services can be offered by professional actors as well as natural persons, for whom such services are not necessarily the main field of economic activity. Due to the use of the internet as intermediary tool, this exchange of services became feasible on a considerably larger scale than before, including cross-border contracts in the internal market. As a result, the exchange of services provided for remuneration involved business actors as well as the so-called 'peers'. The model of business-to-consumer contracts (B2C) and business-to-business contracts (B2B) has been expanded with peer-to-peer (P2P) and platform-to-business (P2B) types. This constellation of economic actors involved in the collaborative economy clearly disrupted the traditional approach based on 'bipolar' contractual relationships between a trader and a consumer, and was thus

² See e.g. Vassilis Haztopoulos, *The Collaborative Economy and EU Law*, Chapter 1, Oxford–Portland, Hart Publishing 2018; Marco Inglesse, *Regulating the Collaborative Economy in the European Union Digital Single Market*, Chapter 2, Cham: Springer International Publishing 2019.

called a ‘triangular’ model.³ The European Commission named such platforms *collaborative economy platforms*, which considered their role and functions first, in the more general context of the internal market⁴ and then in more detail, in a Communication dedicated to them.⁵

For the purpose of this article, collaborative economy platforms are defined as ‘internet-based tools that enable transactions between people providing and using a service’.⁶ Undoubtedly, collaborative economy platforms are just one category of a more general group of online platforms (which, in turn, are part of a vast group of providers of information society services).⁷ This categorisation has been confirmed in the Digital Services Act (DSA),⁸ which introduced new obligations for all providers of intermediary services in the EU internal market, including

³ Christoph Busch and others, ‘The Rise of the Platform Economy: A New Challenge for EU Consumer Law?’, *Journal of European Consumer and Market Law* 2016, No 1, 4.

⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Upgrading the Single Market: More opportunities for people and business, COM/2015/0550, 3.

⁵ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘A European agenda for the collaborative economy’, COM (2016) 356 final. Consumer protection was also considered in the context of online platforms in general. See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, COM/2016/0288, 11; European Parliament, Resolution of 15 June 2017 on online platforms and the digital single market, OJ C 331, 18/09/2018, 135.

⁶ Flash Eurobarometer, *The Use of Collaborative Platforms*, 438 (2016), 2. See also the definition of ‘collaborative economy platform’ in the Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, European Commission SWD (2020) 348 final, Part 1, 2: ‘an online platform ensuring an open marketplace for the temporary usage of goods or services often provided by private individuals. Examples include temporary accommodation platforms, ride-hailing or ride-sharing services’. It must be noted, however, that including in this definition the temporary usage of goods is misleading, because in such a business model the usage of a good (an apartment) is in fact a service of accommodation.

⁷ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘A Digital Single Market Strategy for Europe’, COM (2015) 192. For an analysis, see Claire Bury, Irene Roche Laguna, Tinkering or Fundamental Overhaul? The Past, the Present and the Future of the Digital Single Market, in Sacha Garben, Inge Govaere (eds), *The Internal Market 2.0.*, Oxford: Hart Publishing 2020, 233–258.

⁸ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27/10/2022, 1–102.

online platforms⁹ (collaborative economy platforms being one type). However, the main feature that makes such platforms stand out from all the other online platforms is that they mediate in contracts between users who offer underlying services (accommodation, transport, maintenance or cleaning, translation, etc., provided in real life) and users who search for such services.

It is worth noting that the phenomenon of collaborative economy platforms was principally analysed from the perspective of their freedom to provide services in the internal market (Article 56 TFEU), which included 1) the possibility of such a platform registered in one Member State accessing the markets for services in other Member States and 2) the scope of Member States' competence to restrict such access, when justified by important reasons of public interest.¹⁰ Other perspectives were also discussed, such as those focussing on the protection of individuals and businesses who are parties to contracts for the underlying services: 1) data protection for all persons engaged in the exchange of services; 2) protection for recipients of intermediary services in relations with a collaborative economy platform (both parties to contracts for underlying services); 3) protection for providers of the underlying services in relations with a collaborative economy platform (whether self-employed or working under the supervision of an employer); and 4) protection for recipients of an underlying service in relations with the providers of the service, with the central question being whether EU consumer protection law applies.¹¹ As can be seen, the legal implications of this business model appearing on the EU internal market seemed quite significant in many different aspects. This article focuses on collaborative economy platforms interfering with consumer protection in the internal market.

In its first reflection (2016) on the effects that collaborative economy platforms brought about in the legal framework of the EU internal market, the European Commission stated: 'Traditionally, EU consumer and marketing legislation has been designed to address transactions in which there is a weaker party that needs

⁹ An 'online platform' is defined as 'a hosting service that, at the request of the recipient of the service, stores and disseminates information to the public, unless the activity is minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation', Article 3(i) of the DSA.

¹⁰ See further Monika Szwarc, 'EU Law and the Member States' Competence to Regulate the Operation of Collaborative Economy Platforms – Where Do We Stand after the Digital Services Act', *European Business Law Review* 35, No 2 (2024).

¹¹ Hatzopoulos (n 2); Inglese (n 2).

to be protected (typically the consumer). However, the collaborative economy blurs the lines between consumers and businesses since there is a multisided relationship that may involve business-to-business, business-to-consumer, consumer-to-business, and consumer-to-consumer transactions. In these relationships, it is not always clear who the weaker party requiring protection may be.¹² The EU institutions agreed that the main benefits for users (including consumers) of the collaborative economy were access to new services, a greater range of services and lower prices, while it recognised risks connected with fair trading.¹³ As identified by the European Commission in 2016, the most important issues from the perspective of collaborative platform users were 1) uncertainty as to who is responsible if a problem arises while the services are being provided; 2) the trust and reliability of the service provided by peers through the platform; and 3) the fact that the services on offer do not meet consumers' expectations.¹⁴ The main instrument to increase consumer confidence in general and trust in peer-to-peer services specifically, according to the EC, was trust-building mechanisms, such as online rating and review systems developed by the collaborative platforms themselves or by specialist third parties.¹⁵ At that time (2016), it seemed that due to the triangular configuration of economic and legal relationships between actors involved in the provision of services in the collaborative economy model, it would deserve a sector-specific reflection and possibly – specific legal reaction at the EU level. Nonetheless, it soon became clear that the discussion within the EU institutions shifted from a specific focus on this particular category of platforms towards more general deliberations on the role of providers of information society services, of which collaborative economy platforms are just one category. The provision of services in the EU internal market with the intermediation of collaborative economy platforms nowadays

¹² COM (2016) 356 final, 9.

¹³ OECD, *Protecting Consumers in Peer Platform Markets: Exploring the Issues*, 2016, COM (2016) 356, 2; see also European Parliament, Resolution of 15 June 2017 on a European Agenda for the collaborative economy, OJ C 331, 18/09/2018, 125, para 2; Opinion of the European Committee of the Regions – A European framework for regulatory responses to the collaborative economy, OJ C 79, 10/03/2020, 40, para 5.

¹⁴ Commission Staff Working Document, accompanying the document 'A European agenda for the collaborative economy', SWD (2016) 184 final, 5, on the basis of the Eurobarometer survey; see also OECD, *Trust in peer platform markets: Consumer survey findings*, 2016.

¹⁵ COM (2016) 356 final, 10; supported by the European Economic and Social Committee, Opinion of the European Economic and Social Committee on 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European agenda for the collaborative economy', OJ C 75, 10/03/2017, 33, para 4.3.5.

fits into the overarching legal approach addressed to all providers of information society services, which resulted in the Digital Services Act. At the preparatory stage, one of the risks identified as connected with the functioning of the Digital Single Market was illegal online activities, including ‘the provision of illegal services such as non-compliant accommodation services on short-term rental platforms, illegal marketing services, services infringing consumer protection provisions, or non-respect for extended producer responsibility obligations’.¹⁶ In addition, because collaborative economy platforms were recognised as ‘traders’ for the purposes of the EU rules on consumer protection, the amendments introduced after the New Deal for Consumers¹⁷ to strengthen consumer protection in the online environment also applied to such platforms. This objective was to be attained by improving transparency in B2C contracts concluded via online marketplaces. Such modifications were supplemented with updated guidelines for the interpretation of Directive 2005/29 and Directive 2011/83. In the recent 2020 New Consumer Agenda, the European Commission recognised the Digital Services Act as a tool to protect consumers, stating that it ‘will ensure that consumers are protected effectively against illegal products, content and activities on online platforms as they are offline’.¹⁸

The objective of this article is to present the EU rules regarding the protection of consumers’ rights in the context of the provision of services in the EU internal market with the intermediation of collaborative economy platforms. As can be seen, there was an important shift of reflection from sector-specific to more general, overarching all online platforms and even more general – to providers of information society services. After almost fifteen years of the presence of collaborative economy platforms in the EU internal market, it seems important to present the synthesis of this evolution of the EU approach and resulting EU regulatory

¹⁶ European Commission, Commission staff working document, Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, SWD (2020)348 final, Part 1/2, 12; European Commission, Commission staff working document, Impact Assessment Report, Annexes, accompanying the document Proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, SWD (2020)348 final, Part 2/2, 85.

¹⁷ Outlined in European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A new deal for consumers, COM (2018) 183.

¹⁸ European Commission, Communication from the Commission to the European Parliament and the Council, New consumer agenda strengthening consumer resilience for sustainable recovery, COM (2020) 696, 10–11.

scheme, starting with the E-commerce Directive,¹⁹ then modifications introduced to Directive 2005/29²⁰ and Directive 2011/83,²¹ and finally the DSA.²²

These considerations may be reframed as assessing who is a *trader* and who is a *consumer* – crucial for deciding whether the EU consumer law applies, the duties of such platforms and the providers of the underlying services in their relations with consumers, the division of liability between the collaborative economy platform and the provider of the underlying service²³ and, last but not least, the role of collaborative economy platforms in the context of enforcing the obligations of the underlying service providers. The article is structured so as to present answers to these issues.

2. WHO IS WHO IN COLLABORATIVE ECONOMY PLATFORMS

Firstly, let us recall that the EU rules on consumer protection apply only to any natural person who, in the context of a particular contract, ‘is acting for purposes which are outside his trade, business, craft or profession’.²⁴ It must be a natural person.²⁵ The concept of a *consumer* is ‘objective in nature and

¹⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market, OJ L 178, 17/07/2000, 1–16.

²⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11/06/2005, 22–39.

²¹ Article 2(1) of Council Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304, 22/11/2011, 64–88.

²² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27/10/2022, 1–102.

²³ Busch and others (n 3) 5–7; OECD, ‘Protecting consumers in peer platform markets: Exploring the issues’, OECD Digital Economy Papers 2016, No 253, 23–24.

²⁴ Article 2(a) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11/26/005, 22–39; Article 2(1) of Council Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304, 22/11/2011, 64–88; Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21/04/1993, 29–34.

²⁵ Case C-541/99, *Cape Snc*, EU:C:2001:625, para 16 (on the grounds of Article 2(b) of Directive 1993/13); Case C-329/19, *Condominio di Milano*, EU:C:2020:263, para 25.

is distinct from the concrete knowledge the person in question may have, or from the information that person actually has’;²⁶ it is also ‘a functional concept, requiring determination of whether the contractual relationship is amongst the activities that a person provides in the course of their trade, business or profession’.²⁷ This means that under the particular circumstances of a given case, a professional in one field of economic activities may be recognised as a consumer in another capacity. In *Costea*, the CJEU recalled that in relation to the services offered by lawyers by means of contracts for legal services, there is inequality between ‘client-consumers’ and lawyers, particularly due to the asymmetry of information between the parties to the contracts. At the same time, the Court acknowledged that ‘that consideration cannot, however, rule out a lawyer from being categorised as a “consumer” within the meaning of Article 2(b) of that directive where that lawyer is acting for purposes which are outside his trade, business or profession’. It was recognised that a lawyer signing a contract with a trader which does not relate to the activity of his law firm is not linked to the exercise of the lawyer’s profession and must be recognised as holding the weaker position.²⁸ Thus, the concept of a consumer ‘must be assessed by reference to a functional criterion, consisting in the assessment of whether the contractual relation at issue has arisen in the course of activities outside trade, business or profession’.²⁹ This also holds true for other professionals entering into a contract with a trader, where the contract does not directly involve a professional business.³⁰ The standpoint of the CJEU merely confirms what is expressly encoded in EU consumer directives.³¹ Obviously, these rules also apply to contracts involving a triangular configuration, where a collaborative economy platform acts as an intermediary in the contract for the underlying service. In addition, however, collaborative economy platforms are recognised as providers of information society services in the meaning of the E-commerce Directive and the Digital Services Act. Although the legal classification of such platforms from this perspective has been discussed elsewhere, some additional obligations concerning consumer protection also stem from these legal acts and are discussed below.

²⁶ Case C-110/14, *Costea*, EU:C:2015:538, para 21 (on the grounds of Directive 1993/13).

²⁷ Case C-147/16, *de Grote*, EU:C:2018:320, para 55 and the case law referred to therein.

²⁸ Case C-110/14, *Costea*, EU:C:2015:538, paras 24–26 and the case law referred to therein.

²⁹ Case C-74/15, *Tarcău*, EU:C:2015:772, para 27; Case C-534/15, *Dumitraș*, EU:C:2016:700, para 32; Case C-535/16, *Bachman*, EU:C:2017:321, para 36.

³⁰ Case C-455/21, *OZ*, EU:C:2023:455, paras 48–49 and the case law referred to therein.

³¹ See (n 24); European Commission, Guidance on the interpretation and application of Directive 2011/83 of the European Parliament and of the Council on consumer rights, OJ C 525, 29/12/2021, 1–85.

Secondly, there should be no doubt that collaborative economy platforms are recognised as traders for the purposes of applying EU rules on consumer protection.³² Let us recall here that the rights derived from EU law by a consumer are to be enforced only in relations with a trader. A trader is defined as ‘any natural or legal person who [...] is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader’³³ or as ‘any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession’.³⁴

Thirdly, the most problematic issue is whether a provider of an underlying service is to be recognised as a trader in the above meaning. As was explained in the introduction, such a provider may be a natural person acting for purposes relating to their business or a natural person acting outside any business activity (even if it is a paid service). As a result, whether such a provider is a trader (in terms of EU consumer law) is an important distinction for the rights of the recipient of the service, who may be a consumer (a natural person acting outside their trade, business, craft or profession) or a peer. In its Communication from 2016, in order to decide who is a trader, the European Commission proposed taking into account the frequency of the services, the profit-seeking motive and the turnover.³⁵

The issue of how to interpret the notion of a trader in online trade was considered by the CJEU in *Kamenova*.³⁶ The primary question addressed by the national court adjudicating in the main proceedings was whether a natural person who simultaneously published a number of advertisements offering new and second-hand goods for sale on a website might be classified as a trader within the meaning of Article 2(b) of Directive 2005/29. Secondly, the court asked whether such an activity constituted a ‘commercial practice’ within the meaning of the same provision. The Court of Justice explained that given the almost identical definitions of a trader in Directives 2005/29 and 2011/83 and the fact that both directives pursue the same objectives (to contribute to the proper functioning of the internal market

³² See for example explanation in the context of Directive 2005/29 – Bram Duivenwoorde, ‘The Liability of Online Marketplaces under the Unfair Commercial Practices Directive, the E-commerce Directive and the Digital Services Act’, *European Journal of Consumer and Market Law* 2022, No 2, 47.

³³ Article 2(b) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11/06/2005, 22–39.

³⁴ Article 2(2) of Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304, 22/11/2011, 64–88.

³⁵ COM (2016) 356, 9–10.

³⁶ Case C-105/17, *Kamenova*, EU:C:2018:808.

and to ensure a high level of consumer protection in the legislative, regulatory and administrative framework which they cover), this concept must be interpreted uniformly in both directives.³⁷ Furthermore, the Court ruled that ‘classification as a “trader” requires a “case-by-case approach”’, taking into account several circumstances and facts: ‘whether the sale on the online platform was carried out in an organised manner, whether that sale was intended to generate profit, whether the seller had technical information and expertise relating to the products which she offered for sale which the consumer did not necessarily have, with the result that she was placed in a more advantageous position than the consumer, whether the seller had a legal status which enabled her to engage in commercial activities and to what extent the online sale was connected to the seller’s commercial or professional activity, whether the seller was subject to VAT, whether the seller, acting on behalf of a particular trader or on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive; whether the seller purchased new or second-hand goods in order to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with her usual commercial or business activity, whether the goods for sale were all of the same type or of the same value, and, in particular, whether the offer was concentrated on a small number of goods’.³⁸

Neither the criteria proposed by the Commission nor those proposed by the Court of Justice are to be treated as exhaustive or exclusive.³⁹ This leads to the conclusion that the decision about the character of the provider of an underlying service in the context of a collaborative economy platform must also be taken on a case-by-case basis. The obligations of traders, as will be seen in the following section, include a duty to self-declare. Needless to say, such a declaration – in disputable cases – will be assessed by a national court on an *ad hoc* basis.

3. OBLIGATIONS IN RELATIONS WITH CONSUMERS

3.1. OBLIGATIONS OF COLLABORATIVE ECONOMY PLATFORMS

Firstly, let us recall that ensuring legal certainty and consumer confidence was already an objective of the E-commerce Directive,⁴⁰ according to which seven

³⁷ Case C-105/17, *Kamenova*, EU:C:2018:808, paras 27–29.

³⁸ Case C-105/17, *Kamenova*, EU:C:2018:808, paras 37–38.

³⁹ Case C-105/17, *Kamenova*, EU:C:2018:808, para 39.

⁴⁰ Recitals (7) and (10) of the E-commerce Directive.

ral obligations for providers of ‘information society services’ were imposed in relation to the recipients of such information. These obligations apply to collaborative economy platforms, because they were recognised as providers of hosting services (one of the categories within the definition of providers of information society services) in the E-commerce Directive.⁴¹ The other party to a contract for providing an information society service is a recipient of an information society service, defined as ‘any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for purposes of seeking information or making it accessible’.⁴² The obligations of providers of information society services relate to a broad range of recipients of such services, consumers being only one category.⁴³ According to the E-commerce Directive, a provider of information society services is under the obligation to ‘render easily, directly and permanently accessible’ certain information, such as the name, the geographical address and electronic e-mail address.⁴⁴ In addition, when an information society service refers to prices, these are to be ‘indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs’.⁴⁵ Secondly, detailed requirements for commercial communications have been set.⁴⁶ Thirdly, specific obligations rest on the providers of information society services when concluding a contract, including the requirement to provide specific information to the recipient of the service⁴⁷ and to respect rules concerning order placement.⁴⁸ It is worth mentioning that in both instances, these requirements are obligatory in relation to a recipient of a service who is recognised as a consumer. Modifications are allowed only under contracts between a service provider and a service recipient who is not recognised as a consumer.

⁴¹ See the discussion and the literature referred to in Szwarc (n 10) 183–206.

⁴² Article 2(d) of the E-commerce Directive.

⁴³ Please note that the definition of ‘consumer’ is coherent with the one used in the consumer protection Directives – Article 2(e) of the E-commerce Directive.

⁴⁴ Article 5(1) of the E-commerce Directive. As interpreted by the Court of Justice, a service provider is required to supply recipients of the service – in addition to its email address – with ‘other information which allows the service provider to be contacted rapidly and communicated with in a direct and effective manner. That information does not necessarily have to be a telephone number. That information may be in the form of an electronic enquiry template through which the recipients of the service can contact the service provider via the internet, to whom the service provider replies by electronic mail except in situations where a recipient of the service, who, after contacting the service provider electronically, finds himself without access to the electronic network, requests the latter to provide access to another, non-electronic means of communication’, Case C-298/07, *Deutsche Internet Versicherung AG*, EU:C:2008:572, para 40.

⁴⁵ Article 5(2) of the E-commerce Directive.

⁴⁶ Article 6 of the E-commerce Directive.

⁴⁷ Article 10 of the E-commerce Directive.

⁴⁸ Article 11 of the E-commerce Directive.

It is interesting to see that obligations of service providers are duplicated in the Services Directive,⁴⁹ which provokes questions about mutual relations between these two EU acts. This is because, in general, each information society service is to be recognised simultaneously as ‘a service’ under Article 57 of the TFEU and the Services Directive.⁵⁰ Therefore, it may happen that a provider of an information society service pursuant to the E-commerce Directive is a provider of service pursuant to Article 57 of the TFEU and the Services Directive. The general conflict rule is to be found in the Services Directive, according to which ‘[i]f the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions’.⁵¹ This means that in this particular context, it might be necessary to consider whether a given service is an information society service under Article 2(a) of the E-commerce Directive. Only if it does not, would the Services Directive apply. In this context, it is also important to note that in the context of a collaborative economy platform, the Court of Justice confirmed that the E-commerce Directive applies,⁵² and thus the obligations from the Services Directive do not.

Secondly, the obligations for collaborative economy platforms, as traders, stem from Directive 2005/29 and Directive 2011/83 as modified by Directive 2019/2161 (called the Omnibus Directive). Regarding the obligations under Directive 2011/83, traders are under specific duties to inform consumers of the following before

⁴⁹ Article 22 of the Services Directive; the scope of information that is to be provided to a recipient of a service is wider here than in the E-commerce Directive.

⁵⁰ Confirmed by the Court of Justice in Case C-390/18, *Airbnb*, EU:C:2019:1112, para 40; Busch, ‘The sharing economy at the CJEU: Does Airbnb pass the ‘Uber test’? Some observations on the pending case C-390/18 – *Airbnb Ireland*’, *Journal of Consumer and Market Law* 2018, 7(4), 172–174; Liesbet Van Acker, ‘C-390/18 – The CJEU Finally Clears the Air(bnb) Regarding Information Society Services: Case Note to CJEU, C-390/18 *Airbnb Ireland*’, *Journal of European Consumer and Market Law* 2020, 9(2), 77–80; Van Francesch P, ‘Accommodating the freedom of online platforms to provide services through the incidental direct effect back door: *Airbnb Ireland*’, *Common Market Law Review* 2020, 37(4), 1201–1228.

⁵¹ Article 3(1) of the Services Directive.

⁵² Case C-390/18, *Airbnb*, EU:C:2019:1112, para 69. Please note that in Case C-62/19, *Star Taxi App*, EU:C:2020:980, the Court classified an intermediation service via smartphone application as a ‘service’ in terms of the Services Directive, because the national rule applied to such an intermediation could not be treated as a rule creating a new prior authorisation scheme specifically and exclusively targeted at information society services (paras 82–84); therefore, such a national rule was to be scrutinised in the light of relevant articles of the Services Directive. For more, see Caterina Gardiner, ‘Star Taxi App is an “Information Society Service”: But is the Meter Still Running for the Classification of Platform Services? Case Note to CJEU, C-62/19 *Star Taxi App SRL*’, *Journal of European Consumer and Market Law* 2021, No 2, 67–71.

concluding a contract – particularly with respect to distance and off-premises contracts: the trader,⁵³ the transaction,⁵⁴ the right of withdrawal,⁵⁵ codes of conduct and alternatives for dispute resolution.⁵⁶ All traders are also bound by provisions concerning formal requirements for distance contracts,⁵⁷ obliging them to enable a consumer to withdraw from the contract,⁵⁸ as well as those concerning other consumer rights.⁵⁹ The above obligations are addressed to all traders, including collaborative economy platforms.⁶⁰

In addition, specific obligations are addressed to ‘online marketplaces’, which are ‘a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers’.⁶¹ Collaborative economy platforms, being such online marketplaces, are obligated to provide consumers with information about the main parameters determining the ranking;⁶² whether the third party offering the goods, services or digital content is a trader (based on the third party’s declaration);⁶³ when the third party is not a trader the fact that the consumer rights stemming from EU consumer protection law do not apply to the contract;⁶⁴ and how the obligations related to the contract are shared between the third party and the provider of the online marketplace.⁶⁵

Secondly, specific obligations for online marketplaces were included in the logic of Directive 2005/29 (as amended by the Omnibus Directive) with the introduction of additional misleading actions (that may lead to a commercial practice being assessed as unfair) and the addition of one commercial practice that is always treated as unfair (blacklisted). Collaborative economy platforms are under a general obligation to refrain from unfair commercial practices. In particular, in the

⁵³ Article 6(1)(b)–(d) of Directive 2011/83.

⁵⁴ Article 6(1)(a), (e), (ea), (g), (m) and (o)–(q) of Directive 2011/83.

⁵⁵ Article 6(1)(h)–(k) of Directive 2011/83.

⁵⁶ Article 6(1)(n) and (t) of Directive 2011/83. For a comprehensive analysis, see Christiana Markou, ‘Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 on consumer rights’, in Arno Lodder, Andrew Murray, *EU Regulation of E-commerce: A Commentary*, Cheltenham–Northampton: Edward Elgar Publishing Limited 2022, 151–221.

⁵⁷ Article 8 of Directive 2011/83.

⁵⁸ Articles 9–16 of Directive 2011/83.

⁵⁹ Articles 18–22 of Directive 2011/83.

⁶⁰ Damjan Možina, ‘Retail Business, Platform Services and Information Duties’, *Journal of European Consumer and Market Law* 2016, No 1, 25–30.

⁶¹ Article 2(17) of Directive 2011/83, introduced by Directive 2019/2161.

⁶² Article 6a(1)(a) of Directive 2011/83.

⁶³ Article 6a(1)(b) of Directive 2011/83.

⁶⁴ Article 6a(1)(c) of Directive 2011/83.

⁶⁵ Article 6a(1)(d) of Directive 2011/83.

context of misleading omissions by online marketplaces, particular information is to be recognised as material. Namely, when an online marketplace allows consumers to search for goods or services offered by different traders using a query in the form of a keyword, phrase or other input, then it must provide consumers with material information consisting of ‘general information [...] on the main parameters determining the ranking of products presented to the consumer as a result of the search query and the relative importance of those parameters’.⁶⁶ As a result, failure to provide consumers with the above information is to be treated as a misleading action. This definition of information that is material for the consumer corresponds closely with one category of commercial practices which are considered unfair (blacklisted) in all circumstances: ‘providing search results in response to a consumer’s online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results’.⁶⁷

In addition, because it is important for a consumer to know whether they will be protected under consumer protection rules at all when goods, services, digital services or digital content are offered on online marketplaces, it is considered to be material to inform the consumer whether the third party offering them is a trader, according to the third party’s declaration to the provider of the online marketplace.⁶⁸

Thirdly, under Directive 2005/29 and Directive 2011/83, online marketplaces – including collaborative economy platforms – are obligated to inform consumers about the status of third-party suppliers of goods or providers of services. However, an online marketplace relies in this regard on declarations from the provider of the underlying service, which could support the conclusion that it was not obligated to verify such information. This conclusion would also be coherent with the general prohibition established by the E-commerce Directive against imposing on the providers of information society services a general obligation to monitor the content supplied by third parties.

The DSA does not introduce revolutionary changes in terms of the scope of information that is to be provided to consumers. The exclusion of intermediaries’ liability and the prohibition of a general obligation to monitor third-party content

⁶⁶ Article 7(4a) of Directive 2005/29. For the definition of ‘ranking’, see Article 2(m) of Directive 2005/29 and recitals 19, 22 and 23 of the preamble to Directive 2019/2161.

⁶⁷ Point 11a of Annex I to Directive 2005/29, see further Madalena Narciso, ‘The Unfair Commercial Practices Directive – Fit for Digital Challenges? An Analysis of the European Commission’s Guidance (C/2021/9320)’, *European Journal of Consumer and Market Law* 2022, No 4, 147–153.

⁶⁸ Article 7(4)(f) of Directive 2005/29.

are continued.⁶⁹ However, the DSA introduced specific obligations for providers of online platforms which allow consumers to conclude distance contracts with traders, and collaborative economy platforms are in this category. To start with, such providers are obligated to ensure that they have certain information about the traders who use their platforms to promote messages or to offer products or services to consumers located in the EU. Before a trader uses an online platform, the online platform provider is obligated to obtain from them a name, address, telephone number and email address, a copy of the identification document, the payment account details of the trader, the trade register (if the trader is registered) and ‘a self-certification by the trader committing to only offer products or services that comply with the applicable rules of Union law’.⁷⁰ Providers of online platforms are also obligated to make the above information accessible to the recipients of the service (thus consumers) ‘in a clear, easily accessible and comprehensible manner’ and ‘at least on the online platform’s online interface where the information on the product or service is presented’.⁷¹

To some extent, the scope of information required from a trader duplicates both obligations which are stemming for a trader under Directive 2005/29 and Directive 2011/83 and the obligations arising for a provider of intermediary services under Directive 2005/29 and Directive 2011/83, which raises questions about the internal coherence of EU law.⁷² What really makes the difference is that under both Directives, online platforms are obligated ‘to provide the consumers with information’ about the capacity in which the third party offers goods or services (trader or not). Under the DSA, the platform is responsible for obtaining such information from traders. This conclusion is confirmed by the wording of Article 30(2) of the DSA, stating that

upon receiving the information referred to in paragraph 1 and prior to allowing the trader concerned to use its services, the provider of the online platform allowing consumers to conclude distance contracts with traders shall, through the use of any freely accessible official online database or online interface made available by a Member State or the Union or through requests to the trader to provide supporting documents

⁶⁹ For more, see Sara Tommasi, ‘The Liability of Internet Service Providers in the Proposed Digital Services Act’, *European Review of Private Law* 2021, No 6, 925–944. For the first reflection on the DSA proposal, see also Christoph Busch, Vanessa Mak, ‘Putting the Digital Services Act in Context: Bridging the Gap between EU Consumer Law and Platform Regulation’, *Journal of European Consumer and Market Law* 2021, No 3, 109–115.

⁷⁰ Article 30(1)(a)–(e) of the DSA.

⁷¹ Article 30(7) of the DSA.

⁷² Caroline Cauffman, Catalina Goanta, ‘A New Order: The Digital Services Act and Consumer Protection’, *European Journal of Risk Regulation*, 12(2021), 760–763; Ece B Suzel, ‘Responsibility of Online Platforms Towards Consumers. A Comparative Analysis between EU Law and Turkish Law’, *European Journal of Consumer and Market Law* 2023, No 6, 226–232.

from reliable sources, make best efforts to assess whether the information referred to in paragraph 1 point (a) to (e), is reliable and complete. For the purposes of this Regulation, traders shall be liable for the accuracy of the information provided.⁷³

In addition, the DSA contains rules on how an online platform has to complete or correct the information about a given trader.⁷⁴ Moreover, under the DSA, providers of online platforms allowing consumers to conclude distance contracts with traders must design and organise their online interfaces in such a way that they meet the requirements from Article 31 of the DSA. The point is to design an online interface that enables traders to comply with obligations regarding pre-contractual information and compliance (Article 31(1)), including information about the trader (Article 31(2)) and information necessary for the clear, unambiguous identification of the services offered to consumers (Article 31(2)(a)).

3.2. OBLIGATIONS FOR PROVIDERS OF UNDERLYING SERVICES AS TRADERS

Providers of underlying services in the collaborative economy triangular model who are recognised as traders are under the obligation stemming from Directive 2011/83 to inform consumers before the conclusion of a contract – particularly with respect to distance and off-premises contracts – about the identity of the trader,⁷⁵ the transaction,⁷⁶ the right of withdrawal,⁷⁷ codes of conduct and alternatives for dispute resolution.⁷⁸ All traders are also bound by provisions concerning formal requirements for distance contracts,⁷⁹ obliging them to enable a consumer to withdraw from the contract,⁸⁰ and those concerning other consumer rights.⁸¹ It is true that, as long as both a collaborative economy platform and a provider of the underlying service are recognised as traders, both will be obligated in the relation with a consumer, as the recipient of the intermediary service provided by the platform and of the underlying service. It is then the question of dividing liability between the two providers of services (see below).

⁷³ Please note the transition regulation in Article 30(2).

⁷⁴ Article 30(3)–(6) of the DSA.

⁷⁵ Article 6(1)(b)–(d) of Directive 2011/83.

⁷⁶ Article 6(1)(a), (e), (ea), (g), (m) and (o)–(q) of Directive 2011/83.

⁷⁷ Article 6(1) (h)–(k) of Directive 2011/83.

⁷⁸ Article 6(1)(n) and (t) of Directive 2011/83; for a comprehensive analysis, see Markou (n 56) 151–221.

⁷⁹ Article 8 of Directive 2011/83.

⁸⁰ Articles 9–16 of Directive 2011/83.

⁸¹ Articles 18–22 of Directive 2011/83.

In the context of Directive 2005/29, it is also important to recall that providers of underlying services are obligated to declare their status relying on facts. Otherwise, their omission is to be treated as unfair commercial practice: ‘falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer’.⁸² In case of doubt as to whether such a provider is a trader, the rules established in Regulation 2019/1150⁸³ may be helpful. The platform-to-business regulation applies to online intermediation services and online search engines provided or offered to business users and corporate website users, where a business user is ‘any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession’.⁸⁴ As a result, when the provider of an underlying service declares the status of a business user for the purposes of this Regulation, then they are not able to hold ‘non-trader’ status in relation to the recipient of the underlying service they offer. In such situations, in order to be protected as the weaker party in their relations with the platform, the provider of the underlying service cannot escape their obligations towards consumers with whom they sign a contract.

4. RELATIONS BETWEEN COLLABORATIVE ECONOMY PLATFORMS AND PROVIDERS OF UNDERLYING SERVICES

In this context, there are two important issues for a consumer who concludes a contract for an underlying service via a collaborative economy platform. The first is the delimitation of liability between the platform and the provider of the service, which is crucial for the consumer in case the contract is not executed (for example, the accommodation is not of the standard that was promised/advertised before the contract was signed). In order to be able to effectively claim liability, the consumer must know to whom such claims should be addressed: the collaborative economy platform or the trader providing the underlying service. The second issue is the growing role of collaborative economy platforms as ‘enforcement agents’, thus enforcing trader’s obligations under EU consumer law from providers of underlying services.

⁸² Point 22 of Annex I to Directive 2005/29.

⁸³ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11/07/2019, 57–79.

⁸⁴ Article 2(1) of Regulation 2019/1150.

4.1. DIVISION OF LIABILITY TOWARDS CONSUMERS BETWEEN TRADERS

To begin with, one of the most important features of the EU law regulating the obligations of providers of hosting services (collaborative economy platforms falling under the category of providers of ‘information society services’) is the exclusion of their liability for information stored at the request of a recipient of the service, ‘on condition that the provider: a) does not have actual knowledge of illegal activity or illegal content, and as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content’.⁸⁵ Thus, the exclusion of liability of the provider of hosting services (such as collaborative economy platforms) is the principle, and the obligation of the provider to act in particular instances is the exception.

The DSA introduced another exception to the general exclusion of liability for online platforms that allow consumers to conclude distance contracts with traders (compared to what stemmed from the E-commerce Directive). Such an online platform will be held liable for the information it presents if a specific piece of information is presented in a way that leads an average consumer to believe that the information or service that is the object of the transaction is provided either by the online platform itself or by a recipient of the service acting under its authority or control.⁸⁶ As a result, a collaborative economy platform has a general obligation of due diligence to clearly, precisely inform consumers about who is the genuine provider of the underlying service. Failure to provide such information results in the platform’s liability in relations with consumers.

Simultaneously, the EU legislature assumed that the liability of an online platform might arise in particular situations. This issue has been addressed under a more general obligation of transparency as regards relations between consumers and traders. For collaborative economy platforms (as providers of online marketplaces pursuant to Directive 2011/83), this means the obligation to inform consumers whether a provider of an underlying service is a trader and, if so, ‘how the obligations related to the contract are shared between the third party offering the goods, services or digital content and the provider of the online marketplace, such information being without prejudice to any responsibility that the provider of the online marketplace or the third-party trader has in relation to the contract under other Union or national law’.⁸⁷

⁸⁵ Article 6(1) of the DSA.

⁸⁶ Article 6(3) of the DSA.

⁸⁷ Article 6a (1) (d) of Directive 2011/83.

As a result, EU law does not intervene in the contractual obligations between a platform and the provider of an underlying service, which means that the contract between them as well as the national law applicable to that contract, is decisive in this regard. Such a conclusion is supported by the preamble to Directive 2019/2161, which states that ‘[t]he information to be provided about the responsibility for ensuring consumer rights depends on the contractual arrangements between the providers of online marketplaces and the relevant third-party traders. The provider of the online marketplace could indicate that a third-party trader is solely responsible for ensuring consumer rights, or describe its own specific responsibilities where that provider assumes responsibility for certain aspects of the contract, for example, delivery or the exercise of the right of withdrawal’.

Therefore, one of the initial concerns about the uncertainties connected with the collaborative economy model was not addressed at the EU level. It is still the national private law that rules the division of liability between platforms and traders, which does not give consumers more legal security whatsoever in case the contract is not executed.

4.2. COLLABORATIVE ECONOMY PLATFORMS AS ENFORCEMENT AGENTS

Let us start with a general remark that because collaborative economy platforms are recognised as online platforms allowing consumers to conclude distance contracts with traders according to the DSA, they also have particular obligations towards providers of the underlying services (acting as traders).

As previously stated, it is the provider of the underlying service (acting as a trader) that is responsible for the accuracy of the information supplied to the online platform. However, the online platform must undertake specific actions in order to make sure that the information thus supplied is correct, accurate and complete, including addressing a request to that trader ‘to remedy that situation without delay or within the period set by Union and national law’ and even suspending ‘the provision of intermediary service to that trader in relation to the offering of products or services to consumers located in the Union, until the request has been fully complied with’.⁸⁸

In addition, online platforms are under the obligation to ‘make reasonable efforts to randomly check in any official, freely accessible and machine-readable online

⁸⁸ Article 30(3) of the DSA.

database or online interface whether the services offered have been identified as illegal'. Last but not least, Article 32 of the DSA requires an online platform to take action when it becomes aware 'that an illegal product or service has been offered by a trader to consumers located in the Union through its services, that provider shall inform, insofar as it has their contact details, consumers who purchased the illegal product or service through its services of the following: the fact that the product or service is illegal; identity of the trader; and any relevant means of redress'.

It is clear that these obligations are no longer in line with the general exemption from liability for providers of hosting services. The responsibilities of online platforms allowing traders to conclude contracts with consumers, including collaborative economy platforms, also extend beyond EU consumer law. While in EU consumer law, the intermediary is responsible for providing information about traders to consumers (and it is this trader that is responsible for the correctness of the information), the DSA introduces obligations to act proactively in order to ensure that the information provided by traders is up-to-date and correct.

In this regard, it seems that the DSA has introduced a new model for enforcing the obligations of traders that provide underlying services in relations with consumers. As explained above, these obligations consist of requesting information from the traders that offer goods or services via their online interfaces and – additionally – verifying whether this information is correct. These new obligations for collaborative economy platforms seem to be in line with the wider tendency of involving private actors in the enforcement of law in the online environment.

5. CONCLUSIONS

These reflections on actors, obligations and enforcement in the context of protecting consumers' rights in the collaborative economy model lead to the following conclusions. Firstly, it raises no doubt that collaborative economy platforms shall be recognised as traders for the purposes of EU consumer protection law, provided that the other party to a contract for intermediary service is a consumer. It is also a provider of an 'information society service' according to the E-commerce Directive, a provider of an 'intermediary service' and – even more specifically – a provider of hosting services under the DSA (for all recipients of such services, including consumers). The only exception from such classification (so far) has been Uber, which the Court of Justice recognised as a provider of transport services and not of information society services.⁸⁹

⁸⁹ See the explanation in Szwarc (n 10) 183–206.

Secondly, the legal classification of providers of underlying services as traders for the purposes of EU consumer protection law relies on *ad hoc* analysis, which is an inherent part of applying consumer law. The general definitions of a *trader* and a *consumer* in the EU Directives on consumer protection allow for a flexible application of EU law depending on the dynamic social and economic circumstances, including contracts for providing underlying services via collaborative economy platforms. It seems that the most useful provision, from a practical perspective for natural persons concluding contracts for the provision of underlying services (via collaborative economy platforms), is the obligation of such a provider to declare whether they are acting in a professional capacity – as a trader. This clearly informs the natural person whether the contract will be governed by the EU consumer protection rules (implying a higher level of protection) or will be a contract between peers, governed by classic private (civil) law.

Thirdly, the obligations of collaborative economy platforms in relations with consumers are to be found in EU consumer law: in particular, Directive 2011/83 and Directive 2005/29, as amended by Directive 2019/2161 (Omnibus Directive), the E-commerce Directive and the DSA. That makes the legal picture quite a complicated puzzle of obligations. The legal picture is even more complicated when considering that providers of the underlying services are also obligated under EU consumer law (although not under the DSA) in their relations with consumers (as long as they are recognised as traders). This means that both collaborative platforms and traders providing underlying services are under specific obligations in their relations with consumers, including the duties to inform (Directive 2011/83) and the prohibition of unfair commercial practices (Directive 2005/29).

This takes us to the next point, which is the division of liability between a collaborative economy platform and a trader providing an underlying service. EU law – as it stands today – does not interfere with the rules governing this issue. It is left to the contractual commitment between a collaborative economy platform and a trader, as well as the relevant national private law. The most significant lack of progress in legal developments can be observed at the EU level, which results in legal fragmentation and considerable problems for consumers entering into contractual relationships in the EU internal market.

Last but not least, the role of collaborative platforms is growing in importance in the context of law enforcement. The obligations of online platforms under the DSA mean that they are designed to play an active role in enforcing the obligations of traders (providers of underlying services) in relations with consumers as far as the duty to inform are concerned. This is evidently the new paradigm of enforcement in the internal market, where public law competences are conferred onto private actors.

To conclude, it seems that the EU law in general has not addressed the interests of consumers in the particular context of the collaborative economy (as explained by the European Commission in 2016). Instead, collaborative economy platforms and their role in the digital single market have been addressed as only one narrow category of a general group of online platforms. Therefore, the discussion about consumers' rights in the collaborative economy is not the central point in the academic discourse. Instead, it should be seen from the perspective of the discussion on the shift of paradigm of consumer protection. The legislative changes introduced recently and discussed in this article are based on the general approach of 'disclosure' – providing consumers with information. The future of this paradigm and possible shift from disclosure to transparency is under discussion, and any results in this domain will affect all consumers, not only those who use collaborative economy platforms to conclude contracts with traders offering the underlying services.

It is also worth underscoring that the legislative changes concerning these online platforms do not have much impact on the most important element of the collaborative economy, at least in its early stages: activating the resources of private parties (peers). Apart from the question of who is a consumer and who is a trader in the collaborative economy (to be assessed on an *ad hoc* basis), a remaining question is about the rights of the two parties to a contract when they are peers. In such situations, these are contracts between peers, thus outside the paradigm of EU law and the distinction between traders and consumers. This is likely an unfulfilled promise from the past that has been forgotten forever.

REFERENCES

- Busch Ch and others, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?', *Journal of European Consumer and Market Law* 2016, No 1, 4
- Cauffman C, Goanta C, 'A New Order: The Digital Services Act and Consumer Protection', *European Journal of Risk Regulation*, 2021, 12, 760–763
- Haztopoulos V, *The Collaborative Economy and EU Law*, Oxford–Portland, 2018
- Inglese M, *Regulating the Collaborative Economy in the European Union Digital Single Market*, Cham: Springer International Publishing 2019
- Markou Ch, 'Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 on consumer rights', in *EU Regulation of E-commerce: A Commentary*, Arno Lodder, Andrew Murray (eds), Cheltenham–Northampton 2022, 151–221
- Možina D, 'Retail Business, Platform Services and Information Duties', *Journal of European Consumer and Market Law* 2016, No 1, 25–30

Weber R H, *From Disclosure to Transparency in Consumer Law*, in *Consumer Law and Economics*, Klaus Mathis, Aavishalom Tor (eds), Cham: Springer International Publishing 2021

This contribution was funded by the National Science Centre, Poland under the project with registry No 2017/27/B/HS5/02073.

Ewa Milczarek

University of Szczecin, Poland

e-mail: ewa.milczarek@usz.edu.pl

ORCID:0000-0003-0726-0959

SECURITY OF CROSSBORDER DATA TRANSFER – THE EU-USA PERSPECTIVE

Abstract

In the era of the information society, the security of personal data has become a key issue, both at the individual and state levels. Significant challenges arise in the context of cross-border data transfers between the European Union and the United States, where differences in approaches to privacy protection and legal frameworks create numerous tensions and difficulties. The main issues concern the lack of coherent legal frameworks allowing for the secure transfer of personal data to the United States in compliance with EU privacy standards. Previous mechanisms, such as Safe Harbor and Privacy Shield, were deemed incompatible with EU regulations by the Court of Justice of the European Union, leaving data flows in a legal vacuum.

The study aims to analyze the current conditions of cross-border data transfers between the EU and the US in the context of protecting the security and privacy of EU citizens' data. The key outcome is to identify potential regulatory scenarios that could ensure effective protection of Europeans' personal data. The analysis includes case studies of regulatory mechanisms (Safe Harbor, Privacy Shield) and EU legal frameworks, such as the GDPR, in light of CJEU decisions. The research also explores possible future scenarios for transatlantic data transfer cooperation, examines the political and legal differences in privacy approaches between the EU and the US, and considers alternative solutions, such as data localization or technical protection barriers.

KEYWORDS

data transfer, EU-US, data protection, GDPR, Safe Harbor, Privacy Shield, cross-border regulations

SŁOWA KLUCZOWE

przekazywanie danych, UE-USA, ochrona danych, RODO, program *Safe Harbor*, program *Privacy Shield*, przepisy transgraniczne

1. INTRODUCTION

In the era of the information society, data security becomes of key importance in the individual and national context. The influence of the United States in this matter is undoubtedly significant. The United States has control over network and server management. They also have a substantial impact on the largest Internet companies, such as Facebook, Google and Microsoft, which are used by billions of people around the world.

The data flow between the EU and other countries is an indispensable part of the Internet. This transfer should be implemented in compliance with EU data security standards. One way of transferring personal data abroad is based on a decision by the European Commission, which states that a given country applies adequate protection of personal data.

Since 2000, this flow has been based on the Safe Harbor scheme,¹ annulled by the judgment of the CJEU in the *Schrems* case.² A similar fate befell the successor of the program – the Privacy Shield, which was invalidated by the CJEU under the *Schrems II* judgment³ in 2020. Since then, it has not been enough to reach an agreement between the EU and the US, leaving the data flow regulations in a legal vacuum.

¹ 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441), L 215, 25/08/2000.

² Judgment of the Court of Justice of the European Union of 6 October 2015, C-362/14, *Maximilian Schrems v Data Protection Commissioner, joined party: Digital Rights Ireland Ltd*, ECLI:EU:C:2015:650.

³ Judgment of CJEU of 16 July 2020, C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems*, ECLI:EU:C:2020:559.

The chapter is divided into three analytical parts. The first of them defines the conditions for secure cross-border data flow based on standards developed by EU legislation and case law. The second part is devoted to legal forms that allow cross-border data flow between the EU and the US. The third part presents possible scenarios for future US-EU cross-border data transfers. The research objective of this chapter is to determine the current conditions of data flow to the United States in terms of security and privacy protection of EU citizens. The result of the considerations is the determination of how the cross-border data flow between the US and the EU should be regulated to protect the privacy of Europeans.

2. DATA SECURITY AND PRIVACY IN THE EU – OUTLINE OF THE SUBJECT

The intensive development of the Internet has led to the transfer of most social and economic contacts to the Internet, thus facilitating access to information. Technological advances open up possibilities for highly sophisticated surveillance and espionage, through methods where the older rules of the game may not be enough to keep everything in check.⁴ Privacy and data protection are the most vulnerable in the face of new pressures from surveillance technology.⁵

The experience related to the development of the Internet led to the conclusion that online privacy and data protection require different tools than those that were sufficient offline. For years, the internet environment has developed without significant government oversight. Left unsupervised, the sector created its own regulations, often detached from offline legal relationships. The innovative⁶ and transnational nature of the Internet makes it difficult for legislators to define an appropriate legal framework for effective data protection. The European Union is trying to meet these challenges. In the last years, the EU privacy protection system has evolved⁷ to be more responsive to the challenges of the information

⁴ Stig Strömholm, 'Right of Privacy and Rights of The Personality a Comparative Survey; Working paper prepared for the Nordic Conferen. on privacy organized by the International Commission of Jurists' (Stockholm 1967), 18–19.

⁵ Alan Westin, 'Science, Privacy, and Freedom: Issues and Proposals for the 1970's. Part I--The Current Impact of Surveillance on Privacy' (1966) *Columbia Law Review* 66 (6), 1003–1050.

⁶ Colin J. Bennett, 'Regulating Privacy: Data Protection and Public Policy in Europe and the United States', Cornell University Press, (New York, 1992), 4–5.

⁷ Denitza Topchiyska, 'The Rule of Law and EU Data Protection Legislation: Some Controversial Issues in light of the new EU General Data Protection Regulation', (2017) *The ORBIT Journal* 1(1), 1–16, doi.org/10.29297/orbit.v1i1.16.

society. Today, one of the main aims of the European Area of Freedom, Security and Justice is stronger data protection.⁸

The EU considers privacy and protection of personal data to be fundamental rights. Articles 7 and 8 of the Charter of Fundamental Rights of the EU⁹ (the Charter) provide that ‘everyone has the right’ to the ‘protection of personal data concerning him or her’ and that data ‘must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law’. Article 52 of the Charter states that any limitations on these rights must be subject ‘to the principle of proportionality’ and must be ‘necessary and genuinely meet objectives of general interest of the Union or the need to protect the rights and freedom of others’. These rights are implemented by a number of legal acts, of which the most important is the General Data Protection Regulation (GDPR),¹⁰ which constitutes a general legal framework providing rules on the processing of personal data in the EU. The reform added a new value to the informational sovereignty of EU citizens in the digital space.¹¹ The GDPR formulates principles relating to personal data processing, which are: lawfulness, fairness and transparency; purpose limitation; data minimization; accuracy; storage limitation; integrity and confidentiality; accountability.¹² One of the aspects regulated in GDPR is the transfer of European Union citizens data to third countries, including the US.

The United States was the birthplace of the Internet, so from the very beginning, it played a key role in its development.¹³ This affected the strategic role of the United States in network and server management. Also, since the 1990s, commercialization of the internet took off, leading to the development of new industries, such as e-commerce and online advertising. The companies of the United States

⁸ Danijela Vrbljanac, ‘Personal Data Transfer to Third Countries – Disrupting the Even Flow?’, (2018) *Athens Journal of Law* 4 (4), 349, 337–358, doi.org/10.30958/ajl.4-4-4.

⁹ Charter of Fundamental Rights of the European Union, Arts 7–8, 18 December 2000, 2000 O. J. C 364/1.

¹⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016, 1–88.

¹¹ Mira Burri and Rahel Schär, ‘The Reform of the EU Data Protection Framework: Outlining Key Changes and Assessing Their Fitness for a Data-Driven Economy’, (2016) *Journal of Information Policy* 6, 506, 479–511.

¹² Efrén Díaz Díaz, ‘The New European Union General Regulation on Data Protection and the Legal Consequences for Institutions, Church’, (2016) *Communication and Culture* 1 (1), 206–239, doi.org/10.1080/23753234.2016.1240912.

¹³ Barry M Leiner and others, *A brief history of the internet*, (2009) *Computer Communication Review* 39(5), 22–31, doi.org/10.1145/1629607.1629613.

took the lead in this. Today, US technology companies, such as Google, Facebook, and Amazon, continue to dominate the global internet landscape. Also, US-based online platforms, when their services are used within the territory of the EU, are bound to comply with both the EU and US data protection laws, including the data protection laws of all the respective Member States. It may become complicated for them to define their legal obligation in processing personal data.¹⁴ Each of our activities on the Internet is related to the production of data and its flow. Most of the data flows to the United States. They, therefore, play a key role in terms of international data security.

3. EU-US DATA TRANSFERS REGULATIONS

Generally, GDPR allows to transfer personal data outside the UE if the third country provides an ‘adequate level of protection’ for the data (Article 45 GDPR) or when the controller adduces adequate safeguards with respect to the protection of privacy (Article 46 GDPR).

Data transfer between the EU and the US primarily occurs through data transfer mechanisms such as:

1. Decision of the European Commission that transfer of personal data from the EU to the US that has been deemed adequate.
2. Provision of appropriate safeguards and on condition:
 - 2.1.1. Standard contractual clauses (SCCs), SCCs are agreements between data controllers and data processors that ensure adequate data protection measures are in place. They are a form of Article 46 contractual clause pre-approved by the European Commission.
 - 2.1.2. Binding corporate rules (BCRs). BCRs are internal company policies and procedures for data protection that have been approved by European data protection authorities.
 - 2.1.3. Code of conduct or certification mechanism.
3. Consent.

This system was created hierarchically. The use of subsequent ones is possible when those ‘higher’ in the hierarchy have not been established.

¹⁴ Shakila Bu-Pasha, ‘Cross-border issues under EU data protection law with regards to personal data protection’, (2017) Information & Communications Technology Law 26(3) doi.org/10.1080/13600834.2017.1330740.

3.1. ADEQUACY DECISION

Currently, data transfer to third countries is allowed under the GDPR if the European Commission considers the legal system of those countries as providing an ‘adequate’ level of personal data Protection.¹⁵ GDPR facilitates transnational data transfers with improved mechanisms and provides procedures, conditions and restrictions for personal data transfers outside the EU, to third countries or to ‘a territory or specified sector within a third country, or an international organisation’ upon the European Commission’s adequacy decision.¹⁶ In order to determine the adequacy, the European Commission takes into account a number of factors, such as the existing legal system, criminal law and access to justice in the country in question; inter alia: the rule of law, respect for human rights and fundamental freedoms and relevant legislation, including in the field of data protection, defence, national security and criminal law, and access by public authorities to personal data. The system is to guarantee effective, enforceable rights, including the right to effective administrative and judicial remedies for individuals and the existence of an effectively functioning independent supervisory authority. Compliance with legally binding conventions, in particular the Council of Europe Convention No 108,¹⁷ and participation in multilateral or regional data protection regimes should also be considered.

So far, the flow between the United States and the European Union has been carried out around two programs: Safe Harbor¹⁸ (2000–2015) and Privacy Shield (2016–2020). Neither of these programs can be considered successful – they were withdrawn after the CJEU judgments declaring them incompatible with EU law. The analysis below will provide a clue to the problems with the functioning of these two programs. It should be noted at the outset that the Safe Harbor and Privacy Shield programs were implemented before the introduction of the GDPR (but Privacy Shield was in effect during the GDPR period).

¹⁵ Chapter V (Arts 44–49) of the GDPR.

¹⁶ Recitals 103–107, 169, Art 45 GDPR.

¹⁷ The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No 108).

¹⁸ 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441), L 215, 25/08/2000 P. 0007 – 0047.

3.1.1. SAFE HARBOR

Directive 95/46/EC¹⁹ (GDPR predecessor) also allowed for cross-border data transfer based on the decision of the European Commission recognizing the adequacy of the principles of the program to the European level of protection of personal data. Enterprises wishing to join the Safe Harbor program or wishing to undergo certification notified their intention to the US Department of Commerce. Directive 95/46/EC forbids the transfer of personal data to a third country that does not ensure an adequate level of protection. Third countries can ensure different solutions of protection, varying from those employed within the European Union. However, requirements must be effective in order to ensure protection essentially equivalent to that guaranteed within the European Union. The CJEU found that Safe Harbor did not meet these conditions.²⁰ Undermining the effectiveness of Safe Harbor was related to the disclosure of data collection practices by US intelligence services, including through the PRISM²¹ and FISA²² program.²³

The European Commission has confirmed reservations about the level of protection of personal data of EU citizens transferred to the United States under the Safe Harbor program due to the voluntary and declarative nature of the system. US authorities have had access to personal data of EU citizens transferred to the US under the Safe Harbor program and may process it in a way that is incompatible with EU data protection principles. Most US internet companies targeted by surveillance programs such as PRISM or FISA have had Safe Harbor clearances,²⁴ thus, it has become one of the channels for US intelligence authorities to access personal data which has been pre-processed in the EU.

¹⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, L 281, 23/11/1995 P. 0031 – 0050.

²⁰ Judgment of the Court of Justice of the European Union of 6 October 2015, C-362/14, *Maximillian Schrems v Data Protection Commissioner, joined party: Digital Rights Ireland Ltd*, ECLI:EU:C:2015:650.

²¹ Liane Colonna ‘Prism and The European Union’s Data Protection Directive’, (2013) *The John Marshall Journal of Information Technology & Privacy Law* 4 (3), 203–221.

²² Foreign Intelligence Surveillance Act of 1978 (FISA Pub.L. 95–511, 92 Stat. 1783, 50 U.S.C. ch. 36).

²³ Ewa Milczarek, ‘Prywatność wirtualna: unijne standardy ochrony prawa do prywatności w Internecie’, (Warszawa 2020), 176–183.

²⁴ Dot. 2 Communication From the Commission to the European Parliament and the Council Transatlantic Data Flows: Restoring Trust through Strong Safeguards, Brussels, 29 February 2016, COM(2016) 117 final.

The following deficiencies were identified:²⁵

- certified US companies do not adhere to the Safe Harbor principles for secure data transfer;
- structural deficiencies were found in transparency and law enforcement, as well as in specific Safe Harbor principles and the functioning of the National Security Clause;
- the program also acts as a conduit for the transfer of personal data of EU citizens from the European Union to the US through companies required to provide data to US intelligence services under US data collection programs.

The US law enforcement requirements, including assurance of national security and public interest, received preference over the Safe Harbour framework. The US public authorities would prevail, allowing the US undertakings to ignore the Safe Harbour principles.²⁶

This information undermined the trust of both EU citizens and EU institutions in the security of cross-border data transfers to the United States. Resolution of the European Parliament from 2014 calls on the US to ‘revise its legislation without delay in order to bring it into line with international law, to recognise the privacy and other rights of EU citizens, to provide for judicial redress for EU citizens, to put rights of EU citizens on an equal footing with rights of US citizens’.²⁷

As Simon Davies points out, the Safe Harbor was ‘generally viewed as a minimalist solution that was supposed to evolve into something stronger. It transpired, however, that the United States never intended to follow through on commitments to strengthen it’.²⁸

The European Commission has started work on a new agreement. It should be remembered that after the end of Safe Harbor, data transfer to the United States continues (the majority of companies can continue using the conventional

²⁵ Dot. 3.2. *ibid.*

²⁶ Martin A Weiss and Kristin Archick, ‘U.S.-EU Data Privacy: From Safe Harbor to Privacy Shield’ (Congressional Research Service, 19 May 2016) 6. <<https://sgp.fas.org/crs/misc/R44257.pdf>> .

²⁷ European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens’ fundamental rights and on transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)), C 378/104.

²⁸ Simon Davies, ‘Privacy Opportunities and Challenges with Europe’s New Data Protection Regime’ in *Privacy in the Modern Age* 55, 57 (Marc Rotenberg, Julia Horwitz & Jeramie Scott (eds), The New Press 2015).

SCCs). The lack of an agreement raises even greater doubts about the security of cross-border data transfers.²⁹

3.1.2. PRIVACY SHIELD

On 12 July 2016, the European Commission adopted a decision³⁰ recognizing the new program, the Privacy Shield, as meeting an adequate level of protection of personal data in accordance with EU standards.³¹ Like Safe Harbor, it was based on the mechanism of self-certifying companies located in the United States. Also, the principles themselves are similar to those under the Safe Harbor³² (notice; purpose limitation; compliance responsibility or accountability; relevancy; recourse). The similarities were so significant that, according to Schrems, Privacy Shield was only a ‘soft update’ of the Safe Harbor.³³ The program also raised objections as to its compliance with the CJEU guidelines set out in *Schrems I*.³⁴

US companies had to register with the US Department of Commerce. The Department was responsible for managing and administering the Privacy Shield and ensuring that enterprises complied with their commitments. Companies operating under the scheme had to inform EU citizens about: the types of personal data they processed, the reasons for processing the personal data, whether they intended to transfer personal data to other companies and for what purpose. The protection of individuals’ rights and access to justice was slightly improved. Complaints were resolved either by the company itself or by national data protection authorities, who then would contact the Federal Trade Commission. An arbitration route was also introduced.³⁵

²⁹ David Bender, ‘Having mishandled Safe Harbor, will the CJEU do better with Privacy Shield? A US perspective’ (2016) *International Data Privacy Law* 6 (2), 117–138. doi.org/10.1093/idpl/ipw005.

³⁰ Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield. L 207/1.

³¹ <<https://www.privacyshield.gov/welcome>> accessed 1 January 2022.

³² Gregory W Voss, ‘The Future of Transatlantic Data Flows: Privacy Shield or Bust?’ (2016) *Journal of Internet Law* 19(11), 1, 9–18.

³³ Max Schrems, ‘The Privacy Shield is a Soft Update of the Safe Harbor’ (2016) *European Data Protection Law Review*. 148, doi.org/10.21552/EDPL/2016/2/4.

³⁴ Xavier Tracol, ‘EU–U.S. Privacy Shield: The saga continues’ (2016) *Computer Law & Security Review* 32(5), 775–777, doi.org/10.1016/j.clsr.2016.07.013; Fabien Terpan, ‘EU-US Data Transfer from Safe Harbour to Privacy Shield: Back to Square One?’ (2018) *European Papers* 3, 1045–1059, doi: 10.15166/2499-8249/261.

³⁵ European Commission launches EU-U.S. Privacy Shield: stronger protection for transatlantic data flows, 12 July 2016, <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2461>.

In 2017, the first review of the functioning of the program took place. Article 29 The Working Party³⁶ and the European Data Protection Supervisor described its functioning as far from satisfactory.³⁷ Their recommendations, among others included: more active and regular monitoring of enterprises in terms of meeting the obligations imposed by the Privacy Shield by the US Department of Commerce; increased scrutiny of companies misleading their users about their participation in the scheme; strengthening cooperation between the Department of Commerce and the Federal Trade Commission and EU data protection authorities to develop appropriate guidance for companies and law enforcement authorities; appointment of the Privacy Shield Ombudsman.³⁸

Privacy Shield was the subject of another Schrems' complaint to the CJEU.³⁹ In July 2020, the CJEU declared the European Commission's Privacy Shield Decision invalid on account of invasive US surveillance programmes, thereby making transfers of personal data on the basis of the Privacy Shield Decision illegal. In particular, the CJEU highlighted two problems with the US system: that intelligence agencies' abilities to collect and analyse EU citizens' data (like US surveillance programmes such as PRISM and UPSTREAM⁴⁰) was unnecessarily broad and included inadequate safeguards to protect rights and the judicial review mechanisms for EU citizens did not meet the standards required by the EU Charter of Fundamental Rights.⁴¹

3.1.3. TRANS-ATLANTIC DATA PRIVACY FRAMEWORK

In March 2022, the EU and USA announced the agreement in principle on the Trans-Atlantic Data Privacy Framework. Under the framework, US intelligence agencies are to adopt procedures to ensure effective oversight of new privacy

³⁶ The Article 29 Working Party was the independent European working party that dealt with issues relating to the protection of privacy and personal data until 25 May 2018 (entry into application of the GDPR).

³⁷ European Data Protection Supervisor Annual Report 2018, Executive Summary, Luxembourg: Publications Office of the European Union, 2019, 7.

³⁸ Report From The Commission To The European Parliament And the Council on the first annual review of the functioning of the EU–U.S. Privacy Shield {SWD(2017) 344 final}, Brussels, 18.10.2017COM(2017) 611 final, 5–7.

³⁹ Judgment of CJEU of 16 July 2020, C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems*, ECLI:EU:C:2020:559.

⁴⁰ Caspar Bowd and Didier Bigo, 'Directorate General For Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs Civil Liberties, Justice And Home Affairs, The US surveillance programmes and their impact on EU citizens' fundamental rights', PE 474.405.

⁴¹ Dara Hallinan and others, 'International transfers of personal data for health research following Schrems II: a problem in need of a solution'; (2021) *European Journal of Human Genetics* 29, 1502–1509, doi.org/10.1038/s41431-021-00893-y.

and civil liberties standards; a new two-tier redress system to investigate and resolve complaints of Europeans on access to data by US Intelligence authorities, which includes a Data Protection Review Court.⁴² In August 2025, the European Commission and the United States Trade Representative reached an agreement on a Framework Agreement for Reciprocal, Fair and Balanced Trade, marking a new stage in transatlantic economic cooperation.⁴³

3.2. ADEQUATE SAFEGUARDS WITH RESPECT TO THE PROTECTION OF PRIVACY

In the absence of an Adequacy Decision, a transfer can take place through the provision of appropriate safeguards and on condition that enforceable rights and effective legal remedies are available for individuals. Those safeguards are:⁴⁴

- the so-called binding corporate rules – in the case of a group of undertakings, or groups of companies engaged in a joint economic activity, companies can transfer personal data based on internal policies approved by the competent supervisory authority, which ensure adequate data protection safeguards across the group;
- contractual arrangements with the recipient of the personal data, using, for example, the standard contractual clauses approved by the European Commission;
- adherence to a code of conduct or certification mechanism, together with obtaining binding and enforceable commitments from the recipient to apply the appropriate safeguards to protect the transferred data.

3.2.1. STANDARD CONTRACTUAL CLAUSES

Standard contractual clauses (SCCs) are ‘standardised and pre-approved model data protection clauses that allow controllers and processors to comply with their obligations under EU data protection law’.⁴⁵ In 2021, the Commission issued modernised standard contractual clauses under the GDPR for data transfers

⁴² European Commission and United States Joint Statement on Trans-Atlantic Data Privacy Framework <https://ec.europa.eu/commission/presscorner/detail/es/ip_22_2087>.

⁴³ Joint Statement on a United States-European Union framework on an agreement on reciprocal, fair and balanced trade <https://policy.trade.ec.europa.eu/news/joint-statement-united-states-european-union-framework-agreement-reciprocal-fair-and-balanced-trade-2025-08-21_en>.

⁴⁴ <https://commission.europa.eu/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/what-rules-apply-if-my-organisation-transfers-data-outside-eu_en>.

⁴⁵ The New Standard Contractual Clauses – Questions And Answers Overview, <https://commission.europa.eu/system/files/2022-05/questions_answers_on_sccs_en.pdf>.

from controllers or processors in the EU to controllers or processors established outside the EU.⁴⁶

There are two sets of Standard Contractual Clauses:

- SCCs for the relationship between controllers and processors based on Article 28(3) and (4) of ‘GDPR’ and on Article 29(3) and (4) of Regulation 2018/1725⁴⁷ – which can be used by public and private entities as well as by EU institutions, bodies, offices and agencies.
- SCCs as a tool for data transfers⁴⁸ to comply with the requirements of the GDPR for transferring personal data to countries outside of the EEA. The are most used data transfer instrument for European companies.⁴⁹

The protection may differ from that in the EU, as long as they prove to be effective in practice. The objective is not to mirror the European legislation point by point, but to establish the essential core requirements of that legislation.⁵⁰ Aspects such as the essence of the right to privacy, its effective implementation, enforcement and supervision should be taken into account. Obligations of the parties include standards like: purpose limitation; transparency; accuracy and data minimisation; storage limitation; security of processing. The CJEU in *Schrems II*, stipulated stricter requirements for the transfer of personal data based on standard contract clauses (SCCs). Data controllers or processors that intend to transfer data based on SCCs must ensure that the data subject is granted a level of protection essentially equivalent to that guaranteed by the General Data Protection Regulation (GDPR) and the EU Charter of Fundamental Rights (CFR) – if necessary, with additional measures to compensate for lacunae in the protection of third-country legal systems. When failing to meet that requirement, operators must suspend the transfer of personal data outside the EU.

⁴⁶ Commission Implementing Decision (EU) 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council (Text with EEA relevance).

⁴⁷ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC.

⁴⁸ Commission Implementing Decision (EU) 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council (Text with EEA relevance) C/2021/3972 OJ L 199, 7 June 2021, 31–61.

⁴⁹ PP-EY Annual Privacy Governance Report 2019.

⁵⁰ Laura Bradford, Mateo Aboy, Kathleen Liddell, ‘International transfers of health data between the EU and USA: a sector-specific approach for the USA to ensure an “adequate” level of protection’ (2020) *Journal of Law and the Biosciences* 7(1), doi: 10.1093/jlb/l5aa055.

Standard contractual clauses (SCCs), the main alternative legal mechanism for EU-US data transfers, are also vulnerable. Complaints, investigations and potentially suspensions of SCCs used to transfer data to the US are highly likely to increase in the coming years. This implicates major internet and telecommunications companies being most affected by the US mass surveillance law.

3.2.2. BINDING CORPORATE RULES (BCR)

Binding Corporate Rules are one of the ways in which such adequate safeguards (Article 47 GDPR) may be demonstrated by a group of undertakings, or a group of enterprises engaged in a joint economic activity. BCR was first introduced by Article 29 Data Protection.⁵¹

Binding corporate rules constitute an important aspect. They are internal rules adopted by multinational groups of enterprises in order to transfer data within the same group of enterprises to related entities located in countries that do not provide an adequate level of protection.⁵² BCRs are designed to facilitate data transfers within an organisation and must be approved by the competent domestic supervisory authority in accordance with Article 63 of the GDPR. They are approved when two conditions are achieved, namely that they are legally binding, applied and enforced by every member concerned of the group of undertakings or enterprises, including employees, and that they expressly confer enforceable rights on data subjects.⁵³

This requires approval from the relevant EU data protection authority to facilitate data transfers within a company or group of companies. They are almost exclusively used by large multinational corporations operating in multiple jurisdictions, because they are relatively costly and burdensome for organisations.⁵⁴

Unlike the SCCs, there is no set wording for the BCRs, so companies can tailor them to suit their own needs.⁵⁵

⁵¹ Recommendation on the Standard Application for Approval of Controller Binding Corporate Rules for the Transfer of Personal Data, adopted on 11 April 2018, 17/EN WP264.

⁵² Communication from the Commission to the European Parliament and the Council, Exchanging and Protecting Personal Data in a Globalised World, Brussels, 10 January 2017 COM(2017) 7 final.

⁵³ Danijela Vrbljanac, 'Personal Data Transfer to Third Countries – Disrupting the Even Flow?' (2018) *Athens Journal of Law* 4(4), 345, 337–358.

⁵⁴ Oliver Patel and Dr Nathan Lea, 'EU-U.S. Privacy Shield, Brexit and the Future of Transatlantic Data Flows', (2020) UCL European Institute Policy Paper, 9.

⁵⁵ Philip Rees, Dominic Hodgkinson, 'Binding Corporate Rules: A simpler clearer vision?' (2007) *Computer Law & Security Review* 23(4), 352-356, doi.org/10.1016/j.clsr.2007.03.004.

3.2.3. CODE OF CONDUCT

Code of conduct is a new transfer mechanism introduced by Articles 40(3) and 46(2)(e) GDPR. Once approved by the competent supervisory authority and having been granted general validity within the Union by the Commission, a code of conduct may be adhered to and used by controllers or processors not subject to the GDPR located in third countries, for the purpose of providing appropriate safeguards to data transferred to third countries. Then, the controllers and processors are required to make binding and enforceable commitments, via contractual or other legally binding instruments, to apply the appropriate safeguards provided by the code, including with regard to the rights of data subjects as required by Article 40(3).

In the meaning of Article 46, the following elements need to be addressed:⁵⁶

- Essential principles, rights and obligations arising under the GDPR for controllers/processors;
- Guarantees that are specific to the context of transfers (such as with respect to the issue of onward transfers, conflict of laws in the third country).

As Krekora-Zajac and Marciniak point out, the codes of conduct provide an unprecedented possibility of the sector self-regulation, enabling a real influence on the adopted regulations to all stakeholders.⁵⁷ Nevertheless, the role of such a code of conduct is not to supplant the GDPR's obligations, only to clarify and assist in interpreting them in a particular context. It is possible to violate the GDPR even assuming perfect adherence to an approved code of conduct.⁵⁸

3.3. CONSENT

Moreover, when a transfer can be made based on a number of derogations for specific situations, for example, where an individual has explicitly consented to the proposed transfer after having been provided with all the necessary information about the risks associated with the transfer⁵⁹ (Article 49(1)(a) GDPR). In view

⁵⁶ Guidelines 04/2021 on Codes of Conduct as tools for transfers.

⁵⁷ Dorota Krekora-Zajac, Błażej Marciniak and Jakub Pawlikowski, 'Recommendations for Creating Codes of Conduct for Processing Personal Data in Biobanking Based on the GDPR art.40' (2021) *Frontiers in Genetics* 12:711614, doi: 10.3389/fgene.2021.711614.

⁵⁸ Mark Phillips, *International data-sharing norms: from the OECD to the General Data Protection Regulation (GDPR)* (2018) *Human Genetics* 137(8), 575-582. doi: 10.1007/s00439-018-1919-7.

⁵⁹ European Data Protection Board, Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679 adopted on 25 May 2018.

of recital 111 GDPR, data transfers on the grounds of this derogation may take place ‘where the transfer is occasional and necessary in relation to a contract. Also transfer must be necessary for important reasons of public interest or for the establishment, exercise or defense of legal claims or in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent. Transfer must be made from a public register’.

Obligations regarding the consent:

- Consent must be explicit;
- Consent must be specific for the particular data transfer/set of transfers;
- Consent must be informed, particularly as to the possible risks of the transfer.

According to Article 49(4), only public interests recognized in European Union law or in the law of the Member State to which the controller is subject can lead to the application of this derogation.

4. FUTURE OF EU-US DATA TRANSFER – REVIEW OF SCENARIOS

The influence of the US on EU data transfer continues to be a topic of discussion and negotiation between the two regions. Also, these two regions have different approaches to data privacy and protection – an emphasis on self-regulation in the former versus strict legal requirements in the latter.⁶⁰ Both authorities have an interest in enforcing their privacy laws in an extraterritorial manner.⁶¹

Data protection depends on normative commitments established in advance.⁶² The failure of Safe Harbor and Privacy Shield weakens the security of Europeans. The lack of implementation of data protection standards in such a significant element as the EU-US data flow allows us to conclude that the protection is only theoretical. Moreover, Safe Harbor and Privacy Shield were focused on legalistic

⁶⁰ Gerhard Steinke, ‘Data privacy approaches from US and EU perspectives’, (2002) *Telematics and Informatics* 19 (2), 193-200, doi.org/10.1016/S0736-5853(01)00013-2.

⁶¹ Briseida S Jiménez-Gómez, ‘Cross-Border Data Transfers Between the EU and the U.S.: A Transatlantic Dispute’, (2021) *Santa Clara Journal of International Law* 19(2) 44.

⁶² Derek E Bambauer, ‘Privacy Versus Security’, (2013) *Journal of Criminal Law and Criminology* 103(3) 673, 667–684.

mechanisms to protect data transfers rather than on protection in practice.⁶³ This raises doubts about the effectiveness of the current regulatory direction.

Alkiş-Tümtürk points out that the best and quickest way for the US to achieve an adequate level of data protection may be a two-way data protection approach with stricter Supplementary Rules covering only EU data subjects; requiring intelligence services to stop accessing data received from the EU unless there is a reasonable concern for national security; ensuring an independent oversight mechanism; and providing effective redress mechanisms especially in the event of intelligence services' non-proportional and limitless access.⁶⁴ In my opinion, the problem is not legal or practical, but political. The US does not want to comply with EU data protection guidelines. It is worth noting that during the Privacy Shield and current negotiations, the US government has implemented laws, such as the CLOUD Act.⁶⁵ CLOUD Act obligates the US companies to disclose information about the user, regardless of whether the information was stored in the US or outside the US. It is clear that laws like that are evidently contradictory to EU privacy laws.

The issue of regulating cross-border data flows is essential for the EU economy. However, it is worth noting that the United States' failure to comply with EU data protection standards is not solely due to a lack of political will or disregard for European values, but it also has a rational justification in the American logic of national interest. The measures taken by the US authorities, including the introduction of legal acts such as the CLOUD Act, are part of a broader strategy to ensure national security as well as combat terrorism and organised crime. In this context, access to data, including data processed by foreign companies, is seen as a key element of effective prevention and prosecution of serious crimes. This security logic may clash with the European perspective based on the primacy of individual rights and privacy protection, but it does not mean that the US position is irrational. At the same time, it seems reasonable to ask whether some of the security arguments are not also serving as a smokescreen for deeper economic interests, in particular, control over global data flows, which gives an advantage to US-based technology companies. Further analysis of US motivations, both explicit and implicit, could enrich the debate by providing a broader geopolitical and economic context.

⁶³ Christopher Kuner, 'Reality and Illusion in EU Data Transfer Regulation Post Schrems' (2017) *German Law Journal* 18(4), 881-918. doi:10.1017/S2071832200022197.

⁶⁴ Asli Alkiş-Tümtürk, 'Uncertain future of transatlantic data flows: Will the United States ever achieve the 'adequate level' of data protection?' (2022) *Hungarian Journal of Legal Studies* 63(3), 308, 294–311 doi.org/10.1556/2052.2022.00376.

⁶⁵ Clarifying Lawful Overseas Use of Data Act or the CLOUD Act, H.R.4943.

The current state of uncertainty, when another agreement between the United States and Europe is called into question, prompts a change of perspective on this problem and the need to find an alternative solution. Christakis and Terpan indicate three possible scenarios for the future of EU-US relations:⁶⁶

- the ‘PNR’ or ‘TFTP’ model – comprehensive and self-standing EU–US Agreement;
- the ‘MLA’ or ‘Extradition’ model – bilateral agreements between the US and EU Member States;
- mixed agreement of the two above options.

Moreover, many sectors, including the health sector, due to the critical need for data transfer, began to create *lex specialis* for their fields in the area of transfer based on the possibilities of GDPR (e.g., based on the code of conduct⁶⁷). For health data, there are postulates that the transmission should be based on the HIPAA⁶⁸ shield.⁶⁹

These solutions, however, do not include the clue to the problem of the general reluctance to adapt the American system to European standards. The source of the problem is divergence between European and American approaches to privacy.⁷⁰ In the American system, the right to privacy is a derivative of the right to property and personal inviolability.⁷¹ In the European culture, the right to privacy is of a different nature.⁷² It is an inherent element of human dignity and personal good. As a human right, it is universal, natural, inalienable and inviolable. This attitude to privacy is the foundation of liberal policy and the assumptions of the

⁶⁶ Theodore Christakis and Fabien Terpan, ‘EU–US negotiations on law enforcement access to data: divergences, challenges and EU law procedures and options’, (2021) *International Data Privacy Law* (11) 2, 81–106, doi.org/10.1093/idpl/ipaa022

⁶⁷ Fruzsina Molnár-Gábor, Jan O Korbel, ‘Genomic data sharing in Europe is stumbling – Could a code of conduct prevent its fall?’ (2020) *EMBO Molecular Medicine* 12:e11421 doi.org/10.15252/emmm.201911421.

⁶⁸ Health Insurance Portability and Accountability Act of 1996.

⁶⁹ Laura Bradford, Mateo Aboy, Kathleen Liddell, ‘International transfers of health data between the EU and USA: a sector-specific approach for the USA to ensure an ‘adequate’ level of protection’, (2020) *Journal of Law and the Biosciences* 7(1) doi.org/10.1093/jlb/lsaa055.

⁷⁰ Shannon Togawa Mercer, ‘The Limitations of European Data Protection As A Model for Global Privacy Regulation’ (2020) *AJIL Unbound* 114, 20–25. doi:10.1017/aju.2019.83

⁷¹ Judith Jarvis Thomson, ‘The Right to Privacy’, (1975) *Philosophy and Public Affairs* 4, 308.

⁷² Vera Bergelson, ‘It’s Personal but Is It Mine? Toward Property Rights in Personal Information’ (2003) *University of California, Davis Law Review* 37, 383, 379–451; Jessica Litman, ‘Information Privacy/Information Property’ (2000) *Stanford Law Review* 52, 1286, 1283–1314.

rule of law.⁷³ Failure to unify these differences will always require one of the parties to ‘give in’. However, neither side is willing to do so.

Due to the nature of the network, the EU should not only strive to ensure the protection of users on its territory, but also influence the global standard of data protection in the network by disseminating its values and standards. The unification of legal systems has a positive effect on ensuring the rights of Europeans. The problem of over-surveillance is not just between the EU and the US, but between the US and every region of the world.

There are various proposals among researchers related to the global unification of international privacy protection on the Internet. Briseida S Jiménez-Gómez suggests adopting the International Principles on the Application of Human Rights to Communications Surveillance⁷⁴ as a way to global protection of privacy as a human right. Yik-Chan Chin points out China’s proposition of unification of the cross-border data flow in the following initiatives – ‘Global Initiative on Data Security’ and ‘Global Security Initiative’.

It seems that developing common global standards is the best solution. However, this approach generates two main problems. The idea is to promote connectivity in the digital era and support the strengthening of international cooperation in the digital economy and security, including participating in or joining the negotiations on relevant regional trade rules.⁷⁵ Proposals to unify the online legal space have appeared since the beginning of the Internet’s history. However, significant differences in legal cultures, along with the threat of legal dualism – i.e., varying online and offline protection, stand in the way. The second problem is more significant. It should be remembered that access to data gives enormous power. The question is whether the United States is able to give it up. If not, any agreement will exist only on paper.

The Internet, although it represents the global media, is becoming a legal regionalization. The regional protection is based on legal tradition and cultures, depending on the origin of region.⁷⁶ This allows to maintain a satisfactory level of

⁷³ Sławomir Oliwiak, ‘Giorgio Agamben o prawach człowieka we współczesnym demokratycznym państwie prawa’ in Marta Andruszkiewicz, Anetta Breczko and Sławomir Oliwniak (eds) *Filozoficzne i teoretyczne zagadnienia demokratycznego państwa prawa*, (Białystok 2015), 103.

⁷⁴ <<https://www.eff.org/files/necessaryandproportionatefinal.pdf>>.

⁷⁵ Yik-Chan Chin and Jingwu Zhao, ‘Governing Cross-Border Data Flows: International Trade Agreements and Their Limits’, (2022) *Laws* 11(4), 63; doi.org/10.3390/laws11040063.

⁷⁶ Christopher Kuner, ‘Regulation of Transborder Data Flows under Data Protection and Privacy Law: Past, Present and Future’, (2011) *OECD Digital Economy Papers* 187 (OECD Publishing, Paris), 7. doi.org/10.1787/5kg0s2fk315f-en.

protection in a given region, but in a case such as trans-regional data transfer, it creates problems. It seems obvious that a company wishing to operate in the EU should respect the local legal system. That means we need to consider the need for companies to transfer personal data from the EU to third states in general and to the US in particular. Therefore, the possibility of storing and processing personal data on servers located in the European Union should be carefully considered as a legitimate and feasible alternative to data transfers outside the EU.⁷⁷ Nevertheless, some researchers argue that data localization neither solves the problem of foreign surveillance, nor enhances personal privacy, while undermining other values embraced by the European Union.⁷⁸ Also, the technological solutions like encryption will not prove useful in all contexts.⁷⁹

5. CONCLUSIONS

The development of the information society, including the transfer of social, economic and political relations to the Internet, increases the risk related to the use of data by unauthorized entities. The development of sophisticated methods of surveillance on the Internet combined with big data technologies, which allow for real-time analysis of large amounts of data, affects the security of individuals of entire societies. Protecting the right to privacy on the Internet is an ever-changing challenge. Rapid technological changes require a flexible approach that allows you to quickly adapt to new threats.

EU is shaping how the world thinks about data privacy.⁸⁰ The EU has impacted the development of data protection laws globally and taken an essential role. Standards developed by the EU often become the basis for regulations in other regions. The world is, therefore, watching how the EU will deal with the problem of cross-border data transfer to the US.

⁷⁷ Xavier Tracol, ‘“Schrems II”: The return of the Privacy Shield’, (2020) *Computer Law & Security Review* 39, doi.org/10.1016/j.clsr.2020.105484.

⁷⁸ Anupam Chander, ‘Is Data Localization a Solution for Schrems II?’ (2020) *Journal of International Economic Law* 23 (3), 771–784, doi.org/10.1093/jiel/jgaa024.

⁷⁹ Maria Helen Murphy, ‘Assessing The Implications Of Schrems Ii For Eu–Us Data Flow’, (2022) *International & Comparative Law Quarterly* 71(1), 245–262. doi:10.1017/S0020589321000348.

⁸⁰ Paul M Schwartz, ‘Global Data Privacy: The EU Way’, (2019) *New York University Law Review* 94 (4), 771, 771–818.

Over the years, tensions have arisen in the USA-EU data transfer relationship.⁸¹ The United States claims that the EU has burdensome standards. The EU, after many scandals related to the illegal use of data by US surveillance authorities, also approaches cross-border transfers with due caution.

The existing solutions, which have been described in this chapter, provide only theoretical protection. They cannot be considered sufficient in terms of protecting the security of European data. Solving problems with data transfer between the EU and the US is not an easy task. This problem results from significant differences between the European and American legal systems, mentality and understanding of the essence of the right to privacy. The EU approach is significantly different than US privacy law.⁸² However, the crux of the problem is not the legal impossibility of regulating the transfer. The problem is political will. The transfer of personal data from Europe to the US will remain an issue because it is not likely that the US will adopt privacy rules that could lead to an adequacy status.⁸³ The adoption of legislation such as the CLOUD Act shows that the United States is not interested in limiting its access to the data of third-country nationals.

The dominant role of the United States in the internet area makes negotiations difficult. Despite violating the principles of Safe Harbor and Privacy Shield, respectively, data transfer takes place continuously. The US is, therefore, not sufficiently interested in bringing its practices into line with EU requirements, as the absence does not result in the closure of the EU market. The solution to the situation is to take up the challenge by the EU in terms of developing technological barriers that inhibit access to the data of Europeans. Only if no one can reach them, only then will they be safe.

REFERENCES

Alkiş-Tümtürk A, 'Uncertain future of transatlantic data flows: Will the United States ever achieve the "adequate level" of data protection?' (2022) *Hungarian Journal of Legal Studies* 63(3), doi.org/10.1556/2052.2022.00376

⁸¹ Maria Helen Murphy, 'Assessing The Implications Of Schrems Ii For Eu–Us Data Flow, (2022) *International & Comparative Law Quarterly* 71(1), 245–262. doi:10.1017/S0020589321000348.

⁸² Chris Jay Hoofnagle, Bart van der Sloot and Frederik Zuiderveen Borgesius, 'The European Union general data protection regulation: what it is and what it means', (2019) *Information & Communications Technology Law*, 28:1, 65–98, doi: 10.1080/13600834.2019.1573501.

⁸³ Dorothee Heisenberg, 'Negotiating Privacy: The European Union, the United States, and Personal Protection', in the series *iPolitics: Global Challenges in the Information Age* (Boulder, 2005) doi.org/10.1515/9781626370074.

- Bambauer DE, 'Privacy Versus Security', (2013) *Journal of Criminal Law and Criminology* 103(3)
- Bender D, 'Having mishandled Safe Harbor, will the CJEU do better with Privacy Shield? A US perspective' (2016) *International Data Privacy Law* 6(2), doi.org/10.1093/idpl/ipw005
- Bennett CJ, 'Regulating Privacy: Data Protection and Public Policy in Europe and the United States', Cornell University Press, (New York, 1992)
- Bergelson V, 'It's Personal but Is It Mine? Toward Property Rights in Personal Information' (2003) *University of California, Davis Law Review* 37, 383, 379–451; Jessica Litman, 'Information Privacy/Information Property' (2000) *Stanford Law Review* 52
- Bowd C and Bigo D, 'Directorate General For Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs Civil Liberties, Justice And Home Affairs, The US surveillance programmes and their impact on EU citizens' fundamental rights', PE 474.405
- Bradford L, Aboy M, Liddell K, 'International transfers of health data between the EU and USA: a sector-specific approach for the USA to ensure an "adequate" level of protection' (2020) *Journal of Law and the Biosciences* 7(1), doi: 10.1093/jlb/Isaa055
- Bu-Pasha S, 'Cross-border issues under EU data protection law with regards to personal data Protection', (2017) *Information & Communications Technology Law* 26(3) doi.org/10.1080/13600834.2017.1330740
- Burri M and Schär R, 'The Reform of the EU Data Protection Framework: Outlining Key Changes and Assessing Their Fitness for a Data-Driven Economy', (2016) *Journal of Information Policy* 6, 506
- Chander Anupam, 'Is Data Localization a Solution for Schrems II?' (2020) *Journal of International Economic Law* 23 (3), doi.org/10.1093/jiel/jgaa024
- Chin Y-Ch and Zhao J, 'Governing Cross-Border Data Flows: International Trade Agreements and Their Limits', (2022) *Laws* 11(4), doi.org/10.3390/laws11040063
- Christakis Te and Terpan F, 'EU–US negotiations on law enforcement access to data: divergences, challenges and EU law procedures and options', (2021) *International Data Privacy Law* (11) 2, 81–106, doi.org/10.1093/idpl/ipaa022
- Colonna Liane 'Prism and The European Union's Data Protection Directive', (2013) *The John Marshall Journal of Information Technology & Privacy Law* 4 (3)
- Davies Simon, 'Privacy Opportunities and Challenges with Europe's New Data Protection Regime, in *Privacy in the Modern Age* 55, 57 (Marc Rotenberg, Julia Horwitz & Jeramie Scott (eds), The New Press 2015)
- Díaz Díaz Efrén, 'The new European Union General Regulation on Data Protection and the legal consequences for institutions, Church', (2016) *Communication and Culture* 1 (1) doi.org/10.1080/23753234.2016.1240912
- Hallinan D and others, 'International transfers of personal data for health research following Schrems II: a problem in need of a solution'; (2021) *European Journal of Human Genetics* 29, doi.org/10.1038/s41431-021-00893-y

Heisenberg D, 'Negotiating Privacy: The European Union, the United States, and Personal Protection', in the series *iPolitics: Global Challenges in the Information Age* (Boulder, 2005) doi.org/10.1515/9781626370074

Hoofnagle ChJ, van der Sloot B and Zuiderveen BF, 'The European Union general data protection regulation: what it is and what it means', (2019) *Information & Communications Technology Law*, 28:1, doi: 10.1080/13600834.2019.1573501

Jiménez-Gómez BS, 'Cross-Border Data Transfers Between the EU and the U.S.: A Transatlantic Dispute Transatlantic Dispute', (2021) *Santa Clara Journal of International Law* 19(2) 44

Krekora-Zajac D, Marciniak B and Pawlikowski J (2021) 'Recommendations for Creating Codes of Conduct for Processing Personal Data in Biobanking Based on the GDPR art. 40' (2021) *Frontiers in Genetics* 12:711614, doi: 10.3389/fgene.2021.711614

Kuner C, 'Reality and Illusion in EU Data Transfer Regulation Post Schrems' (2017) *German Law Journal* 18(4), 881-918. doi:10.1017/S2071832200022197

--, 'Regulation of Transborder Data Flows under Data Protection and Privacy Law: Past, Present and Future', (2011) *OECD Digital Economy Papers* 187 (OECD Publishing, Paris), 7. doi.org/10.1787/5kg0s2fk315f-en

Leiner BM and others, 'A brief history of the internet', (2009) *Computer Communication Review* 39(5), doi.org/10.1145/1629607.1629613

Milczarek E, 'Prywatność wirtualna: unijne standardy ochrony prawa do prywatności w Internecie, (Warszawa 2020)

Molnár-Gábor F, Korbel JO, 'Genomic data sharing in Europe is stumbling – Could a code of conduct prevent its fall?; (2020) *EMBO Molecular Medicine* 12:e11421 doi.org/10.15252/emmm.201911421

Murphy MH, 'Assessing The Implications Of Schrems Ii For Eu–Us Data Flow, (2022) *International & Comparative Law Quarterly* 71(1). doi:10.1017/S0020589321000348

Oliwiak S, 'Giorgio Agamben o prawach człowieka we współczesnym demokratycznym państwie prawa' in Marta Andruszkiewicz, Anetta Breczko and Sławomir Oliwniak (eds) *Filozoficzne i teoretyczne zagadnienia demokratycznego państwa prawa*, (Białystok 2015), 103

Patel O and Lea N, 'EU-U.S. Privacy Shield, Brexit and the Future of Transatlantic Data Flows', (2020) UCL European Institute Policy Paper, 9

Phillips Mark, *International data-sharing norms: from the OECD to the General Data Protection Regulation (GDPR)* (2018) *Human Genetics* 137(8), 575-582. doi: 10.1007/s00439-018-1919-7

PP-EY Annual Privacy Governance Report 2019

Rees P, Hodgkinson D, 'Binding Corporate Rules: A simpler clearer vision?' (2007) *Computer Law & Security Review* 23(4), 352–356, doi.org/10.1016/j.clsr.2007.03.004

Schrems M, 'The Privacy Shield is a Soft Update of the Safe Harbor', (2016) *European Data Protection Law Review* 148, doi.org/10.21552/EDPL/2016/2/4

- Schwartz PM, 'Global Data Privacy: The EU Way', (2019) *New York University Law Review* 94 (4)
- Steinke G, 'Data privacy approaches from US and EU perspectives', (2002) *Telematics and Informatics* 19 (2), 193–200, doi.org/10.1016/S0736-5853(01)00013-2
- Strömholm S, 'Right of Privacy and Rights of The Personality a Comparative Survey; Working paper prepared for the Nordic Conference on privacy organized by the International Commission of Jurists' (Stockholm 1967)
- Terpan F, 'EU-US Data Transfer from Safe Harbour to Privacy Shield: Back to Square One?' (2018) *European Papers* 3, doi: 10.15166/2499-8249/261
- The Article 29 Working Party was the independent European working party that dealt with issues relating to the protection of privacy and personal data until 25 May 2018 (entry into application of the GDPR)
- Thomson JJ, 'The Right to Privacy', (1975) *Philosophy and Public Affairs* 4, 308
- Togawa Mercer Shannon, 'The Limitations of European Data Protection As A Model for Global Privacy Regulation' (2020) *AJIL Unbound* 114, doi:10.1017/aju.2019.83
- Toptchiyska D, 'The Rule of Law and EU Data Protection Legislation: Some Controversial Issues in light of the new EU General Data Protection Regulation', (2017) *The ORBIT Journal* 1(1) doi.org/10.29297/orbit.v1i1.16
- Tracol Xavier, 'EU–U.S. Privacy Shield: The saga continues', (2016) *Computer Law & Security Review* 32(5), 775–777, doi.org/10.1016/j.clsr.2016.07.013;
- , "'Schrems II': The return of the Privacy Shield", (2020) *Computer Law & Security Review* 39, doi.org/10.1016/j.clsr.2020.105484
- Voss G W, 'The Future of Transatlantic Data Flows: Privacy Shield or Bust?' (2016) *Journal of Ternet Law* 19(11).
- Vrbljanac D, 'Personal Data Transfer to Third Countries – Disrupting the Even Flow?' (2018) *Athens Journal of Law* 4 (4) doi.org/10.30958/ajl.4-4-4
- 'Personal Data Transfer to Third Countries – Disrupting the Even Flow?', (2018) *Athens Journal of Law* 4(4), 345, 337–358
- Weiss M A and A K, 'U.S.-EU Data Privacy: From Safe Harbor to Privacy Shield' (Congressional Research Service, 19 May 2016) 6. <<https://sgp.fas.org/crs/misc/R44257.pdf>>
- Westin A, 'Science, Privacy, and Freedom: Issues and Proposals for the 1970's. Part I--The Current Impact of Surveillance on Privacy' (1966) *Columbia Law Review* 66 (6)

Edyta Figura-Góralczyk

Department of Civil, Commercial, and Private International Law,

Krakow University of Economics,

Center for Private International Law, Jagiellonian University in Krakow

e-mail: edyta.figura-goralczyk@uj.edu.pl

ORCID: 0000-0003-4403-4707

ESCAPE CLAUSE IN INTERNATIONAL FAMILY, PROPERTY AND SUCCESSION LAW

Abstract

This article discusses the regulation of the escape clause in private international family, property and succession law from the perspective of the jurisdiction of a Polish court or other authority, like a notary public. In cases concerning family, property and succession, the predictability of the applicable law is of particular importance as private laws in those matters differ in substantial way from one country to another. Whereas the escape clause exceptionally allows the court for the *a posteriori* application of the law more closely connected or at least substantially connected to the case which can create a situation of uncertainty of applicable law for the involved parties. The functioning of the escape clause in the family (parental responsibility and maintenance), property (transit goods) and succession private international law is analysed in this article. The common features and the particularities of the legal regulation are presented. First, the law that is manifestly more closely connected to the case, no matter if family, property or succession, is indicated on the basis of all circumstances of the case and not only one (or two), as is the case in the indication of law on the basis of the connecting factor. Those circumstances are different depending on the hypothesis of the legal norm (e.g., different for transit goods than for the succession case), the wording of the escape clause and are estimated by the court *a posteriori* on the basis of all facts of the case. Second, the application of the escape clause is excluded if there is a choice of law (although in

some cases parties are not allowed to choose law, e.g., for transit of goods or parental responsibility). Third, the escape clause is applicable exceptionally, as it introduces the uncertainty of law. Fourth, the escape clause is not regulated uniformly in international family, property and succession law. Moreover, the article presents how values such as legal certainty and flexibility are balanced by the legal regulation of the escape clause in family, property and succession private international law in order to indicate the law most closely related to a given relationship.

KEYWORDS

escape clause, private international law, parental responsibility, maintenance, transit good, succession

SŁOWA KLUCZOWE

klauzula korekcyjna, prawo prywatne międzynarodowe, odpowiedzialność rodzicielska, alimenty, rzecz w transporcie, dziedziczenie

1. INTRODUCTION

An escape clause (*exception clause, clause d'exception, clausola d'eccezione, Ausweichsklausel*) is the way of indicating the applicable law on the basis of the connecting factor of the closer connection.¹ Indication of law on the basis of the escape clause is always in correction to the conflict of laws rule that incorporates an objective connecting factor. The escape clause makes the indication of law more flexible by giving the judge the possibility to indicate the law that is closer to a given relationship than the one appointed by the legislator on the basis of the objective connecting factor. However, it also creates the risk of indication of the law being unpredictable to the parties. As the judge indicates the applicable law *a posteriori*, at the stage of the court proceeding.

In cases concerning family, property and succession matters, the predictability of the applicable law is of particular importance as the material law differs in substantial way from one country to another.² Therefore, the application of a different law in cross-border matters than the one appointed on the basis of the

¹ See more about the escape clause in Jürgen Basedow in *Encyclopedia of Private International Law*, Vol 1, Basedow and others (eds), Cheltenham, Northampton 2017, 668–674.

² See, Jens M Scherpe, *Comparative Family Law*, in Mathias Reimann, Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, Oxford 2019, 1089–1109; Sjeff Van Erp, *Comparative Property Law*, in Reimann, Zimmermann (eds), *The Oxford Handbook of Comparative*

conflict of laws rule, which incorporates the objective connecting factor, may have substantial effects on the rights and duties of the parties. Despite the issue of unpredictability, the escape clause is also introduced in the provisions concerning applicable law to property, family and succession matters. This article focuses on regulating and functioning of the escape clause in cross-border family, property and succession cases, as well as on law-making policies and values related to this mechanism of indicating applicable law.

2. ESCAPE CLAUSE IN INTERNATIONAL FAMILY LAW

2.1. PARENTAL RESPONSIBILITY

In private international family law, the escape clause indicates law for parental responsibility and maintenance between spouses.

The general conflict of laws rule for the parental responsibility indicates the law of the authority that adjudicates such a case (*lex fori*) according to Article 15 paragraph 1 Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.³ ‘However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection’. (Article 15 paragraph 2 of the 1996 Hague Convention).⁴ This provision (Article 15 paragraph 2 of the 1996 Hague Convention) is based on the closer connection rule and the principle of the best interest of the child⁵ and not only on the closer connection to a given parental responsibility relationship.

Law, Oxford 2019, 1032–1057; Marius J De Waal, *Comparative Succession Law*, in Reimann, Zimmermann (eds), *The Oxford Handbook of Comparative Law*, Oxford 2019, 1058–1087.

³ Further: ‘1996 Hague Convention’; See more, Piotr Mostowik, *Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym*, Kraków 2014, 282; Mostowik, *Rozdział 7 Prawo właściwe dla pieczy nad osobą dziecka i jego majątkiem* in *Międzynarodowe prawo rodzinne. Filiacja. Piecza nad dzieckiem. Alimentacja*, Mostowik (ed), Warsaw 2023. <<https://sip.lex.pl/#/monograph/369528150/129?keyword=Mostowik.%20Mi%C4%99dzynarodowe%20prawo%20rodzinne.%20Filiacja.%20Piecza%20nad%20dzieckiem.%20Alimentacja%20Warsaw%202023&toHit=1&cm=SFIRST>> accessed 27 July 2025.

⁴ See about escape clause, Andrzej Mączyński, *Kodyfikacyjne zagadnienia części ogólnej prawa prywatnego międzynarodowego*, in Andrzej Janik (ed), *Studia i Rozprawy. Księga jubileuszowa dedykowana profesorowi Andrzejowi Calusowi*, Warsaw 2009, 443.

⁵ Paul Lagarde, *Explanatory Report on the 1996 Hague Child Protection Convention*, in *Hague Conference on Private International Law*, Proceedings of the Eighteenth Session, 30 September to 10 October 1996, Vol II, Protection of children, Hague 1998, 574, further: ‘Lagarde Report’.

The term ‘parental responsibility’ is defined in Article 1(2) of the 1996 Hague Convention as ‘parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child’. Additionally, in Article 3 of the 1996 Hague Convention, the exemplary claims concerning parental responsibility are mentioned. These are the cases that concern contacts between a parent and a child, the possibility of taking decisions in the important matters of the child, like the habitual residence of the child, etc.⁶

For such cases, the escape clause from Article 15 paragraph 2 of the 1996 Hague Convention allows for the indication or consideration of a different law than the *lex fori*, being in the ‘substantial connection’ with the case of the parental responsibility and serving the best interest of the child.⁷ However, the provision does not require checking if there is no close connection of the situation with the law of the forum.⁸ In case of parental responsibility, the peculiarity of the escape clause is that it also allows for taking into consideration the more closely connected law and that it expressly invokes the best interest of the child (the protection of the person of the child or the property of the child) as the directive for the determination of the more closely connected law. Because of that, Article 15 paragraph 2 of the 1996 Hague Convention is qualified by the Polish doctrine as serving an alternative corrective indication due to the fact that it seems to require a substantive result in the form of ‘protection of the child’s person or property’.⁹ Apart from considering different circumstances than the *lex fori*, it is also possible to apply law on the basis of the different temporal subdeterminer – e.g., past or future circumstances.¹⁰ However, also for cases of parental responsibility, the escape clause should be applied exceptionally.¹¹

The law indicated or taken into consideration on the basis of the escape clause may be the law of the convention state, but also of any other state, because the

⁶ See more, Mostowik (n 3) 54–68.

⁷ See Paulina Twardoch, in *Prawo prywatne międzynarodowe. Komentarz*, Maksymilian Pazdan (ed), Warsaw 2018, 1069; Maria C Baruffi, *The 1996 Hague Convention on the Protection of Children*, in Ilaria Viarengo, Francesca C Villata (eds), *Planning the Future of Cross Border Families. A Path Through Coordination*, Series: Studies in private international law Vol 29, Hart, Oxford, London, New York, New Delhi, Sydney 2020, 264.

⁸ Similarly for the contractual obligation there is no need to check so called negative premise, see Judgment of the Court (Grand Chamber) of 6 October 2009. Case C-133/08, ECLI:EU:C:2009:617, further: ‘Case C-133/08’, at 51, 64.

⁹ See Mostowik (n 3) 286.

¹⁰ See Mostowik (n 3) 286.

¹¹ Lagarde Report (n 5) 575, para 89.

convention has a universal scope of application of its conflict of laws rules¹² in accordance with its Article 20 of the 1996 Hague Convention.¹³ Additionally, from the perspective of a Polish court, Article 56 paragraph 1 Polish Private International Law¹⁴ extends the application of the conflict-of-law rules contained in the 1996 Hague Convention to all matters relating to parental responsibility and contact with the child (parental responsibility).¹⁵

An important question to be answered is what other laws – apart from *lex fori* – could be applicable to parental responsibility and what circumstances should be taken into account according to Article 15 paragraph 2 of the 1996 Hague Convention. The doctrine indicates that this may be the child's country of citizenship or the location of the child's property based on the interpretation of the provision – Article 8 (2) of the 1996 Hague Convention.¹⁶ Another example mentioned by the doctrine is that if the case involves jurisdiction derived from a matrimonial case and the child has its habitual residence in a country other than the seat of the adjudicating court, then it is permissible to indicate the law of the child's habitual residence on the basis of the clause.¹⁷ Such a situation could be a case of parental authority in which the Polish court has jurisdiction, and parents are Polish citizens working in the USA, the child having Polish and USA citizenship and habitually residing in the USA.¹⁸

Another circumstance is the citizenship of the child, if the child is to return to the country of its nationality soon.¹⁹ Additionally, some authors suggest that even if the child does not have the citizenship of the country but is going to move to a certain country which is going to become his/her habitual residence, the best

¹² For the purpose of this article the legal source for the determination of jurisdiction is not being analysed on the basis of the formerly binding Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 in Michał Wojewoda *Jurysdykcja krajowa i prawo właściwe w sprawach dotyczących stosunków między rodzicami a dziećmi - studium przypadku w relacjach Polska-USA*, EPS 2018, No 4, 26–29.

¹³ Baruffi (n 7) 264, 266.

¹⁴ Private International Law Act from 4th February 2011, consolidated text Journal of Laws from 2023, position 503, further: 'Polish Private International Law'.

¹⁵ See Mostowik (n 3) 167–168; Wojewoda (n 12) 30. The same mechanism is used for the guardianship and care according to Article 59 paragraph 1 of Polish Private International Law.

¹⁶ Baruffi (n 7) 264.

¹⁷ Mostowik, in Pazdan (ed), *System prawa prywatnego. Prawo prywatne międzynarodowe*, Vol 20C, Warsaw 2015, 354, nb 98; Mostowik (n 3) 286.

¹⁸ See the similar facts of the case described by Wojewoda (n 12) 31.

¹⁹ Permanent Bureau HCPIIL, Revised Draft Practical Handbook, 53–54, Lagarde Report, 574; P. Mostowik (n 17) 354, nb 98; Paulina Twardoch, in Pazdan (eds), *Prawo prywatne międzynarodowe. Komentarz*, Warsaw 2018, 1069–1070.

interest of the child may suggest application of this law on the basis of the escape clause²⁰.

Next possible situation is the case when it may be necessary to give the guardian consent to the disposal of a child's property in that country, even though the law of the forum does not provide for such a requirement.²¹ This type of case suggests the application of the law of the location of the property (*lex rei sitae*), if it is known that the child is going to return to this country soon.²²

The other circumstances that may be relevant for the application of the escape clause may be the former habitual residence of the child; the place where family members that are going to take care of the child have their habitual residence; the place where the parent that has the right to personal contacts with the child has his/her habitual residence or the place where the child has contacts with the members of the family.²³

On the contrary, there is no justification to apply the escape clause in a case when a child who has travelled to another country to be subject to the surgical operation and the hospital of that country should ask for consent to that operation from the authorities of the country of the child's habitual residence. The court should apply *lex fori* (own law) and not the law of the conduct of operation.²⁴

Article 15 paragraph 2 of the 1996 Hague Convention also allows for considering a law different than *lex fori*. As such an example, the doctrine mentions using the legal terminology from a given state by a judge when writing a judgment.²⁵ Yet another example is the consideration of the law of the location of the real estate as the justification for the refusal to issue a sales permit.²⁶

To sum up, the difference between the escape clause in matters concerning parental responsibility is that it may be the basis for determining the applicable law, even though the parties cannot choose the law in order to avoid its application. Such regulation results in a situation in which the parties may not protect themselves from the uncertainty of applicable law. Nevertheless, the balance between uncertainty and flexibility is achieved differently. Namely, the court may only apply foreign law on the basis of the escape clause in parental responsibility cases.

²⁰ Andreas Bucher, *L'enfant en droit international privé*, Genève-Bâle-Paris 2003, 187.

²¹ Permanent Bureau HCPIL, Revised Draft Practical Handbook, 53–54; Mostowik (n 3) 286.

²² Lagarde Report (n 5) 574; Mostowik (n 3) 286.

²³ Lagarde Report (n 5) 179.

²⁴ Lagarde Report (n 5) 575.

²⁵ Permanent Bureau HCPIL, Revised Draft Practical Handbook, 91.

²⁶ See, Alain Devers, Isabelle Rein-Lescastereyres, Rahima Nato-Kaltane, *Loi applicable à la responsabilité parentale*, in Pierre Murat (ed), *Droit de la famille 2016-2017*, Paris 2016, point 533.71.

Such regulation guarantees that the courts use the escape clause in these matters exceptionally. This way of regulating the applicable law as the *lex fori*, from which the escape clause always indicates foreign law, assures legal certainty.

Additionally, for the parental responsibility cases, the best interest of the child is the directive for indication of the applicable law on the basis of the escape clause, which allows the court to not apply *legis fori*.²⁷ This criterion and not only closer connection has to be additionally checked by the court in order to indicate foreign law on the basis of the escape clause.²⁸ Another special feature of this mechanism is that it may be used not only for application but also for consideration of the foreign law.

2.2. MAINTENANCE

Another scope of family matters in which the escape clause is introduced is the law applicable to maintenance between spouses, ex-spouses or to parties of a marriage which has been annulled. In this field, the law applicable is indicated according to the Protocol of 23 November 2007 on the law applicable to maintenance obligations.²⁹

The general conflict of laws rule for maintenance between spouses, ex-spouses or to parties of a marriage which has been annulled is expressed in Article 3 of the Hague Protocol. It indicates the law of the habitual residence of the maintenance creditor. However, in case of maintenance between spouses, ex-spouses or parties to annulled marriages, there is the possibility to object to the application of the law indicated on the basis of Article 3 of the Hague Protocol according to Article 5 of the Hague Protocol.³⁰

The objective scope of the conflict of laws rule expressed in Article 5 of the Hague Protocol covers maintenance between spouses, former spouses, legally or de facto

²⁷ *Lex fori* may be indirectly determined by the jurisdictional circumstances that do not concern the person of the child. See, Mostowik (n 3) 285.

²⁸ See more about the protection of individuals placed in an unfavourable position in Gerald Goldstein, *Objective, subjective and imperative localization in the resolution of conflict of laws*, Yearbook of Private International Law Vol 24, 2022/2023 20.

²⁹ 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, OJ L 331, 16 December 2009, 17–18, ELI: <http://data.europa.eu/eli/dec/2009/941/oj>, further: ‘Hague Protocol’.

³⁰ This provision is based on the proposal from the delegation of the European Community (Work. Doc. No 4), after: Andrea Bonomi, *The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, YPIL Vol 10 (2008), 348, footnote 25.

separated spouses, as well as parties to the annulled marriage. This provision differs from Article 8 of the 1973 Maintenance Convention,³¹ which had a narrower scope of application. The change results from the fact that during the preparatory works, it has been found that it is better not to change the law applicable to the maintenance in case of law or separation, and that the law of the last common habitual residence of the spouses is even more adequate for the maintenance between spouses of an existing marriage.³² However, Article 5 of the Hague Protocol does not refer to civil partnerships or same-sex marriages. Nevertheless, during the preparatory works, it has been noted that the countries that have legalized these institutions may also apply this provision to the abovementioned relationships.³³ Such extension of the scope of this provision by analogy is optional and is not binding on the other State parties to the Hague Protocol.³⁴

The Hague Protocol in Article 3 expresses as the rule the applicable law of the habitual residence of the creditor. This solution is different for maintenance between spouses, divorced spouses and parties to the annulled marriage compared to Article 8 of the 1973 Maintenance Convention, which provided for the law applicable to divorce also in the field of maintenance. A similar solution was introduced in Article 8(2) of the 1973 Maintenance Convention for maintenance in cases of legal separation and annulled marriages.³⁵

However, in case of maintenance between spouses, ex-spouses or parties to annulled marriages, there is a possibility to object to the application of the law indicated on the basis of Article 3 of the Hague Protocol according to Article 5 of the Hague Protocol. This provision states that ‘in the case of a maintenance obligation between spouses, ex-spouses or parties to a marriage which has been annulled, Article 3 shall not apply if one of the parties objects and the law of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage. In such a case, the law of that other State shall apply’.

The provision is classified as the escape clause by the doctrine.³⁶ Nevertheless, there is a significant difference in the regulation of Article 5 of the Hague Proto-

³¹ Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations, further: ‘1973 Maintenance Convention’.

³² See Bonomi (n 30) 350.

³³ See Minutes No 6, para 59 and following, after: Bonomi (n 30) 350.

³⁴ See Bonomi (n 30) 350. The author also points out the possibility of applying Article 13 of Hague Protocol and invoking the public order clause in the case of a maintenance case brought by a party to a civil partnership or same-sex marriage. (See Bonomi (n 30) 350).

³⁵ See Bonomi (n 30) 347.

³⁶ See Bonomi (n 30) 346–350, Anna Juryk, in *Prawo prywatne międzynarodowe. Komentarz*, Pazdan (ed), Warsaw 2018, 1125, Anna Juryk, *Prawo właściwe dla alimentacji dziecka*, in Mos-

col compared to other provisions that express the escape clause. The difference is that the court cannot *ex officio* invoke a law more closely related to the marriage for maintenance obligations between spouses, former spouses or parties to an annulled marriage, but it is necessary for one of the spouses or former spouses to oppose the application of the law designated in accordance with Article 3. Only if such an objection occurs, the court should assess whether any other law, e.g. the law of the spouses' last habitual residence, is more closely related to the marriage than the law indicated in accordance with Article 3 of the Hague Protocol. Moreover, the objection of one of the spouses (it seems that not only debtor but also creditor may object) does not cause the court to automatically depart from the application of the law specified in accordance with Article 3, but in the event of an objection, the court is obliged to examine whether another law – not necessarily indicated in the objection by the spouse or ex-spouse – is more closely related to the marriage than the law of the habitual residence of the maintenance creditor.³⁷ As advantages of Article 5, it is stated that adding the spouse's objection reduces legal uncertainty, because only in cases when an objection is raised, the court may refrain from specifying the law pursuant to Article 3.³⁸ It is also important to underline that the objection cannot be raised if the parties chose law on the basis of Article 7 or 8 of the Hague Protocol.

However, the important question to answer is what the deadline is to submit an objection. The provision does not introduce a time limit in this respect. Therefore, it depends on the procedural rules of the court adjudicating on the case.³⁹ For example, if a Polish court decides on a case, the provisions of the Polish Code of Civil Procedure⁴⁰ apply. However, the doctrine postulates that it is the moment when the parties enter into a dispute, unless, as a result of an objection, Polish law is applied.⁴¹ On the contrary, the Polish Supreme Court states that such an objection may be filed even in appellate proceedings.⁴²

towik (ed), *Międzynarodowe prawo rodzinne. Filiacja. Piecza nad dzieckiem. Alimentacja*, Warsaw 2023, 422.

³⁷ See Bonomi (n 30) 349.

³⁸ See Bonomi (n 30) 348–349.

³⁹ See Postanowienie Sądu Najwyższego z dnia 23 marca 2016 r., III CZP 112/15, LEX nr 2016029, further: 'Judgment No III CZP 112/15', Juryk (n 36) 423.

⁴⁰ Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, i.e. Journal of Laws 2024.1568 as amended.

⁴¹ See Juryk, in *Prawo prywatne międzynarodowe. Komentarz*, Pazdan (ed), Warsaw 2018, 1125, Juryk (n 36) 423, The author refers to a similar view expressed by P. Mostowik regarding the choice of law for divorce see. P. Mostowik, *Prawo właściwe dla rozvodu i separacji w świetle rozporządzenia unijnego nr 1259/2010*, KPP 2011/2, 366–367.

⁴² Uzasadnienie Postanowienia Sądu Najwyższego, z 23.03.2016 r., III CZP 112/15, LEX nr 2016029.

The provision of Article 5 of the Hague Protocol contains another important difference in its regulation of the escape clause, as it clearly indicates the law of the last common habitual residence of the spouses as being most closely connected to the marriage. However, this is not a real presumption similar to that under Article 4 paragraph 2 of the Rome Convention,⁴³ but only a mere indication,⁴⁴ reflecting the most common cases of the more closely related law other than the creditor's habitual residence.⁴⁵ Similar regulation is introduced in Article 4 Section 3 of the Rome II Regulation.⁴⁶ In case of Article 5 of the Hague Protocol, it is enough for the habitual residence to be in the same country, and it is not necessary for it to be in the same town or at the same address.⁴⁷

The abovementioned circumstance of the last common habitual residence of the spouses or former spouses as being closely related to the marriage has been indicated by the Special Commission.⁴⁸ However, the literature also provides other circumstances that indicate the law that is more closely related. For example, if the last common habitual residence is state A, to which the spouses have moved from state B, where they previously had their common habitual residence, and then one of the spouses or former spouses (maintenance creditor) returns to state B, it would seem that the law of state B, which is the place of residence of the maintenance creditor, is more closely related to the maintenance case than the law of state A.⁴⁹ In such a case, there would be no need to apply the escape clause, as the law of the habitual residence of the maintenance creditor is indicated on the basis of Article 3 of the Hague Protocol. Another example is the situation of the spouses who lived for several years in country A, then moved for a short time to country B, and then the creditor moved to country C. In such a situation, there is no close link with the last common habitual residence, which was in country B, but rather there is a link with the previous common habitual residence, which was in country A.⁵⁰

⁴³ Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (Rome Convention); Bonomi (n 30) 349, footnote 27.

⁴⁴ See Work. Doc No 2, after: Bonomi (n 30) 349.

⁴⁵ Bonomi (n 30) 349.

⁴⁶ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31 July 2007, 40–49, ELI: <http://data.europa.eu/eli/reg/2007/864/oj>.

⁴⁷ See Juryk (n 36) 422.

⁴⁸ See Bonomi (n 30) p 348. However, 'the current common habitual residence' was not used because it coincides with the creditor's habitual residence and therefore does not lead to an exception from Article 3 (See Bonomi (n 30) 349).

⁴⁹ This example is invoked in Bonomi (n 30) 348.

⁵⁰ This example is invoked in Bonomi (n 30) 349.

In the judgment of the Polish Supreme Court of 23 March 2016,⁵¹ the court correctly invoked the following circumstances as having importance to indicate the closer law. ‘i.e., on the one hand, that their [spouses] last and only common place of habitual residence during the marriage’ (..) [Norway] ‘and that the defendant still has his habitual residence there and that Norwegian law is applicable to the divorce, and on the other hand, where the marriage between the plaintiff and the defendant was concluded, and that the defendant, taking into account the citizenship of the plaintiff and her place of residence before the marriage, must have seriously taken into account that in the event of the breakdown of the marriage she would probably return to Poland’.⁵² The court also correctly stated that in this case it should be rather ‘a law that has a closer connection with the spouses’ marriage than the law of the maintenance creditor’s habitual residence, and (..) a law that has a closer connection with the maintenance creditor or other person entitled to maintenance vis-à-vis the person obligated to pay it. From this point of view (...) the place of residence of the spouses’ child (..) is ‘(..) not decisive’.⁵³ In the invoked case, the facts of this case concerned, among other things, maintenance for a former spouse who, at the time of the application for maintenance, had habitual residence in Poland and held Polish citizenship. The maintenance debtor, on the other hand, had Swedish citizenship and, after getting married in Poland, both spouses lived in Norway. The husband filed for separation in Norway. The wife, after returning to Poland and giving birth to their child, filed for divorce and, among other claims, the maintenance for herself. The justification of this judgment rightly invokes the circumstances closer to marriage relevant for the escape clause. As good examples, the judgment lists such circumstances as ‘common place of habitual residence during the marriage’,⁵⁴ where ‘the defendant still has its habitual residence in that country’ and ‘the law applicable to the divorce’.

Other examples of the more closely related law are also: the previous common place of habitual residence of the spouses or former spouses⁵⁵ and the place of legal separation or divorce.⁵⁶ Theoretically possible, but very rarely constituting the link that more closely connects maintenance with a given law, is the law of common citizenship of the spouses or former spouses⁵⁷ and the place of legal separation or divorce.⁵⁸

⁵¹ Justification of Judgment No III CZP 112/15.

⁵² Quote, Justification of Judgment No III CZP 112/15.

⁵³ Quote, Justification of Judgment No III CZP 112/15.

⁵⁴ See the same circumstance invoked by Bonomi (n 30) 349.

⁵⁵ See Bonomi (n 30) 348, 349.

⁵⁶ See Bonomi (n 30) 349.

⁵⁷ See Bonomi (n 30) 348, 349.

⁵⁸ See Bonomi (n 30) 349.

To sum up, the particularity of the escape clause in maintenance law is that it is applicable only if one of the spouses, ex-spouses or party of a marriage which has been annulled objects to the law of the habitual residence of the maintenance creditor. This assures legal certainty as the court cannot invoke the escape clause *ex officio*. Additionally, this provision provides an indication of the law that is most often more closely connected with the marriage, namely the law of the country of the last common habitual residence of the spouses. This also ensures the balance between flexibility and legal certainty. Other features of this mechanism, like its functioning on the stage of indication of applicable law, exceptionality, exclusion in the case of choice of law and the necessity to examine all the circumstances of the case do not show any particularities in comparison to other provisions that express the escape clause. There is also no need to check if the law of habitual residence of the maintenance creditor does not have a close connection to the marriage. It is enough to check if the other law is closely connected to the marriage.⁵⁹

Three elements need to be underlined to guarantee the balance of values such as flexibility and legal certainty in case of the escape clause for maintenance: the choice of law, the objection of the spouse and the exemplary indication of the law closer related to the marriage. It is also worth adding that the legislator introduced the escape clause only in case of matrimonial maintenance, that is the relationship of equal parties and not in relation to maintenance for weaker parties, like children.

3. ESCAPE CLAUSE IN INTERNATIONAL PROPERTY LAW

Conflict of laws rules concerning property are not unified on the international or EU level.⁶⁰ Each country has its own legal norms on the law applicable to property matters. In most countries (Poland included), the general rule concerning property is the location of the thing (*lex situs*). This legal norm is expressed in Article 41 of Polish Private International Law.⁶¹ Polish private international property law has mostly 'rigid' legal norms from which parties may not waive by choosing a different law.⁶² Such regulation concerns all private international property law,

⁵⁹ Similarly, see Case C-133/08, at 51, 64.

⁶⁰ EU has the competence to regulate applicable law starting from the Treaty of Amsterdam. However, there is no EU regulation on law applicable to property.

⁶¹ Ustawa z dnia 4 lutego 2011 r. Prawo prywatne międzynarodowe, i.e. Journal of Laws 2023.503, further: 'Polish Private International Law'.

⁶² See Chapter 9 of Polish Private International Law. In addition to Polish Private International Law, conflict of laws provisions in the field of property matters are also regulated in Aviation

including the conflict of laws rule referring to transit goods. However, in the case of transit goods (*res in transitu*), the escape clause is introduced in Article 43 sentence 2 of Polish Private International Law. Moreover, for transit goods, the conflict of laws rule expressed in Article 43 sentence 1 of Polish Private International Law does not indicate the law of the location of the thing but the law of the country of dispatch.

The draft of Polish Private International Law has already provided for the possibility of departing from the law of the country of dispatch in favour of a more closely related law for transit goods, although the wording of the provision differed from the final version.⁶³ The justification for the draft indicates that the conflict of laws rule specifying the law applicable to property rights in transit goods contains a ‘specific corrective rule with a narrow scope of application’⁶⁴ that should allow for the flexibility of the indication of law.⁶⁵ As a result of the opinion on the draft act,⁶⁶ the subcommittee modified the provision regarding transit goods, however the escape clause has been preserved. This version of the provision has been adopted unchanged as Article 43 of Polish Private International Law.⁶⁷

Polish Private International Law does not define the concept of ‘transit goods’ (*res in transitu*). This term may be understood in various ways.⁶⁸ In Polish doctrine

Law, Maritime Code and Statute on some financial securities as well as in bilateral international agreements.

⁶³ The draft included Article 41, according to which ‘Real rights in transit goods are subject to the law of the country from which the goods were sent, unless the circumstances indicate that they are more closely related to the law of another country. The law of that other country then applies’. Translation into English of Rządowy projekt ustawy – Prawo prywatne międzynarodowe, druk nr 1277 z 31.10.2008, <<https://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/1277>> accessed 27 July 2025.

⁶⁴ In Polish: ‘(...) szczególną regułą korygującą o wąskim zakresie zastosowania’ from Uzasadnienie rządowego projektu ustawy – Prawo prywatne międzynarodowe, druk nr 1277 z 31.10.2008, 7, <<https://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/1277>> accessed 27 July 2025.

⁶⁵ Uzasadnienie rządowego projektu ustawy - Prawo prywatne międzynarodowe, druk nr 1277 z 31.10.2008, 7, 23, <https://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/1277> accessed 27 July 2025.

⁶⁶ Opinia o projekcie ustawy – Prawo prywatne międzynarodowe (druk sejmowy nr 1277) z dnia 16.12.2008 r., prepared by Mączyński, 19; <<https://orka.sejm.gov.pl/rexdomk6.nsf/Opdodr?OpenPage&nr=1277>> accessed 27 July 2025.

⁶⁷ Sprawozdanie Podkomisji Nadzwyczajnej do rozpatrzenia rządowego projektu ustawy – Prawo prywatne międzynarodowe (druk nr 1277) z dnia 9.08.2010 r. wraz z projektem, that includes Article 43 in final version, <[https://orka.sejm.gov.pl/opinie6.nsf/nazwa/spr_1277/\\$file/spr_1277.pdf](https://orka.sejm.gov.pl/opinie6.nsf/nazwa/spr_1277/$file/spr_1277.pdf)> accessed 27 July 2025.

⁶⁸ See e.g., F. Hellendall, *The res in transitu and Similar Problems in the Conflict of Laws*, in Janeen McCarruthers (ed), *Transfer of property and private international law Volume I*, Cheltenham, UK ; Northampton, MA, USA : 2016, 766–767. The author of this article for transit good understands also the transport of goods from country A to country B that are directly adjacent to each other.

and jurisprudence, it is assumed that the term ‘transit goods’ applies to situations when an item is transported (regardless of the means of transport) from one country to another through the territory of at least one third country or across the high seas.⁶⁹ On the contrary, the factual situation when the good is transported only across one state border (without the need to move it across the high seas) remains outside of the scope of this concept. In the latter factual situation, it is assumed that there is only a change of the property statute.⁷⁰ Likewise, the legal norm expressed in Article 43 of the Private International Law does not apply to rights established on means of transport, e.g., the pledge on the ship.⁷¹ However, Article 45 of Polish Private International Law respectively applies Article 43 to the possession of the transit goods.⁷² Therefore, based on Polish Private International Law, a narrow understanding of the concept of transit goods is adopted. Such a narrow understanding of the concept of *res in transitu* means that the escape clause also applies to a rather narrow range of cases.⁷³

Another issue that the legislator does not specify in Polish Private International Law is from and until what moment the good is in transport. For example, a thing is transported from country A to country C via country B. Is the transit of goods taking place from the moment the thing is loaded in country A to the place of unloading in country C, or from the moment the thing crosses the border between country A and B until the border between country B and C is crossed? In the context of the connecting factor of the country of dispatch, which is used in Article 43 of Polish Private International Law, this issue is important from the moment of crossing the border between countries B and C to the moment of unloading in country C.⁷⁴ The doctrine states that the moment of delivery of the item in the destination country (in the example, country C) means that the transit of goods does not take place anymore.⁷⁵ Similarly, it should be assumed that the moment

⁶⁹ See Jacek Górecki, in Pazdan (ed), *System prawa prywatnego. Prawo prywatne międzynarodowe*, Vol 20B, Warsaw 2015, 963; Wyrok Sądu Apelacyjnego w Krakowie - I Wydział Cywilny z dnia 24 września 2014 r. I ACa 722/14, Legalis.

⁷⁰ See *ibid* ; compare Hellendall (n 68) 766–767.

⁷¹ See Article 42 of the Polish Private International Law.

⁷² See Górecki, in Pazdan (ed), *Prawo prywatne międzynarodowe. Komentarz*, Warsaw 2018, 405.

⁷³ Also in the situation of a break in transport on the territory of transit country, the property effects of the legal events should be estimated on the basis of the law of the location of the good (*lex situs*), See Maciej Tomaszewski in Jerzy Poczobut (eds) *Prawo prywatne międzynarodowe. Komentarz*, Warsaw 2017, 707.

⁷⁴ E.g., Ulrich Ernst, *Das polnische IPR-Gesetz von 2011 – Mitgliedstaatliche Rekodifikation in Zeiten supranationaler Kompetenzwahrnehmung*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* Vol 76, No 3, 2012, 625.

⁷⁵ See Kazimierz Kruczałak, *Prawa rzeczowe w ustawie o prawie prywatnym międzynarodowym*, KPP 2000, issue 3, 617, See also Edward Drozd, *Kolizyjna problematyka rzeczy w transporcie*, KSP 1979, 45, Górecki (n 69) 965–966.; Tomaszewski (n 73) 706.

when the process of transit of goods begins is when the goods are loaded in country A, and not when they cross the border between country A and country B.⁷⁶ As already mentioned, this moment has no practical significance if the applicable law is determined on the basis of the connector, which is used in Article 43 sentence 1 (law of the country of dispatch) of Polish Private International Law. However, when the escape clause is the basis for the indication of law, it acquires practical significance because it results in a departure from the law of the country of dispatch in favour of another law that is more closely connected (e.g., the law of the country of destination of the goods).

The Polish legislator adopted in Article 43 sentence 1 of Polish Private International Law as the applicable law, the law of the country of dispatch (*lex loci expeditionis*) for property rights to transit goods.⁷⁷ However, there is no possibility of derogating from this legal norm on the basis of the choice of law. Only on the basis of the escape clause, the court may indicate *a posteriori* another law more closely related to the case. The legal norm does not include any examples of the circumstances that indicate the law more closely connected. According to Article 43 sentence 2 of Polish Private International Law, the court may *a posteriori* determine as applicable a law other than that indicated on the basis of the law of the country from which the item was sent, provided that this law is more closely related to property rights than the law indicated by the objective connecting factor. In the scope of the transit goods, it is proposed to use the escape clause very narrowly, because the parties cannot in any way protect themselves against the legal uncertainty resulting from indication of law on the basis of the closer connection.

Nevertheless, it is important to answer the questions which other laws – apart from the law of the country of dispatch – could be applicable to transit goods

⁷⁶ See Tomaszewski (n 73) 706.

⁷⁷ The law of the country of dispatch has also been introduced in a few European countries, i.e. Spain - Article 10.1.III of the Spanish Civil Code (See more Jose C Fernández Rozas, Sixto Sánchez Lorenzo, *Derecho Internacional Privado*, Cizur Menor (Navarra) 2022, 829–832; *Derecho Internacional Privado*, Ana P Abarca Junco and others, Madrid 2016, 615–617) and Romania – Article 2618 of Book VII of the Romanian Codex Civil Law Provisions of Private International (See translation into Polish, Paulina Twardoch, Alexander Stan-Otasevici, *Księga VII rumuńskiego kodeksu cywilnego Przepisy prawa prywatnego międzynarodowego*, Problemy Prawa Prywatnego Międzynarodowego 2013 Vol 13, 165–198 and comments in Twardoch, *Nowe rumuńskie prawo prywatne międzynarodowe*, Problemy Prawa Prywatnego Międzynarodowego 2013 Vol 13, 117–139). Some representatives of the doctrine were also in favor of the law of the country of dispatch (See Pierre Arminjon, *Précis de Droit international privé*, Vol 2, Paris 1958, 114; Etienne-Adolphe Bartin, *Principes de Droit International Privé*, 1935, Vol 3, 231; Hellendall (n 68) 793–794).

on the basis of the escape clause and what circumstances result in the law being 'more closely connected' to the property rights to transported things.

The following applicable laws could possibly apply on the basis of the escape clause regulated in Article 43 sentence 2 of Polish Private International Law: (1) the law of the destination of the thing (*lex loci destinationis*)⁷⁸ (including the potential destination; the law of the place where the transport of goods is actually terminated; the law of the place of delivery of the thing); (2) the law of the place of origin of the means used to transport goods (e.g. the law of the ship's flag⁷⁹); (3) the law of the place of the current location of things;⁸⁰ (4) the law of the place of action (*lex actus*),⁸¹ as well as (5) the law applicable at the court's seat (*lex fori*).⁸²

The abovementioned laws are all possibly applicable depending on the facts of the case, as provision of Article 43 sentence 2 of Polish Private International Law does not indicate any circumstance as constituting a more closely connected law. The escape clause gives the possibility to apply the law that is more closely connected on the basis of all the circumstances of the case and not only one or two elements as in the case of an objective connecting factor. However, this should be the law of one country. This is much appreciated, especially in situations related to transit goods that are often very complicated, as several entities frequently participate in transport, including: carrier, carrier's subcontractors, forwarder, and entity of the storage contract. Therefore, the multilevel dependencies may arise. In addition, when ordering online, it may turn out that the seller has a seat in a different country than the state from which the item has been sent. This means that, depending on the situation, a different circumstance may indicate a closer connection.

⁷⁸ See Jean P Niboyet, *Des conflits de lois relatifs à l'acquisition de la propriété et des droits sur les meubles corporels à titre particulier*, Recueil Sirey, 1912, 107; Ernst Frankenstein, *Internationales Privatrecht*, 1929, Vol 2, 54; Adolf Schnitzer, *Handbuch des Internationales Privatrecht*, 1937, 264; Compare cases: *Lüttges v Ormiston & Glass Ltd*, Case 3522, Recueil des Décisions des Tribunaux Arbitraux Mixtes, 1926 Vol 6, 570, whereas in this case the law of the country of dispatch was applied to the moment of the crossing the border of the country of destination by the good; *Case Büsse v British Manufacturing Stationery*, Recueil des Décisions des Tribunaux Arbitraux Mixtes, 1927, Vol 7, 349.

⁷⁹ Christian v Bar, *Theorie und Praxis des International en Privatrechts*, 1889, Vol 1, 619, Frankenstein, *ibid* 53; H. Weil, *Die Kollisionsrechtliche Beurteilung von Tatbeständen des Sachenrechts in Beziehung auf res in transitu*, Berlin 1933, 33. But there is no justification for the applicable law to be registration law in matters relating to motor vehicles (See Eva-Maria Kieninger, *Property Law (International)*, point 3, Special rules, <[https://max-cup2012.mpipriv.de/index.php/Property_Law_\(International\)](https://max-cup2012.mpipriv.de/index.php/Property_Law_(International))> accessed 27 July 2025.

⁸⁰ *Ibid*, 608, with restriction that the rule does not concern all things.

⁸¹ E.g. the judgments of USA courts in *Hellendall* (n 68) 792, footnote 77. However the author is against the law of place of action.

⁸² These laws mentioned as potentially applicable laws for transit goods by Górecki, in (n 69) 963.

Certainly, the most common circumstances would be the destination, delivery or the place where the transport was actually terminated. Especially, since the circumstance of destination is introduced by most legislators and soft law constitutes the basis for law applicable to transit goods.⁸³ The example of the departure from the principle of the country of dispatch in favour of the law of the country of delivery could be a situation when the endorsement of documents constituting the title of ownership (e.g. bill of lading) has reached the place of destination of the goods and the confirmation has the effect of transferring the ownership of the goods in accordance with the law of delivery, even if the item has not reached the destination country yet.⁸⁴ The advantage of the law of delivery is that this is the law under which the transported good is to be subject to further trading. The disadvantage is that this law is uncertain at the moment when the transport begins.

Another example could be the place of origin of the means used to transport goods (e.g., the law of the ship's flag). The example is the case of the property effects of sale contract of the transit goods for which the bill of lading is issued to the sea carrier in accordance with the law of the state of the ship's flag, which also governs the contract of carriage and the sale contract that is subject to the law of the ship's flag state by the choice of law of the parties. In such a case, the property effects of the sales contract concluded during the transport of goods should also be governed by the ship's flag law based on the escape clause.⁸⁵

⁸³ See Górecki, in (n 69) 964. Based on Article. 5 GEDIP, the law applicable to assets in transit is the law of the country of destination. Pursuant to this provision, the acquisition and the loss of proprietary rights in an asset in transit or to be exported are governed by the law of the country of destination. This rule provides for detailed solutions for certain means of transport in Article 6, i.e. plane, train and vessel. (See: The law applicable to rights *in rem*: skeleton GEDIP, <<https://gedip-egpil.eu/wp-content/uploads/2019/09/The-law-applicable-to-rights-in-rem-July-2019-1.pdf>> accessed 27 July 2025). Similarly in Article 85 (4) UNCITRAL Model Law on Secured Transactions, 'A security right in a tangible asset that is in transit at the time of its putative creation or intended to be relocated to a State other than the State in which it is located at that time may also be created and made effective against third parties under the law of the State of the asset's ultimate destination, provided that the asset reaches that State within [a short period of time to be specified by the enacting State] after the time of the putative creation of the security right'. (See UNCITRAL Model Law on Secured Transactions, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-08779_e_ebook.pdf> accessed 27 July 2025). Górecki proposes the discussion to amend Article 43 of Polish Private International Law by changing the applicable law to the law of destination (See Górecki, *Prawa rzeczowe na rzeczy w transporcie z perspektywy kolizyjnej* in Edyta Figura-Góralczyk and others (eds), *Prawne zagadnienia międzynarodowego obrotu cywilnego i handlowego*, Warsaw 2023, 156).

⁸⁴ Such exception from the law of the country of dispatch invokes Hellendall (n 68) 794. Similarly case *Baker v Brown*, 2014 Mass 196.

⁸⁵ See Tomaszewski (n 73) 707; compare Górecki (n 69) 965.

The next example is the application of the law of the place of the current location of things. This example is invoked as to the encumbrance of transit goods with property rights that have arisen in accordance with the law of the place where the good is currently located, e.g., in the transit country.⁸⁶ However, if the good is located on the high seas or when its location is not known at the time of the legal transaction, the principle of the place of location of the good should not apply.⁸⁷

Another example is the law of the place of action (*lex actus*) in case it is equivalent to the location of the thing. Then, it could also be the applicable law based on the escape clause. However, the sole place of action, e.g., the place of conclusion of the contract or creating the encumbrance, if other circumstances of the case are located in a different country, is not enough to apply the law of the place of action to the property rights of transit goods.

Similarly, the law of the seat of the court (*lex fori*), based only on the jurisdiction of this court in cases concerning property rights over transit goods, does not justify its application by virtue of the escape clause. As this instrument should be applied exceptionally, the sole jurisdiction of the court does not constitute sufficient connection for the application of the law of the court. Moreover, other circumstances, like the destination of the thing to the country of the court's seat should occur.

In summary, the specific nature of the escape clause in property law is that it may serve as a basis for indicating the applicable law, even though the parties cannot choose the law to prevent its application. Such a regulation results in a situation in which the parties may not protect themselves from the uncertainty of applicable law for transit goods. However, other features of this instrument, like its functioning on the stage of the indication of applicable law, exceptionality, no negative premise⁸⁸ and the necessity to examine all the circumstances of the case, do not show any particularities in comparison to other provisions that express the escape clause.

When analysing the escape clause from the point of view of the values such as flexibility and legal certainty, the regulation in private international property law is unfortunately imbalanced. The flexibility predominates the legal certainty. In case of transit goods, the escape clause may be used to indicate both foreign law and the law of the court as the jurisdiction is not coherent with the law of the dispatch from Article 43 sentence 1 of Polish Private International Law. This may lead to a situation where Polish courts are tempted to apply a too broad escape clause, especially

⁸⁶ See Pazdan, *Prawo prywatne międzynarodowe*, Warsaw 2017, 263; Górecki (n 72) 400.

⁸⁷ See Hellendall (n 68) 784.

⁸⁸ Similarly, see Case C-133/08, at 51, 64.

to indicate their own law. Additionally, there is no possibility to choose the law for transit goods in order to avoid the uncertainty of the applicable law.

4. ESCAPE CLAUSE IN INTERNATIONAL SUCCESSION LAW

Private international succession law is unified in the EU⁸⁹ by Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.⁹⁰ This Regulation covers both jurisdiction and the applicable law concerning succession.

Succession is defined in Article 3 paragraph 1 (a) of Regulation No 650/2012 as ‘succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession’.

If the deceased person has not chosen the law, the law applicable to succession is the law of the country where the deceased had his/her habitual residence at the time of death (Article 21 paragraph 1). Habitual residence is not defined in Regulation No 650/2012.⁹¹ However, if it is clear from all the circumstances of the case that the deceased was manifestly more closely connected to another country than the place of habitual residence, the court may exceptionally indicate this law as applicable to the inheritance based on Article 21 paragraph 2, which expresses the escape clause. The escape clause should be the basis for indicating the applicable law only in exceptional cases.⁹² Additionally, it is possible that the deceased person chooses as the applicable law the law of his/her citizenship on the basis of Article 22 Regulation No 650/2012.

⁸⁹ Except Denmark and Ireland.

⁹⁰ ELI: <<http://data.europa.eu/eli/reg/2012/650/oj>>, further: ‘Regulation No 650/2012’.

⁹¹ See the examples of how courts interpret the habitual residence in succession matters in Marcin Margoński, in Konrad Osajda (ed), *Rozporządzenie Parlamentu Europejskiego i Rady (UE) Nr 650/2012 z dnia 4 lipca 2012 r. w sprawie jurysdykcji, prawa właściwego, uznawania i wykonywania orzeczeń, przyjmowania i wykonywania urzędowych dokumentów dotyczących dziedziczenia oraz w sprawie ustanowienia europejskiego poświadczenia spadkowego. Komentarz*, Warsaw 2019, commentary to Article 21, letter D, Legalis.

⁹² See Lena Kunz, *Die neue Europäische Erbrechtsverordnung – ein Überblick* (Teil I), GPR 4/2012, 210.

Legal norm expressed in Article 21 paragraph 2 does not introduce any other criteria – apart from, manifestly closer connection of the deceased – at the time of death – with other State than the State whose law is indicated on the basis of the objective connector from Article 21 paragraph 1. The closer connection should be based on all the circumstances of the case. It clearly expresses only an indication of the law, without reference to the consideration of the law. Moreover, it does not require the heirs or other parties to the inheritance case to show any activity (e.g., objection regarding applicable law) in the field of applicable law, but it is the role of the court or other authority (e.g., notary) to determine the applicable law in this respect.

Recital 25 of the preamble to Regulation No 650/2012 is given as an example of a situation in which it is possible to indicate the applicable law based on the escape clause. The EU legislator states that this is possible in exceptional cases, where, for example, the deceased had moved to the state fairly recently before the death and all the circumstances of the case indicate that the deceased was manifestly more closely connected with another state. Let us imagine a situation where a person with Polish citizenship and previously living in Poland moves to Italy, where this person intends to retire. However, this person dies a few months later. Some authors point out that this is the only example of the application of the escape clause, due to the possibility of flexible interpretation of the concept of habitual residence in Article 21 paragraph 1.⁹³ This issue is described in the next example. A person with Polish citizenship, property and family in two countries, e.g., Poland and France, living in France for many years, moves back to Poland at the end of his/her life and after dies a few months. The example given in recital 25 of the preamble to Regulation No 650/2012 concerns a situation where a person only has a new habitual residence in a country and no other circumstances binding with that country, such as citizenship, family or property. Therefore, more complicated cases, such as the second example (Polish-French), should not be resolved on the basis of the escape clause, but on the basis of determining in which of the two countries the person had habitual residence based on Article 21 paragraph 1. Additionally, recital 25 clearly states that difficulties in determining habitual residence should not constitute a reason for invoking the escape clause.⁹⁴ The other example of such difficulties may be shuttle traveling of the deceased person between two countries.⁹⁵

⁹³ See Alfonso-Luis Calvo Caravaca, *General Rule*, in Alfonso-Luis Calvo Caravaca, Angelo Davì, Heinz-Peter Mansel (eds), *The EU Succession Regulation. A Commentary*, Cambridge University Press 2016, 318–319, footnote 62.

⁹⁴ Also the escape clause is not intended to replace other instruments, e.g. fraud of the law (See Calvo Caravaca (n 93) 321–322).

⁹⁵ Kunz (n 92) 211.

In inheritance matters, the principle of uniformity of the succession statute applies.⁹⁶ Therefore, it seems that on the basis of the escape clause, the court may only indicate one different law, more closely connected with the deceased than the law of the deceased person's habitual residence at the time of death, for all inheritance matters. It does not seem that the escape clause makes it possible to specify a different law only for a part of these matters (e.g., in the field of inheritance of movable property).

So far, the CJEU has not ruled on the escape clause in succession matters. It seems that the reason for this is, firstly, that the country of habitual residence, as a rule, remains in close connection with the deceased person.⁹⁷ The concept of habitual residence is interpreted by some representatives of the doctrine in such a way that only if social relations were established in the country to which the deceased moved, which replaced those in the country of the previous habitual residence, is there a change of habitual residence.⁹⁸ Others point out that habitual residence occurs in the country with which the deceased was objectively integrated and if the centre of life interests was located in this country.⁹⁹ One of the conditions for integration with a given country is the adoption of its citizenship.¹⁰⁰ Such interpretation of the concept of habitual residence (especially in the first version) makes the escape clause from Article 21 paragraph 2 of Regulation No 650/2012 redundant.¹⁰¹ Secondly, the connecting factor of habitual residence creates such flexible interpretative possibilities¹⁰² that the courts, by interpreting this concept, arrive at the applicable law without the need to use the escape clause.¹⁰³ Moreover, the jurisdiction according to the general rule expressed in Article 4 of Regulation No 650/2012 is also based on the habitual residence. Therefore, in most cases,¹⁰⁴ the escape clause may only constitute the basis to indicate foreign law in a succession case. Additionally, it is possible for the testator to choose the law of the

⁹⁶ Opinion of Advocate General Campos Sánchez-Bordona delivered on 23 March 2023, Case C-21/22, ECLI:EU:C:2023:247, point 64.

⁹⁷ Marion Greeske, *Die Kollisionsnormen der neuen EU-Erbrechtsverordnung*, in Rainer Hausmann, Astrid Stadler, Michael Stürner (eds), *Schriften zum internationalen Privat- und Verfahrensrecht*, Band 17, Frankfurt am Main 2014, 147.

⁹⁸ See *ibid* 148.

⁹⁹ See Kunz (n 92) 211.

¹⁰⁰ See Kunz (n 92) 211.

¹⁰¹ See Greeske (n 97) 149. It is proposed to delete from Article 21 paragraph 2 of the escape clause (See Greeske (n 97) 150)

¹⁰² See Recital 23 and 24 of the preamble of Regulation No 650/2012.

¹⁰³ Paul Lagarde, *Les principes de base du nouveau règlement européen sur les successions*, *Revue critique de droit international privé* 2012/4, 701; Rapp. C Kohler, Walter Pintens, *Entwicklungen im europäischen Familienund Erbrecht 2011-2012*, *FamRZ*, 18/2012, 1429.

¹⁰⁴ Differently on the basis of Article 10 of Regulation No 650/2012.

citizenship¹⁰⁵ in accordance with Article 22 Regulation No 650/2012 in a situation where he or she does not want the law of the habitual residence to be applicable. Therefore, only in exceptional cases would the court establish jurisdiction on the basis of the deceased's habitual residence under Article 4, and then conclude that foreign law is applicable on the basis of the escape clause. In turn, if Polish courts find out that the deceased's habitual residence was abroad, they could reject the case on the basis of lack of jurisdiction.¹⁰⁶

Despite the abovementioned reasoning, it is worth considering whether there might occur situations in which the applicable law is indicated in succession on the basis of the escape clause. The example of such a situation is the following: the deceased, intending to reside in a given country, moves there shortly before his or her death and dies suddenly, while all other circumstances still link this person to another country¹⁰⁷ – e.g., previous habitual residence or citizenship. This example may concern an elderly person from a northern European country who, after retirement, due to the higher cost of living in his or her home country and a worse climate than in southern Europe, moves to Spain or Italy, and dies shortly thereafter.¹⁰⁸

Another example is a case where the deceased and his/her family moves to another country for a certain predetermined period of time for professional reasons, but with the intention of returning to the country of origin.¹⁰⁹

The next example is the death of a diplomat or consul in a country where this person had held duties and lived for several years. In such a situation, it would not be the law of the country of the last habitual residence that would be applicable to the succession, but the law of the country of origin.¹¹⁰ Also, such circumstances

¹⁰⁵ In case of an agreement as to succession regarding the succession of several persons, the chosen law may be the law of citizenship of any party of the agreement according to Article 25 paragraph 3 of Regulation No 650/2012.

¹⁰⁶ See Postanowienie Sądu Rejonowego w Sopocie – I Wydział Cywilny z dnia 25 października 2022 r., I Ns 180/22, Legalis; Postanowienie Sądu Rejonowego Szczecin-Centrum w Szczecinie - III Wydział Cywilny z dnia 3 grudnia 2020 r., III Ns 356/20, Legalis; Postanowienie Sądu Rejonowego w Słupcy - I Wydział Cywilny z dnia 2 grudnia 2020 r., I Ns 254/20, Legalis; Postanowienie Sądu Rejonowego w Biskupcu - I Wydział Cywilny z dnia 18 lipca 2017 r., I Ns 148/17, Legalis.

¹⁰⁷ H. Dörner, *EuErbVO: Die Verordnung zum Internationalen Erb- und Erbverfahrensrecht ist in Kraft!*, ZEV (2012), 510–511.

¹⁰⁸ See Calvo Caravaca (n 93) 318.

¹⁰⁹ See Dörner (n 107) 511; Greeske (n 97) 147, Calvo Caravaca (n 93) 321.

¹¹⁰ Calvo Caravaca (n 93) 319; Pazdan, in Pazdan (ed) *Prawo prywatne międzynarodowe. Komentarz*, Warsaw 2018, 1172. It would also be possible to interpret the concept of habitual residence in such a way that the diplomat/consul would still have his habitual residence in the country of origin, which does not exclude the indication of the law of that country on the basis of the escape clause.

constitute the case of the relocation of an elderly person to another country to a nursing home because he or she cannot afford to pay for such care in his or her home country.¹¹¹ In such a case, the country of the previous habitual residence of the deceased person could also be applicable on the basis of the escape clause.

In order to establish the closeness of a deceased's connection with the country to which he or she had moved – especially after retirement – knowledge of the language of that country is important.¹¹² In case of elderly people who require care, also family relationships with the person providing care should be particularly taken into account.¹¹³

The doctrine also mentions an example of the invalid choice of law made by the testator.¹¹⁴ Some argue that in such a situation, additionally the testator should have an objectively sufficient close connection to the country.¹¹⁵ However, the only element being an invalid choice of law as justifying the applicable law on the basis of the escape clause seems to be insufficient. Similarly, despite that in doctrine, there is a postulate to interpret Article 21 section 2 by analogy and on the basis of the closer connection to indicate the applicable law even when the deceased had no habitual residence.¹¹⁶ However, CJEU ruled in case EE C-80/19¹¹⁷ that the habitual residence of the deceased must be established in each succession case.¹¹⁸

Other circumstances relevant for indicating law on the basis of the escape clause in succession cases are: the law of the testator's citizenship¹¹⁹ and the previous

(See, Andrea Bonomi, *Article 4*, in Andrea Bonomi, Patrick Wautelet (eds), *Le droit européen des successions. Commentaire du Règlement n° 650/2012 du 4 juillet 2012*, Bruxelles, 2013, 175 footnote 21; Lagarde (n 103) 701).

¹¹¹ Kunz (n 92) 211.

¹¹² See Kunz (n 92) 211.

¹¹³ See Kunz (n 92) 211.

¹¹⁴ See Anatol Dutta, Commentary to EuErbVO Article 21 Allgemeine Kollisionsnorm, in Münchener Kommentar zum BGB 8. Auflage 2020, Rn. 6, beck-online; Compare, Peter Kindler, *The law applicable to the succession objective connecting factors*, in Stefania Bariatti, Ilaria Viarengo, Francesca C Villata (eds), *EU Cross-Border Succession Law*, Cheltenham, Northampton 2022, 110.

¹¹⁵ Michael Volmer, *Die EU-Erbrechtsverordnung – erste Fragen an Dogmatik und Forensik*, Rechtspfleger 2013, 424, Compare, Kindler ibid 110.

¹¹⁶ See Pazdan (n 86) 1172 and the literature there indicated. Compare Greeske (n 97) 75.

¹¹⁷ Judgment of the Court (First Chamber) of 16 July 2020, Case EE C-80/19, ECLI:EU:C:2020:569, further: 'Case EE C-80/19'.

¹¹⁸ At 40 in Case EE C-80/19 'the habitual residence of the deceased must be established by the authority dealing with the succession'.

¹¹⁹ Mateusz Pilich, *Łączniki norm kolizyjnych oparte na podstawie obywatelstwa in Zasada obywatelstwa w prawie prywatnym międzynarodowym. Zagadnienia podstawowe*, Warsaw 2015.

or different habitual residence of the deceased person, and not the last one.¹²⁰ However, the applicable law should be determined not only on the basis of one element (e.g., citizenship) but should reflect all circumstances of the case.

Difficulties in using the escape clause in the area of inheritance law are caused by the fact that in the succession there is a different specificity than in the area of obligations, in which the clause provides the basis for a closer connection of the obligation with a given law.¹²¹ Similarly, in family or property law, the closer connection concerns the relationships between living persons. On the contrary, the law applicable to succession matters determines the further fate of the inheritance.¹²² Therefore, the law additionally indicated on the basis of the escape clause should also reflect the justified expectations of the parties involved.¹²³

The following threats are indicated by the doctrine related to the escape clause in the area of inheritance law. Firstly, it is contrary to the principle of legal certainty.¹²⁴ Secondly, it allows to depart from the court's law in favour of another, more closely connected law,¹²⁵ which may prolong the proceedings due to, for example, the need to determine the content of foreign law, and consequently increases its costs.¹²⁶ In terms of legal certainty, the doctrine emphasizes that the clause allows the court to indicate the law of a different country than the parties could expect.¹²⁷

On the contrary, certain conditions are indicated as advantages of the possibility of using the escape clause. Firstly, it is possible to indicate the law on the basis of the escape clause in case the deceased did not make a choice of law or this choice is invalid.¹²⁸ Secondly, it is a remedy for such cases when all the circumstances of the case show a closer connection of the deceased with another country than the

<https://sip.lex.pl/#/monograph/369334638/287138> (accessed 27 July 2025), Pazdan, Górecki (eds), *Nowe europejskie prawo spadkowe*, LEX 2015, Reguła korekcyjna z art. 21 ust. 2 r.s. (accessed 27 July 2025).

¹²⁰ See Pazdan, Górecki (eds), *ibid.*

¹²¹ Calvo Caravaca (n 93) 319.

¹²² Under Roman law, inheritance is a continuation of the deceased's personal life. (See, Calvo Caravaca (n 93) 319).

¹²³ Anna Wysocka-Bar in Mariusz Załucki (eds), *Unijne rozporządzenie spadkowe Nr 650/2012. Komentarz*, Warsaw 2018, 143–145; Maciej Rzewuski, *Transmisja spadku*, WK 2016, Chapter VI, point 3.3.1.

¹²⁴ See, Calvo Caravaca (n 93) p 320; Greeske (n 97) 150.

¹²⁵ Lagarde (n 103) p 701; Dörner (n 107) 511.

¹²⁶ Calvo Caravaca (n 93) 320.

¹²⁷ Calvo Caravaca (n 93) 321; Greeske (n 97) 150.

¹²⁸ Calvo Caravaca (n 93) 321.

last place of habitual residence.¹²⁹ Thirdly, the court may use this institution *ex officio* without the party having to invoke it.¹³⁰

To sum up, the escape clause in succession law is applicable as an exception to the general conflict of laws rule, which is based on the connecting factor of the habitual residence of the deceased at the time of death, which should be, by definition, closely connected to the succession. Moreover, there is the uniformity of the applicable law in succession matters and the function of this branch of law is to determine the fate of inheritance, which influences the functioning of the escape clause. Other features of this instrument, like indication of the applicable law, exclusion in case of choice of law, no need to test the negative premise,¹³¹ exceptionality and the necessity to examine all the circumstances of the case do not show any particularities in comparison to other provisions that express the escape clause.

When considering the escape clause from the point of view of the values such as legal certainty and flexibility, the succession regulation seems to serve as the model regulation. First of all, the jurisdiction and the conflict of laws rule are based on the same circumstance, that is the habitual residence of the deceased. Due to this, the escape clause in most of the cases, would be used to indicate only foreign law. This assures legal certainty. Because the courts, in order to apply by their 'own choice' the foreign law, would invoke the escape clause only in really exceptional situations. This would happen only in evident situations when *lex fori* known to the court is prevailed by foreign law because of all the circumstances of the case. Furthermore, the only premise for invoking the escape clause is the closer connection and no material elements are to be checked by the court. This causes the indication of the law to be quicker because the court does not have to check the content of the material law. Moreover, the testator may choose the law of his/her citizenship and protect himself/herself in this way from applying the escape clause.¹³² This also strengthens the legal certainty. In effect, the regulation of the escape clause for succession is best written from the point of view of the balance of values such as flexibility and legal certainty in order to indicate the law that is most closely connected.

¹²⁹ Calvo Caravaca (n 93) 321.

¹³⁰ Calvo Caravaca (n 93) 322.

¹³¹ Similarly, see Case C-133/08, at 51, 64.

¹³² It should be worth considering to allow the testator also to choose the law of its habitual residence, as such widening of the choice of law, would better protect the deceased from the courts unexpected use of escape clause than the possibility to choose only the law of the citizenship.

5. CONCLUSIONS

The analysis of the escape clause in private international family, property and succession law allows for the formulation of some interesting conclusions. Firstly, the law that is manifestly more closely connected to the case, no matter if family, property or succession is indicated on the basis of all the circumstances of the case and not only one or two as it is in the 'classical' connecting factor of the legal norm of private international law. Those circumstances are different depending on the hypothesis of the legal norm (e.g., different for *res in transitu* than for the succession case) and the wording of the escape clause (e.g., for succession, all the circumstances of the case should be manifestly more closely connected with the deceased and for maintenance – with the marriage). However, they are estimated by the court *a posteriori* on the basis of all the facts of the case. Secondly, the application of the escape clause is excluded if there is a choice of law (although the analysed material shows some peculiarities as, e.g., there is no possibility to choose law for transit goods or parental responsibility). Thirdly, the escape clause is applicable exceptionally, as it introduces the uncertainty of law. The exceptionality of the escape clause should guarantee that the applicable law is foreseeable for the parties of a given relationship. Fourthly, the escape clause is not regulated uniformly in details in international family, property and succession law (e.g. in the case of a maintenance obligation between spouses, ex-spouses or parties to a marriage which has been annulled, one of the parties has to object against the applicable law in order for the court to apply the escape clause whereas in other cases such objection is not introduced).

The balance of the values, such as legal certainty and flexibility, in order to indicate the law most closely connected to a given relationship, may be observed in some but not all analysed matters. Namely, such a balance occurs only when the legal regulation guarantees that the escape clause is applied exceptionally. It occurs if on the basis of the escape clause – in most cases – the court applies foreign law, because then the court would do it exceptionally. Such regulation takes place if the jurisdiction is based on the same circumstances as the connecting factor of the conflict of laws rule from which the escape clause is introduced (e.g., regulation of the escape clause for succession matters in Regulation No 650/2012).

Additionally, to strengthen the legal certainty, the regulation should allow the parties (or at least one party, similarly to succession matters) to choose the applicable law. Such legal regulation guarantees protection from the uncertainty of applicable law.

Therefore, two observations may be presented serving as the indications for the future modifications of private international law when the escape clause is regulated. Firstly, the jurisdiction and the conflict of laws rule in relation to which the escape clause is introduced should be based on the same circumstances, so that the indicated law on the basis of the escape clause would be – in most cases – the foreign law. Secondly, in cases when the escape clause is regulated the choice of law should also be allowed.

The article was created as a result of a research query financed by the Travel Fund for employees of the Faculty of Law and Administration of the Jagiellonian University in Cracow as part of the programme: “Program Strategiczny Inicjatywa Doskonałości – Uczelnia Badawcza w Uniwersytecie Jagiellońskim” – source of financing PSP: UIU/W11/NO/10.

REFERENCES

- Abarca Junco AP and others (eds), *Derecho Internacional Privado*, Madrid 2016
- Arminjon P, *Précis de Droit international privé*, Vol 2, Paris 1958
- Bar v C, *Theorie und Praxis des International en Privatrechts*, 1889, Vol 1
- Bartin E-A, *Principes de Droit International Privé*, 1935, Vol 3
- Baruffi MC, *The 1996 Hague Convention on the Protection of Children*, in I Viarengo, FC Villata (eds), *Planning the Future of Cross-Border Families. A Path Through Coordination*, Series: Studies in private international law Vol 29, Hart, Oxford, London, New York, New Delhi, Sydney 2020
- Basedow J and others (eds), *Encyclopedia of Private International Law*, Vol 1, Cheltenham, Northampton 2017
- Bonomi A, Wautelet P (eds), *Le droit européen des successions. Commentaire du Règlement n° 650/2012 du 4 juillet 2012*, Bruxelles, 2013
- Bonomi A, *The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, Yearbook of Private International Law Vol 10, 2008
- Bucher A, *L'enfant en droit international privé*, Genève-Bâle-Paris 2003
- Calvo Caravaca A-L, *General Rule*, in A-L Calvo Caravaca, A Davì, H-P Mansel (eds), *The EU Succession Regulation. A Commentary*, Cambridge University Press 2016
- Devers A, Rein-Lescastereyres I, Nato-Kaltane R, *Loi applicable à la responsabilité parentale*, in P Murat (ed), *Droit de la famille 2016-2017*, Paris 2016
- Dörner H, *EuErbVO: Die Verordnung zum Internationalen Erb- und Erbverfahrensrecht ist in Kraft!*, ‘Zeitschrift für Erbrecht und Vermögensnachfolge’, 2012

Drozd E, *Kolizyjna problematyka rzeczy w transporcie*, Krakowskie Studia Prawnicze 1979

Dutta A, *Commentary to EuErbVO Article 21 Allgemeine Kollisionsnorm*, in *Münchener Kommentar zum BGB*, 8. Auflage 2020

Ernst U, *Das polnische IPR-Gesetz von 2011 – Mitgliedstaatliche Rekodifikation in Zeiten supranationaler Kompetenzwahrnehmung*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2012, Vol 76, No 3

Erp Van S, *Comparative Property Law*, in M Reimann, R Zimmermann (eds), *The Oxford Handbook of Comparative Law*, Oxford 2019

Fernández Rozas JC, Sánchez Lorenzo S, *Derecho Internacional Privado*, Cizur Menor (Navarra) 2022

Frankenstein E, *Internationales Privatrecht*, 1929, Vol 2

Goldstein G, *Objective, subjective and imperative localization in the resolution of conflict of laws*, *Yearbook of Private International Law* Vol 24, 2022/2023

Górecki J, *Prawa rzeczowe na rzeczy w transporcie z perspektywy kolizyjnej [Property rights on the transit good from comparative perspective]*, in E Figura-Góralczyk and others (eds), *Prawne zagadnienia międzynarodowego obrotu cywilnego i handlowego [Legal issues of international civil and commercial relationships]*, Warsaw 2023

Greeske M, *Die Kollisionsnormen der neuen EU-Erbrechtsverordnung*, in R Hausmann, A Stadler, M Stürner (eds), *Schriften zum internationalen Privat- und Verfahrensrecht*, Band 17, Frankfurt am Main 2014

Hellendall F, *The res in transitu and Similar Problems in the Conflict of Laws*, in JM Carruthers (ed), *Transfer of property and private international law*, Volume I, Cheltenham, UK; Northampton, MA, USA : 2016

Kieninger E-M, *Property Law (International)*, point 3 Special rules, <[https://max-eup2012.mpipriv.de/index.php/Property_Law_\(International\)](https://max-eup2012.mpipriv.de/index.php/Property_Law_(International))> accessed 27 July 2025

Kindler P, *The law applicable to the succession objective connecting factors*, in S Bariatti, I Viarengo, FC Villata (eds), *EU Cross-Border Succession Law*, Cheltenham, Northampton 2022

Kohler C, Pintens W, *Entwicklungen im europäischen Familienund Erbrecht 2011-2012*, 'Zeitschrift für das gesamte Familienrecht 2012 No 18

Kruczalak K, *Prawa rzeczowe w ustawie o prawie prywatnym międzynarodowym [Property rights in Private International Law Act]*, *Kwartalnik Prawa Prywatnego* 2000, issue 3

Kunz L, *Die neue Europäische Erbrechtsverordnung - ein Überblick (Teil I)*, *Zeitschrift für das Privatrecht der Europäischen Union* 2012 No 4

Lagarde P, *Explanatory Report on the 1996 Hague Child Protection Convention*, in *Hague Conference on Private International Law*, Proceedings of the Eighteenth Session, 30 September to 10 October 1996, Vol II, Protection of children, Hague 1998

Lagarde P, *Les principes de base du nouveau règlement européen sur les successions*, 'Revue critique de droit international privé' 2012 No 4

Mączyński A, *Kodyfikacyjne zagadnienia części ogólnej prawa prywatnego międzynarodowego [Codification issues of the general part of Private International Law]*, in A Janik (ed), *Studia i Rozprawy. Księga jubileuszowa dedykowana profesorowi Andrzejowi Calusowi [Studies and Dissertations. Anniversary book dedicated to Professor Andrzej Calus]*, Warsaw 2009

Mostowik P (ed), *Międzynarodowe prawo rodzinne. Filiacja. Piecza nad dzieckiem. Alimentacja [International family law. Filiation. Childcare. Maintenance]*, Warsaw 2023

--, *Prawo właściwe dla rozvodu i separacji w świetle rozporządzenia unijnego nr 1259/2010 [The law applicable to divorce and separation in the light of EU Regulation No. 1259/2010]*, *Kwartalnik Prawa Prywatnego* 2011, issue 2

--, *Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym [Parental authority and child custody in Private International Law]*, Kraków 2014

Niboyet JP, *Des conflits de lois relatifs à l'acquisition de la propriété et des droits sur les meubles corporels à titre particulier*, *Recueil Sirey*, 1912

Osajda K (ed), *Rozporządzenie Parlamentu Europejskiego i Rady (UE) Nr 650/2012 z dnia 4 lipca 2012 r. w sprawie jurysdykcji, prawa właściwego, uznawania i wykonywania orzeczeń, przyjmowania i wykonywania dokumentów urzędowych dotyczących dziedziczenia oraz w sprawie ustanowienia europejskiego poświadczenia spadkowego. Komentarz [Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. Commentary]*, Warsaw 2019

Pazdan M (ed), *Prawo prywatne międzynarodowe. Komentarz [Private International Law. Commentary]*, Warsaw 2018

--, *System prawa prywatnego. Prawo prywatne międzynarodowe [System of Private Law. Private International Law]*, Vol 20B, Warsaw 2015

--, *System prawa prywatnego. Prawo prywatne międzynarodowe [System of Private Law. Private International Law]*, Vol 20C, Warsaw 2015

Pilich M, *Zasada obywatelstwa w prawie prywatnym międzynarodowym. Zagadnienia podstawowe [The principle of citizenship in private international law. Basic issues]*, Warsaw 2015

Poczobut J (ed) *Prawo prywatne międzynarodowe. Komentarz [Private International Law. Commentary]*, Warsaw 2017

Rzewuski M, *Transmisja spadku [Transmission of Inheritance]*, Wolters Kluwer 2016

Scherpe JM, *Comparative Family Law*, in M Reimann, R Zimmermann (eds), *The Oxford Handbook of Comparative Law*, Oxford 2019

Schnitzer A, *Handbuch des Internationales Privatrecht*, 1937

Twardoch P, *Nowe rumuńskie prawo prywatne międzynarodowe [New Romanian Private International Law]*, Problemy Prawa Prywatnego Międzynarodowego 2013 Vol 13

Volmer M, *Die EU-Erbrechtsverordnung – erste Fragen an Dogmatik und Forensik*, Rechtspfleger 2013

Waal De MJ, *Comparative Succession Law*, in M Reimann, R Zimmermann (eds), *The Oxford Handbook of Comparative Law*, Oxford 2019

Weil H, *Die Kollisionsrechtliche Beurteilung von Tatbeständen des Sachenrechts in Beziehung auf res in transitu*, Berlin 1933

Wojewoda M, *Jurysdykcja krajowa i prawo właściwe w sprawach dotyczących stosunków między rodzicami a dziećmi – studium przypadku w relacjach Polska-USA [National jurisdiction and applicable law in matters relating to relations between parents and children - a case study in Poland-USA relations]*, Europejski Przegląd Sądowy 2018, No 4

Załużcki M (ed), *Unijne rozporządzenie spadkowe Nr 650/2012. Komentarz [EU Inheritance Regulation No 650/2012. Commentary]*, Warsaw 2018

