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EUROPEANISATION OF ENVIRONMENTAL PROTECTION THROUGH CRIMINAL LAW

JANA TLAPÁK NAVRÁTILOVÁ*

DOI 10.2478/in-2024-0019

Abstract

This article focuses on the European legal framework for environmental protection, in particular through criminal law. Given the societal need to reconcile technological development with the protection of natural resources and the environment in general, this is a highly relevant issue. The aim of this article is to describe and examine the current European legislation in the field of the environmental protection through criminal law, employing descriptive, analytical and synthetic methods. The article first discusses the history of environmental policy in public international law and European law, where initially the legal instruments of criminal law were not used. Subsequently, the author examines the current legal framework and, finally, considers its future. In the last parts, the article addresses the secondary law of the European Union, namely the Directive of the European Parliament and of the Council on the protection of the environment through criminal law of 2008 and the new Directive of the European Parliament and the Council on the criminal law protection of the environment of 2024. However, other decisions, directives and case law relevant to the issue are also covered. Overall, this is a unique article mapping all the essential legal instruments in the field of European environmental protection through criminal law. The author highlights the importance of protecting the environment through criminal law, but also emphasises the necessity of applying one of its basic principles, i.e., *ultima ratio*.

Keywords: environment, criminal law, European Union, protection, directive

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INTRODUCTION

Although environmental policy is one of the European Union's most recent activities, it is regarded as one of its most important issues. It not only responds to acts of public international law, which have been addressing the subject for several decades, but also includes requirements perceived as common and specific to the Member States of the European Communities, or the European Union.

The article focuses on the European legal framework for environmental protection, which has determined the direction of criminal policy in the field of environmental protection in the EU Member States in recent years.[1]

Given that this issue encompasses a wide range of activities, the result is a broad system of standards covering various areas, which is rapidly evolving through EU legislation. In particular, efforts to reconcile technological development with the protection of natural resources are reflected in many dimensions. Yet, over time, it has become clear that effective protection of the environment against destruction and pollution is not achievable solely through appropriate legal and civil regulations (tort liabilities); the use of criminal law is essential. Criminal law, however, addresses only the most pressing and socially harmful environmental offences and thus does not provide comprehensive environmental protection like administrative law. Therefore, in some cases, it may operate in a fragmented manner, stemming from its subsidiary nature (*ultima ratio*).[2]

Documents from the European Union institutions show that

> 'Environmental crime (…) grows at a rate of 5%–7% per year (…), generates $110–281 billion of losses every year. (…) Environmental crime is one of the **world's most profitable organised criminal activities** and has a major impact not only on the environment but also on human health. This type of crime is highly lucrative but **it is hard to detect, prosecute and punish it**. These factors make it highly attractive for organised crime groups.' Currently, this crime is mainly focused on improper collection, transport, recovery or disposal of waste; illegal emission or discharge of substances into the atmosphere, water or soil; killing, destruction or possession of, or trade in protected wild animal or plant species; or the illegal trade in ozone-depleting substances. The consequences include 'increased levels of pollution, degradation of wildlife, reduction of biodiversity, disturbance of ecological balance and increased risks to human health.'[3]

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[1] In this context, the EU has gradually adopted a number of secondary legislation acts which, however, have not had a direct impact on criminal law, such as Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora and Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds, which are also mentioned in the rest of the paper.

[2] The subsidiarity of criminal repression follows from the provisions of Section 12(2) of the Czech Criminal Code, which states that the criminal liability of the perpetrator and the associated criminal consequences may be applied only in cases that are socially harmful, where the application of liability under another legal provision is not sufficient.

[3] See https://www.consilium.europa.eu/en/infographics/eu-fight-environmental-crime-2018-2021 [accessed on 12 September 2024].

HISTORICAL EXCURSUS: LANDMARKS OF ENVIRONMENTAL PROTECTION IN PUBLIC INTERNATIONAL LAW AND EUROPEAN LAW

Before addressing the role of the European Union in combating environmental crime, it is worth pointing out that protection through criminal law has become a method of environmental protection relatively recently. It was preceded by a global effort to regulate environmental protection through means other than criminal law.

The United Nations Conference on the Human Environment, held in Stockholm in 1972 by decision of the UN General Assembly, significantly influenced the emergence and development of environmental protection in European law.

The conference was a response to the accumulation of problems that had arisen over previous decades, resulting in environmental disasters such as the Great Smog of 1952 in London, in which several thousand people died due to fog, cold, emissions from motor vehicles, and increased use of solid fuels for heating, as well as issues related to pesticides contaminating large watersheds and agricultural areas.[4]

The meeting highlighted the need for a common framework to protect and improve the environment, recognising that contemporary society is reshaping its environment as never before, and that the natural and cultural components of their environment are fundamental to the well-being of people. Participants agreed on the need to protect the environment worldwide, while drawing attention to the problems of the contemporary environment (such as chemical pollution of its components, destruction and depletion of non-renewable resources, challenges faced by developing countries, and the threat of overpopulation) and the importance of preserving a healthy environment for future generations. The conference thus laid the foundations for the current concept of sustainable development.

The Conference resulted in a Declaration on the Human Environment containing 26 principles concerning environment and development, and adopted an Action Plan with 109 recommendations. The scope of the conference was very broad. The Stockholm Declaration addressed protection of human rights, conservation of natural resources, wildlife, Earth pollution, population policy, environmental education, balance between regional development and environmental development requirements, and the need to eliminate weapons of mass destruction.[5]

This Declaration became the primary and foundational document for the further development of international environmental law.

Influenced by the Declaration, the Council of Europe drafted a multilateral Convention on the Protection of the Environment through Criminal Law and

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[4] Along with the so-called socialist states, Czechoslovakia did not attend the conference in protest against the exclusion of the German Democratic Republic, which was not invited as it was not a member of the UN).

[5] Available at: https://webarchive.loc.gov/all/20150314024203/http%3A//www.unep.org/Documents.Multilingual/Default.asp?documentid%3D97%26articleid%3D1503 [accessed on 12 September 2024].

opened it for signature by the member states of the Council of Europe, as well as others, in 1998.[6]

The Convention seeks to improve environmental protection at the European level. Unlike the Declaration, the Convention proposed a much more radical approach, using criminal law to deter and prevent the most environmentally damaging behaviours.

This objective was to be achieved through bringing about measures to align national criminal legislation in this area. The Convention obliges States Parties to introduce specific provisions into their criminal law or modify existing provisions. It criminalises a number of acts committed intentionally or negligently, where a perpetrator (natural or legal person) causes permanent damage to the quality of air, land, water, animals, or plants, or causes death or serious injury to any person.

The Convention establishes specific grounds for criminal liability not only for natural persons but also for legal persons, specifies and imposes measures for the confiscation of the property of offenders, and regulates the conditions of international judicial cooperation.

A rather controversial provision permits non-profit environmental associations to participate in criminal proceedings concerning the offences referred to in the Convention.

However, the demanding nature of the requirements imposed on national legislation (with criminal law being an expression of the internal sovereignty of each state) ultimately led to doubts among the Signatories regarding the need to ratify the Convention. Due to the insufficient number of ratifications, the Convention has not yet entered into force. Currently, discussions are ongoing within the Council of Europe on the need for a new convention involving the European Union as a subject of international law.[7]

In public international law environment, numerous international conventions have been adopted to date, which to varying extents have influenced the position of the European Community, and subsequently the European Union, in the field of environmental protection.

These include, in particular, Convention on Biological Diversity (Nairobi 1992), Convention on Wetlands of International Importance, Especially as Waterfowl Habitats (Ramsar 1971), Convention on the Conservation of Migratory Species of Wild Animals (Bonn 1979), Bern Convention on the Conservation of European Wildlife and Natural Habitats (Bern 1979), Framework Convention on the Conservation and Sustainable Development of the Carpathians (Kiev 2003), Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington 1973),

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[6] Strasbourg, 4 November 1998, ETS No. 172; available at: http://conventions.coe.int/Treaty/en/Treaties/Html/172.htm. 3 ratifications are missing, including the Czech Republic [accessed on 18 January 2024].

[7] On 23 November 2022, the Committee of Ministers of the Council of Europe established a Committee of Experts on the Protection of the Environment through Criminal Law and mandated it to draft a new Convention to replace the 1998 Convention on the Protection of the Environment through Criminal Law (ETS No. 172) by 30 June 2024. The European Commission was mandated by the Council of the EU to participate in the negotiations on the new Convention on behalf of the EU.

Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris 1972), European Landscape Convention of the Council of Europe (Florence 2000), UN Convention to Combat Desertification in those Countries Experiencing Major Droughts and/or Desertification, Particularly in Africa (Paris 1994), and Antarctic Treaty (Washington 1959, along with subsequent protocols and conventions).

The European Union was founded as a political superstructure on the legal basis of the European Community, an international organisation, therefore, its first steps in the field of environmental protection also stem from the content of the Stockholm Declaration.

In 1973, the Commission of the European Communities initiated environmental activities through a well-established, but legally 'soft' instrument – the Action Programmes,[8] which are strategic and conceptual documents representing the long-term intentions of the European Parliament and of the Council in specific areas. The first environmental action programme within the European Community was adopted following the Stockholm Declaration.

To date, eight programmes have been announced in this area.

In 1987, the Single European Act[9] inserted Article 100a into the Treaty establishing the European Community, the third paragraph of which laid down that the EC Commission, in its proposals concerning, *inter alia*, environmental protection, will base its approach on a high level of protection.

Further changes to primary law in this area were introduced by the Treaty on European Union,[10] which explicitly uses the phrase 'environmental policy' (Article 130). Thus, regulation in this area has evolved from addressing the most pressing priorities of the 1970s, including responses to industrial and agrarian pollution, to protecting water, birds, and other animal and plant species, managing waste, promoting environmentally friendly products, and integrating the principles of sustainable development into all Community policies.

The Sixth Environment Action Programme (EAP) adopted in Gothenburg for the period up to 2012,[11] had an even broader scope. It included the fight against climate change, the protection of nature and biodiversity, the protection of health, and the responsible management of natural resources and waste among the Union's key environmental policies. One of the agenda's items was the issue of the effectiveness of enforcement of the Union's legislative measures concerning environmental protection. This programme identified the need to adopt environmental liability

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[8] The first so-called European Action Programme was announced for the period 1973–1976, cf., e.g., Damohorský, M. (ed.), *Právo životního prostředí*, 3rd ed., Praha, 2010, pp. 102ff.

[9] OJ L 169, 29.6.1987, p. 1. The aim of the Single European Act (SEA) was to revise the Treaties of Rome, which established the European Economic Community (EEC) and the European Atomic Energy Community, in order to create a single internal market.

[10] Cf. consolidated version of the Treaty, OJ C 202, 7.6.2016, p. 1, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016ME%2FTXT-20240901 [accessed on 13 September 2024].

[11] Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002, on the Sixth Environment Action Programme, OJ L 242, 10.9.2002, p. 1, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32002D1600 [accessed on 13 September 2024].

legislation and to start combating environmental crime. The programme was the main incentive to adopt subsequent secondary EU legislation. The Sixth EAP ended in July 2012, but many of the measures and actions it initiated continued to be implemented.

The final assessment of the Sixth EAP concluded that the programme had delivered environmental benefits and established an overarching strategy for environmental policy. However, despite these achievements, unsustainable trends were still observed in all four priorities identified in the Sixth EAP.

The Seventh Environment Action Programme,[12] followed with priorities set to protect nature and strengthen ecological resilience, stimulate growth in a resource-efficient, low-carbon economy, and reduce risks to human health and well-being from pollution, chemicals and the impact of climate change.[13]

The Eighth Environment Action Programme was adopted in 2022[14] as a guideline for environmental policy up to 2030, with some visions extending to 2050. It aims to accelerate ecological transformation, mainly by reducing greenhouse gas emissions, adapting to climate change, promoting a regenerative growth model, achieving zero pollution, protecting and restoring biodiversity, and reducing key environmental and climate impacts related to production and consumption.[15]

Environmental protection has also been addressed in secondary EU legislation,[16] where the objectives directly impact the application of criminal law.

Initially, the Council of the European Union presented a draft Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law.[17] This Framework Decision regulated basic requirements for environmental protection through criminal law; however, the Court of Justice subsequently annulled the decision.

In 2008, the Council adopted the Environmental Crime Directive, which aimed to unify criminal sanctions in the field of environmental protection. This Directive was a response to the increasing number of environmental crimes with a cross-border

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[12] Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', OJ L 354, 28.12.2013, p. 171, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013D1386 [accessed on 13 September 2024].

[13] Fiala, P., Krutílek, O., Pitrová, M., *Evropská unie*, 3rd ed., Brno, 2018, p. 589.

[14] Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030, OJ L 114, 12.4.2022, p. 22, available at: https://eur-lex.europa.eu/eli/dec/2022/591/oj [accessed on 13 September 2024].

[15] Council of the European Union, *Council adopts Eighth Environment Action Programme*, press release of 29 March 2022, available at: https://www.consilium.europa.eu/en/press/press-releases/2022/03/29/council-adopts-8th-environmental-action-programme/ [accessed on 13 September 2024].

[16] Several non-punitive regulations have been adopted within the EC/EU, such as Directive 2008/56/EC of 17 June 2008 establishing a framework for Community action in the field of marine environmental policy, OJ L 164, 25.6.2008, p. 19; or Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds, OJ L 20, 21.1.2010, but their listing and analysis would be beyond the scope of this paper, which is primarily concerned with criminal law.

[17] The Council Framework Decision was the legal instrument of the Third Pillar of the European Union in the field of criminal law, OJ L 29, 5.2.2003, p. 55, available at: http://data.europa.eu/eli/dec_framw/2003/80/oj [accessed on 13 September 2024].

dimension. Existing national sanctioning systems were found to be insufficient, and there was a need to introduce sanctions that would serve as a greater deterrent to potential offenders.

In 2021, the Directive was amended, as it was determined that the existing regulation was not adequately fulfilling its intended purpose. While environmental protection should continue to be addressed through criminal law, it was established that Member States needed to harmonise national legislation more deeply.

Finally, in April 2024, a completely new directive concerning environmental protection through criminal law was adopted, which addressed some problematic areas of the directive of 2008. This directive led to the tightening of sanctions related to criminal offences impacting environmental protection.

The Lisbon Treaty included environmental policy among the areas of shared competence between the Union and the Member States.

EUROPEANISATION OF THE EC/EU CRIMINAL LAW IN THE FIELD OF ENVIRONMENTAL PROTECTION

EC/EU SECONDARY LEGISLATION ON ENVIRONMENTAL PROTECTION THROUGH CRIMINAL LAW

Efforts in the field of criminal environmental protection in the EC/EU, as mentioned above, began to emerge as early as the end of the 20th century.

The first proposal for a Directive on the protection of the environment through criminal law was drawn up by the European Commission in 2001.[18] The purpose of the proposed legislation was to ensure more effective application of EC environmental legislation by introducing a minimum set of criminal offences in all EU Member States. The proposer believed that compliance with environmental legislation should largely be enforced through criminal sanctions, which alone would provide sufficient deterrence.

However, the proposal was not adopted by the Council, which in 2003 put forward its own solution in the form of Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law.[19] This Framework Decision built on the aforementioned Commission proposal for a Directive of 2001 and set out the basic requirements for the protection of the environment through criminal law. The adoption of the Framework Decision raised the fundamental question of which mandate and which pillar of the European issue provided legitimacy to such an approach. This led the Commission to bring an action before the Court of Justice against the Council, proposing that the Council Framework Decision be annulled.

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[18] Document (2001/0076(COD)), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52001PC0139 [accessed on 13 September 2024].

[19] OJ L 29, 5.2.2003, available at: http://data.europa.eu/eli/dec_framw/2003/80/oj [accessed on 13 September 2024].

The European Court of Justice subsequently annulled the Framework Decision on 13 September 2005,[20] precisely because it was adopted outside the EC legislative framework.[21]

In its decision, the European Court of Justice stated that

> 'while it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, this does not, however, prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.'[22]

The Court of Justice further confirmed in its judgment that neither criminal law, nor criminal procedure law, as a general rule, falls within the Community competence.

The key significance of this decision is that, at the time of the adoption of the draft Framework Decision, there was no consensus on the form and scope of the sanctions proposed in the Framework Decision. The annulled Framework Decision required that the defined acts be punishable by 'effective, proportionate and dissuasive criminal sanctions' without further specification. It follows from this and the Court's decision that the choice of the specific measure and the level of sanctions was left to the Member States.

Subsequently, in 2005, the Council adopted a Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.[23] This Decision was also challenged by the Commission before the Court of Justice.[24] The Court of Justice was called upon by the action to clarify the extent to which the Community is entitled to adopt measures relating to penalties under the criminal law of the Member States.

The Court eventually annulled the contested Framework Decision.[25] While it confirmed the principle of integrating environmental policy into transport policy

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[20] Judgment of the Court of Justice of 13 September 2005, *Commission of the European Communities v Council of the European Union*, case C-176/03:, OJ C 315, 10.12.2005, p. 2, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:C2005/315/03 [accessed on 18 January 2024].

[21] On the new directive on environmental criminal law, see article: 'K nové směrnici o trestněprávní ochraně životního prostředí', *Právní zpravodaj*, 2008, Vol. 9, No. 6, pp. 9–10.

[22] Pomahač, R., 'EVROPSKÝ SOUDNÍ DVŮR: K pravomoci stanovit trestní sankce na ochranu životního prostředí', *Trestněprávní revue*, 2006, Vol. 5, No. 2, p. 56; Smolek, M., 'EVROPSKÝ SOUDNÍ DVŮR: Trestní sankce v oblasti životního prostředí – revoluce v trestním právu členských států?', *Trestněprávní revue*, 2005, Vol. 4, No. 12, p. 329.

[23] Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L 255, 30.9.2005, p. 164, http://data.europa.eu/eli/dec_framw/2005/667/oj [accessed on 13 September 2024].

[24] Proceedings for annulment of Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.

[25] Judgment of the Court (Grand Chamber) of 23 October 2007, *Commission of the European Communities v Council of the European Union*, case C-440/05. Cf. also article 'K nové směrnici…', op. cit.

and the possibility of introducing offences at the Community level, it excluded the possibility of introducing specific types and levels of penalties. In light of this decision by the European Court of Justice, the Commission also modified the 2008 draft Directive on the protection of the environment through criminal law.[26]

The issue of marine pollution was addressed in Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements.[27]

In parallel with developments at the European level in the first decade of the new millennium, the petrochemical company Total SA and others were on trial in France for the 1999 wreck of the tanker Erika, which polluted more than 400 km of the French coast. It was the first time litigation resulted in parties' conviction for environmental damage;[28] this was an important precedent of pan-European significance, and the proceedings undoubtedly influenced further development of the EU legislation.

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 2008 ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW

After several years of negotiation and litigation, an agreement was finally reached to introduce criminal penalties for those who intentionally or negligently cause serious damage to the environment. The Directive on the protection of the environment through criminal law[29] was adopted, seeking more effective, stronger and impartial protection of the environment.

The draft directive was part of a broader effort to protect the environment in the EU, which included not only the adoption of the European Parliament's report on maritime strategy – calling, among other things, for a reduction in shipping emissions and a decrease in the level of land-based marine pollution – but also a proposal for a greener approach to the decommissioning and disposal of old vessels, aimed particularly at protecting India, Pakistan, and Bangladesh from the offloading of toxic waste.

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[26] Stejskal, V., 'Trestněprávní ochrana životního prostředí v evropském komunitárním právu těsně před cílem?', *České právo životního prostředí*, 2008, Vol. 8, No. 2, p. 66.

[27] Council Framework Decision 2005/667/JHA…, op. cit.

[28] The French oil company Total SA was found guilty of involvement in the sinking of the Erika oil tanker, which polluted the Breton coast in 1999. The Italian shipowner Giuseppe Savarese, who owned the Erika, Antonio Pollaro, head of the company that operated it, and RINA, which issued the seaworthiness certificate, were also named as accomplices. The Court sentenced Total and RINA to a fine of EUR 375,000 (10.1 million Czech crowns), and Savarese and Pollaro to a fine of EUR 75,000. All four perpetrators were collectively ordered to pay 192 million euros in compensation to those affected.

[29] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328, 6.12.2008, p. 28, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0099 [accessed on 18 January 2024].

The Directive is relatively brief; it consists of an explanatory memorandum and 10 articles. After defining the scope of the regulation and the basic concepts, it lists the individual elements of environmental offences. The basic types of sanctions are then defined and the liability of legal persons is explicitly mentioned. The final articles set out the reporting obligations to the Commission and the deadline for transposition of the Directive. An annex then contains a list of Community legislation the infringement of which will lead to criminal sanctions.

The individual illegal acts follow from a compromise between the between the European Commission's position and that of the opponents of deeper integration of parts of criminal law. Only acts relating to cases of serious harm, death or serious injuries to persons are criminalised.

According to the Directive, the following acts are to be considered criminal offences:

'(a) the discharge, emission, or introduction of a quantity of materials or ionising radiation into the air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, or the quality of water, or to animals or plants;
(b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker (waste management),[30] which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants.
(c) the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity whether executed in a single shipment or in several shipments which appear to be linked;
(d) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage of the quality of air, the quality of soil quality or the quality of water, or to animals or plants;
(e) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
(f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
(g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
(h) any conduct which causes significant deterioration of a habitat within a protected site;
(i) the production, importation, exportation, placing on the market or use of ozone-depleting substances.'

[30] See, for example, judgment of the Court (Second Chamber) of 4 July 2019, *Criminal proceedings against Tronex BV*, C-624/17, in which the Court held that appliances suffering defects that require repair, such that they cannot be used for their original purpose, constitute a burden for their holders and must thus be regarded as waste, in so far as there is no certainty that the holders will actually have them repaired.

The Directive requires sanctions to be 'effective, proportionate and dissuasive'.[31] In addition to fines and imprisonment, punishments such as prohibition of activities, publication of the judgment and obligations to restore the environment to its previous state will apply. Furthermore, incitement and complicity in the above-mentioned acts are to be made punishable. In terms of the subjective aspect, not only intentional conduct is required, but gross negligence is also sufficient.

The process of adopting the substantive legislation created by EU legislation has been greatly facilitated by the adoption of the Lisbon Treaty. According to Article 83(2) TFEU, if the approximation of criminal law and regulations of a Member State proves essential to ensure the effective implementation of a Union policy in an area that has been the subject of harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

In 2021, the European Commission announced that the Directive on the protection of the environment through criminal law (2008) needed to be revised, as in the opinion of a European Commission working group, the Directive had not fully achieved its intended purpose.

Subsequently, the Commission adopted a draft amendment on 15 December 2021.[32] The proposal contains new categories of environmental offences, definitions of new aggravating circumstances as well as the minimum and maximum levels of sanctions.[33]

There has been much debate about the specific shape of the directive, and more than 500 amendments have been tabled.[34] In March 2023, a consensus was reached on some areas of the new directive, with proposals to add new offences such as the growing of genetically modified organisms, illegal fishing or acts causing forest fires. There is also agreement on some of the sanction areas, where it is envisaged that offences causing death or significant damage to the environment should be punishable by a minimum of 10 years' imprisonment.[35]

For legal persons, the penalties will be based on a certain average turnover of the legal person over the previous period. On 16 November 2023, a preliminary agreement was reached between the European Parliament and the Council on the draft Directive and subsequently the final version of the Directive, which was adopted

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[31] Vomáčka, V., 'Požadavky práva EU na účinné trestání v ochraně životního prostředí', *České právo životního prostředí*, 2019, Vol. XIX, No. 3, pp. 136–154.

[32] European Commission, *European Green Deal: Commission proposes to strengthen criminal protection of the environment through criminal law*, press release of 15 December 2021, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_21_6744/IP_21_6744_EN.pdf [accessed on 13 September 2024].

[33] Fabšíková, T., 'Změny v trestněprávní ochraně životního prostředí podle návrhu nové směrnice', *České právo životního prostředí*, 2022, Vol. XXII, No. 1, pp. 13–38.

[34] On 13 October 2022, as part of the Czech Presidency of the European Union, a report was submitted, which subsequently served as a basis for further discussion.

[35] Cf., for example, the information of the Minister of Justice of the Czech Republic on the course of the Council and European Parliament negotiations of 9 December 2022. Available at: https://www.consilium.europa.eu/en/press/press-releases/2022/12/09/council-agrees-its-negotiating-mandate-on-the-environmental-crime-directive/ [accessed on 13 September 2024].

on 11 April 2024 and published on 30 April 2024, replacing the 2008 Directive. The new Directive entered into force on the 20th day following its publication in the Official Journal of the European Union, i.e., on 20 May 2024.

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW OF 2024

Directive 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC is an entirely new directive that was adopted after long discussions in the European Parliament and the Council. This is a response to the shortcomings observed in the former Directive on the protection of the environment through criminal law of 2008,[36] as discussed in the previous part of this article. In addition to correcting the shortcomings of the previous document, the aim of this new one was to further strengthen environmental protection, particularly through criminal law. To fulfil the objectives of the Directive, new criminal offences against the environment were defined and introduced, and the types of sanctions for natural and legal persons were updated. Furthermore, the Directive also urges Member States to take necessary measures to ensure that specialised regular training is provided to judges, prosecutors and other entities involved in criminal proceedings and investigations, as the issue of crimes against the environment is a complex area that requires a multidisciplinary approach.[37]

One of the most important areas of the new Directive is undoubtedly Article 3, which addresses criminal offences. Criminal offences and the conditions of their qualification and commitment are specified in much greater detail than was the case in the 2008 Directive. Similarly, existing criminal offences have been expanded by the addition of new offences, in response to the evolving criminal activities of offenders in the field of environmental crime, as this type of crime increases by up to 7% year-on-year.[38] The system of assessing criminal offences has also undergone a transformation, with a clearer distinction made between intentional conduct and conduct due to gross negligence. The consequences of the perpetrator's acts are now graded differently, particularly regarding conduct that causes destruction or widespread and substantial damage, which is either irreversible or long-lasting to an ecosystem of considerable size or environmental value, a habitat within a protected site, or the quality of air, soil, or water. At the same time, however, it is necessary to consider the baseline condition of the affected environment, whether

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[36] Directive 2008/99/EC, op. cit.

[37] Article 18 of the Directive 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC.

[38] Environmental Crime Directive, available at: https://environment.ec.europa.eu/law-and-governance/environmental-compliance-assurance/environmental-crime-directive_en [accessed on 5 August 2024].

the damage is long-lasting, medium-term or short-term, the extent of the damage and the reversibility of the damage. Compared to the previous directive, the new legal regulation of criminal offences in the field of environmental protection thus offers Member States much wider possibilities for applying criminal law instruments, which will undoubtedly lead to greater protection of the environment.

As already mentioned, the criminal acts themselves underwent significant adjustments, with several additional types of conduct now qualifying as criminal acts. Notably, there is a new criminal offence consisting of intentional illegal act, which is connected with the recycling of ships that can cause extensive, substantial or otherwise significant damage to the environment.[39] Another newly modified action, which will be qualified as a criminal offence, focuses on the protection of surface and underground waters: the illegal abstraction of water from natural sources, which causes or is likely to cause a substantial damage to the ecological status or ecological potential of surface water bodies or groundwater bodies, is now classified as a criminal act.[40]

The Directive also focuses on tightening up actions against violations of the European Union legislation in the field of chemicals. There are stricter penalties for breaches of laws on mercury[41] and fluorinated greenhouse gases.[42] This approach strengthens the protection of human health and the environment, as the handling of these substances is highly dangerous and poses significant threats.

Lastly, the Directive introduces a criminal offence related to the bringing into the territory of the Union, placing on the market, keeping, breeding, transporting, using, exchanging, permitting to reproduce, growing or cultivating, releasing into the environment, or the spreading of invasive alien species of animals, plants, fungi, and microorganisms that have a significant impact on the territory of the Member States.[43] Invasive non-native species pose a threat to biological diversity and the ecosystem, which is likely to result in the displacement of native species,

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[39] Within the scope of Regulation No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC, OJ L 330, 10.12.2013, p. 1, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32013R1257 [accessed on 5 August 2024].

[40] Within the meaning of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0060 [accessed on 5 August 2024].

[41] In accordance with Regulation No 2017/852 of the European Parliament and of the Council of 17 May 2017 on mercury, and repealing Regulation (EC) No 1102/2008, OJ L 137, 24.5.2017, p. 1, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0852 [accessed on 5 August 2024].

[42] In accordance with Regulation 2024/573 of the European Parliament and of the Council of 7 February 2024 on fluorinated greenhouse gases, amending Directive (EU) 2019/1937 and repealing Regulation (EU) No 517/2014, OJ L 2024/573, 20.2.2024, available at: http://data.europa.eu/eli/reg/2024/573/oj [accessed on 5 August 2024].

[43] In accordance with Regulation No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species, OJ L 317, 4.11.2014, p. 35, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R1143 [accessed on 5 August 2024].

transmission of diseases, and threats to human health and the economy. It is therefore appropriate that such conduct be more severely punished.

It is certainly worth highlighting the strengthening of the position of groups involved in nature protection, known as environmental defenders. Article 15 of the new Directive establishes the obligation for Member States to publish information in the public interest, thereby enabling access to justice for the public concerned. Member States are required to ensure that persons affected by crimes in the field of environmental protection have appropriate procedural rights, especially in relation to participation in criminal and civil proceedings and the exercise of claims within them. Entities should have access to information about the steps taken against perpetrators and the nature and extent of the crimes. Proceedings regarding criminal offences in the field of environmental protection should be more transparent, ensuring greater fairness, balance, and non-discrimination. Thus, a certain level of public oversight in the area of environmental protection will be ensured.

Finally, the regulation of sanctions imposed on legal persons cannot be overlooked, as there have been significant changes in the new directive, with sanctions now more extensive and stricter than in the previous directive. While the 2008 Directive contained only brief and non-specific provisions regarding sanctions for legal persons, the new directive specifies the exact types of sanctions that can be imposed for environmental crimes. This primarily involves determining the maximum and minimum levels of fines, with a maximum possible fine of up to EUR 40,000,000.[44] Furthermore, the new directive specifies the possibility of withdrawing licences and permits for business activities of a legal person or banning participation in public contracts. The stricter regulation of sanctions for legal entities aims primarily to act as a preventive measure to avoid danger and damage to the environment.

Member States have until 21 May 2026 to adopt or amend legislation to fulfil the obligations imposed by the new Directive. Given this deadline, for now it is impossible to predict the real effects this directive will have on environmental protection. However, the adoption of the Directive can be positively evaluated, since the previous Directive on the protection of the environment through criminal law of 2008 was already outdated and did not regulate the issue of environmental protection sufficiently and purposefully. The new Directive thus addresses and regulates a number of areas that were not adequately regulated in the previous one and punishes environmental crime more severely.

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[44] For the criminal offences listed in Article 3(2)(a)–(l), (p), (s) and (t) of Directive 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC.

CONCLUSION

The article discusses the development of Europeanisation of criminal law in the field of criminal protection of the environment. Following the increasing levels of pollution, degradation of wildlife, and reduction of biodiversity caused by environmental crime, there is an noticeable increase in the European Union's interest in protecting the environment through criminal law institutions. As already mentioned above, a new European Union directive to curb environmental crime was adopted in 2021, and a completely new directive on the protection of the environment through criminal law was adopted in 2024. This step fulfilled a key commitment of the European Green Deal.[45] The European Union seeks to make environmental protection more effective, particularly by obliging Member States to protect the environment through criminal law means. The regulation also aims to streamline the relevant investigations and criminal proceedings.

Last but not least, it is important to note that environmental crime is a global phenomenon and therefore the Directive also includes the Commission's support for international cooperation. It is indisputable that environmental protection is a priority, but we should ask ourselves whether increased pressure to criminalise acts against the environment is the right approach, and when criminal law should be the *ultima ratio*, the last resort in this fight. Of course, the most serious actions must be punished by means of criminal law, but other options should not be forgotten and, in my opinion, all available institutions should always be considered. The constant pressure for higher penal rates and the criminalisation of further acts will not in themselves ensure better environmental protection.

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[45] The European Green Deal was issued by the Commission in December 2019 and taken note of by the European Council at its December meeting. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal, COM(2019) 640 final, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2019%3A640%3AFIN [accessed on 13 September 2024].

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CONSENT TO SEXUAL ACTIVITY IN ACCORDANCE WITH ARTICLE 197 OF THE CRIMINAL CODE

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Abstract
In the 21st century, legislation in many jurisdictions is moving away from defining the crime of rape based on the use of coercion and instead focusing on the violation of the injured person's will. This analytical article aims to highlight changes in the understanding of the features of a crime under Article 197 of the Criminal Code, aligning it with the current societal awareness and views. This issue is relatively absent in scientific discourse, likely because phenomena such as stealthing have only recently received attention. The authors posit that, given the current interpretation of the features of the crime of rape in both doctrine and case law, the present legal framework satisfies the criteria of Article 36 of the Istanbul Convention. However, the doctrine, jurisprudence, and potentially the legislator face the challenge of adapting the crime of rape to contemporary needs. The conclusions drawn from the conducted research reveal problems that are only briefly touched upon in criminal law literature.

Keywords: rape, consent, criminal law, sexual crimes, stealthing

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INTRODUCTION

Article 36 of the so-called 'Istanbul Convention'[1] requires States Parties to criminalise vaginal, anal, or oral penetration of another person's body with any part of the body or object, as well as other acts of a sexual nature towards another person without their consent. This also includes causing another person, without their consent, to engage in acts of a sexual nature with a third party. According to paragraph 2 of this article, consent must be given voluntarily as an expression of free will, which must be assessed in light of the circumstances. This regulation is highly specific, which may be seen as advantageous, as it clearly demonstrates the complexity of the current approach to protecting sexual freedom.

It seems reasonable to conclude that the succinct formulation of the elements of the offences set out in Articles 197, 198, and 199 of the Criminal Code (CC), as enacted in 1997, and their interpretation, do not meet today's needs. Subsequent amendments to the content of these articles have not addressed this issue. An analysis of the relevant literature indicates a dualistic approach to the problem – whether or not sexual activities were coerced in some way. What is often overlooked is that consent can be limited to specific forms of sexual contact and can be withdrawn at any point. It should also be noted that current Polish criminal law does not adequately protect sexual freedom from certain methods of coercing sexual activity. For example, one can mention inducement to perform or submit to sexual activity through threats of committing a misdemeanour or initiating disciplinary proceedings.

The introduction of a new definition of rape, such as the one proposed in the Istanbul Convention, will undoubtedly lead to even greater evidentiary difficulties than those involved in determining the manner or circumstances under which sexual activity was undertaken without the victim's consent. It is reasonable to assume that, following the change in the definition of rape, there will be allegations of this offence even when the perpetrator has not used violence, threats, or deception.[2] This is, after all, the primary purpose of this change. Consequently, new situations are likely to arise that are not covered by the current legal framework, where the issue will not necessarily be establishing the facts but rather determining whether, in a particular case, the behaviour of one of the parties could be interpreted as consent to sexual contact. This will, in turn, require establishing the broader social context in which they operate. It is also noted that currently, the victim is often forced to recount the incident in a humiliating manner and demonstrate that they attempted to stop the perpetrator. As a result, the proportion of cases where evidence of the offence relies on physical traces on the victim's body or biological traces of the perpetrator is likely to decrease.

However, the aforementioned limitations in the scope of protection of sexual freedom justify a closer examination of the issue of consent to sexual intercourse

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[1] Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210).

[2] It is worth adding that the Istanbul Convention, in Article 36, requires that intentional sexual acts simply without the consent of another person be subject to criminal liability. In contrast, the draft amendment to Article 197 of the Criminal Code, which has been submitted to the Sejm (Draft 209), contains a requirement for informed and voluntary consent.

or other sexual acts in light of current legislation. Consent to sexual activities has historically been of secondary importance in the analysis of the crime of rape, due to the way the elements are framed. In cases involving unlawful threats or deception, the lack of consent is clear. In contrast, when violence is used by the perpetrator, commentators often focus on the victim's resistance to this violence as a manifestation of non-consent, which can lead to inconsistencies in the interpretation of the elements of the offence.

CAUSING SEXUAL ACTIVITY BY VIOLENCE OR THREAT

Violation of sexual freedom under Article 197 CC consists in causing a person to perform or submit to a sexual act against the will of the victim, or in a situation where a decision of the will is impossible due to the actions of the perpetrator. The former situation primarily occurs when violence or unlawful threats are used. In both cases, it can be inferred that the legislator expects a certain degree of determination from the victim in order to protect their freedom. This contrasts with offences such as performing a medical procedure without the patient's consent (Article 192 CC) or violations of domestic trespass (Article 193 CC), where it is sufficient that the perpetrator does not comply with the request of the authorised person. An analysis of this issue can be based on a case reported in the media, in which the court found no rape because the woman did not scream during the incident.

A case with the following course of events may serve as a starting point for our analysis: a woman[3] visited her family for Christmas. Due to limited sleeping arrangements, guests had to share beds, with several people in one bed. The woman in question initially slept with her cousins, but finding it uncomfortable, she moved to a bed where another distant relative was supposed to sleep. This relative returned drunk at around 3 a.m., after which sexual activities occurred. The Regional Court found that rape had occurred because the victim pushed the perpetrator away, tried to move away, cried, and expressed that she did not want it. However, the Supreme Court ruled that rape had not occurred, reasoning that the victim's actions – such as pushing the accused's hands away when he leaned over her, crying, and telling him to leave her – did not demonstrate sufficient resistance when compared to the accused's actions, which included turning the victim, extending her legs, removing his underwear, and then the victim's underwear, and engaging in sexual acts.[4] This view expressed by the Supreme Court provides a basis for analysing certain elements of the crime of rape. In assessing the Court's position, it is necessary to answer the question: what form and intensity must resistance to violence take for the perpetrator to be considered to have brought about sexual activity by violence?

Violence as an element of the crime of rape is defined by S. Hypś as the use of physical force against the victim, a person close to the victim, or a thing, in order to

[3] The victim was 14 years old at the time of the act, but this is irrelevant to the discussed aspects of the offence under Article 197 CC.

[4] Decision of the Supreme Court of 5 October 2021 (ref. no. V KK 316/21), http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/V%20KK%20316-21.pdf [accessed on 14 July 2023].

prevent or break resistance. This resistance must be real and comprehensible to the perpetrator.[5] It may be added that, according to V. Konarska-Wrzosek[6], K. Nazar, and J. Warylewski,[7] violence may also be used against someone other than the victim or the person closest to the victim, distinguishing these acts from the use of unlawful threats.

According to M. Berent and M. Filar, in cases involving violence, the victim's resistance is fundamentally important, and it need not always be physical; for example, it can be expressed through crying, screaming, or loud calls for help. Resistance should be viewed as the externalisation of disagreement. At the same time, it is not required of the victim to exhaust all possible means of resistance.[8] Based on this position, one can challenge the equivalence of the use of violence with a lack of consent. For instance, if sexual activities (e.g., touching of the breasts) occur while the other party is completely physically passive but verbally indicates non-consent, can it still be considered that the sexual activity was brought about by violence? On the other hand, this externalised non-consent must be sufficiently intense; simply expressing an objection is not enough – it must manifest through actions such as screaming or crying.

M. Budyn-Kulik and M. Kulik agree with M. Filar's view[9] that one cannot speak of violence if the victim does not resist, and this resistance does not necessarily have to be physical.[10]

Taking the above into account, it should be stated that the definition of the elements of the offence under Article 197 CC departs from the linguistic wording of this provision. Since violence is physical force used to overcome resistance, and resistance is understood as an unequivocal expression of opposition to the behaviour of the perpetrator, including non-verbal expressions, there is a certain contradiction. How can resistance occurring in the form of a loud cry for help be broken by force? If the perpetrator does not, in such a situation, block the victim's mouth or otherwise force them to stop screaming, would that not constitute rape? It is difficult to imagine breaking through resistance by physical force when the resistance takes the form of crying, especially when the perpetrator is committing another sexual act. It is unreasonable to consider that mere touching of intimate parts of the victim's body, in the presence of the victim's physical passivity (e.g., no pushing away of the perpetrator or similar behaviour), constitutes the use of physical force to prevent or break resistance. In the absence of physical resistance by the victim, there is no use of violence by the perpetrator, since, as A. Marek states, violence involves acting

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[5] Hypś, S., 'Przestępstwa przeciwko wolności seksualnej i obyczajności', in: Grześkowiak, A. (ed.), *Prawo karne*, Warszawa, 2009, p. 317.

[6] Konarska-Wrzosek, V., in: Konarska-Wrzosek, V. (ed.), *Kodeks Karny. Komentarz*, Warszawa, 2018, p. 942.

[7] Nazar, K., Warylewski, J., in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 1369.

[8] Berent, M., Filar, M., in: Filar, M. (ed.), *Kodeks Karny. Komentarz*, Warszawa, 2015, pp. 1141–1142.

[9] Filar, M., *Przestępstwo zgwałcenia w polskim prawie karnym*, Warszawa–Poznań, 1974, p. 93.

[10] Budyn-Kulik, M., Kulik, M., in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny. Komentarz*, Warszawa, 2013, p. 605.

by physical means to prevent or break the resistance of the victim.[11] It is also worth quoting the position of the Supreme Court: violence is 'a broadly defined physical action directed (…) against the victim himself, which forces him to submit to the will of the perpetrator and to behave in a certain way'.[12] It follows that there must be two stages in the commission of the crime of rape: first, the perpetrator must use violence, and then the sexual act must occur.

Difficulties arise in understanding the view expressed in the doctrine that 'It is therefore sufficient for the victim to externalise the lack of consent to sexual intercourse by his or her action, to put up real resistance to the perpetrator, and for the perpetrator to break it'[13]. Does this mean that it is necessary both to express the lack of consent and to offer physical resistance to the perpetrator, or is the mere externalisation of the lack of consent already considered such resistance? However, in the case of resistance that is not physical, it is difficult to refer to it as being broken; the perpetrator ignores such resistance rather than breaking it.

Regarding Article 197 CC, M. Budyn-Kulik and M. Kulik state that 'Thus, the consent of the victim excludes the unlawfulness of the perpetrator's behaviour; his/her act does not constitute a crime.' It is difficult to agree with this statement in the context presented. Indeed, sexual contacts are originally legal and not merely legalised by the decision of the consenting person, a point highlighted by A. Michalska-Warias. Giving consent to sexual contact results in the absence of the crime of rape, but this consent cannot be equated with the countertype of the victim's consent.[14] In such a case, the elements of the criminal act are simply not fulfilled. J. Warylewski also expresses this position, stating that a necessary condition for committing an offence under Article 197 CC is the lack of legally effective consent from the victim. This lack of consent may involve the expression of a negative decision or the absence of a positive decision. This author unequivocally defined the lack of consent of the victim as an unspoken element of the crime of rape.[15] M. Budyn-Kulik and M. Kulik agree with this view, while stressing that the absence of positively expressed consent may mislead the perpetrator, which should be considered in light of Article 28 CC.[16]

An example of this is when the victim is unable to resist the sexual assault due to paralysing fear ('frozen fear'). The lack of objection by the victim will inevitably be interpreted by the perpetrator as implicit consent to the sexual activity. Therefore, it is difficult to agree with the aforementioned position of J. Warylewski that rape also occurs in the case of a 'lack of positive decision' by the victim. The absence of a positive decision, which is not accompanied by manifested resistance of a certain

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[11] Marek, A., *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa, 1997, p. 449.

[12] Judgment of the Supreme Court of 12 August 1974, Rw 403/74, OSNKW 1974, No. 11, item 204.

[13] Nazar, K., Warylewski, K., in: *Kodeks karny*…, op. cit., p. 1368.

[14] Michalska-Warias, A., *Zgwałcenie w małżeństwie. Studium prawnokarne i kryminologiczne*, Warszawa, 2016, pp. 153–154.

[15] Warylewski, J., in Wąsek, A. (ed.), *Kodeks Karny. Część szczególna. Tom I. Komentarz do artykułów 117 – 221*, Warszawa, 2006, p. 809.

[16] Budyn-Kulik, M., Kulik, M., in: *Kodeks karny*…, op. cit., p. 605.

intensity, even when the victim internally did not consent to the sexual acts, does not fall within the scope of criminalisation set by Article 197 CC.

M. Rodzynkiewicz is of the opinion that resistance is an expression of lack of consent to sexual activity.[17] It should be noted that examples of resistance other than physical, such as screaming or crying, as cited in the literature, indicate that this expression of non-consent must assume a certain degree of intensity. This view is also reflected in jurisprudence; the Court of Appeal in Gdańsk rightly noted in this context: 'It is impossible to agree that the mere blocking of a car door to prevent the wronged woman from exiting through it, or disregarding her verbal opposition, can prove the use of violence by the accused in relation to the crime of rape,' and further stated: 'The complainant rightly emphasises – following the Supreme Court (V KKN 95/99) – that possible forms of resistance on the part of the victim of the crime of rape may also be, for example, loud calls for help, shouting, crying (…); however, the point is that in the circumstances of the present case such behaviour did not take place.'[18]

The above review of the views presented in doctrine and jurisprudence leads to the thesis that the crime of rape, in the form of the use of violence, is understood as bringing another person to engage in sexual activity despite that person's objection.

SCOPE OF CONSENT, IF GIVEN

While in cases involving violence, the victim has the possibility to object to participating in the sexual activity, in cases involving deception, this possibility is intrinsically excluded. The doctrine distinguishes between two situations where the perpetrator is considered to have used deception: misleading or exploiting the victim's mistake regarding the prerequisites for the correct decision-making process concerning sexual involvement (narrow approach), and leading the victim, by misleading or exploiting their mistake, to a state in which they are unable to make a free decision on the matter due to the deactivation of the volitional-motor apparatus (broad approach).[19] There are also considerations as to how this misrepresentation may occur.

The doctrine commonly accepts that in the first situation – misrepresentation or exploitation of a mistake as to the motivational premises of sexual activities – one can distinguish between material mistakes, the induction or exploitation of which determines the fulfilment of the elements of the offences under Article 197 CC, and incidental mistakes, which are of no fundamental importance for the motivational premises.[20] Taking the object of protection, which is sexual freedom, as the starting

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[17] Rodzynkiewicz, M., in: Zoll, A. (ed.), *Kodeks Karny. Część szczególna. Komentarz. Tom II. Komentarz do art. 117 277 k.k.*, Kraków, 2006, p. 605.

[18] Judgment of the Court of Appeal in Gdańsk of 23 June 2022, II AKa 152/22, LEX No. 3436633.

[19] Budyn-Kulik, M., Kulik, M., in: *Kodeks Karny*…, op. cit., pp. 610–611.

[20] Hypś, S., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, 7th ed., Warszawa, 2021, Article 197, n. 20; Berent, M., Filar, M., in: *Kodeks Karny*…, op. cit., Article 197, nt. 15.

point, M. Filar rightly argued that there can be no question of deception 'where the victim consciously agrees to the intercourse, remaining only in a mistake as to the incidental motives of this decision'.[21] Collateral circumstances, such as the partner's age, property status, marital status, confessions of love, declarations of marriage, or promises to pay, are often cited.[22] Recently, M. Grudecki attempted to question this well-established approach in the doctrine, indicating that the possible reprehensibility of motives considered as incidental cannot deprive criminal protection in cases of engaging in unwanted sexual acts.[23] In his argument, the author provided the following examples: a promise of marriage, a promise of payment for sexual intercourse, a false declaration of love, and the removal of a condom by a man during sexual intercourse to which the woman consented only on the condition that he used protection.[24] It is difficult to agree with the author that the first three cases involve 'unwanted sexual activities'; in each instance, both parties wish to engage sexually, there is no confusion about the partner, and the unfulfilled promises occur after the engagement and do not influence it. The protection of sexual freedom under criminal law cannot extend to the possible expected benefits of voluntary sexual engagement. The analogies made by the aforementioned author to the crime of fraud are inaccurate, partly due to the differing objects of protection under Article 286 CC and Article 197 CC. In the case of fraud, both the purpose of the perpetrator's action and its negative consequences are clearly defined. In the crime of rape, neither the purpose of the perpetrator's action nor the reasons for the lack of consent of the victim are relevant. It is also irrelevant why this consent was given, provided it included the nature of the act and the partner, as Article 197 CC does not address these issues. In contrast, the fourth situation differs substantially from the previous three because it involves a mistake not about the motivation but about the form of the sexual act.

This phenomenon, referred to as 'stealthing', has only recently become a subject of consideration in Polish criminal law literature. It involves the removal of a condom during intercourse by a man, without the consent of the other person, whether woman or man, or the intentional damaging of a condom before or during intercourse by a partner.[25] The last interpretation of the term brings to mind the issue mentioned by R. Krajewski of a woman falsely assuring her partner that she is taking birth control pills.[26] In all these cases, the question of whether the sexual contact was consensual must be answered affirmatively. Furthermore, there was no misrepresentation affecting the motivation of one of the partners. The sexual activity took place because both parties wanted it. However, it must be assumed that the

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[21] See Filar, M., *Przestępstwo zgwałcenia…*, op. cit., p. 109.

[22] Bielski, M., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117–211a*, Warszawa, 2017, Article 197, nt. 54.

[23] Grudecki, M., 'Podstęp jako znamię przestępstwa zgwałcenia a uboczne motywy podjęcia decyzji o obcowaniu płciowym', *Studia Prawnoustrojowe*, 2022, No. 55, p. 77.

[24] Ibidem, pp. 75–76.

[25] Staroń, M., 'Stealthing', *Prokuratura i Prawo*, 2023, No. 5, p. 73.

[26] Krajewski, R., 'Podstęp przy przestępstwie zgwałcenia', *Studia Prawnoustrojowe*, 2018, No. 40, p. 269.

encounter would not have occurred if one of the parties had known what the course or circumstances of the encounter were to be.

M. Bielski points out that the distinction between a material and an incidental error is based on the assessment of whether the circumstance about which the victim was in error, from the point of view of cultural patterns, could have been the main premise for making a conscious decision on sexual involvement.[27] Sz. Tarapata agrees, writing that the freedom to make a decision about one's sexual activity is ensured when the individual has the possibility to recognise all the elements that, in our cultural circle, are relevant for deciding to engage in an intimate relationship.[28] Such a definition of the conditions for free decision-making should be considered too broad, since, as is not in doubt in the doctrine, the purpose of engaging in sexual activity does not necessarily have to be the satisfaction of sexual desire. Other purposes may include, as has been discussed in criminal law literature, the attainment of financial gain, marriage, or more broadly, a certain social status. In psychology, such aims as revenge or reparation for harm or betrayal are also indicated.[29] Adopting such a definition of the freedom to make decisions regarding sexual activity would first require deciding what these relevant circumstances are from the point of view of 'our cultural circle'. Are they those that are socially accepted, such as procreation, or those that actually motivate sexual contact in a given culture, but are generally not disclosed or seen as negative, such as demonstrating dominance, betrayal, or drowning out one's own emotional problems? Furthermore, it is not easy to determine whether the existence of common cultural patterns of sexual involvement can be assumed, for example, in women of different ages, with different life experiences, or from different environments.[30] It is also difficult for a court to analyse all possible elements influencing the decision to engage in a sexual act in terms of misrepresentation, as many of them go far beyond the realm of sexuality.

The position, which is common in doctrine and jurisprudence, that the freedom of decision of the will, as far as the elements of the offence under Article 197 CC are concerned, must be violated in relation to the nature of the activity and the choice of a partner, can be considered optimal. This is because this scope of freedom of decision coincides with the area of sexual freedom protected by the aforementioned provision. Otherwise, it would not only be sexual freedom that is protected, but

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[27] Bielski, M., in: *Kodeks karny*…, op. cit., Article 197, n. 54.

[28] Tarapata, S., 'Podstęp jako jedna z form przestępstwa zgwałcenia – zagadnienia wybrane', *Prawo w Działaniu. Sprawy Karne*, 2022, No. 51, p. 53.

[29] Nowacka, V., *Nieseksualne powody seksu*, https://www.self-psychologia.pl/medium/nieseksualne-powody-seksu [accessed on 22 August 2023].

[30] It is worth emphasising that, on the one hand, there is a worldwide trend towards the globalisation of culture; on the other hand, societies themselves are becoming increasingly diverse. One of the symptomatic examples are religious conversions, such as the relatively popular adoption of Islam by Poles (see Kulig, R., 'Dlaczego Polacy przechodzą na islam?', *Onet*, 20 August 2012, https://wiadomosci.onet.pl/religia/dlaczego-polacy-przechodza-na-islam/5n9dk [accessed on 15 September 2023]), as well as other nations (see Piętak, P., 'Dlaczego islam jest tak atrakcyjny i pociągający dla miliardów ludzi?', *Dziennik Gazeta Prawna*, 7 September 2016, https://www.gazetaprawna.pl/wiadomosci/artykuly/973761,islam-demokracja-cywilizacja-zachodnia.html [accessed on 15 September 2023]).

also the realisation of short- or long-term goals that a person wanted to achieve by engaging in sexual activity.

While much attention has been paid in the literature and case law to considering when free expression of will can be established, the analysis of the scope and nature of consent has received less attention. In practice, however, consent can only be given for certain forms of sexual activity and not for others. The aforementioned example of consent to sexual intercourse on the condition that a condom is used, or consent by a woman or a man to oral sex on the condition that ejaculation does not take place in the mouth, illustrate this problem well. Obviously, deception in these cases of sexual intercourse can only occur through the element of surprise, because if the victim became aware that the partner was removing the condom or intended to ejaculate in their mouth, they would need to express their objection. Otherwise, it would have to be assumed that although the parties had agreed on a different course of sexual activities, there was implicit consent to change it.

In jurisprudence, the issue of the scope of consent, as described above, has not been fully recognised. Regarding the scope of consent to sexual acts, one can refer to a judgment of the Supreme Court, which stated: 'The fact that the victim accepted the sexual act, or even wanted the act, does not at all prejudge her consent to every form of it. Indeed, it should be assumed that we are dealing with an attack on sexual freedom not only when the victim does not accept the act of sexual intercourse, but also when her lack of acceptance refers to the manner in which the perpetrator performs the act. Obviously, this does not mean that each and every attempt to violate the sexual freedom of another person understood in such a manner exhausts the elements of the crime of rape. For this depends on whether his or her conduct exhausts the elements of this crime described in the Criminal Code.'[31] In the case at hand, the victim accepted the act of sexual intercourse as such, but objected to her partner's use of the instrument he inserted into her anus.

As in the cited judgment, the considerations in jurisprudence and literature to date regarding the scope of consent to sexual activities focus on the issue of forcible transgression of this scope. In such cases, however, the qualification of the sexual activity as rape is not in doubt, as firstly, the victim realises that the form of the sexual activity is being altered, secondly, they object to this, and thirdly, the perpetrator uses violence or unlawful threats to perform the activity in an altered form.

Meanwhile, the phenomenon of stealthing, or ejaculation in a partner's mouth despite a prior explicit reservation of non-consent to this activity, concerns an entirely different problem. M. Staroń is of the opinion that if the use of a condom was an absolute condition for consent to sexual intercourse, its removal should be classified as rape.[32] Of course, there is immediately the problem of proving that the man intended to remove the condom even before sexual contact. What about in a situation where he makes the decision during sexual intercourse? The problem

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[31] Decision of the Supreme Court of 9 April 2001, II KKN 349/98, OSNKW 2001, No. 7–8, item 53.

[32] Staroń, M., *Stealthing…*, op. cit., p. 80.

seems to arise from the well-established assumption that it is necessary to consider consent as something that is given before the sexual activity starts and is either given or not. The situation would be different if we viewed a failure to comply with the conditions of the given consent as a form of deception.

In the doctrine of criminal law, based on Article 197 CC, it is often emphasised that consent is an 'unspoken element' of this offence. However, the importance attached to the prerequisites of legally effective consent and possible violations in this respect is much less than, for example, in the case of personal data protection provisions. The GDPR provisions explicitly indicate what conditions must be met by consent to the processing of personal data, it is to be 'any freely given, specific, informed and unambiguous indication of the data subject's wishes by which the he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her'.[33] Furthermore, the Preamble devotes significant attention to explaining what the different elements of consent consist of in light of the cited definition, i.e., voluntariness, awareness, etc. (e.g., recitals 32 and 42 GDPR). Similarly, in the literature, the issue of consent for the processing of personal data, including its necessary conditions, scope, or form, is one of the central issues and is analysed in detail.[34] In contrast, in the criminal law literature on Article 197 CC, despite emphasising the essence of consent to sexual activities, there is no broader consideration of its scope, which is, after all, of crucial importance.

There is no doubt that, as with the processing of personal data, consent to sexual activities should be voluntary, specific, conscious, and unambiguous. It follows from this that consent can be limited in scope and may pertain only to specific modes of conduct and forms of intercourse. Clearly, in intimate situations, obtaining consent for sexual activities cannot be done in the same formal way as for the processing of personal data. However, it must be said that, much like the ubiquitous consent forms for data processing that we have grown accustomed to in everyday life, any change in the pre-established terms of sexual engagement should, at the very least tacitly, receive the approval of the other party. The challenge facing contemporary

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[33] Article 4(11) of the 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) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1.

[34] See, e.g., Lubasz, D., 'Warunki wyrażania zgody jako przesłanki legalizującej przetwarzanie danych osobowych', *Gdańskie Studia Prawnicze*, 2021, No. 4, pp. 62–79; Fajgielski, P., in: 'Komentarz do rozporządzenia nr 2016/679 w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych)', in: Fajgielski, P., *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz*, Warszawa, 2022, Article 4; Lubasz, D., Chomiczewski, W., Czerniawski, M., Drobek, P., Góral, U., Kuba, M., Makowski, P., Witkowska-Nowakowska, K., in: Bielak-Jomaa, E., Lubasz, D. (eds), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, Warszawa, 2018, Article 4; Litwiński, P., 'Rozporządzenie Parlamentu Europejskiego i Rady (UE) 2016/679 z dnia 27 kwietnia 2016 r. w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych)', in: Litwiński, P. (ed.), *Ogólne rozporządzenie o ochronie danych osobowych. Ustawa o ochronie danych osobowych. Wybrane przepisy sektorowe. Komentarz*, Warszawa, 2021, Article 4.

criminal law under Article 197 CC is how to address the issue of changing the terms of previously given consent by surprise, and its assessment under criminal law. Examples of such situations include the phenomenon of stealthing and ejaculation in a partner's mouth, despite an earlier explicit reservation of non-consent to this activity. These behaviours are likely not new in intimate relationships, but there has been a recent increase in media interest in these topics, driven by changes in societal attitudes and evaluations of sexual relationships, greater openness in this area, and increased self-awareness.

It appears that stealthing or unconsented ejaculation in a partner's mouth has not yet been considered by the courts in Poland, although there have been rulings on these issues, at least concerning stealthing, in other parts of the world.[35] There is no doubt, however, that sooner or later, a domestic court will have to address the question of whether stealthing, unconsented ejaculation, or some other undetermined change in the form of sexual activity without the knowledge of the victim constitutes a crime under Article 197 CC, or whether these acts are not prohibited but only morally reprehensible, as R. Krajewski suggests.[36]

It seems, however, that even without the need to amend Article 197 CC, stealthing and similar behaviours may meet the elements of the crime of rape under the current legal framework. This position is based on the view that failing to comply with the conditions of previously given consent to a form of sexual activity could be considered as deception. Such an approach would require courts to examine consent more meticulously, not only in terms of whether it was given before the sexual activity but also to determine the extent of that consent in cases of an unanticipated change in the form of the activity. A surprise change in the form of the sexual act, to which the other party could not object and would have absolutely not consented if informed in advance, constitutes a violation of sexual freedom. This is not a case of introducing or exploiting a mistake as to motivation, which *in genere* are incidental circumstances, but rather a mistake concerning the sexual act itself, thus constituting a material error.

However, the example cited earlier of a woman's false assurance that she was taking contraceptive pills cannot be assessed in the same way. In such a case, the false assurance pertains to a circumstance that is indeed important but nonetheless incidental to the sexual engagement itself. There is no misrepresentation or exploitation of a mistake concerning the identity of the partner, the nature of the act, or the form of intercourse. The potential fear of an unplanned pregnancy falls under the category of motivations for which someone engaged in or refrained from sexual activity, and, as previously mentioned, the doctrine generally agrees that a mistake regarding the motivation for sexual activity is incidental. Sexual freedom was not violated if the sexual engagement was voluntary and there was no mistake

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[35] M. Głuchowski gives the example of a judgment of the Lausanne District Court in 2017, see Głuchowski, M., 'Stealthing – karalność zdjęcia prezerwatywy bez wiedzy partnerki', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2022, Vol. 84, No. 3, p. 100, while M. Staroń discusses, *inter alia*, a judgment of the Berlin Court of Appeal in 2022, see Staroń, M., *Stealthing*…, op. cit., p. 77.

[36] Krajewski, R., *Podstęp przy*…, op. cit., p. 269.

in the choice of partner. Accepting a different interpretation would necessitate considering even more far-reaching factual situations – what if a man wishes to have children and the woman, aware of this desire and outwardly approving of it, secretly takes birth control pills? Could it then be assumed that the man has been raped? It seems that the answer to this question is clearly negative.

DISCUSSIONS ON THE NEED FOR CHANGES TO THE DEFINITION OF THE ELEMENTS OF THE CRIME OF RAPE AND THE CHANGES MADE

The discussion on reshaping the elements of the crime of rape has been ongoing in various countries, as the existing definitions no longer align with modern expectations. It is evident that societal changes are reflected in the evolution of legal norms. In today's world of globalising culture, natural changes are often accelerated by foreign influences, and the distinction between national and supranational norms is increasingly blurred. Undoubtedly, the jurisprudence of the European Court of Human Rights and the adoption of the Istanbul Convention[37] have significantly influenced the reconsideration of rape crime regulations, sparking widespread discussions in many countries. Some foreign examples follow.

As early as 2012–2013, the Finnish government considered amendments to the Penal Code to redefine the crime of rape based on the lack of victim's consent. However, at that time, this was deemed unnecessary and contrary to Finnish criminal law tradition. It was emphasised that introducing detailed conditions for the effectiveness of such consent would undermine the principle of the free assessment of evidence by the court.[38] Nevertheless, the definition of the elements constituting the crime of rape, which is very similar to the Polish one, has been criticised by both Finnish researchers and foreign experts. For instance, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) has argued that such a framing of the offence results in the main focus in court proceedings being on the behaviour of the victim rather than on the act of the accused.[39]

In Finland, the offence of rape involves forcing sexual intercourse through the use of violence, the threat of violence, other coercion, or exploiting the victim's state of vulnerability. Forcing a sexual act other than intercourse by using these means constitutes a separate sexual offence. Sexual intercourse is defined in a manner analogous to Polish law, and its elements are fulfilled with the insertion of a finger into the vagina.[40]

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[37] Alaattinoğlu, D., Kainulainen, H., Niemi, J., 'Rape in Finnish criminal law and process – A discussion on, and beyond, consent', *Bergen Journal of Criminal Law and Criminal Justice*, 2020, Vol. 8, No. 2, p. 38.

[38] Ibidem, p. 39.

[39] Ibidem, p. 40.

[40] Ibidem, pp. 34–35.

In Germany, until 2016, the crime of rape consisted of forcing sexual activity by using violence or threats to deprive the victim of life or cause bodily harm, or by making the victim vulnerable and leaving them at the mercy of the perpetrator. According to T. Hörnle, this approach to the crime of rape had its roots in the Middle Ages and was perpetuated by subsequent German laws. Despite numerous modifications to German criminal law, the coercive approach was not challenged. Moreover, where there was room for interpretation, such as in the case of putting the victim into a state of defencelessness, the Federal Court of Justice (*Bundesgerichtshof*) interpreted this requirement very narrowly, demanding that the victim take all possible measures to resist the perpetrator.[41] The changes introduced in 2016 were the result of efforts by NGOs and women's organisations, and the impact of the Istanbul Convention cannot be overlooked as well.[42]

Currently, Section 177 of the German Criminal Code defines rape as conduct involving performing sexual acts with another person, forcing that person to perform sexual acts against their will, or compelling that person to perform or submit to sexual acts with a third person. In this view, the lack of consent of the victim is crucial, reflecting the 'no means no' principle. These changes have attracted a wave of criticism and predictions of an increase in false accusations.[43]

As far as Poland is concerned, attention should be drawn to A. Michalska-Warias' analysis of the scope of criminalisation of rape committed through the use of unlawful threats. The author rightly points to a number of diverse behaviours that may constitute threats influencing the will of another person, but which do not fulfil the elements of an offence under Article 197 CC. Examples include threats to initiate disciplinary proceedings, juvenile proceedings, or committing a crime to the detriment of a person other than the victim or someone close to the victim. Other threats, however, may be considered to fulfil the elements of the offence under Article 199 CC.[44] It should also be noted that the disparity in the severity of sanctions between these offences is significant. For the basic type of rape, the punishment ranges from 2 to 12 years of imprisonment, whereas for exploitation of a state of dependence, the sentence is up to 3 years of imprisonment.

Furthermore, the author states, '(…) from the point of view of analysing also such threats as means of exerting strong pressure on the victim's psyche, it seems entirely plausible that situations will arise in which the will of the victim will be paralysed to the same extent as in the case of a threat to cause criminal proceedings'.[45] This view must be fully agreed with. However, one might also ask whether the will of the victim needs to be paralysed at all. Is it not sufficient that the perpetrator's behaviour causes discomfort by putting the victim in a position of having to choose between two unfavourable and unwanted alternatives?

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[41] Hörnle, T., 'The New German Law on Sexual Assault and Sexual Harassment', *German Law Journal*, 2017, Vol. 18, No. 6, pp. 1310–1312.

[42] Ibidem, pp. 1314–1315.

[43] Ibidem, p. 1316.

[44] Michalska-Warias, A., 'Groźba bezprawna jako ustawowe znamię przestępstwa zgwałcenia', *Ius Novum*, 2016, No. 1, pp. 10–17.

[45] Ibidem, p. 13.

Regarding the fulfilment of the requirements of the Istanbul Convention by Polish legislation, E. Lewandowska and D. Solodov emphasise that the important aspect is achieving the objectives and standards of the Convention, rather than directly copying its provisions into domestic law.[46]

CONCLUSION

Although the elements of the crime of rape – violence, threat, and deception – have not changed since 1932, case law and, especially, doctrine show clear shifts in the interpretation of these concepts, particularly regarding 'coercion by violence'. It can be assumed that the doctrine has adopted an interpretation of violence in which the principle of 'no means no' applies. The violence does not need to overcome the physical resistance of the victim but must continue despite the victim's explicit opposition. In Polish criminal law, non-consent is framed quite specifically, which is why there are fewer issues with defining the crime of rape solely based on physical coercion. It can be concluded that Article 197 CC essentially fulfils the criteria of the Istanbul Convention.[47]

As noted, this state of affairs has been achieved through the evolution of doctrinal views and case law. The wording of the provision does not prevent sentences that may not align with the contemporary interpretation of the elements of the crime of rape. However, it should be noted that the emphasis on the victim's objection avoids the problems associated with focusing on defensive actions on the one hand and consent on the other. In the latter case, an evidentiary problem arises: how to prove the non-existence of something? In the case of Article 192 CC, consent is often formalised or given in front of witnesses – something that is rarely feasible in intimate situations. Conversely, requiring the victim to engage in very intensive defensive measures is outdated today. It would be paradoxical if, in this regard, domestic privacy were protected more than sexual freedom. Therefore, the adoption in Polish doctrine, whether explicitly or implicitly, of the principle 'no means no' should be regarded in the most positive light.

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[46] Lewandowska, E., Solodov, D., 'Zasadność sporu odnośnie nowej definicji zgwałcenia – uwagi na tle proponowanych zmian', *Studia Prawnoustrojowe*, 2021, No. 54, p. 579.

[47] Article 36 of the Convention:

'1. Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:
   a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
   b) engaging in other non-consensual acts of a sexual nature with a person;
   c) causing another person to engage in non-consensual acts of a sexual nature with a third person.
2. Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.
3. Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.'

However, this does not mean that the current state of the law does not raise any concerns. Social changes mean that freedom, including sexual freedom, is increasingly valued. Therefore, changes in the content of the laws or their doctrinal and judicial interpretation are necessary. Behaviours such as threatening to commit a misdemeanour or committing a crime against a person other than the victim or their closest relation do not constitute rape. On the other hand, phenomena such as stealthing need to be properly assessed. Merely considering the issue of consent or objection to sexual contact is not sufficient; it is necessary to examine the scope of this consent and conduct a criminal law assessment of the violation of its conditions.

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THE 'BLACK SWAN' THEORY IN AVIATION SAFETY

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Abstract
The article is a review and focuses on the analysis and interpretation of Nassim Nicholas Taleb's 'Black Swan' theory in the context of aviation safety, considering various aspects of risk management and preparation for unforeseeable events in aviation.

We present the thesis that the Black Swan theory has significant implications for the development of risk management strategies in aviation, emphasising the need to prepare for rare but catastrophic events that traditional risk analysis methods may overlook.

The aim of the research is to understand how the Black Swan theory can be integrated into existing aviation safety frameworks and how it can contribute to the aviation industry being better prepared for extreme events.

The article stands out for its original approach to the analysis of the Black Swan theory in the context of the specific nature of aviation safety, highlighting new perspectives in aviation risk management. It provides valuable insights into the practical aspects of applying the Black Swan theory to aviation, offering a novel approach to predicting and responding to unexpected aviation events. This is important for both aviation safety theorists and practitioners in this field.

The research covers extensive literature analysis, including case studies, risk management theories and current aviation safety strategies, providing a comprehensive overview of the issue.

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'The things that have never happened before, happen all the time.'
Scott D. Sagan, *The Limits of Safety: Organizations, Accidents, and Nuclear Weapons*, Princeton, 1993[1]

INTRODUCTION

The Black Swan theory, formulated by Nassim Nicholas Taleb in 2007,[2] refers to unpredictable and rare events that have a significant impact but are outside the realm of everyday expectations. These events, such as natural disasters, terrorist attacks and unique aircraft accidents, pose significant challenges in risk management, especially in a dynamically changing technological world.

In the context of aviation safety, this theory emphasises the need to continually adapt strategies and procedures to effectively manage unexpected threats. Examples of such 'Black Swans' include disasters such as the 2004 Indian Ocean tsunami, the 2010 volcanic eruption in Iceland, and the September 11, 2001 attacks.

The article observes that most aviation accidents result from human error and examines changing approaches to investigating and preventing accidents, such as the Germanwings flight disaster. These events compel experts to reflect on the nature of risk and to implement effective countermeasures to both prevent and respond to unpredictable events.

In the context of the Black Swan theory, the article points to the need for a holistic approach to risk management in aviation, taking into account both predictable and unexpected challenges.

A REVIEW OF THE LITERATURE ANALYSING THE BLACK SWAN THEORY IN THE CONTEXT OF AVIATION SAFETY

The literature on Black Swan theory in the context of aviation safety ranges from fundamental theoretical works to detailed case studies, risk analyses, and considerations of aviation policy and regulation.

With regard to Nassim Nicholas Taleb's Black Swan theory, several key sources are noteworthy. The first is Taleb's book entitled *The Black Swan: The Impact of the Highly Improbable*, which offers a detailed description of the theory and its applications in various fields. Lee Clarke, in his book *Mission Improbable: Using Fantasy Documents*

[1] Sagan, S.D., *The Limits of Safety: Organizations, Accidents, and Nuclear Weapons*, Vol. 53, Princeton, 1993, https://doi.org/10.2307/j.ctvzsmf8r.

[2] Taleb, N.N., *The Black Swan: The impact of the highly improbable*, New York, 2007.

to Tame Disaster,[3] discusses risk management and unpredictable events, providing context for the Black Swan theory. Additionally, Taleb, in his article 'The Fourth Quadrant: A Map of the Limits of Statistics', published in *The Edge*, expands on the concept of 'Black Swans', particularly in the context of the statistics limitations.[4]

Examples of 'Black Swans' can be found in the *Encyclopedia Britannica*'s analysis of the 2004 Indian Ocean tsunami[5] and *National Geographic*'s description of the 2010 eruption of the Eyjafjallajökull volcano in Iceland.[6] Both sources illustrate the impact of these events on aviation. *Encyclopedia Britannica* also contains a comprehensive analysis of the September 11, 2001 attacks, another event often cited as an example of Black Swans.[7]

The Aviation Safety Network discusses Germanwings flight crash,[8] providing a detailed description and analysis of the event, and highlighting the human error aspect of aviation. An article by Terje Aven entitled 'On the Paradoxes of Risk Management in the Light of the Black Swan Theory', published in the *Journal of Risk Research*, addresses the paradoxes of risk management in the context of this theory.[9] Scott D. Sagan, in his book *The Limits of Safety: Organizations, Accidents, and Nuclear Weapons*, analyses accidents and organisational safety, which may be useful for understanding the concept of Black Swans in the context of aviation safety.[10] Daniel Kahneman, in his book *Thinking, Fast and Slow*, discusses cognitive biases and their impact on decisions, which is important in relation to human errors and unpredictable events.[11] These sources provide valuable information for deepening one's understanding of the Black Swan theory, its applications, and its context in risk management and aviation safety.

Another key work examining the Black Swan theory in the context of aviation safety is the book *Safety Accidents in Risky Industries: Black Swans, Gray Rhinos and Other Safety Animals* by Sasho Andonov. This publication examines incidents and accidents in risky industries, including aviation, using mathematical analysis of these events through statistics and probability. The book covers topics such as real-time monitoring, stress testing, change management, predictive maintenance, management system, contingency plans, human factors, behavioural safety,

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[3] Clarke, L., *Mission Improbable: Using Fantasy Documents to Tame Disaster*, Chicago and London, 1999.

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[5] *Encyclopaedia Britannica*, 'Indian Ocean tsunami of 2004', https://www.britannica.com/event/Indian-Ocean-tsunami-of-2004 [accessed on 23 August 2024].

[6] 'Eyjafjallajökull volcano eruption in Iceland', *National Geographic*, https://education.nationalgeographic.org/resource/eyjafjallajokulls-volcanic-ash/ 2010 [accessed on 23 August 2024].

[7] *Encyclopaedia Britannica*, 'What were the September 11 attacks?', https://www.britannica.com/question/What-were-the-September-11-attacks [accessed on 23 August 2024].

[8] 'Germanwings flight disaster', Aviation Safety Network, https://asn.flightsafety.org/asndb/320334 [accessed on 23 August 2024].

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[10] Sagan, S.D., *The Limits of Safety…*, op. cit.

[11] Kahneman, D., *Thinking, Fast and Slow*, New York, 2011.

anticipatory failure determination, resilience engineering, resilience management, the Swiss cheese model, and probability distribution. It is an essential resource for professionals working in the fields of health and safety, quality engineering, compliance engineering, aerospace engineering, workplace health and safety, and industrial engineering.

The literature also includes case studies of specific plane crashes considered Black Swans, and a selection of these is presented in this article. Case studies often focus on analysing the causes, effects, and lessons learned from these events.

Moreover, there is considerable work focusing on aviation risk management methods in the context of Black Swans. These publications analyse how airlines and airports can better anticipate and prepare for unexpected, catastrophic events. Both technical and organisational issues are discussed in this article.

Major plane crashes are often followed by changes in policy and regulation. An analysis of the literature in this area focuses on how regulations are adapting to better cope with unexpected events and how these changes are affecting airline operations around the world.

New technologies can both generate Black Swans and help predict them and minimise their effects. The literature in this area examines how technological innovations, such as the development of drones and advanced monitoring systems, impact aviation safety.

In the context of Black Swans, the role of human decisions and behaviours is also important. The literature in this area examines how human factors, such as pilot errors, can contribute to unexpected disasters, and how these risks can be minimised.

THE BLACK SWAN THEORY IN AVIATION SAFETY

The Black Swan theory takes its name from the widely known but false belief that all swans are white. In fact, some are black and live in Australia.

In 2007, Nassim Nicholas Taleb defined a Black Swan event as one that 'is an outlier' because it lies outside the realm of regular expectations. Black Swans, by this definition, are mostly unforeseen, rare, and may be created by, among others, natural environmental, geopolitical, economic factors, or other unexpected circumstances and events.

Black Swans pose a challenge to risk management, especially in our rapidly changing technological landscape. On the other hand, transformative changes in emerging technology increase the ability to analytically forecast and attempt to mitigate events related to this phenomenon.

In 2004, the Indian Ocean tsunami killed 230,000 people. In 2010, an Icelandic volcano erupted, closing the airspace over Europe for almost a week and grounding millions of passengers at a cost of over $200 million a day. On 11 September 2001, four commercial airliners were hijacked to be used as missiles to destroy American infrastructure and human lives.

Most aviation accidents are caused by human errors. It is estimated that currently, as many as 80% of incidents related to aviation safety originate from the so-called 'human factor'. In order to identify current safety threats and develop possible solutions, the role of human factors as the root cause of aviation accidents has transformed the nature of aviation accident investigation over the years. Typically, countermeasures to avoid certain types of accidents focus on error management. Unfortunately, new types of accidents are becoming more frequent, such as unlawful interference, as in the case of the Germanwings plane crash. In this incident, the pilot deliberately and consciously crashed the plane into the ground, committing suicide and simultaneously killing all passengers and crew members. Public opinion was shocked and demanded stringent preventive measures. But how do you address this type of accident given your awareness of such behaviours and risks?

After each aircraft accident, investigators use a variety of measures, methods, and investigative models to understand how the aircraft incident occurred, what its main causes are, and to develop countermeasures to prevent the situation from recurring in the future. Most interpretations depend on the paradigm used. Until now, different paradigms have led to different interpretations and remedies. The Germanwings case, in which a pilot intentionally crashed a plane full of passengers, poses a challenge to safety researchers. Is this event a Black Swan, an unpredictable and surprising phenomenon, or perhaps a manifestation of a broader trend affecting flight safety?

Currently, while transportation security experts have to deal with preventing terrorist attacks, those involved in security in the sense of preventing aircraft accidents focus their efforts, among others, on preventing human errors. In fact, reinforced doors, as in the case of the Germanwings plane crash mentioned above, which were created as a solution, have become a problem. Between 2013 and 2015, we witnessed a disturbing series of accidents and serious incidents in which the pilot voluntarily caused the plane to crash into the ground. In most of these cases, one of the pilots was locked outside the cockpit thanks to the locked and additionally reinforced door.

The first case was a LAM (Mozambique Airline) aircraft that crashed in Namibia in 2013; after the captain locked himself in the cockpit while the co-pilot was away, the plane began to dive from cruising altitude until it finally hit the ground.

Shortly thereafter, in 2014, the co-pilot of Ethiopian Airlines locked himself in the cockpit while the captain was away and, instead of beginning his descent to his original destination, Rome Fiumicino airport, he continued to Geneva, landing virtually on the last of his fuel. After landing, the co-pilot tried to escape from the plane and asked for political asylum.

Another example is Malaysian Airlines flight MH 370 which took place in 2014 and which still remains a mystery. So far, in the history of aviation, there has been no record of an aircraft disappearing from radar screens and whose wreckage cannot even be found.

In the final report, which was prepared after the 'Germanwings flight', investigators compiled a list of events due to the deliberate actions of the pilots, and that included a description of the Malaysian plane case. Of course, as regards

the flight MH 370, caution should be exercised in dealing with this case because, in the absence of conclusive evidence, reliable documents and flight data recordings so far, there is no certainty as to its causes. Nevertheless, there are facts about some deliberate actions of the pilots (or those on board at that time) in the minutes before the plane disappeared from radar screens.

Such prior disturbing events, which should have raised alarm bells among the entire aviation community, occurred in countries far from Europe (with the exception of the Ethiopian plane, as this case took place in Europe but involved a plane belonging to an African airline). In March 2015, the 'Germanwings case' suddenly came to the attention of the European public. The world has also started to become interested in that incident. Attention was drawn to the fact that this is not a sporadic or random occurrence, as we are talking about four events in a relatively short period of time. If we can assume that – excluding the Germanwings plane – three cases suffice as a proof, we are faced with a disturbing phenomenon that cannot be defined as an improvised, exceptional and isolated case.

We can, therefore, conclude that the 'Germanwings case' is a symptom of a trend that is highlighted as a real threat to aviation safety. The final report filed by the BEA (Bureau d'Enquête et d'Analyses) on the Germanwings crash cited a number of events in which the pilot's poor mental state caused (or could have caused) criminal behaviour.

This could be another turning point in analysing aviation safety. Is this a Black Swan as Nassim Taleb put it? Do we need a new paradigm to capture such a phenomenon? What can we do to prevent such dangerous behaviour? By now, we are used to training people to avoid, detect, or mitigate errors. Deliberate behaviour intended to destroy aircraft and passengers has, until now, been beyond the attention and study of security experts. Where to start working on remedies?

Perhaps the first step is to understand what is happening to the pilot community, assessing organisational aspects, individual lifestyle and their impact on personal mental resilience as a tool to overcome the imbalance that may arise during, for example, a forty-year career.

In addition to the obvious qualifications, a pilot is also hired for certain specific personality traits, such as self-confidence, mental balance, physical stamina, and sound judgment. Nevertheless, the pilot is human and, like every human being, is affected by negative life events (illness, financial problems, bereavement, divorce, moving, etc.). The ability to resist and return to a healthy mental state is not always an easy task. In such situations, the pilot should be able and willing to seek help. For example, by participating in dedicated support programs for crew members temporarily mentally incapable of flying, which is already implemented in some airlines.

Usually, to become a pilot, individuals need to have a leadership personality. Being a captain requires specific approach to commanding and leading other people. Typically, such a person does not dwell on problems. And even if they notice and experience them, they do not talk about them. It is rare for these types of personalities to share their problems with specialists and psychologists.

A more effective way to support such people is to ensure they establish relationships with colleagues with similar experiences who have been in the same situations, who are acting not as 'assessing judges' but as partners.

SELECTED CASE STUDIES OF THE BLACK SWAN THEORY IN AVIATION SAFETY

The Black Swan theory in aviation safety, as already mentioned, refers to unpredictable, rare, but extremely influential events that can significantly affect the aviation industry. In the context of aviation, there are several key case studies that exemplify this theory:

1. Air France Flight 447 crash (2009). Flight AF447 from Rio de Janeiro to Paris disappeared over the Atlantic. Subsequent investigation revealed that the cause was a loss of speed due to frozen speed sensors, which, combined with crew errors, led to the disaster. This case is often referred to as a Black Swan due to the unexpected sequence of events and mistakes that led to the tragedy.
2. Disappearance of Malaysia Airlines flight MH370 (2014). Flight MH370 from Kuala Lumpur to Beijing suddenly disappeared from radar and has not been found to this day. This case is the quintessence of the Black Swan, because despite modern technology, the plane and its passengers disappeared without a trace, which was an unprecedented event and difficult to explain.
3. Attacks of September 11, 2001. The use of airliners as weapons in the terrorist attacks on the World Trade Center and the Pentagon was an event that no one saw coming. The use of aircraft as tools of terror not only had tragic immediate consequences, but also changed the global approach to aviation safety in the long term, introducing strict safety controls and new regulations.
4. Eyjafjallajökull Volcano Eruption (2010). The eruption of an Icelandic volcano caused massive disruptions to air traffic around the world. While volcanic eruptions are known, the scale of the event and its impact on aviation were unexpected, making it a Black Swan in the context of global air travel. The incident demonstrated how natural phenomena can have far-reaching impacts on global airlines and airports, leading to mass airspace closures and financial losses.
5. Challenger Space Shuttle Disaster (1986). Although this event took place in space, it is often cited in the context of the Black Swan theory in aviation. The explosion of the space shuttle shortly after launch was a shocking event that highlighted the unpredictability and potential risks of space exploration.
6. Tenerife Flight Disaster (1977). The most tragic accident in the history of aviation occurred when two Boeing 747s collided at Los Rodeos Airport in Tenerife. The incident, which resulted in the deaths of 583 people, was due to a series of unfortunate circumstances, including poor visibility, misunderstandings, and communication errors. It was a Black Swan due to the unexpected convergence of several negative factors.

7. Chernobyl Reactor Accident (1986). Although not directly related to aviation, this event had a huge impact on commercial aviation, especially in Europe. The emission of radioactive dust into the atmosphere forced many airlines to change flight routes and led to the introduction of new flight safety protocols in the event of a nuclear threat.
8. Attack on Pan Am Flight 103 over Lockerbie (1988). The terrorist attack on a plane flying from London to New York, which exploded over Lockerbie, Scotland, was a shocking and unexpected event. It resulted in changes to global aviation security standards, particularly around baggage screening and airport security measures.
9. Germanwings Flight 9525 Crash (2015). This incident, already discussed, occurred when the first officer intentionally caused an Airbus A320 aircraft to crash into the ground, resulting in the deaths of all persons on board. This tragedy led to changes in regulations regarding pilot mental health and cockpit procedures.
10. Computer System Failure at British Airways (2017). A global IT system failure at British Airways led to mass flight cancellations and significant chaos at airports. It emphasised the importance of IT system resilience and business continuity planning in the aviation industry.
11. American Airlines Flight 191 Crash (1979). Immediately after take-off from Chicago's O'Hare Airport, an engine separated from the DC-10's wing, leading to the deadliest aviation accident in U.S. history. This event, although caused by technical and design errors, was unpredictable and had a profound impact on aircraft safety and maintenance regulations.
12. Electrical Failure on a Boeing 787 Dreamliner (2013). A series of problems with lithium-ion batteries in modern Dreamliner planes prompted a global grounding of the model. This was unexpected given the newness and technological sophistication of the aircraft, and resulted in a review and change in regulations regarding batteries used in aircraft.
13. Turkish Airlines Flight 981 Crash (1974). This accident, caused by a failure of the cargo door latch, led to the crash of the McDonnell Douglas DC-10 aircraft shortly after take-off from Paris. The causes of the accident were unforeseen and prompted a review of aircraft design and safety protocols.
14. Swissair Flight 111 Disaster (1998). The plane burned down and crashed off the coast of Nova Scotia due to a fire caused by faulty electrical wiring. This accident led to changes in regulations regarding combustible materials used in aircraft and fire safety standards.
15. The Concorde Disaster (25 July 2000). It is often cited as an example of a Black Swan in aviation. The plane, which was a symbol of luxury and innovation in transatlantic air travel, crashed shortly after taking off from Charles de Gaulle Airport in Paris. The cause of the disaster was a tire burst, which damaged the fuel tank and started a fire. This event had far-reaching consequences, not only in terms of the loss of life, but also in how it affected perceptions of safety and the economic feasibility of high-speed supersonic flight, ultimately leading to the discontinuation of Concorde use.

16. Emergency Landing of US Airways Flight 1549 on the Hudson River (2009). This incident, in which the plane lost engine power after hitting a flock of birds and had to make an emergency landing on the river, is an example of effective crisis management and the high professionalism of the crew in the face of unexpected events.
17. Bomb Attack at Brussels Airport (2016). The terrorist attacks on Brussels Airport showed how attacks can not only cause human and material losses, but also affect public confidence in aviation safety and cause long-term disruptions to air traffic.
18. Delta Air Lines IT System Failure (2016). A computer system failure caused global disruptions to Delta Air Lines operations, including flight cancellations and delays. This incident highlighted the importance of IT system resilience in the aviation industry.
19. Cyber Attack on British Airways IT Systems (2017). A hacking attack on the airline IT systems caused significant operational disruptions, including flight delays and cancellations. This event highlighted the importance of cybersecurity in the aviation industry.
20. Boeing 737 MAX Crisis (2019, 2020). After two plane crashes (Lion Air Flight 610 and Ethiopian Airlines Flight 302) in which the new 737 MAX model was involved, the series was globally grounded. The event raised questions about safety standards, certification processes and the wisdom of trusting automated on-board systems.
21. Drone Incidents in Dubai (2016). Dubai International Airport has experienced several incidents involving drones that violated the airspace, causing the airport to temporarily close. These incidents sparked a discussion about the need for better regulation and monitoring of the airspace around airports.
22. Collision of a Drone with a Passenger Plane (2017). A collision between a drone and a passenger plane during landing was reported in Canada. Although the incident did not cause serious damage, it highlighted the potential risk of drones colliding with manned aircrafts.
23. Gatwick Airport Closure (2018). One of the most notorious drone incidents occurred at Gatwick Airport in the UK, where drone sightings near the runway led to the closure of the airport for several days. The incident caused massive disruption to air travel, highlighting the problem of unauthorised use of drones in airport airspace.
24. COVID-19 Pandemic (2020). The outbreak of the pandemic in 2020 was an event of unprecedented scale for the aviation industry. It has created a global aviation crisis, with mass flight cancellations, border closures and the introduction of new health and safety protocols.

These case studies demonstrate how unpredictable and rare events can have a profound impact on aviation safety, forcing changes to policies, procedures and approaches to risk management in the aviation industry.

ANALYSIS OF THE LEGAL CONDITIONS OF THE BLACK SWAN THEORY IN AVIATION SAFETY

When analysing the legal conditions of the Black Swan theory in the context of aviation safety, it is worth referring to a number of important sources. The theoretical basis is the previously mentioned work by Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable*, which introduces the concept of Black Swans.[12] To understand legal implications of the theory, it is worth reading *The Principles and Practice of International Aviation Law* by Brian F. Havel and others, offering a perspective on aviation law.[13] Lee Clarke in *Mission Improbable: Using Fantasy Documents to Tame Disaster* discusses risk management in unpredictable situations, which is important in the context of the Black Swan theory.[14] The International Civil Aviation Organization in its 2018 *Safety Management Manual* presents international standards and practices for safety management, which may be helpful in understanding legal requirements.[15] Alan J. Stolzer and others analyse aviation safety management systems in *Safety Management Systems in Aviation*.[16] Andrew Hoskins and John Tulloch look at the impact of technology on risk perception in *Risk and Hyperconnectivity: Media and Memories of Neoliberalism*.[17] Daniel Kahneman examines cognitive biases in the context of crisis decisions in *Thinking, Fast and Slow*.[18] The International Air Transport Association provides recommendations for the industry in its 2017 *Airline Safety and Security Guidelines*.[19] Nawal K. Taneja in *Airlines in the Age of Information* focuses on the role of information technologies.[20] Robert W. Poole Jr. in *Rethinking Airport Security* offers an overview of aviation security strategies.[21]

The analysis of the legal conditions of the Black Swan theory in the context of aviation safety focuses on how current aviation law and regulations can prepare the industry and relevant institutions to deal with unpredictable, rare, but potentially catastrophic events. As already mentioned, this theory, formulated by Nassim Nicholas Taleb, describes events that depart from the norm, beyond the scope of regular expectations, and, consequently, beyond what is usually included in standard safety procedures and emergency plans.

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12 Taleb, N.N., *The Black Swan*…, op. cit.

13 Havel, B.F., Sanchez, G.S., *The Principles and Practice of International Aviation Law*, Cambridge, 2014.

14 Clarke, L., *Mission Improbable*…, op. cit.

15 International Civil Aviation Organization, *Safety Management Manual*, ICAO, 2018.

16 Stolzer, A.J., Goglia, J.J., *Safety Management Systems in Aviation*, London, 2016.

17 Hoskins, A., Tulloch, J., *Risk and Hyperconnectivity: Media and Memories of Neoliberalism*, Oxford, 2016.

18 Kahneman, D., *Thinking*…, op. cit.

19 International Air Transport Association. *Airline Safety and Security Guidelines*, IATA, 2017.

20 Taneja, N., Airline Industry (1st ed.). Taylor and Francis. Retrieved from https://www.perlego.com/book/1569239/airline-industry-poised-for-disruptive-innovation-pdf [accessed on 23 August 2024], original work published 2016.

21 Poole, R.W. Jr., *Rethinking Airport Security*, Reason Foundation, Rethinking Airport Security-A 2011 Window of Opportunity?", 2016, https://reason.org/airport-policy/airport-policy-and-security-news61/ [accessed on 23 August 2024].

In aviation law, incorporating the Black Swan theory would mean increasing flexibility and adaptability in safety planning. This requires regulators and aviation organisations to consider scenarios that may seem unlikely but have potentially huge consequences. This also means that regulations must be dynamic enough to be quickly adapted in the event of unexpected occurrences.

Moreover, in the context of this theory, it is crucial that legal systems focus not only on preventing and mitigating the effects of potential disasters but also on ensuring effective response mechanisms after such events occur. This includes provisions for investigations, rescue operations, compensation for victims and their families, and quick and effective communication with the public.

In the context of 'Black Swans', the role of continuous training and education in the aviation industry is also significant. Workers in the aviation industry must be prepared for emergencies that may fall outside standard emergency procedures. This underscores the need to invest in advanced training and simulations that can help prepare staff for unpredictable scenarios.

The legal framework for the Black Swan theory in aviation safety focuses on the identification and adaptation of legal frameworks for managing rare, unpredictable, but potentially catastrophic aviation events.

Firstly, these conditions emphasise the importance of flexibility and adaptation in aviation legislation, enabling quick reactions and changes in response to unexpected events. The law must be prepared for situations that were not previously foreseen, which requires constant evaluation and updating of regulations and safety standards.

Another important aspect is advanced risk management. Aviation regulations should promote and implement risk management strategies that go beyond traditional statistical models and take into account potentially unpredictable threats. This includes both predicting and minimising the effects of rare events.

In the context of Black Swans, it is also important to establish comprehensive procedures for investigating and reporting after aircraft accidents. Such procedures should aim to thoroughly investigate the causes of events, identify unforeseen factors, and develop recommendations on how to avoid similar situations in the future.

Moreover, these conditions highlight the need for international cooperation and harmonisation of regulations. Aviation is a global industry and Black Swan events often have international implications. It is therefore important that safety regulations are consistent and effective worldwide.

Finally, innovation and technology play a significant role in aviation law. Modern technologies such as advanced monitoring systems, data analytics, and artificial intelligence can be crucial in identifying and preventing Black Swan events. The law should support the development and implementation of such technologies, while ensuring that they are used in an ethical and privacy-compliant manner.

CONCLUSION

The metaphor 'Black Swan' refers to an unexpected, unlikely, or even impossible, catastrophic event that no one plans for, situations that no one anticipates or realises that could even happen. The definition of the Black Swan phenomenon shows that these phenomena are unpredictable or very difficult to predict. Therefore, you should assess your level of exposure to these phenomena and develop countermeasures.

The probability and frequency of their occurrence should be assessed and the possibility of reducing them should be analysed through training, continuous updating, and expansion of the evaluated list of negative phenomena. Conducting tests and practical exercises that implement specific threat scenarios is also an essential element of appropriate response and risk reduction.

Other important aspects include assessing sensitivity and reducing the impact of negative phenomena by, for example, introducing additional 'firewalls' in the organisation that mitigate the impact of events or prevent their occurrence. All types of preventive actions, forecasting negative phenomena and developing appropriate actions and their implementation are crucial to reducing the effects of Black Swans.

Analysis of the legal conditions of the Black Swan theory in aviation safety requires an integrated approach that includes a flexible legal framework, continuous training and preparation, as well as effective planning and response to rare but potentially catastrophic events. This means that lawmakers, regulators and the aviation industry need to be constantly vigilant and ready to adapt in the face of unforeseen challenges.

Legal considerations of the Black Swan theory in aviation safety also require a holistic approach that includes flexibility, advanced risk management, thorough investigations, international cooperation and technological innovation. This comprehensive approach is key to effectively addressing unpredictable, rare, but potentially catastrophic aviation events.

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PROBLEMS OF DEFINING FINANCIAL-LEGAL MEASURES FOR ENVIRONMENTAL PROTECTION IN POLISH LAW

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Abstract

Effective protection of environmental resources is not possible without the use of instruments typical of financial law. This requires the use of public funds from the State and local governments, which are collected and spent in the manner prescribed by law. The Environmental Protection Law regulates the various legal-financial instruments used to fulfil this protective purpose. It also contains a provision defining what financial-legal measures are in terms of this Act. However, the legal definition is formulated in a way that raises numerous drafting and interpretative doubts. This article aims to demonstrate the accuracy of the thesis that there are defects in the statutory definition of legal and financial measures for environmental protection.

Keywords: financial-legal measures, environmental protection, legal definition

INTRODUCTION

Real, effective, and efficient environmental protection is not possible without a commitment of financial resources from both public and private entities. These resources are crucial for the development of society and national economies, and

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are subject to public policy and legal restrictions.[1] It is the responsibility of the State to ensure protection of the natural environment in accordance with the principle of sustainable development.[2] According to the statutory definition, this development is social and economic in nature, characterised by the process of integrating political, economic, and social activities.[3] Business and public planning should consider preserving natural balance and ensuring the sustainability of fundamental natural processes. Sustainable development aims to ensure that the basic needs of individual communities and citizens can be met, both for the present and future generations. Notably, Polish law incorporates a significant aspect of intergenerational solidarity. Environmental resources are viewed as a foundation for long-term economic and social development, extending beyond the lifespan of a single generation. Therefore, financial-legal measures cannot be used as emergency solutions or as instruments with an annual scope for protective purposes, which is typical of state budget execution. The correct legal formulation of these instruments requires their inclusion in the State's strategic plans and programmes.

The Constitution mandates that every entity is responsible for the state of the environment and any deterioration caused by its actions or omissions.[4] Environmental protection is undeniably a public task, and the State is responsible for fulfilling this duty.[5] Achieving this task requires use of public funds for operations carried out within the framework of budgetary and off-budget management.[6] Public finances and the environment are constitutional values, and legal institutions that have a mutual and functional connection. As previously stated, protecting the environment is not possible without funding. The use of resources and mitigation of their impact generate public revenue. However, the fiscal needs of the State alone cannot determine the extent of permissible interference with environmental resources. Indeed, public interest justifies the primacy of non-fiscal functions, particularly those aimed at stimulating behaviour and redistributing GDP through financial law to protect the environment.

The Environmental Protection Law ('EPL') contains the phrase 'financial-legal measures'. This terminology refers to the instrumental use of public monetary resources to achieve the State policy objectives set out in the Act. It can be concluded that the protection of the environment is a higher value in the legal hierarchy than concern for public finances. This type of systemic and functional relationship of supremacy and subordination is not present in constitutional axiology. The Basic Law also does not use the phrase 'financial-legal measures'. Polish Constitution

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1 Gorgol, A., 'Kontrowersje uregulowania prawnofinansowych środków ochrony środowiska: Zagadnienia systemowe', in: Jeżyńska, B., Kruk, E. (eds), *Prawne instrumenty ochrony środowiska*, Lublin, 2016, pp. 23–24.

2 See Article 5 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended), hereinafter referred to as 'the Constitution'.

3 See Article 3(50) of the Act of 27 April 2001 – Environmental Protection Law, (consolidated text, Journal of Laws of 2021 item 1973, amended), hereinafter referred to as 'the EPL'.

4 See Article 86 of the Constitution.

5 See Article 74(2) of the Constitution.

6 Gorgol, A., 'Prawo ochrony środowiska jako ustawa daninowa', *Krytyka Prawa: Niezależne Studia nad Prawem*, 2020, Vol. 12, Issue 4, pp. 73–74, https://doi.org/10.7206/kp.2080-1084.410.

serves as the foundation for the national legal system and is considered the supreme law, directly applicable in principle.[7] This regulation establishes the legal obligation to interpret statutory terms in a manner consistent with the Constitution. However, the practical significance of this precept in determining the scope of the meaning of the expression 'financial-legal measures' within the framework of linguistic-grammatical interpretation is questionable. No comparison is necessary between the designations of identical constitutional and statutory terms. Furthermore, the directive of pro-constitutional interpretation is a systemic interpretation that aims to rectify uncertain conclusions of legal semiotics. However, the legal definition does not alleviate this uncertainty.

An intra-system interpretation of the statutory definition shows that the legal term 'financial-legal measures' is used only twice in the Act, at different levels of its formal layout. The title, which is the most general editorial unit, is where the term first appears in the nomenclature of this part of the Act.[8] Based on initial assumptions and referring to the Latin maxim *nomen omen* and the rationality of the lawmaker's actions, it should be considered that legal phrases are used deliberately in the legislative process and carry a specific meaning. Thus, it is reasonable to assume that all financial law measures in statutory terms, which are used to protect the environment, should be included in Title V of the EPL. Secondly, this term is used as a *definiendum* in the defining provision.[9] The Environmental Protection Law includes a 'statutory glossary', which groups legal definitions formulated to apply to this Act.[10] However, the catalogue does not contain a provision defining legal and financial measures. Therefore, the question to be clarified is whether this omission is a rational solution.

The purpose of this article is to critically analyse the legal significance of the phrase 'financial-legal measures' as used in the Environmental Protection Law. The defined research intention determines the thematic scope and structure of the article. The author's argument aims to demonstrate the accuracy of the thesis that there are defects in the statutory definition of legal and financial environmental measures. To address the research problem, it is necessary to use dogmatic interpretation. This helps analyse legal texts and determine the applicable legal provisions. Laws will be treated as formalised linguistic expressions of a molecular nature, consisting of linguistic signs linked by syntactic and logical ties.

7 See Article 8 of the Constitution.
8 See Title V of the EPL.
9 See Article 272 EPL.
10 See Article 3 EPL.

DEFINIENDUM OF FINANCIAL-LEGAL MEASURES FOR ENVIRONMENTAL PROTECTION IN THE LIGHT OF THE PRINCIPLES OF LAW-MAKING TECHNIQUE

Before establishing the meaning of the expression 'financial-legal measures', it is worth considering the legislative conditions for the application of legal definitions. The importance of this issue lies in the fact that the accuracy of law-making directly affects the content of provisions and their interpretation and application. Defects in the law may be so significant that they cannot be remedied without derogating from or amending the law.

In Polish law, the principles of legislative technique have been formulated as an appendix to the Regulation of the Council of Ministers. As the name suggests, these principles aim to achieve the correct outcome of the legislative process. They hold technical value as they recommend the use of precise instruments to accomplish the intended legislative goals. Statutory definitions are one example of such means.[11] It is worth noting that this method of definition is subject to constraints that are not homogeneous, as they are governed by separate editorial units of a legal act with the same formal rank, namely paragraphs. Some of these give rise to legislative imperatives, while others result in legislative prohibitions, which can be applied either conditionally or unconditionally.

Firstly, it is important to note the injunction to create legal definitions. The legislative body is not free to choose whether or not to use such an instrument, as § 146(1) RLT uses the expression 'shall be formulated'. The use of a legal definition is deeply justified from a rational praxeological perspective. Failure to apply this means of legislative technique in the situations described in the provision under consideration would result in significant legislative shortcomings.

Legal language is used to edit the content of a legal document. It typically employs the official language of a country, which is often the national colloquial language. However, there is a notable exception in EU legislation, which is drafted in all the languages of the Member States. The wording in each language version is equivalent to the national wording in the others. In Poland, statutory definitions are drawn up solely according to the rules of the Polish language, which is the official language used by public authorities, including those responsible for creating laws.[12] Legislation is a procedure for carrying out a public task, and therefore, the use of the Polish language is required.[13] The monopoly of this language in official matters does not, however, guarantee the absence of problems in the construction of legal provisions, the decoding of their content, and their application in social relations. These issues arise from the use of colloquial Polish, which may not always be adequate for achieving legislative goals. Legal acts frequently describe intricate

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[11] See for example § 147 and 148 of the Regulation of the Council of Ministers of 20 June 2002 on Rules of Law-making Techniques (consolidated text, Journal of Laws of 2016, item 283, as amended), hereinafter referred to as 'the RLT'.

[12] See Article 4 of the Act of 7 October 1999 on the Polish Language (consolidated text, Journal of Laws of 2021, item 672, as amended), hereinafter referred to as 'the APL'.

[13] See Article 5(1) APL.

social, economic, and political phenomena using technical terminology, which may have a different meaning in informal Polish than in legal language. It can be concluded that provisions of Polish law may be drafted within the scope of legislative discretion using typical dictionary rules of the Polish language or with their omission but in accordance with the principles of law-making technique. The literature on the subject emphasises the need for legal definitions to assign specific meanings to vocabulary that differ from those in common Polish language.[14]

The obligation to provide a legal definition is restricted to situations listed in a closed catalogue. Under § 146(1) RLT, this applies in four cases: (1) when the term in question is ambiguous; (2) when it is unclear and it is desirable to limit this defect; (3) when its meaning is not universally understood; and (4) when there is a need to establish a new meaning for the term due to the field of regulated matters. § 146(2) RLT clarifies the rationale for ambiguity. This provision applies when an unclear term appears in a single legal provision. In this case, the requirement to use legal definition is subject to the condition that the context in which the term is used has not resolved the ambiguity. It is important to note that a linguistic-grammatical interpretation alone is insufficient to determine the meaning of legal language. The meaning of the *designatum* is derived from both its content and its position in the structure of the legal act. The contextual interpretation of the provision is achieved through systemic interpretation, which includes *argumentum a rubrica* in the inferential process.

As previously stated, Title V of the EPL uses the term 'financial-legal measures'. It is important to note that this section of the Act does not constitute a legal provision. The meaning of the legislative measure is functionally linked to the nomenclature of the formal unit. At first glance, it is clear that this does not resemble a sentence written in legal language. Article 272 EPL is the only provision that includes the term 'financial-legal measures'. It is important to note that this provision defines a legal expression that differs from the one used in the title of Title V of the EPL. The *definiendum* also includes the phrase 'environmental protection'. This raises the question of whether this regulation results in a significant alteration of the definition. The answer to this question should be negative. It is evident from the normative context that 'financial-legal measures' serve as tools for environmental protection. This instrument is functionally linked to the protective purpose of its application. The term 'financial-legal measures' appears only twice in the Act. It is unnecessary to create a legal definition of this term to understand the meaning of other legal provisions that do not include this wording. Assuming the rationality of the legislator's actions,[15] it should be considered that the *definiens* contained in the defining provision refers both to the concept of 'financial-legal measures' and 'financial-legal measures of environmental protection'. It is important to note that the identified inconsistency of statutory terms should not be

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[14] Wierczyński, G., *Redagowanie i ogłaszanie aktów normatywnych: Komentarz*, Warszawa, 2010, pp. 743–745; Zieliński, M., Wronkowska, S., *Komentarz do zasad techniki prawodawczej*, Warszawa, 2012, pp. 287–289.

[15] Wróblewski, J., 'Racjonalny model tworzenia prawa', *Państwo i Prawo*, 1973, No. 11, pp. 4–6.

seen as a weakness of the legal definition; rather, it constitutes an error in constructing names of the units within the structure of a legal act.

The construction of the *definiendum* is disputed due to the incorrect use of the phrase 'financial-legal measures'. The error lies in the use of the term 'financial-legal'. There is no dictionary definition of this wording in the Polish language. Even at first glance, it is evident that this term has a complex lexical structure. It is composed of two words connected by a hyphen. From this, two conclusions can be drawn. Firstly, a word is a binary linguistic compositum, containing two elements: 'financial' and 'legal'. Secondly, the use of a hyphen indicates that the two elements should be equivalent, each referring to the characteristics of the noun 'measures', which must be both financial and legal. In order to decipher the meaning of the *definiendum*, internal relations within the linguistic compound should not be taken into account. The term 'financial' does not clarify the term 'legal'. The meaning of the word 'legal' is not narrowed by reference to the context expressed by the word 'financial', nor does the reverse relationship occur. However, the construction of the *definiendum* should be considered incorrect as the structure of the linguistic compound cannot be deemed equivalent. The importance of the legal element outweighs that of the financial element. In a democratic state ruled by law,[16] financial phenomena cannot operate in isolation from legal rules and the axiological foundations of the legal system. For this reason alone, the separation of legal and illegal forms of finance has no substantive justification and should even be considered absurd. The phrase 'financial-legal' should be replaced by 'legal-financial', as it relates directly to financial law.[17] As previously stated, the measures outlined in this legislation are crucial for safeguarding environmental resources. Environmental law is a form of public law. Financing environmental protection is a public task and is one of the processes typical of public finance.[18] Laws should therefore define the competencies, forms of action, and means necessary for this task. Consequently, the collection and disbursement of public funds for environmental protection purposes must adhere to the basis of implementing financial regulations, within their limits and for their intended purpose. These considerations lead to the thesis that the expression 'financial-legal measures' means financial law instruments used to protect the environment.

The phrase 'financial-legal measures' is not defined in the Polish language dictionary, nor is it commonly used in colloquial Polish. On these grounds alone, the term can be considered specialised and used exclusively by professionals. As previously stated, its editorial structure does not meet the requirements of correct legislation. These arguments justify the need for a legal definition to determine the meaning of the expression 'financial-legal measures'. It is important to note that legislative bodies are required to include a definition of any terms that may not be commonly understood in the law.[19]

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16 See Article 2 of the Constitution.

17 Gorgol, A., 'Kontrowersje…', op. cit., pp. 27–28.

18 The legal definition of public finance is contained in Article 3 of the Act of 27 August 2009 on Public Finances, (consolidated text, Journal of Laws of 2021, item 305, amended), hereinafter referred to as 'the APF'.

19 See §146(1)(3) RLT.

As previously mentioned, the term being defined is a composite used in legal language. This circumstance is significant in terms of the Rules of Law-making Technique, as they allow for the use of the shortened phrase.[20] Repetition of the identical term in the same act is a condition for using this instrument of legal drafting. The use of the abbreviated phrase would be unnecessary if 'financial-legal measures' were mentioned only once in the Environmental Protection Law. However, this is not the case because the compositum is used twice. Nevertheless, there is uncertainty regarding the meaning of 'multiple' as a requirement for abbreviating the defined word. The term is not defined in any legal act; therefore, it is necessary to refer to the dictionary definition of the Polish language. Based on this evidence, it can be concluded that the term 'multiple' refers to 'something that is repeated many times'.[21] Multiplicity is the opposite of singularity and includes duplicity, characterised by a single repetition. For this reason, the phrase 'financial-legal measures' must be considered to have been used multiple times in the text of the Act.

It is worth noting that the legislative directive prescribes that the abbreviation be placed in a general provision, a systemising unit of a legislative act, or a provision in which the compositum first appears.[22] The Act's general provisions do not use the phrase 'financial-legal measures'. As previously stated, this term is not included in the glossary of statutory terms created for the application of the entire Act. The placement of the legal definition among specific provisions is a contentious issue in design. In view of the crucial role of legal and financial measures in the environmental protection, it is advisable that they be defined at the beginning of the legislative act, in addition to the general provisions. This thesis is further supported by the formal structure of the Act. The importance of financial law measures is demonstrated by the fact that the *definiendum* is reflected in the nomenclature of Title V of the EPL, which is the most general editorial unit. It is important to note that the designation of the subject should not be abbreviated in place of its first regulation. The use of an abbreviation in the legal definition itself makes no sense when subsequent provisions do not refer to the *definiendum*. However, the rule of decent legislation is more relevant than the non-use of abbreviated words. The use of abbreviations is not allowed in the section of the provision that defines the term.[23] As aptly noted in the literature, it is important to distinguish between the abbreviation and the legal definition. Explanations of abbreviations may not be provided in the glossary of statutory terms but in a separate provision.[24] Therefore, the abbreviation cannot be used to signify the *definiendum* in a defining provision. The examined prohibition is a rational tool for preventing ambiguity in the definition of a legal concept.

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[20] See §154(1) RLT.

[21] Bańko, M., *Słownik Języka Polskiego. Tom 6*, Warszawa, 2007, p. 34; Szymczak, M., *Słownik Języka Polskiego PWN R-Z. Tom 3,* Warszawa, 1999, p. 657.

[22] See §154(2) RLT.

[23] See §154(4) RLT.

[24] Szafrański, D., *Zasady techniki prawodawczej w zakresie aktów prawa miejscowego: Komentarz praktyczny z wzorami oraz przykładami*, Warszawa, 2016, Legalis/el., Nb. 7.

DEFINIENS OF FINANCIAL-LEGAL MEASURES FOR ENVIRONMENTAL PROTECTION IN LIGHT OF THE PRINCIPLES OF LAW-MAKING TECHNIQUE

The explanation of the meaning of financial-legal measures for environmental protection takes the form of an exemplary enumeration of their specific categories. According to Article 272 EPL, these include a fee for using the environment, an administrative fine, a differentiation in the rates of taxes and other public imposts to protect the environment, and an emission fee. At first glance, it is evident that the items listed in the statutory catalogue are not uniform in their editorial aspect; some are singular, while others are plural. Based on this, it can be concluded that measures for environmental protection can take the form of a specific financial instrument or a combination of different instruments. The singular designation is characteristic of the fee for using the environment, the administrative fine, and the emission fee. In contrast, a collective editorial description has been applied to the rates of taxes and other public imposts. It is important to note that differentiating between singular and plural forms when referring to environmental protection measures can have interpretative implications and substantive justification. Rates are an element of the construction of taxes and other public imposts, and they are used to calculate the amount of a pecuniary performance. In contrast, fees and administrative fines are considered pecuniary performances themselves. It should be stressed that the defining provision includes two categories of fees. Therefore, there is a question as to whether they should not be regulated together in the legal definition. However, the current editorial solution is reasonable, as the charges differ significantly despite the common name. They have very different structures and fiscal purposes. A standard fee is a mutual performance; the entity making the payment receives a service or an official act from the state or local authority. In the absence of such mutual performance, a tax may be disguised as a 'fee'. The distinction between a tax and a fee is based on only one feature: unlike a fee, a tax is non-chargeable. It has been argued in the literature that the terms 'emissions fee' and 'fee for using the environment' are misleading and that they are actually taxes.[25] In agreement with this position, it should be considered that the terms used in the provisions should not be misleading. The law must use precise and commonly accepted linguistic phrases in their basic meaning.[26] The term 'fee' used in relation to a tax does not meet the requirements of this important drafting directive.

It is possible to allege a breach of the legislative directive in Article 8(1) RLT by using the singular in the *definiens* to designate a measure that is, in fact, a group of separate instruments. The defining provision includes a fee for using the environment, which is drafted in the singular. However, an analysis of the following articles of the Act contradicts the legislative accuracy of this expression. For instance, in Article 277(1) EPL, the term 'fees for using the environment' is used. From a logical perspective, an instrument cannot be designated in two opposing and

[25] Głuchowski, J., *Podatki ekologiczne*, Warszawa, 2002, p. 71; Gorgol, A., 'Prawo…', op. cit., p. 81.

[26] See § 8(1) RLT.

mutually exclusive ways. It cannot be both a 'fee' and 'fees'. Identical terms should always be used to refer to the same concepts, and different concepts should not be referred to using the same terms.[27] This directive aims to prevent confusion in the wording of legal language. It is important to note that legislation cannot be reduced solely to its formal aspects. Concepts have specific meanings, and legal language describes social, economic, and political phenomena. It should reflect reality and avoid speculative creations that contradict observable regularities.

When analysing the provisions that regulate fees for using the environment, it is important to note that they formally include the so-called 'increased fee'. This impost shall be paid by the entity using the environment without obtaining the required permit or other decision. The entity using the environment without obtaining the required permit or other decision shall be responsible for paying this impost.[28] The linguistic drafting of this fee indicates that it is a single measure. However, the detailed regulation is located in Chapter 3 of Title V of the EPL, which is titled 'increased fees'. In this case, there is a set of environmental protection measures that share a common feature indicated by their name. There is an increase in monetary performance that distinguishes these measures. It is worth considering whether the increase in monetary value is merely an additional feature of the measure or if it alters the fundamental nature of the environmental protection instrument. An increase in the fee for using the resources of the environment should not be evaluated solely on quantitative grounds; the legislative effect is also significant. This thesis is motivated by the rationale for applying increased fees. If the entity does not have a permit or other authorisation to use the environment, it is not entitled to use it. In this situation, the individual is breaking the law by illegally exploiting environmental resources. This justifies imposing a penalty rather than a fee.[29] The payment of higher public imposts should not legalise infringements of the law, as this would weaken its protective function. Increased fees may be considered an administrative fine, leading to an unjustified preference for wealthier entities who can avoid necessary administrative formalities over permit holders or those with other decisions. The fee increase is actually an administrative fine.[30] As previously stated, it is listed in the definition as a measure within the category of 'financial-legal' measures. This is the main reason for disguising the actual monetary penalty as a 'fee'. Thanks to this legislative solution, it became possible to apply various environmental protection measures simultaneously in the same factual situation. However, it should be noted that this solution is incorrect from the point of view of legislative technique. The administrative fine is accompanied by an increased fee.[31]

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[27] See § 10(1) RLT.

[28] See Article 276(1) EPL.

[29] Radecki, W., *Odpowiedzialność prawna w ochronie środowiska*, Kraków, 2004, p. 29; Wincenciak, M., *Sankcje w prawie administracyjnym i procedura ich wymierzania*, Warszawa, 2008, p. 73; Radecki, W., 'Kary pieniężne w polskim systemie prawnym: Czy nowy rodzaj odpowiedzialności karnej?', *Przegląd Prawa Karnego*, 1996, No. 14–15, pp. 5–18; Szydło, M., 'Charakter i struktura prawna administracyjnych kar pieniężnych', *Studia Prawnicze*, 2003, No. 4, pp. 123–150.

[30] Gorgol, A., 'Kontrowersje…', op. cit., pp. 30–31; Bukowski, Z., Czech, E., Karpus, K., Rakoczy, B., *Prawo ochrony środowiska: Komentarz*, Warszawa, 2013, pp. 476–482.

[31] See Article 276(2) EPL.

From Roman law, the maxim *ne bis in idem* is derived. This short sentence contains the important principle that no one can be punished twice, or repeatedly, for the same deed. From a formal perspective, the application of an administrative fine alongside a fee does not constitute an infringement. However, if an administrative sanction is disguised as an 'increased fee', it violates the principles of fair legislation and the standards of a democratic state ruled by law. It is important to note that an increased fee may be charged in addition to the standard fee for using the environment.[32] This applies when waste is dumped illegally. From the perspective of a democratic state ruled by law, it is impermissible to tax the same individual twice. For this reason, the provision allowing for the cumulative application of two fees violates the principle of good legislation, as it is not clear and concise. However, the legal classification of the situation differs when an administrative fine is imposed in addition to the standard fee. Not only does the use of various means enhance the protection of environmental resources, but the standard of a democratic state ruled by law is upheld.

The inclusion of differentiated rates of taxes and other public imposts in the catalogue of financial-legal measures for environmental protection should be considered a matter of legislative discretion and a manifestation of the traditional right of the sovereign state. However, the outcome of this legislative process is not flawless and raises valid concerns regarding both content and drafting. Fees, along with taxes, are categorised as public imposts, which are one of the groups of public revenues.[33] The rate is a structural element of these legal and financial instruments. Fees applied to protect the environment have different rates. The nomenclature and structure of the increased fee confirm this unequivocally. The rates of the typical fees for using the environment are regulated in Chapter 2 of Title V of the EPL. The title of this editorial unit is misleading, as it suggests that the structural elements of the public impost are derived directly from its provisions. However, the regulated rates are not actually governed by the Act, but rather by the implementing regulations. The statutory provisions only introduce maximum ceilings on the amount of rates.[34] Still, the Act does not introduce a threshold limit. The purpose of this regulation is to define the limits of legislative discretion, within which the legislator has the competency to determine the rates. The statutory provision includes an authorisation that grants the government the authority to issue an implementing regulation.[35] The Council of Ministers must comply with the legislative directives outlined in the statutory empowerment, which include, *inter alia*, the possibility of differentiating the rates of fees. Assuming the rationality of law-making activity, it can be considered that differentiation is determined by the function of the legal-financial instrument used to protect the environment. As a fee is a public impost with differentiated rates, it can be considered a hybrid of the two measures described in the *definiens*. It is characterised both by its features and by the diversity of its rates for environmental protection purposes. This example highlights the logical and drafting errors in the definition of the term 'financial-legal measures'. There is a view in academic literature

[32] See Article 295(7) EPL.
[33] See Article 5(2)(1) APF.
[34] See Article 290(1) EPL.
[35] See Article 290(2) EPL.

that considers this to be a categorical error in definition.[36] This thesis is not valid, as within the framework of legislative discretion, it is possible to define the term 'measure' differently from its colloquial meaning in Polish.[37] A well-constructed statutory catalogue should contain elements with separable scopes of meaning.

It is important to note that the differentiation of rates of taxes and other public imposts is a legislative directive of law-making aimed at protecting the environment. However, it is inadequate for achieving the statutory objective. From a linguistic perspective, the rate itself is not included in the *definiens*. This tax parameter should have the additional feature of being differentiated. No provision clarifies what it should specifically consist of. Under Article 283(1) EPL, rates of taxes and other public imposts should be differentiated based on the objectives of environmental protection. When evaluating the informational value of this legislative sentence, it must be considered very limited. Essentially, the legal expression is a repetition of the words used in the name of an environmental protection measure. The addition of the word 'purpose' indicates the purposeful and stimulative nature of the differentiation of rates. However, the means of achieving the statutory result have been omitted. Therefore, it should be noted that the reviewed provision contains a standard programming norm.[38] It should also be noted that only in the case of differentiating excise duty rates is there an additional imperative to structure them in a way that the market price of fuels primarily reflects their negative environmental impact.[39] It is thus clarified that prices are the instrument of direct influence on taxpayers, shaped directly by the market mechanism. The state has an indirect influence on public imposts through its regulation of their construction, which is achieved by standardising rates rather than differentiating them.

It is should be noted that the differentiation of rates of taxes and other public imposts stands out among other elements of the *definiens* by the manner of its regulation in statutory provisions. Title V of the EPL does not contain any chapters or subchapters that further develop this issue. As previously stated, the differentiation of rates is regulated by a single article of this Act. It is worth noting that the provision is located at the end of Chapter 1, titled 'General Provisions'. Based on this evidence, it can be concluded that the regulation of rate differentiation is very vague, fragmentary, and purposeful. There is another drafting issue of great importance in establishing non-compliance with the rules of law-making technique. Title V of the EPL is structured by dividing the normative content into chapters. As previously stated, the initial section is titled 'General Provisions'. The use of the term 'nomenclature' in this context is misleading as subsequent editorial units do not contain specific provisions on legal and financial measures for environmental protection. Chapter 1 should be seen as the section of the Act where the provisions common to all the instruments included in the statutory catalogue of the *definiens* are collected in one editorial unit. This chapter serves as a reference point for the

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[36] Draniewicz, B., *Opłata produktowa*, Warszawa, 2009, p. 67.

[37] Gorgol, A., 'Kontrowersje…', op. cit., p. 31.

[38] Grzonka, L., *Koncepcja norm programowania z perspektywy teorii prawa*, Poznań, 2012, pp. 31–51.

[39] See Article 283(1) EPL.

entire Act. The title 'General Provisions' is not appropriate and should be changed to 'Common Provisions'. However, a caveat must be made. The provision governing the differentiation of rates of taxes and other public imposts is not common or general. It should not be placed in Chapter 1 of Title V of the EPL, but in a separate editorial unit covering the matter regulated in that title. The use of the term 'General Provisions' is not discretionary, primarily due to the rules of decent legislation. The legislative body is bound by the order in which individual provisions appear in a legal act.[40] The general provisions of the Act should be placed immediately after its title. The regulation of legal and financial measures for environmental protection does not meet this requirement. Their placement in Title V of the EPL, and thus in the middle of the Act, indicates that they are special provisions. General provisions of an act define its subjective and objective scopes, specify the matters and entities excluded from regulation, and explain the expressions and abbreviations used.[41] The Act may also contain provisions that are common to all or most of its substantive provisions.[42] However, it is important to note that common legal solutions for special provisions should not be interpreted as general provisions, as this would breach the rule of law-making technique. The Act's editorial units use the same nomenclature 'General Provisions' to designate both its Title I and Chapter 1 found in Title V. This could be classified as a violation of another rule of law-making technique, where different concepts should not be designated by the same terms.[43] It can be concluded that specific regulations should not be referred to as general regulations.

The defining provision mentions the emission fee and indicates that it is 'referred to in Article 321(1)'. Based on this evidence, it can be concluded that the *definiens* was constructed using a typical legislative technique of reference. Surprisingly, other legal-financial measures are not described in the statutory catalogue through a cross-reference provision, prompting the question of whether this is the outcome of rational action. The emission fee is a single monetary performance and does not need to specify whether it covers a set of instruments. Article 272 is the first instance of its appearance in the Act. Chapter V in Title V of the EPL contains provisions that regulate this environmental protection measure. The emission fee is referenced in various special provisions, not only in Article 321(1) EPL. Therefore, the reference therein is unnecessary and confusing. There is an additional question about the location of the provision referred to in the legal definition, as the reference does not provide sufficient information about the legal act. This editorial issue cannot be resolved through linguistic and grammatical interpretation. The use of systemic interpretation is necessary to determine that the reference is internal rather than external. The analysed element of the defining provision does not meet the requirements of proper legislation. It is important to note that the statutory definition contains a linguistic error in stating that any provision 'talks' about an

[40] See § 15 RLT.
[41] See § 21(1) RLT.
[42] See § 21(2) RLT.
[43] See § 10(1) RLT.

emission fee. Speaking requires uttering words to communicate with other people.[44] Provisions lack this ability, a trait commonly found in humans and some animals.

A reference is an instrument of legislative technique used to ensure the brevity of the text or the coherence of the legal institutions regulated in a legal act.[45] As noted above, neither legislative outcome can be achieved in terms of regulating the emission charge in the statutory definition of 'financial-legal measures'. It should be noted, however, that to ensure consistency, the cross-referencing provision must both define the scope of the matter referred to and clearly identify the legal provision or provisions to which reference is made.[46] There is undoubtedly a lack of such clarity in the *definiens*. The reference contained in the provision defining legal and financial measures for the protection of the environment cannot be considered an instrument for achieving consistency between legal institutions. As noted above, there is only one provision to which reference is made. At first glance, it may appear that the legislative requirements for using the reference to shorten the content of the Act have been met. They consist in indicating the provision or group of provisions to which reference is made.[47] However, the lack of clarity as to the location of the provision to which the reference is made precludes its recognition as a measure having the effect of shortening the content of the legal act.

The provision to which reference is made must be in force. However, its meaning may change as a result of amendments to the Act, raising the issue of selecting the correct wording, which is crucial for its proper interpretation and compliance with the rule of law. The rules of law-making technique provide instructions for dealing with such situations, including the use of dynamic references.[48] The textual version of the provisions in force at the time of application of the referring provision must be considered. The exception is a static reference. The name of this instrument indicates that, when interpreting a legal act, the wording of the provision does not change, even if it has been amended. The reference provision should clearly indicate the version of the legal regulation to which it refers.[49] It should be emphasised that the reference provision contained in the legal definition of 'financial-legal measures' has a dynamic form. In practice, however, it does not matter whether this reference is static or dynamic. A systematic interpretation of the *definiens* shows that it follows Article 321a(1) EPL, and this provision has not been amended.

The use of the method of exemplary enumeration of legal and financial measures applied for environmental protection in the *definiens* makes the statutory catalogue a form of exemplification of these instruments. From the point of view of an interpreter of the text of a legal act, there is no doubt that the enumerated explanatory elements of the *definiendum* must be qualified in legal terms accordingly. As a rule, only the typical legal institutions characteristic of the defined concept

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[44] Bańko, M., *Słownik Języka Polskiego. Tom 3*, Warszawa, 2007, p. 22; Szymczak, M., *Słownik Języka Polskiego PWN L-P. Tom 2*, Warszawa, 1999, p. 208.

[45] See § 156 RLT.

[46] See § 156(3) RLT.

[47] See § 156(2) RLT.

[48] See § 159 RLT.

[49] See § 160 RLT.

are included in the catalogue. For this reason, the informational value of the exemplification is relatively limited. It should also be noted that the definition of 'financial-legal measures' is restricted to a non-exhaustive list of examples of these instruments. However, the text does not provide an explanation of the specific characteristics that each means of protecting environmental resources should possess. The limitation of the content of the *definiens* to exemplification should be considered a legislative defect. The legal definition becomes partial, apparent, and uncommunicative. This error leads to the division of environmental legal-financial measures into named and unnamed ones.[50] Named instruments are included in the statutory catalogue, while unnamed measures are omitted from the definition. The shortcomings of the legal definition are mainly seen in the absence of any editorial description of this group of instruments. In this case, it is not even a matter of legislative understatement; rather, there is no legal requirement for such measures. This issue should be addressed by broadening the content of the *definiens* to clarify the essence of each 'financial-legal measure' for environmental protection.

A definition constructed by enumerating the constituent elements of the scope of meaning of a *definiendum* has a defined scope.[51] However, this statement needs clarification, as an enumerative catalogue can influence the meaning of a legal term in a positive or negative manner. A clear and objective definition enables the determination of the meaning of a *definiendum*. A negative definition, on the other hand, is formulated by contradiction, indicating the exclusions of certain elements from the scope of the *definiendum*. As it creates exceptions, they should be included in a closed catalogue. The Latin rule *exceptiones non sunt extendendae* requires strict interpretation of provisions drafted in this manner. It is important to note that defining provisions can have both positive and negative elements, which should not be considered in isolation. By placing them together in the *definiens*, the legal definition becomes a mixed, but not a hybrid, definition. The positive and negative elements must not overlap in their scopes of application. Overlapping scopes would create a functional and logical contradiction, indicating a mutual relationship between the elements. It should be noted that the term 'financial-legal measures' is defined positively. There are no negative elements present in either the *definiens* or the *definiendum*.

The Rules of Law-making Technique establish a standard for defining the scope of a legal concept. § 153(1) RLT requires that the definition be formulated in a single provision and cover the entire scope of the term being defined. It follows that the constituent elements of a definition should not be scattered throughout the text of a legal act. It is not permissible to include them in the text of two or more provisions, as this would cause interpretative issues. Determining the designation of legal language requires more than just interpreting the linguistic and grammatical features of the Act's editorial units. The outcome of the interpretation depends on the interaction of all rules, which are collectively used. Ambiguity in legal provisions can lead to disputes during interpretation and application. It is important to acknowledge that a single definitional provision has a functional

[50] Gorgol, A., 'Kontrowersje…', op. cit., pp. 26–27.
[51] See § 153(1) RLT.

and positive correlation with its coverage of the entire scope of the definition. The formal fragmentation of the regulated matter is a result of the multiplicity of provisions. A loophole may arise if the legal term being defined has a broader range of meaning than the combined ranges of the individual elements in the legal definition resulting from separate provisions. It is important to note that the term 'financial-legal measures' has been defined through a single provision. However, the formal compilation of the regulation did not lead to a full definition of their entire scope of meaning in the *definiens*.

A scope definition may be closed or open, and this division is crucial in interpreting the content of a legal act. The definition of a closed scope meets the requirements outlined in § 153(1) RLT. The defining provision governs the entire scope of the meaning of the *definiendum*, and the interpreter cannot supplement or alter a legal definition constructed in this manner. However, if the content violates the coherence of the legal system, it is necessary to remove this defect by applying the rules of systemic interpretation. In contrast, a scope definition that is open-ended does not fully specify the meaning of a legal language concept. This definition only provides an example list of the most common indications for the *definiendum*. The defining provision uses the phrase 'in particular', which is to be expected; it is not an editorial means of differentiating the designations used. The use of 'especially' instead is not acceptable because it implies that the following elements in the *definiens* may have been considered more important than the others.[52] An open-ended scope definition weakens the process of interpreting legal provisions, as its application does not resolve various doubts arising from the findings of linguistic-grammatical interpretation. Too narrow a scope of the terms included in the content leads to the vagueness of the provision. There is no doubt that the legal definition of 'financial-legal measures' is an open-ended definition of its scope. This conclusion is confirmed by the fact that the list of instruments used for environmental protection in the statutory catalogue is too limited. Furthermore, the defining provision contains the term 'in particular', which is typical of an open-ended scope definition.

In the process of creating an open scope definition, the requirements set out in § 153(3) RLT cannot be ignored. This provision makes its application conditional on the *definiens* indicating the exemplary nature of the enumeration. The use of the term 'in particular' achieves the editorial objective. The legislator is thus deprived of the possibility of using another word that is equivalent to the wording of the legal definition. The rule of law-making technique 'binds' him strictly, so that he loses his legislative discretion. This undoubtedly leads to a standardisation of the defining provisions, but its degree and scope are limited by the meaning of the expression 'in particular'. On this basis, it can be concluded that such restrictive regulation of the legislative process is unnecessary and not reasonable. It even contradicts the rule that the meaning of terms in the legal language is determined by their context. For the legislator and the interpreter of legal provisions, what follows from their validity is more important than the specific word used. If the words are synonyms, each can potentially be used to regulate the scope of the *definiendum* meaning.

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[52] Szafrański, D., *Zasady…*, op. cit., Nb. 4.

It should be considered reasonable to remove the legislative discretion to choose whether the scope definition is open or closed. § 153(3) RLT makes clear that there is a sequential standard for applying these measures. A closed scope definition is the typical tool for defining legal terms and should be applied in the first instance and whenever possible. An open scope definition, on the other hand, is an exceptional instrument, used on a conditional basis. This is the case when it is 'not possible' to give a definition in closed form, implying that it is a 'last resort' measure, as it is the only legislative technique available in certain situations where there is no alternative. However, the rationale for applying an open scope definition may be questionable. The difficulty lies in the precise decoding of the meaning of the expression 'it is not possible'. It should be considered equivalent to the meaning of the word 'impossible'. The Dictionary of the Polish Language explains that it is a phrase expressing the belief that the thing in question has not happened or will not happen.[53] Impossibility means that a given situation becomes impossible, i.e., fails to happen. It should be understood in objective terms, not subjective ones. The impossible is not due to the lack of capacity of a particular person to act; rather, objective circumstances are the source of the obstacle to the realisation of a state or situation. They prevent the planned outcome from materialising, regardless of the actor who takes action to achieve this goal. It should be noted that there is no absolute impossibility that precludes the possibility of constructing a closed definition while allowing the use of an open definition. This would mean that, for objective reasons, the legislator is not in a position to describe all the *definiendum* indications in the definitional provision and instead confines itself to listing them by way of example.

It should be emphasised that any scope definition is a non-classical definition. Indeed, it contains a list of the designations of the defined legal language. Enumeration is characteristic of a *definiens* and does not apply to a *definiendum*, which may be a collective concept but not a collection of individual elements. The provision defining 'financial-legal measures' describes them in the plural, aptly indicating that there is more than one. Although the *definiendum* consists of three words, they are not homogeneous. The noun 'measures' is further specified by the compositum, which is made up of two words that function as adjectives. This leads to the conclusion that they do not constitute an enumeration of the defined concept of the language of law. The legal definition under consideration is a nominal one, not a real one, as it defines a name, a linguistic construct, not a real existing object. This definition should be treated as a design definition, not a reporting definition, as it creates a new concept of legal language, which is unknown in common Polish language. It is worth noting that design can also be thought of in terms of making laws and programming how they are interpreted and applied. Legislative activity consists, *inter alia*, in drafting the content and form of legal acts and their constituent parts.

Definiendum and *definiens* are undoubtedly the two basic elements of any legal definition. The construction of this measure of legislative technique also includes a link known as a *copula*. Following an analysis of the syntax of the provision

[53] Bańko, M., *Słownik Języka Polskiego. Tom 3*, op. cit., p. 149; Szymczak, M., *Słownik Języka Polskiego PWN L–P. Tom 2*, op. cit., p. 324.

defining financial-legal measures for environmental protection, we can conclude that it contains an indicative sentence. A legal definition provides information about the meaning of the phrase used in the *definiendum*. The combination of this element with the *definiens* should meet the requirements described in the Rules of Law-making Technique. The typical form of a *copula* is the terms 'means' and 'means as much as'.[54] However, stylistic considerations may also justify the use of the phrase 'it is'. Neither of these versions of the *copula* appears in the legal definition of the concept of 'financial-legal measures'. The *definiendum* is linked to the *definiens* by the word 'constitute', i.e. a verb. It follows that the *definiens* functions in a sentence as an object, defining the verb and being its logical completion. The function of the *copula* can be described using the metaphor of weight: there are two elements of the defining clause on either side of the hyphen that should 'balance' each other. This means that the range of meanings of the *definiens* and *definiendum* must be equivalent so that the error of inadequacy does not occur. As noted above, the definition of 'financial-legal measures' is flawed for this reason. The scope of meaning of the *definiens* is too narrow in relation to the *definiendum*, which is characteristic of a narrow and unequal definition.

CONCLUSION

'Financial-legal measures for environmental protection' are a legal language concept that is used only twice in the Environmental Protection Law. It appears in the name of Title V of the Act and in only one of its provisions. It is important to note that the formulation of a legal definition for this term was based on qualitative rather than quantitative factors. This legislative technique is commonly used to determine the meaning of a word or group of words in a legal act. In a standard scenario, this applies to the interpretation of the following provisions that include the defined term. In the legal definition of financial-legal measures, this legislative motif is irrelevant. This definition introduces a mental construct, creating a new linguistic expression that describes a set of legal instruments used to finance environmental protection. It is not, therefore, a reporting and real definition. Undoubtedly, this is a non-classical, nominal, projective, scope, open, and unequal definition.

It should be considered a proven thesis that the legal definition of financial-legal measures has numerous shortcomings weakening its legislative and interpretative value. The defining provision violates several rules of law-making technique regarding its rationale, content and location. An open scope definition should be used only exceptionally, as a legislative 'last resort' measure, when it is not possible to give it a closed form. This definition should be included in the initial part of the Act, among the general provisions. In contrast, financial-legal measures are defined in specific provisions in the middle of the Act. Defects in the construction of a legal definition can be found in each of its elements: the *definiendum*, *definiens*, and *copula*. The terminology of the compositum used in the *definiendum* is disputed. The *copula*, on the other hand,

[54] See § 151(1) RLT.

does not meet the drafting requirements outlined in the Rules of Legislative Technique. However, the regulation of the *definiens* is a highly debated topic. It is an exemplary list of financial-legal means for environmental protection. This results in an imbalance between the scope of the *definiendum* and the *definiens*. The defining provision lacks clarity regarding the characteristics of each financial-legal instrument. The definition does not encompass all of these measures, but only a select few. The terminology employed in the statutory catalogue is misleading and inconsistent with the nature of the regulated legal and financial institutions. The defining provision fails to meet the principles of decent legislation due to constructive and linguistic errors.

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‘NEW’ SUPPORT SERVICE – SELECTED ISSUES AND AN ATTEMPT TO EVALUATE THE REGULATION

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Abstract
On 1 January 2024, the Act of 7 July 2023 on support benefits came into effect, introducing a new type of benefit, the support benefit. This publication aims to present the essence of the newly introduced support benefit and to attempt an evaluation of the adopted regulations. The authors also indicate the necessary directions for changes in the support system for people with disabilities, with the main goal being the empowerment of people with disabilities.

Keywords: person with a disability, care services, support benefits

INTRODUCTION

The Strategy for People with Disabilities[1] covers areas of the state that are significant for pursuing policy for this social group in a comprehensive manner. Like the Convention on the Rights of Persons with Disabilities,[2] it concerns thematic

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1 Strategy for People with Disabilities 2021–2030 adopted by Resolution No. 27 of the Council of Ministers of 16 February 2021 on the adoption of the document Strategy for People with Disabilities 2021–2030 (M.P. 2021, item 218). Hereinafter referred to as: ‘the Strategy’.

2 Convention on the Rights of Persons with Disabilities, signed in New York on 13 December 2006, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities [accessed on 26 August 2024].

areas; therefore, its effective implementation requires active involvement of not only the central administration but also local government and non-governmental organisations. The strategy is thus a call for concerted actions to realise the vision of equal opportunities and rights for people with disabilities on an equal basis with others. In priority V of the strategy, entitled *Living conditions and social protection*, it was assumed that the main objective of activities under this priority is to provide appropriate living conditions, including meeting basic living and material needs, and necessary social protection to persons with disabilities and their families. This priority includes an action called the *Financial Support System for People with Disabilities*,[3] which assumes that 'the policy of benefits will be aimed at empowering people with disabilities, so that support is directed to the person concerned. A person with a disability is to be the decisive entity regarding how the received support is to be used.'[4]

The aforementioned priority is to be realised by the Act of 7 July 2023 on support benefits,[5] which came into force on 1 January 2024. On the one hand, this Act introduces a new type of benefit, the support benefit, and on the other, it introduces a number of changes to many legal acts, such as the Act on Family Benefits,[6] the Act on Vocational and Social Rehabilitation and the Employment of Disabled Persons,[7] the Act on the Social Insurance System,[8] and the Act on Employment Promotion and Labour Market Institutions,[9] in which the legislator added a chapter entitled *Activation program for disabled people or guardians of disabled people*.

The analysis of the amendments to the aforementioned acts is not the subject of this publication. The reference to selected acts is only intended by the authors to signal that, with the Act on Support Benefits, the legislator has introduced a significant change to the existing system of benefits for persons with disabilities and their carers. The purpose of this publication is to present the essence of the newly introduced support benefit and to attempt an evaluation of the adopted regulations. Although the assessment is general, a detailed and practical evaluation will *de facto* only be possible after the new institution has been in use for some time.

This approach to the topic also determines the choice of research methods. It seems necessary, first of all, to analyse the existing legal solutions in this area using the dogmatic method. The use of this method of analysing legal provisions allows, on the one hand, for the determination of the essence and the subjective and objective scope of support services as a new form of support for people with disabilities and, on the other hand, for a very preliminary attempt to assess the

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3 V. 1 of the Strategy.

4 The Strategy, p. 220.

5 Journal of Laws of 2023, item 1429. Hereinafter referred to as: 'Act on Supportive Benefits', 'ASB'.

6 Act of 28 November 2003 on family benefits (Journal of Laws of 2023, item 390, as amended).

7 Act of 27 August 1997 on vocational and social rehabilitation and employment of disabled people (Journal of Laws of 2023, item 100, as amended). Hereinafter referred to as: 'Act on Vocational and Social Rehabilitation and Employment of Disabled Persons', 'AVSREDP'.

8 Act of 13 October 1998 on the social security system (Journal of Laws of 2023, item 1230).

9 Act of 20 April 2004 on employment promotion and labour market institutions (Journal of Laws of 2023, item 735).

introduced solutions in terms of their validity and rationality. Indeed, there is no doubt that an in-depth assessment will only be possible after the adopted solutions are compared to practice and assessed by the judicial authorities. Then it will also be possible to present the views of the judiciary regarding practice of applying the recently adopted law. This method is supported by a literature survey to explore the views of the doctrine on both existing and postulated instruments of the disability support system.

THE ESSENCE AND SUBJECTIVE AND OBJECTIVE SCOPE OF THE SUPPORT BENEFIT

The support benefit, introduced on 1 January 2024, is a new cash benefit aimed at adults with disabilities who have the greatest need for support due to difficulties in independent living. Unlike other care benefits intended for the caregiver of a person requiring care,[10] the support benefit is addressed directly to a person with disabilities.[11] Entitlement to this benefit may be exercised jointly with other benefits such as the social pension or the supplementary benefit for incapacity.[12]

In Article 2 of the Act on Support Benefits, the legislator defines the subjective scope of the benefit, indicating the group of eligible persons. The support benefit is available to Polish citizens and foreigners who, on the basis of Community regulations and international agreements, have been granted rights analogous to those of Polish citizens in the field of social benefits. In addition, foreigners – third-country nationals with the right to legal residence in the territory of the Republic of Poland and the right to access the Polish labour market – will also be entitled to the support benefit, provided they meet the condition of residence in the territory of the Republic of Poland. The Act on Support Benefits further conditions the right to a support benefit on residing in the territory of the Republic of Poland for the period during which the benefit is to be granted.[13] Moreover, the benefit will be due to a person who has a decision determining the level of need for support,[14] in which the need for support is specified at the following levels: 1 to 3 points on the scale of need for support in case of children under 3 years of age; and from 70 to 100 points on the scale of need for support in case of children and people over 3 years of age.[15]

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[10] For more information on this type of benefits, see: Borski, M., 'Świadczenia opiekuńcze dla opiekunów dorosłych osób z niepełnosprawnościami – przykład niekonsekwentnej polityki państwa', *Zeszyty Prawnicze*, 2020, Vol. 20, No. 3, pp. 91–118.

[11] On the subject: Mrozek, P., in: Mrozek, P., Pawka-Nowak, E., *Świadczenia rodzinne*, 2023, Legalis. *Pismo RPO z dnia 02 stycznia 2024 r., sygn. akt XI.503.4.2016.DB*, https://bip.brpo.gov.pl/sites/default/files/2024-01/Do_KPRP_ozn_asystencja_projekt_opinia_2.01.2023.pdf [accessed on 26 August 2024].

[12] Redakcja BISP, 'Nowe świadczenie dla osób z niepełnosprawnością o największej potrzebie wsparcia', *Biuletyn Instytutu Studiów Podatkowych*, 2023, No. 11, Legalis.

[13] Article 2 ASB and justification to the Act on Supportive Benefits, p. 5, available: https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=3130 [accessed on 11 January 2024].

[14] Decisions determining the level of need for support are issued by provincial disability assessment teams at the request of a person with a disability.

[15] Article 3(2) ASB.

In accordance with Article 5 of the Act on Support Benefits, the support benefit is not payable if:

– The person entitled to a support benefit is placed in a nursing home, a family welfare home, a care and treatment facility, a nursing and care facility, a facility providing 24-hour care for disabled, chronically ill, or elderly persons, a prison, a correctional facility, a remand centre, or a shelter for minors;
– The person entitled to a support benefit is also entitled to a benefit of a similar nature abroad, unless bilateral social security agreements provide otherwise;
– Another person abroad is entitled to a benefit to cover the expenses of caring for a person entitled to a support benefit, unless bilateral social security agreements provide otherwise.

It should be noted that the amount of the support benefit is linked to the amount of the social pension. However, this does not mean that it will replace the annuity; both benefits will be paid simultaneously.[16] The legislator has determined that the support benefit ranges from 40% to 220% of the social pension, depending on the level of need for support. Decisions determining the level of need for support will be issued by provincial disability assessment teams[17] at the request of disabled persons for a maximum period of 7 years.[18] The monthly support benefit is as follows:

– 220% of the social pension if the need for support is assessed at a level of 95 to 100 points.
– 180% of the social pension for 90 to 94 points.
– 120% of the social pension for 85 to 89 points.
– 80% of the social pension for 80 to 84 points.
– 60% of the social pension for 75 to 79 points.
– 40% of the social pension for 70 to 74 points.

In 2023, the amount of the social pension was set at PLN 1,588.44 gross.[19] Therefore, until March 2024, the support benefit will range from a minimum of approximately PLN 635 to nearly PLN 3,495. The amount of the benefit will depend on the number of points awarded. The indexation of the social pension amount will result in an increase in the amount of the support benefit.

In order to monitor the process of implementing the support benefit, in July 2023, the Team for Monitoring the Implementation of the Support Benefit was established at the Ministry of Family and Social Policy as an auxiliary body of the Minister of Family and Social Policy.[20] This team monitors various aspects, including the flow

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16 Dązbłaż, B., 'Sejm uchwalił ustawę o świadczeniu wspierającym', *Prawo.pl*, 26 May 2023, https://www.prawo.pl/kadry/swiadczenie-wspierajace-sejm-uchwalil-ustawe,521428.html [accessed on 26 August 2024].

17 Article 6b[3] AVSREDP.

18 Article 6b[5] (3) AVSREDP.

19 Social pension is indexed annually on 1 March of a given year in accordance with the Act of 17 December 1998 on Pensions and Annuities from the Social Insurance Fund (Journal Laws of 2022, item 504, as amended).

20 Pursuant to Order No. 27 of the Minister of Family and Social Policy of 5 July 2023 on the Establishment of a Team in the Ministry of Family and Social Policy for Monitoring the Implementation of Support Services (Official Journal of the Ministry of Labor and Social Policy, 2023, item 27), which took effect on 8 July 2023.

of information regarding support benefits, especially their dissemination to people with disabilities and their guardians, to local government units, and to the mass media. It also oversees the implementation of necessary changes in ICT systems, primarily those relating to the procedures for electronic applications for support benefits, process of granting support benefits by the Social Insurance Institution, securing of financial resources for the implementation of tasks arising from the Act on Support Benefits, employment of specialists, development of a tool for assessing the level of need for support, and training of specialists in the principles and procedures for determining the level of need for support, as well as the use of new tools for assessing this level.[21]

PROCEDURE FOR GRANTING A SUPPORT BENEFIT

Proceedings regarding the support benefit are conducted, and the benefit is paid by the Social Insurance Institution,[22] with supervision over the compliance of the Social Insurance Institution's activities in this area carried out by the minister responsible for family matters. The proceedings are initiated at the request of the person authorised or their representative. Such an application should be submitted no earlier than in the month in which the decision establishing the level of need for support becomes final. Importantly, the legislator has adopted a fully electronic process for both applying for and granting support benefits. Applications and attachments are submitted only in electronic form using:

(1) An information profile created in the IT system provided by the Social Insurance Institution;
(2) The ICT system of domestic banks and cooperative savings and credit unions providing services electronically, meeting the requirements specified in the information available on the BIP Social Insurance Institution website;
(3) An ICT system created by the minister responsible for family affairs.

If the person submitting the application does not have an information profile in the IT system provided by the Social Insurance Institution, this profile is created by the Social Insurance Institution. With this solution, the legislator adopted a model of support from the state apparatus. Additionally, the Social Insurance Institution, based on an agreement, may provide access to technical means enabling the submission of the application and attachments, and assist in submitting these documents at locations other than the head office, branches, or designated organisational units of the Social Insurance Institution.[23] Electronicisation applies to both parties to the proceedings; information from the Social Insurance Institution on the granting of a benefit or a negative decision, subject to judicial review in the event of an appeal by the interested party, will also be provided via the aforementioned IT system.

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[21] § 2 of the Order No. 27.
[22] Article 7(1) ASB.
[23] Article 11 ASB.

As indicated above, the Social Insurance Institution is the entity competent to grant and pay the support benefit, but the condition for granting the benefit is that the disabled person must first obtain a decision determining the level of need for support. This decision is issued by the provincial team for assessing disability on the basis of the provisions of the Act on Vocational and Social Rehabilitation and Employment of Disabled Persons, as mentioned above. Therefore, the procedure for support benefits is a two-stage process. First, a person with a disability must submit an application to the provincial disability assessment team for a decision determining the level of need for support, and only after this decision is obtained and becomes final, and if the other criteria are met, can the person with a disability submit an application to the Social Insurance Institution for a support benefit.[24]

In accordance with Article 12 ASB, the granting of a support benefit by the Social Insurance Institution does not require issuing a formal decision, and information about the granting of the benefit and registration for health insurance is provided by the Social Insurance Institution on its information profile created in the IT system. The legislator has also provided for the possibility for the Social Insurance Institution to communicate this information to the person applying for the support benefit via the e-mail address or telephone number provided in the application. Importantly, failure to receive information about the granting of a support benefit does not suspend the payment of this benefit. However, a formal decision issued by the Social Insurance Institution is required in cases of refusal to grant a support benefit, annulment or change of the right to a support benefit, or in instances of unduly collected support benefits.

The support benefit, in principle, will be available from the month of application. However, considering the nature of this benefit and its connection with the requirement to obtain a decision determining the level of need for support, the legislator has allowed for an extended period for submitting an application for the support benefit.[25] Specifically, 'if an application is submitted within a period of 3 months from the date of issuance of the decision determining the level of need for support, the right to a support benefit is established from the month in which the application for issuing the decision determining the level of need for support was submitted (…) If a person, (…), applies within 3 months from the date of turning 18, the right to the support benefit is established from the month the person turns 18.'[26] Conversely, in the event of submitting an appeal to the court against the decision determining the level of need for support, the deadline is counted from the date the decision establishing this level becomes final.

It follows from the wording of Article 27 ASB that the payment of the support benefit by the Social Insurance Institution will only be made in a non-cash form, to the payment account number in the country indicated in the application or the number of the payment instrument issued in the country within the meaning of

[24] Redakcja BISP, 'Nowe świadczenie…', op. cit.

[25] Justification to the Act on Support Benefits, p. 9, https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=3130 [accessed on 26 August 2024].

[26] Article 26 ASB.

the Payment Services Act of 19 August 2011.[27] As stated in the justification of the Act, 'the introduction of such a solution is intended to reduce the administrative costs on the part of the Social Insurance Institution related to the payment of the above benefit. This goal is to be achieved by introducing non-cash forms of payment, while excluding other methods that require direct contact between the beneficiary and employees of the office or postal operator.'[28]

Under the Act on Support Benefits, the legislator has also regulated the issue of unduly received support benefits, obliging the recipient to refund such benefits.[29] At the same time, the Act specifies when a benefit is considered to be unduly received. Article 29(2) ASB states that the benefit paid is considered unduly received if:

(1) It is paid on the basis of false statements or documents, or in other cases of deliberate misrepresentation by the person receiving the support benefit;
(2) It is received despite the lack of entitlement to the support benefit;
(3) It is received by a person other than the one entitled to a support benefit, for reasons beyond the control of the authority which granted the benefit.

Statutory interest for delay is charged on the amounts of unduly collected support benefits, unless the granting of the support benefit was the result of an error by the Social Insurance Institution. Receivables for unduly collected support benefits become time-barred after three years from the date on which the decision to determine and refund the unduly collected support benefit becomes final. The death of a person who received an unduly paid support benefit causes both the benefit itself and the receivables (interest) to expire.

It should also be noted that the support benefit, including the costs of its administration and health insurance contributions, is financed from the state budget.[30] Additionally, the legislator introduces, through Article 32 ASB, reporting obligations for the Social Insurance Institution, which is required to prepare a material and financial report on the performance of tasks related to the benefit for the period from 1 January to 31 December of a given year, and then submit it to the minister responsible for family matters by 15 February of the year following the year for which the report is submitted.

AN ATTEMPT TO EVALUATE THE REGULATION

After a brief presentation of the essence of the newly introduced support benefit, an attempt should be made to determine whether the legislator acted appropriately and rationally by introducing a new benefit into the Polish legal system addressed directly to people with disabilities, rather than to their guardians. In our opinion, this assessment is not straightforward. On the one hand, this is a groundbreaking act in the sense that, for the first time, a functional assessment of the need for support is introduced into the Polish system of supporting people with disabilities. Moreover,

[27] Journal of Laws 2023, item 1394.
[28] Justification to the Act on Support Benefits, op. cit., p. 10.
[29] Article 29(1) ASB.
[30] Article 31 ASB.

the point system introduced by the legislator, allowing for greater individualisation of support, can also be considered groundbreaking. It represents a departure from the previously implemented policy of equal treatment of people with disabilities, which was based solely on the degree of disability. Meanwhile, there is no doubt that the needs of people classified as, for example, severely disabled, vary greatly depending on the type of disability and its intensity. In this sense, the adopted solution allowing for greater individualisation of support according to needs should be assessed very positively, as a kind of breakthrough in the current approach to supporting people with disabilities. On the other hand, it must be clearly emphasised that the Act, by introducing a new, previously non-existent benefit, does not streamline the system by maintaining existing forms of support, such as supplementary benefits for people unable to live independently or care allowance. It seems that the legislator, when enacting the Support Benefit Act, could have gone a step further and integrated the existing solutions. This would have made the system of financial support for people with disabilities, unlike the complicated system of supporting their caregivers, more structured and transparent.

Of course, it is difficult to assess its individual provisions only a few days after the Act entered into force. A complete assessment of the adopted solutions will only be possible when the established practice regarding the granting of support benefits is reviewed by the judicial authorities. However, this does not mean that it is impossible to formulate certain *ad hoc* assessments and conclusions.

Referring to the general assumptions of the Act, in our opinion, the adoption by the legislator of a functional assessment focusing on the need to support people with disabilities, rather than on their dysfunctions, should be assessed very positively. Another important achievement is the assignment of support benefits directly to the person with a disability, rather than to their caregiver. It is also worth emphasising that the Act provides a greater opportunity to individualise support by introducing six thresholds for assessing the level of need for support for a person with a disability.

In more detailed matters, the fact that the new benefit is to be granted without any income criteria can be assessed very positively. The Act also does not impose any restrictions on the earnings of persons with disabilities receiving benefits. This approach should be assessed positively, as the benefit is intended solely to 'partially cover the expenses related to meeting the special living needs of a person with a disability'.[31] For the rest, these individuals should be given the opportunity to take up employment in order to facilitate their full integration and participation in society as far as possible.

The changes introduced by the Act in the field of care services should also be assessed positively. In addition to increasing the amount of this benefit by 100% for the second and each subsequent person cared for, the Act removes the controversial condition that made the granting of the benefit dependent on the caregiver resigning

[31] Cf. Article 3(1) ASB.

from or not taking up employment in order to care for a person with a disability.[32] The demand to waive the above-mentioned condition has been raised for many years by groups working for people with disabilities, as it was seen as discriminatory, especially against parents of disabled children who were forced to give up full-time work due to the care they provide. The complete resignation from professional life, and sometimes from an important career, was extremely unfavourable for caregivers, so the possibility of combining the receipt of care benefits with work, especially part-time work, should be assessed very positively.[33]

Of course, not all solutions adopted in the Act deserve a positive assessment. Some groups working for people with disabilities indicate the need for changes to the Act. For example, the Polskie Forum Osób z Niepełnosprawnościami (Polish Disability Forum)[34] (PFON/PDF) points to the problem of excessively large differences in the amount of support benefits between individual thresholds, calling for reconsidering the percentages on which the amount of support granted depends. This is undoubtedly a noteworthy postulate, because the rationality of expenditure on supporting people with disabilities depends on whether these indicators are determined correctly. From this point of view, the psychological factor is also important, as the sense of justice among those who receive support seems to be significant. In our opinion, they should be convinced that they receive support adequate to the level of their needs and that they fully deserve it.

A significant problem affecting the granting of support benefits is the imprecise regulation of the scale for assessing the level of need for support. There is no doubt that assessing the level of need for support is extremely important, as it determines the amount of the support benefit. Therefore, establishing precise and transparent rules for this assessment is absolutely crucial for the proper application of the Support Benefit Act. However, the regulation on determining the level of need for support, in

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[32] Currently, Article 17(1) of the Act of 28 November 2003 on Family Benefits (Journal of Laws of 2023, item 390, as amended) states that 'Care benefit is due to:

(1) mother or father,
(2) other persons who, in accordance with the provisions of the Act of February 25, 1964 – Family and Guardianship Code (Journal of Laws of 2020, item 1359 and of 2022, item 2140), are obliged to pay maintenance, as well as spouses,
(3) the child's actual guardian,
(4) a foster family, a person running a family children's home, the director of a care and education facility, the director of a regional care and therapy facility or the director of an intervention pre-adoption center,
   – if they take care of a person up to 18 years of age who has a certificate of a significant degree of disability or a certificate of disability together with the indications of: the need for permanent or long-term care or assistance from another person due to a significantly limited ability to exist independently and the need for constant participation in every day as a child's caregiver in the process of treatment, rehabilitation and education.'

[33] For more on this topic, see: Borski, M., 'Aktywizacja zawodowa opiekunów osób z niepełnosprawnościami jako ważne zadanie państwa – wybrane zagadnienia', *Studia z zakresu prawa pracy i polityki społecznej*, 2019, Vol. 26, No. 2, pp. 155–158.

[34] A non-profit organisation with the status of a public benefit organization (OBP), bringing together associations and unions of associations of disabled people in Poland. Since 2004, PFON/PDF has been a member of the European Disability Forum (EDF). For more information see https://pfon.org/ [accessed on 11 January 2024].

force from 29 November 2023,[35] has been assessed very negatively by communities working for people with disabilities. Primarily, it is criticised as an unsuccessful attempt to adapt the Spanish BVD scale to Polish conditions.[36] Addressing this criticism, it should be noted that, on the one hand, this is a pioneering solution, as the Polish legislator has no experience in formulating similar assessment scales. Therefore, it is clear that the solutions developed will need to be verified in the future, taking into account the practicalities of assessing the level of need for support. On the other hand, the legal language used by the legislator deserves strong criticism. In many places, the regulation is grammatically incoherent, and the wording used is overly complicated and chaotic. It should be remembered that a potential support beneficiary who wishes to understand the process of assessing the need for support should be able to learn this from the regulation itself. However, considering the regulation volume and complexity, this is not only impractical, but the interpretation of its individual provisions often yields contradictory results. Therefore, there is no doubt that work on clarifying the regulations should continue, and the regulation itself should be amended as soon as possible,[37] because the very concept of support benefit, as well as the scale for assessing the level of need for support, is, in our opinion, a step in the right direction towards strengthening the autonomy of persons with disabilities and providing an opportunity to individualise support.

Regardless of the above, it seems that such an important issue as the scale for assessing the level of need for support should be regulated at the statutory level, given its significant impact on the rights of people with disabilities. As the Constitutional Tribunal rightly noted in its judgment of 24 September 2013, 'The more the statutory regulation concerns the issue of fundamental rights for the position of an individual (similar entities), the more complete the statutory regulation must be and the less space there is for references to implementing acts.'[38] The Tribunal also emphasised that 'the legislator may not delegate for regulation the matters of significant importance for the realisation of human and civil rights and freedoms guaranteed by the Constitution. The mentioned matters must be regulated directly in the act.'[39] In our opinion, we can thus speak of the development of

[35] Regulation of the Minister of Family and Social Policy of 23 November 2023 on Determining the Level of Need for Support (Journal of Laws of 2023, item 2581).

[36] See, *inter alia*, statements by Dr. Maria Libura, head of the Department of Medical Teaching and Simulation of the Collegium Medicum of the University of Warmia and Mazury in Olsztyn, or Dr. Agnieszka Dudzińska, sociologist, lecturer at the University of Warsaw – Różański, M., 'Rozporządzenie o ustalaniu potrzeby wsparcia. Co trzeba zmienić?', *niepełnosprawni.pl*, 7 November 2023, http://www.niepelnosprawni.pl/ledge/x/2157090;jsessionid=1834DAEEE6D6B27992899CD23BE862AB [accessed on 7 January 2024].

[37] The Commissioner for Human Rights draws attention to this in his opinion on the presidential draft law on personal assistance, emphasising that 'it seems justified to re-analyse the issue of the scale determining the level of support. This scale will affect not only the determination of the right to personal assistance, but also the possibility benefiting from assistance under the proposed Act and its possible scope.' See letter of the Commissioner for Human Rights of 2 January 2024, ref. no XI.503.4.2016.DB, https://bip.brpo.gov.pl/sites/default/files/2024-01/Do_KPRP_ozn_asystencja_projekt_opinia_2.01.2023.pdf [accessed on 7 January 2024].

[38] Cf. judgment of the Constitutional Tribunal of 24 September 2013, ref. no. K 35/12, OTK ZU 2013, issue 7a, item 94.

[39] Ibidem.

the Tribunal's jurisprudence, which outlines broad requirements for statutory regulation. Therefore, the need to regulate the scale of assessment of the level of need for support by statutory means cannot be doubted.[40]

We also negatively evaluate the failure to adopt in the Act the proposed exclusion of support benefits from the income of a person with a disability when applying for care services (CS) and special care services (SCS). There is no doubt that this benefit should not be considered when calculating the fees for these services, especially in the context of Article 55 of the Act on Support Benefit, which states that this benefit is not included in the income criterion for supplementary benefits for persons unable to live independently. This means that a person receiving supplementary benefit may also receive a support benefit and vice versa. In our opinion, the lack of consistency in this area negatively affects the situation of less independent people with disabilities who need to use CS and SCS. Thus, in practice, a person who receives support benefit and uses care services will, effectively, return this benefit by paying for the services mentioned above. Consequently, the funds intended for people with disabilities will instead go to municipalities responsible for providing care services.

In our view, the rejection at the procedural stage of the Support Benefit Act of the Senate amendments, proposed by groups working for people with disabilities, should also be assessed negatively. One of the rejected proposals was to lower the point threshold from 70 to 50 points when determining the level of need for support, along with a proposal to increase the percentage values of the social pension, which would translate into a higher amount of the support benefit. Another important amendment that was rejected by the majority of the Parliament concerned granting the right to support benefits to individuals staying in facilities such as social welfare homes, family welfare homes, or other establishments providing 24-hour care, with the assumption that the payment of the benefit would be suspended during the stay in the given facility. Consequently, in families where the caregiver resigns from care services so that the person under their care can receive a support benefit, it may occur that the family does not receive any benefits for a period of time. This situation only applies temporarily, as the support benefit will eventually be awarded with compensation. We also negatively evaluate the rejection of the Senate amendments aimed at considering additional factors when determining the level of need for support, such as time or level of pain and discomfort during activities performed. These amendments were intended to further individualise the form of support granted, and would undoubtedly have made the benefit more tailored to its beneficiaries.

CONCLUSION

Summarising the above considerations, there is no doubt in our view that the Support Benefit Act is a step in the right direction, which, however, still needs further development. Beyond the need to consider the aforementioned comments

[40] Similarly, *inter alia*, Garlicki, L., *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa, 2018, p. 155.

in the next amendment of the Act, it also seems necessary to introduce additional measures allowing for greater individualisation of support for people with disabilities based on their needs.

For this reason, the statutory regulation of the institution of personal assistance seems to be an absolutely fundamental issue. This project was prepared by the Chancellery of the President and subjected to public consultations, which concluded on 22 December 2023. The Commissioner for Human Rights has already highlighted certain shortcomings, such as the risk of dualism in assistance services for people with disabilities: 'systemic' – based on the proposed Act, and 'programmatic' – based on the continuation of the government programme on personal assistance.[41] There is no doubt that all identified problems, and those likely to arise, should be eliminated both at the design stage and during the legislative process. However, this Act is crucially important and should be thoroughly analysed as soon as possible during parliamentary work. It could become a significant step towards the deinstitutionalisation of the support system for people with disabilities.

Of course, the normative regulations indicated above are not sufficient to ensure respect for the individual's right to an independent life, in accordance with their autonomous choice. To this end, it is necessary to carry out a comprehensive and systematic reform of the support system for people with disabilities, which also includes replacing the institution of incapacitation with a system of supported decision-making. This change is absolutely fundamental to the full realisation of the principle of living independently in society for persons with disabilities, as set out in Article 12 of the Convention on the Rights of Persons with Disabilities. The UN Committee on the Rights of Persons with Disabilities has already highlighted this issue[42] calling for the State Party 'to withdraw its interpretative declaration on article 12 of the Convention and (…) to repeal all discriminatory provisions (…) allowing for deprivation of legal capacity of persons with disabilities, considering that legal capacity includes the capacity to be both, a holder of rights and an actor under the law, and capacity to legal acts, as it is defined in legislation'.[43] The Committee also stressed the need to 'establish a procedure aimed at restoring full legal capacity of all persons with disabilities, and to develop supported decision-making mechanisms that respect the autonomy, will and preferences of the person.'[44]

Taking the above into account, it should be assumed that the Act on Support Benefits is only the first step, albeit in the right direction, towards creating a support system aimed at empowering people with disabilities.

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41 See letter from the Commissioner for Human Rights of 2 January 2024, op. cit.

42 The Committee on the Rights of Persons with Disabilities has the power to consider individual complaints under the Convention on the Rights of Persons with Disabilities, and its Optional Protocol, https://www.ohchr.org/en/treaty-bodies/crpd [accessed on 7 January 2024].

43 See Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Poland, point 20 https://bip.brpo.gov.pl/sites/default/files/Rekomendacje%20Komitetu%20ONZ%20dla%20Polski%20%28j%C4%99z.%20angielski%29.pdf [accessed on 7 January 2024].

44 Ibidem.

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THE SOFT LAW ACTS OF THE UOKIK PRESIDENT AND THEIR IMPACT ON DETERMINING THE POSITION OF AN ENTREPRENEUR IN ANTI-MONOPOLY PROCEEDINGS

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Abstract
With the adoption of the *acquis communautaire*, the Polish administration encountered a significant number of soft law acts issued by the EU administration and began to utilise them extensively. The systematic 'hardening' of soft law acts leads to a discrepancy between their formally non-binding status and their actual intended meaning and effects – often resembling 'hidden directives' or even more imperative measures, producing legal consequences and defining the legal situation of e.g. entrepreneurs. Consequently, it is proposed that soft law acts should be subject to autonomous judicial review in terms of both interpretation and annulment.

The President of UOKiK may also issue official explanations and guidelines that fit the definition of soft law acts. Guidelines on the amounts of fines for entrepreneurs significantly impact the determination of their legal position, and judicial decisions increasingly refer to the methodology of setting fines specified therein without critical examination.

Keywords: soft law acts, guidelines, competition, challengeability of soft law acts

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INTRODUCTION

The declining quality of Polish law-making, attributed to the so-called qualitative inflation of legal regulations,[1] particularly in business law, creates uncertainty for regulated entities regarding the content of their mandatory conduct in the market, which contradicts the fundamental principle of legal certainty. In the practice of competition protection, authorising the UOKiK President to issue soft law acts, such as explanations and interpretations of major questions of anti-monopoly law, which become non-binding normative acts, is seen as a remedy for these deficiencies.

Despite the widespread and growing importance of soft law acts in both Poland and the European Union, they continue to provoke controversy, primarily due to their ambiguous position in the formal hierarchy of legal sources. The normative content of these acts, intended to influence entrepreneurs' behaviour and consequently affect their legal position, for instance, in anti-monopoly proceedings and the imposition of administrative fines, is of considerable significance. This should facilitate the challengeability of soft law acts in court or the citation of such acts in judicial proceedings to protect entrepreneurs' rights, traditionally the domain of hard law acts.

These issues, along with an exploration of the challengeability of soft law acts in court to protect the rights of entrepreneurs, will be the subject matter of this study.

SOFT LAW ACTS IN THE EUROPEAN UNION

The normative sphere of the European Union has exhibited clear evolution since the 1990s, as various 'soft law' instruments have increased in both number and significance.[2] O. Stefan highlights the political context of the 'soft law' concept, which became a recognised part of legal science only in the early 21st century.[3] As soft law instruments within the European Union become more prevalent, their legal force has become a subject of academic inquiry. Several approaches have been employed to define and distinguish between soft and hard laws, establishing a systematic classification of soft and hard remedies.[4] As the number of soft law acts issued, particularly by the European Commission,[5] continues to rise, there is growing doctrinal interest in studying the essence, normative content, and challengeability

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1 Cf., e.g., Knosala, E., *Zarys nauki administracji*, Warszawa, 2010, p. 253; Zawadzki, S., 'Inflacja prawa oraz problemy podnoszenia jego jakości', *Studia Prawnicze*, 1989, No. 2–3, p. 349.

2 Król-Bogomilska, M., *Zwalczanie karteli w prawie antymonopolowym i karnym*, Warszawa, 2013, p. 69.

3 Stefan, O., 'The future of European Union soft law: A research and policy agenda for the aftermath of COVID-19', *Journal of International and Comparative Law*, 2020, No. 7(2), pp. 330–331.

4 Láncos, P.L., 'A Hard Core Under the Soft Shell: How Binding Is Union Soft Law for Member States?', *European Public Law*, 2018, Vol. 24, Issue 4, p. 755, DOI: 10.54648/EURO2018042.

5 Cappellina, B., 'EfSoLaw: a new data set on the evolution of soft law in the European Union', *ECPR Virtual General Conference 2020*, August 2020, Innsbruck (Virtual), Austria, hal-03117788f, https://hal.archives-ouvertes.fr/hal-03117788/document [accessed on 8 July 2022], p. 19, where the author states that research affirms the European Commission has a maximum impact on the EU policy as the key author of its legal acts.

of these acts, as well as their 'hardening'.[6] This is because, as O. Stefan notes,[7] the European Union administration now regularly relies on soft law instruments.

This analysis should begin with a brief reminder of the categorisation of the Union's legal acts, originating from primary legislation. According to Article 288 of the TFEU,[8] to exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation has general application. It is binding in its entirety and directly applicable in all Member States. A directive is binding as to the results to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of forms and methods. Recommendations and opinions have no binding force.

In light of this provision, the division into binding and non-binding legal acts is fundamental.[9] The former includes regulations, directives, and decisions, while the latter includes recommendations and opinions, known as soft law acts and comprising, beside the 'typical' recommendations and opinions identified in Article 288 of the TFEU, 'atypical acts', not specified in Article 288 of the TFEU, such as: communications, notifications, Green and White Papers, resolutions, declarations, guidelines,[10] or frameworks.[11] Too much attention should not be paid to the labelling of individual soft law acts, as the terms are often interchangeable.

In his study of soft law and its application in the then European Community, L. Senden suggested a definition of 'soft law' as rules of conduct laid down in instruments that do not have legally binding force per se but may, nonetheless, give rise to certain indirect legal effects and are designed to produce actual effects.[12] A. Chudyba offers a synthetic definition of soft law acts as all non-imperative (non-binding) legal acts expressing norms (models of conduct).[13]

These definitions imply some basic characteristics of soft law acts, such as: (1) setting certain norms (models) of conduct, (2) no formal binding effect on intended targets, and (3) the potential to cause actual, though not legal, effects that influence the targets. This nature of EU soft law acts is coupled with the fact that they fulfil two principal, interconnected functions: to inform and to support the interpretation of binding regulations. Thus, non-binding legal acts aim to ensure that the Union

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[6] Láncos, P.L., 'The Phenomenon of "Directive-like Recommendations" and their Implementation: Lessons from Hungarian Legislative Practice', in: Popelier, P., Xanthaki, H., Robinson, W., Silveira, J.T., Uhlmann, F. (eds), *Lawmaking in Multi-level Settings*, Baden-Baden, 2019, pp. 199–218.

[7] Stefan, O., *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union*, Warszawa, 2013, p. 12.

[8] Treaty on the Functioning of the European Union, consolidated text: OJ C 202, 7.6.2016, p. 1.

[9] Steiner, J., Woods, L., Twigg-Flesner, Ch., *Textbook on EC law*, Oxford, 2003, p. 54.

[10] Wróbel, A., Kurcz, B., 'Komentarz do art. 288 TFUE, 288.1.1.', in: Kornobis-Romanowska, D., Łacny, J., Wróbel, A. (eds), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom III (art. 223–358)*, Warszawa, 2012.

[11] Cf. judgment of the General Court of 19 March 2019, joint cases T-282/16 and T-283/16, paragraph 44, ECLI:EU:T:2019:168.

[12] Senden, L., *Soft Law in European Community Law*, Oxford, 2004, p. 3.

[13] Chudyba, A., 'Związanie aktami unijnego *soft law*. Uwagi na tle prawa konkurencji', *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 2019, No. 6(8), p. 65, DOI: 10.7172/2299-5749.IKAR.6.8.4.

operates in a transparent and predictable manner, providing legal certainty.[14] These functions are also highlighted by European court decisions, which note: 'In adopting such rules of conduct, such as those of the SGEI Framework,[15] and announcing, by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its aforementioned discretion and, in principle, cannot depart from those rules without being found, where appropriate, to be in breach of general principles of law, such as the principle of equal treatment or that of the protection of legitimate expectations.'[16]

In its judgment in the *Grimaldi* case, the Court explained the circumstances under which recommendations can be accepted, which may also be extended to other soft law acts, stating that they are generally adopted by the Union institutions when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules.[17] They can be adopted in any field, at all possible stages of the decision-making processes, whether that is early, upstream consultation of the stakeholders or downstream implementation of legislative acts. Thus, those instruments can equally be both pre-legislative or post-legislative.[18]

Regarding the pre-legislative functions of soft law acts, critics and opponents of their increasing numbers and significance emphasise the ease of their adoption outside the normal legislative procedure (Article 289(1) TFEU), which makes them more than mere tools for realising Union policies and objectives. More importantly, they may be used to circumvent procedures, bypassing the European Parliament and the Council, and potentially disrupting the institutional balance and division of powers among EU authorities and institutions.[19] Furthermore, the legal effects of soft law cannot be precisely defined, which interferes with legal certainty and the rule of law.[20] These risks are also noted by the Member States[21] and the CJEU Advocate General[22] who points out: 'that creates (…) pre-emption (…) in particular for pre-legislative recommendations: the ability to articulate the norms before the actual legislative process takes place, which may even translate into unilateral

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[14] Staszczyk, P., 'Akty *soft law* jako reakcja instytucji unijnych na skutki pandemii COVID-19', *Europejski Przegląd Sądowy*, 2020, No. 7, p. 42.

[15] Communication from the Commission – European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, p. 15.

[16] Judgment of the General Court of 19 March 2019, joint cases T-282/16 and T-283/16, paragraph 44, ECLI:EU:T:2019:168; similarly, judgment of the Court of 28 June 2005, case C-189/02 P, *Dansk Rørindustri A/S and Others v. the Commission*, paragraph 211, ECLI:EU:C:2005:408.

[17] Judgment of the Court of 13 December 1989, case C-322/88, *Grimaldi v. Fonds des Maladies Professionnelle*s, paragraph 3, ECLI:EU:C:1989:646.

[18] Opinion of Advocate General Bobek delivered on 12 December 2017, case C-16/16 P, *Kingdom of Belgium v. European Commission*, paragraph 81, ECLI:EU:C:2017:959.

[19] Rošic Feguš, V., 'The growing importance of soft law in the EU', *InterEULawEast*, 2014, Vol. I(1), p. 145 et seq.

[20] Eliantonio, M., Stefan, O., 'Soft Law Before the European Courts: Discovering a "common pattern"?', *Yearbook of European Law* , 2018, Vol. 37, p. 458, DOI:10.1093/yel/yey017.

[21] Cf. the Kingdom of Belgium's second charge against the Commission Recommendation 2014/478/EU of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online, case C-16/16 P, *Kingdom of Belgium v. the European Commission*, paragraph 12, ECLI:EU:C:2018:79.

[22] Opinion of Advocate General Bobek, case C-16/16 P, op. cit., paragraphs 94–95.

pre-emption of the legislative process', as 'they clearly have the normative ambition of inducing compliance on the part of their addressees.'

In the case of post-legislative process, soft law acts 'may contain "mild obligations" or "robust exhortations" that are coined in terms of "invitation"'. The soft law acts are likely to be used in legal interpretation, in particular to give meaning to indeterminate legal notions contained in binding legislation, primary or secondary, and thus complement binding regulations.[23]

However, the General Ombudsman M. Bobek argues in his opinion that recommendations (as well as other soft law acts, e.g., notices),[24] though clearly described as non-binding, can generate considerable legal effects, in the sense of inducing certain behaviour and modifying normative reality. They are likely to have an impact on the rights and obligations of their addressees and third parties.[25]

A similar view is advanced in the literature, suggesting that both the content and phrasing of provisions in soft law acts, as well as the legal framework within which these instruments operate, imply that they may be more than non-binding from the perspective of their addressees. The often prescriptive nature of soft law instruments, including absolute and obligatory phrasing and detailed provisions, along with the presence and design of implementation or enforcement tools (e.g., specific deadlines for actions, reporting, and information requirements for addressees), points to the intention of their authors (commonly the European Commission) to persuade or compel Member States to comply fully with these acts. C. Andone and F. Coman-Kund argue that the broader legal policy context in which the Commission's soft law instruments are adopted and implemented may contribute to their legal 'hardening' at both the European Union and Member State levels, given the EU principles of loyal cooperation, legitimate expectations, legal certainty, and their opaque relationship with legally binding acts.[26]

Thus, soft law acts do not easily fit the binary distinction between binding and non-binding legal effects of normative acts. C. Andone and F. Coman-Kund note that their systematic 'hardening' creates a discrepancy between their formally non-binding status and their actual intended meaning and effects.[27] For these reasons, the literature highlights the fundamental option of judicial control over soft law acts. Generally, courts may consider the effects of soft law from various perspectives, including: (1) grounds for judicial review, (2) the object of challenges to validity, (3) recourse by parties to court disputes, and (4) aids in the interpretation of hard law regulations.[28]

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[23] Ibidem, paragraphs 86 and 91.

[24] Cf. Opinion of Advocate General Kokott delivered on 6 September 2012, case C-226/11, *Expedia Inc. v. Autorité de la concurrence and Others*, in which the Court was to assess the Commission's *de minimis* announcement where the Commission sets out the circumstances under which it presumes that there is an 'appreciable restriction of competition' within the meaning of Article 101 TFEU.

[25] Opinion of Advocate General Bobek, case C-16/16 P, op. cit., paragraph 88.

[26] Andone, C., Coman-Kund, F., 'Persuasive rather than "binding" EU soft law? An argumentative perspective on the European Commission's soft law instruments in times of crisis', *The Theory and Practice of Legislation*, 2022, Vol. 10, Issue 1, DOI:10.1080/20508840.2022.2033942.

[27] Ibidem, p. 27.

[28] Snyder, F., Snyder, F., 'Interinstitutional Agreements: Forms and Constitutional Limitations', in: Winter, G. (ed.), *Sources and Categories of European Union Law: A Comparative and Reform Perspective*, Baden-Baden, 1996, p. 463.

Considering the possibility of soft law being subject to challenges to its validity, it should be noted that, in light of Article 263 TFEU, the Court of Justice of the European Union reviews the legality of legislative acts, acts of the Council, of the Commission, and of the European Central Bank, other than recommendations and opinions, and acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It also reviews the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. This final sentence of the provision seems to provide grounds for challenging the validity of a soft law act; however, its 'intention to produce legal effects' vis-à-vis third parties must be demonstrated. Due to the formal lack of binding power and the consequently vague legal effects of soft law, the availability of this route is somewhat limited, or even non-existent.[29]

Therefore, both researchers[30] and practitioners[31] have argued that the Court should lower the threshold of legal effects to allow for judicial review of all types of EU law, not only hard law. M. Eliantonio and O. Stefan[32] point out:

> 'in the circumstances, it's unreasonable to continue seeing the Union's legal framework as defined by a combination of soft and hard law, whereas European courts should accept the hybrid nature of soft law acts. At the same time, the basic concepts of judicial review need to be reconsidered, the tight corset of binding legal effects loosened (…) and it should be admitted soft law will remain a management tool in the Union that must be both used and controlled by European courts.'

E. Korkea-aho, cited by M. Król-Bogomilska,[33] likewise emphasises that, given the advantages and disadvantages of soft law acts, a more holistic and multi-faceted analysis is required, not limited to their role in judicial decisions. These proposals need to be accepted and fully embraced.

In its landmark judgment in the *Grimaldi* case, the Court stated: 'Since the choice of form cannot alter the nature of a measure, the court required to interpret a measure described as a recommendation in order to determine its scope must ascertain whether the measure is not in fact, in view of its content, intended to produce binding effects.'[34] Thus, a court should examine the actual purpose and effect of a legal act, rather than its format or nomenclature, to determine its true legal nature and effects. Advocate General M. Bobek explains that the criteria for assessing whether a Union legal act produces legal effects vis-à-vis its addressees

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[29] CJEU judgment of 15 July 2021, case C-911/19, *Fédération Bancaire Française (FBF) v. Autorité De Contrôle Prudentiel et de Résolution (ACPR)*, ECLI:EU:C:2021:599. The CJEU stated in its decision: 'Article 263 TFEU must be interpreted as meaning that acts such as the Guidelines of the European Banking Authority (…) cannot be the subject of an action for annulment under that article.'

[30] E.g., Stefan, O., 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance', *Maastricht Journal of European and Comparative Law*, 2014, No. 21(2), pp. 359–379.

[31] Opinion of Advocate General Bobek, case C-16/16 P, op. cit., paragraph 110.

[32] Eliantonio, M., Stefan, O., 'Soft Law…', op. cit., p. 469.

[33] Król-Bogomilska, M., *Zwalczanie karteli…*, op. cit., p. 70.

[34] The CJ judgment of 13 December 1989, case C-322/88, *Grimaldi*, paragraph 2.

and/or third parties include: (1) the text, (2) context, and (3) purpose of the contested act. As far as the text is concerned, if the EU act features a number of specific and precise commitments, this is certainly an essential element of a desire to induce binding legal effects. This may also be supported by certain indirect compliance mechanisms required by the act, such as: compulsory reporting, notification, monitoring or supervision.[35]

These circumstances can mean that, despite an act's labelling as soft law, it is not, in fact, intended merely as an invitation or suggestion to Member States to introduce certain regulations into their domestic legislation but is instead a 'latent directive' or an even more imperative measure. If a state, being a reasonable addressee, can infer from the content, aim, general scheme and the overall context of a soft law act that it is expected to undertake the actions specified therein and incorporate them into its national legislation, these regulations affect the legal position of enterprises and possibly other entities which are their indirect addressees. Thus, an EU soft law act produces legal effects by determining the legal situation of its indirect addressees. Of course, it can be maintained that formally and in itself it is not a soft law act but the potential national legislation that will impact third party rights, yet it is hard to deny that the effective source of the national legislation is to be found in that act. Consequently, an apparently non-binding act of EU soft law can become the subject of a petition for a preliminary ruling concerning both its interpretation and validity.[36] This is upheld by the Court, which states: 'Article 267 TFEU must be interpreted as meaning that the Court has jurisdiction under that article to assess the validity of acts such as the Guidelines.'[37] Meanwhile, the option of challenging the legality of soft law acts is approached with considerable reservations in most states. This is because European legal thought is still largely founded on the prescriptivist theory, which, by rejecting the possibility of regarding non-binding norms as legal norms, effectively rules out the review of their legality in court.[38]

THE SOFT LAW ACTS OF THE UOKIK PRESIDENT

With the adoption of the *acquis communautaire*, the Polish administration encountered a large number of soft law acts issued by the EU administration. Moreover, Polish authorities were keen to make extensive use of this form.[39]

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[35] Opinion of Advocate General Bobek, case C-16/16 P, op. cit., paragraphs 111, 119–121.

[36] Ibidem, paragraphs 108, 113, 133.

[37] The CJEU judgment, case C-911/19, op. cit.

[38] Chudyba, A., 'Zaskarżalność aktów *soft law*. Podejście Trybunału Sprawiedliwości Unii Europejskiej na tle orzecznictwa wybranych państw członkowskich', *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 2020, No. 5(9), p. 155, DOI: 10.7172/2299-5749.IKAR.5.9.10.

[39] Błachucki, M., 'Wytyczne w sprawie nakładania administracyjnych kar pieniężnych (na przykładzie wytycznych wydawanych przez Prezesa UOKiK)', in: Błachucki, M. (ed.), *Administracyjne kary pieniężne w demokratycznym państwie prawa*, Warszawa, 2015, pp. 42–43.

Currently, the issuance of what the legislator refers to as 'legal explanations' is generally based on Article 33 of the Entrepreneurs Law.[40] This provision states that competent ministers and authorities issue explanations of business regulations concerning their practical application. It should be noted in this context that the Polish Constitutional Tribunal has frequently pronounced on the principles arising from Article 2 of the Constitution, including the principle of legal certainty. It has emphasised that legal certainty means not so much the stability of legal regulations as the predictability of actions by state authorities and the corresponding behaviour of citizens.[41] What should be stable is the application of law by public authorities, as this is the main pillar of public confidence in these authorities.[42] This is not to be underestimated in the context of the principle of democratic rule of law since, as J. Zimmermann notes, '(…) democracy can only exist where its informal rules are followed, of course, in conjunction with clear legal regulations.'[43]

Besides this general foundation for issuing legal explanations, the UOKiK President is additionally provided with specific grounds under Article 31a CCPA.[44] The provision states the UOKiK President may publish in the Public Information Bulletin explanations and interpretations of major significance to the application of law in cases subject to the President's competence. This provision states that the UOKiK President may publish in the Public Information Bulletin explanations and interpretations of major significance to the application of law in cases within the President's competence. These official explanations and interpretations align with the definition of soft law acts suggested in the literature since, in principle, they are not formally binding on their addressees and cannot produce legal effects, yet they cause actual effects, at least by creating a kind of promise that gives rise to their addressees' reasonable expectations regarding the future behaviour of the public authority, namely, the UOKiK President.[45] This is of particular importance given that the authority has a rather broad range of discretionary powers, which may cause uncertainty among entrepreneurs.

In search of legitimisation for soft law acts, one should refer back to Polish administrative science and F. Longchamps' theory of non-organised sources of administrative law.[46] He recognised the need to change the perception of the

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[40] The Entrepreneurs Law of 6 March 2018, Journal of Laws of 2021, item 162, as amended (hereinafter 'the EL').

[41] The Constitutional Tribunal judgment of 15 October 2008, P 32/06, http://prawo.sejm.gov.pl/isap.nsf/download.xs/WDU20081901172/T/D20081172TK.pdf [accessed on 14 June 2023].

[42] Wieczerzyńska, B., 'Obowiązki organów władzy w zakresie wydawania objaśnień prawnych przepisów dotyczących działalności gospodarczej w projekcie ustawy – Prawo przedsiębiorców – wersja z 5 października 2017 r.', in: Smarż, J. (ed.), *Złożoność materialnego prawa administracyjnego*, Radom, 2018, pp. 124–144; http://old.uniwersytetradom.pl/art/display_article.php?id=8943 [accessed on 14 June 2023].

[43] Zimmermann, J., *Aksjomaty administracji publicznej*, Warszawa, 2022.

[44] The Competition and Consumers Protection Act of 16 February 2007, Journal of Laws of 2021, item 275 (hereinafter 'the CCPA').

[45] Błachucki, M., 'Wytyczne w sprawie nakładania administracyjnych kar…', op. cit., p. 45.

[46] E.g., Longchamps de Bèrier, F., O źródłach prawa administracyjnego (problemy poznawcze)', in: Jaśkiewicz, W. (ed.), *Studia z zakresu prawa administracyjnego. Ku czci prof. dra Mariana Zimmermanna*, Warszawa–Poznań, 1973.

system of law sources – defined as 'closed-ended', that is, 'changing only in ways determined within itself' – from dogmatic to realistic and to accept 'the informal ways the legal system supplements itself'.[47] J. Zimmermann notes that naming these sources 'non-organised' implies a variety and unpredictability of their forms.[48] There are, therefore, acts that cannot be part of the constitutionally established, closed-ended catalogue of the sources of generally prevailing law but should be addressed in the administrative law system as forms affecting an individual's legal position, thus 'opening' that system.[49]

As far as the broadly defined business law, including competition law, is concerned, soft law acts play a significant regulatory role, bridging the gap between law and the market, the legal norm and best practices, or customs; their influence continues to expand.[50] Soft law acts are not accepted without doubts and fears, though. As M. Król-Bogomilska notes, these concerns are essentially caused by 'the penetration into the Polish system – via non-statutory routes – of totally new elements that are different from statutory regulations' and are normative novelties.[51]

Wyjaśnienia dotyczące ustalania wysokości kar pieniężnych dla przedsiębiorców w sprawach związanych z naruszeniem zakazu praktyk ograniczających konkurencję (*The Explanations concerning the Amounts of Monetary Penalties on Entrepreneurs in Cases Relating to the Violations of the Ban on Practices Restricting the Competition*, hereinafter '*The Explanations*'),[52] effective as of 1 April 2021, are the UOKiK President's soft law official explanations of paramount importance to determining the legal position of entrepreneurs. Penalties for such practices are based on the penalty calculation algorithm contained in this regulation.

Some authors stress[53] that *The Explanations* have a considerable impact on court decisions, which increasingly reference the methodology set out therein. Two opposing approaches to *The Explanations* and their application by courts can be observed in the decisions. *The Explanations* most often serve an auxiliary function as a source of intellectual inspiration, with courts making subsidiary references to them in the process

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[47] Supernat, J., 'Przedmowa', in: Supernat, J. (ed.), *Niezorganizowane źródła prawa administracyjnego*, Warszawa, 2022, p. 16.

[48] Zimmermann, J., *Prawo administracyjne,* Warszawa, 2022, p. 148.

[49] Puczko, A., 'Wpływ niezorganizowanych źródeł prawa na system prawa administracyjnego', in: Supernat, J. (ed.), *Niezorganizowane źródła prawa administracyjnego*, Warszawa, 2022, p. 71.

[50] Iwaniec, M., '*Soft law* – współczesny instrument regulacji życia gospodarczego, *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 2020, No. 5(9), p. 122, DOI: 10.7172/2299-5749.IKAR.5.9.8.

[51] Król-Bogomilska, M., *Zwalczanie karteli…*, op. cit., p. 73. The author cites the minimum and maximum percentages of revenue as the starting points for determining the base amounts of penalties for violations named as 'very serious', 'serious', and 'other', which had not been provided for in the 2007 CCPA law, included in the already obsolete version of *The Explanations*, as some instances of 'normative novelties'.

[52] *Wyjaśnienia dotyczące ustalania wysokości kar pieniężnych dla przedsiębiorców w sprawach związanych z naruszeniem zakazu praktyk ograniczających konkurencję*, 2021, https://uokik.gov.pl/Download/499 [accessed on 3 September 2024].

[53] Famirska, S., 'Wpływ regulacji typu *soft law* na orzecznictwo sądów polskich orzekających w sprawach kar nakładanych za praktyki ograniczające konkurencję (na wybranych przykładach)', *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 2020, No. 5(9), p. 142.

of mitigating penalties. There are other decisions where the method of determining penalties laid down in *The Explanations* is adopted as a point of reference for penalties adjudged by courts or is copied without any reservations or modifications, whether in the stages of determining the base amounts of penalties or the weights ascribed to the particular assumptions underlying the degree of penalties. The latter approach is controversial, or even incorrect, since *The Explanations* are not binding. The fact that the Court of Appeals in Warsaw, in the case of the cement cartel,[54] relied on the methodology of determining penalties set out in the UOKiK President's *Explanations* without establishing anything independently in this regard is problematic. However, it stated,

> 'It's true *The Explanations* are not normative; however, their preparation and publication in the UOKiK Official Journal are of significant informational value to entrepreneurs, provide an objective assessment of the directives on the degree of penalties (…), and allow entrepreneurs to make an initial estimate of their penalty'.

This view is shared by the Supreme Court when considering a cassation appeal in the same case of the cement cartel, declaring, 'The UOKiK President's *Explanations* (…) are not binding on the court, which does not mean, however, that it cannot apply the methodology adopted there, as it is grounded in legislation'.[55] Thus, the court does not merely rely on *The Explanations* but applies them in a straightforward manner.

The chief objections against *The Explanations concerning the Amounts of Monetary Penalties on Entrepreneurs in Cases Relating to the Violations of the Ban on Practices Restricting the Competition* include the absence of individual penalties for the gravest practices, the departure from the traditional method of penalty mitigation within the statutory range, and the inability to consider all conditions of penalty in a given case that are not envisaged in *The Explanations*. These shortcomings argue for decision-making courts to use *The Explanations* as a guide, rather than automatically replicating the UOKiK President's algorithm from *The Explanations*. The principle of judicial discretion requires decision-making courts to approach the contents of the document and the methodology of its algorithm more critically, especially since penalties imposed for anti-monopoly violations are comparable to penal sanctions.

The possibility of challenging soft law acts issued by the Polish anti-monopoly authority, such as *The Explanations*, in court is another matter. Like European thought, Polish legal theory remains heavily influenced by the prescriptive concept that rejects the option of treating soft law acts as sources of law, dismisses their non-binding norms as legal norms, and rules out the judicial review of their legality.

However, claims that the traditional notions of the sources of law, including the prescriptive concept, are losing their significance and that closed-ended catalogues of these sources cannot be constructed are increasingly present in legal discourse, particularly in the field of administrative law. In light of the multicentricity of

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[54] The Court of Appeals in Warsaw judgment of 27 March 2018, case VI ACa 1117/2014, unpublished.

[55] The Supreme Court judgment of 29 July 2020, case I NSK 8/19 (cassation concerning the cement cartel), LEX No. 3037828.

the legal system,[56] one can also speak of its multisourcity, as contemporary law encompasses an extensive catalogue of non-organised sources that shape its contents in various ways and to different extents. Whether something is a source of law is not determined by whether it meets certain defined requirements, but by its actual, real norm-making nature. This view presumes a plurality of rule-making centres and a shift from prescriptivism towards legal realism – from law in books to law in action – since the contents of law are revealed in practice.[57] The implementation of soft law acts like guidelines, best practices, or compliance programmes in every area of economic life, including competition law, exemplifies this approach.[58]

This concept is expected to pave the way for an autonomous judicial review of soft law acts, particularly as they are so prevalent in the legal system. The CJEU has already made a significant step in that direction by identifying an extensive catalogue of acts adopted by EU institutions, authorities, or organisations, including guidelines, whose validity may be reviewed as part of the Court's preliminary rulings under Article 267 TFEU.[59] This serves as a signal to domestic courts, including Polish courts, to be more receptive to the possibility of judicial review of soft law acts.

CONCLUSION

With the adoption of the *acquis communautaire*, the Polish administration encountered a large number of soft law acts issued by the EU administration and began to make extensive use of them itself.

By virtue of Article 31a of the CCPA, the UOKiK President is also authorised to issue explanations, guidelines, or interpretations that hold considerable significance for the application of competition and consumer regulations. The UOKiK President's official explanations and interpretations align with the definition of soft law acts proposed in the literature since, in principle, they are not binding on their addressees and cannot produce legal effects, yet they cause actual effects. *The Explanations*, particularly those related to the determination of monetary penalties for entrepreneurs, have a considerable impact on court decisions. Courts sometimes automatically apply the methodology for determining and mitigating monetary penalties against entrepreneurs as set out in these documents. Despite the non-binding nature of such guidelines, therefore, the fact that courts refer to them indicates a 'hardening' of soft law and its actual legal effects on the legal position of entrepreneurs, as seen in previous EU court decisions. This, in turn, suggests the need to subject these acts to autonomous judicial review.

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[56] Łętowska, E., 'Mechanizm nie tekst', *Portal konstytucyjny.pl*, 30 July 2017, http://konstytucyjny.pl/mechanizm-nie-tekst/ [accessed on 22 January 2023].

[57] Osajda, K., 'Multiźródłowość – teoria czy praktyka? Atypowe źródła prawa prywatnego', in: Giaro, T. (ed.), *Źródła prawa. Teoria i praktyka*, Warszawa, 2016, Lex.el.

[58] Iwaniec, M., '*Soft law* – współczesny…', op. cit., p. 121.

[59] CJEU judgment of 15 July 2021, case C-911/19, op. cit.

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THE RIGHT TO EFFECTIVE REDRESS FROM A MUNICIPALITY FOR FAILURE TO PROVIDE SOCIAL HOUSING

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Abstract

Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides that every natural and legal person is entitled to the peaceful enjoyment of their possessions. No one shall be deprived of their possessions except in the public interest and subject to the conditions provided by law and the general principles of international law.

The primary purpose of these provisions is to protect property. By recognising that everyone has the right to the peaceful enjoyment of their possessions, Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms effectively guarantees the right to property, with deprivation of property permissible only under certain conditions.

These guarantees are not sufficiently implemented in national case law. Although municipalities are required to provide compensation (Article 18(3a) of the Act on the Protection of Tenants' Rights, Housing Resources of Municipalities and on Amendments to the Civil Code), the courts are too stringent in assessing the evidentiary requirements imposed on applicants. In the case of *Wyszyński v. Poland*, where the applicant was not awarded damages from the municipality for failing to provide social housing, the Court rightly noted that the domestic courts assumed that the applicant had failed to prove that the damage sustained was a normal consequence of the municipality's unlawful inactivity, even though two expert opinions were produced during the proceedings. In the case of *Broniowski v. Poland*, concerning property beyond the Bug River, it was clearly indicated that the taking of property without compensation in reasonable proportion to its value is generally considered disproportionate interference, and a total absence of compensation can only be justified in exceptional

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circumstances. It also appears essential, when assessing the existence of an adequate causal link, to rely on the knowledge and life experience of the adjudicating panel, applied appropriately to the circumstances of the case. The requirements as to the proof of damage should not be interpreted too strictly.

There is a need to liberalise evidentiary proceedings and make broader use of factual presumptions (Article 231 of the Code of Civil Procedure), as well as to limit the evidence required for substantiation, to ensure that the owner can effectively seek compensation from the municipality for failure to provide social housing.

Clear legislative intervention is necessary to address the defective court practices. It would be advisable to make an explicit procedural reference to the application of Article 322 of the Code of Civil Procedure in this category of cases, not only regarding the amount of damage but also concerning the fact that it occurred.

Keywords: ownership law, peaceful enjoyment of possessions, compensation, social housing, protection of tenants' rights, owner, municipality, effective protection, damage, remedy

INTRODUCTION

Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[1] provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

This analysis employs dogmatic-formal and historical methods to reconstruct the main principles derived from the conventional right to the peaceful enjoyment of possessions. These principles are then compared with the interpretation of the concept of lost profits as presented in court decisions and legal doctrine, to demonstrate the main thesis that an overly strict interpretation of the concept of lost profits, when an owner seeks compensation from the municipality for failure to provide social housing, may lead to the violation of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

Research on selected judicial decisions and European Court of Human Rights (ECtHR) judgments leads to the conclusion that, in such cases, there is a need to liberalise evidentiary proceedings and make broader use of the presumption of facts (Article 231 CCP), as well as to lend credibility to ensure that an owner can effectively seek compensation from the municipality for failure to provide social housing. *De lege ferenda*, to simplify evidentiary proceedings in such cases, it would even be advisable to reverse the burden of proof.

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[1] Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Paris on 20 March 1952, ETS No. 9; Garlicki, L., Hofmański, P., Wróbel, A., *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom 1. Komentarz do artykułów 1–18*, Warszawa, 2010, p. 329 et seq.

PEACEFUL ENJOYMENT OF POSSESSIONS AND THE LIMITS OF PERMISSIBLE INTERFERENCE: CONVENTIONAL AND CONSTITUTIONAL ASPECTS

The right to property is one of the most important rights in the European legal system. It is expressed on three levels: in Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, in Article 17 of the Charter of Fundamental Rights of the European Union, and in the national law of each Member State of the European Union.[2] According to Article 21(1) and (2) of the Constitution, the Republic of Poland shall protect ownership and the right of succession. Expropriation may be allowed solely for public purposes and for just compensation. Furthermore, pursuant to Article 64 of the Constitution, everyone shall have the right to ownership, other property rights, and the right to succession.

The Convention, which has a guarantee value, also sets the permissible limits of interference with property. In accordance with Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, any interference by public authorities with the enjoyment of possessions must be subject to the conditions provided by law. In particular, Article 1 second paragraph recognises that States have the right to control the use of property, making these rights conditional on exercising them through the application of 'laws'. Moreover, such interference must not only be lawful but also comply with the principle of proportionality. This concerns the so-called reasonable proportion of the means applied to the intended objective of any measure depriving a person of property.

As a result of the ECtHR case law, interference with ownership rights must not only constitute the implementation, both in fact and in principle, of a 'legitimate aim' in the 'general interest', but must also occur while maintaining a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures designed to control the use of an individual's property. This requirement is expressed in the concept of 'a fair balance' which must be struck between the demands of the general interest of the community and the requirements for the protection of the fundamental rights of an individual.[3]

According to the ECtHR case law, it is necessary to determine whether the national legislator has struck 'a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.' This involves examining whether there is 'a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions.' To determine whether the taking of property maintains the required balance, it is necessary to assess whether it imposes

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[2] Tuora-Schwierskot, E., 'Prawo własności w prawie wspólnotowym a regulacje prawa krajowego', in: Stępień-Załucka, B. (ed.), *Konstytucyjne prawo własności – sposoby naruszenia i środki ochrony*, Warszawa, 2021, p. 1 et seq.

[3] ECtHR pilot judgment of 22 February 2005, *Hutten-Czapska v. Poland*, application no. 35014/97, https://hudoc.echr.coe.int/?i=001-68364 [accessed on 3 September 2024].

'a disproportionate burden'.[4] In making this assessment, the ECtHR considers the conditions for compensation for the loss.[5] In accordance with the established case law of the ECtHR, 'the taking of property without payment of an amount reasonably related to its value'[6] normally constitutes a disproportionate interference, and a total lack of compensation can be considered justified under Article 1 of the Protocol only in exceptional circumstances.[7] Furthermore, to meet the requirement of proportionality, compensation must be paid within a reasonable time.[8]

As indicated in the doctrine, the primary purpose of these provisions is to protect ownership. Recognition that everyone has the right to the peaceful enjoyment of possessions, in accordance with Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, essentially guarantees ownership rights, and deprivation of property is permissible only under specified conditions.[9] There are three rules derived from this regulation in the ECtHR case law. The first general rule expresses the principle of the peaceful enjoyment of property; the second, contained in the second sentence of the first paragraph, refers to expropriation and specifies the conditions for the taking of property; the third, expressed in the second paragraph, recognises the right of the Contracting State, *inter alia*, to regulate the use of property in accordance with the general interest. However, these rules are not distinct in the sense of being unconnected. The second and third rules are concerned with specific instances of interference with the right to the peaceful enjoyment of property and must therefore be construed in the light of the general principle enunciated in the first rule.[10]

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[4] ECtHR judgment of 21 February 1986, *James and others v. the United Kingdom* (CE:ECHR:1986:0221JUD000879379, paragraph 54). Importantly, Article 1 of the Protocol No. 1 to the European Convention of Human Rights does not provide for such compensation. Nevertheless, the ECtHR stated in its judgment that the lack of obligation to pay compensation would make the protection of the property rights be 'largely illusory and ineffective'. This way, the Court mitigated the omission in the text and stated that the necessity of compensation 'derives from an implicit condition in Article 1 of Protocol No. 1 read as a whole' (ECtHR judgment of 8 July 1986, *Lithgow and others v. the United Kingdom*, CE:ECHR:1986:0708JUD000900680, paragraph 109), https://hudoc.echr.coe.int/?i=001-57526 [accessed on 3 September 2024].

[5] ECtHR judgment of 21 February 1986, *James and others v. the United Kingdom*, op. cit.

[6] Article 1 of the Protocol to ECHR does not guarantee the right to full compensation, because the legitimate objectives of public interest may call for less than the reimbursement of the full market value. Moreover, the ECtHR grants a State a wide margin of appreciation in this domain (ECtHR judgment of 21 February 1986, *James and others v. the United Kingdom*, op. cit.

[7] ECtHR judgments of: 21 February 1986, *James and others v. the United Kingdom*, op. cit.; 9 December 1994, *Holy Monasteries v. Greece* (CE:ECHR:1994:1209JUD001309287, paragraph 71), https://hudoc.echr.coe.int/eng?i=001-57906 [accessed on 3 September 2024]; 23 November 2000, *The former King of Greece and others v. Greece* (CE:ECHR:2000:1123JUD002570194, paragraph 89), https://hudoc.echr.coe.int/eng?i=001-59051 [accessed on 3 September 2024].

[8] ECtHR judgment of 21 February 1997, *Guillemin v. France* (CE:ECHR:1997:0221JUD001963292, paragraph 24), https://hudoc.echr.coe.int/eng?i=001-58019 [accessed on 3 September 2024].

[9] Nowicki, M.A., 'Komentarz do art. 1 Protokołu nr 1 do Konwencji o ochronie praw człowieka i podstawowych wolności', in: *Wokół Konwencji Europejskiej, Komentarz do Europejskiej Konwencji Praw Człowieka*, 8th ed., 2021, Lex el., legal state as of 1 July 2021 [accessed on 6 February 2024].

[10] ECtHR judgment of 21 February 1986, *James and others v. the United Kingdom*, op. cit.; ECtHR judgment of 22 June 2004, *Broniowski v. Poland*, application no. 31443/96, paragraph 134, https://hudoc.echr.coe.int/eng?i=001-61828 [accessed on 3 September 2024]; Nowicki, M.A.,

It is also necessary to take into account that Article 31(3) of the Constitution of the Republic of Poland stipulates that any limitation upon the exercise of constitutional rights and freedoms may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health, public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights. In turn, Article 64 of the Constitution of the Republic of Poland protects the right to ownership, stating that everyone shall have the right to ownership, other property rights, and the right to succession. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights, and the right of succession. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.

With regard to protecting tenants, Article 75 of the Constitution of the Republic of Poland stipulates that public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular by combating homelessness, promoting the development of low-income housing, and supporting activities aimed at the acquisition of a home by each person. The protection of tenants' rights shall be established by statute. In addition, in accordance with Article 76 of the Constitution of the Republic of Poland, public authorities shall protect consumers, customers, hirers, and lessees against activities threatening their health, privacy, and safety, as well as against dishonest market practices.

The Constitutional Tribunal's case law indicates that Article 64(1) and (2) of the Constitution lays down the principle of equal protection of property and other property rights for all. According to the Tribunal, 'other property rights' also include the right to rent residential premises and other rights relating to premises used to meet housing needs. Each of these rights, both of owners (landlords) and tenants, shall enjoy constitutional, though not identical, protection. There is usually a collision of these interests; however, treating this conflict simplistically by assuming that providing a certain degree of protection to one party must automatically reduce the protection of the other would be an oversimplification. The Constitutional Tribunal is fully aware of the difficulty in balancing the justified interests of owners and tenants and in finding the most appropriate solutions for these relations. This is especially true in the Polish context, where owners' rights were not respected for a long period, and the so-called public management of housing premises was in force for decades. This, along with other political and economic factors, led to a degradation of housing conditions unprecedented in Western European countries, the effects of which continue to impact not only owners but also tenants.[11]

'Broniowski przeciwko Polsce wyrok ETPC z dnia 22 czerwca 2004 r., skarga nr 31443/96', in: Nowicki, M.A., *Nowy Europejski Trybunał Praw Człowieka. Wybór orzeczeń 1999–2004*, Zakamycze, 2005, p. 1224.

[11] Constitutional Tribunal judgment of 19 April 2005, (K 4/05) https://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=3858&dokument=355 [accessed on 3 September 2024]; Constitutional Tribunal judgments of 12 January 2000 (P 11/98) https://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=2849&dokument=535 [accessed on 3 September 2024]; and 10 October 2000, (P 8/99), https://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=2841&dokument=1155 [accessed on 3 September 2024].

As the Constitutional Tribunal has held, it is the responsibility of the legislator to strive to harmoniously shape the legal position of owners and tenants so that it is possible to achieve the desired complementarity of these relations, rather than a relationship characterised by inevitable antagonism. The fees for the use of premises, including rents, are particular exponents of these relations. They should ensure that landlords cover the costs of maintaining and renovating buildings, as well as provide a return on capital (depreciation) and a fair profit, as statutory provisions cannot nullify one of the basic rights of ownership, which is to derive benefits from property.[12] At the same time, according to the Constitutional Tribunal, it is also necessary to take into account the justified interest of a tenant (lodger) and to create real mechanisms for their protection against the abuse of law by landlords. It is essential to build instruments that will support tenants who are in more difficult financial and life situations. This should not, as has occurred in the past, be done primarily at the expense of landlords, but should instead rely mainly on the deployment of special public funds.[13] One of such basic conditions for achieving the necessary balance between the protection of owners' rights and ensuring a secure situation for tenants in difficult circumstances is appropriate compensation.

ANALYSIS OF THE NATIONAL AND ECTHR CASE LAW

The ECtHR and Constitutional Tribunal case law imply the need to strike a 'fair balance' between the needs of the general interest of the community and the requirements for the protection of fundamental rights of individuals. At the national level, when resolving compensation disputes concerning damage caused by the failure to provide social housing to an evicted tenant, courts generally do not question the municipality's liability for damages. However, issues related to the award of compensation are problematic, mainly in the procedural aspect, i.e., proving the fact of sustaining damage. In accordance with Article 14(1) and (6) of the Act on the Protection of Tenants, Housing Resources of Municipalities, and on the Amendments to the Civil Code,[14] in the judgment ordering the vacation of premises, the court shall decide on the right to conclude a social housing lease

[12] Constitutional Tribunal judgment of 19 April 2005, (K 4/05).

[13] Constitutional Tribunal judgments of: 19 April 2005, (K 4/05); 12 January 2000 (P 11/98); and 10 October 2000, (P 8/99). In the judgment of 12 January 2000 P11/98, the Constitutional Tribunal assessed the situation in the light of the Convention and stated that the questioned system of rents regulation violated Article 1 of Protocol No. 1. The Constitutional Tribunal, also in the judgment of 19 April 2005, indicated many serious flaws of the system in force and noted that Act of 2001 in its current version 'does not provide for a satisfying and coherent mechanism balancing landlords' and tenants' interests'. In this area, the Constitutional Tribunal reminded the authorities that there was an urgent need to introduce provisions under which, after dozens of years of subsidising the State's housing policy, landlords would be able to earn 'a decent profit' from their property, and emphasised that the right to generate profit is one of the basic elements of ownership rights. However, the authorities have not taken any steps to adopt those suggestions up to now.

[14] Act of 21 June 2001 on the Protection of the Rights of Tenants, Housing Resources of Municipalities, and on the Amendments to the Civil Code, Journal of Laws 2002, No. 71,

agreement or on the lack of such a right in relation to the person subject to that order. The obligation to provide social housing rests with the municipality where the premises in question are located. When ruling on the right to conclude a social housing lease agreement, the court shall order the suspension of the execution of the decision to vacate the premises until the municipality submits an offer of a social housing lease agreement.

According to Article 18(1) and (2) of the Act, persons occupying premises without legal title are obliged to pay compensation every month until they vacate the premises. This means that, if the court rules to suspend the execution of the order to vacate the premises until the municipality provides social housing, the persons without legal title to the premises shall pay compensation covering the rent or other fees for the use of the premises that they would be obliged to pay if occupying premises from the stock of housing of the municipality under a social housing lease agreement. In this way, the legislator seeks to protect the rights of owners and ensure protection against eviction onto the street. However, the municipality is obliged to cover the difference between the compensation referred to in paragraph 3 and the compensation paid by the tenant. Under Article 18(5) of the Act, if the municipality fails to provide social premises to a person entitled to conclude a social housing agreement based on a court judgment, the owner has the right to claim compensation from the municipality in accordance with Article 417 of the Civil Code (Article 18(3a) of the Act). The owner's claim for compensation against the municipality provided for in Article 18(5) of the Act shall cover compensation for damage in full.[15]

Courts classify this type of claim as compensation based on Article 417 § 1 of the Civil Code. According to Article 417 § 1 CC, the State Treasury, a local government unit, or another legal person exercising authority by virtue of law shall be liable for damage caused by an unlawful act or inactivity in the exercise of public authority. Pursuant to this provision, the municipality is obliged to pay compensation only if the owner proves that they suffered damage as a result of the occupation of their premises by tenants who did not have legal title.[16]

As the Supreme Court indicated in the resolution of 7 April 2006, the claim of the owner of premises against the municipality referred to in Article 18(4) [currently Article 18(5)] of the Act of […] 2001 […] is a claim for damages. Pursuant to this provision, the municipality is obliged to pay compensation only if the owner proves that they suffered damage as a result of the occupation of their premises by a tenant without legal title. This type of damage involves lost profits due to the owner's inability to use their premises. The Supreme Court held in two resolutions: of 21 January 2011, III CZP 120/10,[17] and of 21 January 2011, III CZP 116/10,[18] that

item 733; Krzekotowska, K., Malinowska-Wójcik, M., *Ochrona praw lokatorów i mieszkaniowy zasób gminy. Komentarz*, 2nd ed., Lex 2021, commentary to Article 18 [accessed on 7 February 2024].

15 Krzekotowska, K., Malinowska-Wójcik, M., *Ochrona praw*…, op. cit.

16 Thus in the Supreme Court resolution of 7 April 2006, III CZP 21/06, Biul. SN 2006/4.

17 The Supreme Court resolution of 21 January 2011, III CZP 120/10, LEX No. 685563.

18 The Supreme Court resolution of 21 January 2011, III CZP 116/10, LEX No. 685372.

the municipality may be liable to the owner of premises under Article 417 CC for damage caused by failure to provide temporary social housing.

Furthermore, in the resolution of 13 December 2011, III CZP 48/11, the Supreme Court judged that 'the municipality shall be liable to the owner of housing premises under Article 417 § 1 CC for damage occurring in the period when Article 1046 § 4 CCP was in force in the wording adopted by the Act of 2 July 2004 amending the Act: Code of Civil Procedure and some other acts (…) as a result of failure to indicate, at the request of a bailiff, a temporary social housing for a debtor who is obliged to vacate, empty, and hand over the premises.'[19] The Supreme Court found that eviction from residential premises without offering the evicted person any housing is inhuman and cannot be permitted by law. For this reason, Article 1046 § 1 CCP provides for an obligation to provide the evicted debtor with temporary accommodation.[20]

It is also worth noting that the Constitutional Tribunal indicated in its judgment of 8 April 2010, P 1/08,[21] that as a result of an eviction judgment with the right to lease social housing, trilateral relationships are created between the owner of the premises, the evicted persons, and the municipality obliged to provide social premises. Persons entitled to lease social accommodation should be provided with it without delay. Moreover, premises subject to vacancy pursuant to an eviction judgment shall perform the function of premises leased by the former tenants under the social housing agreement until the municipality fulfils the obligation imposed by the court. Consequently, to enable the premises' function referred to by the Constitutional Tribunal to be performed for the former tenant waiting for social accommodation, the amount of compensation determined in Article 18(3a) of the Act was adjusted to correspond to the amount of rent for a social housing lease. However, the obligation to cover the difference between the fees established by the owner and the amount of social rent rests on the municipality that is obliged to provide social housing premises.[22]

On the other hand, the doctrine indicates that the principle of civil liability of the municipality should not be derived from Article 18 of the Act but from the general principles of the Civil Code, i.e. Article 417 § 1 and Article 363 § 2 CC. The municipality's failure to provide replacement accommodation constitutes an improper exercise of public authority, resulting in damage to the creditor of the lessee (owner of the premises). Thus, compensation for damage should cover the losses incurred and lost profits. In practice, it is possible to claim compensation equal to the rent that could have been collected from the premises that were not vacated from the date of

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[19] The Supreme Court resolution of 13 December 2011, III CZP 48/11, LEX No. 1070592.

[20] The Supreme Court judgments of: 12 September 2003, I CK 51/02, MoP 2007/16, item 901; and 5 August 2004, III CK 332/03, MoP 2007/16, item 901, as well as the Supreme Court judgments of: 26 March 2003, II CKN 1374/00, LEX No. 78829, and 28 April 2005, III CK 367/04, Biul. SN 2005/7, item 14.

[21] The Constitutional Tribunal judgment of 8 April 2010, P 1/08, Journal of Laws, item 488.

[22] Krzekotowska, K., Malinowska-Wójcik, M., *Ochrona praw*…, op. cit., commentary to Article 18.

the submission of an application for the provision of temporary accommodation to the municipality until the date of the actual eviction.[23]

It is also worth pointing out that the ECtHR has already examined this remedy in the context of general measures adopted at the national level regarding persons affected by the systemic problem identified in the ECtHR pilot judgment in the case of *Hutten-Czapska v. Poland*[24] and the judgment in the case of the *Association of Real Property Owners in Łódź and others v. Poland*.[25] Based on these cases concerning the systems of monitoring the levels of rent, the Court noted that the new rules in Article 18(5) of the Act of 2001, extending the scope of civil liability of municipalities for failure to provide protected tenants with social accommodation, enabled owners of premises to recover compensation for losses incurred on account thereof.

In the case of *Wyszyński v. Poland*, the Court found that allowing the tenant to remain in the applicant's apartment for more than four and a half years after the eviction order must be considered an interference with the applicant's property rights.[26] The Court held that the interference in question was, nevertheless, in accordance with national law and pursued a legitimate objective, namely the protection of the public interest and the need to counter evictions 'onto the street'. Although the Court does not question the existence of a clear provision in the Act of 2001 providing for the right to compensation if the municipality fails to provide an entitled person with social accommodation, the claim based on that provision requires that all conditions of eligibility for compensation be fulfilled.

The ECtHR also judged similarly in other similar cases: *Wasiewska v. Poland*,[27] *Strzelecka v. Poland*,[28] and *Kołpaczewska v. Poland*.[29] The Court found the applications to be inadmissible because the applicants failed to exhaust the more effective domestic remedies available to them, namely an appellate measure clearly provided for in Article 18(5) of the Act of 2001. Moreover, in accordance with the Court's case law, a claim lodged against an individual cannot be treated as a remedy against an act issued by the State. Bearing in mind that applicants are required to use 'any procedural means that might prevent a breach of the Convention', the Court stated

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[23] Ibidem; Dziczek, R., 'Komentarz do ustawy o ochronie praw lokatorów, mieszkaniowym zasobie gminy i zmianie Kodeksu cywilnego', in: Dziczek, R., *Ochrona praw lokatorów. Dodatki mieszkaniowe. Komentarz. Wzory pozwów*, LEX 2020, commentary to Article 18.

[24] ECtHR judgment of 22 February 2005, *Hutten-Czapska v. Poland*, op. cit.

[25] Ibidem.

[26] ECtHR judgment of 24 March 2022, *Wyszyński v. Poland*, application no. 66/12, https://hudoc.echr.coe.int/eng?i=001-216357 [accessed on 3 September 2024].

[27] ECtHR decision of 2 December 2014, *Wasiewska v. Poland* (dec.), decision no. 9873/11, https://hudoc.echr.coe.int/eng?i=001-150572 [accessed on 3 September 2024].

[28] ECtHR decision of 2 December 2014, *Strzelecka v. Poland* (dec.), no. 14217/10, paragraph 44, https://hudoc.echr.coe.int/eng?i=001-150561 [accessed on 3 September 2024].

[29] ECtHR decision of 6 December 2016, *Kołpaczewska v. Poland* (dec.), no. 10872/11, https://hudoc.echr.coe.int/eng?i=001-170488 [accessed on 3 September 2024]. In the case, the applicant stated that she was not a lawyer herself and she acted upon the advice she had received from the municipality. The Court held that even if the applicant had been incorrectly informed by the municipality, the District Court, in its judgment of 9 September 2010, drew her attention to the fact that she was entitled to seek compensation pursuant to Article 18(5) of the Act of 2001 directly from the municipality. However, the applicant did not use this appellate measure and lodged her application directly to the Court.

that the applications were inadmissible for failure to exhaust domestic remedies in accordance with Article 35(1) and (4) of the Convention.

Therefore, what is of crucial importance in such cases is not the lack of an appropriate remedy but rather the failure to provide appropriate damages during the compensation proceedings. By guaranteeing such compensation, the State ensures that a 'fair balance' is struck between the demands of the general interest of the community and the requirements of the protection of an individual's fundamental rights.[30]

COMPENSATION FOR THE LANDLORD FROM THE MUNICIPALITY FOR FAILURE TO PROVIDE SOCIAL HOUSING

The issue of fair compensation for the landlord for failure to provide social housing to an evicted tenant is an important issue, as confirmed by the current Strasbourg Court case law.[31]

In national law, Article 361 § 2 CC lays down the principle of full compensation for property damage, both in terms of loss and lost profits.[32] Loss (*damnum emergens*) includes a decrease in assets or an increase in liabilities of the aggrieved party, i.e., actual damage to the property they own at the time of the event for which responsibility was assigned to a given entity. In turn, lost profit (*lucrum cessans*) covers that part of the property of the aggrieved party that did not increase their assets or decrease their liabilities, and this effect would have occurred if the causative event for which responsibility was assigned to a given entity had not taken place.[33]

It is assumed in the doctrine that the occurrence and amount of damage should be determined using the differential method, which requires assessing damage as the difference between the actual state of the aggrieved party's property at the time it is determined and a hypothetical state that would exist if the causative

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[30] ECtHR judgment of 22 February 2005, *Hutten-Czapska v. Poland*, op. cit.

[31] ECtHR judgment of 24 March 2022, *Wyszyński v. Poland*, op. cit.

[32] Czachórski, W., 'Ustalenie wysokości odszkodowania według przepisów kodeksu zobowiązań', *Nowe Prawo*, 1958, No. 4, p. 54, and No. 5, p. 24; Czachórski, W., *Zobowiązania. Zarys wykładu*, Warszawa, 1974, p. 71 et seq.; Ohanowicz, A., *Zobowiązania. Zarys według kodeksu cywilnego. Część ogólna*, Warszawa–Poznań, 1965, p. 74 et seq.; Szpunar, A., 'Zakres obowiązku naprawienia szkody', *Państwo i Prawo*, 1960, No. 1, p. 20; Szpunar, A., *Ustalenie odszkodowania w prawie cywilnym*, Warszawa, 1973, p. 218 et seq.; Szpunar, A., 'Rozważania nad odszkodowaniem i karą', *Państwo i Prawo*, 1974, No. 6; Winiarz, J., *Ustalenie wysokości odszkodowania*, Warszawa, 1962; Dąbrowa, J., 'Odpowiednie ograniczenie rozmiarów obowiązku naprawienia szkody na tle kodeksu cywilnego', *Państwo i Prawo*, 1968, No. 1, p. 91 et seq.

[33] Czachórski, W., *Prawo zobowiązań w zarysie*, Warszawa, 1968, p. 118; Radwański, Z., Olejniczak, A., *Zobowiązania – część ogólna*, Warszawa, 2012, nb 233; Szpunar, A., 'Ustalenie odszkodowania według przepisów kodeksu cywilnego', *Nowe Prawo*, 1965, No. 4, p. 334 et seq.; Kaliński, M., *Szkoda na mieniu i jej naprawienie*, Warszawa, 2014, p. 188 et seq., Nesterowicz, M., in: Nowicka, A. (ed.), *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*, Poznań, 2005, p. 189 et seq., Kaliński, M., in: Olejniczak, A. (ed.), *System Prawa Prywatnego. Tom 6. Prawo zobowiązań – część ogólna*, Warszawa, 2009, p. 11.

event had not occurred.[34] Its characteristic feature consists of taking into account all consequences of a given event for the aggrieved party's property, i.e., not only direct effects on particular assets but also further consequences for all assets constituting the aggrieved party's property. In turn, the determination of damage in the form of *lucrum cessans* requires demonstrating a high degree of probability of the loss of benefits in the given case.[35]

As indicated in the doctrine, it is difficult to demonstrate this kind of damage and its amount. Such damage is always hypothetical in nature and cannot be fully verified. However, the aggrieved party must demonstrate it with such high probability that, in the light of life experience, it is justified to assume that the loss of profit really occurred.[36] To determine the occurrence of damage and its amount, the actual state of the property after the causative event is compared with the hypothetical state, i.e., the state that would exist if the causative event had not occurred. In other words, the state of property before and after the harmful event is examined to detect the difference in the state of property (the so-called 'differential method').[37] Although the determination of damage in the form of lost profit is hypothetical in nature, the aggrieved party must demonstrate it with such high probability that it would justify, in the light of life experience, the assumption that the loss of profits actually occurred.[38]

Thus, in light of the national case law, it can be concluded that courts require that the loss of profit should be proved at a high level of probability, i.e., one that appears to be a natural consequence of an ordinary cause-and-effect relationship and not a result of extraordinary measures or coincidences,[39] but is almost certain. As the Supreme Court points out, damage in the form of *lucrum cessans* is always hypothetical in nature. What determines such damage is a high level of probability, bordering on certainty, of obtaining specific profits if the event causing the damage had not occurred. This distinguishes the obligation to compensate for damage in the form of lost profit from so-called potential damage, which consists in the loss of opportunity to obtain certain revenues. In other words, a claim for lost profits may be accepted only if the aggrieved party demonstrates, to a degree bordering

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[34] Cf. Kaliński, M., in: Olejniczak, A. (ed.), *System Prawa Prywatnego…*, op. cit., p. 82 et seq.; Duży, A., 'Dyferencyjna metoda ustalania wysokości szkody', *Państwo i Prawo*, 1993, No. 10, pp. 55–59; Jastrzębski, J., 'Dyferencyjna metoda ustalania szkody w sprawach reprywatyzacyjnych – krytyczne uwagi na tle orzecznictwa Sądu Najwyższego', *Przegląd Sądowy*, 2016, No. 3, pp. 7–17.

[35] Olejniczak, A., Kidyba, A. (eds), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część ogólna, Komentarz do art. 361*, 2nd ed., LEX 2014, Appellate Court's judgment of 15 July 2015, I ACa 483/15; Koch, A., *Metodologiczne zagadnienia związku przyczynowego w prawie cywilnym*, Poznań, 1975, p. 48 et seq.

[36] Fuchs, B., 'Komentarz do art. 361 k.c.', in: Fras, M., Habdas, M. (eds), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, Warszawa, 2018, Lex [accessed on 7 February 2024].

[37] Fuchs, B., 'Komentarz do art. 361 k.c.', in: Fras, M., Habdas, M. (eds), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, Lex version, [accessed on 7 February 2024].

[38] Cf. Supreme Court judgment of 3 October 1979, II CR 304/79, OSNCP 1980, No. 9, item 164, with a gloss by Szpunar, A., *Państwo i Prawo*, 1981, No. 11–12, p. 142.

[39] Judgment of the Appellate Court in Gdańsk of 24 March 2021, V ACa 628/20, LEX No. 3280637.

on certainty, that they would have obtained those profits if the event that gave rise to the obligation to pay compensation had not occurred.[40]

In another judgment, the Supreme Court also refers to the demonstration of profits to an extent 'bordering on certainty so that, assessing the matter reasonably, one can state that the applicant would almost certainly gain profits within the meaning of Article 361 § 1 CC if the event for which the perpetrator of the damage is responsible had not occurred.'[41]

As indicated above, based on the interpretation of the provisions concerning compensation for damage, a court may find it difficult to recognise the fact of suffering damage and to prove its amount. In the Strasbourg Court case law, cases of this type, including their procedural aspects, are considered in the context of respect for the guarantees resulting from Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. This issue was the subject of the ECtHR pilot judgment in the case of *Hutten-Czapska v. Poland*.[42] The Court found that both the case of *Broniowski* and the case of the applicant, Hutten-Czapska, revealed the existence of a shortcoming in the Polish legal order as a consequence of which a whole class of individuals have been or are still denied the peaceful enjoyment of their possessions. This led to the statement that 'the deficiencies in national law and practice (…) may give rise to numerous subsequent well-founded applications.' Moreover, in both cases, the violation of law has originated in a systemic problem connected with the malfunctioning of domestic legislation and practice, caused by the State's failure to resolve the problem. The fact is that the applicant could not regain her property or obtain a decent rent for many years, not because of a defective judgment or decision but because of defective legislation.[43]

In the case of *Wyszyński v. Poland*,[44] in which the applicant did not obtain compensation from the municipality for failure to provide social housing based on the national law, the Court rightly pointed out that the courts had assumed that the applicant failed to prove that the damage he had suffered was a normal consequence of the municipality's unlawful inactivity regardless of the fact that two expert opinions were obtained in the course of the proceeding in this case. The opinions outlined how

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[40] Supreme Court judgment of 22 March 2019, IV CNP 43/17, LEX No. 2639461; Supreme Court judgment of 29 April 2015, V CSK 453/14, LEX No. 1675447; Supreme Court judgment of 23 October 2014, I CSK 609/13, OSNC 2015/10, item 122; Supreme Court judgment of 21 June 2011, I CSK 598/10, LEX No. 863906; Supreme Court judgment of 26 January 2005, V CK 426/04, LEX No. 147221; Supreme Court judgment of 10 April 1997, II CKN 92/97, LEX No. 1227958. Banaszczyk, Z., in: Pietrzykowski, K. (ed.), *Kodeks cywilny. Tom I. Komentarz do art. 1–449[10]*, Warszawa, 2011, Article 361, nb 2–3; Dybowski, T., in: Radwański, Z. (ed.), *System prawa cywilnego. Tom III. Część 1. Prawo zobowiązań – część ogólna*, Wrocław–Warszawa, 1981, p. 255; Kaliński, M., *Szkoda na mieniu…*, op. cit., p. 373 et seq.; Koch, A., *Związek przyczynowy jako podstawa odpowiedzialności odszkodowawczej w prawie cywilnym*, Warszawa, 1975, p. 166 et seq.

[41] Supreme Court judgment of 19 June 2008, V CSK 19/08, unpublished.

[42] ECtHR pilot judgment of 22 February 2005, *Hutten-Czapska v. Poland*, op. cit., ECtHR decision of 8 March 2011, *The Association of Real Property Owners in Łódź and others v. Poland* (dec.), application no. 3485/02, paragraphs 70 and 72, ECHR 2011, https://hudoc.echr.coe.int/eng?i=001-104329 [accessed on 3 September 2024].

[43] ECtHR pilot judgment of 22 February 2005, *Hutten-Czapska v. Poland*, op. cit.

[44] ECtHR judgment of 24 March 2022, *Wyszyński v. Poland*, op. cit.

much rent the applicant might expect if he rented out the flat on the open market. The first opinion took into account the state of the flat as it stood at the time, while the calculations in the second opinion were based on the assumption that the flat would be renovated in due course; the applicant had made clear his intention to renovate the flat before renting it out. The court held that on the basis of the provision relied on by the applicant, compensation could only be awarded if the applicant could prove that all relevant conditions had been met, that is, the existence of a damage, its exact amount, and the existence of a causal link between the event in question and the damage incurred. The court further considered that the applicant failed to prove that he would have managed to find a new tenant from whom he would receive a rental income, even if the tenant had moved out. The court underlined that the flat was in need of renovation and, in any event, it would not be rented out immediately after the tenant left it. The applicant lodged a cassation appeal against the unfavourable judgment of the district court. He relied, among other things, on the fact that in other sets of proceedings against the Municipality of Poznań, with the same factual circumstances, the courts had in the past ruled in favour of the applicants.

Although the Court pointed out that it is in the first place for the national authorities, and notably the courts, to interpret domestic law, it held that the requirements that the Polish courts expected the applicant to have met, namely to prove that he would renovate the flat and rent it, were in fact very difficult to fulfil and that their imposition amounted to an excessive burden, which in consequence led to the dismissal of his compensation claim. Thus, the Court was right to recognise that the requirements imposed on the applicant by domestic courts in the course of the proceedings for compensation essentially deprived the applicant of the right to be redressed for the damage he had suffered. There was no 'fair balance' struck between the means employed and the aims sought to be realised. The foregoing considerations were sufficient to enable the Court to conclude that there has been a violation of Article 1 Protocol No. 1 to the Convention.

In the case *Broniowski v. Poland*, concerning the property beyond the Bug River, the Court clearly stated that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportional interference, and a total lack of compensation can be justified only in exceptional circumstances.[45] In the application to the Court, Broniowski alleged that the Polish State failed to react to, and to resolve through legislative measures, the problem of the insufficient amount of real property to satisfy the housing needs of the former owners of property beyond the Bug River and it introduced laws that made it almost impossible for them to obtain real property from the State. He also claimed that by abandonment

[45] ECtHR judgment of 22 June 2004, *Broniowski v. Poland*, application no. 31443/96, https://hudoc.echr.coe.int/eng?i=001-61828 [accessed on 3 September 2024]. In the case *Broniowski v. Poland*, which concerned the issue of compliance of the statutory regime concerning a big number of people (circa 80,000) with the Convention, the Grand Chamber held for the first time that there was a systemic violation and defined it as a situation, where 'the facts of the case disclose the existence, within the Polish legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied the peaceful enjoyment of their possessions [in accordance with the Convention]' and where 'the deficiencies in national law and practice identified in the applicant's individual case may give rise to numerous subsequent well-founded applications.'

of sale of real property and hindering participation in tenders, the authorities practically prevented him from upholding his claim (Article 1 Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms). However, due to the fact that Broniowski's family had received a mere 2% of the compensation due under the legislation as applicable before the entry into force of the Protocol No. 1, the Court found no cogent reason why such an insignificant amount should *per se* deprive him of possibility of obtaining at least a proportion of his entitlement on an equal basis with other former Bug River residents.

The above analysis of the judgments implies that the requirements for demonstrating damage cannot be interpreted too strictly. As the Supreme Court pointed out in the judgment of 12 March 2013, III PK 64/12,[46] it cannot be required that the amount of the presumed profit be demonstrated with certainty (which is impossible) or with a probability bordering on certainty. The distribution of the burden of proof is related to the degree of risk that the event providing profit will not occur. In typical and repetitive situations in which the expected profits usually materialise, the risk of failing to obtain them is small; therefore, the burden of proof on the person claiming compensation cannot be too rigorous. All factual and legal circumstances should be assessed, and if necessary, the court should use the option provided for in Article 322 of the Code of Civil Procedure.[47]

DE LEGE FERENDA CONCLUSIONS

The above analysis of the national courts' judgments indicates that courts are too rigorous in their interpretation of the concept of lost profits in cases concerning landlords' claims for compensation from municipalities for their failure to provide social housing. This practice results in a violation of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

The research on selected court judgments also proves that the courts did not present comprehensive justification for dismissing claims due to failure to demonstrate the fact of damage and its amount. The courts also required that the landlords claiming compensation from the municipalities demonstrate the loss of profit with a level of probability bordering on certainty, which is a challenging task and usually resulted in the dismissal of the claim.

Therefore, it would be advisable to lower the evidentiary requirements for landlords in demonstrating the loss of *lucrum cessans*. Such liberalisation may include the possibility of wider use of factual presumptions (Article 231 CCP) or lending credibility by courts within the assumed hypothetical factual state. *De lege ferenda*, to simplify the evidentiary proceedings in such cases, it would be advisable to reverse the burden of proof to ensure effective protection of the owners' rights in accordance with Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. In this particular case, derogation from

[46] Supreme Court judgment of 12 March 2013, III PK 64/12, LEX No. 1360271.
[47] Ibidem.

the general principle of *onus probandi* would mean that under Article 243 of the Code of Civil Procedure, the observance of the detailed provisions concerning evidentiary proceedings is not necessary whenever statute provides for substantiation instead of proof. Thus, the municipality, when questioning the fact of damage, would be obliged to prove that the damage is overstated or that it did not occur.

In order to overcome the defective practice of the courts, clear legislative intervention is necessary. It would also be appropriate to make an explicit procedural reference to the application of Article 322 CCP, pursuant to which, in cases concerning compensation for damage, income, return of unjust enrichment, or benefit under a life annuity contract, if a court finds that precise proof of the amount of the claim is not possible, extremely difficult, or obviously pointless, it may award an appropriate sum in accordance with its assessment based on the analysis of all circumstances of the case.

A narrow interpretation of this provision still prevails in case law, as it is considered that in cases concerning compensation, the principle is that the plaintiff is obliged to demonstrate the damage suffered and its amount (Article 6 of the Civil Code). Only when the damage is demonstrated, but proving its exact amount is impossible or too difficult, can Article 322 CCP be applicable.[48] *De lege ferenda*, it would be advisable to broaden the scope of this provision and apply it in cases concerning the demonstration of the fact of damage suffered, not just the amount.

The recommendations made are further strengthened by the arguments derived from the ECtHR judgment in the case of *Wyszyński v. Poland*, where the courts assessed evidentiary requirements too strictly and refrained from utilising possibilities arising from, for example, factual presumptions, principles of life experience, or the application of Article 322 CCP, as well as drawing logical conclusions from expert opinions.

Moreover, it would be advisable to abandon the excessively rigorous interpretation and expectations of courts regarding the demonstration of damage by applicants, including the expectation that the damage must be shown as a normal consequence of the municipality's inactivity to an extent bordering on certainty.[49] As a result,

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[48] Traditionally, the requirement for the application of this provision in a case concerning compensation for damage is the occurrence of damage; Supreme Court ruling of 23 May 1980, III CRN 51/80, LEX No. 8237; Supreme Court judgment of 12 October 2007, V CSK 261/07, LEX No. 497671.

[49] The courts argued that the applicant did not prove that he could have rented out the apartment to another person and make a profit from it, but also failed to prove when the apartment would have been ready for lease as it was necessary to consider that it required renovation. Therefore, even though the courts recognised that the municipality's failure to provide social housing to a tenant constitutes an omission that can be grounds for compensatory liability, they assessed the normal consequences of the damage too rigorously. The District Court found that the applicant did not prove that, if the municipality had provided social housing, he would have received rent for his apartment, as he failed to prove that he would have rented it out. Furthermore, the court stated that even if it were assumed that the apartment would have been renovated and leased, the applicant did not indicate the date from which he would have received a rent. The damage claimed might have occurred only after the completion of renovation works. The ECtHR found that the requirements that the District Court expected the applicant to have met, as formulated in the judgment of this court, namely to prove that he would renovate the flat, how long the renovation works would take and that he would rent the flat after renovation were in fact very difficult to fulfil and that their imposition amounted to an excessive burden,

although the national provisions in force allow for awarding compensation in the event of a municipality's failure to provide social housing, court practice imposes excessively stringent evidentiary requirements.[50] Refusal to award compensation in cases where the municipality's inactivity is demonstrated constitutes a violation of Article 1 of Protocol No. 1. Regardless of the interference with the right of ownership, the applicants cannot receive adequate compensation for the period during which tenants continue to occupy premises despite the eviction order. Therefore, in such cases, there is a discrepancy between the scope of evidentiary requirements expected by national courts and the guarantee of effective judicial protection.

To sum up, courts attach too much importance to procedures, forgetting that a civil proceeding is not an end in itself but is aimed at materialising and exercising substantive rights. The above-presented cases concerning compensation clearly show that they may involve violations of ownership rights or the peaceful enjoyment of possessions.[51] The system of civil procedure law cannot be perceived and applied in isolation from constitutional and conventional principles. It must not be forgotten that the aim of a civil proceeding is to adjudicate while maintaining respect for human rights guarantees.[52]

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which, in consequence, led to the arbitrary dismissal of the applicant's compensation claim. ECtHR judgment of 24 March 2022, *Wyszyński v. Poland*, op. cit.

[50] As to the amount of damage, the Court notes that in the course of the national proceeding two expert opinions were produced. They specified the amount of damage that the applicant could expect before and after the renovation of the apartment. In spite of this fact, the District Court held that the applicant did not prove whether and from what time he would have been able to obtain the rent that the expert calculated for the lease after renovation. However, the justification of the District Court judgment did not explain on what grounds the court refused to award compensation corresponding to the lower amount calculated for the lease of the apartment before renovation. ECtHR judgment of 24 March 2022, *Wyszyński v. Poland*, op. cit.

[51] Vollkommer, M., 'Einleitung', in: *Zöller. Kommentar zur Zivilproezessordnung*, 29th ed., Köln, 2010, p. 19.

[52] Łazarska, A., *Rzetelny proces cywilny*, Warszawa, 2012, p. 374 et seq.

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THE EXCLUSION OF RUSSIA FROM COUNCIL OF EUROPE: INITIAL REFLECTIONS ON THE EFFECTS

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Abstract

The new situation related to Russia's aggression against Ukraine led to Russia's exclusion from the Council of Europe and the European regional human rights protection system in March 2022. This article aims to examine the legal and political consequences of the Russian Federation's exclusion from the Council of Europe and the European human rights protection system. The research objective was achieved through the analysis of normative acts (hard law, soft law) of the Council, a review of domestic and foreign literature, and the analysis of statistical data provided by the Council and the European Court of Human Rights.

The article seeks to answer the following research questions: 1. What are the actual and potential consequences of excluding Russia from the Council for both Russia and other member states?, 2. What impact will Russia's exclusion from the Council of Europe and the European human rights protection system have on the citizens of Russia and those under its jurisdiction?

Membership in the Council of Europe entails mandatory participation in the European human rights protection system, based on the European Convention on Human Rights and the European Court of Human Rights. The primary consequences of Russia's exclusion from the Council are: 1. exclusion from the family of European states, 2. denunciation of the Convention and other agreements adopted within the organisation, and 3. the inability to file individual and interstate complaints against Russia.

Keywords: Council of Europe, Russia, human rights

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INTRODUCTION

This article aims to identify and provide an initial analysis of the effects of Russia's exclusion from the Council of Europe (CoE, the Council). The consequences of this event will vary for Russia and other member states. The paper outlines the origins and development of the organisation, followed by a discussion of the European regional human rights protection system and issues related to membership in the Council of Europe. Thus, the consequences of the Russian Federation's exclusion are examined.

Russia's exclusion from the Council and the European human rights protection system resulted from its unjustified aggression against Ukraine. This conflict, which should be termed a war, contravenes not only the European Convention on Human Rights (Convention, ECHR), but also international law. R. Bierzanek and J. Symonides accurately define 'war' as 'a state of armed struggle between states and as a counterpoint to a state of peace'.[1] Every war inevitably leads to violations of certain aspects of human life. The actions of the Russian military constitute a blatant violation of human rights. The concept of human rights is inherently ambiguous due to the multitude of perspectives in this field. It can be assumed that human rights are entitlements inherent to individuals solely by virtue of being human.[2] Crimes committed against civilians certainly infringe upon all or nearly all of the rights enshrined in the Convention and its additional protocols, which Russia, upon ratification and acceptance, had committed to upholding.

ORIGINS AND DEVELOPMENT OF THE COUNCIL OF EUROPE

The Council of Europe was established in May 1949 in London. The founding members were ten European countries: Belgium, Denmark, France, Ireland, the Netherlands, Luxembourg, Norway, Sweden, the United Kingdom, and Italy.

The Council's formation was preceded by the Congress of Europe, held in The Hague from 7 to 10 May 1948. During this congress, two concepts of European cooperation were developed. The first was a federative concept, inspired by W. Churchill's 1943 call for the creation of a 'United States of Europe'. This project was innovative and ahead of its time, but states were apprehensive about relinquishing some of their prerogatives to a central authority. The second concept, which gained broader approval, proposed cooperation between sovereign states at the governmental level. This form of collaboration did not raise significant concerns about the loss of sovereignty and thus received greater support among the participants.

Three resolutions were adopted during the congress as part of the work of the cultural, political, and economic and social committees. These are now collectively known as the 'Manifesto to Europeans'. The document outlines four demands:

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[1] Bierzanek, R., Symonides, J., *Prawo międzynarodowe publiczne*, Warszawa, 2009, p. 379.

[2] Kowalski, J., 'The right to water as a fundamental human right in Poland and worldwide', *International Journal of Human Rights and Constitutional Studies*, 2020, Vol. 7, No. 3, pp. 234–235.

1. free movement of persons, ideas, and goods; 2. adoption of a Charter of Human Rights; 3. creation of a Court of Justice with the authority to impose sanctions for non-compliance with the Charter; and 4. establishment of an Assembly representing all the countries of the continent. These demands were gradually fulfilled, some through the Council of Europe (e.g., the European Convention on Human Rights and the European Court of Human Rights), and others within the European Union (EU), e.g., the free movement of people and goods.

L. Griffith cites the desire to unite Western Europe to counteract the spread of communist ideology from the Eastern Bloc, as the primary reason for the Council's establishment. As a secondary goal, he notes promotion of Western values and their integration with human rights, in contrast to the lack of freedoms in Eastern Europe.[3] The creation of the Council was a response to the horrors of World War II and represented the first step towards European integration.

The objectives of the Council are set out in its Statute.[4] The preamble states that 'the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation.' By listing values such as justice, peace, and international cooperation at the outset, the Statute sets the main goal of the organisation and provides a 'roadmap' for achieving this goal.

It is often mistakenly assumed that the Council's activities are confined solely to the protection of human rights. This misconception stems from the robust human rights protection system established by the Council, which is based on the Convention and the European Court of Human Rights (ECtHR, Court). Although the protection of human rights is a dominant focus, it is not the only area of the Council's activity. Currently, the Council's work centres on three key areas: the protection of human rights, democracy, and the rule of law.

Accession to the Council occurs upon invitation from the Committee of Ministers, reflecting the Council's status as a conditionally open organisation. This means it is open to new members who meet specific formal and legal requirements, as set out in the organisation's Statute.

The admission of a state follows an accession procedure, and over time, mechanisms regulating the accession of new countries have evolved. These include the monitoring procedure and the accession procedure.

The accession of the Russian Federation to the Council of Europe was a lengthy and challenging process for both sides. In Russia's case, there were significant concerns regarding compliance with democratic standards and respect for human rights. The accession procedure was interrupted for six months due to the ongoing First Chechen War and the blatant human rights violations associated with this conflict.[5] It appears that Russia's admission to the Council in 1996 was motivated

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[3] Griffith, L., 'The Council of Europe, the European Convention on Human Rights and the Social Charter', in: McCann, G., Ó hAdhmaill, F. (eds), *International Human Rights, Social Policy and Global Development*, Bristol, 2020, p. 41.

[4] Statute of the Council of Europe, signed in London on 5 May 1949, ETS No. 1.

[5] See: Bowring, B., 'Russia's accession to the Council of Europe and human rights: compliance or cross-purposes?', *European Human Rights Law Review*, 1997, Vol. 6, pp. 628–643.

more by the desire to promote human rights in post-Soviet states than by Russia's actual fulfilment of the accession requirements.

Since its foundation in 1949, the Council of Europe has expanded to include new countries. Currently, the Council comprises 46 member states. Notably, among all the countries that have applied for membership, only Belarus's application has been rejected. The application submitted by Belarus in 1993 was suspended in 1998 due to a lack of progress in democratisation, human rights development, and the rule of law.[6]

EUROPEAN REGIONAL SYSTEM OF HUMAN RIGHTS PROTECTION

As an international organisation, the Council was a precursor in creating regional human rights protection systems. The vision for such a system emerged during the Hague Congress in May 1948. Following the Congress, resolutions were adopted that included the desire to establish a Charter of Human Rights (ECHR) and create a specialised Tribunal to supervise the implementation of its provisions.[7] Intensive work on the Convention culminated on 4 November 1950 in Rome, where its text was signed by ten member states of the Council. After securing the required number of ten ratifications, the ECHR entered into force on 3 September 1953. Currently, 46 countries (all Council of Europe member states) are parties to the ECHR.

The next step in establishing a European regional system for the protection of human rights was the creation of bodies to ensure compliance with the rights and freedoms set out in the Convention. The European Commission of Human Rights was established in 1955, and the European Court of Human Rights (ECHR) was established in 1959. In its case law, the Court was supported by the Committee of Ministers of the Council of Europe (the Committee).[8] This tripartite system functioned until 1998 when Additional Protocol No. 11[9] came into force. This reform, the most profound of the Strasbourg system to date, resulted in the dissolution of the European Commission of Human Rights, the removal of the Committee's *quasi*-judicial powers, and the transformation of the ECHR into a permanent court.[10] Under these changes, the ECHR was granted exclusive jurisdiction over individual complaints.

The Court, individual applications, interstate applications, and the enforcement mechanism collectively form the control mechanism of the Convention. Over the

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[6] Parliamentary Assembly, *Resolution 1671 (2009). Situation in Belarus*, adopted by the Assembly on 23 June 2009, https://pace.coe.int/pdf/c20caac0840755656eafa0a83dde01f5f8c71901001fa28a6789f68643de7282?title=Res.%201671.pdf [accessed on 26 August 2024].

[7] Robertson, A.H., Merrills, J.G., *Human rights in Europe: A study of the European Convention on Human Rights. Vol. 1*, Manchester, 1993, p. 5.

[8] Madsen, M.R., 'From Cold War instrument to supreme European court: The European Court of Human Rights at the crossroads of international and national law and politics', *Law & Social Inquiry*, 2007, Vol. 32, No. 1, p. 144.

[9] Additional Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, ETS No. 155, https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=155 [accessed on 26 August 2024].

[10] The European Commission of Human Rights ceased its activities on 31 October 1999.

seventy years of the ECHR, this mechanism has undergone numerous adjustments. The primary objective of the reforms introduced through additional protocols and non-protocol measures has been to maintain the effectiveness and efficiency of the entire control mechanism.[11]

The accession procedure for newly admitted countries and the requirements they must meet have also evolved. Currently, membership in the Council obligates states to accede to the Convention. In the early years of the Council and the convention system, there was no such requirement; this applied to both founding members and states already within the organisation. The obligation for states to join the ECHR developed over time, eventually merging Council membership with accession to the Convention. In this context, the organisation and the ECHR cannot be viewed separately. Article 58(3) of the Convention provides that 'Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.'

The signing of the ECHR by representatives of Russia took place on 28 February 1996, coinciding with the country's accession to the Council. However, the Russian Federation delayed the ratification and entry into force of the agreement by more than two years. It is worth noting the effects of the Convention ratification. Perhaps the most significant result for the Russian authorities was the unprecedented consent to external oversight of its activities. This situation was extraordinary, given that Russia, as a member of many international organisations and agreements, had never before agreed to limit its sovereignty in favour of other entities of international law.[12]

RUSSIA IN THE COUNCIL OF EUROPE

The Council of Europe is a conditionally open organisation, meaning that only states meeting specific requirements outlined in its Statute can be accepted. These conditions are set out in Article 3 and the preamble to the Statute, though not all are presented *expresis verbis*. The conditions for membership in the organisation are as follows:

- Representative and pluralistic democracy;
- The principle of the rule of law;
- Respect for fundamental human rights and freedoms;
- Sincere and substantial cooperation towards achieving the objective of the Council set out in Chapter I of the Statute;
- A European vocation and cultural identity;
- The peaceful nature of the candidate.[13]

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[11] Kowalski, J., 'Istota mechanizmu kontrolnego w porządku Europejskiej Konwencji Praw Człowieka', in: Jaskiernia, J., Spryszak, K. (eds), *System ochrony praw człowieka w Europie w czasie wyzwań pandemicznych*, Toruń, 2022, pp. 85–100.

[12] Busygina, I., Kahn, J., 'Russia, the Council of Europe, and "Ruxit," or Why Non-Democratic Illiberal Regimes Join International Organizations', *Problems of Post-Communism*, 2020, No. 67, pp. 64–77.

[13] Drzewicki, K., 'Triada czy sekstet? Kontrowersje wokół warunków członkostwa w Radzie Europy', in: Gajda, A., Grajewski, K., Rytel-Warzocha, A., et al. (eds), *Konstytucjonalizm polski:*

In addition to these conditions for acquiring membership, each member state is required to fulfil several obligations, such as ratification of the Convention, recognition of the Court's jurisdiction, and more prosaic ones, such as payment of membership fees. Member states are also obliged to comply with the judgments of the Court and to implement the settlements concluded before it. Alongside these duties, a member state also has certain powers, such as having representatives in the bodies of the organisation, as well as a judge in the ECtHR.

A member state may participate in decision-making on the functioning of the organisation and takes part in its work through its representatives. In the Committee of Ministers, each country has one representative. However, the number of representatives in the Parliamentary Assembly varies, ranging from 2 (for the smallest countries) to 18 (for the largest countries). The number of representatives is significant because it translates into voting power. Russia, as a large country, had 18 representatives in this body.

Failure by a member state to comply with its treaty obligations may result in suspension from membership or even exclusion from the Council. The Statute of the Council provides for the possibility for a state to leave the organisation under Articles 7 and 8. Article 7 addresses voluntary withdrawal from the organisation, where the member state notifies the Secretary-General of its decision. Article 8, on the other hand, concerns the exclusion of a state from the organisation when a member has seriously violated Article 3 of the Statute. In this situation, exclusion is preceded by the suspension of the member's rights and a call by the Committee of Ministers to withdraw from the organisation. Until January 2022, this had only occurred once. In December 1969, the Greek government decided to withdraw from the Council[14] following the takeover of power in Greece by the military junta of the so-called 'Regime of Colonels' in 1967. Greece was readmitted to the Council of Europe in 1974.

Fifty years after these events, it may have seemed that such a situation would not occur again. The idea of protecting human rights appeared to have taken strong root in the member states. Democracy and the rule of law were intended to be values common to all member states, serving as the foundation for the shared future of European countries. However, events that unfolded after 24 February 2022 demonstrated that this was not the case. The Russian Federation, one of the member states, launched an unprovoked armed attack on Ukraine, another member state. Russia's actions were a continuation of the aggression that began in 2014, when Russian troops illegally seized Crimea and the Luhansk and Donetsk regions.[15] In light of these developments, the reaction of the Council and the Court was resolute and immediate. On 25 February, the Committee of Ministers suspended the rights of the Russian Federation's representative in the organisation, with immediate effect in response to the invasion of Ukraine. Russia's actions were described by the

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refleksje z okazji jubileuszu 70-lecia urodzin i 45-lecia pracy naukowej profesora Andrzeja Szmyta, Gdańsk–Sopot, 2020, p. 495.

14 Turner, B., *The Statesman's Yearbook 2008: The Politics, Cultures and Economies of the World*, New York, 2007, p. 37.

15 Rokita, J., 'Przegrana wojna, wygrana rewolucja', *Horyzonty polityki*, 2014, Vol. 5, No. 12, pp. 149–164.

Committee of Ministers as 'a breach of peace of unprecedented magnitude on the European continent since the creation of the Council of Europe'.

Russia's actions clearly violated the standards of the Council of Europe, as well as the provisions of the Convention and other agreements that Russia had accepted as a member state. On 16 March 2022, the Committee of Ministers of the Council of Europe, during a special session, unanimously adopted a resolution on the exclusion of the Russian Federation from the Council of Europe, effective immediately. The adoption of the resolution was preceded by a strong opinion from the Parliamentary Assembly of the Council of Europe on 15 March 2022, which stated that Russia had committed serious violations of the Statute of the organisation.[16,17] All 216 members of the Parliamentary Assembly voted in favour of excluding Russia, with no votes against. On the same day, the Russian government informed the Secretary-General of the Council of Europe of its decision to withdraw from the organisation. As a result, Russia was excluded from the Council on 16 March 2022, and, pursuant to Article 58 of the Convention, which provides for a six-month notice period, Russia ceased to be a party as of 16 September 2022.[18]

By pursuing an imperial and aggressive policy towards neighbouring countries, Russia has caused problems for the Council of Europe since the beginning of its membership. In 2000–2001, the rights of the Russian delegation to the Parliamentary Assembly of the Council of Europe were suspended in response to numerous human rights violations associated with the Second Chechen War in Russia.[19] The Russian delegation was again suspended in 2014 after Russia's annexation of Crimea. In response, Russia accused the organisation of applying double standards to member states and suspended the payment of membership fees in 2017. At the same time, the country began signalling its willingness to leave the Council. After more than two years, the sanctions imposed on Russia were lifted, and the country resumed participation in the work of the Parliamentary Assembly of the Council of Europe.[20]

The annexation of Crimea, Donbas, and Luhansk in 2014, along with the earlier war with Georgia and armed intervention in Chechnya, signalled that Russia did not share the values of modern Europe. In addition to its foreign policy, Russia repeatedly challenged the judgments of the ECtHR, attempting to delegitimise the Court in the eyes of member states. During its membership, Russia frequently

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16 Resolution CM/Res (2022)2 of the Committee of Ministers on the cessation of the membership of the Russian Federation to the Council of Europe, adopted by the Committee of Ministers on 16 March 2022, https://rm.coe.int/0900001680a5da51 [accessed on 9 May 2023].

17 Parliamentary Assembly, *Opinion 300 (2022), Consequences of the Russian Federation's aggression against Ukraine*, adopted by the Assembly on 15 March 2022, https://pace.coe.int/en/files/29885/html [accessed on 9 May 2023].

18 Resolution CM/Res (2022)3 on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe, adopted by the Committee of Ministers on 23 March 2022, https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ee2f [accessed on 9 May 2023].

19 See Ziemblicki, B., 'Rosja jako strona Europejskiej konwencji praw człowieka', in: Jaskiernia, J., Spryszak, K. (eds), *Wyzwania dla europejskiego systemu ochrony praw człowieka u progu trzeciej dekady XXI wieku*, Toruń, 2021, pp. 804–822.

20 Zaremba, S., 'Powrót Rosji do Zgromadzenia Parlamentarnego Rady Europy', *Polski Instytut Spraw Międzynarodowych – Biuletyn*, 2019, No. 108(1856).

failed to comply with the judgments of the ECtHR. In 2017, it was estimated that Russia had not properly executed nearly 1,600 of more than 2,100 unfavourable judgments.[21] It should also be pointed out that in the case of unfavourable judgments of the ECtHR, the improper implementation of the judgment most often consisted in Russia limiting its actions to the payment of awarded compensation to the applicant without amending national legislation that was incompatible with the Council's standards.

Moreover, from the outset of its presence in the Council and the European human rights protection system, Russia withheld support for all draft amendments to the Convention. The most notable instance was its opposition to changes introduced by Additional Protocol No. 14, where Russia's resistance led to the adoption of a separate Protocol No. 14 bis specifically for this country.[22] This situation demonstrated how one state could paralyse the operation of the Council and the Convention's control system.

LEGAL AND POLITICAL CONSEQUENCES OF THE RUSSIAN FEDERATION'S WITHDRAWAL FROM THE COUNCIL OF EUROPE

The direct consequences of excluding Russia from the Council is that the country is prevented from influencing the organisation's functioning. This outcome is significant because Russia has been stripped of any influence over the actions undertaken by the organisation in relation to other member states and itself. With its departure from the Council, Russia lost its representation in the statutory bodies of the organisation, namely the Parliamentary Assembly and the Committee of Ministers. Additionally, by leaving the organisation, Russia also forfeited its representatives in the non-statutory body, the Congress of Local and Regional Authorities of Europe. Furthermore, Russia will have no influence over the election of the Secretary-General of the Council of Europe or the Commissioner for Human Rights of the Council of Europe. Interestingly, despite Russia's exclusion from the Council, a Russian judge continued to hold his mandate until 16 September 2022, serving in Section III of the Court. However, pursuant to the Court's resolution of 5 September 2022, the office of the judge representing the Russian Federation was dissolved.[23] The dissolution of this office also resulted in the termination of the posts of *ad hoc* judges representing Russia. In 2022, Russia had three such judges.

The effect of Russia's exclusion from the Council of Europe is the severance of cooperation between the excluded country and the other member states. It should be noted that the Council includes all countries that are also members of the EU. As

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[21] Zaremba, S., 'Rosja w Radzie Europy: skutki potencjalnych ustępstw', *Polski Instytut Spraw Międzynarodowych – Biuletyn*, 2018, No. 41(1614).

[22] Bowring, B., 'The Russian Federation, Protocol No. 14 (and 14 bis), and the Battle for the Soul of the ECHR', *Göttingen Journal of International Law*, 2010, Vol. 2, No. 2, pp. 605–613.

[23] Resolution of the European Court of Human Rights, Strasbourg, 5 September 2022, https://echr.coe.int/Documents/Resolution_ECHR_cessation_Russia_Convention_20220916_ENG.pdf [accessed on 9 May 2023].

a result, Russia has lost the opportunity to collaborate in many important areas of life. Considering Russia's relations with the EU and the economic sanctions imposed on it, the loss of Council membership has effectively excluded the country from the European community.

In addition to statutory and non-statutory bodies operating within the Council, there are several institutions functioning within organisations that are not formally part of the Council. These institutions perform various functions and undertake tasks related not only to human rights protection but also to other areas, such as combating corruption, supporting and promoting linguistic diversity in Europe, and financing social projects. Before 24 February 2022, Russia was a member of most of these bodies. After that date, in accordance with Resolution CM/Res (2022)3, Russia ceased to be a member of the following partial agreements:

- International Cooperation Group on Drugs and Addictions (Pompidou Group);
- Co-operation Group for the Prevention, Protection Against, and Organisation of Relief in Major Natural and Technological Disasters (EUR-OPA);
- European Support Fund for the Co-Production and Distribution of Creative Cinematographic and Audiovisual Works 'Eurimages';
- Enlarged Partial Agreement on Sport (EPAs);
- Enlarged Partial Agreement on Cultural Routes (EPA);
- Enlarged Partial Agreement on the Observatory on History Teaching in Europe;
- European Audiovisual Observatory.

Russia also ceased to be a member of the European Commission for Democracy through Law. However, it remained a member of the Group of States against Corruption, although the Committee of Ministers severely limited its participation.[24]

Another consequence of Russia's exclusion from the Council of Europe is its exit from the European regional system of human rights protection. As of 16 September 2022, Russia ceased to be a party to the ECHR and, consequently, to all its additional protocols. This means that Russia has lost both active and passive procedural and substantive standing before the ECtHR, rendering it unable to bring or defend cases in the Court. The Strasbourg Court retains jurisdiction over cases against the Russian Federation concerning acts or omissions that may constitute a violation of the Convention, provided these occurred before 16 September 2022. The Committee of Ministers continues to oversee the execution of judgments against Russia. The excluded state has the right to participate in Committee of Ministers' meetings when it supervises the enforcement of judgments in cases where Russia is the respondent state. However, Russia has been deprived of the right to participate in voting and decision-making.

In the current context, it can be assumed that Russia will not comply with the Court's judgments. It is important to note that neither the Court nor the Council possesses legal or political tools to compel Russia to comply with judgments rendered against it.

In practical terms, Russia's exit from the European system of human rights protection signifies a departure from the principles of human rights. Russia is expected to reinstate the death penalty, which is prohibited under the ECHR. It can

[24] Resolution CM/Res (2022)3, op. cit.

be anticipated that the rights and freedoms of Russian citizens and persons residing in areas under Russian jurisdiction will be restricted and potentially violated. This expectation is supported by the crimes committed by the Russian military in the occupied territories of Ukraine. Furthermore, changes in Russian legislation, including harsher penalties in the Criminal Code and the introduction of new categories of offences, are evident. Examples include severe prison sentences and fines for using the term 'war in Ukraine'. The introduction of prison sentences for individuals protesting against the aggression towards Ukraine constitutes a blatant violation of the freedom of speech and expression guaranteed by the ECHR.[25] The current legislation of the Russian Federation grossly violates virtually all the rights and freedoms set out in the Convention and the Additional Protocols.

CONSEQUENCES OF RUSSIA'S WITHDRAWAL FROM THE COUNCIL OF EUROPE FOR RUSSIAN CITIZENS AND PERSONS UNDER ITS JURISDICTION

The exclusion of Russia from the Council of Europe has significant consequences for its citizens, as well as for those under its jurisdiction. One of the most important outcomes of Russia's exclusion from the organisation and the European system of human rights protection is the inability to file individual complaints against the country. Consequently, Russian citizens and persons under Russia's jurisdiction have been deprived of the ability to assert their rights before the Court in Strasbourg. It is worth emphasising that Russia, with its population of 144 million, was the most populous member state. With Russia's departure from the Council, the number of persons subject to conventional protection decreased by 144 million.

Russia has historically had persistent human rights issues. It was hoped that the country's admission to the Council of Europe and its ratification of the ECtHR and additional protocols would improve this situation. Unfortunately, this has not been the case. Since joining the Council, Russia has opposed any proposed changes to the control mechanism and the catalogue of rights and freedoms. The entire period of Russia's membership in the organisation was characterised by tension in its relations with the Council. Russia consistently resisted any attempt to limit its sovereignty in favour of the Council of Europe or the Court. While pursuing aggressive policies towards Chechnya, Georgia, and Ukraine, Russia was suspended from membership several times.[26] In recent years, Russian rhetoric against the Court and its rulings has intensified. The official denial of Strasbourg judgments and the open undermining of the Court's authority, not only by ordinary courts but also by state authorities, led to the Russian Constitutional Court's decision on 14 July 2015. This ruling declared that judgments issued by the Court that were contrary to the

[25] Fischer, S., 'Russia on the road to dictatorship: Internal political repercussions of the attack on Ukraine', *SWP Comment*, 2022, No. 30, pp. 1–3.

[26] Leach, P., 'A time of reckoning?: Russia and the Council of Europe', *European Human Rights Law Review*, 2022, Vol. 3, p. 219.

Russian Constitution could not be implemented and that no international treaty could constitute a renunciation of national sovereignty.[27]

Statistical data on the number of violations of rights and freedoms set out in the ECHR and the Additional Protocols, as identified by the Court, reveal the serious human rights problems in Russia (Table 1). By December 2021, the ECHR had found a total of 6,910 violations of individual rights and freedoms contained in the Convention and the Additional Protocols. The most frequent violations concerned Article 5 of the ECHR – the right to liberty and security of person – with 1,299 violations. The second most common violation was of Article 3 – the prohibition of inhuman and degrading treatment – with 992 violations. In third place was Article 6 – the right to a fair trial – with 988 violations. During its membership in the Council of Europe, Russia also faced significant problems with the right to an effective remedy (Article 13 ECHR), the right to respect for property (Article 1 of Additional Protocol No. 1), the prohibition of punishment without a legal basis (Article 7 ECHR), and the right to life (Article 2 ECHR). Notably, the Court did not find any violations by Russia of Article 12, the right to marry.

Table 1. Number of violations of individual rights and freedoms set out in the Convention and the Additional Protocols

Violated right and/or freedom	Number of identified violations of the rights and freedoms set out in the ECHR and additional protocols
Right to life	349
Prohibition of punishment without a legal basis	406
Prohibition of torture	83
Prohibition of inhuman and degrading treatment	992
Right to a fair and public hearing/right to a fair trial	273
Prohibition of slavery and forced labour	1
Right to liberty and security	1,299
Right to a fair trial	988
Length of proceedings/right to a fair trial	207
Prohibition of punishment without a legal basis	3

[27] Bowring, B., 'Russian cases in the ECtHR and the question of implementation', in: Mälksoo, L., Benedek, W. (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect*, Cambridge, 2018, pp. 191–194.

Violated right and/or freedom	Number of identified violations of the rights and freedoms set out in the ECHR and additional protocols
Right to respect for private and family life	297
Freedom of thought, conscience and religion	14
Freedom of speech	114
Freedom of assembly and association	79
Right to marry	0
Right to an effective remedy	701
Prohibition of discrimination	27
Right to respect for property	688
Right to education	3
Right to free elections	7
Prohibition of re-trial or punishment	7
Other articles of the ECHR and additional protocols	372

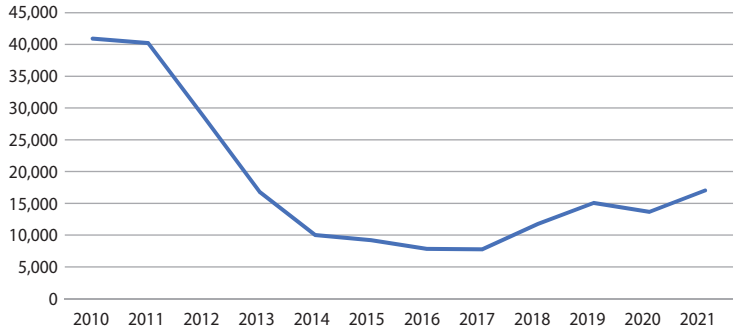
Source: https://www.echr.coe.int/Documents/Stats_analysis_2021_ENG.pdf [accessed on 9 May 2023].

The entire period of Russia's membership in the Council of Europe was characterised by a large number of individual complaints against the country. In 2010, more than 40,000 cases were pending before the ECtHR (Figure 1). In the subsequent years, the number of cases gradually decreased, reaching its lowest point in 2017, with 7,747 cases against Russia heard by the Court. However, in the following years, the number of cases again began to gradually increase. At the beginning of 2022, the number of complaints in which the Russian Federation was the defendant was approximately 17,550. This figure represented 24.1% of all cases pending before the Court.[28]

Russia's exit from the European system of human rights protection will undoubtedly result in a significant decrease in the number of complaints filed with the ECtHR. This reduction will have an impact on the entire human rights protection system. It seems likely that a reduced caseload will enhance the effectiveness and efficiency of not only the ECtHR but also the entire control mechanism.

[28] ECtHR, *Pending Applications Allocated to a Judicial Formation*, https://echr.coe.int/Documents/Stats_pending_month_2022_BIL.PDF [accessed on 9 May 2023].

Chart 1. Number of cases brought against the Russian Federation pending before the ECtHR (2010–2021)



Source: Own study based on numerical data available on the website of the European Court of Human Rights, https://www.echr.coe.int/sites/search_eng/pages/search.aspx#{%{%22sort%%22:[%[%22createdAsDate%%20Descending%%22],%%22Title%22:[%22\%%22analysis%%20of%%20statistics\%22%22],%%22contentlanguage%22:[%[%22ENG%22]} [accessed on 9 May 2023].

CONSEQUENCES OF RUSSIA'S WITHDRAWAL FROM THE COUNCIL OF EUROPE FOR OTHER MEMBERS OF THE ORGANISATION

One of the consequences of excluding Russia from the Council, as previously mentioned, is that it loses its representation in the organisation. Reducing the number of members of the Parliamentary Assembly by the number of representatives previously held by Russia will alter the balance of power within this body, which will be important when making decisions. It can be assumed that having fewer member states may lead to a more efficient functioning of the organisation. The speed of decision-making is likely to increase, and the time between the adoption and the entry into force of subsequent agreements within the organisation's activities may be shortened.

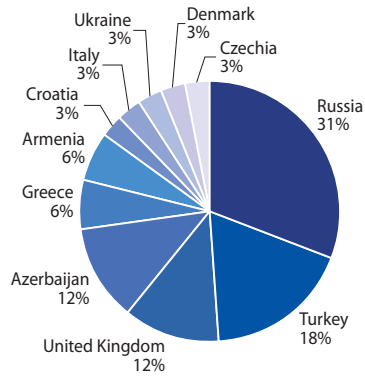
As a result of Russia's exclusion, its obligation to pay membership fees to the Council ceases. The organisation's budget for 2022 was set at EUR 447 million.[29] Russia, as a member state, contributed approximately EUR 34 million annually to the budget.[30] This amount will now need to be distributed among the remaining 46 member states. It is worth mentioning that the organisation could achieve considerable savings by releasing all Russian staff from the secretariat and chancellery instead of transferring them to other Russian-speaking countries, including Ukraine.

Another consequence of excluding Russia from the Council of Europe is the inability to file interstate complaints against the country. This is significant because,

[29] CoE, *Budget*, https://www.coe.int/en/web/about-us/budget [accessed on 9 May 2023].
[30] Leach, P., 'A time of reckoning?...', op. cit., pp. 221–222.

by January 2022, almost a third of the 31 interstate cases brought before the Court were directed against the Russian Federation (Figure 2). All complaints were lodged by states against which Russia pursued aggressive policies, often involving the use of its armed forces. The countries that lodged complaints against Russia were: Georgia (4 complaints), the Netherlands (1 complaint), and Ukraine (6 complaints). In the case of the Netherlands, the complaint was joined with that of Ukraine. This case concerns the shooting down of a Malaysian airliner by Russian troops in July 2014, on board of which the majority of passengers were Dutch citizens.

Chart 2. Structure of actions brought under Article 33 of the Convention by respondent State



Source: Own study based on: https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c [accessed on 9 May 2023].

The lack of active and passive legitimacy means that Russia no longer has the opportunity to lodge such complaints. It is worth noting that Russia has, to date, only once decided to lodge a complaint under Article 33 of the Convention. This occurred on 22 July 2021, when the Government of the Russian Federation accused Ukraine of violating Article 2 (right to life), Article 3 (prohibition of inhuman or degrading treatment), Article 5 (right to liberty and security), Article 8 (right to respect for privacy and family life), Article 10 (freedom of speech),[31] Article 13 (right to an effective remedy), Article 14 (prohibition of discrimination), Article 18 (limitation of the use of rights restrictions) and Article 1 of Protocol No. 1 (protection of property), Article 2 of Protocol No. 1 (right to education), Article 3 of Protocol No. 1 (right to free elections), and Article 1 of Protocol No. 12 (general prohibition of discrimination). At the same time, Russia demanded urgent interim measures in its case. However, the application for interim measures was rejected by the Court, as no condition of irreparable damage to a right under the ECHR was found to exist.[32]

[31] ECtHR, *Inter-State application brought by Russia against Ukraine*, ECHR 240 (2021), https://hudoc.echr.coe.int/eng-press?i=003-7085775-9583164 [accessed on 9 May 2023].

[32] Ibidem.

CONCLUSION

The consequences of excluding Russia from the Council of Europe, and from the European system of human rights protection, are complex and can be considered from multiple perspectives. Russia's exit from the organisation is expected to improve its operation and increase the effectiveness and efficiency of the Court. It can be assumed that Russia's absence from this system will facilitate further reform and improvement of the control mechanism, as Russia was a major opponent of changes in the past.

A negative ef fect is that, as of 16 September 2022, citizens of the Russian Federation and persons under its jurisdiction have been deprived of the international protection of their rights within the framework of the ECHR and the European human rights system. This is a serious concern, as Russia has a history of repeatedly violating human rights, even without withdrawing from international agreements to which it is or was a party. The Russian Federation faces challenges with democracy and the rule of law, which translate into a lack of respect for human rights. Changes in the country's legislation indicate a shift towards dictatorship, or at least authoritarian governance.

In conclusion, it must be stated that the current and planned changes in Russia will lead to further isolation on the international stage. In the next few years, or even decades, there is little prospect of Russia being readmitted to the Council of Europe and the European human rights protection system. A potential return, as was the case with Greece, would likely require Russia to meet stringent new accession conditions. Such conditions might include the obligation to set aside the July 2015 judgment of the Constitutional Court, which openly undermines the legitimacy of the ECtHR. Other conditions could include the closure of gulags, reform of the justice system, release of political prisoners, and enhancement of democratic standards in the country.

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